

CPI's Asia Column Presents:

Overview of Competition Policy and Law of China in 2017

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Competition policy is an important policy system to promote the prosperity and development of market economy. It plays an important role in standardizing market order, maintaining fair competition, encouraging market innovation, promoting system reform, and enhancing market efficiency and social benefits. In 2017, The Chinese government has continuously strengthened the basic position of competition policy in the national policy system. On October 18th 2017, the *Determined in Building a Well-off Society in an all-round way to win the great victory of socialism with Chinese characteristics in the new era--the 19th National Congress Report* pointed out that China should speed up the improvement of the socialist market economic system. The economic system reform must focus on perfecting the and the marketization of the elements, to realize the effective incentive of the property right, the free flow of the elements, the flexible price response, and the fair and orderly competition. The system of negative lists of market access should be comprehensively implemented, various regulations and practices that hinder the unified market and fair competition should be cleaned up and abolished, the reform of the commercial system should be deepened, the administrative monopoly should be broken, the market monopolies should be prevented, the reform of marketization of factor prices should be speeded up, the restrictions on access to service industries should be broadened, and the market supervision system should be improved. At the same time, China's competition legal system has also formulated supporting regulations for anti-monopoly laws through the improvement of the fair competition review system. Revision of "*the anti-unfair competition law*" and other work is under constantly improvement.

I. "13th Five-Year" Market Supervision Plan Intensified Competition Policy

On January 23rd 2017, the State Council issued the "*13th Five-Year*" *Market Supervision Plan*, which is a comprehensive, basic and strategic plan for market supervision. It emphasizes the market supervision should be started from the national market environment, from maintaining the fair market and from protecting the interests of customers.

The "*13th Five-Year Plan*" for *Market Supervision and Control* pointed out that China should aim at improving the socialist market economic system, strengthen the basic position of competition policy in the state policy system, perfect the competition policy system, perfect the competition legal system, clarify the priority objectives of competition, establish a policy coordination mechanism, advocate a competition culture, and promote the effective implementation of competition policy. The State Council's Anti-monopoly Committee will play a role in researching and formulating relevant competition policies, assessing market competition condition, formulating anti-monopoly guidelines, and coordinating anti-monopoly administrative law enforcement. China should give play to the basic role of competition policy, run competition policy through the whole process of economic development, promote China's economic transformation and institutional perfection, and regard competition policy as an important basis for formulating economic policy. Guided by the national medium and long-term strategic plan, we should fully respect the market, give full play to the market forces, implement a neutral competition system, avoid distortions of the market mechanism, and affect the optimal allocation of resources. Also, the government should regard competition policy as an important guide for formulating reform policies, accurately grasp the direction and measures of reform in accordance with the direction of overall market-oriented reform, and promote the reform of monopoly industries. The shackles of the traditional system and management mode should be broken down, the market innovation and the vitality of development should not be suppressed. Regarding competition policy as an important guide for perfecting laws and regulations, we should continuously perfect the competition legal system in accordance with the requirements of governing the country, provide legal protection for the efficient operation of the market economy, break the pattern of inherent interests, and avoid the division of sectors and the legalization of local protection. Taking competition policy as an important advocacy of social culture, we should form a competitive

culture adapted to the development of socialist market economy, reform the thinking and inertia of traditional planned economy, standardize and restrain government behavior, promote pioneering innovation, abide by the law, and make competition fairly.

The “13th Five-Year” Plan for Market Supervision also emphasizes the need to advocate a competitive culture and form a good atmosphere for the implementation of competition policies. At all levels of government departments, the theory of competition policy is comprehensively popularized to better promote the construction of market economy and eliminate the harm of unfair competition for economic development. The government should strengthen the propaganda of competition policy, enable all types of enterprises to better understand the rules of market competition, actively take the initiative to face the market, change the tendency of relying on government preferential policies, make enterprises become the real market players, and strengthen the micro foundation of economic development. We will use the role of the news media, especially the new online media, through various forms, to publicize the goals, objectives, and policies of popularizing competition policies. We should also strengthen the analysis of competition law enforcement cases, and promote the effective implementation of competition policies.

II. The improvement of fair competition review system can further realize the basic position of competition policy

The fair competition review system means that, by analyzing or evaluating the competitive influence that may be or has been generated by the current or existing public policies, the government’s industry authority or competition authority may propose an alternative solution which does not impede the realization of the policy objectives and minimize the harm to the market competition. The establishment and implementation of the fair competition review system means that China has established a unified, open and competitively regulated market system, has fulfilled the requirements to “promptly establish the basic status of competition policies” set by the CPC Central Committee and the State Council, and has taken a critical step.

In May 2017, the first plenary session of the Inter-Ministerial Joint Meeting on Fair Competition Review examined and adopted the *Implementation Rules for the Fair Competition Review System (Interim)*, *Work Program for Clearing up the Exclusion of Competition Policy in Current 2017-2018* and *Promote the Work Focus of 2017 in Establishing the Fair Competition Review System*. The current tasks of the fair competition review in China mainly include rigorous review of incremental policies, further improvement of the review mechanism, implementation of review responsibilities, prevention of government departments from promulgating policies and measures to eliminate or restrict competition, and orderly rectification of stock policies. The principle of orderly classification and non-retroactivity shall be adopted to eliminate the existing policies and measures that rule out restricting competition. Among them, key issues such as local protection, regional blockade and designated transactions will be eliminated in 2017-2018.

III. Formulation of Anti-Monopoly Supporting Regulations and Enforcement Guidelines can promote the Effective Implementation of Anti-Monopoly Law

The accurate and effective implementation of the anti-monopoly law also needs to rely on law enforcement agencies and courts in specific cases, to clarify and unify the scale of the law implementation through the application of laws. Also, the law enforcement agencies are required to formulate laws and regulations on the basis of summing up practical experience. This can provide guidance for law enforcement agencies

and market competition behaviors of operators, and can also provide mature experience for antitrust judicial activities. 2017 marks the 10th anniversary of the promulgation of China's *Anti-Monopoly Law*. In this year, China's anti-monopoly supporting regulations and guidelines for enforcing the law have also made great progress. The National Development and Reform Commission has issued two guidelines on price behavior regulation. The State Administration for Industry and Commerce is revising the provisions on the *Prohibition of Monopolistic Agreement by the Administration for Industry and Commerce* and *Investigation on Monopoly and Abuse on Dominant Market position by the Administration for Industry and Commerce*. The Ministry of Commerce issued the *Measures for Centralized Examination of Operators* (revised draft for soliciting opinions), and the revision work of the *Anti-monopoly Law* has also been started.

In March 2017, the Anti-Monopoly Committee of the State Council publicly solicited opinions from the society on the *Anti-Monopoly Guide on Abuse of Intellectual Property Rights*. The guidelines seek to outline the analytical principles, analytical ideas, analytical elements in the intellectual property field. The guidelines also clarify how the anti-monopoly enforcement to regulate joint R&D, cross-licensing, exclusive feedback, no-questioning clauses, standard setting, refusal license, unfair high-price licenses, attached unreasonable trading conditions, differential treatment, patent pooling, and injunctive relief.

In July 2017, to further guide and standardize the price behavior of industry associations, to promote the industry associations playing a better and greater role in the process of China's economic transformation and upgrading, to ensure the long-term development of industry associations' health, the National Development and Reform Commission issued *Industry Association Price Conduct Guidelines*. This guideline provides industry associations with specific, actionable legal guidance on price behavior and provides important guidance for antitrust enforcement. From the perspective of legal risk identification, the guideline sorts out the price behavior of industry associations, and lists the different risk levels of price behaviors of industry associations, which can help industry associations and related member companies assess the legitimacy of related behaviors, effectively identify and prevent price monopoly risks. Except laws and administrative regulations, industry associations engage in the following price actions, which have the obvious effect of excluding and restricting competition. The legal risk is extremely high: (1) Organize the operators of the industry to reach a price monopoly agreement; (2) Exchange price information among members and inform each other of the price information among the members or other operators in the industry; (3) Organize the business operators in the industry to reach a price monopoly agreement by means of uniform preferential conditions or deadlines; (4) Release guiding prices, benchmark prices, reference prices, recommended prices and other guiding prices in the industry; (5) Limit cost components, profitability, etc. by publishing price calculation formulas; (6) Formulate rules, decisions, notices, and standards which can exclude and limit price competition; (7) Guarantee or promote operators to implement price monopoly agreements through disciplinary mechanisms within the industry.

In September 2017, the Ministry of Commerce decided to revise the *Measures for the Centralized Examination of Operators* to further standardize and improve law enforcement procedures for operators' review and to publicly solicit opinions from the public on the *Measures for Centralized Examination of Operators* (draft amendment). The revised draft is based on the current review methods and incorporates the provisions of the regulations, methods, and guidelines closely related to the centralized review of multiple operators promulgated by the Ministry of Commerce, including the *Measures for Centralized Reporting of Operators*, *Guiding Opinions on Concentrated Reporting of Business Operators*, *Guiding Opinions on Reporting Concerning Concentrated Cases of Business Operators*, *Provisional Regulations Concerning Applicable Standards for Concentrated Business Cases of Business Operators* and *Provisions Concerning Concentration of Business Operators on Restrictive Conditions*, as well as those included in the *Anti-Monopoly Review Form for Managerial Concentration Review*. This draft is intended to

systematize the relevant regulations for centralized reporting and review by operators, make them more operable, and greatly improve the efficiency of the review.

In November 2017, to strengthen market price supervision for shortage medicines and APIs, effectively regulate the price behavior of shortage drug and raw material drug dealers, guide relevant operators to conduct operations in accordance with laws and regulations, curb illegal price increases and malicious control of sales, maintain fair competition and price order in the areas of shortage drugs and APIs, protect the interests of consumers, and ensure that the reform of the medical and health system is further advanced, the National Development and Reform Commission has formulated the *Guidebook for the Price Behavior of Shortage Drug and API Supplier*. The guideline lists the factors that determine the relevant market definition and market dominance status, clarifies the manifestations of price monopoly behaviors in the areas of shortage medicines and APIs, and confirms the identification of illegality and exemption conditions for price monopoly agreements. The risk of price violations that may arise during the production, operation, and service provision of pharmaceuticals and APIs is indicated, and guidelines are provided for the operators to evaluate the legality of various price behaviors.

IV. Revision of the *Anti-Unfair Competition Law* completes the competition law system.

As emerging market competition behaviors need to be responded with anti-unfair competition legislation, how to clarify the issue of overlapping regulatory issues with the *Anti-Monopoly Law* has also accelerated the legislative revision of the *Anti-Unfair Competition Law*. On February 25, 2016, the Legal Affairs Office of the State Council publicly solicited opinions from the public on the *Anti-Unfair Competition Law* (Revised Draft for Approval); on February 26, 2017, the National People's Congress Law Commission worked on the *Anti-Unfair Competition Law*. (Revised Draft) Publicly soliciting opinions from the public; and on September 5, 2017, the Twenty-ninth Session of the Standing Committee of the Twelfth National People's Congress conducted the review of the *Anti-Unfair Competition Law* (Second Revised Draft). After the deliberation, the National People's Congress Commission for Legal Affairs once again solicited opinions from the public; on November 4, 2017, the Thirtieth Session of the Standing Committee of the Twelfth National People's Congress passed the *Anti-Unfair Competition Act* (Revised 2017)".

The amended China's *Anti-Unfair Competition Law* passed the legislative purpose clause, the basic principle clause, the concept of unfair competition concept in Chapter 1 "General Provisions" and "Anti-Unfair Competition Act" in Chapter 2. The provisions of the "Other Unfair Competition Acts" in Clause 6 and Clause 12 indicate that the *Anti-Unfair Competition Law* is open and inclusive. For example, the continuous emergence of new types of unfair competition act required that the revision of China's *Anti-Unfair Competition Law* shall add pocket-ticket clauses when enumerating the typical acts of unfair competition in Chapter 2. Therefore, the Article 6 in revised *Anti-Unfair Competition Law* stipulates: "Operators shall not commit the following confusing practices, which lead to the misunderstanding of the goods of others or the existence of specific links with others: ... (4) Other confused acts sufficient to lead people to mistakenly believe that goods belong to others or the specific connection with others." Article 12 stipulates: "Operators must not use technical means to influence the normal operation of network products or services legally provided by other operators by affecting user selection or other methods: (4) Other obstructions and damages that will influence normal operation of the network products or services legally provided by other operators." Moreover, the court may also identify new types of unfair competition act based on the legislative purpose clauses, basic principle clauses and unfair competition concept clauses of the *Anti-Unfair Competition Law*. Faced with the act of overlapping regulation in China's *Anti-monopoly law* and *Anti-unfair competition law*, the *Anti-unfair competition law* in the revision deleted the corresponding terms to deal with the relationship between the two laws. The deleted

terms are rules concerning the prohibition of misuse of exclusive status by public or exclusive enterprises, regulations prohibiting government and its subordinate departments from restricting competition, regulations prohibiting predatory pricing, provisions concerning the prohibition of tying, and regulations prohibiting collusion.

In addition, the revised Anti-Unfair Competition Act makes the provisions of typical unfair competition conduct more scientific and reasonable. For example, Article 6 of the revised Anti-Unfair Competition Law rebuilds the behavior of market confusion in Article 5 of the Anti-Unfair Competition Law of 1993,² with "unauthorized use", "certain influence", "commercial marking" and "market confusion" as the core elements. It is prohibited and no longer to list the different constituent elements of a business logo as separate provisions, but in the overall visual field of business identification, unified and standardized, which has made great legislative progress. For example, based on the unfair competition disputes arising from the process of operating Internet products or services, it has emerged with the continuous development of the Internet industry. The reliance on traditional industries is low, and the development of the industry lacks the guidance of rules. China's Anti-Unfair Competition Law has added provisions on unfair competition conduct on the Internet during the revision process. To stipulate that operators shall not use technical means to engage in acts that affect the choice of users and interfere with the normal operation of other operators in the field of the Internet, namely: "the operators use the network to engage in production and business activities shall abide by the provisions of this Law. Business operators may not use technology to influence the user's choice or carry out the following obstructions, Sabotage of the normal operation of network products or services legally provided by other business operators: (1) without the consent of other operators, inserting links into the network products or services provided legally by other operators, forcing the target to jump to another place; (2) misleading and deceptive, forcing the user to modify, close, or uninstall the network products or services lawfully provided by other business operators;(3) maliciously carrying out incompatibility with the network products or services legally provided by other operators; (4) acts that undermine the normal operation of network products or services lawfully provided by other business operators.

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2 Article 5 of the *Anti-Unfair Competition Law* of 1993: "Operators must not use the following unfair methods to engage in market transactions and damage competitors: (1) counterfeiting registered trademarks of others; (2) unauthorized use of unique names of well-known commodities, packing, decorating, or using names similar to those of well-known goods, causing the purchaser to mistakenly consider it as a well-known commodity; (3) unauthorized use of another person's company name to attract people (4) falsifying or misusing quality marks such as certification marks and famous marks on goods, forging production areas, and making misleading statements about the quality of goods." Article 6 of the *Anti-Unfair Competition Law* of 2017: "Operators must not commit the following confusing practices, which leads to the misunderstanding that they are other people's goods or that they have specific contact with others: (1) The unauthorized use of goods that have a certain influence on others, (2) Names of companies (including abbreviation, font size, etc.), names of social organizations (including abbreviation, etc.), and names (including pen names, stage names, translated names, etc.) (3) Unauthorized use of domain names, website names, web pages, etc. which have a certain influence on others; (4) Miscellaneous other confusing behaviors that may lead people to mistakenly believe that they are other people's goods or have specific contact with others."