上大法学文库
SHANGDA FAXUE WENKU

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《上大法学文库》编委会

《上大法学文库》总序

上海大学法学院发展到今天差不多已经三十年了。子曰：三十而立。经过近三十年筚路蓝缕的开拓和高歌猛进的奋斗，一所引人注目的新型法学院已崭露头角。一个学校、一个学院要在强手如林的学术界占有一席之地必须有自己的文化传承和文化积淀，必须有良好的学术氛围，必须有鲜活的学术思想。而学术氛围的打造、学术思想的凝练则必须靠具有一定学术水准的专著、论文、学术讲座等学术平台加以记载、传播和张扬。为了活跃思想、提升学术档次，上大法学院在学校支持下相继打造了“上大法学大讲堂”、《上大法学文库》和《上大法学评论》三个学术阵地。

“上大法学大讲堂”主要是邀请国内外名流、学术精英到上海大学杏坛晒技、传经布道。他们当中，既有我国法学界的领军人物，如江平先生，也有国外的学术名流，如日本著名商法专家早稻田大学教授大塚英明先生、澳大利亚拉卓比大学法学院院长戈登·沃克先生；既有德高望重的学术名宿和学术泰斗，如马克昌先生、李龙先生，也有蜚声学术界的中青年法学家，如朱苏力先生、尹田先生。他们深邃的学术思想、超人的学术勇气和犀利的语言，使广大受众获益良多，同时也极大地提升了上大法学院的学术水准和学术品位。

《上大法学评论》则是一个学术论文集，其主要目的是密切追踪学术动向、及时发布学术思想，作者群主要以本院的师生为主，同时亦邀请了一些学术名家以这一出版物为阵地将其最新研究成果与社会分享。《上大法学评论》现已出版了四本，今后将定期出版，其超前的学术思想和不凡的学术观点已开始在学术界引起关注。

《上大法学文库》是以发布具有较强理论深度和较高学术水准的学术专著为内容的学术平台，其主要目的是通过系列专著的方式集中展示上海大学法学院的整体研究实力，充分反映上大人“重基础、高起点、严要求、铸精品”的学术理念。《上大法学文库》初期的写作队伍以本院的教师为主，以后将逐步吸纳一些能够引领学界的学术大家和崭露头角的青年才俊加入这个群体。我们也真诚地希望社会各界积极对本书库进行关心和指导，使《上大法学文库》这棵学术幼苗尽快发育成长为学术之林中的一棵参天大树。

赵万一

2008 年 12 月

Preface

Mark Furse, BA, LLM, MSc, PhD Professor
of Competition Law and Policy, University of Glasgow

It is with great pleasure that I write the preface to this important work, undertaken by Dr Li Junfeng. Having been involved in competition law for 25 years, and having been entranced by China for 35 years, I am delighted that there are academics, lawyers and policy makers in China who are engaging with the subject of competition law.

I do not take the view that legal or trade imperialism should see sovereign jurisdictions being pressured into adopting laws that are inappropriate for their cultures and needs. This is as true in respect of legislation in the commercial sphere as it is of legislation dealing with social issues. It is true however that the Chinese Anti – Monopoly Law, which will take effect in the Summer of 2008, has been influenced by studies of other competition laws, and of European Community competition law in particular. Lessons relating to the application of competition law in the United States (whose practice has influenced in part the development of the law in the EC) and in the EC should be of interest to those in China involved in formulating legal policy in relation to com-

petition law, applying the competition law, or those involved in studying and teaching competition law.

It is trite, but correct, to point out that the substance of a law and the procedures relating to the implementation of that law are inextricably linked. A competition law with good substance but with ineffective procedures attached to its implementation will be as damaged as a law whose very substance is bad. If procedures are ineffective or ineffectual then it is likely that even a law with good substance will be disregarded, and risks being brought into disrepute. The drafting and enactment of the Anti – Monopoly Law in China has been a long process, but having come to fruition it is clear that there is a genuine intent on the part of the policy – makers to operate an effective competition law regime, although I am sure it will take some time for this new law and for those involved in its implementation, to 'find their feet'.

One of the key challenges the EC has faced is that of developing effective private rights in relation to competition law, and in this respect much attention has been paid to the US system, in which private plaintiffs are given a very strong role in enforcing and developing the application of competition law. That the EC continues to this day to debate the role of private rights, and to seek ways of better allowing for their enforcement, reflects the fact that the area dealt with in this book by Dr Li Junfeng is not at all an easy one.

Many commentators of competition law will point out that some 90% of cases brought in the US under antitrust law are private cases, but this ignores the fact that a great many of these cases are very quickly dismissed by the courts as showing no reasonable grounds for success. The position in the EC is complicated by the nature of the relationship between EC law, which sets out the substance of the competition law, and the 27 national legal systems, which differ, within which private rights are enforced. The EC is attempting at present to clarify this relationship, and to improve the position of private claimants and in recent years there has been much discussion of this issue.

At the outset of the EC competition law system the emphasis was very much on public enforcement. This allowed a clear policy to emerge from the centre, and for expertise to be created in an enforcing and policy – making body. It was clear however from very early cases that the law was intended to confer private rights, but that judges struggled with the issues involved as this was not an area in which they had expertise, and that plaintiffs were reluctant to bring cases where there was an uncertain prospect of success. As time moved on however it became clear that there were significant advantages in encouraging private enforcement. The Commission is now exploring ways of increasing private enforcement, in the belief that it is both effective and efficient.

In the UK matters have proceeded, after a hesitant start, some-

what more swiftly. In 2002 the UK introduced a right to bring an action in the relevant national court for damages where the public authorities, whether they be the UK or EC public authority, have made a finding of an infringement and an appeal has either been unsuccessful or not made within the time limit. In these 'follow on' actions the plaintiff has to prove only that they were a victim of the unlawful activity, and that they suffered a quantifiable loss. This removes from plaintiffs the burden of proving the existence of a breach of the law – and competition law breaches are notoriously difficult to prove – and means that they need only satisfy the court as to their harm. This measure appears to have been successful and a number of cases have already been settled prior to a court hearing. The UK, along with most EC states, does not generally award punitive damages, but it can be argued that the availability of these would be an even more effective sanction. This is an issue Li Junfeng addresses in this book.

While I am convinced of the benefit of private enforcement of competition law, both to the plaintiffs and to the public authority which has its workload reduced as a result, there are many difficulties. These may range from the cultural, to substantive, to procedural, and these are matters that are well dealt with in this book. It is necessary in order to encourage private rights that there be a clear body of legal rules, which can be understood and applied by judges. It may be some time

before this can be confidently said of the Anti – Monopoly Law in China.

It is important, if competition law is to develop in China, that these issues be discussed in a clear and rigorous fashion, and it is the greatest strength of this book that it lays the foundations for such a discussion. Next time I teach the subject in a Chinese university I look forward to recommending this book to my students.

Mark Furse

April 21, 2008

目　录

导　言

“法律重要的不在于写在纸上，而在于由谁执行。”

——列宁①

中国正在向构建法治社会的目标不断迈进，一个可以量化的佐证就是立法数量迅速增加，“以宪法为核心的中国特色社会主义法律体系已经初步形成”。② 然而，如果只重视或强调法的制定而忽视法的实施，则法律规范制定的再多也只是形式上的法，实际上还是等于无法。③ 有学者在研究全国人大常委会执法检查组的报告以及法律实施的实践情况后指出：我国几乎所有的法律规定中的义务性规范都不同程度地存在“实施障碍综合症”，即使是内容非常明确的法律规范，也“都存在严重的违反情况”。法律与现实之间存在巨大的鸿沟，一边是“良法美意”，一边则是

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① 《列宁选集》（第二版），第29卷，第110页。

② 据统计，从1979年到2004年6月，全国人大及其常委会共审议通过包括宪法在内的法律323件，有关法律问题的决定138件，法律解释10件；国务院制定了970多件行政法规；有立法权的地方人大及其常委会制定了上万件地方性法规；民族自治地方制定了480多件自治条例和单行条例。见洪文军：《为依法治国奠定基石——中国人大立法50年回眸》，载于人民日报社官方网站 http://www.people.com.cn/GB/14576/14957/2779900.html。另据统计，新中国成立以来颁行的法律规范已有5万余件，见法律图书馆网站：http://www.law-lib.com/（访问日期：2007年3月16日）。

③ 刘金国、舒国滢主编：《法理学教科书》，中国政法大学出版社1999年版，第240页。

法律的无从落实。研究者认为，我国法律实施普遍遭遇障碍的主要原因，有传统法律文化的消极影响、法律规定与社会现实的脱节、行政执法体制的弊病、立法质量低下、监督机制不健全等。[①]

法律实施是“法律从书本上的法律变成行动中的法律，从应然状态进到实然状态的过程，是由法律规范的抽象的可能性转变为具体的现实性的过程”，[②] 是人们在社会生活中实际贯彻与施行法律规范的一个动态过程，是人的一种能动的行为。因此，如果从法律实施者的主体特征及其实施法律的方式、实施者作出实施行为决策的动机——或曰其实施法律的成本收益分析——找寻法律实施的障碍，或许更能发现症结本源，从而克服我国法律的“实施障碍综合症”。

就法律实施的主体而言，实施者可以分为公主体和私主体两类。其中，公主体是依据公法授权，行使行政权和司法权的公共机构（下文简称“公共机构”），私主体则是包括公主体以外的所有主体（下文简称“私人”）。与实施法律的不同主体相对应，法律实施可以分为公共实施和私人实施。我国法学研究语境下的“法律实施”，通常所指的是“公共实施”，对“私人实施”罕有注意和深入论及。那么，被“忽视”的“私人实施”，对于法律实施的意义是否微不足道？就反垄断法而言，“私人实施”是否有其独特的甚或是举足轻重的作用？市场经济成熟国家的反垄断

① 马怀德主编：《法律的实施与保障》，北京大学出版社2007年版，第7-8页。

② 夏锦文：《法律实施及其相关概念辨析》，载《法学论坛》2006年第6期。

法发展在“私人实施”问题上有何经验教训？我国未来的反垄断法是否有建构私人实施制度的必要与可能？为这些尚未在我国得到深入研究的问题寻求答案，是本书的兴趣和立意所在。

作为研究的背景视野，本书第一章界定了私人实施法律的范畴，并从实践考察和理论基础两个角度对私人实施法律问题加以概述。

私人实施对于反垄断法而言有何利弊，如何才能在激励私人实施反垄断法的同时，尽量减少其可能产生的弊害，如何认识和处理反垄断私人实施机制的价值冲突，这些统领具体制度的问题将是第二章的研究内容。

第三章和第四章是在前两章的理论基础上对具体制度研究的展开，围绕私人实施反垄断法的主要方式——反垄断私人诉讼与私人监督作了较为详尽的分析。这两部分主要运用比较研究的方法，对美国、欧共体等国家和地区的相关制度进行了系统梳理与总结，试图籍此揭示私人实施反垄断法的一般模式和制度经验。

第五章是前四章内容的落脚点，是对中国反垄断法私人实施机制的必要性和可能性作出结论。本书认为，为了避免重蹈“实施障碍综合症”的覆辙，克服中国反垄断法现行和可预期实施机制的缺陷，必须在借鉴外来经验的同时，构建符合中国国情的反垄断法私人实施机制。

第一章

私人实施法律概说

本书研究的主题是私人实施反垄断法问题，准确地说，这只是私人实施法律的活动在特定法律领域的微观体现。由于我国的法学文献对私人实施法律问题迄今为止鲜有深入全面的研究，所以如果把视野局限在反垄断法的私人实施问题本身，而不能从一般意义上把握法律的私人实施问题，就难以充分理解私人实施为什么对于反垄断法实施具有特殊的重要性，难以深刻揭示和分析私人实施在反垄断法中的规律性和特殊性，更无助于引出对中国反垄断法实施有价值的结论与建议。因此，本书从法律的私人实施这一更宏观的视角切入，将其作为研究的逻辑起点和理论基础。

第一节　私人实施法律的范畴

一、我国法理学语境下的“法律实施”

在讨论何谓“私人实施法律”或“法律的私人实施”[①] 之

① “私人实施法律”是主谓词组，而“法律的私人实施”是偏正词组，尽管文字表达方式不同，但所指相同。因此，为行文方便，本书中对这两种措辞的使用不加区分。