



Legal Regulation of Administrative Monopoly As Viewed from Chinese Antimonopoly Law

Ling Wang

Law school of Shandong University of Technology

Zibo 255049, Shandong, China

Abstract

The administrative monopoly breaks the principle of justice, and has large harm to the society. The special chapter in Chinese Antimonopoly Law regulates the contents and corresponding legal responsibilities of administrative monopoly, but the law still has some deficiencies. The Chinese Antimonopoly Law should be perfected from increasing the operation property, confirming the comprehensive legal responsibilities, confirming the law enforcement agency of anti-administrative monopoly, expanding the range of legal regulation and establishing the judicial review system.

Keywords: Chinese Antimonopoly Law, Administrative monopoly, Regulation

In china, the administrative monopoly mainly means the behaviors that administrative subjects harm the market competition and destroy socialism market economy order by the administrative power. The administrative monopoly initially belongs to economic monopoly, and its harm is more than economic monopoly, and it destroys the principle of justice, and induces the occurrence of unfair competition and monopoly in special market, and it harms the benefits of most market subjects, and largely wastes effective resources, and blocks the establishment and perfection of the socialism market competition mechanism. Therefore, it should seek solution and regulation methods from various approaches for the administrative monopoly. Only in this way, the obstacle of Chinese economic system reform and the development of market economy can be removed, which can promote the quick development of economy, enhance the living level of people, improve the total survival environment, and realize the harmony and stability of the society.

1. Regulation of administrative monopoly in Chinese Antimonopoly Law

For the regulation of administrative monopoly, there are many researches and discussions among Chinese scholars, and the system reform view and the legal regulation view are representative views. The system reform view thinks that the administrative monopoly is the product of system, and it can be completely solved by deepening the economic system reform and the political system reform, and the legal measure is hard to solve the problem of administrative monopoly. The central content of the legal regulation view is that the administrative monopoly is very harmful, and it must be forbidden mainly by the laws. The legal regulation view is also can be divided into two factions, and one is to mainly use the administrative law to regulate the administrative monopoly, and the other thinks that Chinese Antimonopoly Law is the main power to regulate the administrative monopoly.

Because Chinese economic and political system reform is a gradual process which needs quite long-term endeavors, and this transfer needs large patients and willpowers, so the administrative monopoly has been a very hot potato at present, and it has seriously blocked the economic development of China with large social harms, and it even blocks the economic and political system reforms which is being in China, so it must be forbidden as soon as possible, or else, the large destroying function on the development of Chinese economy will be hard to image. Therefore, it is too ideal to only depend on the system reform to regulate the administrative monopoly, and the effect is not obvious. In the present national situation, law is the feasible measure to regulate the administrative monopoly. Because the administrative monopoly roots in economic monopoly and has many characters and harms of economic monopoly, more and more legal scholars want to utilize Chinese Antimonopoly Law to regulate the administrative monopoly. "It is the characteristic of Chinese Antimonopoly Law to take the administrative monopoly as the control object of antimonopoly, and it seems a necessary selection according to the national situation, because the administrative monopoly forming in traditional planned economy system is impossible to be removed by administrative measure, and it can only be solved by the legal measure, i.e. the Antimonopoly Law (Zhang, 1993, P.357)".

At August 1 of 2008, Chinese Antimonopoly Law became effective in people's expectations, and the fifth chapter specially regulates the content of administrative monopoly, and the articles from 32 to 37 respectively generalize the elimination of administrative power abuse and the behaviors of competition limitation, and completely regulate the concrete represent form of administrative monopoly, and article 51 regulates corresponding legal responsibilities. Thus, the regulation of administrative monopoly is first regulated in law, and the legal approach is the main measure to govern the administrative monopoly, which indicated that the legal regulation view had been adopted finally. The contents of

administrative monopoly in the Antimonopoly Law embodies the advancement of Chinese legal theory study and legislation technology, and it showed the decision of Chinese legislators to standardize the enforcement of administrative power and stop the abuse of administrative power. Of course, law is only one most important measure to regulate the administrative monopoly, and the reasonable and effective reforms in polity and economy also have very important meanings for the regulation of administrative monopoly behaviors.

2. Deficiencies of administrative monopoly regulation in Chinese Antimonopoly Law

Relative regulations about administrative monopoly in Chinese Antimonopoly Law are active and helpful exploration to regulate administrative monopoly behaviors by law, and corresponding legal regulations are deeply meaningful and influencing to eliminate the bad influences of administrative monopoly, promote the fair competition, establish normal market order, and guarantee the ordered development of market economy. However, whether relative corresponding systems or the articles in the chapter 5 still have some deficiencies, and the anti-administrative monopoly much still remains to be done.

2.1 Regulations are too fundamental to operate

The articles in the chapter 5 of Chinese Antimonopoly Law are some principled articles lacking in operation, which make the judiciary and law enforcement agencies are difficult to distinguish. And many abstract concepts such as what extent can achieve administrative monopoly, and what is that the abuse of administrative power to block the free circulation of commodities can not be defined clearly in only five legal articles, so the catchwords of anti-administrative monopoly appear incapable. At August 1 of 2008, the first day when Chinese Antimonopoly Law was implemented, Chinese State Administration of Quality Supervision, Inspection and Quarantine encountered the first case about Chinese Antimonopoly Law. However, in the expectation of ten thousands of people, this case came to an untimely end, and though the court adopted the article that the limitation of actions was over to evade this case, but it can be supposed that if the court can not evade it by relative reasons, what is the result? Was the behavior that Chinese State Administration of Quality Supervision forced to push the electric supervision code business of Citic Guoan Information Technology Co., Ltd with its own shares in 69 kinds of product an administrative monopoly behavior? The result might reach the same goal by different routes. And relative regulations about the current antimonopoly law endow law-officers too much discretion to make them to “go after profits and avoid disadvantages”.

2.2 The regulations about the legal responsibility of administrative monopoly are deficient

Chinese Antimonopoly Law regulates the civil, administrative and criminal responsibilities assumed by managers who implement monopoly behaviors in detail, but for the legal responsibility of the behaviors of administrative monopoly, only the article 51 of Chinese Antimonopoly Law regulates that “If administrative power by government and organizations to which laws and regulations grant rights to administer public issues abuse administrative power, to eliminate or restrict competition, shall be ordered by superior authorities to correct themselves; people in direct charge and people directly involved shall be imposed administrative punishment. The antimonopoly execution authorities shall supply suggestion to related superior authorities to handle according to law.” Many administrative responsibilities such as “shall be ordered by superior authorities to correct themselves; people in direct charge and people directly involved shall be imposed administrative punishment” form different legal results of different subjects to implement monopoly behaviors, so people begin to suspect the justice of laws, which virtually helps the administrative subjects to implement administrative monopoly, and the deterrent force will be reduced largely. At the same time, though the responsibility of Chinese Antimonopoly Law is too lighter and becomes a mere formality, and the law is not obeyed and strictly enforced, so the administrative monopoly remains incessant after repeated prohibition.

2.3 The jurisdiction of antimonopoly law enforcement institution is limited

The definition about the anti-administrative monopoly law enforcement agency in the fifty first article of Chinese Antimonopoly Law is still blurry, and on the one hand, the supervision procedures should be independently established to restrain laws by this law, and on the other hand, the law regulates that the administrative monopoly should be dominated by superior authorities, and the article that “If administrative power by government and organizations to which laws and regulations grant rights to administer public issues abuse administrative power, to eliminate or restrict competition will be handled by another regulation, shall be applied to another regulation” has left large space for the rights of relative departments and supervision institutions, which has eliminated the jurisdiction of anti-administrative monopoly law enforcement agent to the administrative monopoly. At the same time, it is not reasonable to handle the behaviors of administrative monopoly by the superior authority of lawbreaker for the legal responsibilities. The superior authority is not a specific authority, because the authorities implementing administrative monopoly are different, and divided policies come from various sources, and the law enforcement has be decomposed to various functional authorities, which will easily induce repeat law enforcements or blank law enforcement. Furthermore, the superior authority is not the authority to specially dominate administrative monopoly, or the special judicial authority, and it just is common law enforcement authority (Wang, 2007). Staffs in superior authority may not have strong antimonopoly

consciousness, and both the cognition and treatment result all lack in authorities, and they also lack in the ability to treat the cases about administrative monopoly.

2.4 The range of administrative monopoly regulation is too narrow

The article 33 of Chinese Antimonopoly Law limits the object of administrative monopoly in the domain of goods trade. "Administrative power by government and organizations to which laws and regulations grant rights to administer public issues shall not abuse administrative power to carry out following conducts, to hinder the free flow of the commodities between regions". In fact, the character of the transfer of modern economic industry structure is that the proportion of the service industry is enhanced increasingly, and if the object of the anti-administrative monopoly is only limited in the domain of goods trade, the domain which is bigger and occupies more proportion will be abandoned out of the supervision of Chinese Antimonopoly Law. Though the article 34 forbids and excludes that exterior managers participate in local bid invitation and bidding activities, and the article 35 forbids and excludes that exterior managers invest or establish branches including the domain of service trade in local region, but there are many items in the service industry out of these two ranges, and the legal regulation about administrative monopoly behaviors in the domain of service industry is still blank in Chinese Antimonopoly Law.

2.5 Regulation measures for abstract administrative monopoly are deficient

Though Chinese Antimonopoly Law has prohibitive regulations about the behaviors of abstract administrative monopoly, but it regulates nothing about legal responsibility and relief ways. If the illegal behavior of abstract administration can not be redressed in time (including the mode of administrative lawsuit) in practice, it will always induce larger harm (Huang, 2001). Many administrative monopoly behaviors in practice are implemented by the mode of abstract administrative monopoly behavior, and even certain concrete administrative monopoly behavior is always done according to administrative rules, but these rules and byelaws must be examined and approved, recorded or agreed by superior people's governments or charge authorities when they are constituted, and when they are dissented, the judgment right is always in original authorities which will be hard to deny the rules and byelaws what they constituted. In addition, most countries adopt the judicial review system to treat the abstract administrative behavior by the mode of inefficacy or nonexistence, but this system in Chinese Antimonopoly Law is deficient, so the illegal behaviors of administrative subject is hard to be redressed.

3. Perfection of administrative monopoly regulation in Chinese Antimonopoly Law

Above aspects about the legal regulation for the administrative monopoly in Chinese Antimonopoly Law all need to be perfected and simple opinions are offered as follows.

3.1 Using foreign mature experiences as references and increasing the operation feature of Chinese Antimonopoly Law

Law enforcement should be executed according to laws, and that means the clear description of legal concepts is the premise to exactly enforce laws, and the specific description of legal rules is the base to enforce laws strictly, but the problems about administrative monopoly in Chinese Antimonopoly are very complex, and some legal concepts have not been defined, and detailed legal standards and concrete legal responsibility should be further confirmed. Therefore, the content of the chapter 5 in Chinese Antimonopoly Law can be regarded as the principled legal rules to regulate administrative monopoly, and the explanation of general principles is a complex and hard task, just as when US modified the transverse merger directory in the Antimonopoly Law, it added the word of "efficiency judgment", and the American Competition Bureau used 13000 words to explain it. It is necessary to explain the criterion of general rules, and only to constitute suited rules as soon as possibly, and explain the principled articles in detail, the operation character of Chinese Antimonopoly Law can be added, and the uniform law enforcement standards can be established to effectively regulate the administrative monopoly behaviors by law.

3.2 Establishing various administrative monopoly legal responsibility systems

The past laws in China only regulated administrative monopoly by administrative responsibility, but ignored the function of civil responsibility and criminal responsibility. To more effectively regulate administrative monopoly, the particularity of administrative monopoly should be considered fully, and constitute comprehensive legal responsibilities including administrative responsibility, civil responsibility and criminal responsibility according to the principle of legal responsibility, proper responsibility and own responsibility. When maintaining special competitors' benefits, the behavior of administrative monopoly harms other competitors' competition right at the same time, and it belongs to a kind of tort, and it should assume corresponding civil responsibility, and though the administrative responsibility includes the system of administrative compensation, but the range of administrative compensation is limited, and it doesn't include the administrative compensation. And to better protect relative parties' legal rights, Chinese Antimonopoly Law should specially regulate that victims of administrative monopoly have rights to institute civil actions, and obtain corresponding civil damages. At the same time, the behavior of administrative monopoly has large social harm, and it should be adjusted by the criminal law when it seriously harms the society, and furthermore, the social harm extent achieved by administrative monopoly is far bigger than some economic crimes and occupational

crimes regulated in current criminal laws, so the measure of criminal punishment is necessary to be adopted.

3.3 Confirming independent antimonopoly law enforcement institutions and perfect the law enforcement system

The legal construction in China is to solve practical problems in the final analysis, and the setup of antimonopoly law enforcement institution is not exceptional. Except to solve economic monopoly, Chinese antimonopoly law enforcement institution should treat more complex issues of administrative monopoly. And as the socialism country where the market economy system was established initially, Chinese political economy system has its own peculiarity, so the setup of antimonopoly law enforcement institution must be linked with Chinese politics, economy and legal system, and only in this way, the “rejection reaction” of system “grafting” can be overcome effectively, and when designing one system, advanced experiences and national situations can not be ignored (Liu, 2005, P.151).

The antimonopoly law enforcement institution should be highly independent. To keep the independent is the life line of antimonopoly law enforcement institution, and the meaning of antimonopoly law, that is also the successful experience to effectively execute antimonopoly laws in most countries. The administrative monopoly means the abuse of administrative power, so the legal regulation about administrative monopoly must be independent with general administrative departments, and it should be balanced with the administrative power of administrative monopoly. And antimonopoly law enforcement institution must have high specialty character, and the antimonopoly law enforcement is not simple market management, and it comes down to the contents about economy, law and management, so it is a complex project, which decides the personnel composing and basic conditions of antimonopoly law enforcement institutions. For example, the “Monopoly Committee” of Germany is composed by five experts from public economics, business administration, social policy, technology and economics (Lv, 2004, P.14). Professional organization system is the important factor to guarantee the effective operation of law enforcement institution.

Independent and professional antimonopoly institution should be endowed by extensive administrative power, quasi-legislative power and quasi-judicial power, and that is the need to regulate administrative monopoly in China and the requirement to treat the development of international antimonopoly.

3.4 Combining the generalization mode with the listing mode to specially limit the range of administrative monopoly

Because Chinese Antimonopoly Law defines the range of administrative monopoly by the listing mode, and it is mainly limited in the domain of goods trade, which induces that the regulation range of administrative monopoly in China is too narrow and lacks in corresponding flexibility. Using foreign relative experiences as references, China should adopt the mode combining the generalization mode with the listing mode to define the range of administrative monopoly.

On the one hand, the main representative form of administrative monopoly should be listed specially, and the concrete regulations to regulate administrative monopoly behaviors in the domain of servicing industry should be added. And according to these rules, the antimonopoly law enforcement institutions should quickly judge representative administrative monopoly behaviors, and predict its legal result and increase the efficiency. On the other hand, according to relative authority data, the range of the industry about the national economy and the people’s livelihood should be specially defined, and the monopoly of these industries should be protected by laws, and the protective range and degree should also be defined, and for the behavior to illegally expand the monopoly range, corresponding punishment measures should be regulated.

3.5 Judicial relief approach to perfect anti-administrative monopoly

According to article 12 in Chinese Administrative Procedure Law, abstract administrative behavior has not the character of justiciability, i.e. the abstract administrative behavior is not the object of judicial review, which doesn’t accord with relative obligation of judicial review in WTO when China entered into WTO. At present, Chinese Antimonopoly Law had brought the abstract administrative behavior into the adjusted range, but it is just the first step, and Chinese Antimonopoly Law should advance with the times and develop continually, and establish judicial review system about corresponding abstract administrative behavior, so the behavior of abstract administrative monopoly can be regulated according to law. Matching with the review system after the event, the review before the event about the abstract administrative monopoly is very necessary, i.e. Chinese antimonopoly law enforcement institution should have the review right before the event for the administrative rules, regulations and other standard documents about the competition issued by all administrative departments including State Department, and if it thinks that relative rules block the fair competition of market, it can block the establishment and implementation of them.

Through above analysis, the legal regulation of administrative monopoly behaviors in China just starts, and the relative rules about the administrative monopoly behaviors in Chinese Antimonopoly Law needs to be further perfected and crystallized, and the legal responsibilities about the administrative monopoly behaviors and the jurisdiction of law enforcement institution need to be further confirmed, and the regulation range of administration monopoly needs to be further expanded, and corresponding juridical relief approaches need to be gradually established. At the same time, the system reforms in the economic and political domain need to be further deepened, and the continual perfection of system reform can essentially reduce and stop the happening of administrative monopoly behaviors, and both the

system reform and the legal regulation need to be strengthened, which is the essential way to solve the problem of administrative monopoly.

References

Huang, Xin & Zhou, Yun. (2001). A Study on Administrative Monopolization and Anti-monopolization Legislation. *Chinese Legal Science*. No.3.

Liu, Ningyuan. (2005). *Study on Chinese and Foreign Antimonopoly Law Implementation Systems*. Beijing: Beijing University Press. P.151.

Lv, Mingyu. (2004). *A Study of Competition Law System*. Zhengzhou: Zhengzhou University Press. P.14.

Wang, Xiaohua. (2007). Challenging the Draft Chinese Anti-monopoly Law. *Journal of Shanghai Jiaotong University (Philosophy and Social Sciences)*. No.1.

Zhang, Shouwen & Yu, Lei. (1993). *Market Economy and New Economy Law*. Beijing: Beijing University Press. P.357.