1. Why does China need an Anti-Monopoly Law?*

Anti-monopoly law is a legal system that opposes monopolies and protects competition in the market. The original meaning of ‘monopoly’ is for one business entity to control an entire market. However, because actions that restrict competition can lead to the monopolization of markets, some countries, such as Germany, also refer to ‘anti-monopoly law’ as the ‘law against restrictive competition’. Therefore, the term ‘monopoly’ has been broadened to include various acts that restrict competition. In the United States, anti-monopoly law is called ‘antitrust law’ because the establishment of large trusts can stifle competition, leading to market monopoly structures. Anti-monopoly law is a basic legal foundation for a national market economy system. Following China’s entry into the World Trade Organization (WTO), China should follow the basic WTO rules, learn from the experiences of other nations while taking into consideration China’s unique circumstances, and strive to establish and improve its socialist market economy legal system as soon as possible. Among these, quickly establishing and improving the legal framework for China’s Anti-Monopoly Law is of particular importance and urgency.

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1. THE SOCIALIST MARKET ECONOMY NEEDS ANTI-MONOPOLY LAW

The key tenet of anti-monopoly law is the opposition to monopolies, the opposition to restrictions on competition, and the protection of companies' rights to participate in market competition. Therefore, in order to recognize the importance of establishing and strengthening anti-monopoly law in China, we first should understand the importance of competition in a market economy. This is mainly reflected in the three following aspects.

1.1 Optimal Allocation of Resources

The most significant difference between the planned economy and the market economy is that a market economy is not an economy that is centrally planned. That is to say, in a market economy, production does not depend on a national plan or government orders, and the companies themselves make their own decisions regarding what to produce and the level of production. Generally speaking, if a product on the market is in short supply, its price will increase and producers will invest more in the production of this product; when its supply exceeds demand, its price will drop, and investors will then transfer their capital in that product to other products or services. This shows that, in a market economy, price is a very important factor in deciding production and business plans. The pricing mechanism is extremely important in adjusting market supply and demand, and optimizing the allocation of resources. However, in order for the pricing mechanism to function properly, the market needs to satisfy at least two basic preconditions: first, the companies can freely set their own prices, and secondly, the market's openness (market access) is protected. Namely, businesses need to be able to compete with one another. Over the past 20 years or so of implementing the 'Reforms and Open-Door' policy, the change most deeply felt by the people is that many things that one could not buy under the planned economy are now widely available. This is simply an economic miracle. What is the reason for this miracle? Competition. Now that China's economy has embraced competition, companies' production and services are able to respond to the market, supply and demand can therefore achieve balance, and so social resources can be reasonably and optimally allocated.

1.2 Advancing Economic and Technological Development

Competition is a process of survival of the fittest, as it eliminates inefficient companies, unreasonable production processes, and low-quality products. In contrast, highly efficient companies and high-quality products will gain larger and larger market shares through competition, and a company could even eventually obtain a market dominant, or monopoly, position. In a market economy, because every company hopes to increase its market share in order to realize more profits, all the companies will strive to reduce their costs and prices, continually develop new products and new techniques, and improve company management, with the goal of maximizing profits while minimizing costs. Furthermore, once a company has obtained the leading position in the market, along with significant profits, other companies will try to catch up and become the new winner. This race to the top will bring exuberant vitality to market competition, where competitors are hot on the heels of the frontrunners. Over the past 20 or so years of implementing the 'Reforms and Open-Door' policy, the technological levels and production capacities of China's companies have greatly risen across the nation. In the home appliances industry in particular, a number of great companies with strong capital investment, advanced technology, and economic successes have appeared. And what is the reason for the development of these companies? Competition! Competition has placed huge pressures on these companies, forcing them to be highly innovative and dynamic, creating the conditions for their development. Thus, in a sense, competition is the force behind the development of production force, and is the source of vitality for the national economy.

1.3 Protecting Consumers

Competition is a source of pressure placed on companies, under which they must strive to reduce costs, improve product quality, improve after-sales services, and keep developing new products and new varieties in response to consumer demands. For instance, in China's home appliance sector, there are more and more new products and the quality of the products keep getting better and better, yet the prices just keep dropping. Taking telecommunications equipment as another example, in the early 1990s a mobile phone cost 30,000 RMB, but now an average mobile phone costs only 2–3000 RMB, and one can even be had for a few hundred. What made all this possible? Again, competition is the answer. Competition forces producers and sellers to continually give consumers better prices. Competition forces businesses to try their best to satisfy consumer demands in the quality, quantity, and variety of their products. As such, one way of putting it is that competition has turned consumers into 'gods' in the market. Competition has brought huge social benefits to the consumers.

In other words, under the market economy system, the competition mechanism is absolutely essential. Only competition can lead to the optimal allocation of resources, stimulate companies to innovate and develop, and bring consumers significant social benefits. However, the market economy system by itself does not inherently have the mechanism to protect free and fair competition. To the contrary, in order to reduce competitive pressures and avoid competition risks, companies will typically seek to restrict open competition. For instance, in China's currently immature and imperfect market system, restrictions on competition are ubiquitous. Companies cooperate to fix prices, restrict production quantity or sales numbers, or divide the sales market. It is especially noteworthy that, in China's transition from planned economy to market economy, the separation of the state from business enterprises is far from complete. As a result, administrative restrictions on competition placed by government departments are also rampant, and local protectionism is especially serious. These kinds of restrictions on competition not only harm (the competing) companies and the consumers but also have other serious consequences – once companies have achieved a monopolized position, they no longer have the pressures of market competition and therefore may lose the drive to innovate and develop, which will result in the encumbrance of the national economy and technological development. Therefore, China urgently needs to establish a robust system of anti-monopoly law. Following China's entry into the WTO and the further opening of the domestic market to the outside world, many more foreign companies and foreign products will be entering China's market and engaging in furious competition with domestic companies and products. Therefore, establishing a system of anti-monopoly law in compliance with international standards would provide a free and fair environment of competition to domestic and foreign companies alike. This would not only help China's legal system for economics and trade to connect with the global system, but it would also be beneficial to China's full implementation of the 'Open Door' policies. It will advance China's national economic development and enhance China's global standing.

Anti-monopoly law is a set of fundamental competition rules for the market economy, and has many similarities with the Law Against Unfair Competition. From the perspective of economic policies, both seek to improve and protect competition, prohibit enterprises from using unfair and unreasonable methods to rake in profits, and so are necessary mechanisms to protect the market economic order. The difference between anti-monopoly law and the Law Against Unfair Competition is that the Law Against Unfair Competition prohibits dishonest business practices, such as counterfeit products, false advertising, corporate espionage, or using other unjust means to take competitive advantage of others. The necessary precondition for the Law Against Unfair Competition is that there must be competition in the market, and its goal is to maintain the fairness of competition, and protect the interests of legitimate businesses and consumers. Therefore, this kind of law can simply be called 'fair competition law', as fair competition is the value it strives to realize. In contrast, the purpose of anti-monopoly law is, through opposing monopolies and other restrictions on competition, to protect the competitive conditions of the market, ensuring there are sufficient competitors in the market, and ensuring consumers' rights to product choice. Under a monopoly or restricted system of competition, companies would lose their freedom to compete; therefore the Anti-Monopoly Law strives to protect the freedom to compete. This kind of law can therefore be referred to as a 'free competition law', the objective of which is to secure the rights of companies to compete freely in the market, thereby enhancing the efficiency of companies and generating more social benefits. Since the purpose of the Anti-Monopoly Law is to oppose monopolies, its main focus is especially placed on the structures of the market. According to anti-monopoly law theories, government can only intervene in the market if and when a monopolizing structure or trend appears, and the purpose of the government intervention is to protect effective competition. Even though anti-monopoly law does have certain rules governing market conduct, such rules only apply to monopoly companies and large companies with dominant market positions, with the purpose of preventing them from abusing their positions. Because the Anti-Monopoly Law regulates competition in the entire market, the problems the law must face and resolve are overarching. Therefore, as compared with the Law Against Unfair Competition, the Anti-Monopoly Law has a far greater impact in the advancement and protection of competition, and has extremely significant status in the legal systems of market economy countries. In the United States it is called 'The Great Charter of the Free Enterprises'; in Germany it is called the 'Economic Constitution'; in Japan it is called 'the Core of Economic Laws'. The role of the Anti-Monopoly Law in China's legal system will depend on the future directions of China's economic system. In a socialist market economic system, because the market system and the competition system play the fundamental roles of resource allocation, they are also the most fundamental strategy to develop the national economy. Anti-monopoly law is therefore of extreme importance in China's economic legislation, as it is the core of our national economic law.

2. OVERVIEW OF ANTI-MONOPOLY LAWS OUTSIDE CHINA

Anti-monopoly law is currently entirely new in China's legislative system. Yet in the United States, antitrust law was brought into effect over a century ago. In 1865, after the Civil War and following the establishment and expansion of the US national rail system, formerly local and regional markets rapidly merged into a unified national market. The development of this national market on the one hand allowed the US economy to rapidly develop, but on the other hand also led to the creation and development of monopolies in the form of trusts. In 1879, the Standard Oil Company became the first trust in the oil industry, marking the beginning of the first waves of corporate mergers in US history. The resulting trusts became an uncontrollable economic force in the US. The excessive concentration of economic power in the hands of a few not only forced middle-class and working-class people to suffer the abuses of market power by monopolies, but also caused widespread stagnation in the economy. Under these circumstances, large-scale popular movements against trusts exploded across the US in the 1880s, which led to the Sherman Act of 1890. The Sherman Act is the earliest anti-monopoly law in the world, and thus is known as the mother of anti-monopoly law throughout the world. In a court decision, the US Supreme Court emphasized the significance of the Sherman Act, indicating that the Act 'rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions'.[1]

From the passing of the Sherman Antitrust Act to the end of the Second World War, aside from the Clayton Act and the Federal Trade Commission Act passed in 1914 in the US to supplement the Sherman Act, virtually no other nation passed any anti-monopoly legislation. However, after the Second World War this situation changed considerably. First, under the supervision and guidance of the US, in 1947 Japan passed the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade. In

[1] Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

1957, Germany passed its Law Against Restrictive Competition. Articles 85–90 of the Treaty of the European Economic Community (EEC), effective in 1958, are important competition regulations for the EC. In addition, in 1989 the Council of the European Communities promulgated the Merger Regulation of the European Economic Community, making merger control an important component of EC competition law. In 1990, Italy enacted its own anti-monopoly law, becoming the last developed market economy country to do so. To date, all members of the OECD have anti-monopoly laws.

The adoption of anti-monopoly law in developing countries continues at a more languid pace. Until the late 1980s, despite appeals from the United Nations and technical assistance from the United Nations Conference on Trade and Development in controlling restrictive business practices, fewer than 12 developing nations had passed anti-monopoly laws, including South Korea, India, Pakistan, and Sri Lanka. The main reason that developing countries remained uninterested in anti-monopoly law during that time was that many of their industries or sectors were operated by state-owned enterprises. In order to protect the interests of these enterprises, the governments naturally wanted to prevent competition in these sectors. Additionally, at that time all the socialist countries had planned economy systems, not permitting competition among business enterprises, so obviously these nations also had no need for anti-monopoly legislation. Such was the case with China – during that era, the planned economy system was thought to be the best economic system, and competition to be the product of an ungoverned capitalist system. It was believed that competition would seriously waste and damage society's forces of production; therefore there was no possibility of establishing a legal system advocating competition and opposing monopolies at that time.

From the late 1980s, following the change in the trend of economic policies across the world towards privatization, the reduction of government administrative interference, and the opposition to monopolies, the anti-monopoly legislative process in many nations quickly sped up. Across Asia, Africa, and Latin America many developing countries implemented or enhanced their anti-monopoly laws. In ex-Soviet nations and across Eastern Europe, anti-monopoly laws also took hold. By 1991, most Central and Eastern European nations had passed anti-monopoly laws, including Bulgaria, Romania, Croatia, Estonia, Kazakhstan, Lithuania, Poland, Russia, and Hungary, among others. In recent years, following the application by many nations in these areas to enter the EU, these nations all strengthened their own anti-monopoly laws based on EEC competition regulations. According to the statistics, at the present time some 84 countries have passed anti-monopoly legislation. The main reason that developing countries, ex-Soviet nations, and Eastern European countries passed anti-monopoly laws so eagerly was because the economic performances of state-owned monopolies were generally not satisfactory. As a result, aside from a few specific industries, these countries have all begun to inject private capital into the formerly state-monopolized sectors, even in those industries traditionally viewed as natural monopolies (such as telecommunications, electricity, and gas), and competition mechanisms have been introduced. Today, almost all countries across the world recognize that monopolies not only reduce the efficiency of companies and damage consumer welfare, but also dampen the competitive spirit of the nation and the people, because the competitive spirit is the true force behind the economic and technological development of a nation.

3. THE TASKS OF ANTI-MONOPOLY LAW

The economic principle upon which anti-monopoly law is based is that, if a company obtains a monopoly position or a dominant market position, it will raise product prices and reduce supply. Therefore the task of anti-monopoly law is to prevent the creation of monopolies in the market, and to regulate the legally formed monopolies and prevent them from abusing their dominant market positions. Specifically, anti-monopoly law seeks mainly to achieve the following objectives.

3.1 Prohibit Cartels

According to the economist Adam Smith, competitors – those companies that produce like goods – seldom come together, and if they do so, it is likely for the purposes of plotting against consumers. Anti-monopoly law refers to this kind of restrictive competition agreement as a 'cartel'. For instance, if television manufacturers agree to collude and fix the price of television sets at 3000 RMB or above, then price competition among the companies will become non-existent. This is known as a price cartel. In order to maintain the high price of a product, competitors can also control the production or sales quantity, such as the 1998 colour television production limit agreement among the eight largest television manufacturers in China. This is known as a production cartel. Aside from price and production cartels, competitors can also agree to divide up the sales market, which is known as a market allocation cartel.

The cartels discussed above seriously damage market competition. Using the price cartel as an example, because the price set by a cartel is usually much higher than the price level in an effectively competitive environment, this type of cartel naturally causes serious damage to consumer welfare. In addition, in a market where prices are fixed, a company with high profits (high efficiencies) cannot reduce its prices at will, nor can it respond to the market and expand its production, and therefore it cannot increase its market share. Dividing the sales market also significantly harms competition, because each company in the cartel becomes a monopoly in its own designated territory. This strips consumers of their product choices, and the market loses its function to award the winners and weed out the losers – inefficient companies will not be eliminated and efficient companies will not be able to expand their production capacity, which result will adversely affect the competitiveness of companies and prevent the optimal allocation of resources in society.

In the anti-monopoly law of many nations, the agreements that seriously harm competition (as discussed above) are ‘illegal per se’, which means they are always considered illegal, regardless of the context. According to the US Sherman Antitrust Act, companies can be fined up to $10 million for engaging in such acts, while individuals can be fined up to $350,000 and can also be jailed for up to three years. However, in specific cases the US courts have already significantly increased the level of fines for breaches of anti-monopoly law in accordance with the relevant criminal codes. In 2000, Japan’s Mitsubishi was found guilty of participating in an international price cartel, and was fined $134 million. Recently, the two most famous auction houses in the world, England’s Christie’s and America’s Sotheby’s, were found guilty of illegally fixing commission prices in violation of US antitrust law. As a result, these two auction houses were fined substantial sums, and their directors also faced prison sentences.

It is important to note that, in certain cases, agreements between companies can be beneficial to the economy. For instance, agreements unifying product specifications or models, agreements to use standardized production, distribution or payment criteria, cooperative agreements between small and medium-sized companies, and agreements standardizing export prices can all be highly beneficial. In these situations, the restrictions on competition help reduce production costs, improve product quality, and enhance production efficiency. These agreements generally are considered as reasonable restrictions, and can receive waivers/exemptions under the anti-monopoly laws.

3.2 Merger Control

In a market economy, corporate mergers are a regular occurrence, and the vast majority of these mergers are beneficial to the economy. At China's current stage, company mergers are helpful in consolidating overly dispersed and overly small companies, which in turn will help promote the cooperation of human resources, materials, finances, and skills across the enterprises. This is beneficial for the enhancement of productivity and competitiveness of the companies concerned.

However, from another perspective, as companies under a market economy system have the natural tendency to seek to expand their scales and increase their market shares, if mergers are not controlled, thus permitting companies to engage in mergers, acquisitions and consolidations without any constraints, the result will inevitably be the elimination of market competitors, ultimately resulting in a monopoly market structure. People say that free competition can lead to monopolies, which is essentially what this line of reasoning demonstrates. Out of the need to protect market competition, the anti-monopoly laws of different nations all have merger control provisions. The goal of merger control is not to restrict the absolute scales of companies, but to ensure that there are sufficient competitors in the market. Typically, the legal regime for merger control requires first a notification submission (by the relevant parties to the merger) and then the review/approval of the relevant anti-monopoly authority – when enterprises to the merger exceed certain thresholds, the merger notification must be submitted to the anti-monopoly authority. Based on the anti-monopoly laws in many jurisdictions (such as the US, Germany, and Japan), if a merger would create or enhance an existing dominant market position, then the anti-monopoly authority has the power to prohibit the merger. The laws in some countries also specify the kinds of mergers that can be presumed to create or strengthen a dominant market position. For instance, Germany's Law Against Limiting Competition provides that, if after a merger, a company would control more than a third of the market, or if three or fewer companies would together control half of the market, or if five or fewer companies would together control two thirds of the market, then the merger can be presumed to create or strengthen a dominant market position.

The economy is very vibrant. Under certain special circumstances, even if some mergers will lead to the creation or enhancement of dominant market positions, the government should still allow the merger to proceed. In 1997, the US Department of Justice approved the merger of Boeing and Douglas because Douglas was on the verge of bankruptcy, and also because the merged company would still face competition internationally from Europe's Airbus. The anti-monopoly laws of many countries provide that, if a merger is beneficial to the economy as a whole or good for public interest purposes, then the government authority should approve such merger. It is important to note that mergers that lead to monopolization will seriously harm competition and consumer welfare; therefore government agencies should be extremely cautious in approving such mergers.

3.3 Prohibit Abuse of Dominant Market Position

In practice, companies can use legal means to obtain a dominant market position, or even a monopoly position. For instance, the state may grant a company the monopoly rights of operation in a particular industry, and this company granted with the state monopoly power will naturally become a monopoly. Companies can also obtain dominant market position through intellectual property rights (patents and copyrights). For instance, Microsoft obtained its dominant market position in the international software market through its intellectual property. While anti-monopoly law does not oppose legal monopolies, since the legal monopolists are not restricted by competition, it is very likely they will abuse their dominant market position, harming market competition and consumer welfare. Therefore, it is necessary for governments to more closely regulate those companies that have already obtained monopoly positions or dominant market positions. In 1997, the US Department of Justice indicted Microsoft for violating US antitrust law, thus creating an important precedent for this area of law.

In the Microsoft case, the US Department of Justice argued that Microsoft was abusing its market power by making the following three points. First, Microsoft controlled over 80 per cent of the software market. Secondly, Microsoft had engaged in conduct that restricts competition – bundling the sale of Internet Explorer to the Windows 95 and Windows 98 Operating Systems had resulted in other companies' software products (such as Netscape) being denied entry to the market. According to the US District Court judge, Jackson, Microsoft's goal in the sales bundling was to quash and eliminate competitors. Thirdly, Microsoft's conduct (the sales bundling) affected the ability of consumers to choose. While the US Department of Justice no longer sought to break up Microsoft, the DC. Circuit Court of Appeals still upheld the District Court's decision that Microsoft had violated US antitrust law.

What the Microsoft case demonstrates is that those companies with a monopoly position or dominant market position will be more closely monitored by the government. That is to say, if different businesses engage in the same conduct that restricts competition, the legal consequences may very well be different. For instance, when a consumer purchases a Changhong brand television, if the merchant requires that the consumer must also purchase a Changhong brand stereo (or some other product) at the same time, typically the consumer would not accept such an unreasonable request because he could easily purchase a Haier or TCL television instead. This shows that, in a competitive market, coercive sales practices do not generally result in serious consequences for consumers. However, when a consumer wishes to install a telephone, and the telephone company requires the purchase of a certain brand of telephone set (without which they will refuse to connect the phone lines) – this kind of coercive sales conduct obviously will have a seriously negative impact on the market. On the one hand, it will seriously harm consumer welfare, as consumers do not have the freedom to choose between products; on the other hand, it will seriously harm competition, because of the seriously negative impact on the sales of the other companies. Therefore, the regulation of market conduct in anti-monopoly laws is primarily targeted towards those with monopoly positions or dominant market positions.

In China, the business enterprises that abuse their dominant market positions are typically the public utilities companies. For instance, the Telecommunications Bureau forces users to purchase designated telephones, the Electricity Bureau forces users to buy certain fuse boxes, the water utilities company forces users to buy certain water supply equipment, the gas utilities company forces users to buy certain gas stoves and water heaters, and so on. The abuse of dominant market position also comes in other guises, such as: through charging consumers or users excessive fees or unreasonably high monopoly prices; through predatory pricing – selling below costs to drive competition out of the market; and through price discrimination – charging different prices (or applying other pricing conditions) to similarly positioned transaction counterparties, therefore putting some businesses at a disadvantage. Additional abuses include boycotts or the refusal to deal. For example, if a chemical company with dominant market position refuses to sell to a pharmaceutical company certain key chemicals that are essential for its drug production, then the pharmaceutical company (with its supply cut off) is likely to be forced out of the market entirely. The legal consequences of abusing dominant market positions include injunctions against the illegal conduct and fines. Additionally, the affected parties can also sue for civil damages. In the US, the courts can also order the break up of monopoly companies, with the purpose of transforming a monopoly market into a competitive market. In 1982, the US courts broke up the telecommunications company AT&T into eight pieces, which was the earliest instance of the breaking up of a telecommunications monopoly in the world.

3.4 Prohibit Administrative Monopolies

Administrative monopolies are the result of a government and its departments abusing their administrative powers to restrict competition. In fact, whether in China or abroad, in the past, present, or future, government restrictions on competition are the most severely damaging to competition. This was first pointed out by the classical economists. Therefore, in studying problems of anti-monopoly law, we should not focus solely on company conduct that restricts competition, but we should also pay attention to the role of government conduct, to prevent the abuse of the government's administrative authority to restrict competition.

Due to historical and political factors, ex-Soviet nations and former Eastern bloc nations take 'the abuse of government authority to restrict competition' very seriously indeed. In February 1992, the Republic of Ukraine issued its Law Prohibiting Monopolies and Unfair Business Competition Activities. According to Article 6 of this law, the state and its administrative departments shall not discriminate against companies, which includes: for the purposes of restricting competition, prohibiting certain economic sectors from establishing a new company, or restricting certain business activities or the production of certain products; forcing companies to join an industry group, or forcing companies to provide certain businesses preferential prices for products; issuing orders restricting the sale of products from one region in another, leading to the monopolization of certain product markets; and providing tax waivers or other exemptions to certain companies, giving them a relative competitive advantage over other companies. Administrative monopolies in China typically manifest in the forms of industry monopolies and local protectionism. Industry monopolies refer to the government and its departments abusing their administrative authorities to restrict market entry, or exclude, limit or otherwise hinder competition. This is so especially where the relevant government department has approved the establishment of administrative companies that are 'government-bodies-turned-business enterprises', where industrial regulation and business management/production are concentrated in one body, large (state) company groups have industry regulation responsibilities, or companies enjoy special or preferential treatment because of 'special relationships or linkages' to the government department or ministry. Because of special authorities, authorizations, or treatments given by the government, these companies have competitive advantages unavailable to other companies, such as occupying monopoly positions over the production and sale of certain products or raw materials procurement, thereby unfairly restricting competition. This phenomenon has been called 'use of (governmental) power to conduct business'. The main symptoms of local protectionism include local governments prohibiting non-local products from entering the local market, or preventing locally produced raw materials from leaving the local market. Such actions have thereby divided (what should be) China's nationwide unified market into many and much smaller (narrower) localized markets. For example, in order to prevent the entry of any non-locally produced fertilizers or other products into the local market, some local governments even issued specific orders to prohibit local units and individuals from selling non-local products. Some local governments requested that local residents 'show your love of the hometown by drinking hometown beer' in order to boycott the non-locally produced beers. Some local governments charge excessive fees on non-locally produced automobiles in order to prevent their entry into the local market.

As China is transitioning from a planned economy to a market economy system, even business enterprises' conduct that restricts competition often has 'administrative colour'. For example, in 1998 certain industries in China came up with what they referred to as 'industry self-regulating prices'. However when this concept was explained, it could only be seen as the government department tolerating the price coordination (price fixing) of the business enterprises, which was essentially a compulsory price cartel. As the earliest implementer of the 'industry self-regulating prices', the Farm Equipment Industrial Association's Agricultural Transportation Vehicles Branch even fined Shandong Shifeng Group for not implementing measures for the 'industry self-regulating prices'. However, from the perspective of the market economy, forcing companies to follow these 'industry self-regulating prices' in selling their products is unreasonable, since the prices were fixed based on the average costs for the industry, which would be higher than the costs of the more efficient enterprises. Therefore, 'industry self-regulating prices' would limit such efficient enterprises' ability to lower prices and deny them the opportunity of making more sales and expanding their production.

Administrative restrictions on competition not only harm consumer interests, but also seriously harm businesses' interests. Just imagine, what if, due to local protectionism, Shanghai-produced Santana cars could only be sold in Shanghai, and Hubei's Fukang cars could only be sold in

Hubei – these companies could never expand their scales of production or achieve economies of scale. As a result, they could never improve their competitiveness. Aside from this, the abuse of administrative authorities also provides opportunities for certain government officials (and businesses) to exchange money and influence, resulting in a certain degree of corruption, tarnishing the government's image. Therefore, anti-monopoly law should include opposition to administrative monopolies as an important and urgent task.

4. PROPOSALS FOR IMPROVING CHINA'S ANTI-MONOPOLY LEGISLATION

Since the Third Session of the 11th Central Committee of the Party, following the emergence of competition in China's national economy, anti-monopoly law has come to the attention of the Chinese government. In October 1980, the State Council issued Temporary Regulations on Developing and Protecting Socialist Competition ('Temporary Regulations'), which raised anti-monopoly (especially administrative monopolies) issues for the first time in China. The Temporary Regulations pointed out that 'in economic activities, other than the products that are designated by the national government for monopolization by specific departments or work units, the remaining (products) should not be monopolized, or controlled by a single entity'. 'In order to develop competition, regional isolationism and departmental divisions must be broken – no region or department shall seal off its local market, or prohibit non-local products from entering its local market.'

Following the Temporary Regulations, China issued a series of laws and regulations (in various forms) that relate to anti-monopoly laws. Out of these, the Pricing Law (promulgated in December 1997) and the Anti-Unfair Competition Law (promulgated in 1993) are particularly important. Article 14.1 of the Pricing Law provides that business operators shall not 'collude with each other, manipulate market prices, [or] damage the legal rights of other business operators or consumers'. Section 6 of the Law Against Unfair Competition provides that 'public utilities companies or other legal monopolies shall not require others to purchase designated products, to exclude other business operators from fair competition'. Section 7 of the Law Against Unfair Competition provides that,

> the (local) governments and the governmental departments shall not abuse administrative authorities by limiting others from purchasing the products of

> certain enterprises, or by limiting the proper commercial activities of business enterprises. The (local) governments and the government departments shall not abuse administrative authorities by prohibiting non-local products from entering the local market, or preventing local products from entering outside markets.

Despite these regulations, there are still many problems in the legislative process of anti-monopoly laws in China. First, China does not yet have a complete and comprehensive system for anti-monopoly law. For example, the joint production output limitation in the colour TV tubes industry is a serious restriction on competition, but China does not have a regulation to prevent such conduct. China also does not have any regulations against the abuse of power by companies in monopolizing positions or dominant market positions. Furthermore, there are also no regulations for company mergers. Therefore, (currently) there are no effective ways to prohibit various forms of restrictions on competition. Secondly, some of the existing anti-monopoly regulations are yet to be perfected. For instance, administrative restrictions on competition are the conduct that causes the most serious harm to competition in China currently, but there are still no effective regulations to prohibit administrative monopoly. According to Article 30 of the Law Against Unfair Competition, the legal consequences of 'abusing government authorities to restrict competition' are only 'corrective actions as ordered by the relevant superior authority'. This approach is not appropriate. Since the 'relevant superior authority' is not even a specifically designated authority (let alone any judicial authority or administrative regulatory authority), it is unlikely that the officials at 'the relevant superior authority' would have sufficient awareness of anti-monopoly law. On the other hand, if 'the relevant superior authorities' are indeed authorized to make corrective actions, then there must be an entire set of legal procedures (case establishment, investigation, hearings, judgments) set in place, requiring significant investment of human and financial resources from the state, which would be impractical. Thirdly, currently China does not have a unified anti-monopoly law enforcement agency. Even as the current most important implementing authority for anti-monopoly law in China , the Administration of Industry and Commerce (AIC) does not have sufficient power and independence in the enforcement of anti-monopoly law. Surrounded by local protectionism in the different localities, it would be hard for the AIC to enforce anti-monopoly laws impartially. Several suggestions for the legislation of China's Anti-Monopoly Law are set out below.

First, China needs to establish a more comprehensive system for anti-monopoly law. The legal system for anti-monopoly law is based on over a hundred years of successful experience and practical work in the market economy countries. It is also a fundamental legal system for China's socialist market system. Through over two decades of market reform, China has already acquired the basis and conditions for the enactment of anti-monopoly law, including: (1) the price-fixing system under the planned economy has been dismantled; (2) there is now a diversity of ownership structures for industries and businesses; (3) state-owned enterprises have increasing market autonomy, acting as independent market entities to a large degree; and (4) following China's entry into the WTO, China's economy has now completely merged into the global economy. As a result, China's economic system is also compelled to follow the rules of the market economy, to establish the legal framework to protect competition and oppose monopolies, and to create a free and fair market environment for businesses to compete. Looking to the legislative experiences of other nations, China's Anti-Monopoly Law should not only regulate anti-competitive agreements and prohibit the abuse of dominant market positions, it should also control company mergers. Merger control is an effective measure for preventing the formation of monopolies. Without this legal system, China's markets could easily turn into monopoly structures – in particular, the multinational companies that possess advanced technology and substantial capital could very easily acquire dominant market positions through mergers and acquisitions, and then abuse their market powers.

Secondly, since the restrictions on competition in China's current economic life mostly stem from the administrative restrictions on competition under the old economic system, we should establish an effective legal system to enhance the regulation of administrative restrictions on competition. In my opinion, just like the restrictive competition conduct of enterprises, administrative restrictions on competition should also be regulated by a dedicated and unified quasi-judicial authority. This authority should have a set of transparent processes and procedures for case establishment, investigation, and judgments, and have clear authority to hand out penalties (which will enable the violators to foresee the legal consequences of their actions). Admittedly administrative restriction on competition is a difficult problem in China's economic reforms, and it cannot be completely resolved by the enactment of the Anti-Monopoly Law. However, if the Anti-Monopoly Law could clearly prohibit such actions, it would certainly raise the awareness of anti-monopoly law for government department officials at all levels, clearly distinguishing right from wrong and legal from illegal, thus reducing and avoiding such illegal acts. Therefore, it may be said that (the enactment of the) Anti-Monopoly Law is a catalyst for deepening China's economic reforms.

Thirdly, we should follow the trend of the enactment of anti-monopoly laws in many countries, and break up monopolies across all economic sectors to the greatest extent possible. During the legislative process for Anti-Monopoly Law in China, some industry sectors may seek to cite their unique circumstances to demand a waiver or exemption from the anti-monopoly laws. Based on the experiences of anti-monopoly laws in developed nations, even for natural monopolies, the monopoly companies cannot use their dominant market positions to prevent other companies from accessing networks or other basic infrastructures. These regulations primarily extend to the industry sectors in telecommunications, railways, electricity, gas, and other pipeline infrastructures. Breaking up the monopoly companies in these industries in China is not only necessary to fulfil China's WTO obligations in opening up the market, but could also help motivate these companies to further reduce costs, improve services and management, and bring more benefits to consumers. Regarding the legislation for these industries, we should pay special attention to the opening up of the networks, but at the same time we must protect the ownership of the networks and other basic infrastructures, for example by requiring users to pay reasonable usage fees.

Fourthly, the Anti-Monopoly Law should have extraterritorial jurisdiction, which means that it should not only apply to conduct that restricts competition within China, but also to conduct occurring abroad that has negative anti-competitive effects on the Chinese market, especially international cartels. Not long ago, the EU fined the top eight international vitamin producers a total of more than 8 billion euros for fixing the prices of vitamins, and thereby damaging the welfare of European consumers. As China further merges into the international economy, international cartels will inevitably affect Chinese markets. Therefore, China's Anti-Monopoly Law needs to have extraterritorial jurisdiction, otherwise China will be unable to punish multinational companies effectively for damaging China's market competition and Chinese consumers' welfare.

Anti-Monopoly Law first appeared in China's legislative agenda in 1994 for the Standing Committee of the Eighth National People's Congress. In 1998 it was again included in the legislative agenda for the Standing Committee of the Ninth National People's Congress. This indicates that China already fully recognizes the importance of the Anti-Monopoly Law. Given the important role of the market economy and the necessity and urgency in protecting competition and opposing monopolies, the relevant government departments in China should legislate and enact the Anti-Monopoly Law as soon as possible.