

# Research on Reporting System in the Enforcement Mechanism of Competition Law in China

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**Abstract**—Reporting is the right that the Competition Law grants to private entity to participate in law enforcement. However, due to ineffective enforcement practice of China's Competition Law, there is no provision on the legal status of whistleblower, the substantive rights he enjoys, and the anti-monopoly investigation and litigation procedures. This problem should be solved by clarifying the reporting right of entity through the legal system, establishing the emergency protection system for the safety of the whistleblower, and clearly implementing the reporting reward system. By analyzing the advantages of the reporting system in the enforcement of the Competition Law, this paper solves the problem of information asymmetry between state organs and market entities, helps improve the efficiency of social supervision. It is also a way for citizens to exercise the right of inspection and supervision granted by the Constitution. The reporting system is based more on the law enforcement actions of public enforcement agencies after reporting by private subjects. Only the organic combination of the two can achieve the social goals of the Competition Law.

**Keywords**—*Competition Law; Private reporting; Private enforcement*

## I. LEGAL ANALYSIS ON THE RATIONALITY OF THE REPORTING SYSTEM IN THE ENFORCEMENT OF THE COMPETITION LAW

The establishment of the right to report is essentially the right of inspection and supervision granted by the Constitution. Since the 1980s, the reporting system has played an increasingly important role in various fields such as the economic field, the political field, and the cultural field. According to statistics, in recent years, 80% of the corruption, bribery, malfeasance and other crimes investigated and dealt with by the procuratorial organs come from private reports [1-3]. However, in the field of modern market economy, the reporting system has become an effective way for market subjects to supervise due to its low cost and high efficiency. Article 41 of the Constitution of the People's Republic of China endows citizens with the right of inspection and supervision: "Citizens of the People's Republic of China have the right to make representations, charges or exposures against any state organ or functionary for his or her violation of the law or dereliction of duty, but shall not fabricate or distort facts for false accusations or frame-up." In addition, many laws in China have made detailed explanations on the right to report of private reporting [4-6]. For example, Article 85 of the Criminal Procedure Law of the People's Republic of China stipulates the

rights of whistleblowers. Article 254 of the Criminal Law of the People's Republic of China provides for the criminal liability for retaliation against a whistleblower. In addition, the relevant government departments have issued a number of specific provisions for the reporting system. In the competition law system, Chapter VI of the Anti-Monopoly Law of the People's Republic of China stipulates the procedure of anti-monopoly investigation, and Article 38 provides that: "Any unit or individual has the right to report any suspected monopolistic act to the anti-monopoly law enforcement agency." Paragraph 2 of Article 38 establishes the reporting system, according to which reporting monopolistic acts is a legal right enjoyed by all citizens, and the whistleblower has the right to request the anti-monopoly law enforcement agency to keep it secret [7]. Paragraph 3 of Article 38 of the Anti-Monopoly Law further stipulates that the report shall be in writing and shall provide relevant facts and evidence, and the anti-monopoly law enforcement agency must conduct the necessary investigation. The establishment of the reporting system will undoubtedly help the anti-monopoly law enforcement agency to discover monopolistic behavior, which is also a great progress in the system. According to these two provisions, whistleblowers enjoy a procedural right and, in addition, a negative right to confidentiality. However, the procedural right is very limited, because the anti-monopoly agency has no other compulsory action obligations to the report, and the anti-monopoly agency can even ignore the report of the whistleblower. It can be seen that the legal status of the whistleblower in the Anti-Monopoly Law is quite low.

## II. ADVANTAGES OF THE REPORTING SYSTEM IN THE COMPETITION LAW

### A. *Compensating shortcomings of public enforcement*

In public enforcement, it is necessary to invest huge cost to collect the evidence of violation of offenders and invest specialized equipment and personnel allocation to achieve certain results, and the funds invested are limited, which makes public enforcement more difficult. Moreover, after the law enforcement agencies start the administrative investigation and punishment procedures, in the long process of investigation, the liability of the responsible person, such as criminal liability and civil liability [8-10], may be difficult to pursue over time.

However, private reporting can overcome the shortcomings of public enforcement. For private subjects who report and

complain, the only work they need to complete is to report the relevant information to the law enforcement agencies. And the state organ greatly reduces its own workload and launches investigation after receiving the report, breaking the deadlock of information asymmetry between the state organ and market subjects. [1] In this way, law enforcement agencies limited by resources can concentrate relatively limited resources to deal with cases of universal significance to maintain the order of market competition. It is a low-cost and efficient way of law enforcement. It promotes the rational and optimized allocation of resources, which not only maximizes the efficiency of market subjects, but also maximizes the overall efficiency of the market economy.

#### *B. Combining the advantages of private power and public power*

Private power has the function of compensating for shortcomings of public enforcement in the above contents, while public power, centering on national coercive force, can guarantee the stability of market order. As a typical manifestation of private power participating in public law enforcement, the reporting system helps to dilute social dissatisfaction with public law enforcement and save public resources; On the other hand, it maintains a balance between public law enforcement and private lawsuits, cooperating with and complementing each other. [2] The private reporting system is the way that public influence promotes private power to participate in social supervision. It not only reduces the proportion of state input and improves the enforcement efficiency of law enforcement personnel, but also realizes the fairness and justice of the whole society and put an end to monopoly, which is beneficial to the market and consumers, thus achieving a win-win situation for both public and private.

#### *C. Incentives for whistleblowers*

First of all, the private reporting system has a wide range of subjects. Whether it is the competitor of the competitive actor, the community of interest within the cartel or the general consumer, it reports to the relevant institutions for the infringement of their own legitimate interests or for the effective remedy after the infringement. Private reporting by private individuals is more positive than public enforcement because it is directly and significantly reflected in the protection and compensation of its own economic interests. Secondly, after the reporting agency receives the report, all the remaining work is completed by the state agency, and the whistleblower only needs to wait for the investigation result. Such a system design has no costs and risks for the whistleblower, but can achieve the same results as other private practices. In the end, the whistleblower not only has no cost to pay, but also can ask the law enforcement agencies that receive the report to give a certain monetary reward. In the United States or Europe, some countries implement the fine-sharing system, and private subjects can exchange illegal information for a lot of money in a short time, [3] which greatly stimulates the enthusiasm of private subjects to participate in the implementation of the Competition Law.

#### *D. Deterrent effect on offenders*

The deterrent effect on offenders is to make potential offenders fear the possibility and adverse consequences of the exposure of illegal acts by reporting, so as to achieve the result and effect of self-restraint in engaging in illegal acts. The enforcement of the Competition Law itself is not to detect and sanction more illegal acts of unfair competition and monopoly, but to save the implementation cost of Competition Law by detecting and sanctioning illegal acts, achieving deterrence against potential offenders, thereby reducing the occurrence of unfair competition and monopoly. Private subject, as an important subject in the market, is "all-pervasive" in the fight against unfair competition and monopoly, and is an important social supervision subject. Due to the flow of information generated by reports, the supervision power is decentralized, and the originally hidden offenders may be exposed at any time, thus it is possible to restrain the illegal impulse. In the reporting system, the state is linked to countless unspecified private forces. From the state of government work without supervision and powerless surveillance to the state of cooperation that integrates public and private forces, it has shaped the social structure of "justice has long arms" and formed a strong deterrent effect.

### III. ROUTE OBSTACLES OF THE REPORTING SYSTEM IN THE ENFORCEMENT OF COMPETITION LAW

#### *A. The Competition Law is not clear on the rights of whistleblowers*

First, regarding substantive rights, Article 5 of the Anti-Unfair Competition Law provides a principled provision regarding the right of private supervision, while Article 38 of the Anti-Monopoly Law grants the right of private reporting. However, there is no distinction between the whistleblower and other related subjects, such as victims of monopolistic behavior and monopolistic operators.

Second, regarding procedural rights, Chapter 6 of the Anti-Monopoly Law is about the anti-monopoly investigation procedure, but the anti-monopoly filing procedure lacks detailed regulations. First of all, It does not clearly stipulate the time limit for the initiation of the investigation procedure after the law enforcement agency receives the report materials, the time limit for verification, whether the whistleblower should be replied to, etc., that is, the law enforcement agencies can ignore the report after receiving, because there is no specific legal provisions for binding. Secondly, the legal liability for inaction by law enforcement agencies is not clearly defined. Since law enforcement agencies have the obligation to undertake investigations, they should assume the legal liability for unfinished obligations. This is an important way to urge them to improve their work efficiency and save social resources. [4] Finally, the openness and impartiality of the anti-monopoly investigation process is not clearly defined. Only when the investigation process is made public can the whistleblower know the progress of the case at any time and give feedback to all subjects of market competition, which is more conducive to social supervision.

### *B. The security guarantee for the whistleblower is imperfect*

For private individuals, the benefits obtained from the exercise of the right to report are less than those obtained by the state and society, which reflects the responsibility of the whistleblower to the state and society. [5] Therefore, the state has the obligation to guarantee the personal safety of the whistleblower. Only China's current Criminal Law stipulates sanctions for framing or retaliating against whistle-blowers. For the crime of retaliation and frame-ups stipulated in Article 254 of the Criminal Law, the subject of crime is limited to the staff of state organs. In addition, the crime of retaliating against witnesses stipulated in Article 308 of the Criminal Law also severely punishes the illegal and criminal acts of retaliating and framing. Often in the Competition Law, there are many cases reported by whistleblowers that involve a relatively large amount of information. However, China's law has not yet formed a perfect system in the security guarantee system of whistleblowers, and it is likely to be retaliated by stakeholders. It is bound to affect the confidence of whistleblowers in reporting.

### *C. The reward system for reporting is not yet clear*

The reward system for reporting has been gradually improved in recent years. In particular, the Supreme People's Procuratorate issued the Provisions of the People's Procuratorate on the Work of Reporting Crimes in 2009. It not only specifies in detail the acceptance of reporting clues, the management of reporting clues, the examination of reporting clues, the reply of real-name reporting, the protection of reporting, accountability and so on in nine chapters and 65 articles, but also makes special provisions on rewards for reporting (see Article 58). However, in the field of competition law, especially the anti-monopoly law, there are no specific provisions on reporting, let alone a clear reward system for reporting. The important content of the reward system for reporting crimes should include the subject of the reward, the criteria and principles for the amount of reward, the way of issuing monetary reward, and the source of the amount of reward. However, this series of content only exists in the discussion of scholars, and unfortunately does not exist in the specific provisions of the competition law.

## IV. SOLUTIONS TO OBSTACLES OF THE REPORTING SYSTEM IN THE ENFORCEMENT OF COMPETITION LAW

### *A. Clarify the rights of subjects in the reporting system*

The reporting system is scattered in various articles of various departments, and the substantive rights and procedural rights of the whistleblower is also briefly described, which lacks unity and coordination. Therefore, it is necessary to improve the specific provisions of the reporting system in the competition law. Distinguish between whistleblowers and victims of illegal acts, operators and interested parties are in different roles and have different legal status, and the relationship between rights and obligations are also different. Second, clearly define the powers and obligations of law enforcement agencies, such as the time limit for verification, the criteria for verification, the procedural requirements for registration and filing, the time and manner of responding to

whistleblowers, etc.. After law enforcement agencies launch the investigation mechanism, it is also required to stipulate whether the process of investigation should be publicized to the market competitors and the mode of publication, the criteria for the identification of the investigation results, etc.. Third, formulate rights remedy measures. For example, if operators subject to anti-monopoly investigation refuse to accept the decision, to which organs should they appeal to safeguard their rights and interests. What measures should whistleblowers take and which organs should they seek help from when their own interests are infringed by reporting activities? [6]

### *B. Establish an emergency protection system for the safety of whistleblowers*

The system is divided into two aspects. In the first aspect, establish a system for resetting the identity of whistleblowers. The identity reset is only suitable for those who have been assessed and determined to have reported and investigated (or will investigate) major cases. This is a reference to the protection system for witnesses in European countries and Hong Kong. The main content of the current Witness Protection Ordinance in Hong Kong is "to create a new identity for the witness". In the United States, the "Marshall Plan" refers to the resettlement and issuance of new identification by the office of the Marshall Program. The emphasis of the system is on prevention and the establishment of complete pre-prevention measures to effectively prevent some adverse outcomes from occurring. The aim is to protect the whistleblower, his or her parents and other close relationships from danger [7].

In the second aspect, establish the whistleblower emergency rescue system. When the whistleblower encounters sudden retaliation and seeks help from any national law enforcement agency, the law enforcement agency shall not refuse. [8] In addition, the whistleblower shall have the right to apply to the reporting and accepting organ for urging the public security organs to provide effective emergency protection. If the public security organs fail to provide assistance in time and are found to be slack in law enforcement, the whistleblower may request compensation for the losses suffered.

### *C. Clarify the reward system for reporting*

The purpose of the system is to encourage the public to exercise the right to report according to law and create an atmosphere of social justice. When designing the reward system, the following aspects should be paid attention to:

In the first aspect, regarding the amount of bonuses, the bonus setting should make the bonus amount explicit as far as possible, but it is not suitable to announce the specific bonus amount to the public. This is because, under the incentive of generous bonuses, offering rewards for information will lead to the abuse of the right to report, breed professional information reporting groups to collect information by illegal means such as candid photography and tracking, lead to the alienation of obtaining evidence, and finally seriously infringe the legitimate rights and interests of citizens. [9] When setting the amount of bonuses, the principle of reward according to contribution should be implemented, because the more valuable information

is provided to the law enforcer, the greater the loss to the offender and the greater the risk to the information provider. According to the principle of consistent risk and return, the return should reflect the risk, and the return should be proportional to the risk. Otherwise, the whistleblower will not risk providing effective information to law enforcement agencies.

The second aspect, regarding the source of bonuses, because China's current sources of reported reward funds are different, it is easy to cause disputes between the reporters and the public authorities on the bonus issue. A special source of bonus should be set up. As for the source of funds, we can learn from the quality of anti-monopoly supervision of law-abiding people in the United States, [10] which is the implementation method of the fine-sharing system. The funds are directly derived from the fines of the operators.

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