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An Issue Neglected in the Revision of China's Anti-Monopoly Law: How to Connect with the Anti-Unfair Competition Law?

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Abstract: In order to improve the business environment and optimize the legal system, Chinese legislators have been accelerating the revision of the Anti-Unfair Competition Law and Anti-Monopoly Law in the past two years. Among them, the Anti-Unfair Competition Law has been revised in 2019, and the Anti-Monopoly Law will also be revised in 2022. However, this law leaves a very difficult problem, that is, when the two basic competition laws are applied to regulate some kind of unlawful competition, such as low-price dumping and abuse of comparative advantage, it may lead to normal joinder institutional predicament. Therefore, so as to solve this problem, this paper believes that the general provisions of the Anti-Unfair Competition Law should be applied in the future based on the evaluation of the legitimacy of competition behaviors and on the basis of respecting the target value and legitimate reasons of the Anti-Monopoly Law.

1. Introduction

Anti-unfair competition law and Anti-monopoly law have the same goal: to protect free and fair competition of the market. Meanwhile, these two laws also form the two pillars of competition law. The main value of the anti-unfair competition Law is to establish a code of act for business operators, prohibit unfair competition, put the market competition into the track of promoting the overall interests of society, and safeguard the legitimate rights and interests of honest business operators. The value goal of the anti-monopoly law is to protect the efficiency of competition, with the main pursuit of realizing social public interests, and its focus is on the overall situation of market competition. Therefore, how to promote the connection between these two competition laws has become an issue that needs further exploration. Just as some German scholars believe that under the framework of the concept of competition law, the relationship between anti-monopoly law and anti-unfair competition law is crucial. From the draft amendments to the "Anti-Monopoly Law" for consultation (the "Consultation Draft") published by The Chinese State Administration for Market Regulation (“SAMR”) on January 2, 2020, we can find that the institutional interface between the two subsystems of competition law is clearly not gotten the due attention.

2. Concurrence of Rules between Competition Laws

Monopoly is the result of highly intense competition, and is often the goal and inevitable result of unfair competition. Once monopoly is formed, it will restrict and inhibit the development of competition, resulting in stronger unfair competition, stimulating and intensifying unfair competition. On the other hand, unfair competition behavior may worsen competition, and then produce monopoly, there exists transformation and causality relationship between them. Therefore, unfair competition and monopoly are often combined. It can be said that they are two aspects of a problem, both of which hinder competition. An enterprise's unfair competition behavior often imposes a certain degree of restriction on the competition freedom of other enterprises; conversely, an enterprise's illegal restriction of competition freedom will also constitute a certain degree of unfair competition for other enterprises. This is the practical basis for the existence of concurrence rules in the anti-unfair competition law and anti-monopoly law.

The revision of China's anti-unfair competition law in 2019 only removes the obvious concurrence of regulatory provisions with the anti-monopoly law, which was formed based on historical reasons. However, in terms of theory and rules, the revised competition law still have the following two types of concurrence: one is that a certain act meet the requirements of the anti-monopoly law and the anti-unfair competition law at the same time, the problem caused by this situation is how to choose the applicable law for the concurrence of right of claim; second, a certain act, such as the abuse of comparative advantage, does not fully meet the requirements of the anti-monopoly law, but it complies with the elements of general clause of the unfair competition law, and could it be regulated by that general clause? From a global perspective, some countries and regions choose a combined legislative model of competition law, and some countries choose a separate legislative model of competition law, therefore, their system designs are also different in dealing with this key issue.

3. Disposal Ideas from Typical Country and Region

Monopoly is the result of highly intense competition, and is often the goal and inevitable result of unfair competition. Once monopoly is formed, it will restrict and inhibit the development of competition, resulting in stronger unfair competition, stimulating and intensifying unfair competition. On the other hand, unfair competition behavior may worsen competition, and then produce monopoly, there exists transformation and causality relationship between them. Therefore, unfair competition and monopoly are often combined. It can be said that they are two aspects of a problem, both of which hinder competition. An enterprise's unfair competition behavior often imposes a certain degree of restriction on the competition freedom of other enterprises; conversely, an enterprise's illegal restriction of competition freedom will also constitute a certain degree of unfair competition for other enterprises. This is the practical basis for the existence of concurrence rules in the anti-unfair competition law and anti-monopoly law.

3.1. Germany: Recognizing Concurrence of Right of Claim and Imposing Strict Restrictions

The Act against Restraints of Competition of Germany contains provisions prohibiting obstruction: An abuse exists in particular if a dominant undertaking as a supplier or purchaser of a certain type of goods or commercial services directly or indirectly impedes another undertaking in an “unfair” manner or directly or indirectly treats another undertaking (Article 19, paragraph 2); Undertakings with superior market power in relation to small and medium-sized competitors may not abuse their market position to impede such competitors directly or indirectly in an “unfair manner (Article 20, paragraph 3); Undertakings and associations of undertakings may not request that another

undertaking or other associations of undertakings refuse to supply to or purchase from certain undertakings, with the intention of “unfairly” impeding these undertakings (Article 21, paragraph 1). It is clear that all of the above terms require “unfair” manner or intention, while the German "Anti-Unfair Competition Law" stipulates that "unfair commercial practices shall be illegal" (Article 3, paragraph 1). Here, "unfair" has become an important legal concept connecting the two competition laws and is traditionally interpreted as the violation of good customs.

In dealing with above concurrence of rules, the German Federal Court has recognized the concurrence of right of claim, that is to say, when a certain act satisfies both the requirements of restrictive competition and unfair competition, the parties may seek the protection of any law. In addition, if the act does not satisfy the requirements for restrictive competition but meets the requirements for unfair competition, the parties may seek protection under the Anti-Unfair Competition Law, and the German Federal Court has applied the Anti-Unfair Competition Law in some such cases. However, according to the mainstream view of the German academic community, such application of the law is allowed only if there are special circumstances based on impropriety. In that case, two conditions must be met: the relevant facts are not considered in the constituent elements of the act against restraints of competition and their consideration according to the rules cannot be denied. As for whether this is the case needs to be determined through the interpretation of the act against restraints of competition.

3.2. The Taiwan Region: Recognizing Supplementary Principle Relationship and Imposing Strict Restrictions

Different from germany, the Taiwan Region unifies anti-unfair competition rules and anti-monopoly rules into a Fair Trading Act where Chapter 2 (Article 7 to 20) regulates monopoly act, and Chapter 3 (Article 21 to 25) regulates unfair competition act. It is worth noting that the Article 25 stipulates : “Except as otherwise stipulated in this law, the business operators shall not engage in any other acts of bullying or obvious unfairness that may affect the order of transactions” which regared as Fair Trading Act’s general clause, not only for unfair competition act, after revised in 2005. Meanwhile, the Fair Trade Commission and academic mainstream of Taiwan Reigion believe that Articles 7 to 24 of the Fair Trading Act are specific prohibitions for competition act, and can also be said to be specific cases of general clause derived from Article 25. Therefore, they do not agree that there exists legal concurrence relationship between general and special rules, but there is a relationship of supplementary principles. In other words, Articles 7 to 24 do not exclude the application of Article 25, it’s just that in terms of invoking rules, if there are specific prohibitions for reference, there is no need to invoke Article 25 which only provide supplement relief. However, there is still the possibility of rules concurrence between the monopoly acts stipulated in Chapter 2 and the unfair competition acts stipulated in Chapter 3, but the common general clause just play a complementary rather than a parallel role. At the same time, they also emphasized that the application of the general clause should consider the justifications and legislative objectives of the two types of act.

Corresponding to the above processing mode, the China's theoretical and practical circles have not reached a clear consensus on the connection between the two competition laws. In the current two basic laws of competition in China, is there such an interface and what are specific applicable rules?

4. The Role of the General Clause in System Convergence

4.1. Legal Gaps vs Legal Dilemma

It is worth noting that regarding the legislative issues between the basic competition laws of China, some chinese scholars have proposed the theory of legal gaps, because they think that a business act may be difficult to meet the regulatory conditions of the anti-monopoly law, and it is also difficult to get adjusted by the anti-unfair competition law. For example, they believe that the lack of regulatory provisions for abusing the comparative advantage position act is legal gap in China's anti-unfair competition law and anti-monopoly law. But in fact, under the circumstances of having a general clause, the mainstream of the German academic community believes that the general clause still belongs to the scope of legal interpretation, not a legal gap. The reason is that even though the general clause has its abstraction and uncertainty, but it is finally stipulated, it cannot be said that it has not made a legal order, and this is precisely the difference with the legal gaps. It was also just like Ronald M.Dworkin ever emphasized that “in the absence of clear rules and principles that can be applied, it does not represent a legal gap, but judicial dilemma in law”.[1]

Under the mode of separate legislation of China’s basic competition law, Chinese scholars always emphasize the difference between the two competition laws. Therefore, they are accustomed to denying the possibility of their relationship from a macro perspective, rather than judging whether a business act conforms to the composition from the micro perspective, and believe that act of abusing of comparative advantage cannot be regulated under the framework of Chinese competition law. But in fact, in terms of the abuse of comparative advantage, some countries and regions have already embodied this act as a type of unfair competition or restricting competition. At the same time, because China's anti-unfair competition law has general clause, it is not essentially a problem of legal gaps, but the legal difficulties or rules of concurrence under certain circumstances where the prohibition of one business act is not specified.

4.2. "Law-Abiding Principle" Newly Added to China's Anti-Unfair Competition Law

"Law-abiding principle" is the only basic principle added to the amendment of the Anti-Unfair Competition Law, and the increase in this basic principle is mainly due to the solicitation and feedback of public opinions.[3] To a certain extent, the existing information cannot prove that the legislative achievements are the result of legislators' deliberations or perseverance, but it leaves enough room for imagination to regulate other illegal acts. Looking specifically at its legislative background, at the time when the Anti-Unfair Competition Law was enacted, although a lot of the basic principles (mainly Articles 4 and 7) in the General Principles of Civil Law were absorbed, it did not include Article 6 of the General Rules of Civil Law "Civil activities must abide by the law. If the law does not provide, they should abide by the national policy." As for the reason for introducing the law-abiding principle in this amendment, some scholars interpreted it as the Supreme People’ s Court of China once pointed out that “in a market economy environment, anyone can compete with anyone else as long as they do not violate the law”, and it highlights the "law-abiding principle" as one of the criteria for judging the legitimacy of competitive acts.[2] Of course, no matter whether it is intentional or unintentional, or what the reasons are, the law-abiding principle is a code of conduct applicable to all social citizens, which is particularly emphasized in this revision of the Anti-Unfair Competition Law , and is also carried out in the formulation of the "General Principles of Civil Law", therefore, the specific content and significance of the specification are indeed worthy of further study, especially its impact on the handling of competition issues deserves attention.

According to the logic of system interpretation, the term "violating the provisions of this law" in the general clause should also cover the content of "law-abiding principle". Since the terms "law" (Article 2, paragraph 1) and "this law"(Article 2, paragraph 2) have been adopted before and after, then the term "violating the provisions of this law" refers to the legal stipulations should not be limited to this law, and the scope of "this law" has been extended to "law", which also means that from the perspective of legal interpretation, the evaluation scope of "this law" in the determination of unfair competition is not limited to "Anti-Unfair Competition Law". However, such a logical interpretation is only popular among a few scholars, and there is still a lack of in-depth theoretical research and specific practice in China. From a legislative perspective, the law-abiding principle should be regulated and interpreted from the perspective of prohibitive norms. Regarding the content of the law-abiding principle established by this amendment, some scholars interpreted it as "requires the business operators to respect the law, trust the law, abide by the law, engage in production and operation activities according to the law, and protect their own legitimate rights and interests according to the law." However, this is a positive interpretation of the law-abiding principle, and the interpretation actually has the suspicion of expanding the scope of application of the law-abiding principle, that is, it adds the moral burden of market subjects to "respect the law and trust the law" and the behavior burden of "maintaining rights according to law". At the same time, it is worth noting that in the formulation of this "General Principles of Civil Law", the legislator has modified the "civil activities must comply with the law" stipulated in the "General Principles of Civil Law" to "civil subjects engaged in civil activities, not to violate the law." The reason is that, in the field of private law, absence of legal prohibition means freedom, therefore, it is not appropriate to stipulate that "civil activities should abide by the law." Similarly, in the field of market competition, it also emphasizes freedom and fairness of competition, which means that if the law does not prohibit one act, and business operater can implement it. In summary, interpreting the law-abiding principles of market subjects from the perspective of prohibitive norms is in conformity with legal principles, and also has a declarative meaning for guaranteeing freedom of competition.

5. Concurrence of Rules Between Competition Laws

5.1. Return to the Basic Paradigm for the Evaluation of the Legitimacy of Competitive Act

The law-abiding principle of the "Anti-Unfair Competition Law" cannot be one of the legal basis for the invalidation of civil legal acts as the "prohibition of violation of law" principle stipulated in the "General Principles of Civil Law". The former is more like a declaration of value in legislation. However, some scholars have put forward some special application paths for "law-abiding principles" from different perspectives, including "considering violations of other laws as a violation of the principle of good faith and recognized business ethics" or "the violations can be presumed It harms the interests of consumers, other market participants or competitors", the essence of which is to take violations of the law as proof of a certain standard of legitimacy. At the same time, some Chinese scholars have borrowed from the German legislative model before amending the law, believing that this article should be added to the provisions of China's anti-unfair competition law for specific unfair competition acts.[4] But in fact, China and Germany have different legislative models and relief settings. The German anti-unfair competition law provides that the purpose of this article is largely based on the complementary consideration of legal remedies, that is, on the one hand, the remedies for violations of the business act law are mostly designed with administrative responsibilities, and on the other hand, the main remedy for parties who have been subjected to anti-unfair competition act are civil remedies. Therefore, combining the two laws will not have the problem of repeated sanctions, and can also achieve its legal purpose and effect.

The above issues are obviously not fully established in China. Although the general clause of China’s Unfair Competition Law do not set administrative responsibilities and there is no problem of repeated sanctions, the law does not give competitor groups, consumer groups, or industrial and commercial associations, handicraft association the rights of civil remedies. As for the right of non-action by competitors, the right to exclude obstruction claims and the right to claim damages, German law also requires that the violation constitutes significant damage to rights and interests. Therefore, this issue can also be resolved through tort relief. Absolutly, if one business act complies with the elements of the unfair competition act of the Chinese Anti-Unfair Competition Act, competitors can also seek civil remedies accordingly. At the same time, expanding the general clause of regarding market unlawful acts as unfair competition acts will also raise some legal issues, including how to determine? And how to prevent "escaping" to the general clause of the new law? etc.[5] This was also often criticized in German jurisprudence with varying degrees of leniency. Therefore, German scholars also bluntly said that compared with the situation in China, the type of "unlawful acts" are more important in the practice of anti-unfair competition law in Germany.[6] In summary, whether it is based on the analysis of the legislative purpose or from the perspective of China's legal system, the above-mentioned "proof relationship" beyond the legislative expressions should not be particularly emphasized or justified, but should be based on the purpose and essence of maintaining market competition order, and return to the basic paradigm of the evaluation of the unfair competition acts.

5.2. Respect the Goals, Values and Justifiable Reasons of Anti-monopoly Laws

Based on legislative intent and reality, any business act violation or inadequate violation of anti-monopoly law is not certainly recognized as unfair competition act, but if it is consistent with the general clause or specific clause of anti-unfair competition law, the anti-unfair competition law doubtlessly has room for adjustment and application. This is mainly due to the fact that on the one hand, there is no clear legal exclusion clause between the two laws in terms of legislative technology, on the other hand, it is also in line with the realization of the legislative objectives of the two competition laws to jointly protect fair and free competition. However, it is worth noting that because the general clause of China’s Anti-Unfair Competition Law have corresponding restrictions on the applicable subject and its authority, the party’s seeking civil remedies for the general clause means that they have given up administrative relief, which is also in line with the guidance and spirit of strengthening the private law relief of anti-unfair competition law. Compared with this, the administrative relief of the anti-monopoly law is more powerful with the more stringent application conditions, but the civil liability between two laws is not much different, therefore, this may stimulate competitors to seek relief from anti-unfair competition laws. But at the same time, it should be noted that giving up or losing the relief of the antitrust law does not mean escaping the constraints of the antit-monopoly law, when applying anti-unfair competition rules to judge the legitimacy of competitive acts, it is also necessary to take into account the goals, values and justifible reasons of anti-monoploy law.

6. Breakthroughs and Prospects

The amendment of the anti-monopoly law should deal not only with unclear or misleading regulations, but also with the connection with the anti-unfair competition law. Regarding the issue of convergence, it should be made clear in the amendment of the anti-monopoly law that there exists concurrence of rules between the anti-monopoly law and the anti-unfair competition law, and the judiciary should be given the right to flexibly use the general clause of the anti-unfair

competition law and the justifible reasons of the anti-monopoly law to examine the legitimacy of business acts. If combining two competition laws into one competition code is also one of the options in the future, then the general clause will play a complementary role in the convergence of the two laws.

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