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主 論 文 の 要 旨

論文題目

Establishing Law Enforcement Mechanism to Control
Anti-Competitive Government Conduct in China(中国における競争を制限する行政行為に関する諸規制の執行
メカニズムの構造)

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論 文 内 容 の 要 旨

This dissertation explores on the topic of controlling government restraints on competition in China. Market competition is the essential mechanism to improve the economic performance of a market-economy and open business opportunities to its citizens while reducing the cost of goods and services for consumers. The restraints on competition could stem from private entities and government agencies as well. China, as a developing and transition country, faces a prevalent and severe competition issue of government restraints. Actually, Chinese competition law has adopted prohibitive provisions against anti-competitive government conducts. However, the competition law with those prohibitive provisions infamously lacks any enforcement mechanism. This results in the ineffectiveness, and the competition law is described as “a tiger without teeth” when facing government abusive intervention in the market. In this regards, this dissertation aims to propose a tailored enforcement mechanism for China to address the competition issue concerning government restraints.

This dissertation consists of six chapters, and applies the research

methodology of empirical and comparative study. Chapter I gives a whole picture of the research problem and explains the research motivation. Chapter II provides a comprehensive background information on the historical development and status quo of the legal framework against anti-competitive government conduct in China. The current framework comprises three components: prohibitive provisions in Anti-Monopoly Law, the administrative litigation by private entities, and the fair competition review mechanism. This chapter examines the substance, the practical performance, and the weaknesses of each component. Additionally, by analyzing the basic legal relationship caused by anti-competitive government conduct, this chapter identifies the prominent drawback existing in the current framework among various weaknesses in each component, that is the competition authority has not played an active role in countering government restraints.

Competition advocacy and law enforcement are the two fundamental functions of the competition authority to fulfill its mandate of ensuring and promoting market competition. Advocacy is considered to be the primary, if not the only, the approach to combat government restraints by the leading international competition organizations. Chapter III illustrates the advocacy's definition, rationale, differences from law enforcement, and exemplifies its operation with the model of United States' advocacy programs. However, under the dichotomy of advocacy and enforcement, the current framework in China is of advocacy in essence. Taking the abusive government intervention and the ineffective control into consideration, this chapter reveals that primarily, or just, relying on advocacy cannot effectively address the government restraints issue in China. In this regard, this chapter proposes a new direction for China, that of establishing law

enforcement.

In order to demonstrate the necessity and feasibility of establishing law enforcement in China, Chapter IV adopts an empirical study of 99 cases concluded by the competition authority in the past ten years, and examines a comparative study on the regulatory frameworks of European Union and Russia. This empirical study counts the case number in each year, with different sources, in different industrial sectors. The statistics data verifies the necessity of law enforcement from two sides, by revealing the ineffectiveness of the advocacy framework, and indicating the abundant potential space for utilizing law enforcement. The comparative study illustrates the regulatory framework in the two jurisdictions from legislation, enforcement, and advocacy respectively. This chapter derives three key implications from the comparative study: (1) an enforcement mechanism on government restraints is built with a deep social background, (2) it is necessary to formulate a clear exemption rule when designing enforcement mechanism, and (3) it is indispensable for the competition authority to have substantial enforcement power and procedure in the enforcement mechanism.

Learning implications from the comparative study, Chapter V designs a potential enforcement mechanism tailored to China's context. It gives answers and suggestions to the following key questions thereupon: what is the scope of law enforcement, how to identify an illegal government conduct, and how to enforce it. First, it sets exemption rules. Sector agency's conduct in performance of its task on supervising the market activities in regulated sectors should be exempted from law enforcement by the competition authorities. The concept "regulated sectors" should be precisely identified. Its general definition could be "industries

controlled by the state-owned economy and concerning the lifeline of national economy and national security, and the industries implementing exclusive operation and sales according to law.” Besides, the State Council or its authorized agency should regularly publicize and review an exhaustive list of specific regulated sectors. In contrast, in competitive sectors not appearing on the list, the government conducts are all within the scope of law enforcement by the competition authority, with the exception of government legislation. Second, concerning how to identify an illegal government conduct, the competition authority should adopt the standard of competition effect and conduct competition analysis to determine whether there is harm to competition and to examine whether there is a justifiable defense. Third, concerning the enforcement power and procedure, after competition analysis, the competition authority can make the decision to confirm whether the government conduct violates the Anti-Monopoly Law and require the infringing agency to rectify their conduct. If the infringing agency fails or refuses to comply with the decision, the competition authority should bring an administrative litigation on it.

The last chapter provides a restatement of the research and points out its limitations and prospects. Though the proposed enforcement mechanism is properly designed, as the historical experience shown, adopting coercive measures to control administrative power inevitably faces stubborn internal resistance, thus it ultimately depends upon whether the central government has a strong political will to adopt and implement. Furthermore, law enforcement is resource-intensive, meanwhile the local competition law enforcement resources are quite uneven in China, thus capacity building for the competition authority is

a crucial issue needs more further research. Last but not the least, this research with its special emphasis utilizing law enforcement to combat with government restraints in China provides insights to other transition or developing countries facing the common competition issue. It is time for those countries to rethink the conventional wisdom, and design a workable enforcement mechanism with taking their respective social context into full consideration.