

# On the Exemption System in China's Anti-Monopoly Law: Taking the Exemptions of Monopoly Agreements and Concentrations of Undertakings as Examples

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## ABSTRACT

Monopoly is an inevitable result of the high concentration of production in free competition. The Anti-Monopoly Law aims to regulate such a monopolistic state of highly concentrated economic power. However, in order to better develop the socialist market economy and form a modern economic society with both efficiency and fairness, China's Anti-Monopoly Law also has an exemption system, which gives preferential treatment to some monopolistic behaviors of undertakings. Therefore, this paper takes the exemptions of monopoly agreements and concentrations of undertakings as examples to study and explore the characteristics and existing problems of the exemption system in China's Anti-Monopoly Law, and further points out the development direction and improvement measures, hoping to establish a more perfect exemption system.

**KEYWORDS:** *Exemption System; Anti-Monopoly Law; Monopoly Agreement; Concentration of Undertakings*

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## 1. Overview of the Exemption System in China's Anti-Monopoly Law

### 1.1. Concept of the Exemption System in the Anti-Monopoly Law

Monopoly refers to the behavior of undertakings that, in the form of exclusivity or organized joint actions, rely on economic advantages or administrative power to manipulate and control the market, restrict and exclude competition. Our Anti-Monopoly Law is to curb such abnormal competition caused by excessive production concentration. It correctly regulates the production and operation behaviors of undertakings through legal systems, prevents and restricts monopoly, protects the legitimate rights and interests of undertakings and consumers, maintains the normal operation and effective operation of the market, and stabilizes the market competition order. At the same time, the country needs to stimulate the internal driving force and innovation vitality of various enterprises, limit monopoly penalties within a certain range, revitalize economic resources, and ensure the high-quality development of the national economy, so

as to adapt to the trend of economic globalization. Thus, the exemption system came into being.

The exemption system, also known as the exception system of the Anti-Monopoly Law, is an important legal system in the Anti-Monopoly Law. The exemption system mainly means that in certain specific industries or fields, some special monopolistic behaviors and monopolistic states are allowed to exist. Even if the behaviors of undertakings meet the characteristics of monopoly or relevant legal provisions, they can be exempted from liability to a certain extent and will not be investigated and punished. The anti-monopoly legal system and the exemption system have a relationship of generality and particularity. As a common exception, the exemption is an effective supplement and improvement to the Anti-Monopoly Law. At present, most countries in the world have formulated anti-monopoly laws and stipulated specific circumstances of monopoly exemptions, aiming to create a more fair and reasonable market competition

environment and greater social wealth. For example, there are relevant regulations on industry exemptions in the United States, the exemption system in Germany's Act Against Restraints of Competition, and the exemption system in Japan's Anti-Monopoly Act.

## **1.2. Establishment of the Exemption System in China's Anti-Monopoly Law**

### **1.2.1. Objectives and Content**

In the field of competition law, China adopts a separate legislative model for anti-monopoly or anti-restrictive competition and anti-unfair competition. China's Anti-Monopoly Law was included in the legislative plan of the National People's Congress in 1994. After 13 years, in 2007, the Standing Committee of the National People's Congress reviewed and passed the Anti-Monopoly Law of the People's Republic of China. This is an important law that regulates the socialist market economic relations and a great progress in China's socialist legal construction. It is regarded as an economic constitution in the market economy. The legislative purpose of the Anti-Monopoly Law is to regulate monopolistic behaviors in economic activities, prevent and stop monopoly, protect fair market competition, improve economic operation and resource utilization efficiency, safeguard the interests of consumers and other undertakings, and promote the healthy development of the socialist market economy. The exemption system refers to a special legal system that exempts the liability of relevant subjects for behaviors that meet the characteristics of monopoly under certain specific circumstances and conditions. It has characteristics such as particularity and variability.

The exemption system in China's Anti-Monopoly Law mainly includes exemptions for monopoly agreements, concentrations of undertakings, intellectual property rights, agriculture, natural monopoly industries mainly based on public utilities, and other special industries.

### **1.2.2. Legislative Value**

Value orientation refers to the basic value stance and value attitude maintained by a certain subject based on its values when facing or dealing with various contradictory and conflicting relationships. Value orientation also has practical characteristics. Its prominent role is to determine and dominate the value choices of the subject, and then affect the subject itself and the individuals and environment around it. In modern society, the rationalization of value orientation is an important symbol of human progress. Reflected at the legal level, the value orientation of

legislators and the orientation of social needs guide the formulation and implementation of laws.

In the Anti-Monopoly Law, the value orientation directly determines the law's stance and value choices when dealing with social relations, reflecting the value pursuit and goal choices of the Anti-Monopoly Law itself. The value positioning of the exemption system also plays an important role in adjusting and supplementing the value orientation of the Anti-Monopoly Law. The legislative value of China's exemption system is to, as an exception to the application of anti-monopoly, better optimize the allocation of market resources and encourage the enthusiasm of undertakings. On the one hand, it protects the public interests and fair order of society, laying a material foundation for people's happy lives. On the other hand, it promotes the development of science and technology, protects China's economic security, and improves China's comprehensive national strength and competitiveness in the world pattern. Therefore, we must scientifically and rationally position the anti-monopoly exemption system, continuously improve legal provisions, and realize the theoretical and practical values that the exemption system should have.

## **2. Exemptions in Monopoly Agreements**

### **2.1. Monopoly Agreements**

The conclusion of monopoly agreements by undertakings is one of the four types of monopolistic behaviors stipulated in China's Anti-Monopoly Law. Specifically, it refers to agreements, decisions, or other concerted actions reached among undertakings that aim to exclude or restrict competition or actually have the effect of excluding or restricting competition. It is mainly divided into four types: horizontal monopoly agreements, vertical monopoly agreements, monopoly agreements of industry associations, and concerted actions. According to Article 13 of the Anti-Monopoly Law, a horizontal monopoly agreement is a monopoly agreement signed among horizontal undertakings with a competitive relationship, with content such as fixing or changing prices, restricting the quantity of goods, dividing the market, restricting development, and jointly boycotting transactions. According to Article 14, a vertical monopoly agreement, also known as a vertical restraint agreement, is a price-related monopoly agreement reached between upstream and downstream undertakings, such as suppliers and distributors, to fix the resale price of goods to third parties or limit the minimum price. Industry associations are also not allowed to organize the undertakings in their industries to engage in relevant monopoly agreement behaviors. For example, the

price increase organized by the instant noodle association is regulated by the Anti-Monopoly Law. Concerted actions mainly refer to market monopoly behaviors in which undertakings, in order to evade the law, secretly reach an agreement and take consistent actions through implied means.

It can be seen that monopoly agreements have their distinct characteristics. First, the subjects of monopoly agreements are diverse. The signatories can be undertakings, undertakings with a competitive relationship, trading counterparts, or industry associations. Second, monopoly agreements are jointly or jointly implemented. All parties reaching a monopoly agreement must have a conspiracy awareness and, based on this subjective awareness, have objectively implemented behaviors that exclude and restrict the competition of others, undermining the free and fair market competition environment and order, making the legitimate rights and interests of other undertakings and consumers得不到保障, hindering the social market competition mechanism, and impeding the development of the social economy. Therefore, it must be regulated and punished by law.

## **2.2. Exemption System for Monopoly Agreements**

### **2.2.1. Specific Provisions**

China's Anti-Monopoly Law adopts a legislative model of "prohibition + exemption." The exemption system for monopoly agreements means that a monopoly agreement that restricts competition reached among undertakings can be regarded as not violating the provisions of the Anti-Monopoly Law through legal procedures because its beneficial effects in other aspects are greater than the consequences of restricting competition or based on national development considerations. According to Article 15 of the Anti-Monopoly Law, there are six circumstances that can be exempted from monopoly. The first is for the development of new technologies and new products; the second is for the implementation of specialized division of labor to improve product quality; the third is to support the development of small and medium-sized enterprises and enhance their competitiveness; the fourth is to achieve social public interests; the fifth is to alleviate a serious decline in sales volume or obvious overproduction; the sixth is to protect China's foreign trade, as well as other specific circumstances stipulated by laws and the State Council. In addition, the Anti-Monopoly Law also stipulates that if the relevant subjects meet the first five circumstances, they also need to prove that the monopoly agreements they have signed will not seriously endanger the market competition order and can create benefits for consumers.

### **2.2.2. Existing Problems**

There are two problems with the exemption system for monopoly agreements in China's Anti-Monopoly Law. On the one hand, the legal provisions are too detailed. Clear and specific legal provisions are of course an advantage, but being too detailed will lead to fewer circumstances of monopoly exemptions and a narrow scope of application, which is not in line with the actual situation of China's rapid economic development and diverse forms of market competition. Although the law also stipulates a catch-all clause, it is only limited to the provisions of laws and the State Council. There are still many monopoly blind spots in real society that need to be explored and regulated.

On the other hand, at the end of the exemption clauses for monopoly agreements, the burden of proof on relevant undertakings is stipulated. If an undertaking hopes that its specific monopolistic behavior will be exempted, it also needs to prove that its behavior has more advantages than disadvantages, has a legitimate purpose, and will not seriously restrict market competition. However, the Anti-Monopoly Law does not further stipulate the proof standard, proof method, and how to define serious obstruction of market competition and creation of value for consumers and society. This increases the difficulty of proof for undertakings. Under this institutional defect, two consequences will occur. One is to expand the discretionary power of law enforcement agencies and other relevant subjects, which may lead to the abuse of the right to make rulings or the neglect of the exercise of power. The other is that this legal clause will become a dead letter. Because of the incomplete and unclear provisions, it cannot be applied in practice, allowing some undertakings to take advantage of loopholes and unable to effectively regulate the restrictive competition behaviors under monopoly agreements.

## **3. Exemptions in Concentrations of Undertakings**

### **3.1. Concentrations of Undertakings**

Concentrations of undertakings that have or may have the effect of excluding or restricting competition are also one of the monopolistic behaviors stipulated in China's Anti-Monopoly Law. According to Article 20 of the Anti-Monopoly Law, three circumstances, namely, the merger of undertakings, the acquisition of a certain number of voting shares or assets of other undertakings, and the acquisition of control over other undertakings or the ability to have a decisive impact on them, belong to the monopolistic behaviors of concentrations of undertakings. The fundamental reason for the concentration of undertakings is that undertakings seek to enhance and maintain their



market dominance through relevant measures. Therefore, the concentration of undertakings is also a "double-edged sword." While forming economies of scale and enhancing the competitiveness of small and medium-sized enterprises, it will also bring anti-competitive adverse consequences, disrupting the market structure and having an adverse impact on competitors and consumers. Therefore, China's Anti-Monopoly Law does not regulate all concentration behaviors of undertakings but only those that hinder or damage market competition.

In terms of the legal regulation of concentrations of undertakings, China adopts the principle of prior notification. If the concentration of undertakings meets the notification standards stipulated by the State Council in terms of enterprise turnover, etc., it should be promptly reported to the anti-monopoly law enforcement agency of the State Council, and the concentration behavior shall not be carried out without permission. Of course, for concentrations of undertakings that have not reached the notification standards, but based on the facts and evidence collected in accordance with the specified procedures, it shows that the concentration of undertakings has or may have the effect of excluding or restricting competition, the anti-monopoly law enforcement agency of the State Council should also conduct investigations in accordance with the law.

When reviewing the concentration of undertakings, the law enforcement agency needs to consider multiple factors, such as the market share and control power of the undertakings in the relevant market, market concentration, the impact on market access and technological progress, the impact on other undertakings and consumers, and the impact on the development of the national economy, to determine whether to approve the application of the undertakings. For example, in the case of "Coca-Cola's acquisition of Huiyuan," the Ministry of Commerce of China, in accordance with the provisions of the Anti-Monopoly Law, reviewed this concentration behavior of undertakings from the above aspects. It was considered that after the concentration, Coca-Cola would have a dominant position in the carbonated beverage and fruit juice beverage markets, greatly weakening the competitiveness of other relevant undertakings and also harming the legitimate rights and interests of consumers. This concentration had the effect of restricting and excluding competition and would have a greater adverse impact on the healthy development of China's fruit juice beverage industry and the competition order of the relevant market. Moreover, within the specified time, Coca-Cola did not propose

specific plans to eliminate or mitigate the adverse impact. Therefore, the Ministry of Commerce decided to prohibit this concentration of undertakings.

### **3.2. Exemption System for Concentrations of Undertakings**

#### **3.2.1. Specific Provisions**

In China, not all concentrations of undertakings that reach the standards need to be reported. There are also circumstances of exemption from reporting. According to Article 22 of the Anti-Monopoly Law, the mergers of parent-subsidiary companies and sister companies do not need to be reported to the anti-monopoly law enforcement agency of the State Council. This is the exemption system for concentrations of undertakings in China's Anti-Monopoly Law. The law further stipulates that the review results of concentrations of undertakings include three situations: prohibition, unconditional approval, and approval with restrictive conditions. However, if an undertaking can prove that the adverse impact of its concentration behavior on competition is small while the positive impact is large, or it is in line with the public interest, the anti-monopoly law enforcement agency of the State Council may also make a decision not to prohibit the concentration of undertakings. If an undertaking violates the regulations and implements a concentration behavior, the anti-monopoly law enforcement agency should take necessary measures such as ordering it to stop, disposing of assets within a time limit, transferring within a time limit, or fining to restore the state before the concentration.

#### **3.2.2. Existing Problems**

First, the review period specified in China is too long. According to the Anti-Monopoly Law, the preliminary review period for the law enforcement agency to review the concentration of undertakings is 30 days. If it decides to conduct a further review, it can be extended by 90 days. If there are circumstances such as major changes in the situation after the report, the review period can be extended by up to 60 days. During the review period, undertakings are not allowed to implement the concentration behavior. This is obviously not conducive to the development and competition of enterprises in the current big data era. The information society is constantly changing, and business opportunities are fleeting. Undertakings all hope to maximize economic benefits within the scope permitted by law. The current long review period in China will undoubtedly dampen the enthusiasm and competitiveness of enterprises and is not conducive to the healthy development of the socialist market economy.

Second, the prior notification system established for concentrations of undertakings in China is not perfect, and the notification standards are too broad, which has always been criticized by the academic community. According to the relevant guiding opinions of the State Administration for Market Regulation, China's prior notification standards for concentrations of undertakings are mainly based on turnover. However, in my opinion, it is no easy task to effectively maintain the market competition order. The competition behaviors of enterprises in the market environment are complex and diverse. It is obviously not comprehensive enough to determine whether an undertaking has reached the notification standard only through turnover, lacking practicality and rationality.

Third, there is a lack of post-event supervision for exemptions in concentrations of undertakings in China. China mainly adopts a prior notification and prior review system but does not make specific legal provisions for post-event supervision. If an enterprise, whether due to subjective malice or in response to changes in actual needs, implements behaviors that restrict or exclude competition after the concentration, there are no corresponding legal provisions to regulate it. In addition, similar to the exemption system in monopoly agreements, the exemption in concentrations of undertakings also has problems such as an abstract requirement for the burden of proof on undertakings.

#### **4. Improvement of the Exemption System in China's Anti-Monopoly Law**

##### **4.1. Improve the Legal System and Innovate the Law Enforcement Model**

Taking the exemption system for monopoly agreements as an example, we need to appropriately expand the exemption scope for undertakings to reach monopoly agreements. We should make a reasonable expansive interpretation of overly detailed and rigid legal provisions, or modify specific articles into articles on types of exemptions, continuously improve relevant legal systems, correctly define the standards and methods for the burden of proof of undertakings, and make the legal system adapt to social reality. In addition, the anti-monopoly law enforcement agencies of the State Council and other relevant entities should innovate the law enforcement model when permitted by law. This is not only an effective measure to cope with the rapidly changing market competition situation and the complex and diverse monopoly agreement behaviors, but also a response to the reasonable exercise of discretionary power by law enforcement agencies. Relevant departments should, while abiding by the law, flexibly use the discretionary power granted by the exemption system

to grant exemption permits to eligible monopolistic behaviors that are conducive to the development of the market economy, ensure the normal economic activities of undertakings, and improve administrative and judicial efficiency.

Regarding the exemption system for concentrations of undertakings, China can appropriately shorten the review period according to specific circumstances. For undertakings with a low possibility of monopoly and an urgent need for concentration, they can be appropriately given the power to implement the concentration in advance. China also needs to establish clearer and more specific prior notification standards for concentrations of undertakings, and can consider including the factor of market share. At the same time, the Anti-Monopoly Law should clearly define what circumstances fall within the scope of public interests and how to balance the pros and cons of competition. By improving the exemption system, the actual role of anti-monopoly can be effectively exerted.

##### **4.2. Establish an Information Disclosure and Supervision Mechanism for Exemptions**

Monopoly agreements are not only related to the interests of undertakings, but also closely related to the interests of consumers, public interests, and national economic security. Therefore, China should establish an information disclosure platform for monopoly exemptions, promptly publish the review results on the official website of the State Administration for Market Regulation, and publicly disclose the case content and evaluation criteria in detail. By making the law enforcement process transparent, the right to know of consumers and other undertakings can be fully guaranteed, and social fairness and justice can be demonstrated.

On the premise of information disclosure, China also needs to improve the supervision mechanism for monopoly exemptions. Based on the prior review system, a legal system for post-review and supervision should be established. Re-review of concentrations of undertakings that have been exempted and meet certain necessary conditions can ensure the legality and rationality of the concentration behaviors of undertakings through specific and strict rules, make up for the deficiencies of pre-review, form a full-chain supervision and management system, and conform to the competition laws of the economic market.

##### **4.3. Introduce the Competition Mechanism into Special Industries such as Natural Monopolies**

"Natural monopoly", also known as natural oligopoly monopoly, refers to the phenomenon that due to the

scarcity of resources and economies of scale, the large-scale production and operation of certain products and services by a single enterprise is more efficient than that by multiple enterprises simultaneously. For example, industries such as water, electricity, and gas supply, postal services, and telecommunications. Against the backdrop of the current era, we should also introduce the competition mechanism into these natural monopoly industries mainly based on public utilities, stimulate the enthusiasm of undertakings in various industries, and improve the economic efficiency and quality of the entire industry. Of course, we need to correctly distinguish between competitive and non-competitive links in this special industry. On the premise of not harming public interests, we should reasonably grasp the limits of competition, monopoly, and their exemptions. For aspects with competitiveness, we should take the initiative to introduce the competition mechanism, while for non-competitive aspects, the exemption system can be applied. In this way, the exemption system in China's Anti-Monopoly Law can be continuously improved, and the further development of the national economy and socialist legal construction can be promoted.

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