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Title: The Competition Policy in China: Past, Present and Future

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The fundamental and in-depth change in the economic system has been the transition from a planning economy system to a market economy system since the reform and opening-up policy was implemented in China in 1978. It is well known that competition is the essential feature of a market economy. Without competition, a market economy would be out of the question. However, in the realistic market competition process, there is a great variety of unfair and anti-competitive practices, because some undertakings in market competition, in order to maximize their profits, are bound to fight against and elbow out their competitors by various means to strive for a monopoly and obtain economic gains. If such undertakings' acts are left unchecked and no effective measures are taken to control and cease them, market competition and the function of market mechanisms will be impaired, economic vigor will be killed, technological innovations and advances will be hindered, and consumers' interests will be damaged. The market mechanism per se cannot solve those "market failures" as they must be rectified through the government's "visible hand" to keep the market economy in healthy operation. This is the very purpose of a competition policy.

Competition policies can be defined as the combination of actions or measures adopted, regulations or provisions formulated, and supervision-enforcing authorities established to protect and promote effective competition in a market economy. Different from other economic policies, a competition policy is often based on laws concerning competition control. In other words, the laws as regards to the control of market competition themselves constitute the basic contents of a competition policy. In this sense, a competition law is, in the main, a synonym for a competition policy. Generally speaking, if competition policies do not guarantee competition institutionally and have not been enacted to supervise and sanction anti-competitive practices, effective and healthy competition can't be developed and the operation of a market economy will deviate from the beaten track. In one word, a competition policy is a fundamental, paramount and institutional policy in a market economy. The basic purpose of this article is to review the past, understand the present and look forward into the future of the Chinese competition policies.

I China's Competition Policies in the Past

Since the adoption of the reform and opening-up policy, China has experienced a process of transformation from a planning economy system to a socialist market economy system. Accordingly, China's competition policies have progressed from non-existence to existence, and then to development and improvement. By and large, China's competition policies have undergone 3 phases.

The first phase lasted from the founding of the PRC in 1949 to the implementation of the Reform and Opening-up Policy in 1978. During this period, China adopted a planning economy system. The whole economy was organized and managed through national planning. As such, there was no competition or competition policies.

The second period lasted from the launch of the Reform and Opening-up Policy in 1978 until the goal to establish a socialist market economy system was pronounced at the 14th National People's Congress of the Chinese Communist Party in 1992. During this period, China implemented a "planned market economy" which allowed for limited competition to take place. Nevertheless, because of the setbacks in Chinese economic development and the lack of comprehensive understanding of competition, anti-competitive practices came into being while competition accelerated the process of developing the efficient enterprises and eliminating the inefficient ones, and promoted the efficient allocation of resources. In order to protect the legitimate interests and rights of undertakings in the market, and safeguard the effective, reasonable and healthy operation of the market competition mechanism, China has enhanced its efforts to legislate in the field of economy and the market.

In 1980, the State Council issued the first administrative regulation in China concerning the protection of market competition -- the Provisional Regulation on the Development and Protection of Socialist Competition. This was the first rule to curb monopolies, in particular administrative monopolies, setting out principles *inter alia* on development and protection of socialist, the breaking-up of regional blockades and sectoral compartmentalization, and fostering competition through legal means. The regulation stipulated that "in economic life, monopolies or exclusive operation are prohibited, except for those products exclusively operated by relevant departments or units appointed by the state," and "[t]he development of competition requires the breaking-up of regional blockages and sectoral compartmentalization, and in any region or sector, market blockages or restraints of access to local markets are prohibited." Since the enactment of this regulation, increasing emphasis has been placed on competition policies and laws. The Regulation on the Administration of Advertisement of the People's Republic of China and the Regulation on the Administration of Price of the People's Republic of China, both enacted by the State Council in 1987, involved anti-monopoly issues in varying degrees. For instance, the Regulation on the Administration of Advertisement of the People's Republic of China *inter alia* specifically stated that "monopolies and unfair competition in advertising activities are prohibited." The Regulation on the Administration of Price of the People's Republic of China stated that the practice of negotiating or determining monopoly prices among enterprises or trade associations is illegal. In 1988, the former Legal Affairs Bureau under the

State Council formed the anti-monopoly law drafting group and put forward the Draft of the Provisional Regulation of Anti-Monopoly and Anti-Unfair Competition, which, for some objective reasons, was not enacted. However, this exploration of competition policies shows that the Chinese economic system reform and economic development placed competition policies and competition legislatures under the operation mechanism of a market economy on the agenda.

In November 1990, the State Council enacted the Notice on the Breaking-Up of Market Blockades in Regions and Further Invigorating the Circulation of Products, which specified that manufacturing enterprises have rights to sell their products throughout the country after finishing the planned allocation of products and the purchase and marketing contracts ordered by the state. The regulation also stipulated that enterprises in industrial, commercial, and material sectors have the right to select and purchase products they need throughout the country, forbidding any region or sector to set obstacles to intervene.

The third phase refers to the period since the goal to establish a socialist market economy was announced at the 14th National People's Congress of the Chinese Communist Party in 1992, in particular since the adoption of the Decision on Certain Issues Regarding the Establishment of a Socialist Market Economy System at the 3rd Plenary Session of the 14th Central Committee in 1993. During this period, competition was widely enforced in many fields with the all-around effect of market-oriented reforms. Meanwhile, in order to protect and promote effective competition, to safeguard the interests of consumers and the general public, and to enhance the healthy development of the socialist market economy, the Chinese legislature as regards to market competition has entered an important stage.

The Anti-Unfair Competition Law of the People's Republic of China, adopted in 1993, targets 11 types of illegal conduct and covers five types of monopolistic conduct including bid-rigging, predatory pricing, abuses of dominant market positions by public enterprises, administrative monopolies and tying. Also adopted in 1993, the Consumer Protection Law of the People's Republic of China contains rules regulating competitive conduct of undertakings in the market, with the aim to protect consumers' rights and interests. The Price Law of the People's Republic of China, enacted in 1997, features rules on price cartels, predatory pricing and price discrimination. The Bidding Law of the People's Republic of China of 1999 targets bid-rigging and sets out penalties.

In 2000, the State Council adopted the Telecommunications Regulation of the People's Republic of China, which stipulates that "the supervision and administration of telecommunications shall be carried out according to the principles of separation between government and enterprises, breaking up of monopolies, encouraging competition and promoting development, openness, fairness and impartiality." In 2001, the State Council issued the Regulation on the Prohibition of Regional Blockades in Market Economy Activities, which sets out detailed rules relating to various forms of local protectionism, regional blockades and corresponding sanctions. The Decision on Rectifying and Standardizing the Market Economy Order, enacted by the State Council in the same year, explicitly announced that "regional blockades and departmental and industrial monopolies should be broken up. The administrative authorities, institutions, monopolized industries

and public enterprises that impede fair competition, hinder products or project construction services of other cities and provinces from entering the local market, or limit enterprise competition by any other means will be investigated and sanctioned.” In terms of the Anti-Unfair Competition Law of the People’s Republic of China, the State Administration for Industry and Commerce enacted the Certain Regulations on Prohibiting Competition-Restricting Practices of Public Enterprises and the Provisional Regulation on the Prohibition of Bid-Rigging. Furthermore, the Provisional Regulation on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors and the Provisional Regulation on the Prohibition of Price Monopolistic Conduct, both enacted in 2003, respectively contain rules on the anti-monopoly review of a merger and the prohibition of price monopolies.

The Anti-Monopoly Law of the People’s Republic of China was deliberated and passed on August 30, 2007 at the 29th Meeting of the Standing Committee of the Tenth National People's Congress, and promulgated by Order No. 68 of President Hu Jintao on the same day to become effective as of August 1, 2008. This is an important law enacted by China to prevent and prohibit monopolistic conduct, protect fair competition in the market, enhance efficiencies in the economy, safeguard the interests of consumers and the general public, and promote the healthy development of the socialist market economy. Thus, the basic framework of the competition policies in China has been established.

II China’s Present Competition Policies

The author holds that the framework of China’s competition policies is mainly composed of the Anti-Unfair Competition Law of the People’s Republic of China and the Anti-Monopoly Law of the People’s Republic of China (the AML) in view of the basic concepts and features of competition policies in general. Given that the AML plays the most vital role in competition policies since its implementation on August 1, 2008, this article studies and analyzes the Chinese anti-monopoly law (or anti-monopoly policies) from an economic perspective.

The Goal of China’s Anti-Monopoly Policy

The goals of competition policies are to protect and promote competition, and to make market competition and price mechanisms regulate the economy in an effective way. As the most important component of the Chinese competition policies, Article 1 of the AML sets forth the legislative purpose, stating the goal of China’s anti-monopoly policy as follows:

“This Law will be enacted for the purpose of 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.”

All kinds of monopolistic behaviors impairing market competition should be combated resolutely in order to protect market competition. “Guarding against or ceasing monopolistic conduct” has dual implications. On the one hand, the AML will pose strong deterrence to those enterprises intending to adopt monopolistic practices so as to guard against monopolistic conduct. On the other hand, the AML will investigate the legal responsibility of monopolistic conduct which has been implemented to realize the goal of ceasing such conduct.

The essential feature of a market economy is that effective allocation can only be reached through competition. It is clear that China has implemented a socialist market economy; Hence, it is necessarily required that competition should exercise its fundamental role in the market. Therefore, it is natural that the AML aims at protecting market competition. Here, the article emphasizes ad hoc that the protection of competition is not tantamount to the protection of competitors. In line with the rule “survival of the fittest,” some competitors will be eliminated in fair competition. The interference of the AML with a market is not to protect competitors, but the order of market competition.

Economics has proved that competition can realize the optimum allocation of social resources under certain conditions. Competition makes every competitor work harder to obtain higher gains. Competition brings pressure for participants and avoids monopoly. This means that competition plays an important part in improving the operation efficiency of the social economy, which has thus become one of the important legislative aims of the AML.

Consumers' interests are closely linked with market competition. Effective market competition makes products of higher quality, lower price, and greater variety available in the marketplace. Without competition, consumers cannot obtain quality cheap goods. The AML protects consumers' interests by prohibiting anti-competitive practices from damaging the market and making the market competition mechanism function normally. The interests of the general public are an abstract concept, neither equal to the interests of a state, nor the simple addition of individual interests, rather the organic integration of individual interests.

The AML per se is the ultimate guarantee for the healthy development of a market economy. The formulation and enactment of the AML are bound to promote and ultimately guarantee the healthy development of the socialist market economy.

Main Systems under the AML

The AML has established four systems to safeguard and promote the order of fair market competition and guard against or cease monopolistic conduct: the prohibition of monopoly agreements, the prohibition of abuses of dominant market positions, the control of concentrations between undertakings, and the prohibition of abuses of administrative power to eliminate or restrict competition. Chapters 2 to 5 of the AML specify these four systems respectively, of which the first three are often referred to as the “three backbones”

or “three cornerstones” of an anti-monopoly law, while the fourth one is in essence the regulation concerning the prohibition of administrative monopolies, which may be called the Chinese characteristics. The following explains the four systems one by one.

Monopoly agreements refer to the agreements or concerted efforts by two or more undertakings to fix prices, partition markets, limit output, and supplant other competitors to eliminate and/or restrict competition. Monopoly agreements among undertakings are a relatively typical monopolistic conduct which directly restricts competition and inflicts relatively serious harms to the competition order and consumers’ interests; therefore, they are often a priority in antitrust regulations around the world. Four articles of Chapter 2 under the AML specify *inter alia* the rules concerning monopoly agreements. This chapter follows the idea of “prohibiting all monopoly agreements in principle, but leniency permitted if qualified.” First of all, Article 13 prohibits horizontal monopoly agreements, that is, monopoly agreements concluded by enterprises in competition with each other, and Article 14 explicitly prohibits vertical monopoly agreements reached between undertakings and transaction parties. Secondly, the law specifies the qualifications for exemption. Article 15 specifies the conditions for exemption, providing that certain agreements which display benefits for technical advances, economic development and public interest without significantly impairing competition are exempted from the prohibition in accordance with the law. In addition, Article 16 set a rule that a trade association or other social group is not permitted to organize undertakings to reach monopoly agreements.

A dominant market position is defined as the market position which enables undertakings to influence market competition or not be influenced by market competition in the relevant market. A dominant market position in the AML of the People’s Republic of China refers to the market position that enables an undertaking to control the price, sales volume or other transaction terms of its products in the relevant market, or to impede or influence other undertakings’ entry into the relevant market. In different countries and regions, a dominant market position has different expressions, such as “monopoly” and “monopoly power.” In light of the practices in many countries, it is not in violation of the law *per se* if an undertaking achieves the market dominance through fair competition. However, the abuses of a dominant market position in eliminating or restricting competition are regulated by the anti-monopoly law. In view of established international practices that monopolistic behaviors which are generally recognized as eliminating or seriously restricting competition are strictly prohibited, and also in terms of the Chinese reality that its enterprises are far from mature as market subjects, fostering inadequate competition as different types of enterprises are unevenly developed, the system should be arranged in a clear and explicit way, and it should be moderate, easy for mastering and applying, conducive to fostering an enterprise’s self-determination, self-discipline and self-reliance in line with the law, beneficial to technical betterments and quality improvements, and beneficial to the protection of consumers’ rights and interests. Chapter 3 of the AML contains two rules regarding abuses of a dominant market position. One is to explicitly prohibit abuses of a dominant market position, with Article 17 specifying *inter alia* that a dominant undertaking is prohibited from seven behaviors that abuse its dominance, including selling products at unfairly high prices or buying products at unfairly low prices. The other is to prescribe specifically the factors and criteria for the determination of an enterprise’s market dominance, which are covered by Articles 18 and 19 in this chapter.

A concentration between undertakings includes a merger of undertakings, and an undertaking's acquisition of a controlling right in another undertaking or its ability to exercise decisive influence over another undertaking. Article 20 of the AML states that a concentration covers the following situations: (i) a merger between undertakings; (ii) an undertaking's acquisition of a controlling right in another undertaking through the acquisition of equity or assets; and (iii) an undertaking's acquisition of a controlling right in another undertaking or its ability to exercise decisive influence over another undertaking by contract or other means. A concentration between undertakings is a common phenomenon, but its consequence generally has two sides. On the one hand, a concentration can contribute to the establishment of an economy of scale and the improvement of competitiveness. On the other hand, a concentration may enhance an undertaking's market dominance, form a monopoly and restrict competition. Competition law in every country contains rules concerning concentrations between undertakings and exercises necessary control over them. Chapter 4 under the AML, which includes the rule regarding the control of a concentration between undertakings, has 12 articles. In light of the settled practices in most countries, China has adopted a pre-merger notification system for a concentration of undertakings. Chapter 4 of the AML covers *inter alia* the following contents: situations referred to as a concentration, concentration notification, documents that undertakings should submit when filing a concentration notification, investigation of the filed concentration, investigation period, and factors which should be taken into consideration during investigation and investigation decision.

An administrative monopoly is defined as the abuse of administrative power by a government department or its affiliated institution to restrict competition. It is neither part of the normal management by a government agency to safeguard economic order, nor a component of monetary, fiscal, or other social and economic policies adopted by a government department to exercise macroeconomic regulation. Hence, the foundation for judging whether a government department or its affiliated institution abuses its power lies in the laws and policies of a nation. If a government department or its affiliated institution has implemented a certain competition-restricting act which is explicitly prohibited by the national law or policy, this constitutes the abuse of administrative power to restrict competition. Typical demonstrations of an administrative monopoly are industrial or departmental monopolies, that is, when the administrative authority of an industry or department abuses its power to set up an economic entity and participate in unfair competition. Compared with an economic monopoly, an administrative monopoly has 2 obvious unique characteristics. Firstly, the subject implementing an administrative monopoly is the relevant government department, or its affiliated institution or organization which performs public functions, rather than an undertaking or competitor in the market. Secondly, an administrative monopoly comes into being when the relevant government department, its affiliated institution or authorized unit exercises its administrative power on market competition activities either directly or indirectly. In light of commonly accepted theories and international practices, the administrative restriction of competition is not mainly rectified by the anti-monopoly law, which has great difficulties in solving this issue fundamentally. However, in line with China's actual conditions, the AML, the special and basic law to protect competition in China, explicitly specifies the prohibition of administrative restriction of competition, showing that China emphasizes and firmly objects

to it so as to further prevent and cease such restriction of competition. It is out of such considerations that Chapter 5 of the AML includes rules concerning abuse of administrative power to eliminate and restrict competition. Chapter 5 includes 6 articles, which cover the following behaviors of abusing administrative powers: designated products, obstruction of free circulation of products across regions, excluding or limiting the investment or establishment of subsidiaries of an undertaking originating from other regions, excluding or limiting tenders of an undertaking originating from other regions, forcing an undertaking to pursue monopolistic conduct, and issuing rules with content eliminating or restricting competition.

China's Anti-Monopoly Measures

As the principal part of competition policies, the goal of the anti-monopoly law is to guard against or cease monopolistic conduct, and safeguard and promote the order of fair market competition. In order to achieve this goal, corresponding policies and measures must be enacted to influence an undertaking's practices in market competition. The anti-monopoly measures are generally categorized into three types: legal, economic and necessary administrative ones.

Legal measures are the primary among all the anti-monopoly measures and are the basis for other policies and measures. What makes legal measures project noticeably under the anti-monopoly law is that the law specifies measures to supervise and sanction monopolistic conduct restricting competition. Chapter 6 of the AML targets suspicious monopolistic behaviors. Eight articles in this chapter cover *Inter alia* the following: investigation of suspicious monopolistic behaviors by the anti-monopoly enforcement authority, reporting suspected monopolistic conduct to the anti-monopoly enforcement authority, measures taken by the anti-monopoly authority when it's investigating suspected monopolistic conduct, execution procedures, executing bodies, liability of executing officers to keep confidential the commercial secrets obtained in the process of enforcement, liability of organizations or individuals being investigated to cooperate with the Anti-Monopoly Enforcement Authority, rights of the undertakings being investigated and interested parties to submit statements, and determination and publication of the verification of the suspected monopolistic conduct. Chapter 7 of the AML contains the rules regarding the legal liability of an undertaking in case the undertaking violates the relevant provisions of this Law regarding the prohibition of monopoly agreements as well as implementation of monopolistic agreements, and the legal liability of the anti-monopoly enforcement authority officials if they neglect their duties. The nine articles in this chapter include *inter alia* the following contents: the legal liability of monopolistic agreements which violate the provisions of the Law, the legal liability of abuses of dominant market positions, the legal liability of concentrations between undertakings violating the provisions of the Law, the factors which should be taken into consideration when the anti-monopoly enforcement authority is determining the amount of fines, the civil liability of an undertaking in case it implements monopolistic conduct, the legal liability of eliminating or restricting competition by abusing administrative powers, the legal liability of impeding the anti-monopoly enforcement authority, the approaches of the interested parties to a legal remedy, and the

legal liability of the anti-monopoly enforcement authority officials where they neglect their duties.

Economic measures refer to the protection of market competition through fines and sanctions in accordance with the law. Article 46 specifies that in case undertakings violate the relevant provisions of this Law regarding the prohibition of monopoly agreements as well as implementation of monopolistic agreements, the anti-monopoly enforcement authority shall order the undertakings concerned to cease and desist such acts, confiscate the illegal gains and impose fines from 1% to 10% of the total sales volume in the relevant market from the previous year; if monopolistic agreements have not been implemented, a fine of less than 500,000 RMB may be imposed.

If the undertakings involved in a monopoly agreement report their monopolistic conduct to the anti-monopoly enforcement authority and provide important evidence on their own initiative, they may be given a mitigated punishment or be exempt from punishment at the discretion of the anti-monopoly enforcement authority.

In case a trade association violates the provisions of this Law to organize undertakings to reach monopolistic agreements, the anti-monopoly enforcement authority may impose a fine of less than 500,000 RMB. In case of a serious violation, the registration authority of social organizations may revoke the registration in accordance with the law.

Administrative measures refer to the measures taken by the anti-monopoly enforcement authority to interfere with, supervise, and regulate an undertaking's market behaviors by exercising their administrative power directly in accordance with the law, such as through the system of concentration notification and the investigation of suspicious monopolistic behaviors. Administrative measures of the anti-monopoly policy are the administrative embodiments of legal measures. The AML explicitly specifies the scope of administrative powers of the anti-monopoly enforcement authority and the way to implement administrative measures. For instance, Article 39 states that when investigating suspected monopolistic conduct, the Anti-Monopoly Authority can take the following measures:

- (i) Conduct on-the-spot inspection at the location that the business takes place or other places that are relevant to the undertakings;
- (ii) Question the undertaking under investigation, interested parties, and other relevant organizations or individuals of the relevant circumstances;
- (iii) Examine or copy the relevant documents, agreements, contracts, accounting books, business mail, and electronic data of the undertaking concerned, interested parties, and other relevant organizations or individuals;
- (iv) Seal and retain relevant evidence; and
- (v) Inquire after the bank accounts of the undertakings concerned.

Before any of the actions described in this Article are applied, a written report must be submitted to the senior officials of the anti-monopoly enforcement authority for approval. It should be pointed out that legal, economic and necessary administrative measures should be integrated and not separated during the execution process of the AML.

The Anti-Monopoly Enforcement Authorities

Drawing upon the experience of developed countries in setting up their antitrust enforcement authorities, and taking into account China's actual conditions, the AML establishes antitrust enforcement authorities on two levels.

The Anti-Monopoly Committee under the State Council

As provided for in Article 9 of the AML, “the State Council shall set up an anti-monopoly committee which is responsible for organizing, coordinating and guiding the anti-monopoly work, and performing the following functions: (i) Making competition policies; (ii) Organizing the investigation and assessment of the market competition status as a whole and publicizing an assessment report; (iii) Making and publishing the anti-monopoly guidelines; (iv) Coordinating the anti-monopoly administrative enforcement work; and (v) Other functions assigned by the State Council.”

MOFCOM, NDRC and SAIC

Article 10 of the AML provides that the authorities appointed by the State Council shall be in charge of the anti-monopoly enforcement work. Pursuant to the “Three Designation Plan” approved by the State Council, MOFCOM is responsible for the antitrust review of concentrations between undertakings in accordance with the law, for providing guidance to companies on responding to antitrust complaints abroad, for exchange of competition policy and cooperation in bilateral and multilateral fora, and for the operational work of the Anti-Monopoly Committee under the State Council.

NDRC is responsible for investigating and sanctioning price monopoly conduct, and SAIC is in charge of anti-monopoly enforcement concerning monopoly agreements, abuses of dominant market positions and abuses of administrative power to eliminate or restrict competition (excluding price monopoly conduct). Subject to the organization, and under the guidance, of the Anti-Monopoly Commission under the State Council, these three departments are entrusted with providing effective anti-monopoly enforcement in their respective fields.

III Looking Forward Into the Future of China's Competition Policies

As mentioned above, the basic framework of competition policies has been established in China. With the development of the socialist market economy, the market competition mechanism will play an increasingly important role. Therefore, it can be expected that China's competition policies will perform a fundamental and guaranteeing function in further deepening the reform of the economic system, constructing a fair,

reasonable and orderly market competition environment, maintaining economic vigor, and promoting the effective, healthy and sustainable development of the economy. On the other hand, economic globalization has become a trend from an international perspective. China is increasingly connected with the world economy, and both are exerting more and more influence over each other. Hence, the formulation and enactment of a relatively perfect competition policy will be conducive to promoting the development of our foreign trade and economic and technological cooperation.

The establishment and implementation of China's competition policy framework is a significant landmark in the 30 years of economic construction and development since the adoption of the reform and opening-up policy in China. China's competition policies will pose challenges and also bring about opportunities for the relevant governmental departments and the academic community in the future.

As far as the relevant governmental departments are concerned, the competition policy with the AML as its principal part is very professional and policy-oriented. This is especially demonstrated in the requirement that the execution of the competition policy be based on relevant analysis and research. For instance, the evaluation of the overall condition of competition in the market, the definition of a relevant market, the judgment of an undertaking's market dominance, and the analysis of the level of market barriers all require that the policy-executing department and relevant officials should have a good grasp of laws and a solid foundation of economics. When executing the competition policy, the policy-executing department and relevant officials should keep different goals of industrial and public policies and the national interests in balance to achieve the maximization of both consumers' interests and social interests, showing that the competition policy is policy-oriented. These two qualities of the competition policy pose high requirements for the relevant executing departments and officials. Firstly, officials should command the relevant legal and economic knowledge. As far as the officials executing the competition policy are concerned, quite a few have learned some legal and economic knowledge related to a market economy. However, they still need to recognize, understand and command the AML issued in August 2007, such as by learning how to effectively define a relevant market and analyze the competition situation related with certain behaviors of an undertaking.

Secondly, many issues involved in the AML have been specified only in principle, and detailed measures are yet to be adopted. For instance, Article 21 states that undertakings shall notify the Anti-Monopoly Enforcement Authority regarding concentrations reaching the threshold of notification stipulated by the State Council and without notification, a concentration cannot be implemented. This means that the relevant department under the State Council should establish the criteria for the notification of a concentration. Additionally, the anti-monopoly enforcement authorities must formulate and enact detailed rules or guidelines regarding the execution of the law so that the concerned parties can have a better understanding of the relevant legal regulations and provisions and form clear expectations. All of this needs considerable input.

Thirdly, the real execution of the anti-monopoly law has only just started in China, and we still lack relevant law enforcement experience. Because the anti-monopoly law is very professional and policy-oriented, two mistakes often take place during the execution process

of the law. One is to mistakenly penalize the honest competitor who defeats its rivals through fair competition. The other is the failure to prohibit behavior which damages competition. In order to avoid these two mistakes, the relevant officials who are in charge of the execution of the AML need to accumulate experience from law enforcement practice, absorb and borrow from the internationally recognized antitrust practices, as well as improve their own expertise. On the formal implementation of the AML, the leader of the Price Supervision and Inspection Bureau of NDRC said that the prohibition of price monopoly is different from the general administrative execution as regards to the investigation and punishment of illegal activities related to price, and that the traditional execution idea must be adjusted correspondingly. It was stated that “during the execution thereafter, both a qualitative analysis in terms of the law and a quantitative study in light of economics shall be implemented. Not only should the illegality of monopolistic conduct per se be taken into consideration, but also efforts should be accelerated to strive for the balance between the industrial policy and the AML for the sake of the promotion of the national development and the protection of the economic safety. The AML should be exercised zealously, and the principles of reasonable analysis and careful execution should also be adhered to. These are completely new challenges for our execution work.”

Fourthly, much emphasis should be placed on international cooperation. In the modern world, international cooperation and coordination on competition policy is an active field. Although China has actively participated in bilateral and multilateral international cooperation during the process of the establishment and improvement of the competition policy, China’s ideas and claims are not taken seriously on the stage of international competition policy. This is not in harmony with China’s position of a great developing nation. Therefore, how to build up prestige in the field of international competition policy is a long-term and arduous task faced by the Chinese government.

As far as the Chinese academic community is concerned, the competition policy has posed a series of problems. For instance, the specific implementation of the AML should be combined with detailed rules and policies. The concrete notification system for a concentration between undertakings, the formulation of relevant guidelines, the anti-monopoly regulation regarding the IPRs, and the regulation as regards to an administrative monopoly all require concerted efforts of economic and legal experts. Furthermore, the determination of monopolistic conduct is quite complex, mainly because the decision of monopolistic behavior needs substantial data for support as an economic phenomenon. The establishment of a dominant market position is particularly sophisticated, not only because this data is difficult for law enforcement officials, but also because such data is always changing. The determination of any monopolistic behavior needs considerable input of labor, materials and financial resources over a long period of time. Monopolistic conduct is more hidden than illegal activities in other fields. The anti-monopoly enforcement authorities have difficulty in collecting the proof of illegal activities. Therefore, quite a few monopolistic behaviors haven’t been investigated or sanctioned effectively, or have been albeit at great expense.

On the other hand, it should be seen that the development of China’s competition policy has provided opportunities for economics workers, as 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 act will result in the distortion of the normal competition process and the reduction of economic welfare, which are among the very subjects that economics is concerned with. The role of economics in the anti-monopoly field is displayed in the following respects.

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 to many provisions is too general and abstract. For instance, with respect to 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 investigations into a concentration coming up to or reaching the threshold of notification stipulated by the State Council is not very operational. The foreign practice 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 makes such a review more operational. For instance, the US Department of Justice issued the Merger Guidelines of 1968,¹ formulated by a group of economic and policy experts and professional lawyers working in the governmental departments, which adopted the analytical framework of economics (specifically, the theory of industrial organization). The Anti-Monopoly Committee under the State Council, established not long ago, is endowed with the 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 detailed rules and guidelines for the implementation of the AML.

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

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 facts 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 facts in an anti-monopoly case. It is natural that a judge requires the use of economic theories to support his decision when he realizes the effect upon the concerned parties and the economy. Robert Bork, 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 "[i]t 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.

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

IV Conclusion

The formulation and enactment of the competition policy of China is an unprecedented and challenging job of great significance under the conditions of the socialist market economy. As an economics worker and member of the AML examining and modifying panel, the author has had the opportunity to witness the fundamental drafting process of the AML. The author also feels strongly that economic analysis is bound to play an important role in the anti-monopoly field. At last, the author would like to quote two ideas said by J.E. Kwoka and L.J. White, both famous American scholars in the anti-monopoly field, as the concluding words.

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 an 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.

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.²

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