Public Interest in Competition Law: Legislation and Practice in China

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1. Basic Connotation and Main Function of Public Interest in Competition Law

- Basic Connotation of Public Interest in Competition Law
  • In competition law, "public interest" is not only identified as a value or concept, but also a high-frequency vocabulary in competition legislation instruments for many countries or regions. However, few national and regional competition legislation or practice gives a clear definition of it.
  • According to the legal texts and practices of each jurisdiction, there are at least three aspects of the basic connotation of public interest in competition law, which are as follows:
    ✓ First, effective competition. Effective competition is publicly recognized as an ideal way for resource allocation, which makes the price of goods and services as cheap as possible while also provides sufficient choices for consumers when they are buying goods and services of different types and qualities, therefore, the public
directly enjoys the benefits of effective competition.

✓ **Second, consumer interest.** When engaging in unfair competitions and monopolies, excessive profits are what business operators chase for, however, *such excessive profits originate from consumers because they have to pay more*. Accordingly, anti-monopoly law prohibits anti-competitive behaviors against consumer interests and **protects consumer interests by ensuring free and fair competition**.

✓ **Third, the overall economic benefits.** The overall economic benefits in anti-monopoly law refer to those that *transcend a particular group, a specific area* and **involve a wide range of economic benefits**, such as employment security, environmental protection, resource conservation and innovation incentive.

➤ **Main Function of Public Interest in Competition Law**
For many countries or regions in the world, their competition laws provide the provisions of public interest. Although these provisions differ from each other in their contents, quantities and locations, their functions are mainly embodied in the following aspects:

- Public interest is set as a legislative purpose or a legal principle that primarily illustrates legislation objective and value orientation.
- Public interest is an significant factor in assessing whether a competitive behavior is constituted or could be exempted.
- Public interest is an important basis for the exemption from the application of competition law. In consideration of public interest, competition law is not applied to natural monopoly and policy monopoly industries.
2. Social Public Interest in Anti-monopoly Law of the P.R.C and the Practice

- Social Public Interest in China's Anti-monopoly Legislation
  - In China’s anti-monopoly law, the concept of “social public interest” is adopted, which equals to the basic connotation of “public interest”.
  - At present, the main provisions concerning public interest are listed in the following table.
  - Social public interest is not only one of the main purposes of China's anti-monopoly legislation, but also an important basis to assess whether a competitive behavior is constituted or could be exempted.
<table>
<thead>
<tr>
<th>Provision</th>
<th>stipulation</th>
<th>Main Function</th>
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<tbody>
<tr>
<td>Article 1 of Anti-monopoly Law of the P.R.C</td>
<td>This Law is enacted <strong>for the purpose of social public interest.</strong></td>
<td>illustrates the purpose of legislation.</td>
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<tr>
<td>Article 15 of Anti-monopoly Law of the P.R.C</td>
<td>Where a business operator is able to prove that the agreement it has entered into falls under any of the following descriptions, the provisions of Article 13 and Article 14 shall not apply: (4) where the objective is to fulfill public interest such as energy conservation, environmental protection and disaster relief etc; the business operator must also be able to prove that the agreement it has entered into will not severely restrict competition in the relevant market and that it will allow consumers to benefit from the interests arising therefrom.</td>
<td>assesses whether a monopoly behavior could be exempted.</td>
</tr>
<tr>
<td>Article 28 of Anti-monopoly Law of the P.R.C</td>
<td>where a business operator is able to prove that the positive impact of the concentration on competition far outweighs the negative impact or that the concentration is <strong>favourable for the public interest, the anti-monopoly enforcement agency of the State Council may decide to allow the concentration of business operators.</strong></td>
<td>assesses whether a concentration of undertakings exemption could be exempted.</td>
</tr>
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<td>Article 8 of Regulations of the Administration Authority for Industry and Commerce on the Prohibition of the Abuse of Market Dominant Position</td>
<td>the Administration Authority for Industry and Commerce should take full consideration of the following factors when determine whether there are justified reasons for the abuse of market dominant position:....(2)The <strong>impact of concerning behavior on economic operation efficiency, public interest and economic development.</strong></td>
<td>assesses whether there are justified reasons for the abuse of market dominant position.</td>
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Consideration of Social Public Interest in China's Anti-monopoly Practice

- From Nov. 28th, 2008 to Oct. 20th, 2017, the number of effective judicial judgments which were substantially relevant to monopoly disputes is 17, while the number of administrative announcements or penalty decisions that were substantially concerning anti-monopoly enforcement reaches to 97.

- By analyzing these documents, we find that public interest was only mentioned in 4 cases. Among all these cases, neither court nor anti-monopoly enforcement agency sets public interest as the direct basis to determine whether a monopoly behavior is constituted or could be exempted, it was only mentioned in reasoning process.
<table>
<thead>
<tr>
<th>Sequence No.</th>
<th>Case No.</th>
<th>Case</th>
<th>Reasoning</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>(2016) Taizhou Intermediate People's Court, final instance, No.1749</td>
<td>Contract Dispute: Cai Jianlin, Zhao Zhigao vs. Feng Xiajun</td>
<td>Competition among business operators was eliminated or restricted, consumers had no choice but passively accepted this unified price, market competition mechanism was destructed, and consumer right and public interest were damaged.</td>
</tr>
<tr>
<td>3</td>
<td>Shangdong Administration for Industry &amp; Commerce (2016) No.24</td>
<td>Qingdao Xinaoxincheng Gas Co., Ltd abused its dominant market position to impose unreasonable trading conditions.</td>
<td>Damaged the legal rights and benefits of industrial &amp; commercial units and social public interest, breached market trading rule of fair competition, and interfered with operation efficiency of economy, and the healthy and orderly development of market economy was disrupted.</td>
</tr>
<tr>
<td>4</td>
<td>Chongqing Administration for Industry &amp; Commerce (2016) No.15</td>
<td>Chongqing Southwest No.2 Pharmaceutical Factory Co., Ltd refused to deal.</td>
<td>The legislation objective of Anti-monopoly Law of the P.R.C is to safeguard market competition, improve operation efficiency of economy and protect consumer interest and public interest.</td>
</tr>
</tbody>
</table>
3. Public Interest in Anti-*Unfair Competition Law of the P.R.C* and the practice

- There is **no concept relevant to public interest** in the legislation of Law for Anti-Unfair Competition Law of the P.R.C.. In recent years, unfair competition disputes emerging in internet area are complicated and endless, as to those unfair competitions which are not expressly provided for in the Law for Anti-Unfair Competition Law of the P.R.C., courts always assess whether such behaviors violate public interest to determine their legality or illegality.

- In case **Tencent vs. Qihoo 360, an unfair competition dispute**, when assessing "**whether it is free competition and innovation which is encouraged by internet spirit**", the Supreme Court held that public interest should be taken into account, "**A judgment should be reached under the standard of establishing equal and fair competition order, being in line with the common interests of consumers and public interests**".
In case **Baidu vs. Qihoo 360**, the Beijing Higher People's Court firstly brought up the principle of “**irrelevant to public interest, no intervention**” in its judgment of second instance, which mainly includes the following four points:

- Internet products or services should coexist peacefully with free competition, it **should be depended on network users to voluntarily choose** certain internet products or services;
- **In principle**, internet products or services **should not interfere with each other**;
- In case of the **necessity to protect the interest of network users and other people**, although **network users are unknown and make no choice**, network service operator may interfere with the operation of other internet products or services under certain circumstances, **without the consent of other internet products or service providers**, but it should **ensure and prove the necessity and rationality of its interference means**;
Otherwise, it should be found to violate the principles of voluntariness, equality, fairness, honesty and trustworthiness, violate the basic business ethics that should be abided by in internet products or services competition, and then, it should bear the corresponding tort liability or unfair competition responsibility.

When unfair network competition is to be confirmed, there are still many controversies among members of legal theory field and judicial practice field as to whether public interest should be taken into account and how to consider it.
Thank you!