

CPI's Asia Column Presents:

New Era, New Model

The Opening Remark at the Third Forum on Competitive Ecology

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It is my great honor to attend the 3rd Competitive Environment Forum of Shanghai University on behalf of the Price Supervision and Anti-Monopoly Bureau of the National Development and Reform Commission (NDRC). I'd like to share with you some new thinking in pushing forward the Anti-Monopoly work in China in the new era, based on the new spirit of the 19th CPC National Congress in general and the new requirements on anti-monopoly in particular. After that, I'd like to put forward some suggestions on how to build a good think tank and how to develop an effective cooperative relationship with Chinese Anti-Monopoly Enforcement Authority.

I. China's Anti-monopoly Law and Enforcement has Entered into a New Era.

The Anti-monopoly Law of China was promulgated in 2007, and this year marks its 10th anniversary. Ten years ago, there was no Anti-Monopoly Law in China, and there were even some controversies during the drafting process, such as whether we needed this law at all, and whether this law was good or bad for Chinese national economic development. Nowadays, the Anti-Monopoly Law has been enacted for 10 years and has been enforced for more than 9 years. For a law, 10 years is an important cycle of life as well as a critical turning point. Therefore, we can say without any doubt, that Chinese anti-monopoly work as an important cause has entered into a completely new era. In the past decade, we have made some significant progress despite facing the challenges of both complicated economic environment and law enforcement environment, both domestic and abroad. Such progress could be categorized into three major breakthroughs.

A. The framework of competition policy has been established.

The two key pillars of the competition policy are the Anti-Monopoly Law and the fair competition review Mechanism (FCRM). The two pillars complement each other in terms of the guardian of fair competition, and both are the important tools to implement the competition policy. In terms of their roles in the chain of enforcement, however, the ways they work are different. The Anti-Monopoly Law emphasizes *ex post* enforcement aiming to remedy illegal monopolistic behaviors occurred already, while the latter focuses on *ex ante* enforcement, i.e. before an anti-competitive policy in question takes effect, the government takes preventive actions in advance before the companies in question are negatively affected by the policy. In practice, it is not enough if either of the two components for the competition policy is one-sidedly relied upon. The combination of the two is the only right way to protect companies from being anti-competitively affected. This is just what we have done.

First, the competition policy has been turned into an important policy in practice instead of a concept in the book. In 2015 and 2016, the CPC Central Committee and the State Council introduced two important policies successively. In October 2015, the CPC Central Committee and the State Council jointly issued the *Opinions on Further Promoting the Price Mechanism Reform*, in which “gradually establishing the fundamental role of the competition policy” was declared for the first time since China adopted market economy system in the 1990s. This is kind of the top-level design for the competition policy while its direction and roadmap are clarified. In June 2016, the State Council issued the *Opinions of the State Council on Establishing the Fair Competition Review System in the Course of Building the Market System*, and mandates the establishment of the fair competition review system, which provides another tool, in addition to the Anti-Monopoly Law, for implementing the competition policy. On November 8, 2017, just three days before this conference, the National Development and Reform Commission (NDRC) issued the *Opinions on Comprehensively Deepening the Price Mechanism Reform*, another new policy in the area of price reform, based on its predecessor

in 2015. The new policy requires to “further deepen the price reform in monopolistic industries by liberating the pricing regulations in the competitive areas or segments and subject them to market mechanism.” Obviously, it further expands the applicable coverage for the Anti-Monopoly Law enforcement and automatically strengthens the fundamental position of the competition policy at the same time.

Second, the fair competition review system has been installed. In order to ensure the implementation of the fair competition review system, NDRC, jointly with the Ministry of Finance, the Legislative Affairs Office of the State Council, and MOFCOM and SAIC, the sister agencies for Anti-Monopoly Law enforcement, have done a lot of meticulous work in this regard as follows: a) Established the inter-ministerial coordinating mechanism which consists of 28 ministries and commissions, led by the NDRC and its minister as the leading convener. This mechanism is focusing on study of significant and complex issues by developing consensus among different stakeholders; b) Drafted three supporting documents, including the Implementing Rules to make the FCRM more practically workable, the Working Plan on correcting the existing policies containing anti-competitive measures, and the Annual Working Plan for the FCRM in 2017; c) Continue to carry out the advocacy for the general public and organize the training programs for the enforcement officials.

B. The legal system for Anti-Monopoly Law enforcement has been established.

First of all, NDRC, Ministry of Commerce (MOFCOM) and State Administration for Industry and Commerce (SAIC), the three Anti-Monopoly enforcement agencies in China, have made, separately and respectively, a series of rules and regulations related to their Anti-Monopoly functions as allocated and defined by the State Council. The purpose of such rules or regulations is to make the provisions in the Anti-Monopoly Law more details oriented and more workable, both in substance and procedure. Secondly, the Anti-Monopoly Commission of the State Council, as an overarching and coordinating organization, has also exercised its legislative powers by issuing the guidelines for tackling the specific problems commonly faced by the Anti-Monopoly Authorities. For instance, the commission had promulgated the Guidelines on the Definition of Relevant Markets, completed the Draft Guidelines for Application of the Leniency Regime to Cases of Monopoly Agreements, the Draft Guideline on the Abuse of Intellectual Property, and etc. Nowadays, NDRC has completed drafting some important guidelines and submitted them for the review by the Anti-Monopoly Commission of the State Council.

C. Anti-Monopoly Enforcement is at Full Swing.

Since the Anti-Monopoly Law came into effect in 2008, NDRC and its provincial counterpart agencies have investigated 150 pricing-related monopoly cases, with a total fine of more than RMB 11 billion. In addition, NDRC also investigated some administrative monopoly cases committed by certain government agencies due to their acts of abusing administrative powers. Since 2015, NDRC has investigated 18 such cases on its own and have guided its local authorities to investigate more than 30 government agencies. There are four outstanding features derived from all the cases as follows:

First, the companies subject to investigations and fines are diverse. As we all know, since the implementation of the Anti-Monopoly Law, there are various accusations that China’s anti-monopoly enforcement intentionally targets foreign enterprises. However, this is not the fact. The truth is just the opposite. The companies subjected to investigations and fines are diverse in terms of both

nationalities and nature of their ownership. The well-known foreign-invested enterprises such as Qualcomm, Samsung, Audi, Benz and others are not the only ones to be disciplined. The powerful state-owned enterprises such as China Unicom, China Telecom, Maotai, Wuliangye as well as private enterprises, trade associations and even government agencies are not exempted and excluded from Chinese Anti-Monopoly Law enforcement. If you look at the whole picture, it is self-evident that we follow the principle of fairness and non-discrimination, regardless of the nationality (foreign or domestic), ownership (public or private) of the targets of the enforcement, or nature (company or government agency) of those disciplined.

Second, the categories of anticompetitive behaviors are fully covered. The monopoly behavior subject to Chinese laws and regulations includes not only typical monopolistic behaviors such as anti-competitive merger review, monopoly agreements and abuse of dominance but also abuse of administrative power by government agencies and the anticompetitive behaviors by the trade associations. All the illegal behaviors above are dealt with by the enforcement. With FCRM coming into effect and the guidelines on directing the trade associations issued, the market will become more level a playing field for all the market players, regardless where they coming from.

Third, competition in various industry-sectors are protected. The Anti-Monopoly enforcement is not living in vacuum but involves all aspects in our daily life, not only food and drinks but also housing and transportation. For food, we have investigated cases involving milk powder and medicine. For housing, we have investigated cases involving cement for building house. For general consumptions, we have investigated cases involving eyeglasses, telecommunications, transportation, auto parts, international marine insurance, and so on.

Fourth, the number of big cases is increasing. NDRC has investigated 16 big cases with the total fine of more than RMB100 million in the price-related Anti-Monopoly enforcement, and Qualcomm is the largest in terms of the RMB6.088 billion fine and the great deterrence effect. Besides, the fines on Japanese auto parts companies and international shipping companies exceed RMB100 million as well. Combined with the other two big cases by other enforcement agencies, i.e., Coca-Cola's acquisition of Huiyuan Juice which was blocked by MOFCOM in 2009 and Tetra Pak's abuse of market dominance which was fined by SAIC in 2016, the Anti-Monopoly Law enforcement by NDRC significantly elevated the international status and the influence of Chinese Anti-Monopoly enforcement agencies. Chinese Anti-Monopoly enforcement agencies have surpassed their South Korean and Japanese counterparts and reached the same level as their American and European counterparts by becoming one of the top three, most important anti-monopoly enforcement jurisdictions worldwide, together with EU and the U.S.

The four major achievements above are sufficient to prove that after long-term unwavering efforts, China's Anti-Monopoly enforcement, though starting from scratch, has developed from strength to strength and above all completed the transformation from a learner from EU and the U.S. to one of the world top 3, side by side with the US and EU. China is even playing the leading role in some areas and some aspects. For example, in Chinese Anti-Monopoly Law, we have a special chapter and special provisions on administrative monopoly, and have established the policies and measures as necessary for tackling the anticompetitive behaviors by all kinds of government agencies. Compared to South Korean 37-year history, Japanese 70-year history of their Anti-Monopoly Law, more than 60-year history of the EU Competition Law, and the more than 120-year history of the Antitrust Law in the U.S.,

with only a short history of ten years, China has reached such a high level by achieving significant status in the international anti-monopoly area by striking such significant influence. This is sufficiently enough to prove the fact and the truth that China has established its own way to get the anti-monopoly work done and done beautifully in the new era.

II. Challenge, Target and Task in the New Era.

A. The Challenge.

In my opinion, the most outstanding challenge faced by China's Anti-Monopoly Enforcement in the new era has been transformed into the discrepancy between the role played by the competition policy on the one hand and the ever-enhancing demand for quality and efficiency of the Chinese market economy on the other. Just as the people's ever-growing need has grown and expanded from "material and cultural" to "a better and beautiful life", the ever-growing needs of Chinese economic development have been transformed from "expansion of quantity" to "improvement of quality and efficiency". Similar to the unbalanced and inadequate development of the Chinese economy, our anti-monopoly work is also suffering the unbalanced and inadequate development problem. The Anti-Monopoly enforcement on market players is stronger, compared with regulating the anti-competitive behaviors conducted by the government agencies. In practice, there is a big gap between the importance of the competition policy Chinese government should have attached to on the one hand and the importance to other economic policies such as fiscal, monetary, industrial and investment policies that Chinese government have attached to on the other. How to streamline the discrepancy and create a benign and effective relationship between the competition policy as a newcomer and the other important policies as the establishment is a big challenge ahead of us.

B. The Target.

The 19th CPC National Congress clearly put forward two big goals for China's economic and social development in the next 30 years. Firstly, we will build a "Xiao Kang" meaning moderately prosperous society by 2020. What's more, we will keep up with the trend to realize the second with centenary significance for Chinese Dream. That is to build China as a strong socialist modern country with the multiple qualities including prosperous, democratic, civilized, harmonious and beautiful. The economic development is the premise of the first goal of "Xiao Kang", as well as the second goal of "being prosperous and strong". The quality and efficiency of the economic development are indispensable and precondition for everything else, while they are dependent on the functioning of the fundamental role played by the competition policy and the effective implementation of the fair competition review system as well.

Consistent with the above goals for China's economic and social development proposed by the 19th CPC National Congress, I think the target of China's anti-monopoly undertaking should also be achieved through two phases. The target in Phase I, according to the *Opinions on Further Promoting the Price Mechanism Reform issued by the Central Committee in 2015*, should be "to establish a scientific, regulatory and transparent anti-monopoly enforcement mechanism by 2020, the same year when "Xiao Kang" is to be achieved, and "integrate the separate enforcement powers by merging the three anti-monopoly enforcement agencies into a single one with more authority and consistency. The target in Phase II is to establish the Chinese Model for both the Anti-Monopoly Enforcement and the Fair Competition Review Mechanism, make it internationally acceptable and welcomed so as to make the model to be a new option for the developing countries in establishing and implementing their own

competition policy. This is a target for the next 30 plus years until the middle of this century. It is extremely important for our market economy to be modernized and strong.

C. The Task.

To establish the Chinese Model, we should accomplish six major tasks as below:

First, we should make the competition policy as an important measure of deepening the supply-side structural reform. The supply-side structural reform is and will be the key to all the economic reform policies in the near future and years to come. The competition policy should be playing the pillar role comparing with other competing policies such as industrial or fiscal or monetary ones, instead of an ordinary one side by side with others. To unify the separate markets into one single big national market by breaking down the barriers and blockades is one of the two important functions of the competition policy and to make sure that the single market operates fairly and effectively is the other. Such two functions cannot be achieved by other sister policies.

Second, we should use the competition policy to promote policy connectivity in the “One Belt One Road” initiative. We should contribute our wisdom, share Chinese experiences with other countries along the Belt and Road to tackle their problems when they design their competition policy framework, enact the Anti-Monopoly Law and establish fair competition review mechanism for their own. Through the dialogues with the Anti-Monopoly Agencies in EU, the U.S., South Korea, Japan under the bilateral anti-monopoly cooperation mechanism as established, we should make good use of our chance to tell Chinese story to justify the rationale of the Chinese Model and its inclusive nature for other countries to learn while taking account of their special context. What’s more, we should actively demonstrate the flexibility of the Chinese Model through the platforms such as the BRICs International Competition Conferences, UNCTAD’s competition forums, and the negotiations regarding the competition chapter in various free trade agreements.

Third, we should improve the effectiveness of China’s Anti-Monopoly Law. To meet the special needs of Chinese market in the new era, for the purpose of solving the practical problems, we should revise China’s Anti-Monopoly Law by incorporating the latest inroad of the anti-monopoly legal theories and the best practices so as to make it the “constitution” in real sense to be the guardian of China’s market economy. Regarding the new issues confronted with the enforcement agencies, we should issue the guidelines in a timely manner to improve the predictability of the enforcement. As far as the established experiences in the enforcement practices are concerned, we should make the complementary rules to consolidate the effective measures which have been proved to be beneficial to the quality and efficiency of the law enforcement.

Fourth, we should elevate the Anti-Monopoly enforcement to a higher level. We should introduce antitrust economics in enforcing price-related monopoly cases, through which both quantitative and qualitative analysis will be employed to define the illegality nature of the behaviors in question and the specific anti-competitive effects as well. For the FCRM cases, the comparative analysis of alternative solutions should be employed to identify that with the least anti-competitive effects while guaranteeing that the ultimate purpose is not jeopardized. For the administrative Anti-Monopoly cases, the post evaluation method should be introduced to evaluate the potential benefits or damages of a certain policy measure, summarize the best practices in a timely manner, improve the enforcement procedure for the purpose of enhancing the enforcement effectiveness.

Fifth, we should clearly define the road map for the competition policy development. According to the 13th Five-Year Plan and the targets defined by the 19th CPC National Congress, we should draft the long-term working plan and define the short-term goals for China's Anti-Monopoly Law, its enforcement and the fair competition review system. We should enhance the efficiency of advocacy to improve the fair competition awareness of the officials in all kinds of government agencies so that all the policies and measures are subject to screening and correction through the fair competition review mechanism during their drafting process. The relationship between the competition policy and other policies such as industrial, investment, fiscal, monetary ones should be coordinated and streamlined to make sure that the competition policy is respected in the first place while the very goal of the policy and the measures in question is achieved at the same time.

Sixth, we should continue to cooperate with other competition authorities. As one of the top three, the influence of Chinese Anti-Monopoly Law enforcement has kept pace with that of the EU and the U.S. Nevertheless, this should not be the reason for us to be self-content and arrogant. On the contrary, we should be modest, open-minded and inclusive so that we can continue to learn from others by deepening our existing cooperation with the competition authority of the developed countries such as EU and the U.S. In addition, we should initiate or strengthen cooperation with the developing countries in various ways, including but not limited to, improving the effectiveness of the cooperation with BRICs' countries or providing the technical assistance to those countries whose competition policy and Anti-Monopoly Law are underdeveloped or in the early stage. Keeping pace with the "One Belt One Road" development, we could also increase the influence of China's Anti-Monopoly Law enforcement by sharing our best practices.

III. Suggestions for the Think Tanks in General

If we liken China's competition law enforcement as a fighter aircraft, such a plane has taken off and been flying in the air for quite a while. This plane has gone through the "stormy and risky" troposphere in the early years since China's Anti-Monopoly Law was enacted and came into effect. Nowadays this plane has reached stratosphere and been flying safely and smoothly. If we liken the law-breaching companies as the enemy while the enforcement officer is likened as the pilot to fight, the think tanks should be likened as the technical experts who provides the logistical support on the ground. Either for taking off or landing, the technical experts on the ground are indispensable for either fueling or loading the ammunition. Based upon the analogy above, the close and in-depth interactions between the enforcement agencies and the think tanks is the right way to identify the right solution for any complex problems the enforcement officials could be confronted with. For this purpose, I'd like to put forward three suggestions for your consideration:

First, the new era asks for new passion. I hope that the think tanks follow the problem-oriented principle, focusing their limited time and energy on solving the practical problems, the important problems and the complex problems instead of wasting time on something insignificant. The experts should try their best to be creative so as to be helpful in solving the problems confronted with the enforcement officials. They have high expectation for the experts who should be able to provide the right solution to the big cases in the right time.

Second, the new era asks for new methods. Two big mistakes should be prevented for Chinese

scholars. One is to simply apply the foreign methods to solve Chinese problems while neglecting the special context in China. The other is just the opposite, to refuse to learn the foreign methods by excessively emphasizing that China is different. What do Chinese characteristics mean? I think they are two-fold in nature. On the one hand, they are something good that China already has but the foreign countries don't have yet, such as the regulation on abusing administrative powers by the government agencies, the Fair Competition Review Mechanism aiming to prevent such illegal activities from occurring in the first place. On the other hand, they should be inclusive and open-minded towards the best practices established by our counterpart enforcement agencies in the foreign countries. To get our job done and done well in the new era, we should be confident in what have been proved to be successful and necessary even though different stakeholders have different views from their own perspectives. At the same time, we should respect the basic principles and best practices as established and accepted by the international competition community.

Third, the new era asks for the new environment. Like the nature, a healthy environment is indispensable for the think tanks to be successful. Each think tank should be open-ended instead of closed-ended. In other words, the experts therein should enjoy the freedom of movement from one think tank to another and the freedom of expressing their own ideas which may be different from the main stream of the think tank they are affiliated with. The young experts should be given more opportunities when they apply for the research project or are allocated to the speaking slots of important meeting. The merits instead of their identities should be the only reason for them to be respected and accepted so that competition can be introduced into their study by encouraging them to be the makers of the creative ideas.

IV. Suggestions for Shanghai University in Particular.

In order to strengthen the cooperation between the Anti-Monopoly enforcement agency and the think tank, the Price Supervision and Anti-Monopoly Bureau of NDRC has established the cooperative mechanism with certain think tanks. There are so many universities around China including a lot of good ones in East China. It is not an easy decision for us to pick up Shanghai University as our first partner for the cooperation of this kind. We have trust and great expectation on Shanghai University. To ensure our cooperation is successful, I would like to share some personal suggestions:

First, Shanghai University should set a good example. Shanghai University has everything necessary to be a pioneer, including people, resources, and platform as well. Shanghai as the name of a city has been very popular and representative of something creative and leader-taking in many areas and aspects of academic studies. As a think tank, Shanghai University should take the leading role in developing the benign cooperative relationship between think tanks and enforcement agencies. Both sides are obliged to make a role model for others to look up to.

Second, Shanghai University should focus on practices. As a think tank, Shanghai University should be issue-oriented, particularly focusing on the problems troubling the enforcement officials. If the study centers on the practical issues, the ongoing cooperative relation could be deepened. The outcome of the study could be incorporated into the case handling practice more effectively. If so, the topics of the annual meeting once a year could be turned into more practical, instead of the general ones, which are not good for developing good ideas by brainstorming.

Third, I wish Shanghai University should be the problem shooter. Pure academic research is important, but if we integrate the research with solving of specific issues, the outcome would be more valuable. I hope the research results will produce greater benefit so that Shanghai University becomes the factory of the cutting-edge tools for the benefit of China's Anti-Monopoly enforcement.

It is my great honor to attend the Third Competitive Environment Forum of Shanghai University, and I hope this forum will strengthen the benign interaction between Shanghai University and the Price Supervision and Anti-Monopoly Bureau of NDRC. If we encounter any big problems in the future, we will tell Mr. Jianxin You, Dean of Management School of Shanghai University, and discuss what kind of tools that we would like Shanghai University to make.

Finally, I sincerely wish the Third Competitive Environment Forum of Shanghai University a complete success. I hope that on the march of the anti-monopoly undertaking with Chinese characteristics in the new era, we should work together to achieve our great dream of building Chinese Model for our own Anti-Monopoly Law and Competition Policy at large.