

The Chinese Anti-Monopoly Policy: Achievements, Problems and Prospect

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1. Economic policies mean the guidelines and measures that the government promulgates to increase the economic welfares of the society and deal with economic problems. Economic policies represent the government's conscious interference with economic activities to achieve certain economic goals. As one of economic policies, competition policy refers to a series of rules that the government formulates and puts into practice to protect and promote fair market competition. Compared with other economic policies, one of the important characteristics of competition policy is that it is based on the competition laws, or even these laws on their own belong to competition policy. As a necessary system framework to protect fair market competition, competition policy can promote fair competition and punish anti-competitive acts; therefore, competition policy itself is one kind of legalized economic policies to a great extent, or one kind of economic policies which mainly rely on competition laws to be put into effect. The competition law mainly refers to the anti-monopoly law, which according to the presentation above, is the central illustration of competition policy and therefore is called the anti-monopoly policy in most cases.

2. China's Anti-Monopoly Law (AML) which has been in effect since August 1st, 2008, is an important milestone in the building of the Chinese socialist market economy system. The formulation of AML not only marked the formation of the competition law system of the Chinese socialist market economy, but also the establishment of the basic framework of the Chinese competition policy.

3. The promulgation and implementation of the Chinese AML have displayed the firm determination of the country to let the market exert a basic role in the allocation of resources and to further improve the socialist market economy system. So far, our AML has been in practice for four years. How to understand and evaluate the Chinese anti-monopoly policy and look it ahead in the future are the basic content of my presentation . The presentation material is structured as follows: Part A presents the framework of the Chinese anti-monopoly policy, Part B discusses the achievements of the Chinese anti-monopoly policy, Part C points out the difficulties that the Chinese anti-monopoly policy is facing with and Part D puts forward the prospect of the Chinese anti-monopoly policy in the future.

A the Framework of the Chinese Anti-Monopoly Policy

4. The Chinese anti-monopoly policy consists of the aim, the regulation targets, the anti-monopoly enforcement authorities and the anti-monopoly enforcement system, which will be explained as follows.

1 the Aim

5. Article 1 of the Chinese Anti-Monopoly Law (Hereinafter referred to briefly as AML) defines the aim of the anti-monopoly policy as “guarding against or ceasing monopolistic conduct, safeguarding and promoting the order of market fair competition, improving economic efficiency, protecting the consumer’s interest, protecting the public interest, and promoting the healthy development of the socialist market economy”.

2 the Regulation Targets

6. The AML provides the regulation targets of the Chinese anti-monopoly policy in terms of subject, territory and conduct.

7. (1) Subject: the Chinese anti-monopoly policy is applicable to undertakings, whose scope is quite broad, including all undertakings that participate in economic activities, whether they are state-owned , collectively-owned, privately-owned or owned by foreign investors, whether they are sole proprietorships, partnerships or corporations, and whether they are Chinese or foreign undertakings.

8. (2) Territory: Article 2 of the AML states the applicable territory of the law by providing that the Law is applicable to monopolistic conduct in economic activities within the territory of the People’s Republic of China and the Law is applicable to monopolistic conduct outside the territory of the People’s Republic of China that eliminates or has restrictive effects on competition in the domestic market of the People’s Republic of China. This means that the AML is applicable to monopolistic conduct in two different territories: monopolistic conduct in economic activities within the territory of the People’s Republic of China and monopolistic conduct outside the territory of the People’s Republic of China that eliminates or has restrictive effects on competition in the domestic market of the People’s Republic of China.

9. (3) Conduct: the AML is applicable to three kinds of monopolistic conduct: monopoly agreements made between undertakings; abuse of a dominant market position by undertakings, and concentrations conducted by undertakings that may have the effect of eliminating or restricting competition. At present, abuses of administrative power to eliminate or restrict competition still exist to varying degrees in China. Therefore, Article 8 of the AML states that administrative agencies and organizations empowered by laws and regulations to manage public affairs shall not abuse their administrative power to eliminate or restrict competition. This provision

shows that the Chinese government has been making great efforts to deal with this kind of monopolistic conduct. This provision can also further guard against and cease the abuse of administrative power by administrative agencies and organizations empowered by laws and regulations to manage public affairs to eliminate or restrict competition.

3 the Chinese Anti-Monopoly Enforcement Authorities

10. The AML establishes anti-monopoly enforcement authorities on two levels. On the upper level is the Anti-Monopoly Committee under the State Council, which is responsible for organizing, coordinating and guiding the anti-monopoly work. On the lower level are the Anti-Monopoly Authorities, which shall be in charge of the relevant anti-monopoly enforcement work. This model of the Anti-Monopoly Committee plus the Anti-Monopoly Authorities has drawn upon the experience of developed countries in setting up their anti-monopoly enforcement authorities, and taken into account of China's actual conditions; thereafter, it is consistent with the Chinese reality at present.

11. (1) the Anti-Monopoly Committee under the State Council. The Anti-Monopoly Committee under the State Council was set up in August, 2008, whose responsibility is "organizing, coordinating and guiding the anti-monopoly work". This means that the Anti-Monopoly Committee under the State Council shall organize, coordinate and guide the anti-monopoly work as a whole and in general, and it shall not participate in the concrete anti-monopoly work.

12. (2) the Chinese Anti-Monopoly Authorities. According to the Provision of the State Council, National Development and Reform Commission (hereinafter referred to briefly as NDRC), the Ministry of Commerce (hereinafter referred to briefly as MOFCOM), and State Administration for Industry and Commerce (hereinafter referred to briefly as SAIC) shall be in charge of the operational work of the anti-monopoly enforcement. Concretely speaking, NDRC has established the Bureau of Price Supervision and Anti-Monopoly, responsible for handling price monopoly activities, including price fixing agreements, abuses of dominant market position and abuses of administrative power to eliminate or restrict price competition. MOFCOM established the Anti-Monopoly Bureau in August, 2008, responsible for taking anti-monopoly review on concentrations of undertakings according to law. SAIC established the Antimonopoly and Anti-unfair Competition Enforcement Bureau in August, 2008, taking charge of the anti-monopoly enforcement work concerning monopoly agreements, abuses of dominant market positions and abuses of administrative power to eliminate or restrict competition (excluding price monopoly conduct).

4 the Chinese Anti-Monopoly Enforcement System.

13. Article 50 of the AML states that the undertakings that violate the provisions of this law and cause damage to others shall bear civil liability. This shows that on the

one hand, administrative enforcement based on public power is the most important form of the Chinese anti-monopoly work and on the other hand, the anti-monopoly civil action is an important and indispensable supplement for the public administration. As thus, administrative enforcement based on public power and private enforcement featuring civil lawsuits constitute the Chinese Anti-Monopoly enforcement system.

B the Achievements of the Chinese Anti-Monopoly Policy

14. Since the implementation of the Chinese Anti-Monopoly Law (referred to briefly as AML hereinafter) four years ago, the three Anti-Monopoly Enforcement Authorities, under the organization, coordination and direction of the Anti-Monopoly Committee of the State Council, have been active in exercising their own functions, formulating the supporting provisions in accordance with the law, improving the working mechanism, enhancing the dissemination of the anti-monopoly ideas, establishing the authoritative position of AML, and exercising the system-building function of AML. In sum, the Chinese anti-monopoly policies have made the following achievements.

1 Actively enhancing the formulation of the supporting provisions in accordance with the law

15. Since the implementation of AML, the Chinese government has changed its focus from the building of the basic system to the establishment of the concrete enforcement authorities. The Anti-Monopoly Committee under the State Council and the three Anti-Monopoly Enforcement Authorities have formulated a series of supporting provisions and regulations, further deliberating the anti-monopoly system, increasing the applicability and operability, and providing effective direction and instruction for the anti-monopoly enforcement bodies. Concretely speaking, the State Council promulgated and put into effect as of the date of promulgation the Rules of the State Council on Notification Thresholds for Concentrations of Undertakings on August 1st, 2008, stipulating the threshold for a concentration notification of undertakings. The Anti-Monopoly Committee of the State Council promulgated and put into effect as of the date of promulgation the Guidelines of Anti-Monopoly Committee of the State Council for Defining the Relevant Market on May 24, 2009, providing direction and instruction for defining the relevant market. On July 15, 2009, Ministry of Commerce, People's Bank of China, China Banking Regulatory Commission, China Securities Regulatory Commission, and China Insurance Regulatory Commission jointly promulgated and put into effect as of the date of promulgation the Method to Calculate Turnover of Financial Industry in Notification of Concentrations between Undertakings, stipulating the threshold for a concentration notification of financial undertakings.

16. Table 1 illustrated the provisions issued by the anti-monopoly bureau of National Development and Reform Commission(NDRC).

Table 1

No.	Name	Purpose	Date of promulgation
1	Provisions on Anti Price Monopoly	For preventing and stopping price monopoly activities	December 29, 2010
2	The Provisions on the Administrative Procedures for Law Enforcement against Price Monopoly	For regulating and safeguarding the legal performance of the anti-Price Monopoly functions	December 29, 2010

17. Table 2 listed the provisions issued by the anti-monopoly bureau of Ministry of Commerce (MOFCOM).

Table 2

No.	Name	Purpose	Date of promulgation
1	Measures for Notification of Concentrations between Undertakings	For regulating notification of concentrations between undertakings	November 21, 2009
2	Measures for Review of Concentrations between Undertakings	For regulating the anti-monopoly review of concentrations of undertakings and making clear the procedures on the review of concentrations between undertakings.	November 24,2009
3	Provisional Provisions on Divestiture of Assets or Business during Implementation of Concentrations between	For regulating implementation of decisions on antitrust reviews that provide divestiture of business or assets as a	July 5, 2010

	Undertakings	condition for concentration between undertakings, and for successful implementation of divestiture of assets or business.	
4	Interim Provisions on Assessment of the Competition Impact of Concentration of Undertaking	For standardizing the anti-monopoly review for undertaking concentrations	August 29,2011
5	Interim Measures for the Investigation and Decision in Connection with the Failure of the Concerned Undertaking(s) Reaching Notification Threshold to File a Prior Notification	For regulating the investigation and decision in connection with the failure of the concerned undertaking(s) reaching notification threshold to file a prior notification	December 30, 2011

18. Table 3 listed the provisions issued by the anti-monopoly bureau of State Administration of Industry and Commerce (SAIC).

Table 3

No.	Name	Purpose	Date of promulgation
1	Provisions on Industry and Commerce Authorities' Prohibiting Monopoly Agreements	For prohibiting monopoly agreements in economic activities	December 31, 2010
2	Provisions on Industry and Commerce Authorities' Prohibiting Abuse of Dominant Market Position	For prohibiting abuse of dominant market position in economic activities	December 31, 2010
3	Provisions on Industry and Commerce Authorities' Prohibiting Abusing Administrative Powers to Exclude or Restrict Competition	For prohibiting abusing administrative powers to exclude or restrict competition	December 31, 2010

4	Provisions on the Procedures for Industry and Commerce Authorities to Investigate and Sanction Monopoly Agreements and Abuse of Dominant Market Position	For regulating and ensuring the industry and commerce authorities' investigation and sanction against monopolistic activities	May 26,2009
5	Provisions on the Procedures for Industry and Commerce Authorities to Prohibit Excluding or Restricting Competition by Abusing Administrative Powers	For prohibiting excluding or restricting competition by abusing administrative powers.	May 26,2009

2 Actively carrying out the anti-monopoly enforcement work.

19. The Three Anti-Monopoly Enforcement Authorities have been active in carrying out the anti-monopoly enforcement work. They have investigated into and decided on some influential cases, disseminated the anti-monopoly ideas and accumulated the anti-monopoly experience through their enforcement work, gradually improving the administrative procedures to enforce AML and measures to collect proof and hear civil cases, and increasing their enforcement quality.

20. Since 2011, NDRC have investigated into and decided on some price monopoly cases, which included price monopoly agreements reached by undertakings, abuses of a dominant market position by undertakings, and abuses of administrative powers. These cases involved paper making, chemicals, automobiles, insurance, medicine and so on, and the concerned undertakings included state enterprises, private enterprises and foreign enterprises. At present, NDRC have made decisions to impose administrative penalty on some concerned undertakings in accordance with law, and exposed the typical cases to the public. The price authority has actively carried out enforcement against price monopoly activities, effectively maintaining fair competition and market order, and protecting consumers' interests and social and public interests.

21. In October, 2012, the Price Bureau of Guangdong Province ("GDPB") announced its investigation in a price-fixing cartel among 20 sea sand dredging companies, which formed an association to coordinate the amount of "resource exploitation fee". The GDPB imposed a total of RMB 759,247 (approximately USD 120,515) of fines on three companies and granted a reduction of 50% of the fines imposed on one of the penalized organizers that voluntarily provided key evidence under the leniency program.

22. More recently on January 4, 2013, the NDRC published China's first antitrust

enforcement action against international cartels, where a total amount of RMB 353 million (approximately USD 56 million, consisting of restitution of the past overcharge of RMB 172 million to domestic TV enterprises, confiscation of unlawful gains of RMB 36.75 million and fines of RMB 144 million) was imposed on 6 international LCD panel manufacturers, including Samsung, LG, Chi Mei, AU Optronics, Chunghwa Picture Tubes and Hann Star. The six companies were penalized for fixing the price of LCD panels from 2001 to 2006. In addition to the monetary sanctions, the 6 LCD manufacturers also promised to take corrective measures, including providing Chinese TV makers with high-end products on a non-discriminatory basis, and extending the warranty period of the panels to 36 months.

23. It is noteworthy that the LCD case was penalized under the Price Law instead of the AML, because the activities in question occurred before the AML became effective.

24. Table 4 made a list of the numbers of concentration between undertakings reviewed and concluded by MOFCOM every year since the implementation of AML.

Table 4

Year	2008	2009	2010	2011	2012
the numbers of reviewed and concluded by MOFCOM every year	16	78	109	171	154*

Note: *marked the statistics by the end of November, 2012.

25. In 2012, MOFCOM received 201 notifications for concentration of undertakings, filed 186 notifications, concluded 154 notifications, approved 6 with conditions, withdrew 6 after filing, approved 142 without conditions, which accounted for 92 % of all the concluded notifications. Table 5 made a list of the transaction approved with conditions in total by MOFCOM.

Table 5

No.	Time	Name of the transaction	Type of condition
1.	2012	Acquisition of Goodrich by United Technologies	Structural conditions
2.	2012	Establishment of a Joint Venture between ARM Holdings PLC, Giesecke & Devrient GmbH and Gemalto NV	Behavioural conditions
3.	2012	Acquisition of 33.6% of the Equity of Niu Hai Holdings by Wal-Mart Stores Inc	Behavioural conditions
4.	2012	Acquisition by Google Inc. of Motorola Mobility Holdings Inc.	Behavioural conditions
5.	2012	Acquisition of Hitachi Global Storage by Western Digital	Behavioural conditions & structural conditions
6.	2012	Joint Venture Established by Henkel Hong Kong Holding Limited and Tiande Chemical Holdings Limited	Behavioural conditions
7.	2011	Acquisition of Hard Disk Drive Business of Samsung Electronics Co., Ltd.	Behavioural conditions
8.	2011	The Establishment of a Joint Venture by GE (China) Co., Ltd and China Shenhua Coal to Liquid and Chemical Co., Ltd .	Behavioural conditions
9.	2011	Acquisition of Savio Machine Tessili S.P.A by Penelope LLP	Behavioural conditions
10.	2011	Open Joint-Stock Company Uralkali's Merger with Open Joint-Stock Company Silvinit	Behavioural conditions
11.	2010	Novartis AG's Acquisition of Alcon Inc.	Behavioural conditions
12.	2009	Acquisition of Sanyo Corporation by Panasonic Corporation	Structural conditions & Behavioural conditions
13.	2009	Acquisition of Wyeth by Pfizer	Structural conditions
14.	2009	United States General Motors Corporation which intends to acquire the United States Delphi Corporation	Behavioural conditions
15.	2009	Acquisition of Lucite International Group Limited by Mitsubishi Rayon Co., Ltd	Structural conditions & Behavioural conditions
16.	2008	Acquisition of Anheuser-Busch Companies INC. by INBEV N.V./S.A	Behavioural conditions

26. In 2011, a total of 205 filings were received, with 185 officially accepted and 171 closed. 4 cases approved with conditions.

27. MOFCOM released the number of cases classified by the form of concentration, nature and industry involved as set out in the table 6 below:

Table 6

		2011		2012 (till Nov.)	
		Number	Percentage	Number	Percentage
Form of Concentration	Share Transfer	101	62%	71	55%
	Joint Venture	49	30%	46	36%
Nature	Horizontal	97	60%	80	65%
	Vertical	13	8%	-	-
	Mix	42	26%	-	-
Relevant Industries	Manufacturing*	107	-	74	-
	IT	13	-	-	-
	Retail	12	-	-	-

Note: Manufacturing industry here includes a wide array of industries, such as petroleum, chemical, machinery manufacturing, automobile, shipping, aviation and mining.

28. In terms of the methods for concentration, most of notifications were completed through shares acquisition. In 2011, there were 101 concentrations through shares acquisition, accounting for 62% of the concluded notifications; 49 concentrations through the establishment of joint ventures, accounting for 30% of the concluded notifications. In 2012, there had been 71 concentrations through shares acquisition by the end of November, 2012, accounting for 55% of the concluded notifications; 46 concentrations through the establishment of joint ventures, accounting for 36% of the concluded notifications. According to the statistics, the number of concentrations through shares acquisition in 2012 was slightly lower than that in 2011 and the ratio was also not quite high. In view of the nature, most concentrations belonged to horizontal acquisition, since the seller and buyer were competitors. In 2011, there were 97 horizontal acquisitions, accounting for 60%; 13 vertical acquisitions, accounting for 8%; 42 mixed acquisitions, accounting for 26%. From January to November 2012, there were 80 horizontal acquisitions, accounting for 65%, nearly $\frac{2}{3}$ of all the acquisitions in 2012. Most concentrations took place in manufacturing industry, including petroleum, chemicals, mechanical engineering, automobiles, ship-building, aircraft, mining and so on. In 2011, 107 acquisitions took place in manufacturing industry, 13 in IT, 12 in wholesale and retail industry. In 2012, 74 took place in manufacturing industry. It seemed that the number of acquisitions in manufacturing fell slightly and the number of acquisitions in other industries, such as business retail, IT and service industry rose

slightly when compared with that in 2011.

29. By the end of the middle of December, 2012, SAIC had filed and investigated into 17 monopoly cases, which involved such industries as insurance, telecom, constructing materials, gas, quality inspection, automobiles, tourism and furniture. At present, SAIC has made decisions to impose penalty on 8 cases. These investigations into and decisions on the concrete cases have shown that the anti-monopoly law did not stop at the legislature level and has become into enforcement practice. During the enforcement process, SAIC has accumulated a lot of experience in collecting proof, organizing investigations and improving administrative procedures concerning monopoly cases, and they also have been establishing and improving the enforcement mechanism.

30. In 2012, the SAIC authorized Hunan AIC to investigate the monopoly agreement entered into by insurance companies in Hunan Province to segment the market and fix the price. The insurance companies reached an authorization agreement with one insurance broker to handle all of the new auto insurance businesses and to coordinate the price and divide the market among each other. The Hunan AIC imposed a fine of RMB 1.7 million on the relevant companies in accordance with the AML.

3 Actively facilitating the development of the anti-monopoly enforcement staff and international exchange and cooperation.

31. Since the implementation of the Chinese anti-monopoly policy, the three Anti-Monopoly Enforcement Authorities have fully realized that the development of the capacity of the enforcement staff is a long-term and basic job; therefore, they have put consistent emphasis on the development of the capacity of the enforcement staff.

32. NDRC has held many seminars with USA, EU and other countries (regions), and provided training for the local anti-monopoly enforcement staff. In 2012, NDRC trained more than 200 local enforcement staff. On September 26, 2012, NDRC held the first Sino-American summit talk on competition policies in Washington with the US Justice Department and the US Federal Trade Commission, making exchanges on the relevant problems. In March and October, 2012, NDRC and the committee of EU held Sino-European competition policies week activities, discussing monopoly agreements, abuses of a dominant market position, and abuses of intellectual property rights. Meanwhile, NDRC sent officials to study in EU on a short-term basis, learning the anti-monopoly laws and enforcement work in EU.

33. MOFCOM paid a lot of attention to the propaganda and training concerning

AML. By the end of June, 2012, MOFCOM had given 14 anti-monopoly training classes for local commerce departments. Over 1000 officials attended the training. MOFCOM has made great efforts to carry out international exchange and cooperation, learning the latest international tendency concerning the anti-monopoly enforcement and reasonably borrowing experiences in other judicial regions. At the same time, with the deepening of economic globalization, transnational mergers and acquisitions have become more frequent, and the trading methods have become more complex. The anti-monopoly enforcement authorities in different countries are facing the common regulation challenge, and they need to make more exchange and cooperation.

34. MOFCOM has carried out extensive bilateral anti-monopoly exchange with the anti-monopoly enforcement authorities in EU, USA, UK and Korea. MOFCOM also has actively participated in multilateral international exchanges held by the United Nations Conference on Trade and Development (UNCTAD), OECD and APEC. MOFCOM also participated in the international competition conference of BRICS (Brazil, Russia, India and China) in September, 2011, with emphasis on the bilateral exchange with Russia.

35. In 2004, the Dialogue Framework Agreement on Competition Policies between the People's Republic of China and EU established the dialogue mechanism of the Sino-European competition policies every year. In June, 2012, China and EU succeeded in holding the 8th dialogue. In order to strengthen China-US cooperation in anti-monopoly, China's National Development and Reform Commission, Ministry of Commerce and State Administration for Industry and Commerce, China's three anti-monopoly enforcement agencies, and their US counterparts U.S. Federal Trade Commission (FTC) and Department of Justice signed Anti-trust Memorandum of Understanding (MOU) on July 27 in Beijing . In April, 2012, MOFCOM and UK Fair Trade Commission signed Sino-British Anti-trust Cooperation Memorandum of Understanding (MOU) .In May, 2012, MOFCOM and Korean Fair Trade Commission signed Sino-Korean Anti-trust Cooperation Memorandum of Understanding (MOU).

36. In 2011, SAIC held the first anti-monopoly and anti-unfair competition enforcement experts training course for the officials of different levels of administration of industry and commerce, among which 50 officials came from provincial-level, municipal-level, autonomous region-level and vice-provincial-level of administration of industry and commerce. The training mostly took the form of lectures and the lecturers were famous experts in the field of competition law, cadres from administrations of industry and commerce who have grasped relatively deep theories and accumulated abundant enforcement experiences, and competition enforcement officials from the American Judicial Ministry and the American Federal Trade Commission. The training also took the form of watching video. In addition, SAIC has made full use of international resources, and has held 3 seminars with the competition enforcement authorities in USA, EU and other countries and regions,

learning and borrowing the competition legislature and enforcement practice abroad, and further deepening the understanding and knowledge of many competition enforcement officials.

37. In 2011, SAIC and UK and US competition enforcement agencies signed Cooperation Memorandum of Understanding in the competition enforcement sector, which provided a long-term and stable cooperation framework between the two sides and could promote cooperation in information exchange, enforcement and training. Meanwhile, SAIC carried out extensive exchange and cooperation with the foreign competition agencies, actively participated in the international anti-monopoly meetings held by OECD, UNCTAD and APEC, sharing their experience in the field of anti-monopoly legislature and enforcement, and jointly studying hot issues concerning anti-monopoly.

4 Establishing the anti-monopoly judicial and hearing mechanism in China.

38. Since the implementation of AML, anti-monopoly civil cases have become the important focus in the courts. By the end of 2011, all the local courts in China had dealt with 61 civil cases concerning monopoly and decided on 53 ones. The people's courts have accumulated the initial judicial experiences by handling civil disputes concerning monopoly.

39. With economic and legal issues mixed together, civil cases concerning monopoly are usually difficult and sophisticated, highly professional, having a significant effect on undertakings and industries. Nevertheless, the provisions concerning AML are quite general and abstract, and the rules about how the people's courts enforce AML are quite simple. Therefore, the anti-monopoly civil trials have become one of the most important challenges that people's courts are facing. Under such an undertaking, it has become an urgent task to issue the relevant judicial interpretations and clarify the rules about how to handle the anti-monopoly civil disputes as soon as possible, to provide directions and instructions for the people's courts to apply laws correctly and make trials.

40. Therefore, the Supreme People's Court began the drafting of the judicial interpretations concerning AML formally as early as 2009. This task has attracted quite a lot of attention from at home and abroad. The American government, the American Lawyers Association, the European Union Chamber of Commerce in China (EUCC), the Japanese Chamber of Commerce in China (JCC) and the China Society for World Trade Organization Studies (CWTO) have proposed amendments, which, plus suggestions from other organizations, groups, and individuals, amounted to more than 250.

41. In 2012, China's Supreme People's Court issued the judicial interpretation on antimonopoly private actions. The Monopoly Judicial Interpretation have 16 articles, Despite the lack of details, it provides clarity on certain fundamental issues such as standing of plaintiffs, jurisdiction, burden of proof, evidentiary rules, expert

witness, the judicial process, form of civil liabilities and the statute of limitations

42. In 2012, the following two cases attracted the most attention:

Qihoo v.s. Tencent

In April, 2012, the Guangdong Higher People's Court held the first court hearing for the abuse of dominance action filed by Qihoo (the operator of 360 safety software) against Tencent (the operator of QQ instant messaging software) under the AML. Qihoo accused Tencent for abusing its dominance in the market of online instant communications services and claimed damages of RMB 150,000,000. The court hearing lasted for more than 8 hours, and attracted an audience of almost 400 people. This case has not yet been decided as of now.

Rainbow v.s. Johnson & Johnson

In May, 2012, the Shanghai First Intermediate People's Court rendered the judgment on the vertical monopoly agreement action filed by Beijing Rainbow (a medical equipment company in Beijing) against Johnson & Johnson ("J&J"). Beijing Rainbow alleged that J&J engaged in resale prices maintenance which led to the elimination or restriction of competition in the relevant market and claimed damages of RMB 14.4 million (USD 2.3 million). The court found that the distribution agreement did fix prices, but that alone was not enough and that the plaintiff failed to prove that competition has been restricted. On such basis, the court rendered the judgement in favour of J&J. Beijing Rainbow appealed to the Shanghai Higher People's Court and the decision is still pending.

43. The promulgation of The Monopoly Judicial Interpretation not only marked the initial establishment of the private anti-monopoly litigation mechanism in China, but also marked the fundamental establishment of the anti-monopoly enforcement system in China.

5 Deepening the studies of the relevant anti-monopoly field.

44. The Chinese anti-monopoly studies had dwelt on the system design from the theoretical perspective for a relatively long time, lacking in the pertinent practical research. The implementation of the Chinese anti-monopoly policies have facilitated the deliberation and deepening of the anti-monopoly theoretical research. In particular, a large number of the anti-monopoly enforcement cases have deepened the anti-monopoly theoretical research, promoting the effective mutual interaction between the anti-monopoly enforcement and the anti-monopoly research.

(1) the anti-monopoly enforcement bodies have actively participated in the cooperation and exchange with domestic academic organizations.

45. The anti-monopoly enforcement and legislature work is quite specialized. Whether an economic activity is a monopolistic conduct or not needs to be analyzed on a comprehensive basis from the economic, legal and technological perspectives. On the other hand, the Chinese anti-monopoly policies have been in practice for a

short time, and the anti-monopoly enforcement staff has not accumulated abundant experience. Therefore, many theoretical and practical issues need to be deeply studied. The three Anti-Monopoly Enforcement Authorities have been actively taken part in the cooperation and exchange with domestic academic organizations.

In order to promote the discussion on the problems concerning price monopoly, NDRC entrusted Renmin University of China to make research on the exemption policies for vertical monopoly agreements. MOFCOM carried out such programs as Research on the Methods to Review and Analyze Concentrations between Non-Horizontal Undertakings, Research on the Review of Concentrations between Partners and so on by means of tendering the appropriate academic organizations to improve and enhance the review of concentrations between undertakings. At present, SAIC is establishing research groups with domestic academic bodies and famous scholars to draft the Guidelines for the Anti-Monopoly Enforcement Concerning Intellectual Property Rights, to deepen the anti-monopoly enforcement in the field of intellectual property rights.

(2) academic activities, including academic research, concerning AML are quite active.

46. Before and after the promulgation of AML, some institutions of higher education in China established anti-monopoly research institutes, which added up to about 10 only in Beijing. These institutes hold at least one academic seminar or forum every year, the participants of which include not only the government officials, but also the concerned persons in the academic community and business community. These academic discussion has deepened the relevant anti-monopoly research and further enhanced the communication and exchange among the academic community, government and business community. Anti-monopoly involves economics and law; therefore, since the implementation of AML, the academic papers as regards anti-monopoly in economics journals and law journals have increased apparently. These papers mainly focused on some basic and foreseeable issues in addition to the important and difficult problems arising during the process of anti-monopoly enforcement .

C The Difficulties that the Chinese Anti-Monopoly Policy Is Facing With

47. Although the Chinese anti-monopoly policies have made the above progress and achievements, it still should be pointed out that the Chinese anti-monopoly policies are facing the following difficulties and problems.

1 More attention should be paid to the role of the anti-monopoly policy.

48. Under the background of the socialist market economy, the Chinese society has not reached the common agreement as to how to understand the anti-monopoly

policies, maintain competition order in the market, and promote the transition and development of the Chinese economy. The concrete manifestations include inadequate emphasis on the competition policies in the macroeconomic life, and lack of understanding of and support for the anti-monopoly enforcement in the microeconomic life. As a result, there exists some opposite ideas that the public think that the anti-monopoly policies should be implemented thoroughly while the government consider that the anti-monopoly policies should be carried out on a gradual basis.

49. One law professor from one university in China made a thorough study of Report on the Work of the Government from 1993 to 2012 and the 8th five-year plan, the 9th five-year plan, the 10th five-year plan, the 11th five-year plan, the 12th five-year plan. His research showed that in the Report on the Work of the Government for the 20 years, the word industry appeared more than 450 times, while the word competition, which mostly refers to competitiveness, appeared slightly over 100 times. The number of the word competition in the sense of competition policies appeared just surmounted one-digit number. Compared with the word industry, competition appeared much less frequently. His study of the five five-year plans got the similar result. Moreover, competition policies never appeared in the formal official documents. All these showed to some extent that, there is much room for the government to improve the understanding and use of competition policies.

50. Here the author studies the backgrounds of one Provision issued by MOFCOM, Interim Measures on Investigation and Treatment of Failure to File a Prior Notification in Accordance with the Law, to make further demonstrations.

51. The Chinese AML and the Provisions of the State Council on Thresholds for Prior Notification of Concentrations of Undertakings set the system of Prior notification for concentrations of undertakings, stating where a concentration of undertakings reaches any of the stated thresholds, the undertaking(s) concerned shall file a prior notification with the competent commerce department of the State Council, and no such concentration may be implemented without the clearance of prior notification. In practice, the enforcement bodies noticed that because different reasons, some concerned undertakings still completed concentration without filing a notification in accordance with the law, which not only made undertakings filing a notification in accordance with the law feel unfair, but also affect the authority of AML. Therefore, in order to remind the concerned undertakings of filing a prior notification in time before the concentration in accordance with the law, otherwise they should bear the legal the corresponding legal responsibilities, and also in order to implement AML better, help the enforcement bodies firmly exercise their anti-monopoly function and punish those undertakings reaching the stated thresholds but failing to file a notification, MOFCOM decided to formulate this Provision, to further deliberate the concrete situations in which the concerned

undertaking(s) fail to report a notification and the administrative procedures of investigation and decision, regulating the investigation and treatment.

2 More attention should be paid to fostering the culture of competition

52. The culture of competition can be understood as the competition maintaining Mechanism formed by the whole society, and the common idea and atmosphere of respecting competition rules. The formation and development of the culture of competition are influenced by many different factors, ranging from the ideas of consumers, the conduct of undertakings to the positioning of the function of government, from the inheritance and dissemination of the ethnical traditional culture, the understanding and use of trading rules in the noisy market to the promulgation of economic laws.

53. Because of lack of the tradition of market economy featuring competition, the culture of competition in China is not as strong as that in western market economies, which not only makes different sorts of undertakings in the market lack of ideas to make use of AML to protect their own interests, but also makes different kinds of public organizations authorized with rights to manage economic life lack of ideas to maintain competition mechanism and respect competition rules.

54. Of course, the development of the culture of competition is a gradual and long-term process, and a process accumulated by different kinds of seemingly insignificant little details. Although the Anti-Monopoly Enforcement Authorities have made great efforts to disseminate the anti-monopoly knowledge, establish the authority of AML and give publicity to the value of AML, there is still a long way to go for the whole society and the public to form the correct ideas of competition. The author deeply realizes that the lack of the culture of competition will become one of the main obstacles for the effective implementation of AML.

3 The anti-monopoly enforcement capacity and level are to be increased.

55. The Chinese anti-monopoly enforcement work has been put into order. The three Anti-Monopoly Enforcement Authorities have actively investigated into and decided on some influential cases. However, compared with those countries and regions with a long history of anti-monopoly enforcement, our enforcement staff seems to lack experience, and their enforcement capacity and level need to be increased. Take the concentration of undertakings for an example, although the Anti-Monopoly Bureau of MOFCOM has set all the necessary branches, but it has only dozens of officials. More than 200 notifications of concentration of undertakings every year make the concrete personnel handling the case feel a heavy burden, and also prolong the waiting time of the undertaking(s) filing a notification of concentration to some degree. The economics and law personnel concerning anti-monopoly in China also fall behind their counterparts in developed countries.

4 The anti-monopoly enforcement bodies still lack coordination with the

industry regulators.

56. In China, the industry regulator often imposes comprehensive regulation on the industry, which inevitably involves competition in the industry. When the industry regulation overlaps with the anti-monopoly enforcement, the relationship between the two organizations should be coordinated. It should be recognized that the industry regulation is quite professional, and it can deal with problems concerning competition or monopoly in the industry more effectively. On the other hand, the industry regulators and the anti-monopoly enforcement organizations have different objectives, so it is inappropriate for the anti-monopoly enforcement organization to replace the industry regulator, and the industry regulator also can't take the place of the anti-monopoly enforcement organization to deal with the competition problems in a specified industry. The author firmly holds that the industry regulators should fit in with the anti-monopoly enforcement organizations to promote competition. The anti-monopoly problems should be handled by the anti-monopoly policies and the industry regulators should get involved in competition issues as little as possible. Only in some special industries which need competition rules different from the general clauses of AML can the industry regulator make competition policies to deal with competition problems. At present in China, the government (the anti-monopoly enforcement authorities) or the academic community has not fully thought and discussed this issue.

D Prospect of the Chinese Anti-Monopoly Policy in the Future

57. Since the implementation of AML, the Chinese anti-monopoly policies have made some achievements, and also faced some difficulties and problems. Looking ahead, the author holds that the following changes will take place in the Chinese anti-monopoly fields.

1 The administrative procedure for the anti-monopoly enforcement will become more perfect and mature.

58. Compared with the mature market economies, the Chinese administrative procedure of the anti-monopoly enforcement was launched quite late. The enforcement staff are lacking enforcement experience, so their enforcement level is quite low. However, owing to the beneficial backgrounds of the Reform and Opening-up Policy, and under the drive of economic globalization and informatization, plus the hard work of the enforcement staff, the Chinese anti-monopoly administrative enforcement will have the chance and condition to obtain late-development advantage.

59. (1) Making further progress in the formulation of the supporting provisions and regulations of the AML. Although NDRC has formulated 2 supporting Provisions,

the related laws, regulations and systems are to be supplemented, deliberated and improved. NDRC will make great efforts to deliberate the related regulations and formulate the related anti-monopoly guidelines in accordance with the outstanding problems arising in the process of the enforcement against price monopoly to continually improve the anti-price monopoly legal system and stipulate competition rules in the market. At present, MOFCOM is formulating Interim Provisions on the Summary Procedure Applicable to Concentrations between Undertakings, prepared to put cases into different categories, and then apply the summary procedure to those cases apparently affecting no competition. In doing so, the anti-monopoly staff can deal with the cases with no effect on competition very quickly and focus their energy and resources on the few cases possibly with significant effect on competition, increasing the efficiency to handle cases and decrease the notification costs of undertakings. In addition, MOFCOM is formulating Guidelines for Defining the Undertakings Getting involved with Concentration, to further increase the enforcement transparency and convenience for undertakings to file a notification.

60. (2) Vigorously carrying out the anti-monopoly enforcement practice. The official in charge of anti-monopoly in NDRC has said on many occasions that anti-monopoly enforcement is the hard truth. He thought that positive and effective anti-monopoly enforcement activity can not only maintain market order and fair competition, protect consumers' interest and social and public interests, but also disseminate the anti-monopoly ideas very effectively, promote the understanding of people from all walks of life of the AML, and enhance the awareness of fair competition in the society. Besides, positive anti-monopoly enforcement can enable the anti-monopoly enforcement staff to learn from practice, accumulate enforcement experience and increase enforcement capacity. MOFCOM will make more efforts to study the concluded cases, summarize the similar problems, summarize the experience to handle cases, put more emphasis on the investigation and research, define the relevant market reasonably, analyze the effect on competition exactly, add reasonable relief measures to cases possibly with effect on competition, clarify the responsibilities of the concerned undertakings, exercise the afterward supervision of the cases with condition, and further improve the negotiation before notification.

61. (3) Enhancing the international anti-monopoly cooperation and exchange. With the continuous development of economic globalization, the economic connections between different countries have become closer and closer. It is quite significant to enhance the exchange, cooperation and coordination among the anti-monopoly agencies in different countries to maintain fair market competition enhance economic efficiency and safeguard the interests of consumers. The three Chinese Anti-Monopoly Enforcement Authorities are all actively negotiating with the anti-monopoly enforcement agencies in other countries or regions. They have established good cooperation mechanism and smooth negotiation channel, continuously deepening the cooperation between each other. Through the mutual

promotion, they have all obtained benefits.

2 The anti-monopoly civil litigation will get further development

62. The formation and development of the culture of competition is the important external condition for the effective implementation of AML, while the important means to foster and develop the culture of competition lies in the encouraging the anti-monopoly private litigation, increasing the understanding and awareness of undertakings, consumers and other individual market agencies of competition rules. The establishment of the anti-monopoly private litigation allows market agencies to obtain direct compensation through litigation, enhancing the connections between private agencies and the anti-monopoly enforcement agencies, which, in turn, enables private agencies to increase their awareness of competition rules. Generally speaking, private agencies can more easily get the illegal information of anti-competition of undertakings than the administrative enforcement agencies, and they are more sensitive to anti-competitive behaviors. In this sense, the anti-monopoly private litigation broadens the ways to protect competition order and the interests of the society. During the administrative anti-monopoly enforcement process, because the enforcement agencies lack flexibility and are limited in the administrative enforcement resources during the enforcement process, it is inevitable that administrative enforcement agencies have some drawbacks and deficiencies. The anti-monopoly private litigation can make up for the drawbacks of the anti-monopoly administrative enforcement to some extent, helpful to prohibiting anti-competitive behaviors more extensively and achieving the anti-monopoly goals.

63. Although the anti-monopoly civil litigation system has just been established in China, the author still has sufficient reason to believe that the Chinese anti-monopoly civil litigation will be developed by leaps and bounds, for the Chinese market is so huge and complex, there is a huge demand for the anti-monopoly litigation in China and many law firms have the motivation to seek profits.

3 The academic research of anti-monopoly will obtain further progress.

64. China has implemented AML for 4 years. With the changes of world economy and the fast development of the Chinese economy, new things and new problems will appear in the Chinese anti-monopoly fields, some of which will also exist in developed countries. For example, the anti-monopoly in the fields of intellectual property rights, network industry and natural monopolies, the coordination between the anti-monopoly policy and other economic policies, and the relationship between the anti-monopoly policy and the national security review. From another perspective, the new things and new problems in the field of anti-monopoly will also bring new vigor for it and will promote the academic research of anti-monopoly to a new level.

65. On the other hand, it should be seen that the development of China's competition policy has provided opportunities for economics workers, that is, economics will play an increasingly important role in the enforcement of the AML. In

the abstract sense, the implementation of the AML is, in essence, the recognition and punishment of an undertaking's anti-competitive act, the criterion for which is whether the given competitive act of an undertaking will result in the distortion of the normal competition process and the reduction of economic welfare, which are the very subjects that economics is concerned with inter alia. The role of economics in the anti-monopoly field is displayed in the following aspects.

66. Firstly, economics can help the Anti-monopoly Enforcement Authorities formulate detailed rules and guidelines for the implementation of the law. Although the AML has been issued and enacted, the presentation as regards many provisions is too general and abstract. For instance, as far the anti-monopoly review of a concentration between undertakings, the AML just lists some factors which should be taken into account. For the Anti-monopoly Enforcement Authorities, how to make further investigation into a concentration coming up to or reaching the threshold of notification stipulated by the State Council is less operational. In view of the foreign practices that necessary measures are adopted to ensure that the concerned parties and the enforcement authorities can form a relatively clear expectation for the anti-monopoly review of a concentration and to make the anti-monopoly review of a concentration more operational. For instance, the US Department of Justice issued the Merger Guidelines of 1968¹ which was formulated by a group of economic and policy experts and professional lawyers working in the governmental departments, and which adopted the analysis framework of economics (exactly, the theory of industrial organization). The Anti-monopoly Committee under the State Council established not long before is endowed with a duty of formulating and issuing the anti-monopoly guidelines. It can be predicted that economics will play an important part in the formulation and enactment of the detailed rules and guidelines for the implementation of the AML.

67. Secondly, the recognition of the fact in an anti-monopoly case requires economic analysis. During the litigation process of an anti-monopoly case, it often happens that different parties concerned have different evaluations over the same commercial behavior in many cases. At this time, the concerned parties need evidence to support their own argumentation which may be concerned with price, cost, market, entry barriers, welfare and other economics concepts. This means that economics may appear in an anti-monopoly lawsuit as evidence or attestation.

68. Thirdly, the trial and decision of an anti-monopoly case needs the help of economics. As mentioned above, the concerned parties can provide evidence with the help of economics; however, it's the judge who determines the fact and makes the decision. Generally speaking, one of the main tasks for a judge is to survey the application of the law, not to identify the fact in an anti-monopoly case. It is natural that a judge requires using economic theories to support his decision when he realizes the effect of his decision upon the concerned parties and the economy. Bork,

¹The Merger Guidelines of 1968 was amended in 1982, 1984, 1992 , 1997 and 2010 respectively.

a distinguished American scholar in the anti-monopoly field, once pointed out that “ first of all and most obviously, anti-monopoly is a law.”But in the meanwhile “ It is the collection of a series of constantly evolving industrial organization theories.”It is expected that the reliance of the judgment on economics in a lawsuit will gain popularity with the evolution of anti-monopoly affairs.

69. At last, the author would like to quote the two paragraphs said by J.E.Kwoka and L.J.White, two famous American scholars in the anti-monopoly field, as the concluding words.

70. The first is that the paramount importance of economics in the antitrust process is firmly established. Enforcement policy and court decisions will be grounded in economic analysis to ever-greater degree. Supporters and critics of policy issues all now debate them in terms of competition and efficiency, clearly conceding the central role that economics plays.

71. In addition, these advances in economic understanding continually improve the rationality and consistency of antitrust policy. As these advances gain acceptance, they progressively narrow the range within which policy decisions are made. That is, by demonstrating that some propositions are incorrect, lack generality, or suffer from other defects, the advances limit the degree to which future policy can ever revert to those defective propositions.