

Developments in Legislation and Practice of Prohibition of Administrative Monopolistic Conduct



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I. OVERVIEW

Administrative monopolistic conduct is also considered conduct of abusing administrative power to eliminate or restrict competition. There are three stages in Chinese laws to regulate administrative monopolistic conduct. Stage One: regulate administrative monopolistic conduct mainly through policies and documents (1978-1992).² Stage Two: regulate administrative monopolistic conduct mainly through the *Anti-Unfair Competition Law* ("AUCL") and *Administrative Procedure Law* (1993-2007).³ In particular, Article 7 and 30 of the AUCL issued in 1993 have special provisions on administrative monopolistic conduct specifically regulating administrative monopolistic conduct as unfair competition. Stage Three: regulate administrative monopolistic conduct mainly through *Anti-Monopoly Law* ("AML") and *Administrative Procedure Law* (2007-present). Administrative monopolistic conduct is enumerated in a special chapter of the AML in China, that completely establishes a regulating system for administrative monopolistic conduct from the aspects of purpose, principle, behavioral expression and legal duty. After the enforcement of the AML, the anti-monopoly enforcement agency issued supporting regulations one after another to specifically regulate administrative monopolistic conduct, that mainly include: *Provisions on the Procedure for the Industrial and Commercial Administrations to Stop Acts of Abusing Administrative Power for Excluding or Limiting Competition* issued by the State Administration for Industry and Commerce ("SAIC") on May 26, 2009 (came into force on July 1, 2009); the *Regulation on the Prevention of Conduct Abusing Administrative Powers to Eliminate or Restrict Competition* issued by the SAIC on December 31, 2010 (came into force on February 1, 2011).

Typical cases in China of administrative monopolistic conduct after the enforcement of the AML include: (1) the case of *Anti-counterfeiting ventures v. the General Administration of Quality Supervision,*

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² These policies and documents include *Provisional Regulation of the State Council on Promoting Economic Integration* (July 1, 1980), *Provisional Regulation of the State Council on the Development and Protection of Socialist Competition* (October 7, 1980), *Decision of Central Commission of CPC and the State Council on Prohibiting Party and Government Organs and Officials from Engaging in Business or Starting an Enterprise* (December 3, 1984), *Notice on Breaking Up the Inter-Regional Market Blockade and Further Revival of Circulation of Merchandise* (November 10, 1990), etc.

³ In this stage, a large number of laws and regulations were formulated relating to regulating administrative monopolistic conduct, mainly including the *State Compensation Law* (1994), the *Administrative Penalties Law* (1996), the *Administrative Reconsideration Law* (1999), the *Administrative Licensing Law* (2003), the *Tender and Bidding Law* (2000), the *Drug Management Law* (2001), etc





Inspection and Quarantine in 2008, which aroused broad attention at home and abroad as the first case after the enforcement of the AML in China; (2) the case of *Ministry of Industry and Information Technology ("MIIT") "Green Dam Youth Escort" Software* in 2009. In this case, scholars and lawyers questioned that the *Notice Regarding Requirements for Pre-Installing Green Filtering Software on Computers* (MIIT software [2009] No. 226) was involved in "abusing administrative power to restrict and eliminate competition and harm the interests of consumers,"⁴ which led to the cancellation of this compulsory requirement announced by MIIT; (3) the case of *Guangdong GPS operators v. Certain municipal government of Guangdong province*. In this case, Guangdong Administration for Industry and Commerce offered an anti-monopoly enforcement proposal to the Guangdong Government for "rectifying certain government's conduct that has abused its administrative powers to eliminate and restrict competition pursuant to law" regarding certain administrative enforcement conduct of promoting motor GPS by the government. The Guangdong Government decided to remove the specific administrative acts of the municipal government.⁵

II. LEGISLATION AND POLICY DEVELOPMENT

In 2014, legislation and policy in China on the prohibition of administrative monopolistic conduct further developed.

In July, 2014, the State Council issued *Several Opinions on Promoting Fair Market Competition and Safeguarding the Normal Market Order* (NDRC (2014) Order No.20), which aims to break regional blockades and industry monopoly. A round of comprehensive clean-up shall be conducted with regard to the regulations, rules and provisions formulated by governments at all levels and their departments that touch on market entry and business code of conduct. For instance, to abolish the provisions and practices that hinder the formation of a unified national market and fair competition, to correct the activities of introducing preferential policies in violation of laws and regulations to attract foreign investment, and to rectify the activities of imposing discriminatory market entry conditions and chargeable items on non-local goods or services, setting discriminatory prices and designating the purchase of products or services in violation of laws and regulations. Efforts shall be made to apply the concession model to the fields of public utilities and important public infrastructure, to introduce competition mechanisms and to liberalize the competitive business of natural monopoly industries.⁶

On October 23, 2014, the 4th plenary session of the 18th CPC Central Committee passed the *Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law*, which provides for: strengthening law enforcement supervision, firmly eliminating interference with law enforcement activities, preventing and overcoming the phenomena of local and departmental protectionism, and strictly punishing corruption in law enforcement.⁷

⁴ Refer to *Scholars and lawyers doubted the legitimacy of pre-installing "Green Dam"*. Source:

<http://misc.caijing.com.cn/templates/inc/webcontent.jsp?id=110182910&time=2009-06-11&cl=100&page=all> Date of Upload: June 11, 2009, Date of Access: January 30, 2015.

⁵ Refer to *Minutes of meetings designating undertakings, Industry and Commerce Administrations exercising rights to propose for the first time, Anti-Monopoly Law targeting local government's eliminating and restricting competition – Documentary report of Guangdong Administration for Industry and Commerce investigating cases of abusing administrative powers to eliminate or restrict competition*. Source: http://www.saic.gov.cn/ywdt/gsyw/dfdt/xxb/201107/t20110727_111694.html Date of Upload: July 27, 2011, Date of Access: January 30, 2015.

⁶ Refer to *Several Opinions of the State Council on Promoting Fair Market Competition and Safeguarding the Normal Market Order*. Source: http://www.gov.cn/zhengce/content/2014-07/08/content_8926.htm Date of Upload: July 8, 2014, Date of Access: January 29, 2015.

⁷ Refer to *Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law* (passed in the 4th plenary session of the 18th CPC Central Committee). Source: http://news.xinhuanet.com/ziliao/2014-10/30/c_127159908.htm. Date of Access: January 28, 2015.





On November 1, 2014, *the Administrative Procedure Law* was passed and entered into force on May 1, 2015. Article 12 of the newly revised *Administrative Procedure Law* provides that: "the people's courts shall accept the following suits brought by citizens, legal persons or other organizations: [...] (8) Cases where an administrative organ is considered to have misused administrative power to exclude or restrict competition; [...]." The revision of this provision has the effect of promoting and strengthening the people's court's role in prohibiting administrative monopolistic conduct. Attention shall be paid to that according to the provision of Article 37 of the AML: "administrative authorities shall not abuse their administrative powers to set rules with content of eliminating or restricting competition," but according to the provision of Article 13 of the revised *Administrative Procedure Law*, "the people's courts shall not accept suits brought by citizens, legal persons or other organizations against administrative rules and regulations, or decisions and orders with general binding force formulated and announced by administrative organs." There still exist legislative obstacles and judicial difficulties when courts hear cases of administrative monopolistic conduct manifesting as abstract administrative conduct.

III. MAJOR CASES

In 2014, after the Handan Industry and Commerce Bureau investigated a case where the housing management department abused its administrative powers to limit others from accepting undertakings designated by it, Hebei Administration for Industry and Commerce instructed the entire province to carry out examinations and enforcement in this area; after the Deyang Industry and Commerce Bureau investigated another case where the meteorological department overcharged for lighting detection rods, Sichuan Administration for Industry and Commerce began supervising and examining the conduct of restricting competition by meteorological departments within the entire province.⁸

(1) The Hebei Province Department of Transportation and other departments abused administrative power to eliminate or restrict competition.

In 2014, National Development and Reform Commission ("NDRC"), in accordance with the law, investigated the case where the Hebei Department of Transportation, the Hebei Price Bureau and the Hebei Department of Finance implemented preferential policies of tolls on passenger buses of the province, which is deemed abuse of administrative power to eliminate or restrict competition in the relevant market. The survey found that, Hebei Department of Transportation, Price Bureau and the Department of Finance jointly issued the *Notice on the Integration of Provincial Passenger Bus Turnpike Tolls Vehicle Classification Standard* (Hebei Transportation Highway [2013] No. 548), which determined that from December 1, 2013, there would be an adjustment on the province's toll road's toll vehicle classifications, and effectively implemented preferential policies of tolls on passenger buses of the province. On October 30, 2013, Department of Transportation issued the *Notice on the Implementation of the Province's Turnpike Tolls Passenger Bus Vehicle Classification Criteria Related Matters* (Hebei pay public [2013] No. 574), which further clarified that, "preferential policies only apply to the passenger buses that operate on fixed routes within the province upon approval by the road transportation regulatory organization." NDRC, according to the relevant provisions of the AML, sent a law enforcement recommendation letter to the General Office of Hebei Provincial People's Government, recommending that the Department of Transportation and other departments correct the related behavior and give fair treatment regarding the toll to all passenger transportation enterprises in the province that have fixed operation routes. Corrections of the related behaviors will help to ensure fair

⁸ Refer to *2014 General Description of Industry and Commerce Administration on enforcement of anti-monopoly and anti-unfair competition*. Source: http://www.saic.gov.cn/ywdt/gsyw/sjgz/xxzx_1/201501/t20150128_151713.html Date of Upload: January 28, 2015, Date of Access: January 29, 2015.





competition among all the passenger transportation business.⁹ On September 23, 2014, the Hebei Department of Transportation, the Hebei Price Bureau and the Hebei Department of Finance adjusted in time the practice of offering preferential policies of tolls only on passenger buses of the province, and jointly issued the *Notice on the Adjustment of Preferential Policies of Tolls on Passenger Buses of the Province* (Hebei Transportation Highway [2014] No. 407), which clearly provided that, from October 1, passenger buses of other provinces (or cities or districts) among passenger buses between provinces jointly operated and running from opposite directions against passenger buses of Hebei shall enjoy the same preferential policies of tolls with the passenger buses of Hebei Province.¹⁰ The significance of this case is to indicate that the AML in China, through endowing anti-monopoly enforcement agencies with rights to propose law enforcement actions, has already brought administrative monopolistic conduct into the frame of anti-monopoly law enforcement, which enables anti-monopoly law enforcement agencies to play an active role in the prohibition of administrative monopolistic conduct.

(2) Bureau of Education of Guangdong Province abused administrative powers to eliminate or restrict competition.

On April 22, 2014, Shenzhen Tsinghua Sware Software Hi-Tech Co., Ltd. (“Thsware”) sued Bureau of Education of Guangdong Province for abusing administrative powers by specifying the use of software programs from another company in a national tryout, which was suspected of being in violation of relevant provisions of the AML. According to reports, at the beginning of 2014, the Ministry of Education for the first time listed “Basic Skills of Construction Cost” as one of the competition items in the “2013-2015 National Vocational Students Skills Competition.” In April, 2014, the organizing committee of construction cost for “Basic Skills of Construction Cost” of Guangdong Province combined with Bureau of Education, Vocational Colleges, industries and enterprises, etc. of Guangdong Province, specified the use of Goldon software. Thsware claimed the conduct of specifying exclusive software for the competition by the Bureau of Education of Guangdong Province was suspected of abusing administrative powers and violating the AML. The Bureau of Education of Guangdong Province claimed the competition procedures of Guangdong tryouts were based on the documents of the Ministry of Education. Furthermore, the organizing commission office of “National Competition” is managed by the Ministry of Education, that on April 2, 2014, issued the *Competition Procedures for “Basic Skills of Construction Cost”*, that clearly provided the use of software exclusively provided by Goldon. In terms of organizing commission of “National Competition” specifying the use of Goldon software, before the lawsuit against the Bureau of Education of Guangdong Province, on April 16, Thsware filed an administrative reconsideration to the Ministry of Education. Since the “National Competition” of skills of construction cost that was to be held on June 13 did not take place, Thsware withdrew the application of administrative reconsideration on June 18. Goldon, the third party of this lawsuit, claimed that Goldon attended the oral examination of open selection on February 27, 2014, and after the selection, the organizing commission finally determined that Goldon shall provide support on the competition platform, software and technology for the competition of “Basic Skills of Construction Cost.” Furthermore, Thsware and Shanghai Luban Software Ltd. also participated in this selection, so there was no issue of abusing administrative powers.¹¹ On June 26, 2014, Guangzhou Intermediate People’s Court opened the first

⁹ Refer to *The National Development and Reform Commission pursuant to law recommends Hebei Provincial People’s Government to correct the conduct of the Department of Transportation and other departments of violation of Anti-Monopoly Law and abuse of administrative power to eliminate or restrict competition*. Source: http://jjs.ndrc.gov.cn/gzdt/201409/t20140926_626773.html Date of Upload: September 26, 2014, Date of Access: January 29, 2015.

¹⁰ Refer to *extend the same treatment on tolls to passenger bus jointly operated and running from opposite directions in Hebei Province*. Source: http://jjs.ndrc.gov.cn/gzdt/201410/t20141030_635205.html Date of Upload: October 30, 2014, Date of Access: January 29, 2015.

¹¹ Refer to *The Department of Education of Guangdong Province was sued for suspected administrative monopoly due to specifying competition software*. Source: http://www.legaldaily.com.cn/legal_case/content/2014-12/04/content_5873102.htm?node=33809. Date of Upload: December 4, 2014. Date of Access: January 29, 2015.





court session on this case. It is the first administrative monopoly lawsuit officially accepted and heard by the court and came to material trial stage after more than 6 years' enforcement of the AML. On February 2, 2015, Guangzhou Intermediate People's Court affirmed that, the conduct of the Bureau of Education specifying Goldon software as the exclusive competition software in the provincial competition of "Basic Skills of Construction Cost" was in violation of the AML's regulations.¹² This case indicates that the court, due to its relevance and independency, will play a greater role in the practice of regulating administrative monopolistic conduct in China.

China's market economy has been reforming for over 30 years, but due to the nature of "path dependence" and the rigidity of ideology under a planned economic system, the government's function was not clarified completely vis-à-vis the said market economy. There may be some inaccurate orientation regarding what the government should do and how to do it. The government may over-regulate, omit to regulate, replace the role of the market with itself or improperly interfere with the decision-making of the micro economic entities in the market, etc. Therefore, administrative monopolistic conduct in China is a systemic problem. The establishment and perfection of a system that can prohibit administrative monopolistic conduct in China is closely related to the reforms of the economic and political systems in China. The perfection and enforcement of the legal system is a significant measure that will help solving administrative monopolistic conduct, but the ultimate settlement of administrative monopolistic conduct still depends on the completeness of systemic economic and political reforms in China.

¹² Refer to Wan Jing, *Judicial judgment said no to administrative monopoly for the first time*. Source:

[http://www.legaldaily.com.cn/index_article/content/2015-](http://www.legaldaily.com.cn/index_article/content/2015-02/16/content_5972433.htm?node=5954&from=timeline&isappinstalled=0)

[02/16/content_5972433.htm?node=5954&from=timeline&isappinstalled=0](http://www.legaldaily.com.cn/index_article/content/2015-02/16/content_5972433.htm?node=5954&from=timeline&isappinstalled=0). Date of Upload: February 16, 2015. Date of Access: February 28, 2015.

