The Application of Chinese Anti-Monopoly Law upon State-Owned Enterprises

FANG Xiaomin[*]

I. Introduction and Research Question

Article 130 of German Act against Restraints of Competition (abbr.: GWB in German) and Article 106 of Treaty on the Functioning of the European Union (abbr.: TFEU) both explicitly include Public Enterprises within the applied range of their anti-monopoly rules. It is the essential requirement of market economy that anti-monopoly law shall be equally applied upon all kinds of enterprises and, consequently, shall protect the fair competition among all the market participants. However, one can not take this equal application of anti-monopoly law for granted in China, where a profound transition from the planned economy to the market economy is in the process. Unlike the EU law as well as German law, Chinese anti-monopoly law (abbr.: AML) has no specific rule upon the public enterprises, with the State-Owned Enterprises (abbr.: SOE) at first place.

The fact of remaining privileges of SOEs, along with the resistance from the interest groups, have all put obstacles in the way towards the free and fair competition in China, including the equal application of AML. Article 7 of AML, in which the rule directly points to the state-owned economy, has been incorrectly viewed by some scholars as a granted exemption in anti-monopoly control for state-owned industry in critical areas.[1]

Fortunately, the practice of AML in China has proved this comprehension of article 7 as a total mistake. Since the enforcement of Chinese AML in 2008, there have been considerable cases, in which the SOEs were investigated and punished by

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[*] Prof. Dr. FANG Xiaomin, Nanjing University, China.

[1] Detailed Discussion see Wang Xiaoye, *Market Access of the Non-Public Economy and Anti-Monopoly Law*, The Evolution of China's Anti-Monopoly Law, Edward Elgar 2014. P. 60.

anti-monopoly agencies.[2] From Aug, 2008 to Aug, 2014, the Ministry of Commerce of the People's Republic of China (abbr.: MOFCOM) has dealt with altogether 945 cases involving concentration of business operators.[3] Although the 26 publicized cases by this agency[4], in which conclusions of prohibition or permission only on conditions have been made, concerned no SOEs at all, the MOFCOM inspected the concentration of huge SOEs in more cases[5], such as *Shanghai Baosteel, Guangxi Yuchai Machine Group Co., Ltd, Baotou Beiben Trucks Group Co., Ltd, Guangxi Liugong Machine Co., Ltd, Sinopharm Group Co., Ltd,* etc. Investigations of monopoly agreement and abuse of market-dominant status by the other two authorized AML enforcement agencies, the National Development and Reform Commission (abbr.: NDRC) and the State Administration for Industry and Commerce of the People's Republic of China (abbr.: SAIC), are often the same case. The cases investigated by NDRC involving SOEs have also raised great concerns, such as the case towards *China Telecom* and *China Unicom* concerning abuse of market-dominant status by business operators investigated in 2012, the case towards the giant SOEs like *Kweichow Maotai Co., Ltd* and *Wuliangye Group Co., Ltd* concerning vertical monopoly agreement in Mar, 2013 as well as the penalty of horizontal monopoly agreement of *Shanghai Gold & Jewellery Trade Association* (abbr.: GJTAS) and of *Zhejiang Insurance Association* in 2013.[6] According to the publicized announcement by the SAIC, its national and subordinate bodies have

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[2] Internet Ressourcen see: http://www.saic.gov.cn/jgzf/fldyfbzljz/;
http://www.sdpc.gov.cn/fzgggz/jgjdyfld/jjszhdt/; http://fldj.mofcom.gov.cn/article/zcfb/? [last visit on 12.09.2014]

[3] Press conference held by State Council Information Office on 11.9.2014,
http://www.scio.gov.cn/xwfbh/xwbfbh/fbh/Document/1380796/1380796.htm [last visit on 14.09.2014]

[4] According to article 30 of AML, the anti-monopoly law enforcement agency under the State Council shall timely publicize a decision on prohibiting the concentration of business operators or a decision on attaching restrictive conditions to the concentration of business operators.

[5] http://fldj.mofcom.gov.cn/article/zcfb/? [last visit on 14.09.2014]

[6] http://www.sdpc.gov.cn/fzgggz/jgjdyfld/jjszhdt/;
http://www.ndrc.gov.cn/fzgggz/jgjdyfld/fjgld/201409/t20140902_624511.html [last visit on 14.09.2014]

conducted altogether 39 anti-monopoly investigations by Aug, 2014, in which some local branches of SOEs were involved.[7]

In spite of these practices of AML application upon SOEs, efficient anti-monopoly investigations against SOEs are still not normal. It is often the cases that investigations against huge SOEs ended up with no definite conclusions or judgments. The applications of AML upon Public Enterprises, especially huge SOEs, which are directly owned by central government agencies or function in critical areas, such as financial market, telecommunication, civil aviation, railway, energy and resource, are significantly hindered by the lingering idea of centrally controlled economy and the primary *Semiplan-Semimarket* economy system.[8]

The MOFCOM conducted for instance no legal examination against the fusion in 2008 between *China Netcom* and *China Unicom*, *China Tietong Telecom* and *China Mobile* as well as *China Unicom* and *China Telecom*.[9] The anti-monopoly agencies also ignored the suspected illegal price agreement by *China Civil Aviation Information Network Co. Ltd* in 2009[10] and abuse of market-dominant status of *China Telecom* and *China Unicom* in Broadband-network market in 2011.[11]

The equal application of AML upon SOEs and other market competitors will definitely conflict fiercely against the privileged position and traditional advantages of SOEs, which cause resistance from certain interest groups. From this sense, this equal application of AML is closely connected with the market-oriented reform of SOEs, which also meets huge difficulties when getting constantly deepened. Therefore,

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[7] Press conference held by State Council Information Office on 11.9.2014, http://www.saic.gov.cn/jgzf/fldyfbzljz/ [last visit on 14.09.2014]

[8] WU Jinglian, *Transformation of Rule of Law: Success depends on the Progress of Reform*, Reading (DuShu), Vol. 5, 2011.

[9] WANG Biqiang, *Illegal Fusion of China Unicom and China Netcom*, Economic Observer, 30.4.2009.

[10] WANG Biqiang & LIU Weixun, *The Investigation by NDRC towards Suspected Ticket Price Control of Travelsky*, Economic Observer, 16.5.2009.

[11] Promise of China Telecom and China Unicom on the Reduce of Internet-fee from NDRC Reports, The Beijing News, 15.3.2012.

whether the anti-monopoly rules could be equally and effectively applied upon SOEs or not, is a tremendous challenge and tough task for the reconstruction of economic system.

Are there legal foundations for the application of anti-monopoly rules upon SOEs in China? What is the dogmatic argument of equal application of AML? What is the reason that SOEs could hinder the application of AML in practice? Is it possible that this hindering could be eliminated? How can this hindering be eliminated so that both public and private could be put under equal enforcement of law? These questions form the basis and focus of the discussion in the following essay.

II. The Constitutional Foundations of the Application of Anti-monopoly Law upon SOEs

1. The Constitutional Explanation of the Application of Anti-monopoly Law upon SOEs

Article 15 in the 93' Amendment of Constitution states that, *"The State shall practice socialist market economy as its fundamental economy system"*, which is a principle continuously emphasized in the later 99' and 04' Amendments. After this, China has long stayed in the process of economy system transformation. Market economy is marked with open market, in which the principle of private autonomy and protection of individual freedom are recognized. The constitution has established a whole set of rule system of market economy by recognition of the basic principles of the protection of private property, the freedom of contract, and the freedom to conduct a business, etc.[12] Different market subjects, including the public and private enterprises, thus enjoy equal opportunities and participate in a free and fair competition. In conclusion, the interpretation of article 15 of Constitution builds the constitutional foundation of equal application of anti-monopoly rules.

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[12] SU Yongqin, *The Civil Law Legislation and the Synchronization of Public Law and Private Law*, Beijing University Press, 2005, P. 8.

In comparison with Chinese constitution, there exists no provision dealing with economy system in German Basic Law, which is economically neutral. However, the ownership of private property, the freedom of contract, and the freedom to conduct a business have been explicitly recognized and protected by the German Basic Law as fundamental rights,[13] which forms the foundation for all market participants to freely and fairly compete.

In Chinese Constitution, the ownership of private property, the freedom of contract, and the freedom to conduct a business are not recognized as individual fundamental rights, which are directly protected.[14]

As a result of this, people can only seek for legal remedy by systematic interpretation of the recognized market economy system by constitution with the arguments that the ownership of private property, the freedom of contract, and the freedom to conduct a business shall be protected by the country, while they are essence of its market economy system.[15]

2. Equal Constitutional Positions of Public and Private Economies?

On conditions of the equal constitutional positions of public and private economies, one can easily draw the conclusion that the two should be equally put under application of the anti-monopoly rules and thus protected. However, the constitutional positions of these two remain relatively unclear and complicated.

The constitutional position of private sectors of economy has gotten increasingly emphasized during the constant revisions of article 11 in all the amendments. 99' Amendment of the Constitution should be here especially emphasized. In the 99'Amendment, the original position of the non-public sectors of the economy was revised from *a complement to the socialist public economy* into *an important component of the socialist market economy*. As a result of this revision, the state's

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[13] Art. 2, 3, 14 GG.
[14] SU Yongqin, P.6.
[15] SU Yongqin, P.6 ; HAN Dayuan, Equal Protection for Non-public Economy, Jurist, 2005, Vol..3, P.14.

duty to protect the non-public economy was clarified, *"The State protects the lawful rights and interests of the individual and private sectors of the economy."* [16] The Article 21 of the 2004' Amendment, in which the status of the once merely protected and controlled non-public economy was further raised, reads, *"The state encourages, supports and guides the development of the non-public sectors of the economy."* Despite these, whether the public and private sectors should be equally protected is still not clear. It is clarified in the constitution that the public sector plays the leading role ("*ZhuDao*" / "主导" in Chinese) of economy,[17] which forms the basis of Chinese economy.[18] In contrast with the leading role of the public sector of economy, the private sectors play thus only non-leading role. Thus, it is questionable if these two sectors should be equally treated. As a result of this, the interpretation of constitution is necessary.[19]

One should never ignore that the leading role of public sector of economy exists at first in the mature stage of socialism. However, it is also stated in the constitution that China is still at present and will long stay in the future on the primary stage of socialism.[20] Through the 99' Amendment, the constitution added a paragraph into article 6, which reads, *"In the primary stage of socialism, the State upholds the basic economic system in which the public sector plays the basic role and diverse forms of ownership develop side by side…"* The "basic role" ("*ZhuTi*"/ "主体" in Chinese) stands for market subject. The public sector of economy is considered as one of all the market subjects, which should be equal in competition. This interpretation is not popular. The concept of basic role can also be understood as dominant part. Based on this, the second paragraph of article 6 can be interpreted as following: "the public sector is the dominant part of economy, while the private ownerships develop themselves as supplementary part". Thus, the widespread debate of the role and position of public economy continues.

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[16] *HAN Dayuan*, P.14; compare. also Art.11 of 2004' Chinese Constitution.
[17] Art.7 of 2004' Chinese Constitution.
[18] Art.6 of 2004' Chinese Constitution.
[19] *HAN Dayuan*, P.14.
[20] Paragraph 7 of Preface of 1999' Chinese Constitution.

The one-sided comprehension of dominant part will limit the public economy's social welfare function and the autonomy as well as quality of diversified ownership forms. The standpoint is always the constitutional interpretation of the position of public economy. There are at least two totally different interpretations. Under the first interpretation, the main role of public economy can be illustrated as standard of future economic activities, which means all the kinds of economy sectors should function only when public sector's dominant role is guaranteed. In order to achieve this, the state will be allowed to interfere in the market, while the fundamental role of market itself in resource allocation is weakened. This interpretation is in obvious contradiction with the requirement of socialists' market economy.

The second interpretation views, in the opposite, the main role of public economy from the perspective of property law. From this sense, all the subjects are considered as equal market participants, which are totally independent from their ownership forms, and develop themselves together in completely fair competitions. While this argument fully respects the achievements of public economy in the past planned economy, it also emphasizes justice and efficiency, which are prerequisites of future increment. Therefore, only the competitions in market can decide the allocation of resources so as to optimize the utilization of social resource and promote all the economic subjects of various ownerships. This idea, though in correspondence with the essence of constitutional recognized market economy system in the primary stage of socialism, is not mainstream opinion.

3. Primary Conclusion

The Chinese law itself does not explicitly put public and private sectors of economy under equal application. The Constitution of China also does not directly state equality in competition as one of the economic basic rights of enterprises. However, according to article 11 of Constitution, the recognition of socialists' market economy system as fundamental economy system has provided constitutional foundations of free and fair competitions between both public and private economies, and set boundary for relevant legislation, law enforcement and interpretation. It is

critical for the equal positions between public and private economies to actively interpret the constitution and completely comprehend the constitutional role of non-public economy.[21] However, interpretation and enforcement of constitution are still in a backward state in China, which stays more in scholars' discussion rather than in practice. Fortunately, the decision of the CPC Central Committee to form a system serving "the socialist rule of law with Chinese characteristics" and build a country under "the socialist rule of law" made by the 4th Plenum of the 18th CPC Central Committee, Oct., 2014, clarified, for the first time, that constitution should play the guiding role in Chinese judicial reform. It is required to establish the system of constitutional transformation and application, as well as a detailed implementation's mechanism of constitutional interpretation, like the construction of constitutional supervision by the National People's Congress and its Standing Committee. Only based on this, the non-public sectors of economy could participate in the competition fairly and develop themselves smoothly.[22]

III. Competition Neutrality as Dogmatic Foundations of the Application of Anti-monopoly Law upon SOEs

1. The Concept of Competition Neutrality

The competition between state-owned enterprises (normally the privileged one) and private enterprises is always a conspicuous problem for countries whose state-owned economy accounts for a much larger proportion in its national economy. In most of the cases, the SOEs enjoy some privileges and conditions from the country's special supports rather than from its own technology and management innovation, which unfairly reduces its costs and negatively hamper efficient resource allocation. Taking Australia for instance, it is just its privileged SOEs and inefficient market that limit its economic development. Realizing this, in the process of

[21] HAN Dayuan, P.14.
[22] HAN Dayuan, P.14.

Australian National Competition Policy Reform in 1990s, the concept of Competition Policy first appeared in competition law and later became the important rule of regulating the SOEs.[23] Its fundamental purpose is to eliminate the unequal resource allocation mechanism between SOE and private enterprises so as to create fair competitions between them.

With the deepening of globalization, more and more developing countries and countries in economical transition have participated in the global market, in which the SOEs of these countries thus play much more prevalent roles. How to ensure the fair competition between SOEs and private enterprises has become one frontier problem in international investigation and commerce. Especially in recent years, SOEs from emerging economies rush into world market and make strong competitors against their European counterparts. In order to balance the competitive pressure from emerging economies and limit national capitalism[24], the USA has promoted the concept of Competition Neutrality into world market regulations through bilateral agreements, multilateral agreements and international organizations. Among these, documents published by OECD, like *"Guidelines on corporate governance of State-owned Enterprise (2005)"*[25], *"State Owned Enterprises and the Principle of Competitive Neutrality (2009)"*[26] and *"Competitive Neutrality: Maintaining a Level Playing Field Between Public and Private Business (2012)"*[27], etc., have established one universal Competitive Neutrality Framework. Through this international law-making movement, Competition Neutrality has been gradually and widely accepted as one new rule of international economy and commerce.[28]

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[23] Rennie, M. & F. Lindsay, *Competitive Neutrality and State-Owned Enterprises in Australia: Review of Practices and their Relevance for Other Countries*, OECD Corporate Governance Working Papers, 2011, No.4, OECD Publishing, P.8. http://dx.doi.org/10.1787/5kg54cxkmx36-en.

[24] *The Rise of State Capitalism*, Economist, January 21, 2012.

[25] *OECD Guidelines on Corporate Governance of State-owned Enterprise*，2005，www.oecd.org/daf/corporateaffairs/soe/guidelines.

[26] http://www.oecd.org/daf/ca/corporategovernanceofstate-ownedenterprises/50251005.pdf

[27] http://www.oecd.org/daf/ca/corporategovernanceofstate-ownedenterprises/50302961.pdf

[28] HUANG Zhijin, *Competition Neutrality in International Rule-making and Chinese Response*, International Business Research, Vol.5, 2013.

According to statistics from OECD, Chinese SOEs' output values account for 95% of the total output value of the ten biggest domestic enterprises, standing first worldwide. [29] Because of the large amount and great significance of SOEs in Chinese economy, the introduction of Competitive Neutrality into China will greatly influence its enterprises' international competitiveness. However, the practical and theoretical fields in China paid little attention to Competitive Neutrality. Some scholars in China seem to believe that Competitive Neutrality is a tool of the developed countries to stifle the future development of emerging economies. Therefore, they advocate that the introduction and application of Competitive Neutrality should be phased and cautious.[30] However, the mainstream opinions have agreed that the Competitive Neutrality meets the fundamental requirements of socialists' market economy guided and guaranteed by constitution, and consists with China's goal of economic reform[31], which is significant to its state-owned enterprises' reform of management, increment of efficiency, and sustainability of development.[32] It can be safely concluded that Competitive Neutrality has been recognized as common sense in anti-monopoly and promotion of competition in domestic market.

2. Realisation of the Priciples of Competitive Neutrality

The Competition Neutrality is required both in legislation, enforcement and conformation of anti-monopoly law.

First of all, the legislators are required to fair apply the principle of free and fair competition in antimonopoly law legislation. Friedrich Hayek pointed out that "strong

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[29] Przemyslaw Kowalski, Max Büge, Monika Sztajerowska & Matias Egeland, *State-Owned Enterprises: Trade Effects and Policy Implications*, OECD Trade Policy Papers, No.147, OECD Publishing, 04/2013. http://dx.doi.org/10.1787/5k4869ckqk7l-en.

[30] LI Xiaoyu, The Newest Development of *Competition Neutrality and its Effects on China*, International Problem Research, Vol.2, 2014; WANG Ting, *Competition Neutrality: The New Focus of international Trade and Investment*, International Business Coporation, Vol.9, 2012; YING Pinguang, *Competition Neutrality: Chinese Practice and Outlook*, China WTO Tribune, Vol.6, 2014.

[31] YING Pinguang, *Competition Neutrality* .

[32] WANG Xiaoye, *Market Access of the Non-Public Economy and Anti-Monopoly Law*, The Evolution of China's Anti-Monopoly Law, Edward Elgar 2014. P. 60; Ying Pinguang, *Competition Neutrality: Chinese Practice and Outlook*, China WTO Tribune, Vol.6, 2014.; Tang Jing, *Competition Neutrality: New Challenge before State-owned Enterprises*, International Business Cooperation, Vol.3, 2014.

arguments can be advanced that serious shortcomings here, particularly with regard to the law of corporations and of patents, not only have made competition work much less effectively than it might have done but have even led to the destruction of competition in many spheres."[33] Thus, the idea of free and fair competition is not merely limited in AML itself. A systematic design and construct of legal system emphasizing competition is the guarantee of competition mechanism. In recent years, the Prior Statutory Consultation has raised wide concern by more and more countries.[34] Prior Statutory Consultation should be established, which requires the relating legislators to refer to the opinions from the competition executive before legislation and policy making so as to avoid anti-competition rules and promote competition.

It should be admitted that there is no judicial review and competition-oriented Prior Statutory Consultation in China. But the decision of the CPC Central Committee to form a system serving "the socialist rule of law with Chinese characteristics" made by the 4th Plenum of the 18th CPC Central Committee, Oct., 2014, clarified that every legislative result should in line in line with the Constitution so as to ensure its systematic and effective characteristic. According to this, China plans to put all the laws and regulations under the supervision of NPC and all unconstitutional documents should be withdrawn or corrected. In the foreseeable future, it is one major task of Chinese rule of law that a socialists' market economy system, in which Constitution plays guiding role, Competition Neutrality functions as fundamental characteristic and inner logical correspondence is emphasized, will be established.

Secondly, the administration and judicial judgment are required to apply the principle of Competition Neutrality in its anti-monopoly law practice. Chinese AML enforcement agencies have explicitly its clean break with selective law enforcement

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[33] F.A.Hayek, *The Road to Serfdom*, Chicago, University of Chicago Press, 2007, P.87.

[34] For example, see Article 63 of Korean Monopoly Regulation and Fair Trade Law.

and conformation of Competition Neutrality.[35]

To ensure the equal competition of all the market participants, including the SOEs, is the ultimate purposes of nearly all countries, but is also tough tasks for them. The equal and fair AML enforcement in China, a country in the process of economic transformation, has received worldwide concern and challenge. It was trenchantly criticized that no legal examination against the fusion in 2008 between *China Netcom* and *China Unicom*, *China Railway* and *China Mobile* as well as *China Unicom* and *China Telecom* has been conducted, perhaps because of the involvement of several SOEs.[36] Until today, it is still unclear if the pressure from these giant SOEs led to the omission of MOFCOM in decision making and law enforcement. What is clear is that MOFCOM were really intended to conduct investigation against the SOEs.[37] But the fact is that most of the SOEs are the giant enterprises, even monopoly enterprises in critical areas, which are sometimes controlled directly by administration on ministerial level. And the power and obligation to actively start investigations against an undeclared fusion remained unclear at that time. Besides, opinions towards these cases contradict with each other. Whether the combination of two state-owned enterprises should be considered as reconstruction of state-owned property or fusion under anti-monopoly law, is still questionable.[38] Though these questions remained unclear, fortunately, MOFCOM published its administrative regulation in 2011. According to article 5 of the Interim Measures for Investigating and Handling Undeclared Concentration of Business Operators, *"Where there is any preliminary fact or evidence showing the suspected failure to legally declare the concentration of business operators, the Ministry of Commerce shall file the case and notify the business operators under investigation in writing."* The ignorance of undeclared

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[35] Press conference held by State Council Information Office on 11.9.2014. http://www.scio.gov.cn/xwfbh/xwbfbh/fbh/Document/1380796/1380796.htm [last visit on 14.09.2014]

[36] WANG Biqiang，*MOFCOM Announces the Illegal Fusion of China Unicom und China Netcom*, Economic Observer, 04.05.2009.

[37] WANG Biqiang，*MOFCOM Announces the Illegal Fusion of China Unicom und China Netcom*, Economic Observer, 04.05.2009.

[38] Opinions of EU Commission on the Questions. Compare. Commission 24.06.1991, Fall Pechiney / Usinor Sacilor.

concentration *of business operators* will be no longer possible, because this will be judged as illegal administrative omission.

Apart from this, the case, in which the abuse of market-dominant status of *China Telecom* and *China Unicom* in Broadband-network market in 2011 received no punishment, has long been criticized as inclined protection of the SOEs.[39] In the decision of punishing the price agreement among insurance enterprises in Zhejiang, 2013, the anti-monopoly agency considered the insurance industrial association as the leading organizer of price agreement and thus primarily liable, so the other insurance enterprises enjoyed exemptions from punishment.[40] This ignores completely the relationship of enterprises and their industrial association, which is widely criticized as a strongly partisan decision in favor of the involving state-owned insurance enterprises.[41] How much were the decisions influenced by factors out of the anti-monopoly law? It can be estimated that the political consideration is one important influential factor here. Putting this estimation aside, it is critical to completely examine al the factors, which will hinder the objective law enforcement. These obstacles first appear as the leaks in concerning laws and regulations. What are the limits and conditions of a legal and effective commitment? What are the prerequisites and discretion-range of punishment's mitigation in exemption? There is no concerning provision in law, so the law enforcements might have problems in rule reference and discretion range. At the same time, the lack of supervision will definitely lead to opacity of procedure and decision making.

Thirdly, the creation of competition culture is significant in competition awareness of market participants, conformation of anti-monopoly law and realization

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[39] See Footnote 11; Opposite Opinion, see Wang Xiaoye, *Reflections on the NDRC Case against China Telecom and China Unicom*, The Evolution of China's Anti-Monopoly Law, Edward Elgar 2014, P.60.

[40] Compare NDRC's Decision (NDRC No.7-29,2013). http://www.ndrc.gov.cn/fzgggz/jgjdyfld/fjgld/201409/t20140902_624511.html; Article 46 of AML reads, "Where the business operators reach and fulfill a monopoly agreement in violation of this Law, the Anti-monopoly Law Enforcement Agency shall order them to stop the violations, confiscate the illegal gains and impose a fine of 1% up to 10% of the sales revenue made in the previous year."

[41] SHAO Geng, *12 Questions towards Administrative Penalty from NDRC in the Zhejiang Insurance Enterprises Case*.

of Competition Neutrality. It is undeniable that the anti-monopoly law enforcement itself helps create competition culture and promote competition among all the market participators. For instance, the administrative suit against National General Administration of Quality Supervision, Inspection and Quarantine (abbr.: AQSIQ) was rejected by court in hasty conclusion with unconvincing reason of time limitation excess.[42] However, the conclusion itself, along with the concerning news reports, has brought great concern and heated discussions, in which its illegality and improperness received wide criticism. AQSIQ withdrew the controversial document, which allowed certain business operators privileges in market. Another example is the case, *Chongqing Falin Law Firm vs. Chongqing Insurance Industrial Association* in 2008 for price agreement, the defendant offered to revise its suspected documents and the plaintiff withdrew its lawsuit.[43] At the same time, more and more scholars in China begin to introduce and research on Competition Advocacy as one important part, which should be considered in the policy-making and law enforcement of anti-monopoly agencies.[44] They proposed that the administration should put Competition Advocacy before law enforcement. By the publicity of antimonopoly law, and awareness of market participators, the antimonopoly law could be better applied.[45] Last but not least, China has gradually emphasized Antitrust Compliance of business operators.[46] Instead of deterrence and punishment, the antitrust agencies encourage the enterprises to make compliance commitment by providing compliance guidance to make them voluntarily obey the anti-monopoly laws and regulations.

3. Primary Conclusion

As a belief, Competition Neutrality remains controversial. It is critical to develop Competition Advocacy and Antitrust Compliance, which stay only in initial stage and

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[42] BAI Guixiu, *The Essence of Administrative Monopoly and the Legal Remedy: The First Case in China*, Jounal of Politic Knowledge and Legal Study, Vol.6, 2008.
[43] http://cq.qq.com/a/20081210/000835.htm
[44] ZHANG Zhanjiang, *Research on Competition Advocacy*, Chinese Journal of Law, Vol.5, 2010.
[45] WANG Xianlin, *The Frontier Problems of Chinese Anti-monopoly Law Application*, Law Press, 2011, P.21. Also, see International Competition Network, Advocacy and Competition Policy, 2002, P.i.
[46] YU Ling, *From Threaten to Antitrust Compliance*, Peking University Law Journal, Vol.6, 2013.

are totally new to most market participants in China. While more administrative resource has been put into law enforcement and deterrence and punishment are more emphasized than procedural justice, the anti-monopoly agencies seem to pay not enough attention to Competition Advocacy and Antitrust Compliance as well.

IV. Perfection of Mechanism to Realize Equal and Fair Anti-monopoly Law Application

1. General System

The equal and fair application of anti-monopoly law upon all market participants, no matter its nationality, its ownership, its form or its economical branches, meets the requirements both from the Equality principle of anti-monopoly law, and from the requirements of socialists' market.[47] The fair application of antimonopoly law upon SOEs is not only one task, but also the establishment of one general system. The fair application is senseless without the competition idea, without the market reform of SOE, and without the tax-neutrality, credit-neutrality and regulation-neutrality (no privileges for SOEs in these fields). The law application concerns not merely the law enforcement agency itself, but also requires the social agreement, legal system and political support of fair and free participation in competition. This general system is also based on the constitution to ensure its unification and authority. Without constitution, and without support from the whole legal system, the competition will no longer exist.

The constitution should clarify the fundamental principles of market economy and equality as basic right of all market participants, so as to guide legislation, law enforcement and conformity of law and promise the fair application of anti-monopoly law. Through the effect of competition-oriented "Prior Statutory Consultation" system, the relevant legislation can be guaranteed, which will in turn systematically promote

[47] Press conference held by State Council Information Office on 11.9.2014.

and protect the competition. Also, only the application of competition law in line with Competition Neutrality principle can guarantee the fair application of AML. Through Competition Advocacy and Antitrust Compliance, the competition idea should be further encouraged, the law should be voluntarily obeyed, and thus the law enforcement will be improved. This all-around mechanism of anti-monopoly law application cooperated of legislation, law enforcement and law compliance comes from the deprivation of SOEs' privileges. Among those, the rejection of selective law enforcement is the main part.

In recent years, it can be easily observed that China has enhanced its anti-monopoly law enforcement. With the investigation and punishment involving *BMW, Audi*, *IDC* and *Qualcomm*, the objectivity of Chinese law enforcement is challenged and criticized as selective law enforcement and trade protectionism. Facing al the challenges, the anti-monopoly agencies published statistics to defend themselves. Until now, NDRC has investigated over 335 enterprises, among which 33 are foreign enterprises (10%). SAIC and its provincial subordinate bodies have solved altogether 39 anti-monopoly cases, among which only 2 cases are foreign enterprises (5%), and 37 cases involved SOEs or domestic private enterprises.[48] Naturally, conclusion of selective law enforcement could not be made only by this. Selective law enforcement means not only the discrimination in choosing objects, but also at first law enforcement without unified standard. There are numerous reasons for selective law enforcement. In order to fairly apply the antimonopoly law upon all the market participators, China should perfect the mechanism of antimonopoly law application by relocating the role and authorization of its antimonopoly administrations, choosing the proper law in application and guaranteeing the due process.

2. Law Enforcement Agencies

At present, China has three anti-monopoly law enforcement agencies, *Anti-monopoly*

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[48] Press conference held by State Council Information Office on 11.9.2014, http://www.saic.gov.cn/jgzf/fldyfbzljz/ [last visit on 14.09.2014]

Bureau of *MOFCOM*, *Bureau of Price Supervision and Anti-Monopoly* of *NDRC*, and *Anti-monopoly and Anti-unfair Competition Law Enforcement Bureau* of *SAIC*. The executive power is divided.[49] Also, the authority stays in a relatively low level, so they have no power or will in most of the cases to investigate other powerful government administrations or giant SOEs.[50] Apart from this, the law itself is unclear with the boundary of the authority between anti-monopoly law enforcement administrations and other administrations. It is possible that other administrations, like the Ministry of Industry and Information Technology, Energy and Resource Administration, Insurance Regulatory Commission, Civil Aviation Administration, will influence the investigation within its responsible areas, which will relatively weaken the power of anti-monopoly law enforcement. According to the law, MOFCOM, NDRC, SAIC are all authorized to investigate, to punish and to assume the responsibility. But their subordinate bodies, which are authorized to execute in reality, need not to assume any of the responsibility. So, the authority and responsibility are separated from each other. On one hand, the one, who investigate and decide, have no independence because of the administrative subordination. On the other hand, because of the lack of responsibility, the administrators have no motivation to equally and fairly work. Till now, there is no discussion of the establishment of one unified anti-monopoly law enforcement agency on ministerial level, who enjoys the authority and bears the responsibility at the time. It should be authorized to decide, and be responsible for its decision. It has been commonly agreed that this quasi-judicial administration will benefit to establish an equal and objective anti-monopoly law enforcement mechanism in China. However, the answer, whether this administration can be realized, is more about political decision.

3. Law Application

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[49] Compare http://www.sdpc.gov.cn/fzgggz/jgjdyfld/jjszhdt/, http://fldj.mofcom.gov.cn/, http://www.saic.gov.cn/jgzf/fldyfbzljz/

[50] WANG Biqiang & LIU Weixun, *The Investigation by NDRC towards Suspected Ticket Price Control of Travelsky*, Economic Observer, 16.5.2009.

In China, which is still in the process of economic transformation, the antimonopoly interference and traditionally administrative order exist at the same time. One example of this is the price regulation from the antimonopoly law and from the traditional price law. The choice between these two regulations remains unknown. This uncertainty in law choice might lead to selective law enforcement. A good example is the case involving cosmetic production, in which four giant cosmetic producers in China, namely *Unilever (China) Co., Ltd*, *P & G*, *Liby* and *Nice Group*, happened to respectively send similar notices of suggested price to many supermarkets and demanded a price-rising after Apr. 1st. In early May, according to article 6 of Provisions on the Administrative Punishment of Price-related Violation, Shanghai Price Administration decided to fine Unilever (China) 2 million Yuan for its price-rising notice and disturbance of market.[51] Despite this, Unilever still raises the price on 24th May. However, NDRC and Price Administration kept silence towards it this time.[52] The purpose of NDRC to steady the price failed. The reason seems to be the arbitrary decision of law application, which can also be considered as selective law enforcement. The instruction of price-changing can disturb the price in market because this will lead to price collusion and restriction of competition, which should be interfered by the anti-monopoly law. However, the administration chose to merely apply administrative regulation instead. This goes against the principle that market itself shall play the guiding role in resource allocation. In market economy, the price is decided by the market participants and affected by economic supply-demand relationship. Market-oriented interference based on competition law is superior to administration-oriented interference by instruction which is applied only as exception.

In application of AML, the unified standard of case acceptance, examination and judgment is critical. In the case concerning China Telecom und China Unicom, the

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[51] Press Conference of NDRC about the Price-rising Case of Unilever (China), http://www.ndrc.gov.cn/xwfb/t20110506_410543.htm [last visit on 18.5.2011]

[52] Response of NDRC on the Price-rising Case of Unilever (China): No anti-law Behavior, no Penalty, The Beijing News, 27.5.2011.

business operators received no punishment after making commitment.[53] In the case concerning price agreement among state-owned insurance enterprises in Zhejiang,[54] the fine was reduced into a noticeable amount than the case concerning Japanese automotive components producers.[55] Whether the SOEs enjoyed privileges in these cases? All cases varied from each other, so it can not be concluded if unified investigation- and judgment-standards exist. In comparison, it is much easier to see if there is a unified acceptance-standard of cases. Since the resources of law enforcement agencies are in short supply, the concentration of resource into one specific area or against one specific behavior seems quite reasonable. The experience has shown that this kind of targeted law enforcement in one specific area enjoys outstanding social effects in raising public awareness, propaganda of competition law, creation of competitive circumstance and encouragement of enterprises' antitrust compliance. At the same time, however, this concentration of administrative resource is also criticized as selective law enforcement. According to the announcement of NDRC on a public conference, the law enforcement against administrative monopoly might be its focus in law enforcement in 2015, and more cases concerning this will been seen by the public.[56] This will obviously be suspected as selective law enforcement. Apart from this, the excuse of "no report, no investigation"[57] for the incomplete law enforcement is also biased. The administration, which functions as the protector of public interest, should be empowered to actively initiate investigation ex offcio against suspected monopoly behavior. The failure or duty performance or occasional duty performance should also be considered as selective law enforcement.

4. Due Process

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[53] WANG Xiaoye, *Reflections on the NDRC case against China Telecom and China Unicom*, The Evolution of China's Anti-Monopoly Law, Edward Elgar 2014, P.60.

[54] http://jjs.ndrc.gov.cn/fjgld/ [last visit on 8.11.2014]; Article 46 of AML.

[55] NDRC's Decision (NDRC No.10-13, 2014). Compare http://jjs.ndrc.gov.cn/fjgld/ [last visit on 19.09.2014]

[56] http://finance.chinanews.com/cj/2014/12-01/6833517.shtml [last visit on 2.12.2014]

[57] Press conference held by State Council Information Office on 11.9.2014, http://www.saic.gov.cn/jgzf/fldyfbzljz/ [last visit on 14.09.2014]

Justice means at first procedural justice. The open, fair, visible and appropriate procedure is the prerequisite of equal application of antimonopoly law. Recent cases have revealed many problems in antimonopoly law enforcement, like uncertainty of jurisdiction, opacity of procedure and arbitrariness of decision.

According article 10 of Anti-monopoly Law, the anti-monopoly law enforcement agencies under the State Council may, as required by the work, empower corresponding agencies in the people's governments of the provinces, autonomous regions and municipalities directly under the Central Government to be responsible for the anti-monopoly law enforcement work according to this Law. This forms the delegations of authority of anti-monopoly law enforcement on local level. According to this, SAIC and NDRC both issued administrative regulations to empower their local administrations. Different from the limited delegations of authority of SAIC, by which its local administrations are empowered only in specifically approved cases concerning monopoly agreements and abuse of market-dominant status by business operators, NDRC has made a relative abstract and broad delegation of authority. Only in trans-provincial cases concerning monopoly pricing, NDRC will directly appoint the responsible agency, among which the department in State Council is in charge of the extreme cases.[58] In the case of price agreement among insurance enterprises in Zhejiang, according to procedural provisions by the NDRC, the Provincial Administration for Commodity Prices should investigate and decide. But in the end, NDRC made the decision and punishment directly. The scholars compared this case with the cases of restricting the minimum price of alcohol for resale in Guizhou and Sichuan, 2013, in which the provincial administrations made the decisions.[59] This illustrated that the lack of unified standard in responsibility allocation between central government and local government, which might lead to selective law enforcement.

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[58] See SAIC Documents concerning monopoly agreements and abuse of market-dominant status, 26.05.2009; NDRC Documents concerning Price-monopoly cases, 29.12.2010.
[59] SHAO Geng.

Therefore, the allocation and clarification through legislation of the respective jurisdiction of these three anti-monopoly law enforcement agencies, the clear boundary between the power of administration and industrial self-regulation, and the demarcation between central administration and local administrations, including allocation, transfer, notice, objection of jurisdiction and so on, are the first step of a complete system of equal anti-monopoly law application.

Article 46 Paragraph 2 of AML creates the Leniency Policy. "Where a business operator who is engaged in a monopoly agreement voluntarily confesses the information about the monopoly agreement and provides the important evidence to the anti-monopoly law enforcement agency, the operator may be given a mitigated punishment or be exempt from punishment at the discretion of the Anti-monopoly Law Enforcement Agency." So in the case concerning Zhejiang insurance enterprises as well as in cases concerning Japanese car producers, this policy was applied.[60] Both in these cases, the first voluntary informers are exempt from punishment. However, in Zhejiang case, the second and third voluntarily informers were mitigated from 90% and 45% of the original punishment; in comparison, the second and third voluntarily informers in the Japanese car producers case were mitigated from only 60% and 40% of origin. The administration gave no explanation for these decisions, which was later criticized as selective and discriminative law enforcement. And the criticism without firm evidence focuses mainly on the opacity of procedure and decision making.

The decision of the Zhejiang case in Dec. 2013 was unexpectedly published on the NDRC official website on Sep. 2nd, 2014, which is also the first time NDRC chooses to publish its decision.[61] Before, the investigation and its result could only be found in short reports. This not only illustrated the raising awareness of due process of administration, but also revealed problems of procedure in legislation and practice. The article 44 of antimonopoly law requires normally no publicity or form of the decision. Only a decision on prohibiting the concentration of business operators or a

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[60] Compare http://jjs.ndrc.gov.cn/fjgld/ [last visit on 8.11.2014]

[61] Compare NDRC's Decision (NDRC No.7-29,2013). http://jjs.ndrc.gov.cn/fjgld/ [last visit on 19.09.2014]

decision on attaching restrictive conditions to the concentration of business operators must be publicized.[62] Though the anti-monopoly law enforcement concerns public interest, it remains unknown why the law holds different attitudes towards the publicity of normal decision and decision in concentration cases. The law also does not require form of the decision. Therefore, the publicity of decision is relatively arbitrary and, in most of the case, the decision remained in secret or delayed, just like in Zhejiang case, without detailed information about procedure, and the defense and hearing of the concerning parties. In reality, the concerning parties always disagree with the law enforcement agencies about procedure.

In conclusion, to perfect the antimonopoly procedural law is one important task of equal application of antimonopoly law. At present, the procedural part of AML is too abstract and simple. And there is no general administrative procedural law. In reality, the procedures of administrative penalty, like penalty upon carter agreement, and of administrative permission, like permission decision in concentration, should both in line with law of administrative penalty and law of administrative license. According to law of administrative penalty, before deciding to impose administrative penalties, administrative organs shall notify the parties of the facts, grounds and basis according to which the administrative penalties are to be decided on and shall notify the parties of the rights that they enjoy in accordance with law. The parties shall have the right to state their cases and to defend themselves, or the administrative decision is invalid. Administrations shall not impose heavier penalties on the parties just because the parties have tried to defend themselves. Where any party concerned is dissatisfied with the decision made by the anti-monopoly law enforcement agency, it may apply for an administrative reconsideration or lodge an administrative lawsuit according to law.[63] Its can be observed that few administrative lawsuit has been lodged though the administration is widely challenged. Obviously, the citizens are not aware of their

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[62] Article 30 of AML.
[63] Article 53 of AML.

rights or posses not enough evidence, so these criticism ended up mostly into mere complaints.

V. Conclusion

Different from article 130 of German Act against Restraints of Competition and article 106 of TFEU, in which the SOEs are equally put under the application of Germany and European cartel laws, the 2008' Anti-monopoly Law has no similar provisions. However, article 15 of Chinese constitution, in which it states explicitly that market economy is the basic economic model of China, provides the constitutional basis and guarantee. In the detailed law enforcement, there existed cases in which anti-monopoly investigation was also conducted against SOEs. Chinese antimonopoly law enforcement administrations have announced the rejection of selective law enforcement, and respect competition neutrality. Recently, the antimonopoly law enforcement has received criticism, mainly because of the failure of procedural justice. To accept competition neutrality principle so as to better administrate, and to promote compliance guidance so as to motivate law compliance are both keys to equal and fair application of antimonopoly law.