

# Impact of the Antimonopoly Law on Small and Medium-sized Enterprises

Ruihan Tian \*

School of Politics and Public Administration, South China Normal University, Guangzhou, Guangdong, 510006, China

\* Corresponding author Email: trh3139@163.com

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**Abstract:** The operator commitment system in the antitrust law, also known as the antitrust enforcement settlement system, is a moderated enforcement system in which the enforcement authority and the suspected monopoly operator reach a settlement agreement by way of negotiation to resolve monopoly disputes. On the whole, the operator commitment system in China is deficient in legislation, leading to many problems often encountered in practice. This paper introduces the basic meaning, legislative status and practice of the operator commitment system in the anti-monopoly law, analyzes its deficiencies, and puts forward relevant suggestions for improvement.

**Keywords:** Anti-monopoly Law; Operator Commitment System; Proposal.

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## 1. Introduction

As of 2022, China's anti-monopoly enforcement agencies have punished a total of 223 monopoly cases and 60 cases of abuse of dominant market position, with fines totaling more than 12 billion yuan, ensuring the stable and sustainable development of the economic market. Article 45 of the Anti-monopoly Law of the People's Republic of China stipulates that: "If the operator under investigation commits to take specific measures to eliminate the consequences of the act within a period approved by the anti-monopoly enforcement agency for the suspected monopoly act under investigation, the anti-monopoly enforcement agency may decide to suspend the investigation [1]. While the commitment system is generally considered to be applicable in the field of private law, the antitrust commitment system is provided for in the Antimonopoly Law, a public law, which makes it all the more necessary to improve the enforcement provisions to ensure the smooth implementation of the commitment system [2].

In-depth study of the commitment system in China's antitrust law is crucial. Compared with the previous antitrust enforcement model, the advantages of the commitment system are particularly obvious, as reflected in the settlement agreement reached between the committed operator and the enforcement agency by way of negotiation to mediate monopoly disputes [3]. The commitment system has significantly saved enforcement costs, further improved enforcement efficiency and solved the disadvantages of difficult monopoly enforcement, and maximized the economic value of monopoly case enforcement.

## 2. Impact of the Antitrust Law on Small and Medium-sized Enterprises

### 2.1. Pricing Dilemma in Dealer Sales Model - Price Control vs. Independent Pricing

Enterprises (generally producers or brand owners, hereinafter referred to as "operators") generally have two sales models, self-operated or through distributors. The former relies on the enterprise to build its own sales channels, with large initial investment and time required for market

feedback; while the latter directly uses the existing channels of distributors, which can generate revenue quickly [4]. From the perspective of antitrust law, in the case of self-management, the enterprise sets the price itself, and the sales company or branch with the control relationship is not a "counterparty", so it is difficult to constitute a vertical monopoly agreement prohibited by the antitrust law; while in the case of distributor sales, if the operator requires the distributor to resell the goods at a certain price to a third party (usually a consumer), the operator may not be able to resell the goods at a certain price. Under the distributor sales model, if the operator requires the distributor to resell the goods to a third party (usually a consumer) at a certain price, or requires that the goods be sold at a certain price, it may constitute a vertical monopoly agreement. The reason why the anti-monopoly law prohibits vertical monopoly agreements is that such agreements have the effect of excluding or restricting competition and may ultimately harm the interests of consumers or the public interest [5]. These acts not only exclude and restrict competition among franchisees within the brand, but also restrict competition between franchisees and other brand operators in the same industry. The ultimate consequence is that franchisees are prevented from offering benefits to consumers, which deprives consumers of the opportunity to obtain relatively low-priced and high-quality services through price competition and harms the economic interests of consumers [6]. It is important to note that monopoly agreements are not limited to the form of "contracts", but agreements, decisions or other concerted acts may constitute monopoly agreements, and agreements and decisions are not limited to written, but can also be made orally, algorithmically, etc. This method of determination further enhances the possibility of monopoly agreements between operators and distributors. [7].

In fact, under the antitrust law, this contradiction is inherent in the dealership sales model, and the new Antitrust Law provides a "safe harbor" for operators to avoid the risk of being found guilty of a vertical monopoly agreement and subsequently being fined a large amount of money if they meet the conditions [8].

## 2.2. The "Safe Harbor" System in the New Antimonopoly Law, Gospel or Shackle?

In the new Anti-monopoly Law, two new provisions have been added in respect of vertical monopoly agreements, namely, "Where an operator can prove that an agreement under the first (note: fixing resale price) and second (note: limiting minimum resale price) of the preceding paragraph does not have the effect of excluding or restricting competition, it shall not be prohibited; where an operator can prove that its market share in the relevant market is lower than that prescribed by the State Council. If the operator can prove that its market share in the relevant market is lower than the standard set by the antitrust enforcement agency of the State Council and meets other conditions set by the antitrust enforcement agency of the State Council, it shall not be prohibited." This is known as the "safe harbor" system for vertical monopoly agreements in the new Antimonopoly Law [9].

Regarding the standard of market share set by the anti-monopoly enforcement agency of the State Council, reference can be made to the "Regulations on Prohibition of Monopoly Agreements (Draft for Public Comments)" issued by the General Administration of Market Regulation on June 27, 2022, which stipulates that if the market share of an operator and its counterparty in the relevant market is less than 15% and there is no evidence to the contrary that it excludes or restricts competition, the "vertical monopoly agreement" entered into by the operator shall not be prohibited. Monopoly agreements" are not prohibited [10].

There is a conceptual difference here. The "safe harbor" system under the new Antimonopoly Law can be interpreted as an "absolute safe harbor", i.e., it is not prohibited if it is below the relevant standard. The "safe harbor" system is more inclined to the "relative safe harbor", i.e., if there is evidence to the contrary that the agreement in question excludes or restricts competition, it should still be prohibited.

## 2.3. Impact of the "Safe Harbor" System on SME Pricing

Since the new Anti-Monopoly Law has significantly raised the penalty standards for monopoly agreements and increased the personal liability of managers (up to a fine of RMB 1 million), it becomes more important whether the situation is not prohibited. From the current legislative trend, if an operator intends to apply the "safe harbor" system, two conditions must still be met: (1) the operator and the counterparty have a small market share in the relevant market, e.g., less than 15%, and (2) there is no evidence to the contrary that they exclude or restrict competition [11].

From the operator's side, the main risk mitigation options are as follows: gradually establish self-managed channels; try to avoid fixed price or minimum price limitation clauses in cooperation agreements with distributors, and avoid penalties for distributors' own price adjustments. It should be noted that the "market share" under the "safe harbor" rule is not the operator's or distributor's share alone, but includes other entities that control or exert a decisive influence, and in the case of multiple distributors, the market share should be combined [12].

In terms of distributors, they may consider claiming the invalidity of the relevant provisions to safeguard their rights. The "safe harbor" principle introduced by the new Antimonopoly Law gives the operator certain price control, but in

this case, the operator itself does not have a dominant position in the market and is only a "small" competitor in the relevant market. The dealer can choose not to accept the price restriction clause or to sign a cooperation agreement with another competitor [13].

In summary, the new Antimonopoly Law provides a "safe harbor" for vertical monopoly agreements, which will no longer be prohibited if they meet the conditions.

## 3. Operator Commitment System in the Application of Insufficient

### 3.1. The Lack of Scope of Application of the Operator Commitment System

Article 45 of our Antimonopoly Law provides in general terms that the commitment system may be applied to illegal monopolies under investigation. China regulates administrative monopolies in a separate chapter of the Antimonopoly Law, but the commitment system in China is not applicable to administrative monopolies. The wide scope of application for the commitment system affects the application of the law to a certain extent, especially after the two administrative regulations issued by the State Administration for Industry and Commerce and the Development and Reform Commission similarly fail to delineate the specific scope of application, which, in my opinion, is an important issue that the system should be improved first. The lack of scope of the commitment system will be the uncertainty of application, leading to the abuse of the system, misuse, and cannot play the original advantages of the commitment system.

### 3.2. Inadequacy of the Initiation Procedure of the Operator Commitment System

The time for operators to make applications should be clearly limited and not too broadly specified. The enforcement agencies should deal with the cases that meet the scope of application of the commitment system as soon as possible in order to reduce the negative impact of monopolistic behaviour on all parties in the market and to maintain a fair competitive environment in the market. Article 15 of the Antimonopoly Law, "the period under investigation", is a broad scope and does not have the certainty required by the law. It should be further refined to specify the time of application for commitment and the time up to which the application is made.

Secondly, for law enforcement agencies to accept applications to start the content of the operator's commitment to review the time, review the content and review of the evaluation is also needed to clarify and disclose. This is the basic requirements of the administration according to law, but also the inevitable trend of public disclosure procedures to improve.

Finally, the subject of the proposed commitment system is too single. The current anti-monopoly law only provides that the commitment system can be initiated upon the operator's application. According to the settlement nature of the commitment system, the enforcement agency and the operator should have equal rights in the process of applying the procedure. Considering the considerable strength of China's administrative enforcement agencies, in order to balance the rights, only the right to recommend initiation can be granted to the enforcement agencies to protect the operators' voluntary commitments from coercion by the enforcement

agencies. Giving the enforcement agency the right to recommend also prevents the enforcement agency from being able to advise the operator in case he or she neglects to apply (and the case is well suited for the application of the commitment system).

## 4. Improvement of the Operator Commitment System of the Antitrust Law

### 4.1. Clarify the Conditions of Application of the Operator Commitment System

The essence of the commitment system of the Antimonopoly Law belongs to the agreement of exemption from liability, i.e., if the operator completes the agreement as agreed, it is able to be exempted from punishment by the enforcement agency, but the scope of application is vague and ambiguous, which can easily become an umbrella for the operator's monopolistic acts to be exempted from punishment. The Anti-Monopoly Law does not specify the scope of application of the commitment system, so it can be understood that all four types of monopolistic acts can be subject to the operator's commitment system. This requires a distinction to be made according to the size of the case, the strength of the impact on the market economy, and the size of the victims, so as to avoid the application of the commitment system to all antitrust cases, which leads to the frequent occurrence of malicious commitments and false negotiations, and the abuse of rights by unlawful monopoly operators by any means in order to protect themselves. The commitment system of China's anti-monopoly law is applicable to monopoly cases with simple circumstances and little harm; or cases in which the evidence of the violation is found to be insufficient and difficult to be investigated in a short period of time; or cases in which the investigated party has a strong will and positive cooperation and the application of the system will not harm the society or the legitimate interests of others; except for monopoly cases with serious violations, complexities and huge amounts of money involved.

### 4.2. Standardize the Operator Commitment System Procedures

With regard to the initiation of the commitment system for antitrust operators, it generally includes the following three ways: initiation by the antitrust enforcement agency ex officio, initiation by application of the operator suspected of monopoly, and initiation by application of the operator based on the recommendation of the enforcement agency. The way of initiation of a procedure also marks the status of various subjects in such procedure. The commitment system, as a negotiated way of implementation, should be agreed by both parties, and the fair and reasonable system design concept of the operator's commitment system can be highlighted on an equal basis. During the period of public disclosure, the third party whose rights and interests have been infringed or the competitor can put forward their requirements and opinions to the enforcement agency. The supervision mechanism of the commitment system of our anti-monopoly law is still weak, and it is necessary to analyse the advantages and disadvantages of the hearing procedure through the practices of other countries and regions, combine with the actual situation in China, set up a hearing system, and use the right

of public participation to supervise the practice status of the operator commitment system of our anti-monopoly law.

## 5. Conclusion

In 2016, the NDRC published the "Guidelines for Operator Commitment in Antitrust Cases" (draft for comments) for public consultation. This guideline has comprehensively improved the commitment system, which is a significant progress in the development of the commitment system, but there is no corresponding mechanism for consumer protection and the maintenance of the legitimate rights and interests of third parties, and the restraint on the discretionary power of law enforcement agencies and the punishment for operators not fulfilling their commitments remain unresolved. In addition to the views put forward by the author, there is still a long way to go for the improvement of the antitrust law.

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