

Study on the Legal Regulations of the Administrative Monopoly on Professional Sports

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Abstract: The industry monopoly widespread in professional sports in China has always been the denounced barrier for industrial development. With the great development of the professional sports on marketing, it should follow the general rule in advancing the society and economy. Moreover, the full and effective competition in the market shall be safeguarded. Although the "Competitive balance" in the professional sports provides reasonable base for some conduct to restrain the competition, the administrative monopoly under the government dominating system is increasingly hindering the development of professional sports, which should be regulated. The problem of monopoly in professional sports has been the obstacle to the sound development of sports industry in China. Along with the acceleration of the commercialization of the professional sports industry in our country, the dual attributes of the monopoly and competition of the professional sports are becoming more and more obvious. Its particularity brings about the focus of attention for the regulations in anti-monopoly law.

Introduction

The problem of monopoly in professional sports has been the obstacle to the sound development of China sports industry. However, instead of the concept of professional sports, the expression of competitive sports is adopted in China "Sports Law". Since the implementation of the anti-monopoly law of China from 2008, the controversy about the application and exemption of anti-monopoly of professional sports has never stopped. This argument mainly focuses on the particularities of professional sports.

1. Interpretation of the Professional Sports

Judging from the present *Sports Law*, China has not yet come up with the concept of professional sports. As far as the educational circles are concerned, the professional sports, emphasized more with its inherent marketing and commercial characteristics, is recognized as a commercial activity so as to be differentiated from the competitive sports that has long been flourishing in Chinese tradition. As one illustration, "the professional sports is a commercial activity in which money is returned through the buying and selling of the rights of sports games, or through the athletes participating the sports games or exhibiting their sports talents^[1]." As another illustration, the

professional sports is a high-level competitive sports featuring the high professionalism and commercialism, with an aim at the operation and promotion of professional sports games. The professional sports games, which refer to the competitive sporting events that are highly professionalized, commercialized and market-driven, are also the most important sports services (products) that the professional sports provides to the community^[2].”

As it for sure, the term of professional sports has not yet, however, been generally accepted. Instead, “the commercial sports” or “the professionalism of competitive sports” are more adopted as a description for the fact that China’s competitive sports is under the impact of commerce. To illustrate, “the commercial sports, namely a few of the competitive sporting events that has entered onto the track of commercialization, is a description for the reality that some sporting events, though not yet approved by the current *Sports Law*, have already been operated through the marketing scheme^[3].” As another illustration, “the professionalism of competitive sports, an inevitable outcome of a mechanization in which the competitive sports is driven by the market, community and industry, interprets fairly well the integrated value and function of sports^[4].” In this sense, “the professionalism of competitive sports is a process which depends on the market’s allocation on the scarce sports resources so as to produce the high-level competitive products and services^[5].”

In fact, the different terms did not hinder our understanding on the interpretation of professional sports. Indeed, the professional sports is considered as the follow-up or advanced phase of competitive sports, because “commercial sports” or “the professionalism of competitive sports” precisely illustrate the market-drivenness or economy-dependence of the competitive sports in transition to the professional sports. If the professional sports is thought to operate in a regulated market, it therefore refers to a “collective concept with broad implications^[6]”. Especially with the deepening of the marketization, China’s professional sports, which has been in the apparent industry shape, can be thus regarded as a commercialization process or activities that provide the sports games products or services to the community, catering to the different interests of the different participants, such as the administrative departments, the professional sports leagues, the athletes and consumers.

2. Administrative Monopoly on the Professional Sports

In recent years, the particular attention has been paid to the administrative monopoly which is thought as a “hindering obstacle to the development of China’s professional sports^[7]”. After over two decades’ development since 1992 when China had founded its first professional sports football club, the Chinese professional sports has been evolving differently from its western counterparts under the particularity of “the Chinese Government’s top-down reforms^[8]” in the previous national sports system—the professional team system—so that it never went through the traditional development mode that is driven by the market. Accordingly, the Chinese Government has always played a dominant role in the development of the professional sports. The “national sports system”, with an emphasis on the Government’s support, has objectively rendered the Chinese professional sports with the typical administrative characteristics. In this case, it seems that the Chinese professional sports shares inherently a symbiotic relationship with the administrative monopoly, and even that the history of China’s professional sports is regarded as the history of “the Government monopoly” or “the administrative monopoly^[9]”.

In China, Mr. Hu Ruyin interpreted the administrative monopoly for the first time from the prospective of economics. According to him, the administrative monopoly is the monopoly imposed by the administrative bodies by means of the administration^[10].” However, the administrative monopoly is still unable to come into a clear concept in legal field as the implication of monopoly

must be undermined on its accuracy from the economics to the law. Since then, the scholars endeavored to discuss the implication of the administrative monopoly from the different angles in the field of law. They emphasized the impact of the public forces or of the Government's intervention on the effective competition, taking into consideration the counterparts of monopoly and competition. For example, Mr. Wang Baoshu classified the elements comprising the administrative monopoly into the entity, the subjective condition and the objective condition. He suggested that the administrative monopoly is an act that "the Government and the government sectors restrict the competition by abusing the administrative power^[11]". In other words, with more emphasis on the "administration", the administrative monopoly is different from the economic monopoly in which the concentration of capital is made through the competition. By contrast, the administrative monopoly provides controlling power to the government through administrative compulsion, independent of the marketing scheme. Although the nuances in expression still exist, common belief holds that the administrative monopoly refers to the fact or state that the national administrative sectors exclude, restrict or hinder the legitimate competition by abusing the administrative power.

As for the above mentioned, how the administrative monopoly came into being seems to be interrelated with the government's intervention. And speaking of the professional sports, it is particularly true. The administrative monopoly finds itself the solid foundation in the professional sports, because the development under the "national sports system" inevitably created an internal environment at the center of which are the Government's control and regulation. Admittedly, the national sports system gives a positive impetus to the development of the Chinese sports industry, as it contributes, at an utmost level, to the concentration and allocation of the sporting resources. Moreover, the Government's direct involvement into the sports industry provides the competitive edges that none marketing activities can live up to. In order to be prosperous in sports, it is extremely slow for China to form a relatively stable market through free competition, but instead the Government's direct support has obtained the obvious results. It can be said that the development of the Chinese professional sports is mutually beneficial and reinforcing to the Government's dominance. "The interaction between the professional sports and the Government make themselves two significant forces to the community which in return provides the space and environment for both of them^[12]", thus creating the natural soil for the administrative monopoly on Chinese professional sports.

3. The Particularity of Administrative Monopoly on the Professional Sports

Under the impact of the planned economy system which had lasted for a long time, the administrative monopoly is thought to be equivalent to the professional sports monopoly. This opinion is undoubtedly true before the Chinese competitive sports was professionalized. But along with the accelerating marketization process, the diversified entities in the market have, to some degree, weakened the uniqueness of the administrative monopoly on the professional sports, because both a competition and cooperation have taken place between the economic monopoly and the administrative monopoly, thus rendering the particularity of the regulations concerning the administrative monopoly on the Chinese professional sports.

In the traditional economy, the economic monopoly and the administrative monopoly are distinctive monopolies as they are different in terms of the entity, the characteristics, the method and the compulsion. However, when it comes to professional sports, since the administrative departments are both regulators and operators, the confusion is likely to be caused over the nature of the monopoly as whether it is administration-related or economy-related with regard to the comprising elements. For example, "in reality, whether it be the football management center, the

football association or the Chinese Super League, they are all characterized with the administrative bodies, which allows their resources and assets the essential feature of the assets in the administrative bodies (the state-owned assets)^[15].” So, in this manner, these “administrative bodies” are endorsed with the administration right as stipulated in China’s current regulations, and meanwhile, they play a dominant role in the specialized market where they target at. Therefore, the acts that they made to restrict competition, such as the market access system or the athletes flow system, are hard to be labeled by the monopoly nature, because these bodies can achieve their pre-established targets either through the administrative compulsion or through the exclusive market dominance. In this case, how to distinguish the monopoly on the professional sports should resort to the capability of restricting the competition: to be specific, whether the capability originates from the compulsive power or the exclusive economic power must be analyzed on a case-by-case basis.

The administrative monopoly, regarded as “a distortion of the nature of market competition^[16]”, brings more harm than the economic monopoly does^[17], so that it should be regulated. But in the professional sports, the development itself requires for the “balance in competition” which may reflect as a kind of “natural monopoly”, thus making the administrative monopoly reasonable at certain levels. “Competitive balance” is a process that seeks for, according to the related regulations, the balance in the competitiveness of each participating party, with an aim of maintaining an uncertainty which occurs at “the results of each competition, of each season and of each league”.^[18] And in fact, the professional sports’ biggest attraction to the consumers lies in this kind of uncertainty, which requires that each participating party, theoretically speaking, should at least compete with each other in an equal and fair manner so as to satisfy the consumers’ desires for the professional sports. Or to put it in another way, “the central value of the sports industry originates from the balance in competition^[19]”.

However, as a commercialized competitive sports, the professional sports still conforms to the general rules of the economic market in the process of development. Since the competition is very likely to break up the balance, special approaches, such as the restriction on the athletes flow and on the access to the leagues, have been taken accordingly to regain the balance in competition. To illustrate, “in America, the measures ranging from, first, the reservation system of professional baseball to the selection system, and then the transfer fee system were all taken to put restriction on the free flow of athletes, especially the excellent ones^[20].” These restrictive measures were all made by the administrative bodies, thus taking on the characteristics of administrative monopoly. However, none of them set off on a detrimental basis but to maintain the sound development of professional sports. Given that, the absolute harm of administrative monopoly should be looked at with a grain of salt, and therefore, differentiation should be made on the regulations of monopoly acts.

4. The Regulations of Administrative Monopoly on the Professional Sports

Considering the particularity of administrative monopoly on professional sports, neither the one-sided ban nor laissez-faire would work. With the increasing marketing process of China’s professional sports, the commercial nature requires that the professional sports must observe the general rules of the economic market, and that the adequate and effective competitions should be safeguarded. Even though the “competitive balance” provides the reasonable basis for the monopolies imposed to restrict the competition, the administrative monopoly under the Government’s dominance still hinder the development of professional sports and therefore should be regulated on a necessary basis.

First, with regard to law, China’s *Anti-monopoly Law* has a general application. The professional

sports is not exempted from the *Anti-monopoly law* which is generally applied, without doubt, to the every aspect of it. The administrative monopoly on the professional sports belongs to the regulation framework of the *Anti-monopoly Law*. However, out of the consideration for the national security and the economic development, the ban on the administrative monopoly is not definite in that each state's law will allow for the exceptions of anti-monopoly, that is the exemption from anti-monopoly. Normally, the exemption is granted to the specific industry by considering its particularity and the important role that it plays in the national economy. As what has been mentioned before, the professional sports is an industry with this particularity. Take an example of the market access system of professional sports, the effective restriction has been set on the number and size of sports clubs so as to maintain the competitiveness of professional sports. And the market access system is "an important means that the Government and the professional sports league adopted to regulate the qualification of clubs and the order of leagues^[21]". The market access system, though restrictive to the competition, should be applied to the exemption from anti-monopoly as it aims to facilitate the sound development of professional sports.

Accordingly, "the principle out of reason" should be taken as a judgment on the regulations of the administrative monopoly. Established in the case involving the American standard oil companies in 1911, "the principle out of reason" holds that not all the acts restrictive to the competition are illegal but those conducted on a reasonable basis should be exempted. This principle normally is applicable to the "ambiguous" or "contentious" monopolies which, though restrictive in nature to the competition, will not necessarily result in bad outcomes. Therefore, in terms of regulating the administrative monopoly on the professional sports, the reasonable basis on which the regulations are made should be taken into consideration, which is of great significance especially when the judgment needs to be made on the subjective conditions of administrative monopoly. For example, the restriction on the free flow of athletes may be out of the consideration for the "balance in competition" or out of the target for "local protectionism". Regarding the professional sports industry as a whole, although the two intentions undermine indeed the interests of athletes, they are not exactly the same in terms of the intended values so that they should be regulated to a different degree. In this case, when the *Anti-monopoly Law* applies to regulating the administrative monopoly, the restrictive acts should be possibly considered for exemption under the "principle out of reason".

Additionally, concerning the reforms in institution, an effective way to regulate the administrative monopoly on professional sports is through adhering to "the separation between administration and management", which emphasizes "the separation of government's administrative function from its managing function, or namely the separation of the role as the administrator for public affairs from the role as sponsor^[22]", and this can contribute to the improvement of the prevailing administrative monopoly on professional sports. As what has been mentioned before, the professional sports developed under the national sports system take on very distinct administrative characteristics. The excessive government's intervention has blurred the duty and the nature of administrative departments, thus creating the fertile soil that nurtures the administrative monopoly. In order to implement the effective regulations, China's *2001 to 2010 Sports Reform and Development Outline* provides that "the administration for national sports should be enforced in an indirect and macro way rather than in a direct and micro manner." As it was more clearly suggested in the *CPC Central Committee and the State Council's views on Further Strengthening and Improving the Sports in the New Period*, "clarification must be made on the different roles of the government and the community, and on the separation between the administration and management in that the duties out of the government's exercise should be devolved to the different enterprises, social and intermediary organizations." In 2014, the State Council promulgated a document titled *the Views on the Promotion of Consumption on Sports Through Speeding up the Sports Industry*,

which asks for “the quicker transition of the government’s duty, the consolidated market regulations and the market environment with orderly competition and equal participation.” Given that, the strategy of the separation between administration and management has been bolstered with effective policies. In the process of reforming the Chinese professional sports, clearer boundary needs to be set among the duties and rights of the administrative departments’ “administration” and “management”. Moreover, efforts should be made to cut off the direct economic ties between the administrative departments and the professional sports industry, making sure that the administration departments can contribute to the sound development of the professional sports in case that they would otherwise act beyond their power to interfere with the daily operation of the professional sports. That is to say, the restrictions by means of administrative monopoly on the necessary competition should be lifted on an appropriate basis.

5. Conclusion

Recently, particular attention has been paid to the administrative monopoly on professional sports, which is regarded as the main obstacle to the development of China’s professional sports. Not conforming to the traditional way of depending on the marketing process, the Chinese professional sports instead took shape under the national sports system with the planned economy as background. Accordingly, the Chinese Government has been playing a dominant role in the development of professional sports. “The national sports system” entails the government’s support which in fact has rendered the Chinese professional sports with the strong characteristics of administrative monopoly. Along with the acceleration of the marketing process, the diversified entities in the market have, to certain degree, made the administrative monopoly not an unique type of monopoly on the professional sports, but resulted in the competition and cooperation between the administrative monopoly and economic monopoly, thus bringing the particularity to the regulations of the administrative monopoly on Chinese professional sports. Although the ideal of “balance in competition” provides the reasonable basis to certain monopolies that restrict the competition, the administrative monopoly dominated by the Government, which still hinders the development of professional sports, should be necessarily regulated by law and in line with the reforms on professional sports.

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