Cause Analysis and Enlightenment of "Certainty" in China's Anti-monopoly Administrative Law Enforcement and Prospect of Law Enforcement in Tobacco Industry

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Abstract:China's anti-monopoly administrative law enforcement is highly certain, that is, most parties generally abandon the filing of administrative lawsuits after receiving the punishment decision made by the anti-monopoly law enforcement agency. "Certainty" is formed by the three factors: illegal acts generally lack actionable value; the parties lack reasonable expectations towards changing the punishment way and reducing the punishment amount; and there are abundant formal punishment and substantive reconciliation. In this context, it is necessary to build scientific law enforcement rules and flexible law enforcement mechanisms to reduce false interventions in "false positives". At the same time, we need perfect the anti-monopoly follow-up litigation to reinforce the link between anti-monopoly civil litigation and administrative law enforcement. However, in industries with monopoly license such as tobacco industry, it is also necessary to explore the establishment of a public interest litigation mechanism to protect the interests of market subjects at the same time of safeguarding social public interests.

Keywords: anti-monopoly law enforcement; private enforcement of anti-monopoly law; anti-monopoly follow-up litigation; tobacco industry
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PROBLEM PROPOSAL

Based on the EU competition law, China's "Anti-Monopoly Law" adopts a similar judicial review mode for administrative law enforcement in anti-monopoly law enforcement. Anti-monopoly lawsuits filed by anti-monopoly law enforcement agencies as defendants are very common in EU. According to statistics, between 1998 and 2006, among the 306 European Commission law enforcement cases involving cartel cases, 212 lawsuits were filed, with a lawsuit rate as high as 69%. In 2001-2009, the EU general courts accepted 125 cases of dissatisfaction with the European Commission's cartel anti-monopoly law[1]. In recent years, companies such as Google, Qualcomm, and Broadcom have also filed lawsuits separately due to dissatisfaction with the European Commission's affirmation that they have abused their dominant market position.

China's Anti-Monopoly Law grants the parties the right to initiate litigation when they disagree with the decision made by the anti-monopoly law enforcement agency. Paradoxically, China's anti-monopoly administrative litigation is quite different from the EU in terms of number and proportion. According to the author's statistics, as of 2019, there have been 736 anti-monopoly law enforcement cases in China[2], of which only 34 cases have been filed by the parties, with a prosecution rate of only 4.6%. On April 10, 2021, the State Administration for Market Regulation issued the State Administration Office [2021] No. 28 document,Administrative Penalty Decision, imposing 18.228 billion yuan on Alibaba Group Holdings Co., Ltd. on the grounds of abuse of market dominance, which is so far the heaviest anti-monopoly penalty in China. Alibaba Group immediately issued an announcement, expressing "sincere attitude to accept and resolutely obey" the punishment. A large number of cases reflect a significant feature in China's anti-monopoly administrative law enforcement-the law enforcement results are highly "certain", that is, the parties generally choose to accept penalties instead of continuing to pursue relief after being punished by the anti-monopoly law enforcement agencies.

Law enforcement agencies' clear identification of facts is naturally the first reason. The fact that more than 95% parties in administrative law enforcement cases have not raised objections to the facts ascertained in the case is undoubtedly the best proof. Among the aforementioned 34 cases, the parties to 33 cases of horizontal monopoly agreement have claimed in the litigation that "horizontal monopoly agreement that has the effect of eliminating or restricting competition has not been reached or fulfilled", but none of them received court support. Obviously, the litigation filed on the grounds of "unclear fact finding" is only a litigation strategy choice of individual parties, and the accuracy of the facts ascertained by our anti-monopoly law enforcement agencies cannot be questioned. However, it is clearly unconvincing to explain "certainty" only by this. The anti-monopoly law has a high degree of uncertainty[3]. The root of the uncertainty lies in the fact that the economic theory supporting the operation of the anti-monopoly law is in a state of continuous revision, evolution, and even subversion, and "generalization" of the antimonopoly law leads to ambiguity. Application of the anti-monopoly law is prone to litigation due to "differences" in understanding. There are not massive lawsuits due to differences in our anti-monopoly law enforcement. In addition to rigorous and meticulous law enforcement by law enforcement agencies, what other factors lead to the formation of "certainty", this paper intends to discuss on it. At the same time, under the background that the Internet industry is becoming a hot spot of anti-monopoly law enforcement, this paper selects the tobacco industry as a case study and discusses the direction of anti-monopoly law enforcement in the future for the industry with traditional monopoly characteristics.

ANALYSIS ON THE CAUSES OF "CERTAINTY" IN ANTI-MONOPOLY ADMINISTRATIVE LAW ENFORCEMENT

Illegal Acts Generally Lack Actionable Value

1. The parties to a horizontal monopoly agreement lack an "efficient" defense basis. According to the author's statistics, there are as many as 536 cases penalizing horizontal monopoly agreements in the current anti-monopoly penalties, and the total proportion is as high as 72.83%. In the case of horizontal monopoly agreements, most of them are "Per Se Illegality" (i.e., fixing prices, restricting output, dividing markets, etc.), and there are a few cases involving boycotting transactions.

Since the "Per Se Illegality" behavior is an inherently unreasonable restrictive behavior, it has obvious effects of harming competition and lacks the necessary compensable value. Hence, for such cases, anti-monopoly law enforcement agency can directly make a presumption of illegality and impose penalties as long as the relevant behavior is thoroughly investigated. Boycotting transactions is not an "Per Se Illegality" behavior in the traditional sense. Such behavior "involves self-interest to improve economic efficiency or enhance collective, does not seek to reduce the profits of any other group, and even favors social and moral

goals."[4]. However, seen from the case of administrative punishment for boycotting transactions retrieved by the author, there is no effect of promoting economic efficiency in terms of purpose or consequences. For instance, in the "Panyu Animation Entertainment Industry Association case" handled by Guangdong Provincial Administration for Industry and Commerce, the commitment signed by the industry association and its member units clearly states: "Member units of Guangzhou Panyu Animation and Entertainment Industry Association and the alliance enterprises of this agreement solemnly promise that, except for the special circumstances stipulated in this agreement, we will only participate in Guangzhou exhibitions led, sponsored, or undertaken by the association...If association members need participate in other Guangzhou exhibitions that are not led, sponsored or undertaken by the association, they must submit a written application to the association 30 days in advance and receive written approval from the association."

Regardless of whether it is a case of 'Per Se Illegality' or a boycott transaction, unless the party submits an "efficiency defense" in accordance with Article 15 of the Anti-Monopoly Law, one can only be exempted from punishment by providing sufficient evidence for the exemption matter. According to statistics, in the enforcement of horizontal monopoly agreements in China, most parties file for exemption, but no case finally receives an exemption decision. Among the occurred horizontal monopoly administrative litigation cases, no party has made exemption claims or provided relevant information. Evidence shows that in the current enforcement of horizontal monopoly agreements, the exemption procedure is only a common strategy used by operators to "cope" with law enforcement agencies. Horizontal monopoly agreements almost invariably produce the effect of restricting competition. Since it is difficult to succeed using the path of "efficiency defense", horizontal monopoly agreement usually does not have the actionable value.

2. The unification of system conflicts in the administrative enforcement of vertical monopoly agreements weakens the parties' enthusiasm for litigation. Some scholars point out that there is a "system conflict" in the implementation of our anti-monopoly law. That is, when handling cases of vertical monopoly agreements, the anti-monopoly law enforcement agency tends to interpret the provisions of the Anti-Monopoly Law according to "general prohibition, exception permission" in the EU competition law, without analyzing the effect of "eliminating and restricting competition." The court's judicial interpretation and case handling practices favor the theories and case handling ways of the US antitrust law[5]. That is, the vertical monopoly agreement should have the effect of "eliminating and restricting competition". Accordingly, if the anti-monopoly law enforcement agency cannot prove in the litigation that the plaintiff's conduct has the effect of restricting competition or the court believes that the anti-monopoly law enforcement agency fails to determine that effect of restricting competition in administrative enforcement constitutes an illegal act, the decision of the anti-monopoly law enforcement agency will face the risk of being overthrown.

However, the author found that such vertical monopoly agreement system conflict only exists in anti-monopoly law enforcement and private enforcement. The system conflicts in anti-monopoly administrative litigation have been unified. That is, the court has accepted the idea of "general prohibition, exception permission" of anti-monopoly law enforcement agency. Based on the author's retrieval, a total of 7 civil judgments on vertical monopoly agreement disputes are collected, which belong to 4 disputes. In these four disputes, the plaintiffs of "TianJunwei case" and "Bebe Infant & Mom Home" failed to prove the anti-competitive effect of the vertical monopoly agreement. The written judgment did not analyze the effect of "eliminating and restricting competition". In another two cases, the "effects of eliminating and restricting competition" was systematically analyzed. Take the No. 1771 Final Civil Judgment of Guangdong Higher People's Court (2016) as an example.The judgment clearly points out: In the analysis and judgment of the

nature regarding behavior of limiting minimum resale price, whether the relevant market competition is sufficient, whether the defendant's market position is strong, and the defendant's purpose and consequences of restricting the minimum resale price are all consideration factors." The judgment not only defines the relevant market (in 2012-2013, the domestic air-conditioning commodity market within mainland China), but also analyzes whether the competition in the relevant market is sufficient in this case (in 2012-2013, the top five brands including Gree, Haier, Galanz, Midea, Hisenseoccupy 70%-80% of the domestic air-conditioning market.Although Gree air-conditioning accounts for 32.0% and 40.8% respectively, it is not the only one... In summary, it can be confirmed that the relevant market involved in this case is a market with relatively sufficient competition.) In addition, it also sufficiently analyzes the market position of Gree household air-conditioning products in the relevant market and the purpose and consequences of restricting the minimum resale price. The judgment has as many as 5889 words analyzing "the effect of eliminating and restricting competition". It can be seen that "the effect of eliminating or restricting competition" is an indispensable constituent element for determining whether vertical monopoly agreement is established in a civil case.

However, such analysis model has proven to be inapplicable in the only domestic administrative litigation caused by vertical monopoly agreement-Hainan Yutai v. Hainan Provincial Price Bureau[6]. The Supreme People's Court clearly points out in the retrial ruling of the case: considering that China's market conditions are imperfect and the market itself is weak in correcting deviations, if the anti-monopoly law enforcement agencies are required to conduct comprehensive investigations and complex economic analysis on vertical monopoly agreements to determine its impact on the competition order, it will greatly increase the law enforcement cost and reduce the law enforcement efficiency, which cannot meet the needs of China's current anti-monopoly law enforcement work... The premise that the plaintiff's claim in anti-monopoly civil litigation is supported... …is losses to the plaintiff when the operator implements anti-monopoly behavior, while losses to the plaintiff is the direct manifestation of the effect that monopoly behavior eliminates and restricts competition... In anti-monopoly civil litigation, the court examines whether the monopoly agreement has the effect of eliminating or restricting competition. On this basis, it is determined whether to support the plaintiff's litigation request, and whether it is improper behavior... In administrative litigation, the anti-monopoly agency's judgment standard regarding legality of the vertical monopoly agreement in law enforcement is clearly different from the review standard against the vertical monopoly agreement in civil litigation.

It can be seen that the system conflict between anti-monopoly law enforcement agency and the judicial agency in the vertical monopoly agreement is unified in a way helping to lower the importance of anti-monopoly law enforcement agency. As Bodenheimer said: "Whenever human behavior is controlled by legal norms, the element of repetitive rules will be introduced into social relations. An authoritative source derived from the past will be used to guide private or official behavior in a repeated way."[7]. The unification of system conflicts obviously creates unfavorable guidance for operators who intend to file a lawsuit on the grounds that "law enforcement agencies have not analyzed the effects of eliminating or restricting competition". The law enforcement agency's burden of proof to prove that the behavior has the effect of eliminating or restricting competition shifts to that the operator needs to prove that his behavior does not have the effect of eliminating or restricting competition, which naturally reduces the operator's enthusiasm for filing administrative litigation against vertical monopoly agreement.

3. The definition of the relevant market is less difficult and the illegal acts lack justification. Abuse of market dominance cases are the most widespread anti-monopoly lawsuits handled by European and American anti-monopoly law enforcement agencies in recent years. Not only

companies such as Google, Qualcomm, Broadcom, etc. have initiated this lawsuit in the EU, but companies such as Apple and Huawei have also faced such lawsuit in the United States. All these lawsuits took place in industrial fields with high technical and professional nature. The companies involved in the lawsuits generally have quite big controversies with law enforcement agencies on issues such as market definition and abuse behavior. According to the author's statistics, as of 2019, domestic anti-monopoly law enforcement agencies have handled a total of 62 punishment cases for abuse of market dominance, and none of them have filed an administrative lawsuit. The author believes that there are two reasons: First, it is less difficult to define the relevant market. 2. The illegal acts are obvious and generally lack justifiable reasons.

Definition of relevant market is often a “hotly contested point” in anti-monopoly litigation in Europe and the United States, and the success or failure of the litigation often depends on the definition of the relevant market. In the EU, there are cases where the European Commission loses the lawsuit because of failure to correctly define the relevant market, such as the Continental Tank Case and the Alsette Case[8,9]. Definition of the relevant market is also a common focus of disputes in civil litigation arising from abuse of market dominance in China. However, in the 62 cases, no party raises any objections to the definition of the relevant market, which may be related to the relative simplicity of the relevant market in the case. According to statistics, there are 30 cases involving public utility companies and franchise companies such as tobacco, salt industry, and banks, accounting for 48.39% of the total number of penalty cases. The Guidelines on the Definition of Relevant Markets issued by the Anti-Monopoly Committee of the State Council in 2009 provide a more comprehensive analysis method for the definition of relevant markets. The policy barriers to entry grant these firms special (often exclusive) status. There is significantly lower difficulty and fewer disputes in defining the relevant market of these enterprises than other industries. In other cases, except for the relatively complicated market definitions in the three cases of Qualcomm, Tetra Pak, and Eastman where demand substitution and supply substitution analysis are carried out at the same time, the remaining cases face no too much difficulty in defining geographic market and commodity market, and only demand substitution analysis is used. In particular, with regard to the definition of related commodity markets, except for the Qualcomm, Tetra Pak, and IDC cases where the related product markets have two or more market areas, the remaining cases generally involve only one commodity market.

In terms of abuse behavior, its illegality is usually very obvious and not very controversial. In addition to the two cases of Qualcomm and IDC in 2015 where standard-essential patents are utilized to sell goods at unfairly high prices and unreasonable expenses are added to prices during transactions, making it necessary to fully demonstrate and define the intellectual property rights involved in standard-essential patents, the remaining 60 cases are typical illegal acts, and the parties have no evidence to prove that there are reasonable reasons for engaging in such acts. For example, in the tobacco industry to be analyzed later, Liaoning Tobacco Fushun Company was once subject to anti-monopoly punishment for tie-in sale in 2015, because it, as the only local operator with a license for a tobacco monopoly wholesale enterprise, had forced retailers to order certain brands of cigarettes when selling tight brands of cigarettes, otherwise it would not provide goods. Although some parties applied to participate in the hearing during the investigation process and stated that their behavior was "with reasonable grounds" in the hearing process, none of them was accepted by law enforcement agencies. Obviously, this is also just a strategic choice in the law enforcement process, which does not have practical significance. Moreover with obvious market dominance and abuse behavior, the parties will naturally lose the need to pursue prosecution.

The Parties Lack a Reasonable Expectation towards Changing the Punishment Way and Reducing the Punishment Amount.

Even if the doers give up litigation because the illegal act itself lacks the value of prosecution, it is entirely possible for the doer to file a lawsuit on the grounds that the anti-monopoly law enforcement agency's punishment is too heavy or the punishment way is unreasonable. However, domestically, among the already very limited anti-monopoly administrative litigations, only in the 18 series of cases handled by the Jiangsu Provincial Price Bureau in 2014 and the Shandong Provincial Administration for Industry and Commerce in 2016, parties claimed that penalties are "obviously unfair" and "obviously improper". The author believes that this is related to the judicial review standard of administrative litigation in China.

Economists have revealed to us the relationship between the doer's short-term decision and cost.That is, if the short-term benefit exceeds the variable cost, that is, TR (total revenue)> VC (variable cost), then the doer should implement the decision. According to this principle, when the parties gain benefits exceeding the variable costs in the administrative litigation process by filing anti-monopoly administrative litigation, then the parties should initiate an administrative litigation, otherwise they should abandon the litigation. In anti-monopoly litigation, the party's total income is the financial expenditure that is reduced or avoided by changing or revoking the administrative penalty decision, while the party's variable costs in anti-monopoly litigation include remaining fines, additional fines, attorney fees, litigation fees, etc. Only when the amount of fines reduced or avoided by changing or revoking the administrative penalty> the remaining payable fines, attorney fees, litigation fees and other explicit variable costs, filing administrative litigation is of economic value for the parities. Then, the probability of achieving TR>VC in administrative litigation is undoubtedly an important factor in the parties'decision-making.

The modification or revocation of administrative penalties is closely related to whether the administrative law enforcement is "reasonable". The core lies in how to define "obviously unfair" stipulated in Article 54 of the Administrative Litigation Law of 1989 and "obviously improper" stipulated in Article 77 of the Administrative Litigation Law revised in 2014. Judging from the current consensus, the determination of "obviously improper" should be based on the following four elements: First, the administrative agency's administrative punishment has a factual and legal basis, and the behavior of the punished person does violate the provisions of laws and regulations.Second,although the administrative penalties imposed by administrative agencies fall within the categories and ranges of penalties prescribed by laws and regulations, they are obviously unreasonable and inappropriate. Third, such irrationality and inappropriateness seriously violates the purpose and spirit of laws and regulations, so that people with general sense can sense such inappropriateness. Fourth, improper manifestations include biased handling, mixed punishment methods, obviously biased light and severe punishment ignoring statutory stipulations on light and severe punishment, different penalties for the same case, and the same penalties in different scenarios.

The author further searched the relevant "obviously improper" judgment cases, finding that there were 319 relevant cases from 2014 to 2019[10]. In the end, there were 141 cases where specific administrative actions were revised on the grounds of "obviously improper". However, most of them are not revised due to obvious impropriety of the administrative penalty itself, but the administrative penalty are corrected due to actual error in the determination of administrative action or affirmed amount (for example, work-related injury insurance is deducted by the insurance company on the grounds of claim settlement in the traffic accident).There are only 50 cases where the administrative punishment itself is obviously improper and the sentence is changed. Most of them are cases where punishment of administrative detention by the public security organs is excessively heavy. The fines are adjusted in 23 cases, of which the fines are reduced by more than

50% in 17 cases. Obviously, there are a small number of “obviously improper” administrative punishments corrected through judicial review. It can be seen that although the number of cases in which judicial organs review the legality of administrative law enforcement and adjust "obviously improper" behaviors is beyond expectation, the overall number is still small, and the core of administrative litigation review is still concentrated on legality.

Such judicial habit formed over the years is called "social inertia" by some scholars. That is, there is a desire for stability in the existing judicial rules and discretionary standards, and it is hoped that the rules and discretionary standards will never change. Once "social inertia" is formed, judicial organs will try to avoid overstepping as much as possible, and the parties will also anticipate the consequences of litigation based on "social inertia". Obviously, the expected result based on this is that TR>VC is impossible in a higher probability. When the parties initiate anti-monopoly administrative litigation, the greater possibility is that the total income will not increase, and the variable cost of the litigation will further increase the total cost of the parties. Therefore, it is logical if the parties abandon the filing of anti-monopoly administrative litigation.

The Massive Occurrence of Formal Punishment and Substantial Reconciliation

As an indispensable element of the law, culture is the cornerstone of a country's law, which spawns national people's unique belief in power and rights. The classic literature of comparative law generally believes that concepts such as "harmony" and "ethics" are rooted in our legal culture. For example, K. Zweigert and H. Kertz commented on China’s Far Eastern legal system in the Overview of Comparative Law: “A trend is noticeable, that is, we should avoid fighting with each other in public national courts as much as possible, but resolve disputes through friendly settlement.”[11]. China’s unique legal and cultural tradition formed over thousands of years is also a major reason why there is few anti-monopoly administrative litigation in China. Both law enforcement agencies and parties involved in the anti-monopoly law enforcement are charged with the concepts of "education and being educated" and "persuading and being persuaded".

As far as the anti-monopoly law enforcement agency is concerned, to achieve its expected benefits (the enforcement result becomes effective), it can lower the amount of penalties for the parties through “insufficient best implementation”[12], thereby reducing the parties’ motivation to further file lawsuits. However, such "concession" that treats the symptoms but not the root cause may not necessarily effectively prevent the parties from initiating litigation, nor will it radically prevent the parties from "re-offending". At the same time, regardless of how their competitive concepts are upgraded and how their law enforcement capabilities are improved, the law enforcement personnel of the anti-monopoly law enforcement agency come from the general public after all, and their inherent spirit of reconciliation and resentment towards litigation will not be eradicated because of their role as anti-monopoly law enforcement personnel. Therefore, anti-monopoly law enforcement agencies inevitably need adopt constant persuasion and education in anti-monopoly law enforcement, so that the parties can recognize their mistakes, voluntarily correct illegal behaviors, and finally abandon litigation. As far as the parties are concerned, during the anti-monopoly investigation stage, they will try their best to persuade law enforcement agencies to terminate their investigation or confirm the essentials for exemption of their behaviors through communication. In the case that this goal cannot be achieved, the parties will still further try to reduce the penalties in front of them as much as possible through communication.

The extensive use of statutory considerations in China's anti-monopoly law enforcement undoubtedly clearly proves this point. The so-called statutory considerations mean that the anti-monopoly law enforcement agency shall, in accordance with the provisions of Article 49 in the Anti-Monopoly Law, consider the nature, extent and duration of the violation when determining the specific amount of fines during the enforcement

process. Judging from the statement of the statute, statutory considerations do not necessarily lead to lighter or reduced punishments. Law enforcement agencies are entirely likely to aggravate punishments for cases of vile, serious, and long-lasting violations. However, the cases in which statutory considerations have been used domestically so far have basically achieved the effect of lightening and mitigating punishments[13]. Among the current 631 cases of non-administrative monopoly law enforcement, there are 417 cases where law enforcement agencies use statutory considerations, accounting for 66.9%. Most cases that did not use statutory considerations occurred between 2008 and 2015, with a total of 152 cases, accounting for 71% of the total without such use. For its reason, China's anti-monopoly law enforcement was at an early stage then, and law enforcement agencies lacked communication in this regard with the parties. With the continuous maturity in anti-monopoly law enforcement experience and the continuous enhancement in social influence of anti-monopoly law enforcement, both law enforcement agencies and parties pay more attention to the use of statutory considerations. This fully shows that in most anti-monopoly law enforcement, law enforcement agencies and parties can form a benign communication mechanism. Under the influence of law enforcement agencies, most parties can assist law enforcement agencies in investigations, and some can take the initiative to stop illegal activities. In addition, there were 28 cases where the parties are successfully suspended from investigation through operator's commitment, and in 17 cases, the decision to terminate the investigation was finally reached. It can be seen that our anti-monopoly law enforcement pays great attention to the application of “lightening, mitigating, suspending, and terminating investigations” in the handling results. These contents themselves embody the nature of reconciliation, but they are subject to the legality requirements of our administrative law enforcement procedures and cannot be reconciled through forms such as settlement agreement, leading to the anti-monopoly law enforcement characteristic of "formal punishment and content-based settlement" in China. Under the guidance of strong persuasion and education, a large number of parties have given up further litigation.

The world-renowned "Qualcomm case" provides the best example. From the perspective of Qualcomm’s illegal activities, in various countries and regions, it basically sells goods at unfairly high prices in CDMA baseband chip market, WCDMA baseband chip market and LTE baseband chip market and imposes unreasonable fees or other conditions in transactions. Whether it is in the United States, the European Union, or other countries (such as South Korea) and regions (such as Taiwan), Qualcomm files a lawsuit (or appealed) without exception wherever it is subject to a penalty decision made by an anti-monopoly law enforcement agency or loses the lawsuit in court ruling. It is only after China imposes punishment on it that Qualcomm chose to abandon the lawsuit and directly accept the punishment. It has to be said that the 28 rounds of persuasion and education given by China’s anti-monopoly law enforcement agencies play an "indispensable" role.

ENLIGHTENMENT FROM THE "CERTAINTY" OF ANTI-MONOPOLY ADMINISTRATIVE LITIGATION

The author believes that the high certainty of anti-monopoly administrative enforcement can provide at least the following two points of enlightenment in the implementation of anti-monopoly law:

Establish Scientific and Effective Law enforcement Rules, in-Depth and Flexible LawEnforcement Mechanisms to Reduce False Interventions in "False Positives"

In the anti-monopoly law enforcement process, based on the combined effect of the aforementioned three factors, the vast majority of parties will give up filing a lawsuit. This can be viewed as the parties’ recognition towards anti-monopoly law enforcement, or as a compromise of the parties. For law enforcement

agencies, this does not mean to abuse such recognition and compromise. On the contrary, anti-monopoly law enforcement agencies should adopt a cautious attitude in law enforcement, so as to avoid improper intervention in “false positives” in anti-monopoly law enforcement. The so-called false positives mean to mistakenly identify behaviors beneficial to market competition and consumers as behaviors harmful to market competition and consumers. Wrongly penalizing false positives will bring a series of wrong costs, such as the losses arising from wrong punishment of the parties, and the losses from act of giving up behavior that promotes competition owing to fear of similar penalties. To avoid wrong intervention in false positives, we should make full use of in-depth and flexible law enforcement mechanisms while building scientific and effective law enforcement rules.

First, in the construction of law enforcement rules, attention should be given to the establishment of hierarchical and categorized processing models and the orderly application of standardized economic analysis methods. China is still in the initial stage of anti-monopoly law enforcement. A large number of anti-monopoly violations are obviously illegal and can barely improve economic efficiency. The hierarchical and categorized processing mode will play a positive role in improving the law enforcement efficiency and avoiding the excessive entanglement around simple illegal acts in law enforcement. Hierarchical and categorized processing model, in principle, applies different analysis models for cases of different behavior nature, harm scope and complexity degrees: for behaviors that are particularly harmful and lack positive benefits such as economic efficiency improvement, attempt should be made to apply simple analysis model. For new types of behaviors or behaviors with complex economic effects, a comprehensive analysis model should be applied for behaviors that will not produce a significant impact on market competition, the "safe harbor" regulatory approach should be applied. At present, China has issued a series of rules aimed to detail the implementation rules of Anti-Monopoly Law, but fails to construct complete, systematic economic analysis methods[14]. Therefore, China urgently needs to formulate more detailed law enforcement rules and guidelines to clarify the analysis framework and main considerations in law enforcement. This will play a positive promotion role in unifying the law enforcement thinking in domestic anti-monopoly law enforcement and reducing wrong handling of false positives.

Second, continuously improve the level of law enforcement and establish an in-depth and flexible law enforcement mechanism. Since China is still in the initial stage of the socialist market economy, apart from the Qualcomm case, IDC case and other individual cases involving complicated identification of illegality and great handling difficulty, a large number of illegal acts are generally obvious with relatively low investigation difficulty, and China’s anti-monopoly law enforcement still lacks "touchstones" for testing. Highly developed anti-monopoly law enforcement means not only the ability to handle major and difficult cases, but also means that there will be no wrong enforcement in general cases. This requires that our anti-monopoly law enforcement agencies should continuously improve theoretical level of competition law and actively absorb advanced work experience in anti-monopoly law enforcement from Europe and the United States. At the same time, variability of economic law determines that both economic legislation and economic law enforcement must be adjusted in a timely manner based on current economic policies. This also requires that anti-monopoly law enforcement agencies should not adopt "Apollonian-style" blind adherence to conventions in anti-enforcement.

Perfect the Anti-Monopoly Follow-up Litigation Mechanism

The so-called anti-monopoly follow-up litigation means that victims of monopoly behavior can file a lawsuit for damages based on the administrative decision of the anti-monopoly law enforcement agency after the anti-monopoly law enforcement agency determines that there is a monopoly behavior and makes an administrative decision[15].

China has not introduced this system in Anti-Monopoly Law or other related documents. According to the information retrieved by the author, as of 2019, a total of 648 anti-monopoly civil litigation documents have been retrieved through China Judgment Document Network, of which only 9 cases are won by the plaintiff. In these 9 cases, none of the plaintiffs provided the punishment decision made by the anti-monopoly law enforcement agency in the proof link. It can be seen that there has been no domestic case with the nature of anti-monopoly follow-up litigation in fact. As our market economy continues to deepen, while anti-monopoly law enforcement continues to develop, anti-monopoly violations will inevitably develop in a more controversial and concealed direction, and winning anti-monopoly civil litigation will also face greater difficulty. Just as Judge Posner commented in the case of Sutliff v. Donovan: "Modern federal litigation, especially anti-monopoly litigation, is very costly... If the facts stated by the plaintiff cannot even outline the general situation of such violation, the Federal Court has reason to directly dismiss his prosecution."[16].

The anti-monopoly follow-up litigation mechanism will play a positive role in reducing the burden of proof for the plaintiff in civil litigation and increasing the probability of wining compensation. Anti-monopoly civil litigation is essentially a tort lawsuit. In the litigation, the plaintiff need bear the burden of proof for the defendant's illegal actions and the losses suffered. After follow-up litigation mechanism is introduced,according to the 2012 "Regulations on Several Issues Concerning the Applicable Law in the Trial of Civil Disputes Caused by Monopoly Behaviors", in cases involving horizontal monopoly agreements and abuse of market dominance, the plaintiff no longer need bear the burden of proof that the defendant reaches a monopoly agreement,dominates the market and abuses the market dominance, but only need to produce evidence to prove his losses. In vertical monopoly agreement, in the current judicial practice, the plaintiff still needs to bear the burden of proof that the defendant's actions have the effect of "eliminating or restricting competition", and penalty decision of the law enforcement agency should be used as evidence. Although the degree of mitigation in vexatious suit is lower compared to horizontal agreement and abuse of dominant position, it exempts the plaintiff from the burden of proof for the defendant's behavior after all, thus also creating a certain effect. At present, China has not officially introduced a follow-up litigation mechanism. Although the parties can still submit relevant documents (including penalty decision, investigation suspension decision, investigation termination decision, etc.) as evidence to the court when filing a civil lawsuit, due to the lack of formal system confirmation, this puts the effective documents of law enforcement agencies at risk of refusal, which poses a challenge to the authority of law enforcement agencies. In addition, the follow-up litigation system can also effectively reduce the court's workload of judicial review and help it concentrate on investigating and sorting out the remaining facts to be investigated as well as the legal relationship. Therefore, it is necessary to formally introduce a follow-up litigation system.

In addition to improving the linkage between civil litigation and administrative litigation in the litigation process, the plaintiff in civil litigation should also be granted with the right to apply to the anti-monopoly law enforcement agency for access to relevant case file information. The plaintiff who has filed a lawsuit in the court has the right to, with the acceptance notice and notice of evidence issued by the court, apply to law enforcement agencies for access to relevant law enforcement case file information, including investigation transcripts, case-related material evidence, documentary evidence, and witness testimony. By retrieval of these materials, the parties can have a more in-depth and comprehensive understanding of the defendant's violations of the law and the defenses in law enforcement. For materials that abandon the "efficiency defense" or have no objection to the statement of eliminating or restricting competition in the law enforcement stage, it can be used as evidence for the plaintiff in civil litigation to prove that the defendant's actions have the effect of eliminating or restricting competition. The law

enforcement agency may conceal or make special treatment for the information in the retrieved materials that belongs to business secret or is unsuitable for disclosure.

PROSPECT OF ANTI-MONOPOLY LAW ENFORCEMENT IN TOBACCO INDUSTRY.

Since 2021, the Internet industry has undoubtedly become a hot area of anti-monopoly law enforcement in China, which however does not mean that traditional industries, especially those with monopoly franchises, will gradually fade out of the scope of anti-monopoly administrative law enforcement. Based on a case study of the tobacco industry, the author tries to look forward to the anti-monopoly enforcement in the future.

The Regulation of Abuse of Market Dominance will still be the Focus of Law Enforcement.

At present, the anti-monopoly law enforcements against the tobacco industry in China mainly took place from 2013 to 2015, all of which focused on the abuse of market dominance, including differential treatment, tie-in sale and so on. Because of the tobacco monopoly system implemented in China, tobacco companies are the only subject with wholesale qualification in a certain area, which determines that anti-monopoly administrative law enforcement involving the tobacco industry is usually only in the form of "abuse of market dominance". There is naturally no applicable space for monopoly and concentration of undertakings, and it is bound to be difficult to have precedents such as the case that the Federal Trade Commission of the United States v. Altria Tobacco Company for the acquisition of Juul Labs E-cigarettes and other cases that have attracted attention from the academic community and are not cases of abuse of market dominance[17]. In view of this, the difficulty to investigate and deal with such anti-monopoly violations lies not in the definition of the relevant market, but in how to obtain evidence to prove the existence of abuse by operators. At the same time, due to the limited law enforcement resources, most of these cases come from the reports of distributors, so how to make distributors dare to report illegal acts undoubtedly requires the methods and skills of law enforcement departments. Judging from the determination and attitude of the central government towards anti-monopoly in recent years, the mechanism of giving the victims the right to obtain relief and keeping confidential the informant's information has been continuously improved, which will undoubtedly play a great positive role in the field of regulating and destroying the fair competition environment in the market for the tobacco industry, which is already highly "certain" and the illegal acts are not novel and prominent.

Anti-Monopoly Follow-up Lawsuits against the Tobacco Industry will not Emerge in Large Numbers, and Necessary Public Interest Litigation Mechanisms Need to be Constructed.

As mentioned earlier, anti-monopoly law enforcement can only judge whether it is illegal or not, while operators who suffer losses due to illegal acts can only seek compensation and relief by filing another civil lawsuit. Judging from the current anti-monopoly enforcement of the tobacco industry in our country, no anti-monopoly follow-up lawsuit has been found, which has something to do with the monopoly mechanism of the tobacco industry. Although the department that grants the retail license to the retailers is the tobacco management agency rather than the tobacco companies, the tobacco companies have a crucial influence on the daily supply quantity and variety of the retailers. Civil litigation can certainly obtain compensation and relief, but retailers may not dare to "offend" tobacco companies in order to maintain stable operation, which is common in countries where tobacco monopoly is implemented. For example, a study in the United States shows that retailers have strong dependence on the supply contracts of tobacco companies, and retailers are subject to the requirements and constraints of tobacco companies in terms of wholesale prices of cigarettes, marketing materials and even counter placement[18]. Nevertheless, the author thinks that even if the anti-monopoly administrative law enforcement continues to strengthen in the tobacco industry, anti-monopoly

follow-up lawsuits will still not emerge in large numbers. In order to standardize the normal competition order in the market, and considering the practical difficulties that retailers may face when filing follow-up lawsuits, the author thinks that the necessary public interest litigation mechanism can be introduced in the tobacco industry, that is, the procuratorial organs and public interest organizations can file public interest lawsuits against operators who abuse their dominant position in the market with the consent of the victims, and the compensation can be used to promote social welfare related to market competition, such as organizing publicity lectures, etc. Of course, under the mechanism of public interest litigation, how to further protect the rights and interests of the affected retailers, and how to build an efficient convergence mechanism between private and public subjects will be discussed in the future.

CONCLUSION

The formation of a high degree of "certainty" in China's anti-monopoly administrative law enforcement is not accidental, but is an inevitable result formed under the combined action of the characteristics of the illegal act itself and the characteristics of administrative law enforcement. Although this phenomenon is far different from Europe and the United States, it does not mean that China must follow the example of Europe and the United States and forcefully spawn a large number of anti-monopoly lawsuits that confront law enforcement agencies. On the contrary, only be taking foothold in the local culture and relying on the unique implementation characteristics and environment of anti-monopoly law in China can it be truly beneficial to the development of anti-monopoly administrative law enforcement and law-abiding in China. Of course, under the influence of strong "certainty", once the law enforcement agency conducts anti-monopoly law enforcement by mistake, the parties are likely to eventually incur unnecessary losses. Therefore, law enforcement agencies must continuously improve their law enforcement capabilities to reduce wrong intervention in “false positives”. At the same time, since China takes anti-monopoly administrative enforcement as the core, it is a direction for continuous improvement and development in the future if we establish anti-monopoly implementation system with anti-monopoly private litigation as the supplement, build follow-up litigation mechanism and share the results of anti-monopoly enforcement among private litigants. However, the traditional franchise mechanism in the tobacco industry will give operators a strong ability to intervene in the market. Besides the follow-up litigation mechanism, it is also necessary to construct a public interest litigation mechanism to seek public interests through public interest litigation when retailers are afraid and unwilling to file civil litigation, and then use it for social welfare related to promoting market competition.

Conflicts of Interest Disclosure Statement

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