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THE CURRENT STATE AND PROBLEMS OF ANTI-MONOPOLY LEGISLATION IN THE PEOPLE'S REPUBLIC OF CHINA[†]

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In order to ensure the normal operations of a market economy China must build and maintain an efficient competition policy. The purpose of such a policy is to protect and promote market competition and price-system efficiency. The task is law-related. Whatever agency is created must obey and enforce the law. The foundations of this policy are efficient, competitive markets and sufficiently and consistently interrelated laws and regulations with particular emphasis on anti-monopoly law. These foundations are required, *a fortiori*, in countries transforming from planned to market economy systems.

Presently, China has no anti-monopoly law; however, provisions controlling monopolies and anticompetitive acts are distributed among different laws, rules, and regulations.¹ Although these laws are scattered, they indicate the emergence of China's competition law. In response to the recently drafted Anti-Monopoly Law ("the Law") I would like now to discuss the legislation's character and potential problems.²

I. DEFINITION OF MONOPOLY

There exists a primary problem in defining the term "monopoly": the term is relative to the scale of adjustment created by the anti-monopoly law. There are two opinions about the definition and its policy consequences. The first opinion is that "monopoly" refers primarily to economic monopoly and China's legislation should adapt itself to internationalization. According to this first opinion, administrative monopolies are unique occurrences arising during the period of system

[†] Due to circumstances beyond the Law Review's control, we have relied on the integrity of the Author for facts asserted here in that are not supported by a citation.

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1. The provisions are primarily contained within the Price Law, Unfair Competition Law, Bid Invitation and Bidding Law, Provisions of the State Council on Prohibition of Imposition of Regional Blockade on Market Economic Activities, which prohibits the abuse of dominant market positions, agreements that restrict competition, regional monopolies, and sectional monopolies.

2. The Anti-Monopoly Law was drafted according to the plan of the Ninth Standing Committee of the People's National Congress, the State Economic and Trade Commission, and the State Administration for Industry and Commerce

transformation, and these problems can be solved merely through the addition of relative rules and without being newly redefined. The other opinion maintains that administrative monopoly is the main form present, and therefore, must be specially defined and regulated in the draft law. In addition, opinions differ as to how the term should be defined in the Law. Some advocate a highly formal, logical definition in order to make the term clear, definite, concrete, and perspicuous.³ Others proffer a pragmatic definition based on experience and formations used by Western market countries. These people suggest that the Law enumerate various kinds of monopolistic acts.

In my opinion, we should consider the following facts and factors when defining monopoly. First, because there is no universal definition of monopoly China has no authoritative model to use as reference. Second, strong national characteristics impact the formation of the term. For example, America uses the term "Antitrust," Germany uses the term "Anticartel," and Japan uses the term "Anti-private monopoly," so it is difficult to follow their examples. Third, the term's meaning will be shaped by and reflect current economic development within the country. To explain, legislators and administrators consider scale economy, economic trends, and international market share in their characterization of monopolies; moreover, this characterization changes as the scale, trends, and international market shares develop over time. Finally, China's unique regulations on imports will also be a factor in the definition of monopoly.

Because of China's current economic state and in accordance with the definition of monopoly in most countries, China should adopt as its definition a list. This list should include: monopoly agreement, abuse of the market dominant position, over-concentration of enterprises, and the abuse of administrative power to exclude, restrain competition, and damage the interest of consumers, business operations and the public.

II. THE SCOPE OF ANTI-MONOPOLY LAW'S APPLICATION

A scientific and reasonable scale of China's anti-monopoly law requires hard work and the determination of three issues or concerns. First, we must ask whether the law shall apply to all kinds of monopoly, including economic monopoly. Second, whether sectors involving natural monopolies and public interests shall be exempted in order to avoid wasting social resources such transportation, telecommunications, energy,

3. Examples of highly formal definitions include the term "offense" as it operates in Chinese criminal law, the term "civil law", and the term "contract" in Chinese contract law.

and public facilities like water and waste treatment.⁴ Third, whether national anti-monopoly law can work effectively internationally.

Because of China's unique economic state and the lessons drawn from international legislation, the anti-monopoly law should first involve administrative monopolies, government's abuse of power at the expense to competitive markets. Additionally, as scientific technology and productivity develop, there is a tendency to narrow the exceptions for natural monopolies. For instance, the natural monopolies traditionally allocated to energy, telecommunications, and transportation providers have, in recent years, been replaced with more competitive systems. The natural monopolies have lost their control over these sectors as new competitors have been allowed to enter the market. This is not to say that all acts of natural-monopolistic sectors may be exempted by law, rather, only those acts that damage consumer interests. If competition is not allowed to enter into those sectors earlier excepted, then these same sectors will lose the opportunities afforded by competition, namely higher quality and lower costs. Finally, as I mentioned earlier, the Law must be receptive and responsive to the needs of a global economy; the Law must have effect beyond the borders of China. In short, China's Anti-Monopoly Law must involve economic monopoly, natural monopolies as they are understood by Western market economies, and administrative monopolies during the period of China's economic transformation; and in addition, the Law must adapt to the WTO, and its rules should have clear international effects.

III. MONOPOLISTIC AGREEMENTS

The prohibition of monopolistic agreements is a core feature in anti-monopoly law. The phrase "monopolistic agreement" refers to agreements whose purpose and effect is the restriction and elimination of competition within an enterprise. Essential to these agreements is collusion, whether written or not. Another characteristic of these agreements the coordination to restrict competition even when there is no clear indication of a monopoly. Monopolistic agreements reduce the vigor of market economies, and it is much more harmful than any other type of monopolistic act. In fact, the anti-monopoly agency more frequently deals with these agreements than other monopolistic acts. The ubiquity of these agreements requires that all nations restrict them in some way.

4. This issue is also referred to as the application of law exception.

The law does not prohibit all agreements that restrict competition; it depends on the agreement's classification. Agreements are classified by their effect on competition. First, there are those that, by their nature and scope, violate the law regardless of the circumstances in which they occur. Common to these agreements are the serious harms they inflict upon market competition. Examples of these agreements are price cartels, quantity cartels, and oligarchies that partition the market. So as to limit the occurrence and effects of these agreements, China's Anti-Monopoly law must make it illegal: (1) to enter collusive agreements directed toward maintaining or changing the prices of goods; (2) to limit the quantity of goods supplied to the market; (3) to restrain the purchase of new technology or new equipments; and (4) to jointly sell or purchase raw or compound materials.

There is another classification of agreements that, depending on the circumstances in which they arise and their effects on competition may violate the law. Necessarily, the agreements must be examined *ad hoc*. An agreement that, while restrictive, nonetheless aids in the development of the economy as a whole should be exempted. This type of exemption is common throughout the world. Agreements that promote economic development or other public interests, such as improving technology, increasing productivity and efficiency, reducing production costs, consolidating the standards of production, encouraging the interrelation between production and markets would not violate the Law. Similarly, encouraging small and medium businesses to act in concert to improve operating efficiency, to strengthen competition, to change the face of the market, to maintain quality, to avoid overproduction, to rationalize management functions, and to foster the division or specialization of labor would not violate the Law.

IV. ABUSE OF MARKET DOMINANCE

Another core feature of anti-monopoly law is regulation of the market dominant position. Two legislative principles concern this regulation. The first is the "lower" legislative principle. It holds that anti-monopoly laws shall have an effect on the holder of the market dominant position only so long as the holder abuses such position in a way that results in the restriction of competition. Most countries, including Germany, Korea, Poland, Hungary, and Taiwan embrace this lower legislative principle. Opposed to the lower principle is the "higher" legislative principle. Based on this principle, when market dominance obtains, the State may dismiss and eliminate the dominant enterprise. Every enterprise is charged with the

obligation of declaring its dominant position to an anti-monopoly agency. The State, via the agency, first considers the anticompetitive effects, if any, that dominance has on the market in question; then the agency decides whether to break-up the enterprise. While both America and Japan have adopted the higher principle they have been careful in their examination of the market effects caused by market dominance, as well as the potential effects caused by the enterprise's break-up.

The developing trends of anti-monopoly indicate a greater willingness to regulate anticompetitive acts rather than mere market dominance. But in China the scope of the economy is inadequately developing, and an enterprise's power to compete is lower. Furthermore, China's current policy is to develop large enterprises and to group together small enterprises so as to encourage the growth of the scope of the economy. Consequently, China should embrace the lower legislative principle in order to adapt to international trends. In other words, China's anti-monopoly law should be primarily concerned with prohibiting the abuse of market dominant positions, not with preventing the achievement of such positions. The Law's scope is not limited to prohibiting these abuses, however, it can also encourage competitive market structures, accelerate scope economy formation and development, and avoid monopoly after scope economy takes shape.

V. ADMINISTRATIVE MONOPOLY

"Administrative monopoly" occurs when the state and its agencies abuse their power in ways that restrict competition, and it is the product of the transformation from planned economy systems toward market economy systems. Administrative monopolies differ from economic monopolies in the subject, method, and purpose of the monopoly as well as the conditions in which they arise. The subject of the administrative monopoly is the state and its agencies; the method is abuse of administrative power. The purpose of an administrative monopoly is to benefit an agency or a particular local region. Because administrative monopolies have the apparent legitimacy of state sanction, they pose more harm than economic monopolies, and they are harder to regulate, to supervise, and to punish effectively.

The regulation of administrative monopolies is arguably the most difficult task facing China's anti-monopoly Law, and there are different opinions concerning how they should be regulated. Some believe that the existence of administrative monopoly is firmly embedded in the planned economy system and cannot be eliminated through regulation; instead, it

may only be eradicated through political and economic reform. Historically, anti-monopoly legislation has regulated only economic monopoly and cannot effectively regulate administrative monopoly through simple, conceptual juxtaposition. Other scholars and policymakers disagree; they think the Law should regard administrative monopoly with particular emphasis. While they agree that administrative monopoly is the product of planned economy systems they see both administrative and economic monopoly as posing the same harms, the undesired limitation on competence and consumer benefit. Administrative monopoly strangles market economy systems, exterminates the vitality of economic development, and causes political corruption; in these ways administrative monopolies directly affect market competence. And because administrative monopolies are prominent in present-day China, the law must prohibit administrative monopoly or, at least, not neglect it.

Administrative monopoly will not be eliminated by enactment of one Anti-Monopoly law. No, its elimination requires political and economic reform. But administrative monopolies often act in the same way as economic monopolies: they restrict competition, destroy competitive mechanisms of socialized market economies, and harm the legal interests of enterprises and consumers. And just as often administrative monopolies foster economic monopolies. Though administrative monopoly is a very serious problem, its regulation is not sufficiently systematic, authoritative, or operable. China will benefit from paying heed and drawing upon the experiences of Russia and other Eastern European countries, like Hungary and Bulgaria, which have faced the similar task of regulating administrative monopolies.

VI. THE CONTROL OF OLIGOPOLY

The term “oligopoly” refers to the exaggerated merging of economic powers, and the regulation of this phenomenon is a core feature of anti-monopoly law. This feature has itself three characteristics. First, mergers can create joint enterprises but may also lead to market dominance, raise the costs associated to market entry, and reduce consumer benefit. The results of mergers are two-fold. On the one hand, the market contains only a few enterprises which can harmonize in price and quality. On the other hand, when an enterprise achieves a thirty-five percent market share, this “harmonization” can lead to price increases and quality of production and supply decreases.

Second, most market economy systems have rules regulating mergers in order to avoid over-concentration and to retain competitive order. For

example, America's Clayton Act of 1914, Germany's Restricting Competition Law, the European Union's Merger Control Regulation, Japan's Monopoly Prohibition Law, and Taiwan's Fair Transaction Law. Only Hong Kong's anti-monopoly law fails to regulate mergers. Regulating mergers is one of the three pillars of anti-monopoly law.

Third, in the long run mergers can have the same effect as cartels. It is therefore unreasonable to regulate cartels but not mergers. Mergers can lead to an enterprise holding a market dominant position. Market dominance often leads to price and production controls, and it is very difficult to supervise enterprises holding these positions. Regulations aimed at preventing market dominance, as opposed to regulations aimed at remedying the effects caused by market dominance obtained, is therefore preferable. For example, the best method for regulating price is establishing competitive systems rather than price controls set ex post facto. Because mergers can enable the abuses of market dominance, China should regulate them.

Some agencies and enterprises have shown their concern about mergers. They advocated the belief that regulation of oligopoly should be combined with the structural reform of large, state-owned enterprises. Presently, the merger laws do not apply—or apply with special exceptions—to the railway, civil aviation, and nuclear industries because of each industries specialization. Merger laws do not prevent the development of economies of scale, and they benefit enterprises by improving competitive ability. Economies of scale are not diametrically opposed to anti-monopoly law. First, except for natural monopolies, most enterprises realize economies of scale through the protection of anti-monopoly laws. Second, the substantive laws of most countries do not restrict or prohibit or determine a given market's economies of scale; instead, the substantive law prohibits monopolistic acts that exploit market advantage, gouge monopoly profits, and harm the State economy's operation. However, the primacy of public interest and State economy must allow for some exceptions to the laws regulating oligopoly.

VII. THE CONSTRUCTION OF AN ENFORCEMENT AGENCY FOR THE ANTI-MONOPOLY LAW

There are three opinions about how to set up the anti-monopoly agency. First, there should be a special agency of enforcement which is independent and authoritative. Second, the present administrative agency should enforce the law. Third, a special agency, set up within the present administrative agency, should enforce the law.

Upon examining other countries' experience, some general characteristics or principles become apparent. They are: legal agency, legal procedure, independence, and strict enforcement. Typical examples of these agencies include America's Justice Department and Federal Trade Committee, Japan's Fair Trade Committee, Germany's Federal Economic Department and Competition Committee, and Russia's Federal Anti-Monopoly Agency. Although each agency has its own unique, national character, each of them is independent and capable to enforce the law effectively.

In a word, anti-monopoly is important, but effective enforcement is more important. Mere legislation cannot create a fair and freely competitive market environment; such a creation requires an independent, highly efficient, authoritative anti-monopoly agency. In China, this agency must not only enforce the law against economic monopolies but administrative monopolies as well. Therefore, China must establish and effective and authoritative anti-monopoly agency in order to bestow upon the law legitimacy and integrity.