

Anti-Monopoly Law of The People's Republic of China
(Draft for Comments)
April 8, 2005

Chapter 1: General Provisions

Article 1: Objectives

This law is enacted for the purposes of prohibiting monopolistic conducts, safeguarding fair competition, protecting the legitimate rights of consumers, and the public interest, and to ensure the healthy development of the socialist market economy.

Article 2: Scope of Application

This Law shall be applicable to monopolistic conducts in economic activities within the People's Republic of China.

This Law shall apply to the conducts outside the territory of the People's Republic of China eliminating or having restrictive effect on competition on the domestic market of the PRC.

Article 3: Definition of "Monopolistic Conduct"

"Monopolistic conduct" is defined in this law as the following activities that eliminate or restrict competition, damage the interests of consumers, or endanger the public interest:

- (i) Agreements, decisions or other concerted actions among undertakings;
- (ii) Abuse of dominant market positions by undertakings;
- (iii) Concentration of enterprises that eliminates or restricts competition;
- (iv) Abuse of administrative power by Government agencies and their subordinate departments that eliminates or restricts competition.

Article 4: Definitions of "undertaking" and "relevant market"

An "undertaking" in this law refers to a legal person, other organization or natural person that engages in businesses of commodities (hereinafter "commodities" include services).

A "relevant market" in this law refers to the territorial area within which the undertakings compete against each other during a time period for relevant products.

Article 5: Responsibilities of governments

People's Governments at all levels and their subordinate departments shall adopt measures to create favorable environment and conditions for fair competition.

Article 6: Anti-Monopoly Authority

The Anti-Monopoly authority under the State Council shall exercise its power to prevent monopolistic conducts and to safeguard fair competition pursuant to this law.

Article 7: Social Supervision

The State encourages, supports and protects social supervision of monopolistic conducts by all citizens, legal persons and organisations.

Government agencies and their staff shall not support or cover up for monopolistic conducts.

Chapter 2: Prohibiting Monopoly Agreement

Article 8: Prohibiting Monopoly Agreements

Any agreement, decision or concerted action (hereinafter referred to as the "agreements") among the undertakings with the purpose or effect of eliminating or restricting competition among undertakings shall be prohibited.

For the purpose of the first paragraph, the "agreements" include agreements that:

- (i) fix, maintain or change prices of products;
- (ii) limit the output or sales of the products;
- (iii) allocate the sales markets or the raw material purchasing markets;
- (iv) limit the purchase new technology or new facilities, or the development of, new products or new technology;
- (v) jointly boycott transactions;
- (vi) limit resale price; or
- (vii) rig bids.

The second paragraph shall not apply to any agreement by which the product is covered having a share of less than 10% in the relevant market during the valid period of the agreement.

The first paragraph shall not apply to the conduct of limiting resale prices in issuing and distributing publications.

Article 9: Exemptions

Agreements among undertakings with one of the following objectives shall be exempted from application of article 8 if the agreements can enable consumers to share impartially the interests derived from the agreements, are necessary for achieving the objectives and will not entirely eliminate the competition in relevant market.

- (i) Agreements for the purpose of product quality upgrading, cost reduction and efficiency improvement;
- (ii) Agreements to cope with economic depression, to moderate serious decrease in sales volumes or distinct production surplus;
- (iii) Agreements by small and medium-sized enterprises to improve operational efficiency and to enhance their competitiveness;
- (iv) Agreements to enhance the competitiveness of exports in global market;
- (v) Agreements to improve technology, develop new products or explore new market.

Article 10:

Any interested party or consumer may report to the Anti-Monopoly Authority any monopoly agreement that falls within the scope of article 8 and is not covered by article 9.

The Anti-Monopoly Authority will, upon request of the abovementioned report or ex officio, initiate investigations in monopoly agreements that falls within the scope of article 8 and is not covered by article 9.

Article 11

To safeguard the state's interests and social welfare, the Anti-Monopoly Authority under the State Council may exempt agreements that falls within the scope of article 8 and is not covered by article 9.

Chapter 3: Prohibition of Abuse of Dominant Market Position

Article 12: Prohibition of Abuse of Dominant Market Position

Undertakings shall not abuse their dominant market positions to eliminate or restrict competition.

Article 13: Definition of "Dominant Market Position"

For the purposes of this law, "dominant market position" refers to the market power of one or several undertaking(s) to determine, maintain or alter the price, quantity or other trading conditions of relevant products so as to eliminate or restrict competition within relevant market.

Article 14: Factors for Establishing Dominance

The following factors will be taken into consideration in finding dominant market position:

- (i) Market share in relevant market;
- (ii) Ability to affect price, quantity or other trading conditions of relevant products within relevant market;
- (iii) Ability to control purchase market or distribution market;
- (iv) Financial status and technical conditions of the undertaking;
- (v) Association with other undertakings;
- (vi) Access to relevant market by other undertakings;
- (vii) Import and export of products.

Article 15: Presumption of Dominant Market Position

Undertakings in relevant market that have any of the following market shares, can be assumed to be in a dominant market position:

- (i) The market share of one undertaking accounts for 1/2 or above;
- (ii) The joint market share of two undertakings that occupy the first two positions in terms of market share accounts for 2/3 or above;
- (iii) The joint market share of three undertakings that occupy the first three positions in terms of market share accounts for 3/4 or above.

Undertakings with a market share of less than 1/10 will not be deemed as occupying a dominant market position even if they fall within the scope of item (iii).

Article 16: Monopolistic High Prices

An undertaking with a dominant market position shall not abuse its dominant market power to sell or buy products at unfair (high or low) prices.

Article 17: Predatory Pricing

Without valid reasons, an undertaking with a dominant market position shall not, for the purpose of impairing competition, sell products at prices below cost.

Article 18: Dissimilar Treatment

Without valid reasons, an undertaking with a dominant market position shall not apply dissimilar prices or other transaction terms to equivalent trading partners, so as to put some trading partners at a competitive disadvantage.

Article 19: Refusal To Deal

Without valid reasons, an undertaking with a dominant market position shall not refuse to sell its products to purchasers, so as to put the purchasers at a competitive disadvantage or harm the legitimate interests of consumers.

Article 20: Exclusive Transactions, Forced Transactions

An undertaking with a dominant market position shall not require its distributors to sell exclusively its own products and not to sell the products of other undertakings or to buy products of designated undertakings or impose other exclusive or forced transactions, so as to eliminate or restrict competition with other undertakings.

Article 21: Tie-in

An undertaking with a dominant market position shall not tie products or require as a condition for signing the contract its trading partners to accept additional obligations irrelevant with contract subject in nature or in business practice to eliminate or restrict competition.

Article 22: Refusal of Access to Network

In the case that an undertaking is unable to compete with the undertakings with dominant market position without the access to a network or other infrastructures owned by those dominant undertakings in relevant market, the undertakings in dominant position shall not refuse to grant access to the network or other infrastructures to other undertakings at reasonable prices. However, the undertaking in dominant position may be exempted if it can establish that it is impossible or unreasonable to grant access to the network or other infrastructures to other undertakings on account of technology, security or other justifiable reasons.

Chapter 4: Control of Concentrations

Article 23: Definition of concentrations

A Concentration within the meaning of this law shall be deemed to arise in the following situations:

- (1) merger of one or more undertakings into one existing or new enterprise;
- (2) acquisition of 20% or more voting shares or substantial assets of one or more other undertakings;
- (3) acquisition of control through entrusted operation or joint venture;
- (4) acquisition of direct or indirect control on the business operation or personnel matters of one or more other undertakings;
- (5) acquisition of control of one or more other undertakings by contract or technology transfer.

Article 24: Thresholds for notification and calculation of turnover

A pre-merger notification shall be filed with the Antimonopoly Authority under the State Council where:

- (1) the value of the transaction is more than RMB 300 million, and the aggregate worldwide assets or turnover of all undertakings concerned in the preceding year is more than RMB 5 billion with at least one party's China-wide assets or turnover in the preceding year above RMB 3 billion; or
- (2) the value of the transaction inside China is above RMB 500 million; or
- (3) the market share of one party to the concentration in the relevant market within China is above 20%; or
- (4) the market share of one party to the concentration in the relevant market within China will be above 25% as the result of the concentration.

The assets, turnover or market share of an undertaking mentioned in the preceding paragraph will include those of its affiliated undertakings and undertakings under its control in the calculation.

Article 25: Person who must notify

Where notification is required, the following party is obligatory for submitting the notification to the Antimonopoly Authority under the State Council:

- (1) in case of merger, entrusted operation or joint venture, the participating parties are obligatory for submitting the notification;
- (2) in case of acquisitions of stock shares or assets, the acquiring parties are obligatory for submitting the notification;
- (3) in case of direct or indirect control on the business operation or personnel matters of other undertakings, the controlling parties are obligatory for submitting the notification;

- (4) in case of acquisition of control of other undertakings by contract or technology transfer, the parties acquiring control are obligatory for submitting the notification.

Article 26: Information to be notified

Notification made pursuant to article 24 and article 25 for approval by the Anti-monopoly Authority under the State Council shall include documents covering the following:

- (1) summary of application
- (2) general information of the undertakings concerned;
- (3) the financial reports and sales reports of the proceeding accounting year of the undertakings;
- (4) information on the production or costs, selling prices and output of the relevant products;
- (5) the effect on competition on the relevant market, the national economy and public interest as a result of the concentration;
- (6) the rationales for the concentration;
- (7) the expected date of concentration;
- (8) Other documents required by the Anti-Monopoly Authority.

Article 27: waiting period

A concentration shall not be implemented until 45 working days after the receipt of the documents stipulated in article 26 by the Anti Monopoly Authority under the State Council.

Where no decision of further review is made by the Anti-Monopoly Authority under the State Council within 45 working days, the undertakings concerned can implement the concentration.

Article 28: supplementation of notification

In case that the documents submitted by the notifying undertakings are not complete, the Anti-monopoly Authority under the State Council shall request the undertakings concerned to supplement the relevant information within a set period. The date of receipt of notification documents will be the date on which supplementary documents are submitted. Notification within the set period.

Article 29: Substantial review

If the Anti-monopoly Authority under the State Council considers it necessary to further review the concentration, it shall inform the notifying undertakings of its decision in written forms within 45 days after receipt of the notification.

The Anti-Monopoly Authority under the State Council shall decide whether to approve the concentration within 90 working days as of the date of decision for further review. A decision of approval may include restrictions and conditions.

Under the following circumstances, the time limit stipulated in the second paragraph may be extended to the maximum of 180 days:

- (1) the undertakings concerned agree to extend the time limit;
- (2) the documents submitted are inaccurate and need verification;

(3) other significant events occurred after notification

Article 30: Conditions for prohibition of concentration

The Anti-Monopoly Authority under the State Council shall make a decision of prohibition where a concentration may lead to creation or strengthening of dominant market positions as well as elimination or restriction of market competition. However, the Anti-Monopoly Authority under the State Council may make a decision of approval with restrictions and conditions where a concentration will produce great benefits for the national economy and the public interest.

Article 31: consultations

When making a decision of approval or prohibition of a concentration, the Anti-Monopoly Authority under the State Council shall make prior consultation with the relevant industry regulators.

Chapter 5: Prohibition of Administrative Monopoly

Article 32: Forced purchase

The Government and its subordinate departments shall not abuse their administrative power to require others to purchase only the products designated by them or the products of any undertaking designated by them, with a view to restrict the legitimate business activities of other undertakings.

Article 33: Regional blockage

The Government and its subordinate departments shall not abuse their administrative power to restrict market access or free flow of commodities between regions.

Article 34: Forced restriction on competition

The Government and its subordinate departments shall not abuse their administrative power to compel undertakings to pursue conducts which will eliminate or restrict competition and are prohibited under this law.

Article 35: Administrative Conduct with general application

The Government and its subordinate departments shall not promulgate rules with provisions eliminating or limiting competition in violation of laws and administrative regulations so as to prevent the establishment of a unified and orderly national market and of a fair competition environment.

Chapter 6: Anti-Monopoly Authority

Article 36: Function of the Anti-Monopoly Authority

The Anti-Monopoly Authority established under the State Council shall perform the following functions:

- (1) formulating anti-monopoly policies and rules;
- (2) investigating anti-monopoly matters falling under the scope of this law;
- (3) handling cases in violation of this law;
- (4) investigating and evaluating market competition conditions;
- (5) conducting international exchanges and cooperation with foreign jurisdictions and negotiations of multilateral and bilateral agreements on competition;
- (6) handling other anti-monopoly matters in connection with this law.

Article 37: Local branch

Local branch may be established at the provincial level where necessary and under the unified leadership and administration of the Anti Monopoly Authority under the State Council.

Local branch shall perform its function within the scope of authorization by the Anti-Monopoly Authority under the State Council.

Article 38: Powers of Inspection

When conducting investigations, the Anti-Monopoly Authority can take the following measures in accordance with law:

- (1) searching the residences, business locations or other places of the undertakings;
- (2) requesting the undertaking concerned, interested parties and other relevant organizations or persons to submit relevant documents and information;
- (3) examining, copying, digesting, sealing or retaining relevant evidence;
- (4) inquiring about the bank account information of the undertakings concerned;
- (5) sealing up the business locations of the undertakings concerned.

Article 39: Duties of the Parties subject to investigation

Undertakings concerned, interested parties and other relevant organization and person being investigated shall cooperate with the Anti-monopoly Authority by providing testimonies, relevant documents and information.

When requesting relevant documents and information, the Anti-monopoly Authority shall specify the scope, content and time limit for submitting the documents.

Article 40: Written record of investigation

The investigating officers from the Anti-monopoly Authority, in carrying out their duties pursuant to law, shall present documents proving their identity and make written record of the inspection.

Article 41: Confidentiality

The Anti-monopoly Authority and its staff shall keep confidential of the commercial secrets obtained during the investigations.

Article 42: Right to be heard

When conducting investigations in accordance with this law, the Anti-monopoly Authority shall give the undertakings concerned and interested parties the opportunity to submit statements and defences.

The Anti-monopoly Authority shall hear the opinions of the undertakings concerned and interested parties, and check whether the alleged facts, justifications and evidences are valid.

Article 43: Publication of decisions

Decisions made by the Anti-Monopoly Authority shall take effect on the day of its issuance and be published.

Article 44: Judicial review

Where the undertakings concerned and interested parties are dissatisfied with the decisions made by the Anti-Monopoly Authority, they may file for judicial review by a intermediate people's court at the place where the Anti-Monopoly Authority is located.

Article 45: Relationship with other authorities

The Anti-Monopoly Authority under the State Council shall deal with anti-monopoly matters in accordance with this law, and other authorities may deal with anti-monopoly matters in accordance with other relevant laws. However, before making a decision on relevant anti-monopoly matters, other authorities shall obtain consent from the Anti-Monopoly Authority under the State Council.

Chapter 7: Legal Liabilities

Article 46: Penalty against monopoly agreement

In case there exists monopoly agreement in violation of the relevant provisions of this law, the Anti-Monopoly Authority shall order the undertakings concerned to cease and desist such act, declare the monopoly agreement void, and may also impose fines between RMB 100,000 to RMB 10,000,000 or not exceeding 10% of the turnover in the relevant market in the preceding year. If the said act constitutes a criminal offence, it will be prosecuted and penalized accordingly.

Article 47: Penalty against abuse of dominant market position

In case there exists an act abusing dominant market position in violation of the relevant provisions of this law, the Anti-Monopoly Authority shall order the undertakings concerned to cease and desist such act, and may also impose fines between RMB 100,000 to RMB 10,000,000 or not exceeding 10% of the turnover in the relevant market in the preceding year. If the said act constitutes a criminal offence, it will be prosecuted and penalized accordingly.

Article 48: Penalty against Unauthorised Concentrations

In case the undertakings concerned fail to notify the concentration or implement the concentration before approval or fail to comply with the

obligations prescribed by the Anti-Monopoly Authority in its decision in violation of the relevant provisions of this law, the Anti-Monopoly Authority will declare the concentration concerned void, order the undertakings concerned to dispose whole or part of its stock, to transfer part of its business, to resign from his position or to impose other necessary penalties, and may also impose fines between RMB 100,000 to RMB 10,000,000 or not exceeding 10% of the turnover in the relevant market in the preceding year.

If the undertakings concerned fail to comply with the measures prescribed by the Anti-Monopoly Authority in the preceding paragraph, the Anti-Monopoly Authority may order dissolution or cease of business operation.

Article 49: Penalty against specific administrative monopoly

In case there exists specific administrative act in violation of article 32, 33 or 34 of this law, the Anti-Monopoly Authority shall order the relevant government and its subordinate departments to revoke its specific administrative act, impose on the chief officer directly responsible for it administrative penalties such as dismissal or demotion according to legal proceedings and the seriousness of the said act. If the said act constitutes a criminal offence, it will be prosecuted and penalized accordingly.

Article 50: Penalty Against General Administrative Monopoly

In case there exists violation of article 35 of this law, the Anti-Monopoly Authority under the State Council may advise the competent authority to take measures pursuant to legally established procedures. If the administrative monopoly constitutes a criminal offence, prosecution will be launched according to law.

Article 51: Penalty Against Refusal of Investigation

In investigations by the Anti-Monopoly Authority under the State Council, if the person under investigation has one of the following activities, the Anti-Monopoly Authority under the State Council shall issue orders to correct the situation and may impose fines up to RMB 1 million according to the seriousness of the situation.

- (i) hinder or refuse, without valid reason, to be investigated;
- (ii) refuse to submit materials or submit fraudulent materials or information; or
- (iii) remove items or evidence that are sealed or detained,

Article 52: Obligation to Compensate

The undertaking that violates the provisions of this law and injures the rights and interests of others shall make compensations to the victim. The amount of compensation will be twice of the actual loss suffered by the victim. When it is difficult to calculate the loss of the victim, the amount of compensation will be the profit gained by the violator and attributed to the violation. The violator shall bear the reasonable expenses of the victim incurred during the course of investigation and legal proceedings.

The compensation claim referred to in the above paragraph can be commenced only after the Anti-Monopoly Authority has confirmed a finding of monopolistic conduct.

Article 53: The Responsibilities of the Enforcer

In the case that the staff of the Anti-Monopoly Authority under the State Council violate this law and commit criminal offences in executing this law, he/she will be prosecuted and penalized accordingly. If the violation does not constitute a criminal offence, he/she will receive administrative punishment.

Chapter 8: Supplementary Articles

Article 54: Establishment of Relevant Data

The relevant market share, assets, turnover and other information will be established based on the data obtained by the Anti-Monopoly Authority during investigation, the data issued by statistic agencies at all levels and the data issued by public organizations.

Article 55: Inapplicability to Legitimate Conducts

This Law is not applicable to any conduct which is taken according to other laws and regulations.

Article 56: Exemption of the Exercise of IPRs

This Law is not applicable to undertakings who exercise their rights under the Patent Law, the Trademark Law and the Copyright Law. However, abuse of intellectual property rights in violation of this Law will be dealt with pursuant to this Law.

Article 57: Applicability to Industrial Associations

This law is applicable to non-profit entities such as industrial associations and public institutions which violate provisions of this Law and eliminate or restrict market competition.

Article 58: Effective Date

This law is effective as of [date].