How to Improve Transportation Investment Management: To Introduce Negative List

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Abstract. As a management mode, negative list has been applied successfully in the management of foreign investment in China. The paper analyzes the necessity and feasibility of the application of negative list to the investment management for the transportation industry. After that, it discusses how the mode is applied in the investment management for the transportation industry. In conclusion, the application of negative list can improve the investment management for the transportation industry and promote the investment in the industry greatly.

Introduction

It is possible and necessary to promote in administration area, the general use of the management mode of Negative list, which arose originally in the field of foreign investment management. The introduction of negative list management mode into transportation investment management will certainly have an important and profound influence on the improvement of transportation investment management and even the development of the transport industry.

Negative List and Its Application to Foreign Investment Management

Negative list is originally a widely-used management method for the admission of investment in the world. Negative list, as a concept relative to positive list, refers to the list of industries, areas or businesses published by a country during the introduction of foreign capital, the entry of foreign capital to which is forbidden or restrained in this country [1]. Those outside the list are fully open, that is, “anything not prohibited by law can be done”. In such industries, areas or businesses, the enterprises may operate after making a registration according to legal procedures. For short, it is one of management methods for the admission of investment, which is dominated by post-entry management and supported by pre-entry licensing management by negative list [2].

According to international practice, China also adopts the mode of negative list management for foreign investment. Administrative Measures for China (Shanghai) Pilot Free Trade Zone, adopted by Shanghai Municipal People’s Government in September 22, 2013, provides that the trade zone is subject to the management mode of negative list. Article 11 of the regulation clearly stipulates that “the pre-entry national treatment and a special management measure (negative list) shall apply to foreign investment in Shanghai Free Trade Zone (SHFTZ). In those fields outside of the special negative list as a management measure for foreign investment, the approval system for foreign investment projects shall be replaced with the filing system under the principle of ‘equal treatment to investors both at home and abroad’, except for domestic investment projects which the State Council reserves the right to confirm”. On September 30, 2013, Shanghai Municipal People’s Government issued Special Administrative Measures for Foreign Investment Access to China (Shanghai) Pilot Free Trade Zone, representing that China started to experiment with and implement the management mode of negative list in the field of foreign investment management. On July 1, 2014, Shanghai Municipal Government revised and re-issued this negative list according to practical development.
The negative list mode in SHFTZ helps to reduce the restrictions on market access and entry, create a better business environment, stimulate fair competition and develop rule-of-law economy, thus releasing more reform bonus and inspiring creative energy [3]. The introduction of negative list management mode to SHFTZ ignites the enthusiasm of foreign investment. The number of foreign-investment enterprises newly established in the pilot zone rose from 29 in October 2006, to 207 in June 2014. By the end of June, 2014, there has been 1245 foreign-funded enterprises newly established after the official operation of Shanghai Free Trade Zone, and newly-increased capital exceeded USD 7.3 billion. About 92% of the new foreign-funded enterprises fall outside the scope of negative list and are set up through the filing system. The new foreign investment comes from over 60 countries and regions, and mainly focuses on commercial service and professional service (56.6% and 33.8% respectively, of the enterprises). The foreign investment into financial service and cultural service industries are increasing rapidly.

Causes and Feasibility of Negative List’s Application to Transportation Investment Management

For recent years, the management system for the investment and financing in the transportation industry has undergone a deep reform. The target of such system is clearly defined, and the ownership and financing in the industry are more diversified. In particular, much progress has been made in the reform of investment system related to railways, and corresponding regulations and institutions are being perfected. The innovation and development of the industry are promoted and supported by adjusting financing structure and using such financing means as issuing government-subsidized transportation construction bonds, raising capital through joint stock system, conducting asset securitization and establishing investment funds for the transportation industry.

The implementation of negative list management mode in transportation investment field is an inevitable requirement for playing the decisive role of market in allocating resources. For a long term, China carried out a “positive list” mode in transportation investment management field, that is, the government prepared the category for encouraged, restricted, and forbidden investments, and told the market bodies what and how to do. In such mode, the government, instead of market, made its decision, which often led to a low efficiency of resource allocation. The key for changing such situation is to re-define the government-market relationship, causing the market to play its decisive role in resource allocation and the government to play a better part. To push the negative list management and realize that the market subjects can “do any things not forbidden by law” and the government should “do nothing without authorization by law” is an important path for rebuilding the government-market relationship.

As for whether the negative list management mode originating from foreign investment field is applicable to other administrative area, there is an opinion that the original connotation of negative list should be hold on to and the scope of its application not be extended. But the author holds that the connotation of negative list should and can be extended, that is, it can be applicable to other matters forbidden or restricted by laws and regulations, breaking through the traditional administrative ideas, implementing the rule-of-law concept of “no prohibition by law means freedom” and conforming to the new trend of rule-of-law governance and law-based government.

Globally, the negative list management mode has been a reform direction for governments to manage the economic field, and many countries have introduced such mode to their administrative field. In respect of medical management, for example, the prescription management rules in Germany and Canada clearly stipulate that some medicines fall into the scope of negative list and thus cannot be reimbursed. In respect of tax management, India introduced the negative list management to its 2011 national budget, and simplified and clarified the negative list management in its 2013 budget. In respect of financial management, Switzerland’s financial regulation department sets up the “negative list” items on its official website, which refers to the list of financial institutions undertaking some services without approval by regulation department. In respect of environment protection, Australia
places the guides of negative list and positive list on a prominent position under “initiative for low-carbon agriculture”, which form an important part of the Australia government’s scheme for coping with climate change.

In recent years, China has also undertaken to attempt to introduce negative list management into its administrative field. The State Council takes the pushing of negative list management, as an important measure for transforming government functions, streamlining administration and instituting decentralization, and giving full play to the decisive role of the market in resource allocation, so as to stimulate the market vigor, development impetus and social creativity to the maximum degree. Premier Li Keqiang stressed repeatedly on the pushing of negative list management. At the State Council’s second conference of clean government in 2014, Li pointed out, at the mention of negative list management mode, that market subjects could “do any thing not forbidden by law”, while government departments could “do nothing without authorization by law”[4]. At the State Council’s third conference of clean government in 2015, he stressed again on delimiting the government power using the “rule-of-law” principle, and establishing the system of power list, responsibility list and negative list. In 2015, the national conference on transportation proposed to “gradually carry out and establish the system of power list, responsibility list and negative list”.

Since Shanghai Free Trade Zone started to implement the negative list management mode, other regions have begun to carry out such mode in administrative field. At the end of 2013, the administrative reform of “three lists” (negative list, approval list and supervision list) started at Nanhai district, Foshan, Guangdong Province. The negative list concerned 1196 forbidden or restricted projects in the six fields of enterprise investment projects, foreign investment industries, regional development, environment protection, approval of land use, and business registration, defining the forbidden areas to enterprises. Negative list, approval list and supervision list are altogether brought into the network approval and supervision system, to define the supervision responsibilities and authorities and further reduce the discretion of government departments in respect of administrative examination and approval. Currently, Nanhai’s “Three-List” management reform is extending from administrative field to market management, social organization, and other fields. As another example, in 2014, the Environmental Protection Agency of Xinyang Municipality, Henan Province, issued the Negative List of Environment Protection for industrial and regional development, through which a market orientation based on environment protection was formed, and the local enterprises were promoted to close down outdated production faculties for transformation and upgrading.

International and domestic practices fully demonstrate that it is feasible to extend the connotation of negative list and apply it to administrative and other fields. In contrast with positive list mode, negative list management mode helps to activate the vigor of market subjects, to regulate the government’s discretion, to facilitate the openness and transparency of administrative acts, and to improve the regulation efficiency. The introduction of negative list management mode into the administrative field in China, will delimit the boundaries of control of the government, effectively deal with the question of government and market boundary, and direct more attention of all-level authorities to supervision strengthening. This can also fully demonstrate the legal principle logic behind the negative list management mode, carry forward the rule-of-law spirit of freedom and equality, and accelerate the construction of state, government and society under the rule of law.

The Application of Negative List to Transportation Investment Management

According to the experience in the application of negative list to foreign investment and other administrative fields, the author holds that a “negative list” should be rendered respectively for main fields, important areas and key links involving enterprise investment, on the basis of the foreign investment’s “noncompliance management measures” [5]. For example, the industries or investment undermining environment, harmful to people’s livelihood or with high energy consumption, should
be forbidden or restricted, so as to promote the positive cycle of economic development and livelihood improvement. Therefore, it is advisable that the transportation investment field should introduce the mode of combining negative list and list of approvals, and strengthening of midst and after-event supervision. That is, forbidden and restricted acts and the fields forbidden or restricted for access are published in a list during transportation administrative activities. The administrative counterparts in the transportation field can check against the list, and can freely undertake any business or fields not forbidden or restricted by the list, without interference by the transportation administration. In addition, a supportive list of powers, that is, list of approvals, should list the administrative licensing matters clearly, thereby to provide conveniences for the counterparts in transportation administration to apply for a license and do corresponding acts.

How is a negative list made? That is, where does the negative list originate? This is the basis precondition for carrying out a negative list management mode. The determination of a negative list for transportation industry according to law, is a basic method for researching on and establishing the negative list management mode for transportation. The negative list management mode with Shanghai Free Trade Zone has an important experience of “law governance”. “Law governance” means that the process of preparation of negative list is governed by law. According to the decisions by the Standing Committee of the National People’s Congress and by the State Council respectively, 3 laws, 15 administrative regulations and 3 State Council documents were adjusted temporarily in the free trade zone, as the legal basis for negative list preparation. Meanwhile, the connotation of negative list management mode is made clear through local legislation. Administrative Measures for China (Shanghai) Pilot Free Trade Zone and Regulations on China (Shanghai) Pilot Free Trade Zone, issued by Shanghai Municipal Government, lay a sound basis for the system frame of the free trade zone.

The transportation investment field adopts the negative list management mode. The list should be prepared according to related laws, regulations and rules of transportation industry, such as Highway Law, Railway Law, Port Law, Civil Aviation Law, Regulations on Highway Safety Protection, Road Transportation Management, and corresponding rules. According to the experience of Shanghai Free Trade Zone, if some breakthrough has to be made in respects of wider opening and list decompression, it is necessary to discuss the list on an item-by-item basis, with the related ministries and commissions, by taking into considerations the characteristics of transportation industry.

The details of negative list for transportation investment management field must and can only be drawn and prepared from the forbidding or restricting provisions of the above legislations on the transportation industry. Any acts that “must not” or “are forbidden” to be done according to the above laws, administrative regulations, local regulation and rules shall be listed into the catalog of forbidden acts for enterprises and individuals; any acts restricted by the above laws, administrative regulations and rules shall be listed into the catalog of restricted acts.

According to the legality principle of law-based administration, the drawing of negative list from existing laws, regulations and rules concerning the transportation industry is only a staged achievement towards the completion of negative list. It is also a must to establish a dynamic adjustment mechanism of negative list strictly according to the legality principle of law-based administration, keep track of the effect of application of negative list in practice, and to supplement, adjust, update and perfect the negative list through legislation, according to the standard of “being helpful in clarifying the government-market boundary and in performing government functions in a comprehensive and correct manner”, rendering the content of list more scientific, full and effective. It is required to maximize the policy opening and shorten the negative list as possible, and stimulate the vigor of market subjects.

In addition to the negative list for transportation investment field, a list of license must be established. In recent years, the transportation authorities at all levels has basically finished this job during the pushing of the reform of transportation administrative examination system. While the market comes to play its decisive role in resource allocation in a better way, the size of the list of transportation administrative licenses will be further reduced. The limitations on market entry and the size of the license list will be gradually reduced, as a response to the four circumstances where no
administrative licenses are required under Administrative Licensing Law, that is, where a decision can be made independently by citizens, corporations and other organizations, or the market competition mechanism can mediate effectively, industrial organizations or intermediaries can manage through self-discipline, and administrative bodies can solve through consequent supervision and other administrative means. For example, the sub-industry of cargo transportation, with a higher marketization degree, should take the filing system instead of licensing system.

The application of negative list management mode will certainly be accomplished with the transfer of supervision focus and the change of supervision content. The focus of government supervision will transfer from prior examination and approval, to midst and subsequent supervision. Together with tolerant entry for market subjects, a more strict and orderly midst and subsequent supervision shall be implemented according to the actuality. This means that supportive measures shall be available in a timely manner, and otherwise, the negative list cannot be carried out. Therefore, for preparing the negative list, we should take into full considerations the risks caused by administration examination and the deficiency of actual supervision capability, and make more efforts in transforming government functions and enhancing supervision ability, and step up the building of credit system of transportation operators by full use of Internet and other modern information technology mean, ensuring the implementation of the items enumerated in negative list and the rule-of-law concept of “any thing not forbidden by law can be done”.

Summary

With the implementation of the basic policy of rule of law and the pushing of the construction of law-based government, the transportation administration mode is undergoing a major transition period. With a deep understanding of the original connotation of negative list management mode arising from foreign investment management field, we should be active in widening the connotation of negative list, and be bold to introduce the negative list management mode to transportation investment management. We should study and prepare the negative list for the investment in the transportation industry from existing laws and regulations, in the principle of legality, and keep on adjusting it in a reasonable manner, while establishing the list of licenses for transportation and strengthening the midst and consequent supervision. By restless efforts, we will realize a major change of transportation administrative mode and make active contributions to the exploration for and the pushing of the modernization of national governance system and capability.

References


