

The Special Measures Taken During Administrative Monopoly Investigation in China

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ABSTRACT: China's market economy is based on state power guidance, so the administrative agencies may abuse their public power excluding or restricting market competitions that cause administrative monopoly. The special investigative measures should be taken in administrative monopoly investigation on account of its public power background. Mandatory interview with executive officers and mandatory reporting of the administrative agencies are the mainly special measures during those investigative procedures, while on-site investigations need to be avoided. Unlike ordinary measures, these two special measures are mandatory which means if the investigating authority or its chief executive rejected report or interview who will be admonished by his superior even punished by crime of dereliction. Recently the Chinese People's Congress Standing Committee is studying how to revise the antitrust law, we suggest to add those special mandatory measures in the future Chinese Antitrust law.

KEYWORDS: investigation, measures, administrative monopoly, Antitrust Law

Introduction

Administrative monopoly has been existed in China for a long time, dating to planned economy times. The government agencies and the authorized public organization use their power to excluding or restricting market competitions in order to acquire regional or industry interests, which has seriously blocked the economic development in China for a long time. China has begun its market economic reform since 1994, but the reform and open policy of China still cannot eliminate the administrative monopoly which even harm to political reform. The cause of those is complicated (Zhang 2011, 56). There is a long history of feudal bureaucracy in the country where the government agencies controlled everything of the society. No rule of law but bureaucracy had been deeply infected the people's thoughts. State enterprises were popular in some business area.

All those elements laid a deep foundation of administrative monopoly in China. How to control and limit the administrative monopoly has been a very hot potato present to the Chinese government now. At August 1st. 2008, Chinese Antitrust Law came into force, and the fifth chapter specially regulates the content of administrative monopoly, which indicated the legal measures to regulate administrative monopoly. (The antitrust law of the People's Republic of China, Fifth chapter (article 32nd to 37th) provides the abuse of administrative power to exclude and restrict the competition for which causes administrative monopoly). The regulation in Chinese Antitrust Law is helpful to stop the abuse of administrative power caused monopoly, however, the law neglected the procedural of monopoly investigation. How to investigate administrative monopoly when they got the clues in some case will be a thorny problem the investigative authorities should face. Dawn Raid or on-site inspection, the measures which often used in economic monopoly investigation are failure to comply with the theory of administrative law in China, so they need special measures to take during administrative monopoly investigation.

Administrative Monopoly Characteristics

When we discuss the measures should be taken in the administrative monopoly investigation procedure, we should first have a look of the characteristics of administrative monopoly in China. The most important differences of administrative monopoly from the usual economic monopoly are the public power background which constructed the base of administrative monopoly (Wang, Wang 2007, 31). According to the Law of Chinese Antitrust, there are four situations in administrative monopoly.

(1) Designated purchase: Refers to the compulsory purchase or use of goods produced by a designated operator. Sometimes the government agencies including official enterprises or organizations of official nature command the buyers to order the designated goods or services. The buyers lost their rights to choices the commodities and the producer lost their rights of market competition.

(2) Obstruction of the free flow of goods: Refers to the use of various discriminatory administrative means by government agencies (including official enterprises or organizations of official nature) to impede the free circulation of goods between regions. Often, some local government departments develop special rules for the entry of certain commodities into the region, such as testing standards, special quality requirements, etc., which prevent outside goods from flowing into the region.

(3) Restrictions or exclusion of nonlocal operators: Refers to the use of discriminatory and unjust means by government agencies (including official enterprises or organizations of official nature) to exclude or restrict the participation of nonlocal operators in local bid activities, and to exclude or restrict the nonlocal operators to invest or establish branches in local region.

(4) Compulsory operator monopoly: Refers to the government agencies (including official enterprises or organizations of official nature) to use administrative power to reach an agreement with the main enterprises in some industry field to violate the rules of fair competition in market.

From the theory of administrative law the above four situations of administrative monopoly in China can also be divided into four administrative behavior types.

(1) Abstract administrative action: Refer to the government agencies restricting or excluding fair market competition by the means of formulating red head documents which is the policy or rule in economic field. The unlawful abstract administrative monopoly may cause larger harm because they usually have universal applicability in local regions. In practice, many administrative monopoly behaviors are implemented by the mode of abstract red head documents, but they are very difficult to redress for there is no independent judicial review system in China. The efficacy way to redress that abstract administrative action is to report superior government to review and revoke them.

(2) Concrete administrative action: Refer to the government agencies abusing power to command specific enterprises to do something or forbid doing something. Concrete administrative monopoly behavior is often implemented by mode of abstractive monopoly action and it could be redressed through administrative litigation system in China.

(3) Administrative nonfeasance: Refer to government agencies to take passive administrative action or nonfeasance in view of their own interests, which lead to administrative monopoly. Administrative nonfeasance often is good concealing and difficult to prove its character of abusing administrative power because of the complex administrative responsibility system. A typical example is the government's delay in responding to an application for a new product test, which will hind the new product flowing into the market and attending the market competition.

(4) Joint administrative action: Refer to the administrative agencies and the enterprises jointly make the exclusion and restricting competition by means of agreement and so on. In reality, many administrative monopolies are accomplished by the collaboration of administrative agencies and specific business owners. Often these enterprises are big enterprises or public enterprises that are specially supported by the government.

A common nature of these acts is the abuse of public power, which is different from the private nature of economic monopoly behaviors, and the public power nature of administrative monopoly determines that its antitrust investigation should have to be clearly discussed according to administrative law theories. Who has the power to investigate those abuses of executive power? In theory, it is necessary to demonstrate that the administrative supervision and being supervised relationship between the antitrust enforcement authorities and the administrative monopoly agencies (including official organs or organizations of a public power nature) are legally established. The antitrust enforcement authority is the state administrative law enforcement agency, which is called the administrative subject in administrative law theory, and has the administrative power to

manage the state and social public affairs. The subjects of administrative monopoly, that is, the administrative organs or social organizations under investigation because of the abuse of administrative power to restrict market competition, are also the administrators of state or social affairs in certain fields. So can antitrust investigation enforcement authorities, as administrative subjects, have power to investigate other administrative subjects with other areas of administrative power?

According to the basic theory of Chinese administrative law, the administrative subject is essentially a dynamic theoretical concept, that is, only when the administrative organ or social organization with public service functions exercises the legal administrative power, can it become the administrative subject. The administrative subjects manage the state and social affairs will be restricted by articles of Chinese administrative law for legality and rationality. When administrative organs or social organizations with public service functions do not exercise the statutory functions conferred upon them by laws or regulations, these organs cannot become administrative subjects, but only static administrative organs or social organizations in general, which are subjects to the supervision of other administrative subjects in their daily work. In other words, when any administrative organ exercises executive power in its statutory terms of reference, it is the administrative subject and has the status of manager, but when it does not act within its own executive area, it is just a common organ and needs to be managed by other administrative agencies with management powers. (Hu 2015, 65) Therefore, the antitrust law enforcement authorities in the scope of their statutory duties have the power to investigate whether the other administrative organs (including organizations with the nature of public service functions) having abused its statutory power to cause administrative monopoly.

The special measures taken during administrative investigation

Administrative monopoly has the background of public power, which different from economic monopoly, so the investigative procedures including the investigative jurisdiction evidence measures and other procedural stuff need to be designed in line with the rules of administrative law. Firstly, it is necessary to improve the jurisdictional level of antitrust investigations. The administrative monopoly which is clearly caused by abuse of public power cannot be investigated by the antitrust enforcement authorities below the being investigated agencies because of their lower administrative rank might block their investigation. For example, to investigate the agencies belonging to provincial government must be the state administrative authority.

Secondly, it is necessary to establish self-revocation system among the processing of administrative monopoly investigation. When an antitrust enforcement authority investigates an administrative monopoly, which caused by an illegal administrative warrant or an administrative order, it shall require the administrative agency to revoke or annul the administrative warrant or administrative order on their own. If the administrative agency does not revoke or annul by itself, the antitrust enforcement authority shall submit its illegal behavior to the government it belongs. The government to which it belongs has the duty to revoke or annul the warrant or order immediately.

Thirdly, it is necessary to establish superior revocation system among the processing of administrative monopoly investigation. When an antitrust enforcement authority investigates an administrative monopoly caused by enacted an inappropriate or illegal administrative provision, it shall submit the illegal administrative provision to the government to which it belongs for annulment or revocation, and if the government to which it belongs does not revoke or declare the illegal provision null within the limited time, the antitrust enforcement authority may submit the illegal provision to its superior antitrust enforcement authority, who shall submit the illegal provision to the government which is the superior government above the government to which the provision maker belongs. If the superior government above the government to which the provision maker belongs doesn't null or revoke the illegal provision within the limited time either, the State Council at the highest government must perform the duty to annul or revoke the illegal provision.

Fourthly, it is necessary to take mandatory reporting measure among the processing of administrative monopoly investigation. The investigation of administrative monopoly may adopt the compulsory reporting system, that is, when the administrative agencies or public service organizations were suspected of engaging in monopolistic behaviors should report the relevant matters to the antitrust enforcement authorities on the initial phase of investigation. The reported statement should be a formal official statement on which includes the purpose, action method, legal basis of suspected monopoly behaviors.

Fifthly, it is necessary to take mandatory interview measure among the processing of administrative monopoly investigation. Since the administrative rank of antitrust enforcement authorities may not be higher than that of the administrative agencies under investigation, the law must establish a compulsory interview system, that is, the head of the administrative agency under investigation must, when notified by the antitrust enforcement authorities, go to the antitrust law enforcement authorities to receive interviews with anti-investigators, provide the necessary information on related matters.

In Chinese government agency system, the investigation authority and the investigated agency have the common national interests, and are co-led by the highest state government. Their actions both represent the government interests. Their property and personnel are also derived from the government. So it is difficult to investigate the administrative monopoly with the traditional enforcement measures, such as on-site inspection, seal of places, and seizure of relevant information, goods and equipment, which are commonly applicable to the investigation of economic monopolies. The above points fourth and fifth are the special compulsory measures advised in this paper to take during administrative monopoly investigation procedure, which may be the sole way for antitrust enforcement authorities to solve the interference brought by administrative agencies during the procedure of administrative monopoly investigation because of their government organ status.

Conclusion

Through the above analysis, we can draw the conclusion that although the antitrust investigation authority is a kind of administrative organ in the system of government, its nature and function are the same as other government organs that cause administrative monopoly, but it still has the power to investigate whether the government organs with other state powers have abused their powers to have administrative monopoly behaviors, and to impose penalties for such monopolistic acts. Administrative monopoly has different characteristics from the general economic monopoly. In China, a country with a bureaucratic tradition, the administrative monopoly characteristics will appear more prominent, more harmful so in order to maintain the order of market economy and standardize the operation of government power, the legislator must amend the existing provisions of China's Antitrust Law. We propose to increase the special investigative procedure of administrative monopoly in the future revision of antitrust law, and establish the special compulsory investigative measures in administrative monopoly investigation procedure.

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