

A Legal Analysis on Establishment of a Fair Competition Review Mechanism in China

— A case study based on Opinions for Establishing a Fair Competition Review

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Abstract—China is a country undergoing gradual transition from planning economy to market economy. Administrative monopoly is an urgent problem that has to be solved in China's market economic development. The *Opinions for Establishing a Fair Competition Review Mechanism in the Market System* (Hereinafter referred as *The Opinions*) issued by the State Council determine the fair competition audit program in China preliminarily. The document points out enforcement regulations for *The Opinions* are in still in formulation. This paper aims to provide references for the formulation of enforcement regulations. *The Opinions* are analyzed by document analysis and specific contents of fair competition review mechanism in China based on *The Opinions* are extracted. Section 2 proposes two shortcomings of this mechanism. Section 3 puts forward two solutions to set up independent basic and professional fair competition review departments and regional tour economic court. Shortcomings of the review mechanism are overcome. Original system design of a two-level economic court is proposed in the suggestion to setting up the regional economic courts in China.

Keywords—fair competition review mechanism; administrative monopoly; market economy; fair and free competition

I. CHINA'S FAIR COMPETITION REVIEW MECHANISM DETERMINED BY *THE OPINIONS*

The Opinions stipulate basic norms and general rules on fair competition review mechanism. Objects, means, standard of review as well as exceptional cases are explicitly stipulated. Although implementation rules and relevant local policies are still in compilation, the issuing of this document symbolizes the formal establishment of China's fair competition review mechanism.

China's fair competition review mechanism determines four review standards which contain 18 items and stipulates two general provisions¹. Different from foreign settings, China's standards didn't use definition-type general standards.

¹ "Without supports of laws and regulations, all regions and departments are prohibited to formulate policy measures reducing legitimate interests or increasing obligations of market subjects. They shall not violate Anti monopoly Law of the People's Republic of China to formulate policy measures that excluding and restricting competition contents." *State Council's Opinions on for Establishing a Fair Competition Review Mechanism in the Market System*, National Document: [2016] No.34.

They list prohibitive measures from "damage results", which is conducive to practical operation in my opinion. China is a country undergoing gradual transition from planning economy. The large governmental thinking becomes a potential inertia and definition-type general standards might cause difficult matching between provisions and actual operation. In fact, governmental behaviors which violate fair competition still continue and exploit an advantage due to concept and professional knowledge background. On the one hand, listing standards and general provisions are beneficial to be executed quickly and reduce matching obstacles. On the other hand, all policies and measures that violate laws and regulations and hinder competition are included into the review range of *The Opinions*.

The object of review is administrative monopoly. Administrative monopoly means that organs with administrative power and organizations with authorized rights on public affair management by laws and regulations formulate laws, regulations, normative documents and policy measures that hinder competition and destroy fundamental market regulation, thus resulting in government-dominated monopoly and destroying the market environment for fair and free competition.[1]

The subject of review is administrative organizations, that is, policy makers according to the principle of "whoever made it is responsible for cleaning". The way of review is "Self-examination". Competent organs examine public policies they made according to review standards. Public policies which haven't been examined shall not be implemented since the issuing date of *The Opinions*. Published and implemented public policies shall be canceled or abolished by steps and groups according to the method of "ordered stock cleaning" while maintaining existing public orders.

The Supervise remedial means of review are introduce external supervision and the evaluation mechanism by the third party. External supervision requires disclosure of reviewed document, review process and review results to interested parties and the society for public supervision. *The Opinions* adopts the "encouragement" attitude to the third party evaluation mechanism. These indicate that the supervision mode is powerless and remedial means are not formulated explicitly. The third party evaluation mechanism is "encouraged", indicating that it can be either adopted or not and is not enlisted into the necessary review programs.

II. LIMITATIONS

A. *Local grassroots organizations lack of professional review ability.*

Fair competition review is a judge of whether the public policy has the effect of hindering fair and free competition. Although detailed evaluation standards have been formulated, it can't be denied that this is an activity with high professional requirements. The scheme of "Determinations of Functions, Organizations and Authorized Strength"² full reflects the high requirements of anti-monopoly investigation on professional qualification. The enforcement organs of anti-monopoly laws are only equipped by provincial government, but couldn't offer guidance and technological supports to government review of cities and counties. These grassroots departments make "self-examination" to public policies they made and screen "unqualified products" of impediment to competition, which require reviewers to master the competition law accurately and be familiar with economic knowledge and practical experiences of market operation. [2] These reviewers have no relevant knowledge and relevant practical experience in the beginning of early recruitment into government sectors.

Currently, China's fair competition review mechanism in the market system is facing with limitations in talents and professional skills. Promotion of the mechanism may not reach the expectation in a long time in future and suffer programming risks and shortages.

B. *Limitations of self-examination*

China's fair competition review mechanism is centered at "self-examination" and assisted by "external supervision". Most of existing objects of review are published and implemented public policies. Such "product recall" is recalled and reviewed by makers themselves, which has administrative convenience and high efficiency in early implementation stage of this mechanism.

Meanwhile, "self-treatment" requires authorized organs courageous and able to "cut themselves". There are abundant sectors with economic management and governmental intervention becomes a universal phenomenon. At the same time, one document is not limited within the region where the issued organ lies in. It is universal for inferior agencies to implement economic construction in local regions according to official documents of superior agencies. Facing with the situation that "a slight move in one part may affect the situation as a whole", whether authorized agencies can take the initiative to investigate and abolish infections? Since it is common to conceal one's fault for fear of criticism even under external supervision system, will self-examine end up as a form due to profit driving?

At the beginning of document and policy formulation, although regional protection destroys the large market in China, it will bring economic booming in the short run. Attracted by government performance examination,

²There are only three enforcement organs of anti-monopoly laws at provincial or higher level. The anti-monopoly enforcement system at the city level or lower has no relevant authorities.

competent authorities and madders still might abuse administrative powers or hinder competition in a more concealed manner. Government failure still exists and the review mechanism becomes a mere formality. The review mechanism centered at "self-examination" has inherent defects. *The Opinions* stipulate that only public policies which the maker believed meeting the specifications and having no impediment to free competition can be released and implemented. Different from those of Korea[3], it has no provisions on reexamination by professional enforcement organs of anti-monopoly, which are difficult to convince the public. Absent monitoring will cause abuse of administrative powers in this review mechanism. *The Opinions* pointed out on "ordered stock cleaning". However, starting time of stock cleaning, cleaning rate as well as determination and evaluation of "modified preferential policies" all leave a great space for abuse of administrative power.

In a word, the review mechanism centered at "self-examination" fails to stick to the original intention and goal of *The Opinions* completely due to lack of supervision and internal subject and object reasons. It neither can response to different stages of market development nor be developed independently in different stages.

III. SUGGESTIONS

A. *Set up an independent and professional grassroots department for fair competition review*

Inadequate grassroots local review capability and shortages of "self-examination" might be causes of the program "blank". To address these two problems, the author suggested to establishing a professional grassroots review department independent from government sectors and responsible to local People's Congress directly. "The enforcement organs of fair competition policy review require both professional knowledge and management experiences." [4]

To offset inadequate professional knowledge and management experiences of original formulating agencies on anti-monopoly review, the new authorized review organ must has at least one member with 5 years or more working experiences in anti-monopoly and other key staff have knowledge on competition laws and economical theories. Attention must be paid to improve business capacity and professional knowledge reserves of reviewers.

To offset shortages of "self-examination", the new authorized departments must be independent from government. If the department receives financial supports from the government and is subordinated to government management on administrative system, it is against independent review. The department shall be responsible to People's Congress directly.

Setting of department must be stick to the basic level. At present, there are only three enforcement organs of anti-monopoly in China and all of them are provincial level. The phenomenon of insufficient basic professional skills must be changed. Since objects of review in *The Opinions* involve public policies of cities and counties, corresponding working departments at city and county levels must be equipped. This

study mentions the “new authorized review departments” rather than “new departments” for considerations to construction cost and efficiency of administrative organs. It is not necessary to set up a new sector, but can choose relevant departments from judiciary authorities or legislative authorities, such as Financial and Economic Committee. Professional level of members can be improved by staff mobilization.

B. Set up regional tour economic court

There are economic courts in EU and Russia.[5] Specialized judicial review guarantee of economic courts have important significance to perfect China’s fair competition review mechanism. At present, China’s fair competition review mechanism starts from self-examination and ends with self-examination, that is, administrative examination. External supervision and the third party evaluation mechanism are only suggested, but haven’t been enlisted in the standard review program. Obviously, self-examination has significant shortages and lack of judicial review. Nevertheless, setting top-down economic courts claim high host and long period and will waste judicial resources for the moment. Based on current situations of China, the author suggested to setting up a regional tour economic court.

A two-level economic court shall be set from the perspective of juridical status. The primary level is the central economic court and is subordinated to the Supreme Court, forming the supreme economic court in the Supreme Court. In the national court structure, economic court is only equipped in the Supreme Court. The second level is the regional tour economic court. Viewed from development status of market economic in China, it is necessary to set up economic courts. On the one hand, the regional tour economic court meets judicial demands of special economic cases. On the other hand, it avoids waste of judicial resources. One economic court is set in one large region. The size of this region is determined according to economic development degree and economic cases. Legal supply is determined by legal demands.

There’s no consensus on division of economic cases. Economic court was set up in the past in order to adapt to rapid economic development in China. In actual operation, the economic court mainly dealt with civil cases like contract disputes, but involved few economic cases. The economic court was abolished several years ago due to the “Broad Civil Law”³ [6] pattern of China’s court system. Therefore, scope of accepting cases, lawsuit content and lawsuit subjects of new economic courts will be discussed one by one in the following text.

Viewed from scope of accepting cases, economic court must contain fair competition review content, but is not limited within this. Economic court in Russia deals with all cases

³ According to requirements of Five-year Reform Outline of People’s Court, the judicial reform is to divide criminal, civil and administrative cases and adjudication setting explicitly to cope with criminal, civil and administrative lawsuits by setting the called “Broad Civil Law” pattern. However, many scholars criticized such reform. Some believed that the judicial reform of “Broad Civil Law” pattern is a directional mistake.

involving economic disputes, including cases in the sense of economic law and some civil and administrative cases. Such division conflicts with China’s division of “civil, criminal and administrative cases” in exiting court structure, causing administration overlap and wasting judicial resources. Therefore, we shall discuss definition of simple economic cases. Except for common anti-improper cases and anti-monopoly cases, cases involved in the national macroscopic regulation belong to economic cases in my opinion. These are evaluated according to consensus on core components of economic laws in China’s circle of economic laws, including market regulation laws and macroscopic regulation laws.

Lawsuit content covers informal documents of administrative organs and normative documents violating the law of higher level and legitimate interest, thus increasing justiciability of laws and expanding scope and paths of economic rights and benefit insurance of market subjects. Therefore, the economic laws have justiciability. Since enterprises and other organizations are authorized with rights by government agencies to raise objections to economic field, which is conducive to solve relationship among central government, local government and enterprises, and promote establishment and development of market economic system better.

For lawsuit subjects, the interested party suffering infringement of legal economic rights and benefits can be the accuser. Besides, the supreme inspection agency and other state agencies who believe that the informal documents and some clauses of normative documents violate provisions of laws of higher level and cause infringement or possible infringement to legal rights and interests of market subjects have the right to initiate legal proceedings to the economic court, which strengthens the lawsuit supervision. The case is known as public welfare lawsuit in the economic law field. Operating individuals or groups take legal actions with consideration to individual benefits and lawsuit cost. If the policy influences economic benefits of individuals slightly or the compensated benefits is smaller than the lawsuit cost and economic efficiency of time consumption, individuals wouldn’t take legal actions even the policy influences market environment for fair competition. This can be offset by lawsuit of the supreme inspection agency and other state agencies. With considerations to overall social benefits, they will initiate a public prosecution in order to maintain a national uniform market, promote free accessing to market of operators, and create an active and free competition environment.

IV. CONCLUSION

The fair competition review mechanism which is established preliminarily based on The Opinions has two limitations. Firstly, local review departments are lack of professional investigation abilities. Secondly, self-review has certain limitations. These two limitations might make China’s fair competition review mechanism just a programmed document. It is suggested to setting up basic professional fair competition review department to solve the first limitation, including composition of investigators, endowing some “old agencies” especial investigation power rather than setting up “new agencies”, and direct subordination to the local people’s

congress. Besides, it is recommended to setting up a two-level economic court to solve the second limitation, including levels and legal status, acceptance scope, lawsuit content and lawsuit subjects.

REFERENCES

- [1] Yong Huang, Baiding Wu and Zhanjiang Zhang, "Implementation of fair competition review mechanism under the perspective of competition policy," *Practice Theory and Practices*, 2016-04-25(In Chinese).
- [2] Guangliang Ye, "Fair competition review mechanism: uniform government regulation and lubricant of market laws," *China's Price Monitoring and Anti-monopoly*, 2016-09-20(In Chinese).
- [3] Jian Wang, "Characteristics of China's fair competition review mechanism and optimization suggestions," *Competition Laws and Policy Comments*, 2016-10-31(In Chinese).
- [4] Jing Jin, "EU Path of Fair Competition Review Mechanism," *China's Price Monitoring and Anti-monopoly*, 2016-02-20(In Chinese)
- [5] Jin Sun and Kaixi Sun, "Preliminarily discussion on China's fair competition review subject mechanism," *The Third Session of 30 BBS of Economic Laws: Memoir of "Implementation of Fair Competition Review Mechanism and Deepen Reform of State-owned Enterprises"*, 2016-12-05(In Chinese).
- [6] Jichun Shi and Hong Sun, "Broad Civil Law", *Political and Legal Forum*, vol.5, 2002(In Chinese).