

CPI's Asia Column Presents:

Six Severe Challenges in Implementing China's Anti- Monopoly Law¹

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There have been remarkable achievements in the enforcement of China's Anti-Monopoly Law over the past decade. However, since the implementation of the Anti-Monopoly Law is closely related to the national economic system, and China's economic system is still in transition, there are inevitably many problems in the implementation of the Anti-Monopoly Law, and the enforcement agencies are facing severe challenges.

Challenge One: The “controlling right” in concentration of undertakings needs to be clearly defined.

The first challenge that China's anti-monopoly law enforcement faces is that there are many aspects to be improved in the Anti-Monopoly Law. For example, the acquisition of the controlling right is the core to identify the concentration of undertakings, but the anti-monopoly system still lacks a clear regulation on the controlling right. With such provision, law enforcement agencies can adopt a rapid review mechanism for those undertakings that reach the filing criteria but do not obtain the controlling right, which can not only reduce the burden of enterprise in the filing, but also reduce the burden of the anti-monopoly law enforcement agencies, as well as improving the efficiency of law enforcement.

Challenge Two: There is a lack of quantitative judgment criteria in concentration of undertakings.

There is no clear quantitative standard to guide the enforcement activities during the concentration of undertakings. The "impact on national economic development" is also a factor in reviewing the concentration of undertakings. Since "national economic development" is a broad concept, people often question whether this provision may give the green light to the merger and acquisition between large state-owned enterprises, so it is necessary for legislators to make specific provisions. Article 48 of the Anti-Monopoly Law stipulates that concentration of undertakings against the law can be subject to a fine less than RMB500,000. As it is difficult for the concentration of undertakings that violates the law to remedy through "splitting up", a fine less than RMB500,000 is too low to show enough legal deterrent power.

Challenge Three: Details such as abuse of market dominance need to be specified.

The Anti-Monopoly Law has a lot of ambiguity in terms of monopoly agreements and abuse of market dominance. For example, in the price-fixing case of Moutai and Wuliangye, the anti-monopoly law enforcement authority determined that the companies under investigation had used their strong market positions to reach agreements with their dealers to maintain a minimum sale price, which violated Article 14 of the Anti-Monopoly Law. In *Rainbow v. Johnson & Johnson*, although the Shanghai No. 1 Intermediate People's Court and the Shanghai High People's Court decided that the sales agreement between the plaintiff and the defendant set the minimum price of goods that the plaintiff could resell to a third party, the courts still requested the plaintiff to submit evidence proving that the agreement had an effect of eliminating or restricting competition. It shows the different thinking between the anti-monopoly enforcement authorities and judicial authorities in the proceedings of vertical fixed price agreement, which indicates a specified interpretation of Article 14 of the Anti-Monopoly Law is required.

Challenge Four: The legal liabilities in the Anti-Monopoly Law are not clearly prescribed.

The legal liabilities in the Anti-Monopoly Law also require further improvement. For example, Article 46 and 47 of the Anti-Monopoly Law stipulate that business operators who implement monopoly agreements and abuse market dominance can be fined no less than 1% and no more than 10% of

the sales turnover for the preceding year. As the minimum fine is 1% of last year's sales turnover, law enforcement agencies have felt that the rule limits their discretion. In addition, the concept of market sales turnover is not clear. Considering that transnational corporations operate globally, the Law should make it clear that the sales turnover here refers to the violator's sales turnover in the relevant market.

Challenge Five: "Rectification ordered by the higher authority" cannot prohibit administrative monopoly.

When it comes to administrative monopoly, it is necessary to discuss the issue of Article 51 of the Anti-Monopoly Law. This article stipulates that "if an administrative authority or organization authorized by laws and regulations with the administration of public affairs abuses its administrative authority to eliminate or restrict competition, it shall be ordered to rectify the matter by the authority at the next higher level..... The anti-monopoly law enforcement authority may submit its recommendations on handling the matter in accordance with the law to the relevant higher level authority." It has been proved that it's not an effective policy that the administrative monopoly by the illegal authority is subject to the superior authority for proceedings. There are at least two reasons: first, the abuse of administrative power to restrict competition is virtually a kind of discrimination behavior, which has the underlying economic motivation to protect local businesses or individual companies, so it's difficult for the superior authorities to remain neutral for handling the administrative monopoly by its subordinate; second, the superior authorities here are not specialized agencies, nor are they specialized judicial authorities. Their staff members generally do not have strong anti-monopoly awareness and lack the ability to deal with market competition cases. Due to the existing problems in Article 51 of the Anti-Monopoly Law, there are few major cases involving administrative monopoly since the implementation of the Anti-Monopoly Law. On the other hand, it is a common practice in the anti-monopoly law area worldwide to let anti-monopoly law enforcement agencies hand the cases of abuse of administrative power to restrict competition.

Apparently, breaking administrative monopoly cannot be achieved by a single anti-monopoly law. It requires not only to deepen the reform of the economic system, including reforming and abolishing unreasonable existing policies, laws and unreasonable state monopoly that restrict competition, but also to raise the awareness and concept of competition in the whole society, especially to raise the awareness of top policy-makers and legislators on the importance of competition policies, and firmly adhere to the market-oriented direction of the economic system reform.

Challenge Six: Anti-Monopoly Law enforcement agencies face the challenge of independence.

The independence of anti-monopoly law enforcement means that law enforcement agencies can independently implement the Anti-Monopoly Law, that is, their enforcement activities are not interfered by other government departments. The independence of anti-monopoly law enforcement is determined by the particularity of the Anti-Monopoly Law, which prohibits monopoly agreements, prohibits abuse of market dominance and controls large-scale mergers. Because the cases handled by anti-monopoly enforcement authorities generally have great influence in society, even affect the whole market or the whole industry, abuse of market dominance often involves large state-owned enterprises or large multinational companies. In this case, if the law enforcement agencies lack enough independence and high authority, the proceedings definitely would be affected by other government agencies or other organizations related to the cases.

It is suggested in the World Bank's 2002 report that to improve the independence of antitrust enforcement, the head of the enforcement agency would be better appointed by the national

parliament assembly with an independent financial budget. As far as China's system is concerned, it is impossible to establish an anti-monopoly law enforcement agency that is not affiliated to any government department, but it doesn't mean there're no countermeasures to enhance the independence of anti-monopoly law enforcement agencies in China.

With the implementation of the CPC Central Committee's Plan to Deepen the Reform of the Party and Government Agencies, the three anti-monopoly enforcement agencies under the National Development and Reform Commission, the Ministry of Commerce and the State Administration for Industry and Commerce have been integrated into the State Administration for Market Regulation, thus ending the situation of multiple enforcement authorities in anti-monopoly in China. A set of multiple enforcement agencies is with higher cost and lower efficiency, compared to a set of sole enforcement agency. Considering that a case may involve both price behavior and non-price behavior, the anti-monopoly law enforcement of the National Development and Reform Commission and the State Administration for Industry and Commerce may have jurisdiction conflicts. In this sense, the integration of the three anti-monopoly enforcement agencies is a great good thing. Anti-monopoly law enforcement requires considerable law enforcement resources, which is not only because the Anti-Monopoly Law applies to almost all enterprises carrying out economic activities in China's market, but also because it has extraterritorial jurisdiction. Considering that China has a vast territory and the largest market in the world, theoretically, China's anti-monopoly law enforcement resources should not be less than those of any other country or region in the world. The improvement of anti-monopoly law enforcement resources is a gradual process, which cannot be accomplished overnight, but it requires high attention from top leaders in the design. In short, law alone is insufficient. No matter how good a law is, if there is no effective law enforcement agency, the law will only exist in name. Therefore, the state should allocate an appropriate number of personnel and financial resources for anti-monopoly law enforcement.

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