

# Constructing a Judicial Review System to Regulate China's Administrative Monopoly

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## Abstract

The development of market economy and the construction of country by law make it necessary to regulate administrative monopoly effectively. It is the most important for us to regulate administrative monopoly by law, the key of which is to construct a judicial review system. In view of the widespread existence and serious harm of administrative monopoly and some deficiencies on China's relative systems, realizing judicial review of administrative monopoly is faced with some obstacles. How to overcome the obstacles and establish sound judicial review rules is the main problem studied in the article.

Key words: construct, judicial review, system, regulate, administrative monopoly

## I. Introduction

Administrative monopolies can be divided into abstract and specific administrative monopoly according to ways and means of administrative actions. In contrast, the former is more harmful to the non-specified majority. In practice, the number of the former is greater than that of the latter. Therefore, to regulate the abstract administrative monopoly becomes more important and urgent. In China, it is necessary to regulate administrative monopoly by constructing a judicial review system.

## II. Necessity of constructing a judicial review system

**1. To fulfill WTO rules and to promote administration by law.** According to WTO rules, administrative actions affecting international trade should be subject to judicial review. In addition, administration by law is the basic requirement of modern administrative legislation, and administrative monopoly not only violates the legal rights and interests of operators, but also undermines the interests of consumers.

**2. To reduce damages of administrative monopoly.** Administrative monopoly confines and excludes competition by abusing executive power, so the impact and harm is more serious than that of pure economic monopoly. Besides, the current non-actionable provisions of abstract administrative actions, as well as growing expansion of executive powers, result in more and more unlawful, harmful problems.

**3. To make up for weak administrative enforcement.** As one anti-trust authority, China's industrial and commercial administration has no power to review whether administrative regulations break the relevant competition laws or not; and the local business sectors are often involved in the local administrative monopoly actions. The administration and the legislature lack the initiative and effective supervision

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over administrative power.

**4. To protect interests of the relative more fully.** Legislative supervision over the executive powers emphasizes too much on the public interests and neglects the individual interests within a certain range. Judicial supervision over executive power focuses more on the interests of the relative because judicial review of administrative monopoly is most initiated by the relative persons of monopoly actions and their interests are closely related to the administrative monopoly action.

### **III. Feasibility of constructing a judicial review system**

**1. Some basis provided by existing laws for judicial review.** China's "Administrative Procedure Law" does not prohibit the court from reviewing the abstract administrative action on which the specific administrative action is based. China's "Anti-monopoly Law" provides the forms of administrative monopoly, which helps the court determine the legality of administrative actions.

**2. Some experience accumulated in practice for judicial review.** The implementation of Administrative Review Law makes some experience in the judicial review of abstract administrative action by using administrative review to resolve administrative disputes.

**3. Some reference provided by foreign systems for judicial review.** Judicial review of abstract administrative actions are common in legislation and practice in some western countries. In fact, the laws of those countries generally do not distinguish specific administrative actions from abstract administrative actions, but incorporate them into the scope of judicial review.

### **IV. Obstacles of constructing a judicial review system**

**1. Judges' overall quality needs improving.** A high degree of uncertainty of Anti-monopoly Law makes its operation more difficult than other laws. And the extensive use of economic analysis has also increased the difficulty of antitrust cases for judges.

**2. Basis for accepting administrative monopoly cases is not sufficient.** China's Administrative Procedure Law only regards specific administrative actions as litigation objects, but excludes abstract administrative actions. China's Anti-trust Law also excludes judicial review of administrative monopoly behaviors.

**3. Competent court, subject scope and review standard of administrative monopoly cases are not clear.** The jurisdiction of administrative proceedings in China is limited to specific administrative actions. The plaintiff of administrative litigation in China is mainly limited to the relative who has legal interests in the specific administrative action, excluding the executive authority, the prosecution and certain specific groups or organizations. The court only makes legal review for the specific administrative actions formally, not making rational and legal review for the case essentially. Nor can the court make judicial review of abstract administrative actions.

**4. Legal responsibility system of administrative monopoly is imperfect.** The Anti-monopoly Law provides administrative liability, civil and criminal liabilities,

and also provides organizational responsibilities and personal responsibilities, but criminal responsibility is not directly against the monopolistic behaviors, but against the relevant organizations and individuals whom the anti-monopoly enforcement agencies review and investigate. In addition, the Act also does not involve the issue of civil liability against administrative monopoly.

## **V. Approaches of constructing a judicial review system**

**1. To improve current laws further in China.** Anti-monopoly Law should empower the victims the rights to appeal to administrative monopoly, to claim administrative compensation and civil compensation in special circumstances. Administrative Procedure Law should put abstract administrative actions into the review scope of administrative litigation. In addition, National Compensation Law should formulate the scope of loss caused by administrative actions to the relative and distribution mode of the loss and other related issues.

**2. To explicit jurisdiction court trialing the cases.** Due to the complex, professional, and highly policy-oriented characteristics of administrative monopoly cases, the Intermediate People's Court and the Higher People's Court should establish Administrative Monopoly Trial Chamber composed of some experts on Law and Economics. If such cases are trialed by the administrative tribunal, at least a professional advisory group should be allocated to provide the appropriate economic analysis and expert advice for the judges.

**3. To definite the subjects of administrative monopoly cases.** The plaintiff should be defined as: anyone whose interests are affected by monopolistic behaviors, not only including consumers, producers and operators, but also including the executive authorities, the prosecutors, the specific public interest groups and self-government organizations. The defendant should include all levels of local government agencies and government-owned departments except the State Council, and the organizations authorized to administer public affairs.

**4. To explicit review standard of the cases.** The review criteria should at least include: Firstly, whether the executive and the authorized organizations abuse administrative power or not, and the "abuse" should be defined as "whether they are to restrict and exclude competition and produce practical consequences or not ". Secondly, whether the administrative regulations contains the rules of excluding or restricting competition or not.

**5. To improve the legal liability system.** Anti-monopoly Law should provide additional criminal penalties for administrative monopoly and define the measurement standards and specific forms of criminal responsibility. Criminal liability should directly be aimed at the persons in charge and other direct responsible personnel, not at administrative agencies. Moreover, it is a very direct and effective sanctions way for the beneficiaries of monopoly to compensate the victims. The beneficiaries may include the administrative organs implementing monopoly behaviors and the benefited operators. The former may apply to the actual damages, and the latter may apply to the punitive damages.