

The Comparative Discussion of State Owned Enterprise in Competition Law

Qiongwen Chen

Master of laws of University of Reading, Assistant prosecutor of the Jiangnan District of Nanning People's procuratorate, Guangxi province People's Republic of China, 1-1Baisha Road, Jiangnan District, Nanning, Guangxi Province, China

Abstract: Reflect on the benefits and costs of the current approaches in the European Union and the People's Republic of China. To the conclusion that State Owned Enterprises (SOE)'s and more generally state conduct should be fully covered by competition law.

Key words: State owned Enterprises; EU; China; Competition law; Terms and definition list

Abbreviation: EU-European Union; AML-Anti-monopoly Law(China); NDRC-National development and reform commission; TFEU-The Treaty of the European Union; SOE-state owned enterprise

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***Corresponding author:** Qiongwen Chen, chenqiongwen@126.com

1 Introduction

China aims in establishing its competition legal system through the enforcement of the Anti-Monopoly Law^[1] Until now, the AML has implemented for over years through the two-tier authorities including Anti-Monopoly Commission of the State Council, the enforcement authorities consisting of Anti-Monopoly Bureau of the Ministry of Commerce, National Development and Reform Commission (NDRC in following article) and State Administration for Industry and Commerce^[1].

However, questions and criticisms remain on anti-competition control on State Owned Enterprise in China.

The stipulation on SOE is in Art7 of AML,^[1] lawmakers adopt a quasi- EU approaches for the competition legal framework in AML ranging from definition of relevant market, dominant position and its abusing acts, cartels control, mergers control and related remedies and procedures^[1]. Criticism indicates that firstly, comparing to article 106 of TFEU, article 7 of AML is ambiguous^[1] lack of clear definition. Secondly, the coverage of anti-competitive control is restricted to a small sphere. The prohibition of state conducts or administrative measures for are excluded from the anti-competitive acts, which might lead to some "SOEs" being exempt from the sanction of Competition authorities^[1].

This article aims to afford some suggestions for the further reforms of anti-monopoly control on the SOEs through the comparison and analysis between EU and Chinese approaches on the definition of Stated Owned Enterprise, the state measures or administrative measures in respect of public undertakings, to undertakings granted special or exclusive rights and Chinese unique structure of business entity, government institutions, social organization and institutional organization and their abusing of competitive rules. Through the comparison of the EU and China competition regulations, there would be suggestions for the future competition legal restructure for both legal system.

2 State conduct and State Owned Enterprise

2.1 Definitions and Coverage of Article 106

Article 106(1), 106(2) of TFEU provide justification

for the control and restriction of public power for the purpose of free competition among member states, which consist of two aspects of SOE definitions. The restriction of state interference is regulated in the Article 106(1)¹.

Primarily, the definition of undertakings is explicitly defined in Article 101 and its following cases. Undertakings mean that any entities, regardless of their legal status, engage in an economic activities (activities of economic nature) through functional approaches (socially or)². The significant point is the “economic activities”. In *Hofner and Elser v Macrotron GmbH*³, when deciding whether an employment recruitment consulting service afforded by public entity, which was constructed due to prohibition on private companies affording such service, should be recognized as “economic activity”. The European court of Justice states that the provision of executives by personnel consultants is in accordance with offering service of profession in giving market stipulating in Article 60(1), 60(2) of TEEC⁴ and after referring to *Knoors v. Secretary of State*⁵ and *Sacchi case*⁶, the Court observed that it’s sovereignty of member states to give prerogative for public entities on certain service while should not against provisions of the Treaty relating to freedom of establishment and the provision of services, so the legal status of entities would not affect the nature of activities they conduct. The judgement is further reviewed in the case *MOTOE v Greece*⁷ and *Gosselin Group NV v Commission*⁸. MOTOE is a non-profit organization has public power on authorization of organizing commercial motorcycling events. The act is recognized in function as an economic activities regardless of legal status of MOTOE; as contrast, in *Gosselin case* even though the parent company has the decisive influence on its subsidiary, it has not directly or indirectly participated in the economic activities since it has not any operation on the goods or service market. Another argument about the recognition of economic activity is whether receiving goods or service in the market should be considered as economic activities. The purchase of goods and service by end users without subsequent downstream operations would not considered as economic activity⁹, as well as in *FINN case*¹⁰, the three ministries of the Spanish Government, which run the Spanish national health system (hereinafter “the SNS”) is recognized as the end user of market through purchasing the medicines medical goods and service. It is naturally concluded

that a undertaking falls within the competition should be entity functionally engages in an economic activity which means offering goods or service on a given market is an economic activity regardless of the legal status of the entity and the way in which it is financed.

Secondly, the definition and coverage of the SOE are comprehensively regulated in the EU regulations. The SOE in Article 106 of TFEU is divided in two aspects: the Public Undertaking and Undertaking granted special or exclusive rights. According to Article 2(b) of the Transparency Directive¹¹, public undertaking means undertakings that public authorities may exercise, directly or indirectly dominant influence on and a dominant influence includes holding the major part of the undertaking’s subscribed capital; control the majority of votes attached to the shares issued by the undertakings; or can appoint more than half of the members of the undertaking’s administrative, managerial or supervisory body. the conception has been applied in many cases for determining the sphere of control of EU rules, for instance, *PPC*, 100% state-owned public corporation with exclusive right to generate, transport, and supply electricity throughout Greek¹², *OFCOM*, the British office of Communication was considered as Public Undertaking as licensing the use of the electromagnetic spectrum for telecommunications purposes in *T-Mobile case*¹³, and *Telekom-Control-Kommission*, a telecommunication company whose major shareholder was the state¹⁴.

Thirdly, undertaking granted special or exclusive rights are in most cases public enterprises that are entrusted privilege by states on some particular aspect and with such description that ‘in the form of a public undertaking and enjoyed the exclusive right to produce, transport and supply’¹⁵. In rare cases, there might be non-public undertakings might be granted special or exclusive rights on particular activities, due to national or regional regulations, such as in *Sacchi case*¹⁶ that s broadcasting limited company RAI, which possessed only the exclusive right to transmit television programme under the Italian regulation was considered as granting exclusive rights on the transmission of television broadcasts market.

2.2 State Owned Enterprise actions

When considering action of state intervening the free competition throughout EU member states, two forms of infringements are included: the state regulation directly leads to abuse of competition rules and the state regulation as result cause the privilege undertaking

abusing competition law. Primarily, some people argue that State regulations should be excluded from the competition rules in consideration of state immunity and sovereignty^[1]. However, state action in some means would be seen as “undertaking” within competition rules. Laws, regulations administrative provisions, administrative practices and instrument issued from a public authority^[1] would be involving in economic activities relating to circulation of goods and services in relevant market. In *Commission v Grace*^[1], Grace was alleged to set up prohibitions on non-nationals owning heritable property in certain border regions. ECJ states that such prohibition cause discrimination between the member states throughout market since the inheritance of property is closely connected to the circulation of property rights, commodities and service, abusing Roman treaty. Similarly, Italy was charged as abusing competition rules through only allowing nationals to buy or lease house built under the support of public fund^[1]; German government is alleged to refuse to license master of vessel for non-nationals flying German flag^[1]without significant national safety concerning reasons. Moreover, State measures could directly lead to injustice through conducting of public authority, so as in *Merci* case^[1], under the national regulation of Italy, the port was administered by public authority CPA, and which has the privilege to carry out pork work and related stevedoring with the obligation not to employ dockers who are not Italian. The regulation lead to inequality of opportunity for the non-Italian competitors in the docking market.

Next, the second form of state infringement is usually shown that the undertaking merely by exercising the exclusive right granted by the state, cannot avoid abusing its dominant position^[1]. The category of abusing could be inability to meet demand, the cumulation of rights, the extension of exclusive rights, discriminatory pricing, refusal to supply and inequality of opportunity and distortion competition. In *Hofer* case, the public undertaking Messrs. Höfner and Elser, due to the its exclusive rights on the employment recruitment could not meet the recruitment of executive for only 28 per cent. of vacancies and by the terms of its own circular renouncing its monopoly in the field of executive recruitment, in which necessity to entrust privilege to mere public entity could not be found by the court; in *Motoe* case, the organisation MOTOE is entrusted the authorization rights of organizing motorcycling events by Greek government, but also in organizing such

events itself and entering into sponsorship, advertising and insurance contracts in that connection, which lead to the accumulation of rights, disadvantaging the downstream market.

3 Chinese approach

3.1 Sphere and Coverage of Anti Monopoly Law on SOEs

In order to understand and clearly define the state owned enterprises(SOE) which are fallen within the regulation of AML clearly, the market structure, market entity^[1] and legal person^[1] in China should be considered.

The legal person or entity in China is classified into several forms including (1) business entity, (2) government institutions, (3)social organization and (4) institutional organisation^[1]. The business entity consists of the enterprises owned by the whole people, enterprises owned by the collectives, Sino-foreign equity, contractual joint venture, foreign-owned venture^[1], the government institutions means administrative, authoritative, judicial and military organizations that exercise public power relying on the legal rules, which would be legal entity when involve in civil activities^[1]; Social organization often refers to non-profitable organization, constructed and operated by members under organization rules, for instance, foundations and religious groups^[1]; the institutional organisation means organisations being of general public interest, constructed by state or authorities of state and take role of culture, education, public health and science functions^[1]. According to the definition of legal person^[1] in Civil Law of PRC, all the entities mentioned are able to be involve in civil conduct and have capacity for rights and obligation, and ‘civil conduct’ is a former Latin *civis* meaning ‘citizen’^[1], so it is implied that the civil conduct refers to activities between citizens, which according to Yu yanman^[1], refers to legal person establish, change or terminate civil relationships including property relationship and personal rights. Comparing to economic activities^[1] mentioned before, offering goods and service should be in the sphere of property relationship so that public undertakings like enterprises owned by the whole people, enterprises owned by the collectives, governmental institutions and institutional organizations should in the sphere of competition law.

However, unlike EU competition regulations and

cases, it is difficult to find clear definition of public undertaking falling within the Chinese competition rules^[1] that in article 7 of AML^[1], the reference for SOE is “industries controlled by the State-owned economy and concerning the lifeline of national economy and national security or the industries implementing exclusive operation and sales according to law”. The rule excludes public undertakings such as institutional organizations, which involving in economic activities, might abuse competition laws under the condition that state regulations entrusting them exclusive rights. Some anti-monopoly cases in China are criticised with object bias and selective enforcement^[1], many anticompetitive restraints are actually state-imposed, particularly at the local and regional level’ and most importantly the anti-competitive abusing acts made by national or regional administrative power are shown on the regulations and rules which entrust privilege to the public undertaking thus leading to competition law abusing acts^[1]. Having realized the inconsistency between the economic liberty process and abusive state power, Chinese lawmakers have included prohibition of abuse of administrative power in Art 32 to Art 35 AML. Article 32 stipulates that the administrative agencies and organisations authorised with administrative power should not distort competition by coercive transaction; Article 33 states Administrative agencies and organization authorised with administrative power should impede free competition through setting discriminative pricing policies, discriminative technical requirements and measures to restrict market entry of non-local commodities, discriminative or stricter licensing procedures for non-local commodities^[1], and checkpoints on roads for commodities other than local goods and service^[1]; Article 34 prohibits abuse of administrative power by imposing discriminatory bidding requirements on bidders from other regions, or failing to publish information they would need^[1]; Article 35 prohibits discriminatory treatment by restricting or rejecting investment from other regions or establishment of local branches by undertakings from other regions^[1]. Article 36 prohibits abuse by “compelling undertakings to engage in monopolistic activities that are prohibited under this Law.^[1]” Article 37 states that “Administrative agencies shall not abuse their administrative by setting anti-competitive rules^[1]”.

It could be implied from the rules that China focus on the restriction of the directly governmental monopoly, while less attentions are payed on government granted

monopoly. In contrast to the Article 106 TFEU and EU approaches, which mainly prohibit on state granting monopoly, should China introduces far more measures on the control of government granted monopoly, necessities would be explained in below paragraphs under the comparative analysis between Chinese and EU coverage of SOE control.

3.2 The administrative measures

Firstly, for the enterprises owned by the whole people, enterprises owned by the collectives: according to official lexicon, SOEs in China refers to enterprises owned by whole people, which are excised by central and regional governments due to various ownership forms^[1]. According to Ministry of China^[1], until 2014, there are about 100,000 state-owned enterprises (SOEs) in China, with combined assets of roughly \$13 trillion. However, Art 7 in AML only includes “industries controlled by the State-owned economy and concerning the lifeline of national economy and national security or the industries implementing exclusive operation and sales according to law”, which is known as key sectors or strategically important sectors ranging from defence, electricity, oil and petrochemicals, telecommunications, coal, aviation, to shipping. The regulation is aiming to be in accordance with the Chinese privatization policy that following the enact of Company Law in 1993 and the Decision of Central Committee in 1999^[1], public undertakings were converted into a corporate governance structure and state-owned industry were transformed by opening entry in market for non-state enterprises and foreign trade and investments^[1], nevertheless in many competitive sectors, though Chinese government claims that most state powers have retreated in the sector, the fact is regional governments continue to control SOEs that compete head to head with other non-state companies^[1] in form of state holding(more than 50% shares holding). For instance, local liquor manufacturers Maotai is a state holding company (state owned 61.86%). In 2012, Maotai was fined by NDRC for the vertical agreement with retailer for the minimum resale prices, which considered as bject restriction of article 14 of AML^[1]. However, if NDRC make a further investigation, far more abuses would be found that the regional administrative measures of Guizhou Province has been long time enabling Maotai to extend its monopoly into neighbouring market and distortion of competition in the provincial regulation of the Directive on the Further and Better Promotion of Maotai in the Guizhou^[1]. In

the Art 3 of Section 2, the Maotai Group is entrusted with exclusive rights to choose the raw material provider with a relative lower price and in a particular geographic area or even establish cultivation base with lower prices and prior land use allocation---in the case, Maotai chooses it's wheat providers in the town of Maotai and in the city of Renhuai for spirits, wine and bear making , which not only influence the relevant white spirits market but also the neighbouring raw material market, the price in which should be decided by competition in market instead of favouring choice of Maotai Group. The Maotai case has the high similarity with the Greek lignite case, in which (1) both companies are public undertakings; (2) the two enterprises enjoy dominant position on relevant market; (3) under the state or regional measure, they were entrusted exclusive right on either exploitation or directly or indirectly imposing unfair purchase price, which led to inequality of opportunity in relevant and neighbouring market. Whereas due to the Article 7 and Article 37 of AML, the control on the SOE on competitive sector is scarce comparing to EU approach, especially for the region measures in respect of SOE. So in addition to the regulations on the administrative power of the discriminatory pricing, licencing and market entry policies and the normal anti-competitive regulations, far more controls on the regional measures should be set. Furthermore, undoubtedly, the SOEs in regulated sector are in the review of AML and many of them are not exempt from the fine of NDRC^[1], MOFCOM, however further control should be made on the administrative action in their back.

Secondly, for the institutional organization involving in economic activities, there are highly anti-competitive potentiality. In one way, an institutional organization is public authority entrusted with exclusive rights, in another way, it might abuse competition rules in the process while is exempt from sanction for the lack of relevant regulations. One of the prominent examples is China Central Television (CCTV), a national predominant state television broadcaster. CCTV is registered as institutional organization under the regulation of State Administration of Press, Publication, Radio, Film and Television^[2]. In 2000, CCTV granted exclusive rights for broadcasting Olympics, Asian Games, World Cup under the rule of the 'Notice on the allocation of the broadcasting and transmitting of sports programme'^[3]. It is obvious to see that CCTV has a dominant position on the sports programme

broadcasting, furthermore, according to the rule, CCTV could license its broadcasting rights to other TV station by acquiring licensing fees under the condition that demand of audience could not be satisfied^[4].The anticompetitive acts include the abusing licensing charging excised by CCTV ,the income for the licencing the major sports events, such as World Cup, reached to about half the annual income of CCTV^[5]; CCTV refused to license the World Cup broadcasting rights in 2010 by addressing that they have met all the demand of audience, in fact, for all the time, CCTV is the TV station of the largest number of audience, especially after it developed its on-line broadcasting network, so the reason for refusal is not a strong ground but an excuse for refusal to supply^[6]. The CCTV case has some connection with Sacchi case^[7] mentioned in before paragraph, in which, Italy was recognized as state abuse of Article 106 of entrusting it's public TV Station exclusive rights to license for transmitting of cable, which cause the extension of exclusive rights on the neighbouring market, so that institutional organizations should not exempt from the competition rules and far more competition regulations are expected for the restriction of administrative measures showing on the abusive acts of undertaking granting exclusive rights.

Lastly, when considering the social organizations, it's hard to relate them to anti-competitive rules for their non-profit nature, whereas the industry associations due to its thorough involving in economic activities and leading status in the particular industry, it is possible for industry association to organize, plan and lead a pricing cartel with its member enterprises. One of the famous case is Shanghai Gold & Jewelry Trade Association case^[8], in which, Shanghai Gold & Jewelry trade Association was alleged to fix the price of gold products with its ancillary five members through the making of 'Association Self -Discipline Rules on the Price of Gold Productions'. In the case, Shanghai Gold & Jewelry Trade Association is an industry association established voluntarily by the Gold retainers in Shanghai and the association is entrusted with right to make internal rules for its member enterprises, and the price fixing consensus was existed during the meetings. Art 16 of AML stipulate the prohibition of industry association to organize the price-fixing cartels. Another similar cases including the Zhejiang Insurance Association case^[9] and Liaoning Building Materials Industry Association^[10]. It seems that both in EU states

and China, industry or trade association has played a significant role on cartels^[1], so the separated prohibition for cartel led by industry association in Chinese AML is a appropriate to way to restrict abusing acts.

4 Conclusion

As conclusion, after the description and comparison between the EU and Chinese approaches on the control of SOE. It could be concluded that EU pay attention on the state measures that lead to dominant position of its public undertaking or undertaking entrusted exclusive rights or public interest and their abusive acts of competition law, while in China, the state conduct, which means the administrative measures, is divided from the anti-competitive acts of SOE. The abusive administrative power prohibited by AML focus on the control of local protectionism and only the SOE relating to the lifeline of country or national security falling within the control of AML. The Chinese legal design lodges a narrow cover of state measures and SOEs. Just as proved in before paragraphs, in addition to local protectionism, it is more common for a central or local government abuse competition law by simply entrusting exclusive rights to undertaking under regulations and rules for the purpose of controlling on particular sector, and the legal status of the undertaking could be in various economic forms in China ranging from the entity owned the whole people to the institutional organizations so that in the future reform of AML, a wider sphere of SOE should be applied and should be linked to administrative power. Furthermore, EU states should include the state procurement in the economic activities, which would be helpful for the restriction of state competitive abusing conduct throughout EU.

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