CHINESE COMPETITION LAW: PROBLEMS AND SOLUTION

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Part I: Current legislation

With the transition of planned economy to socialist market economy, considerable effort has gone into the drafting and enactment of China’s competition laws.

As early as 1980, the State Council promulgated Provisional Rules on the Development and Protection of Socialist Competition (1980), China's first legal document on competition. This regulation tried to introduce a maximum degree of competition into the planning system. In 1993, the Law of the People's Republic of China for Countering Unfair Competition ("LCUC") was enacted. Eleven unfair competition behaviors were listed, which can be summarized into four categories: 1. protection of trade mark and business secrets; 2. regulations on false advertisements; 3. prohibition of anti-competition behaviors; 4. regulations on the public utility operators and government. Rather than incorporating a separate anti-monopoly law, several anti-monopoly provisions were inserted into the LCUC. For example, Article 6 of the LCUC prohibited public utility operators or other monopolies from imposing transactions in order to eliminate competitors. Article 11 forbade setting predatory prices; Article 15 prohibited collusion in bidding; Article 7 explicitly opposed administrative monopoly in the form of forced transactions and local protectionism. In relevant provisions, the LCUC stipulated legal liabilities and sanctions of those monopolistic activities. Although the term 'anti-monopoly' is avoided, the LCUC addresses certain forms of restrictive agreement, abuse of dominant market position, and administrative monopoly.

Same efforts can be seen in the drafting of Law of Price (1998) and Provisional Rules on the Prohibiting of Price Fixing (2003). But the situation is far from satisfactory. Firstly, under the current system, legal sanctions are rarely effective due to the absence of effective legal sanction measures and inadequate authority of the executive body. Secondly, so far there is no legislation directly concerns about anti-monopoly issues, such as the prohibition of deterrence of competition, prohibition of abuse of dominant market position and mergers control, which are the core of anti-monopoly policy.

Part II: Main Problems

1 In writing of this article, I have benefited from Pro. Tao Zhenghua and Pro. Wang Xiaoye, but any errors remain solely mine.
1. Widespread Administrative Monopoly

The most hotly-debated and intensely-condemned monopoly in China today is the administrative monopoly. "Administrative monopoly," widely used in China, refers to monopolistic activities initiated by government agencies at various levels by abusing regulatory or administrative power.

2. Industry/Department Monopoly

They include national security, natural monopoly, public goods and services, and key high-technology enterprises.

3. Regional Monopoly

Regional monopoly is motivated by economic (increasing local revenue) and political (promotion of local government officials depends partially on local economic performance) considerations. Local governments take various measures to prevent or discriminate against non-local products and services, which effectively set up regional blockades. Those measures include: forbidding local businesses to engage in wholesaling or retailing non-local products; employing discriminative standards in quality inspection, license issuance and technical requirements; fixing higher prices or price standards for non-local commodities; and setting up checkpoints on the local border to obstruct, intercept, or even confiscate products originating in other regions.

4. Monopoly behaviors of Multinational Corporations

In some industries, MNCs have obtained dominant market position in China. According to a report from State Administration of Industry and Commerce(SAIC) in 2003, Microsoft enjoy 95% market share of computer operating system; Nokia and Motorola take up for 70% of China's mobile phone market; Sony has 18% of camera market. The report also indicates the abuse of dominant market position and price discrimination from MNCs in China.

5. Government's Dilemma: Conflict between Industrial Policy and Competition Policy

To prompt reform of State owned enterprises and coping with the pressure from international competitions, Chinese government adopt a “breeding large enterprises group” policy, which will undoubtedly result in a monopoly market structure. In fact, the giant enterprises developed under the government support have controlled the electric power, telecom, civil aviation, petrifaction, bank and other industries of China. This is the main reason for the lateness of China's anti-monopoly law.

Part III: The Draft of China's Anti-Monopoly Act
In May of 1994, an Anti-Monopoly Law drafting group, which consisted of members of the legal departments of the State Economic and Trade Commission (SETC) and the State Administration of Industry and Commerce (SAIC), was organized to discuss the possibility of an Anti-Monopoly Law.

There are fifty-six clauses in the eight chapters of the latest draft of the Anti-Monopoly Law of February 26, 2002. Some substantial provisions of the draft will be discussed in the following pages.

1 Prohibition of Administrative Monopoly

Under the Draft, the term “administrative monopoly” is used to refer to anticompetitive activities by governments and their subordinate departments who abuse their administrative power through industry monopoly and regional monopoly. Chapter five divides these two types of administrative activities into five categories of prohibited government actions: (1) discriminatory practices that force purchases from certain business operators or restricting other business operators' legal business activities under Article 31; (2) regional monopolies, which limit inflow of products into the local market or outflow of local products to other markets using all kinds of proscribed means under Article 32; (3) department and industry monopolies, which limit operators from entering into the markets of particular industries and eliminate or restrict market competition under Article 33; (4) the compulsion of business operators to take actions to eliminate or restrict market competition prohibited by the Draft under Article 34; and (5) the enactment of regulations that eliminate or limit competition to obstruct fair competition under Article 35.

2 Prohibition of Cartels

Article 8 identify six types of monopoly agreements, including: price fixing of products; collusion in a tender; limitation on production quantity; market allocation; limitation of the purchase of new technology or new facilitates; and joint hindrance of transactions. They are followed by a general catchall provision to prohibit "other agreements with the effect of limiting competition."

3 Prohibition Against Abuse of a Dominant Position

Chapter 3 of the Draft prohibits abuse of a dominant position. According to Article 14, "a business operator shall not abuse its dominant marketing position, obstruct the activities of other business operators, eliminate or limit competition." The Draft's definition provides that a "dominant market position" is "one or several business operators controlling a specific market." A "specific market" means the territorial area affected during a specified time period by the sales of particular products by business operators. When deciding whether a business operator has a "dominant market position", the draft looks mainly at the number of enterprises and the extent of competition in a market.

4 Concentration

According to article 25, “concentration” include merger, control through purchase of shares or assets, and agreement to form a control relationship through agency, joint venture or any other method. Article 26 provides that when the turnover of the merging enterprises reach the prescribed limit, an application must be submitted to the anti-monopoly regulatory authority of the State
Council. However, the Draft Law does not provide for this limit specifically, but rather authorizes a future anti-monopoly regulatory authority to define the limit.

Article 28 provides that the anti-monopoly regulatory authority should make a decision of approval or disapproval within ninety days from the date that it receives the application from the merging enterprises.

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