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**THE OBJECTIVES OF COMPETITION LAW AND POLICY
AND THE OPTIMAL DESIGN OF A COMPETITION AGENCY**

-- CHINA -- (Session I)

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CHINA

OBJECTIVES OF THE COMPETITION LAW OF PRC AND THE OPTIMAL DESIGN OF COMPETITION AUTHORITIES

The Countering Unfair Competition Law of PRC, the only effective competition law of China up to now, is almost ten years old ever since the promulgation on September 2, 1993. It is of significance for implementation of the Law in China to sum up and review it, in particular its objectives and the design of competition authorities. On the other hand, as the draft of Antitrust Law of PRC has almost been completed, this article hereby makes an overview of the objectives and the design of the executive authority based on the draft. Therefore, this article shall talk about the objectives of PRC competition laws and the design of competition authorities under the framework of the Countering Unfair Competition Law and the framework of the draft of Antitrust Law.

1. Objectives of the Countering Unfair Competition Law of PRC

The objective is provided for in Article 1 under Chapter 1 of the Countering Unfair Competition Law. Chapter 1, the General Provisions, primarily provides for the objectives, principles, rules and definitions. Article 1 provides that the objective of the Law is to safeguard wholesome development of socialist market economy, to encourage and to protect fair competition, to curb unfair competition, and to protect rights and interests of businesses and consumers.

Despite the long provision, the Law in fact provides for just one core objective that is to protect fair competition because curbing unfair competition is a means to protect fair competition, while protecting rights and interests of the businesses and consumers is the direct result of fair competition, and safeguarding wholesome development of socialist market economy is the indirect result of fair competition.

Few pay attention to Article 1 of the Law when dealing with unfair competition cases. The main reason is that competition authorities or courts are able to deal with unfair competition cases just based on specific articles of the Law. They do not need to refer to Article 1 since no competing objectives are provided in the Law. Further, the Law actually adopts “per se illegal principle”, by which competition authorities or courts are not required to further prove how the unfair competition practices in question impact on the economy.

Therefore, no other objectives, except the protection of fair competition, are stipulated in the Law. However, some objectives unrecognized in the Law are still competing with the objective to protect competition in practice. Even, the authorities that are responsible for dealing with certain type of cases of unfair competition often ignore the objective of competition protection. The ignorance is directly related to the issue of the design of competition authorities which will be covered in the next part of the article.

2. Competition authorities and the objective of the Countering Unfair Competition Law

The Law provides for two categories of unfair competition practices. One of them refers to traditional ones, e.g. fakes, business bribes, misleading advertisements and infringement of business secrets. The other category refers to unfair competition practices done by government or government agencies through abusing administrative power which exist in the transitional period from planned economy to market economy. Article 7 of the Law stipulates that “government or government agencies are prohibited from forcing other parties to purchase designated commodities from designated sources, restricting legal business of others. Government or government agencies are prohibited from preventing commodities from entering into local market, or preventing local commodities from flowing out of the market.”

According to the Law, the practices falling into the first category are responsible by county-above-level Administration for Industry & Commerce (AICs), while the practices done by government or government agencies are under the supervision of their superiors instead of the AICs. Prior to 1999, the enforcement of the Law made by the AICs was greatly influenced by local interests due to the direct leadership of local government. As a result, the AICs, though upholding the objective of competition protection during their enforcement of the Law, had to reconcile with other objectives, e.g. local development, the increase of the revenue of local government and employment. The objectives were constantly conflicting with the objective of competition protection, thus greatly impairing the enforcement of the Countering Unfair Competition Law of PRC.

Aware of the deficiency, the Chinese Central Government reformed the mechanism of the AICs in 1999, i.e., to make the province-below AICs subject to leadership of provincial governments and the State Administration for Industry & Commerce (SAIC) instead of local governments. The reform relieves the AICs from the control of the local governments, thus enabling them to deem the competition protection as the only objective of the Law. From then on, it is observed that the significant improvement has been made.

However, the unfair competition practices done by government or government agencies are still under the supervision and check of their superior authorities. In practice, we have found that the government or government agencies are seldom punished for their unfair practices, as the objectives such as regional development, the increase of the revenue of local government and employment generally prevail over the objective of competition protection in dealing with such cases. Therefore, it is evident that the unfair competition of government and government agencies is still rampant.

In a word, we believe that the AICs are the ideal organs to enforce the Countering Unfair Competition Law, as they can fairly enforce the law under the single goal of competition protection. In contrast, the local governments themselves are not ideal for enforcement of the Law under the impact of other objectives.

3. Objectives of antitrust law and the optimal design of competent authorities

Similarly, Article 1 of the recently drafted Antitrust Law stipulates the objective as “prohibiting monopoly, safeguarding fair competition, protecting rights and interests of businesses and consumers and public interests and guaranteeing wholesome development of socialist market economy.”

The article actually provides for two objectives, i.e. safeguarding fair competition and protecting public interests. The draft law does not define the term “public interests”. But we believe that it, like the definition in competition laws of Germany and other European nations, refers to economic situation and employment, etc.

The objectives provided in Article 1 are embodied in many specific provisions of the draft. Article 8 of the draft, for instance, provides that “businesses are prohibited from doing the following practices excluding or restricting competition via agreements, decisions or other concerted activities, with the exception of those beneficial to the national economy and public interests.” The competition authorities should evaluate the impact of the monopoly on competition and public interests when addressing most cases.

The draft fails to specify the rank of the objectives of competition and public interest, which is of the most concern. The ambiguity of the draft may lead to overstress on public interests, thus impairing the competition objective.

The draft provides for the functions and powers of the competition agency, but fails to provide for the constitution of it, which is left to be determined by the State Council or the National Congress. But two different opinions can be identified in the drafting process: setting up a new agency or assigning AICs to enforce the Law.

From the perspective of safeguarding fair competition, I do not think that establishing a new organization does more good on achieving the objective of competition protection than an existed organization, like AICs. I believe that it is satisfactory to authorize AICs as the enforcement agencies. First, the AICs have rich experiences in enforcement of the Countering Unfair Competition Law, which is closely related to antitrust law. Second, administrative cost can be reduced if antitrust law is also enforced by AICs. Third, the AICs boasted sound foundation of knowledge and human resource for the enforcement of antitrust law. Surely, our competence construction is still in want of the powerful support of international organization including OECD.