Nagoya University

Graduate School of Law

Establishing Law Enforcement Mechanism to Control Anti-Competitive Government Conduct in China

（中国における競争を制限する行政行為に関する諸規制の執行メカニズムの構造）

Name	**WANG Fayang**
Student ID	**431604088**
	Graduate School of Law
Affiliation Date	**July 19, 2018**
Supervisor	**Dai YOKOMIZO**
Sub-Supervisor	**Shuya HAYASHI**
Sub-Supervisor	**Giorgio Fabio COLOMBO**

Abstract

This dissertation explores on the topic of controlling government restraints on competition in China. Market competition is the essential mechanism to improve the economic performance of a market-economy and open business opportunities to its citizens while reducing the cost of goods and services for consumers. The restraints on competition could stem from private entities and government agencies as well. China, as a developing and transition country, faces a prevalent and severe competition issue of government restraints. Actually, Chinese competition law has adopted prohibitive provisions against anti-competitive government conducts. However, the competition law with those prohibitive provisions infamously lacks any enforcement mechanism. This results in the ineffectiveness, and the competition law is described as "a tiger without teeth" when facing government abusive intervention in the market. In this regards, this dissertation aims to propose a tailored enforcement mechanism for China to address the competition issue concerning government restraints.

This dissertation consists of six chapters, and applies the research methodology of empirical and comparative study. Chapter I gives a whole picture of the research problem and explains the research motivation. Chapter II provides a comprehensive background information on the historical development and status quo of the legal framework against anti-competitive government conduct in China. The current framework comprises three components: prohibitive provisions in Anti-Monopoly Law, the administrative litigation by private entities, and the fair competition review mechanism. This chapter examines the substance, the practical performance, and the weaknesses of each component. Additionally, by analyzing the basic legal relationship caused by

anti-competitive government conduct, this chapter identifies the prominent drawback existing in the current framework among various weaknesses in each component, that is the competition authority has not played an active role in countering government restraints.

Competition advocacy and law enforcement are the two fundamental functions of the competition authority to fulfill its mandate of ensuring and promoting market competition. Advocacy is considered to be the primary, if not the only, the approach to combat government restraints by the leading international competition organizations. Chapter III illustrates the advocacy's definition, rationale, differences from law enforcement, and exemplifies its operation with the model of United States' advocacy programs. However, under the dichotomy of advocacy and enforcement, the current framework in China is of advocacy in essence. Taking the abusive government intervention and the ineffective control into consideration, this chapter reveals that primarily, or just, relying on advocacy cannot effectively address the government restrains issue in China. In this regard, this chapter proposes a new direction for China, that of establishing law enforcement.

In order to demonstrate the necessity and feasibility of establishing law enforcement in China, Chapter IV adopts an empirical study of 99 cases concluded by the competition authority in the past ten years, and examines a comparative study on the regulatory frameworks of European Union and Russia. This empirical study counts the case number in each year, with different sources, in different industrial sectors. The statistics data verifies the necessity of law enforcement from two sides, by revealing the ineffectiveness of the advocacy framework, and indicating the abundant potential space for utilizing law enforcement. The comparative study illustrates the regulatory framework in the two jurisdictions from legislation, enforcement, and advocacy

respectively. This chapter derives three key implications from the comparative study: (1) an enforcement mechanism on government restraints is built with a deep social background, (2) it is necessary to formulate a clear exemption rule when designing enforcement mechanism, and (3) it is indispensable for the competition authority to have substantial enforcement power and procedure in the enforcement mechanism.

Learning implications from the comparative study, Chapter V designs a potential enforcement mechanism tailored to China's context. It gives answers and suggestions to the following key questions thereupon: what is the scope of law enforcement, how to identify an illegal government conduct, and how to enforce it. First, it sets exemption rules. Sector agency's conduct in performance of its task on supervising the market activities in regulated sectors should be exempted from law enforcement by the competition authorities. The concept "regulated sectors" should be precisely identified. Its general definition could be "industries controlled by the state-owned economy and concerning the lifeline of national economy and national security, and the industries implementing exclusive operation and sales according to law". Besides, the State Council or its authorized agency should regularly publicize and review an exhaustive list of specific regulated sectors. In contrast, in competitive sectors not appearing on the list, the government conducts are all within the scope of law enforcement by the competition authority, with the exception of government's legislation. Second, concerning how to identify an illegal government conduct, the competition authority should adopt the standard of competition effect and conduct competition analysis to determine whether there is harm to competition and to examine whether there is a justifiable defense. Third, concerning the enforcement power and procedure, after competition analysis, the competition authority can make the decision to confirm

whether the government conduct violates the Anti-Monopoly Law and require the infringing agency to rectify their conduct. If the infringing agency fails or refuses to comply with the decision, the competition authority should bring an administrative litigation on it.

The last chapter provides a restatement of the research and points out its limitations and prospects. Though the proposed enforcement mechanism is properly designed, as historical experience shows, adopting coercive measures to control administrative power inevitably faces stubborn internal resistance, thus it ultimately depends upon whether the central government has a strong political will to adopt and implement it. Furthermore, law enforcement is resource-intensive, meanwhile the local competition law enforcement resources are quite uneven in China, thus capacity building for the competition authority is a crucial issue that needs more further research. Last but not the least, this research with its special emphasis utilizing law enforcement to combat government restraints in China provides insights to other transitional or developing countries facing similar competition issues. It is time for those countries to rethink the conventional wisdom and design a workable enforcement mechanism while taking their respective social context into full consideration.

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Pursing a doctor degree is a life-changing journey. I am more than happy and excited that I made it finally.

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List of Abbreviations

AML	Anti-Monopoly Law
NPC	National People's Congress
NDRC	National Development and Reform Commission
SAIC	State Administration for Industry and Commerce
MOFCOM	Ministry of Commerce
SAMR	State Administration for Market Regulation
OECD	Organization for Economic Cooperation and Development
ICN	International Competition Network
U.S.	United States of America
FTC	Federal Trade Commission
EU	European Union
FTC	Federal Trade Commission
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on European Union
DG Competition	Directorate General for Competition
FLPC	Federal Law on Protection of Competition
FAS	Federal Anti-monopoly Service
LLC	Limited Liability Company

Chapter I: Introduction

1.1 Problem statement

In modern times, a market economy is embraced and advocated in most countries worldwide. At its most basic, competition is the essential mechanism in a market economy which can maximize consumer welfare and raise economic growth.[1] However, unnecessary restraints on competition could come from two sides, the private and the public. The literature has found that the public restraint is more difficult to remove by the market itself since it occurs with the intervention from government power.[2]

In China, a country in the process of economic transformation and developing a market economy, the problem of government restraints is more obvious and serious than the private enterprises' restraints.[3] It is not difficult to understand from its historical basis. Without a long period of free market competition, private monopolies in China are not as common or as complex as in western countries. On the contrary, under its long tradition of centrally planned economy, all or most productive assets were owned by the state, and bodies of government at all levels had been the principal, if not the only, economic actors. The tendency toward anti-competitive restraints by

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[1] "Benefits of Competition," *International Competition Network*, accessed July 17, 2019 www.internationalcompetitionnetwork.org.

[2] Federal Trade Commission, *The FTC in 2007: A Champion for Consumers and Competition*, (Federal Trade Commission, January 4–2007), www.ftc.gov.

[3] Jiefen Li, "Administrative Monopoly, Market Economy and Social Justice: An Anatomy of the Taxi Monopoly in Beijing," *China: An International Journal* 08, no. 02 (September 1, 2010): 282–308. This article with an empirical case study of the taxi monopoly in Beijing revealed that the biggest obstacle in contemporary China for building a market economy comes from administrative power or government interference with market operation.

government bodies remains strong in its transition process.[4]

China has published laws with provisions to restrict anti-competitive government conducts, from the Anti-Unfair Competition Law to the Anti-Monopoly Law. But the current legal framework against government restraints infamously lacks of an enforcement mechanism. The prohibitive legal provisions are even described as "a tiger without teeth" for its ineffectiveness.[5] The government restraints on competition remains a prevalent and urgent problem in China as shown below. In order to address this government restraint issue, this study aims to propose a new framework with an effective enforcement installment for China.

To illustrate the research object, the terms "government restraint", "public restraint", and "anti-competitive government conduct" are used interchangeably in this study with the same meaning. By referring to Article 8 of China's Anti-Monopoly Law,[6] "anti-competitive government conduct" in this study is defined as: the conduct made by an administrative agency or an organization authorized by laws or regulations to perform the function of administering public affairs in the form of utilizing administrative power which has an adverse impact on market competition.[7] With this explicit definition, the subject of anti-competitive conduct is the administrative agency at

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[4] Yong Guo and Angang Hu, "The Administrative Monopoly in China's Economic Transition," *Communist and Post-Communist Studies* 37, no. 2 (June 1, 2004): 265–80.

[5] Changqi Wu and Zhicheng Liu, "A Tiger Without Teeth? Regulation of Administrative Monopoly Under China's Anti-Monopoly Law," *Review of Industrial Organization* 41, no. 1 (January 8, 2012): 133–55.

[6] Article 8 of the Anti-Monopoly Law stipulates: "Administrative agencies or organizations authorized by laws or regulations to perform the function of administering public affairs shall not abuse their administrative power to eliminate or restrict competition."

[7] In China's academic circle of competition law, it is often called "administrative monopoly [行政垄断]". The meaning is same, but for easy understanding, this study uses "anti-competitive government conduct" instead. See e.g. Zhanjiang Zhang and Baiding Wu, "Governing China's Administrative Monopolies Under the Anti-Monopoly Law: A Ten-Year Review (2008-2018) and Beyond," *SSRN Electronic Journal*, January 7, 2018, https://papers.ssrn.com. Additionally, "government" used in this study includes bodies of federal, state, provincial, or local government unless the context indicates otherwise.

all levels or the organization authorized by laws or regulations to perform the function of administering public affairs. The conduct is in the form of utilizing administrative power such as issuing regulations, making decisions, granting privileges, imposing fines, and others. The conduct's key feature is having adverse impact on market competition. In this regard, the anti-competitive government conduct could be intentional for the government agency's pursuing other interests, or unintentional as well for the government agency's ignorance of competition protection. Moreover, the conduct could also be identified as legal or illegal according to certain identification standard and procedure, which is the main research content in this study.

1.2 Research Motivation

The harm government imposed restraints bring is heavy economically, socially and politically. Economically, for example, empirical studies have revealed that the monopolistic industry established by the government resulted in huge economic losses.[8] A study by (Yu and Zhang, 2010) showed that it caused losses of 3.7%, 1.4%, and 5.7% of GDP in 2006 in the electric power, telecommunication, and gasoline respectively.[9] Also, the government-erected monopoly generates income inequality across industrial sectors. It was estimated that it contributed 71.35% to the income gap between sectors in 2010, where employees in monopolistic industries earn much more than the

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[8] Industrial monopolies could be developed from private economic entities, but also could be established and sustained by government with the administrative power. Establishing monopolies in certain industries by the government, maybe legal though, is a kind of anti-competitive government conduct. See Gordon Y. M. Chan, "Administrative Monopoly and the Anti-Monopoly Law: An Examination of the Debate in China," *Journal of Contemporary China* 18, no. 59 (March 1, 2009): 264.

[9] Liangchun Yu (于良春) and Wei Zhang (张伟), "Intensity and Efficiency Loss of Industry Administrative Monopoly in China" [中国行业性行政垄断的强度与效率损失研究], *Economic Research Journal* [经济研究], no. 3 (2010): 25.

national average.[10] Furthermore, governmental bodies' anti-competitive intervention is likely to result from rent-seeking and corruption which has aroused extensive public resentment.[11] We can say that without solving the problem of public restraints, a genuine market economy cannot be achieved in China.

Despite this urgent issue, the literature is currently quite divergent. Influenced by the central government's promotion of fair competition review system since 2016, many competition law scholars have focused on exploring on this advocacy measure's implementation,[12] or proposing new advocacy tools,[13] while continuing to ignore the compelling disadvantage of the lack of enforcement facing the current framework against government restraints. Some scholars propose learning from the experience of European Union's state aid control,[14] Russia's enforcement system and other countries' institutions,[15] but their researches have not analyzed how to transplant and develop that

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[10] Liangchun Yu (于良春) and Minjie Jian (菅敏杰), "Industry Monopoly and Analysis of Influencing Factors of Residents' Income and Distribution Gap" [行业垄断与居民收入分配差距的影响因素分析], *Industrial Economics Research* [产业经济研究], no. 2 (2013): 37.

[11] Guo and Hu, "The Administrative Monopoly in China's Economic Transition": 226.

[12] *See, e.g.*, Yong Huang (黄勇), Baiding Wu (吴白丁), and Zhanjiang Zhang (张占江), "The Implementation of Fair Competition Review System from the Perspective of Competition Policy" [竞争政策视野下公平竞争审查制度的实施], *Price Theory and Practice* [价格理论与实践], no. 04 (2016): 31–34; Maozhong Ding (丁茂中), "Research on the Excitation Mechanism of Fair Competition Review" [公平竞争审查的激励机制研究], *Legal Science Magazine* [法学杂志] 39, no. 06 (2018): 95–104; Yanbei Meng (孟雁北), "China's Learning and Innovating from International Experience on Competition Advocacy from the Example of Fair Competition Review System" [中国竞争倡导制度对国际经验的借鉴与创新—以公平竞争审查制度为例], *Research on China Market Supervision* [中国市场监管研究], no. 09 (2018): 46–49.

[13] *See, e.g.*, Zhanjiang Zhang (张占江), "Research on Competition Advocacy" [竞争倡导研究], *Chinese Journal of Law* [法学研究] 32, no. 05 (2010): 113–27; Sun Liu (刘笋) and Hao Xu (许皓), "Competition Neutrality Rules and Their Introduction in China" [竞争中立的规则及其引入], *Journal of Political Science and Law* [政法论丛], no. 05 (2018): 52–64.

[14] *See, e.g.*, Jacob S. Schneider, "Administrative Monopoly and China's New Anti-Monopoly Law: Lessons from Europe's State Aid Doctrine Note," *Washington University Law Review*, no. 4 (2009–2010): 869–96; Pengcheng Zheng (郑鹏程), "European Integration and Regulation of State Interference" [欧洲统一市场的建立与对国家干预的规制], *Modern Law Science* [现代法学] 31, no. 05 (2009): 175–81.

[15] *See, e.g.*, Jifeng Liu (刘继峰), "Learning from Russia's Experience on Regulating Administrative Monopoly in Anti-Monopoly Law" [俄罗斯反垄断法规制行政垄断之借鉴], *Global Law Review* [环球

into a feasible mechanism suitable for China's context.

Therefore, it is necessary to do research to analyze and focus on the primary drawback of the current legal framework, and design an effective and tailored enforcement mechanism for China to combat government restraints.

1.3 Research Methodology

This research proposes an institutional approach in establishing robust law enforcement against governmental restraints in China. To illustrate the necessity and feasibility of this proposal, this research adopts two research methods: an empirical study and a comparative study. This research collects all the published cases concluded by the competition authority concerning government restraints from August 1st, 2008 to December 31st, 2018, in total 99 cases.[16] By utilizing the number of cases in each year, with different sources, and in different sectors, this empirical study illustrates the urgent necessity for coercive law enforcement in the field of government restraints. On the other hand, this research makes a comparative study on the regulatory frameworks in European Union and Russia, which provides insights on how to establish law enforcement mechanisms. Taking the China's context into full consideration, lessons can be learned from the comparative experiences of the two jurisdictions.

法律评论] 32, no. 02 (2010): 124–31; Chengzhong Luo (罗成忠), "The Comparative Study on the Regulation of Russia's Administrative Monopoly" [俄罗斯行政垄断规制比较研究] (Master Degree [硕士], Hunan University, 2015).

[16] For detailed cases information of the 99 cases, please refer to the Part "Appendix I".

1.4 Dissertation Structure

This dissertation is divided into six chapters. The first chapter, the introduction, includes the problem statement, research motivation, research methodology, and the dissertation structure. Following this introduction part, Chapter II of this dissertation clarifies the historical development and current legal framework against anti-competitive government conduct in China. Additionally, Chapter II analyzes and concludes the prominent drawback existing in the current framework, that the competition authority has not played an active role in combating government restraints. As an attempt to find a potential solution, Chapter III firstly introduces the conventional wisdom of competition advocacy. But after reflecting on this wisdom with China's context, this chapter concludes it is improbable to rely on advocacy measures, and hence proposes a new direction, establishing law enforcement. In order to demonstrate the necessity and feasibility of the new direction, Chapter IV adopts an empirical study on the published 99 cases concluded by competition agencies and analyzes a comparative study exploring the regulatory frameworks on government restraints in EU and Russia. Based on the implications from the comparative study, Chapter V designs a potential law enforcement mechanism for China, which fully takes the China's context into account. Chapter VI gives a restatement of the dissertation and points out the limitation and prospect of this research.

Chapter II: Current Framework Against Government Restraints in China

This chapter provides comprehensive background information on the framework against government restraints in China. It includes four sections. The first section describes its historical development. The second section analyzes the component parts to the current framework against government restraints, their performance, and their weaknesses respectively. The third section concludes the prominent drawback facing current framework and points out the research focus. The last section summarizes this chapter.

2.1 Historical Development

Direct state control permeated all aspects of the economy throughout the first three decades since the establishment of the People's Republic of China ("China") in 1949. After China adopted the great Reform and Open-Up Policy in the 1980s, it started reforms to liberalize its economic aspects towards building a socialist market economy.[17] Ironically, accompanying this great reform, the problem of governmental restraints, especially local protectionism, began to materialize and deteriorate. In the reform process, China took a path of decentralization of economic decision-making from the central to local governments, which set economic growth as its top priority and evaluated local government officials by comparing local economic performance.[18] This decentralization and evaluation system induced fierce provincial competition to maximize local

[17] Laurence Brahm, "Creating a Socialist Market Economy," *China Daily*, December 7, 2018, www.chinadaily.com.cn.
[18] Wu and Liu, "A Tiger Without Teeth?":137.

economic growth. On the other hand, this system inevitably lead to local protectionism, where local authorities abuse their administrative power to restrict competition and protect local enterprises resulting in a national economy that is undermined by fragmentation and costly over-regulation. Therefore, even though China transplanted and learned competition law from western countries, it has put public restraints regulations, especially local protectionism, in its competition law since the beginning due to its social context, which might been seen as unique from a traditional competition law perspective.[19]

Examining the historical development of controlling governmental anti-competitive actions in China, this research roughly divide it into three stages symbolized by three events.

The first stage is from the year of 1993, when the Anti-Unfair Competition Law was adopted and enacted by the Standing Committee of the National People's Congress ("Standing Committee").[20] Article 7 of the Anti-Unfair Competition Law[21] for the first time statutorily prevented the government and its organs from abusing administrative power to force others to purchase commodities from its designated sellers, to block the entry of commodities originated from

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[19] Eleanor M. Fox, "An Anti-Monopoly Law for China - Scaling the Walls of Government Restraints Symposium: The Anti-Monopoly Law of the People's Republic of China," *Antitrust Law Journal*, no. 1 (2008): 173–94.

[20] Anti-Unfair Competition Law [反不正当竞争法] (promulgated by the Standing Committee of the National People's Congress, September 2, 1993, effective December 1, 1993). The Standing Committee of the National People's Congress is the permanent body of National People's Congress, both exercise the legislative power in China. This law at the time was adopted to control on certain kinds of competitive excesses, such as deceptive advertising, coercive sales, appropriation of business secrets and bribery. The anti-monopoly legislation began its long draft process since 1994, while got promulgated until August 2007.

[21] Article 7 of the then Anti-Unfair Competition Law stipulates:" Governments and their subordinate agencies shall not abuse administrative powers to restrict people to purchasing commodities from the business operators designated by them and impose limitations on the rightful operation activities of other business operators. Governments and their subordinate agencies shall not abuse administrative powers to restrict commodities originated in other places from entering the local markets or the local commodities from flowing into markets of other places."

other regions, or to impede the exit of local commodities. This article was abolished in a recent amendment in 2017,[22] which had not been utilized since the enactment of the Anti-Monopoly Law in 2008 due to its overlap with the provisions in the new anti-monopoly law.

The second stage is from the year of 2008, when the Anti-Monopoly Law ("AML"), the first comprehensive competition legislation promulgated by the Standing Committee of the National People's Congress, entered into force.[23] Apart from provisions against private restraints (anti-competitive agreements, abuse of monopolies, and merge), this competition law sets up one chapter with seven articles to outlaw a variety of unlawful public restraints. This law uniquely had three enforcement agencies at the time: the National Development and Reform Commission ("NDRC"),[24] the State Administration for Industry and Commerce ("SAIC"),[25] and the Ministry of Commerce ("MOFCOM").[26] Among the three enforcement agencies, NDRC and its provincial divisions may investigate price-related government conducts, while SAIC and its provincial divisions may investigate non-price related conducts. The law also establishes the Anti-Monopoly Commission in the State Council, which is comprised of the primary officials from the enforcement agencies and other sector regulators. The Anti-Monopoly Commission is a collegial and coordinating body with no substantial power.[27]

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[22] Anti-Unfair Competition Law [反不正当竞争法] (promulgated by the Standing Committee of the National People's Congress, amended November 4, 2017, effective January 1, 2018).
[23] Anti-Monopoly Law [反垄断法] (promulgated by the Standing Committee of the National People's Congress, August 30, 2007, effective August 1, 2008).
[24] NDRC is in charge of prohibitions on price-related anti-competitive conducts from private or governmental.
[25] SAIC is in charge of control on non-price anti-competitive conducts.
[26] MOFCOM is in charge of merge control.
[27] Article 9 of the Anti-Monopoly Law stipulates:" The State Council shall establish the Anti-Monopoly Commission, which is in charge of organizing, coordinating, guiding anti-monopoly work, performs the following functions: (1) studying and drafting related competition policies; (2) organizing the

During the second stage, another noticeable event is the amendment of the Administrative Litigation Law in 2014.[28] In the Administrative Litigation Law, Article 12(8) explicitly establishes the statutory jurisdiction of courts to hear the cases on anti-competitive government conduct filed by aggrieved "citizens, legal persons or other organizations". Furthermore, Article 53 for the first time provides for statutory authorization for the courts to judicially review the legality of the government's normative documents. The articles of the Anti-Monopoly Law and Administrative Litigation Law will be deeply analyzed in the next part.

The third stage is from June of 2016, when the *Opinion on Establishing A Fair Competition Review System in the Building of the Market System* ("Opinion") was issued by the State Council, the chief administrative authority in China.[29] As its title indicates, the Opinion requires the establishment of a fair competition review system nationwide. According the Opinion, government agencies and organizations empowered by laws and regulations to administer public affairs shall conduct a fair competition review when developing legal rules, normative documents, and policy measures in order to avoid their adverse and unnecessary impact on market competition. This competition review mechanism will also be analyzed in the next part.

Another noteworthy event in the third stage is the consolidation of multiple competition

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investigation and assessment of overall competition situations in the market, and issuing assessment reports; (3) constituting and issuing anti-monopoly guidelines; (4) coordinating anti-monopoly administrative law enforcement; and (5) other functions as assigned by the State Council. The State Council shall stipulate composition and working rules of the Anti-Monopoly Commission."

[28] Administrative Litigation Law [行政诉讼法] (promulgated by the Standing Committee of the National People's Congress, amended November 1, 2014, effective May 1, 2015). This law was amended again in the year of 2017.

[29] Opinions on Establishing A Fair Competition Review System in the Building of the Market System [国务院关于在市场体系建设中建立公平竞争审查制度的意见] (issued by the State Council June 1,2016, effective June 1,2016).

agencies under the AML. On March 17, 2018, the National People's Congress, the highest legislative body, approved a sweeping cabinet reshuffle plan, namely, the State Council's plan of institutional restructuring and function change.[30] According to the plan, a new super market regulator, the State Administration for Market Regulation ("SAMR"), was established and directly responsible to State Council. Importantly for the anti-monopoly world, the Anti-Monopoly Bureau of the SAMR has consolidated the previous three anti-monopoly units within SAIC, NDRC and MOFCOM.

The table below is constructed to conclude the historical development of China's endeavors against anti-competitive conduct.

Table 1: Historical Development[31]

Stage 1 **(1993.09 - 2018.08)**	● Since the great Reform and Open-Up Policy in the 1980s, the problem of governmental restraints, especially local protectionism, begins to materialize and deteriorate. ● The Anti-Unfair Competition Law, adopted in September of 1993 by the Standing Committee, for the first time statutorily prevented certain conducts of local protectionism.
Stage 2 **(2008.08 - 2016.06)**	● The AML, effective from August of 2008, outlaws anti-competitive government conduct in principle, enumerates a variety of unlawful activities, and prescribes terms of settlement. ● The amendment of Administrative Litigation Law in 2014 explicitly empowers the courts to hear the cases on anti-competitive government conducts filed by aggrieved private entities, and to review normative documents issued by government agencies.
Stage 3	● The Opinion, issued by the State Council on June of 2016, requires the

[30] "China Unveils Cabinet Reshuffle Plan," *Xinhua*, March 19, 2018, www.xinhuanet.com.
[31] Source: developed by the author.

(2016.06 - Now)	establishment of a fair competition review mechanism nationwide, where government agencies and public organizations should review their rules, normative documents, and policy measures. ● The Anti-Monopoly Bureau of the SAMR has consolidated the previous three competition units within SAIC, NDRC and MOFCOM.

2.2 Current Framework in China

The current legal framework against abusive government intervention in China includes three parts: the prohibitive provisions of the AML, the administrative litigation by economic entities under the Administrative Litigation Law, and the competition self-review by administrative agencies stipulated in the Opinion. This section will analyze these parts, their performance and weaknesses respectively.

2.2.1 Prohibitive Provisions of Anti-Monopoly Law

The AML contains detailed stipulations outlawing anti-competitive government conducts, which includes Article 8 as the general provision stating the principle, Chapter 5 enumerating illegal conducts, and Article 51 stipulating the legal responsibilities.

Article 8 solemnly states: “Administrative agencies or organizations authorized by laws or regulations to perform the function of administering public affairs shall not abuse their administrative power to eliminate or restrict competition.” Hereby, the “administrative agencies” refers to the whole administrative branch in the polity, including all levels of governments (the State

Council, and the provincial, municipal and local governments) and their subordinate agencies.[32] This article applies to public organizations which assume duties of administering public affairs and exercise administrative power authorized by laws as well. For example, some industrial associations in China may be empowered with certain authorities by laws or regulations. In short, this dissertation will use "government agencies" to refer to "administrative agencies or organizations authorized by laws or regulations to perform the function of administering public affairs" collectively unless the context indicates otherwise. Additionally, Article 8 uses the expression "abuse their administrative power to eliminate or restrict competition" to define the illegal governmental conduct.

Chapter 5 provides the foundation outlawing specific anti-competitive government actions. This chapter, containing six articles, enumerates six categories of typically prohibited conduct. (1)Article 32[33] outlaws designated deals that administrative agencies or organizations require the economic entities to purchase or use the products from the supplier designated by them. (2) Article 33[34] bars regional protectionism by outlawing barriers to free movement of commodities in various forms:

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[32] It is worthy to note that State Council, as the chief administrative authority which the national competition authority subordinates to, practically is not covered by the relevant prohibitive provisions in AML.

[33] Article 32 stipulates: "Any administrative agency or organization authorized by laws or regulations to perform the function of administering public affairs shall not abuse its administrative power, restrict or restrict in a disguised form entities and individuals to operate, purchase or use the commodities provided by business operators designated by them."

[34] Article 33 stipulates: "Any administrative agency or organization authorized by laws or regulations to perform the function of administering public affairs shall not have any of the following conducts by abusing its administrative power to block free circulation of commodities between regions: (1) imposing discriminatory charge items, discriminatory charge standards or discriminatory prices upon commodities from outside the locality; (2) imposing such technical requirements and inspection standards upon commodities from outside the locality as different from those upon local commodities of the same classification, or taking such discriminatory technical measures as repeated inspections or repeated certifications to commodities from outside the locality, so as to restrict them to enter local market; (3) exerting administrative licensing specially on commodities from outside the locality so as to restrict them to enter local market; (4) setting barriers or taking other measures so as to hamper outside commodities from entering the local market or local commodities from moving outside the local region; or (5) other conducts for the purpose of hampering commodities from free circulation between regions."

discriminatory charges or charging standards that disfavor non-local products, discriminatory inspection standards for non-local products, and licensing requirements or measures intended to block the entry of non-local products. (3)Article 34[35] prohibits restrictions on bidding, that administrative agencies or organizations exclude or restrict non-local entities from participating in local bidding by adopting discriminatory procedures or assessment standard. (4)Article 35[36] forbids restrictions on market access which excludes or restricts non-local entities to make investment or establish branch offices. (5)Article 36[37] outlaws the abuse of administrative power to force economic entities to engage in monopolistic activities. (6)Article 37[38] bars the administrative agencies from publishing anti-competitive regulations.

Article 51 of the law sets the legal liabilities and specifies what actions be taken against abusive government behavior. It stipulates: "Where an administrative agency or an organization authorized by laws or regulations to perform the function of administering public affairs abuses its administrative power to eliminate or restrict competition, the superior agency thereof shall order it to rectify, and impose punishments on the leading official-in-charge and the other directly responsible officials. The enforcement agencies of the Anti-monopoly Law may submit a proposal to the relevant

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[35] Article 34 stipulates: "Any administrative agency or organization authorized by laws or regulations to perform the function of administering public affairs shall not abuse its administrative power to reject or restrict non-local business operators to participate in local tendering and bidding activities by such means as imposing discriminatory qualification requirements or assessment standards or releasing information in an unlawful manner."

[36] Article 35 stipulates: "Any administrative agency or organization authorized by laws or regulations to perform the function of administering public affairs shall not abuse its administrative power to reject or restrict non-local business operators to invest or set up branches in the locality by imposing unequal treatment thereupon compared to that upon local business operators."

[37] Article 36 stipulates: "Any administrative agency or organization authorized by laws or regulations to perform the function of administering public affairs shall not abuse its administrative power to force business operators to engage in the monopolistic conducts as prescribed in this Law."

[38] Article 37 stipulates: "Any administrative agency or organization authorized by laws or regulations to perform the function of administering public affairs shall not abuse its administrative power to set down such regulations in respect of eliminating or restricting competition."

superior agency for disposing of that matter." Therefore, Article 51 just grants the competition authority the suggestion power, highly relying on the superior agency's authority in dealing with illegal anti-competitive government conduct. This power allocation is problematic for it actually does not provide the competition authority real power to enforce, which will be analyzed afterwards.

After the promulgation of the AML, the two agencies in charge of investigating government conduct at the time issued several implementing rules. For example, the SAIC issued the *Rules on the Procedure for Administration of Industry and Commerce to Stop Abuse of Administrative Power for the Purposes of Eliminating or Restricting Competition* in 2009,[39] and the *Rules of Administration of Industry and Commerce on Prohibition of Abuse of Administrative Power for the Purposes of Eliminating or Restricting Competition* in 2010.[40] The NDRC issued *Rules for Anti-Price Monopoly*,[41] and the *Rules on the Procedure for Enforcement Against Price Monopoly* at the same time in 2010.[42] These rules further prescribe the procedural and detailed matters in implementing the relevant provisions of the AML.

Though there are prohibitive provisions prescribed in the competition law, in reality these provisions have not been efficiently utilized to combat with abusive government restraints. According to the statement by the head of Anti-Monopoly Bureau of SAMR in a press release, there

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[39] Rules on the Procedure for Administration of Industry and Commerce to Stop Abuse of Administrative Power for the Purposes of Eliminating or Restricting Competition [工商行政管理机关制止滥用行政权力排除、限制竞争行为的程序规定] (issued by the SAIC May 26, 2009, effective July 1, 2009).

[40] Rules of Administration of Industry and Commerce on Prohibition of Abuse of Administrative Power for the Purposes of Eliminating or Restricting Competition [工商行政管理机关制止滥用行政权力排除、限制竞争行为的规定] (issued by the SAIC December 31, 2010, effective February 1, 2011).

[41] Rules for Anti-Price Monopoly [反价格垄断规定] (issued by the NDRC December 29, 2010, effective February 1, 2011).

[42] Rules on the Procedure for Enforcement Against Price Monopoly [反价格垄断程序规定] (issued by the NDRC December 29, 2010, effective February 1, 2011).

are only 193 cases that had been concluded in the ten years, from August 1st, 2008 to October 31st, 2018.[43] Obviously there remains a wide gap to resolve the severe problem of government restraints.

The literature has found three weaknesses in the prohibitive provisions of the AML. First, Chapter 5 of the AML was created to address the then most serious governmental restraints, local protectionism, at the time when the law was promulgated. This chapter does not include other types of government conduct that severely distort competition, especially the aid granted by government agencies.[44] Granting aids or preferences to certain entities is another major source of anti-competitive conduct by governmental agencies, which usually happens to state-owned enterprises. The grants could be in various forms such as financial support, tax preference, regulatory privilege, and immunity not generally available for other entities, which severely impairs fair market competition.[45] The AML is blank with regard to such anti-competitive government aid.

Second, as mentioned before, the AML chooses the expression "abuse of administrative power" to define illegal government conduct, but the law and the supplementary rules have not tried to explain its meaning, which leads to obscurity on the standard to identify illegal conduct.[46] Actually, the concept of "abuse" is essentially a basic concept in administrative law. In administrative law, when determining whether the government agencies "abuse" their power, the courts mainly review cases from two sides: (1) whether the conduct has legal grounding, in other words, whether it is

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[43] Lin Gan (甘霖), "The Ten-Year Enforcement of China's Anti-Monopoly Law and Perspectives" [中国《反垄断法》实施十周年有关情况及展望] (June 23, 2019). Accessed July 17, 2019, http://www.gov.cn/xinwen/2018-11/16/content_5341034.htm#allContent.

[44] Zhang and Wu, "Governing China's Administrative Monopolies Under the Anti-Monopoly Law":11.

[45] Antonio Capobianco and Hans Christiansen, "Competitive Neutrality and State-Owned Enterprises," *OECD Corporate Governance Working Papers*, no. 1 (January 5, 2011), www.oecd-ilibrary.org.

[46] Shiying Xu (徐士英), "A New Approach to Regulate Administrative Monopolies from the Perspective of Competition Policy" [竞争政策视野下行政性垄断行为规制路径新探], *Journal of East China University of Political Science and Law* [华东政法大学学报] 18, no. 04 (2015): 30.

within the scope of power authorized by legislation, (2) whether the conduct abides by the due procedure set by legislation.[47] This standard could be referred as "standard of legitimacy". Such standard probably conflicts with the standard of competition effect which is commonly used to assess anti-competition effect of private monopolistic conduct, anti-competitive agreements, and mergers. For instance, government conducts may have legal grounding with due process, but if following standard of competition effect, such "legitimate" conduct will be probably deemed illegal for its real adverse effect on competition.[48]

This conflict of standards is well manifested in an administrative litigation case, *ShanWei City's ZhenCheng Bus Transportation Co., Ltd. v. ShanWei City's Government*.[49] In the court's judgment decision, it held that the alleged government conduct followed the administrative regulations issued by the State Council and was made with prescribed due process. Though the conduct may cause a real effect of restricting or prohibiting competition, such conduct should not be deemed "abuse of administrative power". Obviously, the court held the legitimacy standard, as opposed to the standard of competition effect.

Last but not the least, Article 53 of the AML does not authorize the competition authority to directly halt illegal government conduct.[50] The competition authority can only make suggestions to

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[47] Zhang and Wu, "Governing China's Administrative Monopolies Under the Anti-Monopoly Law": 12-13.

[48] Xu, "A New Approach to Regulate Administrative Monopolies from the Perspective of Competition Policy": 30.

[49] ShanWei City's ZhenCheng Bus Transportation Co., Ltd. v. ShanWei City's Government [汕尾市真诚公共汽车运输有限公司诉汕尾市人民政府案] (Guangdong High People's Court [广东省高级人民法院] July 27, 2018).

[50] Xiaoye Wang (王晓晔), "Achievements and Challenges on the Ten-Years Enforcement of Anti-Monopoly Law in China" [我国反垄断执法 10 年:成就与挑战], *Journal of Political Science and Law* [政法论丛], no. 05 (2018): 135.

the superior agency thereof to rectify or revoke the infringing agency's anti-competitive conduct. In this case, the enforcement against anti-competitive government conduct is taken by the superior agency of the same administrative system, while removing the power of the competition authority. In most cases, the agency is just an executor of the policies and regulations issued by its superior, which leads to highly uncertain effectiveness of the enforcement. If the agency or its superior agency refuses the suggestion from the competition authority, the authority can do almost nothing.[51]

2.2.2 Administrative Litigation by Private Entities

The AML has not provided judicial remedies for aggrieved entities either just as it excludes genuine enforcement from the competition authority. Meanwhile, at the time of the promulgation of the AML, the Administrative Litigation Law of 1989[52] was the statute which formed the basis of the courts' jurisdiction on government conduct in China. This law also had no specific stipulation concerning its application on anti-competitive government conduct. Furthermore, Article 11 and Article 12(2) of this law made it abundantly clear that only "concrete", as opposed to "abstract" administrative conducts could be subjected to the courts.[53] Concrete conduct is administrative conduct that is usually in the form of administrative decisions targeting specific entities, whereas

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[51] Jin Sun, "On the Defects of Administrative Monopoly 1 in China's 'Anti-Monopoly Law' and Its Improvement," *Candian Social Science* 6, no. 2 (2010): 10.

[52] Administrative Litigation Law [行政诉讼法] (promulgated by the Standing Committee of the National People's Congress April 4, 1989, effective October 1, 1990). Administrative Litigation Law was promulgated in 1989, firstly amended in 2014, and re-amended in 2017.

[53] Article 11 of the 1989 Administrative Litigation Law stipulated: "The people's courts shall accept lawsuits initiated by citizens, legal persons or other organizations against any of the following concrete administrative acts..." Article 12 of the law stipulated: "The people's courts shall not accept lawsuits initiated by citizens, legal persons or other organizations concerning any of the following matters: ...(2)administrative regulations and rules, or normative documents with general binding force formulated and promulgated by administrative organs;..."

abstract conducts refer to those normative documents usually in the form of a notice or policy measures issued by administrative agencies which have "general binding force" without targeting certain entities.[54]

Despite the statutory ambiguity as to judicial remedies for government restraints, the Supreme Court, the apex court in China, incrementally had developed the courts' judicial power over such government conducts, as laid out in its People's Court Daily and Guiding Case.[55] The People's Court Daily[56] is the official mouthpiece of the Supreme Court, which is nationally circulated and regularly read by lower court judges to recognize the positions of the Supreme Court. The Guiding Case[57] is strictly solicited by the Supreme Court to practically guide lower courts to standardize the judicial response in similar cases. On August 1, 2018, the first day the AML entered into force, Justice Yang of the Supreme Court published an article in the People's Court Daily which asserted that the courts indeed possess authority to review "concrete" administrative anti-competitive conduct.[58] A few months later, the head justice of the Administrative Division of the Supreme Court affirmed Justice Yang's position in a People's Court Daily interview.[59] On April 9, 2012, the Supreme Court released one Guiding Case, *Luwei (Fujian) Salt Industry Import and Export Co., Ltd.*

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[54] Junxiang Liu (刘俊详), "On Judicial Review of the Abstract Administrative Act in China" [论我国抽象行政行为的司法审查], *Modern Law Science* [现代法学], no. 6 (1999): 69.

[55] Eric C. Ip and Kelvin Hiu Fai Kwok, "Judicial Control of Local Protectionism in China: Antitrust Enforcement Against Administrative Monopoly on the Supreme People's Court," *Journal of Competition Law & Economics* 13, no. 3 (January 9, 2017): 551.

[56] People's court News and Media Agency [人民法院新闻传媒总社], "People's Court Daily" [人民法院报], accessed July 17, 2019 http://rmfyb.chinacourt.org.

[57] Supreme People's Court [最高人民法院], "Guiding Cases" [指导案例], *China's Court* [中国法院网], accessed July 17, 2019 www.chinacourt.org.

[58] Linping Yang (杨临萍), "Ten Focal Points of the Anti-Monopoly Law and Judicial Review" [反垄断法与司法审查十大焦点], Beijing, *People's Court Daily* [人民法院报] (January 8, 2008).

[59] Lan Liu (刘岚), "Comments on the Application of the Anti-Monopoly Law from the Head of the Administrative Division of the Supreme Court" [最高人民法院行政庭负责人谈反垄断法适用问题], Beijing, *People's Court Daily* [人民法院报] (March 11, 2018).

Suzhou Branch v. The Salt Administration Bureau of Suzhou Municipality, Jiangsu Province.[60] The court not only revoked the infringing agency's administrative decision, but also judicially review the legality of the normative document where the decision originates from.

The Supreme Court's self-empowerment finally received official ratification by the amendment of the Administrative Litigation Law in 2014 adopted by the Standing Committee of the National People's Congress. In the amended law, its Article 12(8) unambiguously provides statutory authorization for the courts to hear suits as to anti-competitive government conduct brought by economic entities.[61] Pursuant to Article 70,[62] 74,[63] 75,[64] 76[65] and 77,[66] the court can revoke, confirm void or illegal, or modify the concrete government conducts, and also can order the agency to take remedial measures or assume compensatory liability. What is more important, Article 53, for the first time, establishes the statutory jurisdiction of courts to review the legality of normative

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[60] Luwei (Fujian) Salt Industry Import and Export Co., Ltd. Suzhou Branch v. The Salt Administration Bureau of Suzhou Municipality [鲁潍（福建）盐业进出口有限公司苏州分公司诉江苏省苏州市盐务管理局盐业行政处罚案] (Jinlv District People's Court [苏州市金阊区人民法院] April 29, 2011).

[61] Article 12 of the 2014 Administrative Litigation Law stipulated: "the people's courts shall accept the following complaints filed by citizens, legal persons, or other organizations:... (8) a complaint claiming that an administrative agency has abused its administrative power to preclude or restrict competition..."

[62] Article 70 of the law stipulated: "Where the alleged administrative conduct falls under any of the following circumstances, a people's court make a judgment to entirely or partially revoke the alleged administrative conduct, and may enter a judgment to require the defendant to resume its conduct:..."

[63] Article 74 of the law stipulated: "Where the alleged administrative conduct falls under any of the following circumstances, a people's court make a judgment confirming the illegality of the administrative act but not revoke it:..."

[64] Article 75 of the law stipulated: "Where the alleged administrative conduct has been taken by a party other than an administrative agency, without legal grounding, or otherwise seriously and evidently violates the law, a people's court shall make a judgment to confirm the void of the alleged administrative conduct if the plaintiff so requests."

[65] Article 76 of the law stipulated: "Where a people's court makes a judgment to confirm the illegality or void of the alleged administrative conduct, it may concurrently order the defendant to take remedial measures; and, if the plaintiff has sustained losses from the administrative conduct, order the defendant to assume compensatory liability according to the law."

[66] Article 77 of the law stipulated: "Where an administrative punishment is evidently inappropriate, or any other administrative conduct is erroneous in determining or recognizing an amount, a people's court may make a judgment to modify it ..."

documents, "abstract conduct", issued by administrative agencies.[67] According to Article 64,[68] if the court deems the relevant normative document under review illegal, the court shall provide suggestions to its promulgating agency to either rectify or revoke the document.

Though the judicial system has provided remedies for aggrieved private entities, private entities have shown little willingness to resist or file lawsuits against government agencies, and there is little possibility for them to win the lawsuits, as will be explained below. Presently, there are very limited number of administrative lawsuits against anti-competitive government conduct can be found from public sources. All the cases adjudicated by the courts are available from the website China Judgments Online[69] specialized for publishing all the courts' judgments. By collecting the cases where the plaintiff's application or the court's judgment quoted the prohibitive provisions of AML, this study finds there are only 61 cases adjudicated by the courts in the ten years, from August 1st, 2008 to December 31st, 2018, the majority of which occurred after the amendment in 2014. Among the 61 cases, there are only 16 cases where government conduct was deemed as illegal by the courts.[70]

The phenomenon of low a willingness and winning rate is mainly due to the fact that private

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[67] Article 53 of the law stipulated: "Where a citizen, legal person or other organization feels that a normative document developed by an agency of the State Council or by a local government or an agency thereof, based on which the alleged administrative conduct was taken, is illegal, the citizen, legal person or other organization may concurrently file a request for review of the normative document when filing a complaint against the administrative conduct. The term 'normative document' as mentioned in the preceding paragraph does not include administrative rules."

[68] Article 64 of the law stipulated: "Where, in trying an administrative case, a people's court deems that any normative document as mentioned in Article 53 under its review is illegal, such a document shall not be used to determine the legality of the alleged administrative conduct, and the court shall provide the promulgating agency with disposition recommendations."

[69] Supreme People's Court [最高人民法院], "China Judgements Online" [中国裁判文书网], accessed July 17, 2019 http://wenshu.court.gov.cn.

[70] For detailed case information, please refer to Appendix II.

entity is highly disadvantaged in lawsuit against government agency.[71] Citizens or firms usually do not dare to sue because they are afraid of the retaliation by the administrative agency sued which enjoys a broad regulatory power in China.[72] Such lawsuits against anti-competitive government conduct is resource-intensive as well. It is difficult for private entities to investigate and collect sufficient evidence to demonstrate the illegality of government conduct, meanwhile they lack the professional expertise and knowledge on competition. This accounts for the high rate of losses in those lawsuits, which in turn further decreases their incentive to sue.[73]

2.2.3 Fair Competition Review System

Another landmark progress on combating abusive government restraints is the introduction of the fair competition review system by the Opinion.[74] Recognizing that anti-competitive administrative conduct is usually in the form of promulgating rules, policies or normative documents, the State Council published the Opinion. The fair competition review system borrowed wisdom and insights from the competition assessment, an influential competition policy recommended by leading international organizations such as the Organization for Economic Cooperation and Development ("OECD")[75] and the International Competition Network ("ICN").[76] The competition assessment

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[71] Robert Heuser, "The Role of the Courts in Settling Disputes between the Society and the Government in China," *China Perspectives* 2003, no. 49 (January 10, 2003), http://journals.openedition.org.
[72] Fengying Yin (尹凤英), "Analysis on the Reasons and Suggestions to the Difficulties in the Administrative Litigation in China" [我国行政诉讼难的原因分析及相应对策], *Journal of Gansu Normal Colleges* [甘肃高师学报], no. 01 (2007): 116.
[73] Angela Huyue Zhang, *The Enforcement of the Anti-Monopoly Law in China: An Institutional Design Perspective*, Rochester, NY, SSRN Scholarly Paper ID 1783037 (Social Science Research Network, October 3, 2011), https://papers.ssrn.com.
[74] Opinions on Establishing A Fair Competition Review System in the Building of the Market System (issued by the State Council June1,2016, effective June1,2016).
[75] Organization for Economic Cooperation and Development, "Competition Assessment Toolkit" (2010),

definition is defined by ICN as "an evaluation by the competition agency or another government body of the potential competitive effects of a proposed or existing policy. Through the assessment, competition agencies can urge policymakers to consider the policy's likely impact on competition, identify whether justifications exist for any restrictions on competition, and assess whether less restrictive alternatives would achieve the intended public policy goal."[77]

According to the Opinion, administrative agencies or organizations authorized by laws or regulations must conduct fair competition review when formulating rules, normative documents, and other policy measures. By reviewing and assessing their adverse effect on market competition during the drafting process, the Opinion aims to prevent the publication of unnecessary anti-competitive rules, normative documents, and policy measures. The review is conducted by the policymaker itself, which may seek suggestions from the competition authority, specialists and interested parties. The Opinion sets the review standard with a list of 18 "not-to-do" items under four main categories: market entry and exit, free movement of commodity and production factors, the increase of undertakings' production cost, and the impairment to undertakings' production and management.[78] It

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accessed July 17, 2019 https://www.oecd.org/competition/assessment-toolkit.htm.

[76] Advocacy Working Group, "Recommended Practices for Competition Assessment" (International Competition Network, 2014), accessed June 17, 2019 https://www.internationalcompetitionnetwork.org/portfolio/recommended-practices-on-competition-assessment/.

[77] *Ibid.*

[78] The 18 "not-to-do" items include: (1) not to set up unreasonable and discriminatory access and exit conditions, (2) not to grant exclusive operation right without fair competition; (3) not to designate the supplier of goods and services; (4) not to set up approval or pre-record procedure without legal grounding; (5) not to set up administrative permission in industries not listed in the negative list; (6)not to impose discriminatory pricing or subsidy policies on non-local goods or services; (7) not to restrict the movement of goods or services; (8) not to restrict non-local entities from participating bidding; (9) not to restrict non-local entities from making investment or setting up branch; (10) not to treat investment or branch of non-local entities in discriminatory manner or impair their legal interest; (11) not to illegally grant preferential policies to certain entities; (12) not to arrange fiscal expenditures in manner consistent with the tax or non-tax revenue paid by entities; (13) not to exempt certain entities from paying social insurance; (14) not to require to provide margin without legal grounding; (15) not to force economic

also stipulates the exceptions for restraining competition under such specific circumstances as national economic security, national defense, poverty alleviation, disaster relief and rescue. If there is an exception, the policy-making agency must explain that relevant rules or policy measures are indispensable for achieving the objectives, that it will not seriously exclude and restrain competition, and should specify a certain period for implementation.[79]

Further on, in October 2017, the then competition agencies (NDRC, MOFCOM, and SAIC), together with the Ministry of Finance and the Legislative Office of the State Council jointly published the implementation document, *Interim Rules on Implementation of the Fair Competition Review System*.[80] This document further clarifies the review procedures and develops the standard of 18 negative items into 50 second level criteria.[81]

This system has been implemented rapidly under the promotion by the State Council. According to the report by the SAMR,[82] by the end of 2018, all agencies under the State Council, all

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entities to engage in monopolistic activities; (16) not to disclose the entities' important information on production and management; (17) not to set goods' price beyond the legal authority; and (18) not to intervene the price level of goods and services which should be adjusted by the market itself.

[79] Jingjie Zhu (朱静洁), "A Study on Fair Competition Review to Control China's Administrative Monopoly" [我国行政性垄断的公平竞争审查规制研究], *Price: Theory and Practice* [价格理论与实践], no. 06 (2017): 47–48.

[80] Interim Rules on Implementation of the Fair Competition Review System [公平竞争审查制度实施细则（暂行）] (jointly issued by the NDRC, Ministry of Finance, MOFCOM, SAIC, Legislative Office, October 23,2017, effective October 23,2017).

[81] Take the item "not to set up unreasonable and discriminatory access and exit conditions" for example, it includes but not limited to: (a) setting access and exit conditions that are markedly unnecessary or beyond the actual need; (b) setting unequal market access and exit conditions by giving discriminatory treatment of entities of different ownership, from different regions or in different forms of organization, without any legal grounding; (c) setting, whether explicitly or in disguise, obstacles to market access, in the forms such as registration, filing, directory, annual inspection, production supervision, certification, designation, allotment, license renew, and requirement of formation of branch offices, and others without legal grounding; (d) setting market access and exit conditions that eliminate or diminish competition without any basis in laws or provisions issued by the State Council.

[82] State Administration for Market Regulation [国家市场监督管理总局], *Implementation of the Fair Competition Review System in 2018* [公平竞争审查制度 2018 年总体落实情况] (2019), accessed July 17, 2019 http://www.samr.gov.cn/fldj/tzgg/gpjzsc/201905/t20190517_293786.html.

provincial government agencies, 98% of municipal agencies, and 85% of county-level agencies had implemented this system. In 2018, these agencies had reviewed 310,000 documents newly prescribed in this year, among which 1700 documents had been rectified.

Though this competition review system have been implemented nationwide rapidly in short term as the data shows, the literature discusses two weaknesses, which casts doubts about whether it can be developed into a long-term effective mechanism.

First, this system stipulated by the Opinion has no statutory basis.[83] Even though the Opinion is published by the State Council, this document itself cannot be regarded as administrative regulations, one form of legislation made by the State Council, because it has not followed the legislation procedure pursuant to Chapter 3 of the Legislation Law of China.[84] Actually, the Opinion could only be seen as a normative document issued by an administrative agency.[85] The significant difference is that the administrative regulation is one type of legislation that the courts must follow to make judgments, whereas the normative document is under judicial review by courts.[86] On the other hand, the Opinion requires policymakers to review and assess the effect of their drafting rules and policy measures on competition. This requirement also cannot find legal grounding from the AML or the Legislation Law. Because it lacks a statutory basis, it is doubtful whether the competition review

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[83] Limin Ren (任立民), "A Study on the Legislative Approach of Fair Competition Review System" [公平竞争审查的法律化路径研究], *Competition Law and Policy Review* [竞争法律与政策评论], no. 4 (2018): 172-78.

[84] Legislation Law [立法法] (promulgated by the National People's Congress, March 15,2015, effective March 15,2015). According to the law, the administrative regulation should be drafted on a certain scope, hear opinions of interested parties, submitted for inspection, and publicized in the form of Order signed by the Premier.

[85] Junqi Hao (郝俊淇), "The Legislative Logic of the Fair Competition Review" [公平竞争审查法制化的逻辑], *The South China Sea Law Journal* [南海法学], no. 1 (2018): 17.

[86] Article 53 of the Administrative Litigation Law prescribes that the normative document is under judicial review, while the legislation by government agency is not.

mechanism will be effectively enforced in the foreseeable future, or if it is just a short-term campaign advocated by the central government.

Second, this system is a self-review and has not endowed the competition authority any review power. This is a problematic setting.[87] On the one hand, a mass of policy-making agencies lack awareness and expertise to review their rules and policies efficiently. On the other hand, as mentioned before, economic performance is an important factor to evaluate and determine the officials' promotion. The agency and its head official have strong incentive to pursue one-sided economic growth of certain region or sector, while ignoring the adverse effect on competition of an integral national market.[88] On the contrary, the agency has little incentive to protect competition since it is not its legal mandate. Thus, whether intentionally or unintentionally, it is very likely that the government agency would exclude or restrain competition.[89] This brings into question whether this self-review system could work effectively.

2.2.4 Brief Summary

Based on above analysis, hereby is the brief summary of the current framework: its components, performance, and weaknesses.

The first component is the prohibitive provisions of Anti-Monopoly Law. Its Article 8 states the principle outlawing anti-competitive government conducts. Chapter 5 enumerates six categories of

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[87] Canqi Chen (陈灿祁) and Mi Ye (叶蜜), "On Optimization Path of the Fair Competition Review System" [公平竞争审查制度的优化路径研究], *Price Supervision and Anti-Monopoly in China* [中国价格监管与反垄断], no. 2 (2018): 17–18.

[88] Wu and Liu, "A Tiger Without Teeth?": 137.

[89] Maozhong Ding (丁茂中), "Research on the Excitation Mechanism of Fair Competition Review" [公平竞争审查的激励机制研究], *Legal Science Magazine* [法学杂志] 39, no. 06 (2018): 100.

typically prohibited government conducts. Article 51 stipulates the relief and gives the competition authority suggestion power. Through these prohibitive provisions, there are only 193 cases concluded by the competition agencies in ten years. The literature has identified three weaknesses of these prohibitive provisions. Chapter 5 fails to include such serious government conduct as granting aid or privileges to certain entities, the standard to identify illegal conducts is obscure between legitimacy and competition effect standard, and Article 53 does not authorize the competition authority to directly halt illegal government conducts.

The second component is the administrative litigation by private entities. Article 12(8) of the Administrative Litigation Law empower the private entities to file lawsuits on anti-competitive government conduct. According to the relevant articles, the court can revoke, confirm void or illegal, or modify the concrete government conduct, and can also order remedial measures or compensation. For abstract government conduct, the court shall provide suggestions to its promulgating agency to rectify or revoke the normative document. Through the judicial remedies for the aggrieved entities, there are only 61 cases adjudicated by the courts in the ten years, and only 16 cases where the government conduct was deemed as illegal. The underlying reason is that a private entity is highly disadvantaged in any lawsuit against the government agency. Private entities do not dare to sue for fear of retaliation, cannot investigate and collect sufficient evidence, and lack professional knowledge and expertise.

The third component is the fair competition review stipulated in Opinion. According to the Opinion' requirements, administrative agencies or organizations authorized by laws or regulations must conduct fair competition review when formulating rules, normative documents, and other

policy measures. The review standard is a list of 18 “not-to-do” items under four main categories. Though this system is implemented nationwide rapidly under the push by central government, it has two critical weaknesses: no statutory basis, nor a self-review mechanism. The two weaknesses cast a long shadow on the effectiveness and sustainability of this system.

2.3 Prominent Drawback

In the legal relationship caused by anti-competitive government conduct, there are three basic parties: the private entity whose competition interests are hurt or threatened, the government agency who made the administrative conduct with adverse effect on competition, and the competition authority who is authorized by the competition law to protect and restore the competition on behalf of consumer interest. The three components of current framework represents different ways to control anti-competitive government conduct by the three parties in the relationship: the competition authority supervises the compliance with the prohibitive provisions of the AML, the aggrieved entities can file administrative litigation, and the government agencies should self-review their prescribing rules and policy measures under the fair competition review system.

Just as the weaknesses already analyzed in last section, lawsuits by private entities and the self-censorship by the government agencies themselves have intrinsic defects respectively. Private entities are generally in a disadvantaged position against government agencies. Arguably, this intrinsic defect directly leads to awkward situations. Even though the Administrative Litigation Law provides judicial remedies, private entities rarely sued and rarely won the lawsuits, as the data vividly shows. As for the fair competition review, the self-censorship mechanism by government

agencies inevitably faces the dilemma of how they can have sufficient incentives to self-review in depth for competition while resisting the temptation for their own mandates.

Compared with the private entity and the government agency, the competition authority is a more reliable force to address the competition problem in a fair and professional way. The competition authority is an independent third party from the aggrieved entity and the government agency in the relationship. It has the only legal mandate to protect and promote competition, has the experience and expertise to analyze and handle with the competition cases, and is not disadvantaged like private entity compared with other government agencies. These characteristics make the competition authority the promising party to play a crucial role in designing a framework against government restraints.[90]

Nevertheless, the competition authority plays a rather insignificant role under the current framework in China. The AML stipulates prohibitive provisions on government restraints, the competition authority naturally assumes the duty of supervising the compliance with those provisions. However, according to the Article 51, the competition authority can only make suggestions to the superior agency to rectify or revoke, and cannot directly halt illegal government conduct. If the superior agency disagrees and refuses to accept the suggestions, the competition authority can do nothing. This suggestion power could be seen as a vague power. The AML and the Administrative Litigation Law also have not endowed the competition authority the power to file any litigation on its own initiative, nor the power to assist the litigation filed by private entities. Furthermore, the authority has no review or supervision power on government agencies'

[90] Eleanor M. Fox and Deborah Healey, "When the State Harms Competition - The Role for Competition Law," *Antitrust Law Journal* 79 (2013): 769.

implementation of the fair competition review.

Therefore, among the weaknesses in each component of the current framework analyzed in last section, this study identifies a prominent drawback which is that the competition authority has not played a core, not even an active, role in the framework against government constraints. Without the complement of the competition authority's positive participation, it is quite doubtful that the administrative litigation by private entities and self-review mechanism could effectively control the severe problem of government restraints because of their intrinsic weaknesses. As for the weaknesses in the prohibitive provisions of AML, the other two weaknesses, limited scope of illegal government conduct and the obscure standard to identify illegal conduct, is an honest mistake related to legislative technique at the time AML was promulgated, which has not raised much controversy on how it should be amended.

Additionally, this defective role assignment for the competition authority in the current framework is an intentional design. In China, whether to endow the competition authority genuine enforcement power, or even whether to include prohibitive provisions against government restraints in the AML, is a hotly debated issue in China which can date back to the time of the drafting of the Anti-Monopoly Law.[91] In the decade-long period of drafting the current Anti-Monopoly Law, from 1994 to 2017, it witnessed dramatic change between several versions of drafts: one draft version has no provision prohibiting government restraints, and another version even included tougher control

[91] For the detail of discussion, *please see* Gordon Y. M. Chan, "Administrative Monopoly and the Anti-Monopoly Law: An Examination of the Debate in China," *Journal of Contemporary China* 18, no. 59 (March 1, 2009): 271–78.

and enforcement measures compared to current Article 53.[92] The relevant provisions are ultimately weakened in a compromise by removing the enforcement power from the competition authority.[93] This arrangement now is reiterated by the State Council in its Opinion which adopts a self-censorship approach to implement a fair competition review system without distributing review power to the competition authority.[94]

In brief, through comparison with the other two parities in the legal relationship caused by anti-competitive government conduct, this study finds that the competition authority should be the crucial force in building an effective framework to control abusive government restraints in China. After identifying the prominent drawback of inactive participation of the competition authority in the current framework, this study will concentrate on what role the competition authority can play in combating abusive government restraints in China, rather than the private entity nor the government agency's itself.

2.4 Summary

This chapter has introduced the historical development and divided it into three stages with symbolic events: the promulgation of the Anti-Unfair Competition Law, the enactment of the AML, the amendment of the Administrative Litigation Law, the release of the Opinion, and the consolidation of three previous anti-monopoly unities into the Anti-Monopoly Bureau of SAMR.

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[92] Xiaoye Wang, "Issues Surrounding the Drafting of China's Anti-Monopoly Law Chinese Anti-Monopoly Law," *Washington University Global Studies Law Review*, no. 2 (2004): 290–91.
[93] Yong Huang, "Pursuing the Second Best: The History, Momentum, and Remaining Issues of China's Anti-Monopoly Law," *Antitrust Law Journal* 75, no. 1 (2008): 130–31.
[94] In the Section 3 of Article 5 in the Opinion, the State Council requires the competition authority to investigate and check whether the government polices violate AML. If so, the competition authority has to make rectification suggestions to the superior agency of the offender.

Then it has concluded the three components of the current framework against government restraints in China, introduced their performance with objective data, and analyzed their weaknesses respectively.

Among the three parties involved in the legal relationship caused by anti-competitive conduct, the competition authority, rather than the private entity nor the government agency, is supposed to be the crucial force to effectively control government restraints. However, the competition authority plays a rather insignificant role in the current framework in China. This is the prominent drawback this study identified. Thus, in order to address the problem of prevalent government restraints in China, this study will concentrate on the role of the competition authority, exploring on what role it can play and how to design a tailored framework for China's context.

Chapter III: Competition Advocacy

The former chapter identifies the prominent drawback that competition authority plays a rather insignificant role in current framework in China. In order to explore what role the competition authority could play to control government restraints, it is necessary to examine the fundamental functions of the competition authority and their applicability in the sphere of government restraints. International studies and experience have concluded that law enforcement and competition advocacy are the two fundamental functions of the competition authority to promote market competition.[95] Especially, competition advocacy is considered to be the primary, if not the only, approach to combat with government restraints on competition. This view is embraced and promoted by leading international organizations.[96] Indeed, it is because of its function on limiting anti-competitive government intervention that the advocacy practice originates and prospers in international competition community.

Therefore, as an attempt to find solutions, this chapter will firstly introduce this conventional wisdom on controlling government restraints, including the definition of competition advocacy, its differences from law enforcement, its working rationale, and its typical model of advocacy programs in United States ("U.S."). Following that introduction of the wisdom on advocacy, this chapter will

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[95] Organization for Economic Cooperation and Development, *A Framework for the Design and Implementation of Competition Law and Policy*, (1998), accessed July 19, 2019 https://www.oecd.org/daf/competition/sectors/aframeworkforthedesignandimplementationofcompetitionlawandpolicy.htm.

[96] *See, e.g.*, Advocacy Working Group, "Advocacy and Competition Policy," Naples, Italy International Competition Network Conference, International Competition Network, 2002; United Nations Conference on Trade and Development, *Ways and Means to Strengthen Competition Law Enforcement and Advocacy*, Geneva (Geneva, July 7, 2015), https://unctad.org.

reflect on its inapplicability in Chinese context, and suggest a new direction hereafter: establishing law enforcement.

3.1 Conventional Wisdom of Competition Advocacy

The term of competition advocacy was first proposed at the international level by Timothy J. Murris, the then chairman of U.S. Federal Trade Commission ("FTC"), based on FTC's experience at the first annual conference of the International Competition Network ("ICN") in 2002.[97] This instrument has gained a considerable currency in the competition community. Over time, it has developed into a comprehensive body of knowledge on competition advocacy by the writings of scholars,[98] the reports of competition authorities and international organizations.[99]

The studies on competition advocacy commonly quotes its definition in the ICN's 2002 report, which defines as "activities conducted by competition authority by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing

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[97] Timothy J. Muris, "Materials of the First International Competition Network," Naples, Italy International Competition Network's Conference, held September 2002, International Competition Network.

[98] *See, e.g.*, Aditya Bhattacharjea, "India's Competition Policy: An Assessment," *Economic and Political Weekly* 38, no. 34 (2003): 3561–74; Organization for Economic Cooperation and Development, *Competition Law and Policy in Chile*, Competition Law and Policy Reviews, (Organization for Economic Co-operation and Development; World Bank, October 17, 2011), www.oecd-ilibrary.org; Salvatore Rebecchini, "Competition Advocacy: The Italian Experience," *Italian Antitrust Review* 1, no. 2 (2014): 13–24.

[99] *See, e.g.*, EeMei Tang, Eugene Chen, and Weilu Lim, "Competition Commission of Singapore: Our Competition Advocacy Journey," *Competition Policy International*, April 17, 2016, www.competitionpolicyinternational.com; Joseph Wilson, "Competition Advocacy as a Tool for Promoting Competition Culture and Combating Public Restraint: The Case of Pakistan," *Competition Policy International*, December 8, 2014, https://ideas.repec.org; Competition Policy Implementation Working Group, *Advocacy in Regulated Sectors: Case Studies (2005)* (International Competition Network), accessed July 18, 2019 www.internationalcompetitionnetwork.org; Organization for Economic Cooperation and Development, "Competition Assessment Toolkit".

public awareness to the benefits of competition."[100] As its definition shows, competition advocacy includes all activities by the competition authority promoting competition, which do not fall under the category of enforcement of competition law. On the one hand, it comprises the initiatives undertaken by the competition authority to persuade or convince other government agencies to abstain from adopting anti-competitive measures. On the other hand, it includes all the efforts by the competition authority directed towards the society as a whole to raise the awareness of the benefits of competition and cultivate competition culture.

Competition advocacy is considered to be the primary, if not the only, instrument to combat government restraints on competition.[101] The reason argued in the literature seems to be simple. Traditional competition law has developed effective enforcement mechanisms on private anti-competitive conduct. In contrast, the government agency's anti-competitive intervention in the market, even beyond strictly necessary, is often masked by its execution of its administrative power on the market. The competition authority, without possessing democratic mandate as parliament or cabinet, generally cannot issue binding orders to other government agencies. Thus, in the field of government restraints, what the competition authority can do is advocating with other agencies to adopt competition-friendly measures instead.[102]

Furthermore, it has often been argued that transition and developing countries should put priorities on competition advocacy rather than law enforcement activities.[103] There are two main

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[100] Advocacy Working Group, "Advocacy and Competition Policy": 25.
[101] Maurice E. Stucke, "Better Competition Advocacy," *St. John's Law Review*, no. 3 (2008): 951–52.
[102] Advocacy Working Group, "Advocacy and Competition Policy": 31.
[103] *See, e.g.*, John Clark, "Competition Advocacy: Challenges for Developing Countries," *OECD Journal* 6 (January 1, 2005): 69–80; A. E. Rodriguez and Malcolm B. Coate, "Competition Policy in Transition Economies: The Role of Competition Advocacy," *Brooklyn Journal of International Law*, no. 2 (1997):

reasons in support of this argument. On the one hand, in developing and transition countries where the market reform has given rise to an intensive rule-making process, which accordingly has heightened the lobbying activities of interest groups for privileges. In this case, dialogues between the competition authority and other rule-makers at early stage may ensure competition-friendly legislation and regulatory framework to be established.[104] On the other hand, law enforcement on private conduct, such as investigation on abuse of dominance and collusive agreements, requires sophisticated expertise and is time-consuming. If young competition authorities get involved with such sophisticated cases at early stage, law enforcement runs a great risk of running out of steam and jeopardizing their credibility and sustainability.[105] Thus it is wise to prioritize advocacy and gradually introduce enforcement at an early stage for young competition authorities, and leave the sophisticated cases for future enforcement when competition culture and accumulated experience allows to do so.[106]

3.2 Differences between Advocacy and Enforcement

Even though competition advocacy touts it out of law enforcement, it is not always clear what the law enforcement is, which is actually different from country to country. Based on a common understanding of competition advocacy, this study, arguably, draws on three critical differences

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365–402.

[104] Allan Fels and Wendy Ng, *Rethinking Competition Advocacy in Developing Countries*, Rochester, NY, SSRN Scholarly Paper ID 2674421 (Social Science Research Network, 2013), https://papers.ssrn.com.

[105] Michal Gal, *The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries*, Rochester, NY, SSRN Scholarly Paper ID 665181 (Social Science Research Network, February 17, 2005), https://papers.ssrn.com.

[106] Simon J. Evenett, "Competition Advocacy: Time for a Rethink," *Northwestern Journal of International Law and Business*, no. 3 (2006): 498–99.

between law enforcement and advocacy.

First, their objectives are different. The objective for law enforcement activities is direct and concrete, which is to strictly enforce the tangible provisions of the competition law. Even though protecting market competition is the most important goal enshrined in the competition law, other harmonious objectives and exemption provisions are usually stipulated in the same law as well, which requires the authority to put priorities on other public interests before competition in particular circumstances. For example, in China's Anti-Monopoly Law, Article 1[107] positions China's economy system to be a "socialist market economy" which implies this law also balances other social objectives while pursing the market competition; Article 7[108] exempts the economic activities from anti-monopoly enforcement in certain sectors affecting the lifeline of national economy or national security or exercising exclusive operation by national laws. In contrast, advocacy's objective is abstract, which is to promote market competition and build competition culture. With this abstract objective, broad activities could fall into its scope, and there is no need to articulate any limitation or exemption on these advocacy activities.[109]

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[107] Article 1 of the AML stipulates: "This Law is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, promoting the healthy development of the socialist market economy."

[108] Article 7 of the AML is obscure, and some scholars pose questions and argue that it has not provided an exemption for enterprises in certain regulated sectors. Whereas, many courts have regarded it as an exemption rule in practical cases. Article 7 of the AML stipulates: "With respect to the industries controlled by the state-owned economy and concerning the lifeline of national economy and national security, and the industries implementing exclusive operation according to laws, the state protects the lawful business operations conducted by the business operators therein. The state also lawfully regulates and controls their business operations and the prices of their commodities and services so as to safeguard the interests of consumers and promote technical progresses. The business operators as mentioned above shall lawfully operate, be honest and faithful, be strictly self-disciplined, accept social supervision, shall not damage the interests of consumers by virtue of their dominant or exclusive positions."

[109] Knyazeva Irina, "Competition Advocacy: Soft Power in Competitive Policy," *Procedia Economics and Finance*, International Economic Conference of Sibiu 2013 Post Crisis Economy: Challenges and Opportunities, IECS 2013, vol.6 (January 1, 2013): 282.

Second, the objects which activities are directed towards are different.[110] The law enforcement generally applies to economic entities which are involved in abuses of dominance, collusive agreements, and anti-competitive mergers. Whereas, the advocacy has two work objects, as its definition states. One object is other public agencies, such as parliamentary and administrative bodies which have legislative and regulatory power, and the competition authority is trying to persuade them from adopting anti-competitive rules and policy measures. The second object of advocacy is the society as a whole, which includes other public agencies (the former object), the judicial bodies, economic entities, and the public at large. The advocacy raises their awareness of the benefits of competition.[111]

Most importantly, their approaches are different, which is hard power versus soft power.[112] For law enforcement, the competition authority takes a "hard" approach with coercive measures such as fines, compulsory splits, disposing of shares or assets. In contrast, the advocacy is a "soft power", where not enforcement power, but the persuasiveness of arguments matters. Such advocacy measures include: performing reviews of existing or proposed laws and regulations, providing advice on government measures that have adverse impact on competition, informing judges about competition matters, conducting outreach activities to educate the public through research conferences, seminars, publications and media, and so on.

One thing should be clarified: whether or not purported or codified literally in the law is not a distinction between the two functions of competition authority. It is easy to have a misperception that

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[110] Advocacy Working Group, "Advocacy and Competition Policy": 26.
[111] Evenett, "Competition Advocacy: Time for a Rethink": 497.
[112] Irina, "Competition Advocacy: Soft Power in Competitive Policy": 280-81.

competition advocacy is different from law enforcement because its activities are conducted without statutory basis or legal grounding.[113] In practice, the function and duty of the competition authority on advocacy activities is generally stipulated in the competition law. Besides, the concrete advocacy measures are also usually stipulated in laws or regulations. The ICN's 2002 report with data of experiences from 50 countries experiences showed, a competition authority may have the statutory authority to be consulted when other government agencies propose new laws and regulations which have an impact on competition, representative of the competition authority may be entitled by the law to present on the cabinet and give suggestion on market regulation, and the manner in which way other agencies must respond to the advice from the competition authority may also be stipulated in law.[114] Thus, whether or not enshrined in the text of laws, there is not a difference between competition advocacy and law enforcement.

Table 2: Differences Between Enforcement and Advocacy[115]

Law Enforcement	Competition Advocacy
Enforcement's objective is direct and concrete, which is to strictly enforce the tangible provisions of the competition law.	Advocacy's objective is abstract, which is to promote market competition and build competition culture without limit or exemption.
Enforcement's object generally is the economic entity involved in abuses of dominance, collusive agreements, or mergers.	Advocacy has two objects: (1)other public agencies, to persuade them from restricting competition, (2)the society as a whole, to raise its awareness of competition.

[113] Evenett, "Competition Advocacy: Time for a Rethink": 497.
[114] Advocacy Working Group, "Advocacy and Competition Policy": 43-92.
[115] Source: developed by the author.

Enforcement takes a "hard" approach with coercive measures such as fines, compulsory split, disposing of shares or assets.	Advocacy is a "soft power", where not enforcement power, but the persuasiveness of arguments matters.

3.3 Rationale for Advocacy

It is found the economic theory of regulation provides a compelling rationale for competition advocacy. In the first place, the government regulation or intervention on the market is needed in principle because of "market failures", that the market economy has intrinsic defects hindering the competition mechanism.[116] For instance, in certain sectors with extensive economies of scale, the optimal number of firms in a market may be just one, otherwise competition with more firms would cause huge losses of repeated construction. To ensure the economy of scale, it is generally recognized that the government regulator grant exclusive rights to certain firms and regulate their conduct, rather than prevent the formation of monopolies by the competition authority.[117] Another defect inherent to market is the information asymmetry between producers and consumers, where producers are better informed about the quality and security risk of their products than customers. In such situations the imposition of quality and safety standards may be warranted even though this intervention may limit competition to some extent.[118] Additionally, without government intervention, some free market conducts may harm the public interests, such as when industrial pollution causes

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[116] Alan Randall, "The Problem of Market Failure," *Natural Resources Journal* no. 1 (1983): 131–48.
[117] Manuela Mosca, "On the Origins of the Concept of Natural Monopoly: Economies of Scale and Competition," *The European Journal of the History of Economic Thought* 15, no. 2 (June 1, 2008): 317–53.
[118] George A. Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism," in *Uncertainty in Economics*, ed. Peter Diamond and Michael Rothschild (Academic Press, 1978), 235–51.

environment damage.[119] Meanwhile, rational economic firm may not do any good for the public without interest return, such as providing postal service in remote rural areas.[120] On this two externality phenomena regulatory intervention is necessary by fining on the conducts of environmental pollution and subsidizing the provision of such public services as postal service in rural areas.

Despite the necessity to subject certain market deficiencies to government regulation, the government encounters problems on regulation ("government failure") as well, which is comprehensively revealed by the economic theory of regulation.[121] The foundation of regulation theory is that politicians are rational self-interested persons as well, who take action that maximize their own well-being, particularly the electoral benefits.[122] Government regulation and intervention thus is not driven purely by considerations of efficiency or public interests, but for political support to the politicians.[123] Under this regulation process, the interest group most able to translate its demand into political pressure is most likely to benefit more from regulation.[124] The theory finds that smaller group make collective action less costly to organize and ensure the benefits are spread within a limited number of beneficiaries.[125] In contrast, diffuse and broad group, particularly

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[119] *See generally* J. E Meade, *The Theory of Economic Externalities: The Control of Environmental Pollution and Similar Social Costs* (Leiden; Genève: Institut Universitaire de Hautes Études Internationales, 1973).
[120] John C. Panzar, "Is Postal Service a Natural Monopoly?" in *Competition and Innovation in Postal Services*, Topics in Regulatory Economics and Policy (Springer US, 1991): 223.
[121] *See generally* George J. Stigler, "The Theory of Economic Regulation," *The Bell Journal of Economics and Management Science* 2, no. 1 (1971): 6.
[122] Sam Peltzman, Michael E. Levine, and Roger G. Noll, "The Economic Theory of Regulation after a Decade of Deregulation," *Brookings Papers on Economic Activity. Microeconomics* (1989): 1–59.
[123] Andrei Shleifer and Robert W. Vishny, "Politicians and Firms," *The Quarterly Journal of Economics* 109, no. 4 (January 11, 1994): 995.
[124] Gary S. Becker, "A Theory of Competition Among Pressure Groups for Political Influence," *The Quarterly Journal of Economics* 98, no. 3 (January 8, 1983): 380.
[125] Joseph P. Kalt and Mark A. Zupan, "Capture and Ideology in the Economic Theory of Politics," *The*

consumers, must expand resources to gain enough information to recognize their interests. Further, it is harder to organize and thus translate their demands into political pressure because the benefits are reflected as a public good and individual members have an incentive to pass the buck and free ride on others' contributions.[126]

In order to correct the government failures, one suggested way among others is to task the competition authority with representing disperse consumers and advocating competition in the political process based on the following considerations.[127] The competition authority is considered less prone to regulatory capture because on one hand, competition authority, as a national actor, is less prone to capture by parochial interest groups. On the other hand, competition authority deals with a wide range of industries which makes it less possible to be captured by certain industrial interest group.[128] In addition, the competition authority is a professional institution working to prevent anti-competitive business practice, where such expertise can be applied to analyze competition issues brought up by government and legislature. Therefore, the advantages of the competition authority could be harnessed to limit government failures to some extent.[129] By resting the competition advocacy function to the competition authority, it could utilize its expertise to explain to the public and politicians whether the proposed regulation is good for the public interest, ensuring that unreasonable and anti-competitive government regulations on market (government

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American Economic Review 74, no. 3 (1984): 289.

[126] Wolfgang Stroebe and Bruno S. Frey, "Self-Interest and Collective Action: The Economics and Psychology of Public Goods," *British Journal of Social Psychology* 21, no. 2 (1982): 123.

[127] James C. Cooper, Paul A. Pautler, and Todd J. Zywicki, "Theory and Practice of Competition Advocacy at the FTC," *Antitrust Law Journal* 72 (2004–2005): 1102.

[128] Michal Gal and Inbal Faibish, *Six Principles for Limiting Government-Facilitated Restraints on Competition*, Rochester, NY, SSRN Scholarly Paper ID 1683378 (Social Science Research Network, 2007), 9–10, https://papers.ssrn.com.

[129] *Ibid.*

failures) are minimized.

3.4 The U.S. Model

The U.S. is a typical model of utilizing competition advocacy against public restraints. The U.S. is not only the country where antitrust law originates, but also the one which recognized and utilized the function of advocacy at the earliest time in the world.[130] Even before Chairman Murris of the FTC first proposed advocacy in international competition conference in 2002, the establishment of competition advocacy program in the U.S. can date back to the 1970s.[131] At that time, the U.S. economy was rough, and some observers suggested that burdensome government regulations were responsible.[132] One such observer was Chairman Lewis Engman of FTC. He made a speech in October 1974, in which he argued that to some extent, excessive federal transportation regulations caused the slow economic growth, and suggested utilizing competition policy as a substitute for regulation of certain industries.[133] Along with the de-regulation tendency of the times, this speech received substantial coverage, which could be deemed as the start of the competition advocacy program in U.S.[134]

The antitrust law of U.S.,[135] as a model of traditional competition law, has a sophisticated and

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[130] Irina, "Competition Advocacy: Soft Power in Competitive Policy": 281.
[131] Cooper, Pautler, and Zywicki, "Theory and Practice of Competition Advocacy at the FTC": 1091.
[132] Todd J. Zywicki and James C. Cooper, *The U.S. Federal Trade Commission and Competition Advocacy: Lessons for Latin American Competition Policy*, Rochester, NY, SSRN Scholarly Paper ID 960893 (Social Science Research Network, June 2, 2007), https://papers.ssrn.com.
[133] Robert Metz, "F. T. C. Chief Calls Role of Agencies Inflationary," *The New York Times*, August 10, 1974, www.nytimes.com.
[134] Deborah Platt Majoras, *Promoting a Culture of Competition*, Beijing, China, Speech (Federal Trade Commission, October 4, 2006), www.ftc.gov.
[135] In the United States, antitrust law is a collection of federal and state government laws, mainly included the Sherman Act of 1890, the Clayton Act of 1914 and the Federal Trade Commission Act. The concept of antitrust law is used interchangeably with competition law in different jurisdictions.

robust enforcement mechanism in place to address private anti-competitive behaviors. However, its enforcement is substantially limited in the sphere of government restraints.[136] Two antitrust immunity doctrines evolved from case law grant state government and its agencies broad authority to impose restraints on competition: the state action doctrine and the *Noerr-Pennington* doctrine.

The state action doctrine was first articulated by the Supreme Court in *Parker v. Brown.*[137] In this case, an Agricultural Prorate Advisory Commission formulated a program regulating the marketing of raisins pursuant to the California Agricultural Prorate Act, which actually set up a raisin cartel. Whereas, the Supreme Court held that "nothing in the language of the Sherman Act or in its history ...suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." Rather, the Sherman act (an antitrust law) is directed against "individual and not state action."[138] Thus, the state government's conduct is immunized from antitrust scrutiny for its sovereignty, regardless whether it restrains competition or not.[139] The non-state actors, such as municipalities and private entities, also can use the state action as a defense for antitrust liability if they can attribute their conduct to the state: (1) they act pursuant to a clearly articulated state law to displace competition with a regulation scheme, and (2)their conduct is actively supervised by the state.[140]

The *Noerr-Pennington* doctrine takes its name from two cases in *Eastern Railroad Presidents*

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[136] Fox and Healey, "When the State Harms Competition - The Role for Competition Law": 770-71.
[137] Parker v. Brown, 317 U.S. 341 (United States supreme.court 1943).
[138] *Ibid.*
[139] "Parker v. Brown: A Preemption Analysis," *The Yale Law Journal* 84, no. 5 (1975): 1169.
[140] California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., No. 79–97 (U.S. March 3, 1980). In this case, the court held that a private party has a state-action defense only if the state has clearly and affirmatively expressed a state policy to replace competition with regulation and the state supervises any private anti-competitive conduct taken to carry out that policy.

Conference v. Noerr Motor Freight, Inc.[141] and *United Mine Workers of America v. Pennington.*[142] In the two cases, the Court provides antitrust immunity for individuals who "petition" government, even when lobbying the government to act in violation with the Sherman Act.[143] This principle is grounded in the First Amendment protection of citizens' right to political speech to urge government action, which the Sherman Act the Supreme Court held should not reach.[144] Engaging in pure private anti-competitive conduct is risky for entities if they are detected and penalties enforced by the antitrust agencies. By contrast, persuading the government to adopt a restriction is much less risky, which is exempted under the *Noerr-Pennington* doctrine.[145]

Because of the two antitrust immunities, in most circumstances the state agencies' conduct is not within the scope of antitrust enforcement.[146] Competition advocacy has become the primary tool available to the enforcers of the antitrust law to challenge government restraints, and the enforcers have to take the battle earlier in the legislative and regulatory process before the restrictive government conduct being made.[147] Just as the regulation theory revealed, in the legislative and regulatory process, the interested groups, such as industrial associations and incumbent firms, lobby with the legislature and regulatory agencies for the imposition of anti-competitive measures to their

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[141] Eastern R. Conference v. Noerr Motors, 365 U.S. 127, Justia Law (United States supreme.court 1961).
[142] United Mine Workers v. Pennington, 381 U.S. 657, Justia Law (United States supreme.court 1965).
[143] In Noerr, the Court held that "no violation of the [Sherman] Act can be predicated upon mere attempts to influence the passage or enforcement of laws". Similarly, the Court wrote in Pennington that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition".
[144] Maureen K. Ohlhausen, "Enforcement Perspectives on the Noerr-Pennington Doctrine," *Antitrust*, no. 2 (2007): 49–50.
[145] D. Daniel Sokol, "Limiting Anticompetitive Government Interventions That Benefit Special Interests," *George Mason Law Review*, no. 1 (2009): 119–20.
[146] James C. Cooper and William E. Kovacic, "U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition Antitrust Conference in Honor of Joseph Brodley: Panel III: Antitrust and the Obama Administration," *Boston University Law Review*, no. 4 (2010): 1567.
[147] Cooper and Kovacic, "U.S. Convergence with International Competition Norms": 1581-84.

own benefits but at the expense of competition and consumer interests. In contrast, the majority, consumers, are generally unorganized and lack access to information to express their demand for policy.[148] To solve this collective action problem, the antitrust agencies in U.S. continually inform the legislature and government agencies about the likely effects of their proposed laws and regulations on competition and consumer interests, and persuade them to abstain from restraining competition.[149] The practitioners claim that such advocacy efforts can move the political equilibrium towards the side more favorable to competition.[150]

The competition advocacy often takes the form of sending letters to the legislature and government officials, providing comments and testimony on legislation and regulation, issuing reports to explain the competition issues, filing amicus curiae briefs, and holding workshops on cutting-edge competition topics.[151] Take an example of the advocacy efforts by the antitrust agencies, FTC and the Department of Justice, concerning competition issues in e-commerce in the early 2000s.[152] The state laws and regulations normally had entry barriers such as a local physical office requirement, which may have pro-consumer rationale such as ensuring the consumers could access servicing in the premises. However, these barriers nevertheless may restrict the entry of new Internet competitors. The antitrust agencies then put a lot of efforts to persuade the legislature and

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[148] Sam Peltzman, *Toward a More General Theory of Regulation*, Working Paper no. 133 (National Bureau of Economic Research, April 1976): 50-51.
[149] Wang Jian (王健) and Wang Wangyu (汪望宇), "Research on American Competition Advocacy System: How to Introduce Competition Advocacy System into China" [美国竞争倡导制度研究——兼论我国如何导入竞争倡导制度], *Economic Law Forum* [经济法论丛], no. 2 (April 27, 2014): 274.
[150] Majoras, "Promoting a Culture of Competition."
[151] Wang and Wang, "Research on American Competition Advocacy System: How to Introduce Competition Advocacy System into China": 292-301.
[152] Timothy J. Muris, "Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy Milton Handler Annual Antitrust Review 2002," *Columbia Business Law Review*, no. 2 (2002): 400–402.

government regulators to abandon or modernize antiquated regulations to allow new innovative forms of business such as online commerce.[153] Among the efforts, the FTC and the Department of Justice sent joint letters to the Ethics Committee of the North Carolina State Bar and the Rhode Island House of Representatives in opposing the requirement of a physical presence of attorneys at real estate closings and refinancing.[154] The FTC made a commentary before the Connecticut Board of Opticians in opposing restrictions on online sale of replacement disposable contact lenses.[155] The FTC also testified before Congress concerning the possible public barriers to e-commerce.[156] The FTC staff also issued a report on analyzing state restrictions on the direct shipment of wine from out-of-state vendors to in-state consumers.[157] The FTC also filed an amicus brief in pending federal

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[153] Majoras, "Promoting a Culture of Competition."

[154] *See* Federal Trade Commission and Department of Justice, "FTC and Department of Justice Comment to the Ethics Committee, North Carolina State Bar, Concerning the Involvement of Non-Attorneys in Real Estate Closing and Refinancing Transactions," December 14, 2001, accessed June 23, 2019 https://www.ftc.gov/policy/advocacy/advocacy-filings/2001/12/ftc-department-justice-comment-ethics-committee-north; Federal Trade Commission and Department of Justice, "FTC and Department of Justice Comment to the North Carolina State Bar Concerning Proposed State Bar Opinions Concerning Non-Attorney Involvement in Real Estate Transactions," July 11, 2002, accessed June 23, 2019 https://www.ftc.gov/policy/advocacy/advocacy-filings/2002/07/ftc-department-justice-comment-north-carolina-state-bar; Federal Trade Commission and Department of Justice, "FTC and Department of Justice Comment to the Honorable John B. Harwood et al. Concerning Rhode Island H. 7462 to Restrict Non-Attorney Participation in Real Estate Closings," March 29, 2002, accessed June 23, 2019 https://www.ftc.gov/policy/advocacy/advocacy-filings/2002/03/ftc-department-justice-comment-honorable-john-b-harwood-et.

[155] *See* Federal Trade Commission, *FTC Staff Comment Before Connecticut Board of Examiners for Opticians as Intervenor In Re: Declaratory Ruling Proceeding on the Interpretation and Applicability of Various Statutes and Regulations Concerning the Sale of Contact Lenses*, no. V020007, *Federal Trade Commission*, (March 27, 2002), accessed June 23, 2019 https://www.ftc.gov/policy/advocacy/advocacy-filings/2002/03/ftc-staff-comment-connecticut-board-examiners-opticians.

[156] Ted Cruz, *Prepared Statement of the Federal Trade Commission On State Impediments To E-Commerce*, *Federal Trade Commission*, (September 26, 2002), accessed June 23, 2019 https://www.ftc.gov/public-statements/2002/09/prepared-statement-federal-trade-commission-state-impediments-e-commerce.

[157] *See* Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine*, (July 2003), accessed June 23, 2019 https://www.ftc.gov/sites/default/files/documents/reports/possible-anticompetitive-barriers-e-commerce-wine/winereport2_0.pdf.

litigation concerning efforts by a state funeral board to restrict the online sale of caskets.[158] Furthermore, the FTC hosted a three-day workshop to examine potential barriers to e-commerce in ten different industries.[159]

To some degree, the U.S. competition advocacy program has obtained certain achievements. For all practical purposes, it is very hard to quantify the value to consumers that the advocacy efforts bring through persuading legislature or government not to restrain competition.[160] In order to measure the effectiveness of the FTC's advocacy, FTC itself has adopted an approach differentiating whether an advocacy is successful or not by examining to what extent the issues are resolved in accordance with the FTC's opinions in comments, letters and reports.[161] In this way, in the FTC's Performance Report for Fiscal Year 2016, the indicator of the percentage of competition advocacy matters filed with agencies including federal and state legislatures, agencies, or courts that were successful showed: 80% were successful in 2015, 93.3% in 2014, 75% in 2013.[162] These actual performance results had all exceeded the targets in those years, which were 55%. In this annual report of 2016, another indicator tracked the percentage of survey respondents finding the FTC's advocacy comments to be "useful". The data showed that: 83.3% of the respondents found useful in

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158 Powers v. Harris, No. CIV-01-445-F (United States district.court, 2002).

159 "Agenda for Public Workshop on Anticompetitive Efforts to Restrict Competition on the Internet," *Federal Trade Commission*, July 10–2002, accessed June 23, 2019 https://www.ftc.gov/news-events/press-releases/2002/10/agenda-public-workshop-anticompetitive-efforts-restrict.

160 Evenett, "Competition Advocacy: Time for a Rethink": 507-510.

161 To see the FTC's performance documents, please refer to "Performance," *Federal Trade Commission*, accessed July 18, 2019 https://www.ftc.gov/about-ftc/performance.

162 The percentage of the year 2016 is not decided in this report yet. See Federal Trade Commission, *Fiscal Year 2016 Performance Report and Annual Performance Plan for Fiscal Years 2017 and 2018*, *Federal Trade Commission*, (Federal Trade Commission, May 23, 2017), accessed June 23, 2019 https://www.ftc.gov/system/files/documents/reports/fy-2017-18-performance-plan-fy-2016-performance-report/fy18_cbj_apr-app.pdf.

2016, 100% find useful in 2015, 2014 and 2013.[163] Normally, the advocacy program uses a very limited percentage of the antitrust agency's budget.[164] Since ill government restraints can impose staggering costs on market and consumers, thus the potential benefits from the advocacy program could well exceed the FTC's entire budget.[165]

The literature has also identified the shortcomings of the U.S. model of advocacy. This study concluded three shortcomings as follows. First, advocacy can only inform the discussion and provide suggestions, while it cannot compel the agency to take certain actions in the same manner as it does to private entities.[166] Second, antitrust agencies, FTC and the Department of Justice, are not constituents who can provide political support in the form of votes or campaign contributions.[167] It is still likely that the politicians, even though full-informed about the competition effect by antitrust agencies, would be captured by industrial interested groups which have strong political influence. Third, even though FTC is an independent and bipartisan agency, it may still be subject to political pressure from legislature and the government. It can be observed that Congress often applies subtle pressure on the antitrust agency when competition advocacy threatens favored industry.[168] Despite the above shortcomings identified on advocacy program in the U.S., it must emphasized that the advocacy is the primary tool for antitrust agencies to control government restraints in the U.S., simply because the immunity doctrines developed in case law largely exempt them from antitrust

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[163] *Ibid.*

[164] To see FTC's budget documents, please refer to "Budgets," *Federal Trade Commission*, accessed June 23, 2019 https://www.ftc.gov/about-ftc/budgets.

[165] Cooper, Pautler, and Zywicki, "Theory and Practice of Competition Advocacy at the FTC": 1111.

[166] Cooper and Kovacic, "U.S. Convergence with International Competition Norms": 1583.

[167] Cooper, Pautler, and Zywicki, "Theory and Practice of Competition Advocacy at the FTC": 1107.

[168] As Timothy Murris, who has served as Chairman and Bureau Director, has observed, "Congress can, and often does, exert considerable influence over an agency such as the FTC." *See* Timothy J. Muris, "Regulatory Policymaking at the Federal Trade Commission: The Extent of Congressional Control," *Journal of Political Economy* 94, no. 4 (August 1, 1986): 884.

scrutiny.[169]

3.5 Reflection and New Direction

After introducing the conventional wisdom of competition advocacy, the question becomes: should China, as a developing and transitional country from socialist planned economy, utilize or even prioritize the advocacy function of the competition authority to address the issue of public restraints, as wisdom recommends? Following the tendency towards embracing advocacy in international competition community, Chinese academics, journalists, and policymakers have spilled a lot of ink studying and writing about the possibility of building competition advocacy and policy in China.[170] The enthusiasm is further promoted with the release of the Opinions,[171] and many studies and research have been conducted on the competition self-review system in this national policy document.[172]

However, there is an unexpected finding if we examine the current framework against government restraints in China with the dichotomy of enforcement and advocacy. The current framework can all be categorized into competition advocacy, rather than law enforcement. In other

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[169] Majoras, "Promoting a Culture of Competition."
[170] *See, e.g.*, Wang and Wang, "Research on American Competition Advocacy System: How to Introduce Competition Advocacy System into China"; Xueping Ying (尹雪萍), "Competition Advocay: From the Perspective of India's Experience" [竞争倡导:发展中国家竞争法实施的短板——以印度经验为视角], *Theory Journal* [理论学刊], no. 06 (2015): 99–106; Zhang, "Research on Competition Advocacy."
[171] Fair competition review system stipulated in the Opinion is of advocacy essence, in which process the competition authority just inform competition issues and persuade the agencies not promote anti-competitive regulations.
[172] *See, e.g.*, Junfeng Li (李俊峰), "The Paradox of Fair Competition Self-Review and Its Solution" [公平竞争自我审查的困局及其破解], *Journal of East China University of Political Science and Law* [华东政法大学学报] 20, no. 01 (2017): 118–28; Meng, "China's Learning and Innovating from International Experience on Competition Advocacy from the Example of Fair Competition Review System"; Ding, "Research on the Excitation Mechanism of Fair Competition Review"; Huang, Wu, and Zhang, "The Implementation of Fair Competition Review System from the Perspective of Competition Policy."

words, there is no coercive law enforcement against anti-competitive government conduct in China until now. (1)Though the Anti-Monopoly Law stipulates provisions prohibiting public restraints, the competition authority can only make suggestions to the superior of the violating agency and can neither ban nor rectify the violations directly.[173] (2) Under the Administrative Litigation Law, the competition authority is not qualified to file any litigation against unlawful government restraints on competition.[174] (3)The fair competition review mechanism stipulated by the Opinions is a typical process of competition advocacy to influence the regulatory environment. Under this process, other government agencies review their own regulatory rules and assess their impact on market competition during drafting rules, whereas the competition authority can only provide advice and advocate for competition-friendly rules.[175]

This finding in China challenges the presumption which the conventional wisdom of advocacy creates, which is that advocacy is the primary, if not the only, instrument to combat public restraints. Such presumption works well in the U.S., but seems to suffer a big setback in China. China naturally has established a framework in accordance with advocacy since the very beginning. However, taking the status quo of widespread government abusive restraints into consideration, it is a long way from having a developed and effective framework in China.

Arguably, it is the fundamental differences in the social context of the U.S. and China that leads to the opposite results when applying the advocacy on government restraints. In the U.S., free market competition has always been the commonly shared value, and the government and the market

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[173] Refer to Part 2.2.1 “Prohibitive Provisions of Anti-Monopoly Law”.
[174] Refer to Part 2.2.2 “Administrative Litigation by Private Entities”.
[175] Refer to Part 2.2.3 “Fair Competition Review System”.

stayed largely in separate spheres.[176] The antitrust law arose at the historical background the excessive economic power such as monopolies and collusion ran rampant threatening the public interests in the 1890s.[177] Just as Senator John Sherman put it, "If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life".[178] In this context, private restraint, rather than government restraint, is a bigger issue which needs more antitrust attention. For this reason, when the sophisticated antitrust legal framework on private restraints has already been established since Sherman Act of 1890, the competition advocacy program arose in U.S. quite late until the 1970s.[179] Furthermore, out of respect for federalism, state action doctrine developed by the Supreme Court shields actions taken by state government and subsidiary agencies from antitrust enforcement. Thus, in the context of the U.S. where the public restraint is not a prominent competition issue and antitrust enforcement is limited in this sphere, it is cost effective to primarily rely on advocacy measures to handle with anti-competitive government conduct.[180]

The context is quite different in China. The Chinese economy is in transition from a planned economy where the government previously controlled almost all economic factors. Though after 30 years' market-oriented reforms, the state-owned enterprises still occupy the major economic sectors.[181] Out of the old habit combined with the incentive for pursing better economic

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[176] Fox and Healey, "When the State Harms Competition - The Role for Competition Law": 770.
[177] The main statutes of antitrust law are promulgated in this period: the Sherman Act of 1890, the Clayton Act of 1914 and the Federal Trade Commission Act of 1914.
[178] Charles A. Boston, "Spirit behind the Sherman Anti-Trust Law," *Yale Law Journal*, no. 5 (1912): 348.
[179] Refer to the speech of Lewis Engman in1974. Robert Metz, "F.T.C. Chief Calls Role of Agencies Inflationary," *New York Times*, (October 08, 1974).
[180] Cooper, Pautler, and Zywicki, "Theory and Practice of Competition Advocacy at the FTC": 1111.
[181] William E. Kovacic, "Competition Policy and State-Owned Enterprises in China", *World Trade Review* no.4 (2017): 704-5.

performance in reforms, the government intervention into the market is pervasive and serious in China.[182] Compared with private restraints, the government restraints has always been the prominent issue in China.[183] Therefore, primarily or only utilizing advocacy apparently is not enough to efficiently address this competition issue in China. The only potential tool for the competition authority other than advocacy is the law enforcement.[184]

Thus, the research direction and focus shifts to law enforcement, namely exploring the role law enforcement could play to supplement the advocacy framework against government restraints in China. As a threshold matter, it could be justifiable to establish law enforcement in the sphere of government restraints from a theoretical perspective. Modern economic systems are built upon free market and competition. The faith in the free market system is firmly grounded with the principle that competition is most likely to yield optimal mix of goods and services at the lowest cost.[185] Market failures (economies of scale, information asymmetry and externality) make it inevitable for government intervention in certain circumstances, but government intervention usually couples with the risk of distorting competition. Since competition is the governing principle in an economic system, government intervention should not exceed the bottom line to address market imperfections. In other words, the justification for government intervention may only be to correct market

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[182] Refer to Part 2.1 "Historical Development".
[183] Actually just for this reason, Chinese competition law has provisions on prohibiting government restraints along with private restraints at the beginning, from the Anti-Unfair Competition Law to the Anti-Monopoly Law, as the former part "2.1 Historical Development" analyzed.
[184] Xuefeng Liu and Shaohua Yan, Research on Law Enforcement Mode of Anti-Administrative Monopoly in China, International Conference on Business Management and Electronic Information, *Beijing, China* (2011).
[185] Murris, "Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy": 364-66.

failures.[186] In an economic law system, the competition law should be regarded as the governing rules enjoying priority over other government regulations in the market, corresponding to the status of competition as the governing principle in the market system.[187] If government intervention cannot justify itself, such government conduct would be deemed illegal for infringing fair competition and consumer interests, that is the legal interests the competition law is there to protect. In this sense, it is reasonable for the authority to police such anti-competitive government conduct and adopt enforcement measures to violations of the competition law in certain circumstances.

3.5 Summary

As the previous chapter has identified, the prominent drawback in the current framework in China is that the competition authority plays a rather insignificant role. International studies and experience have concluded that law enforcement and competition advocacy are the two fundamental functions of the competition authority to promote market competition. Especially, competition advocacy is considered to be the primary, if not the only, approach to combat government restraints on competition.

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[186] This viewpoint borrows insights from the law economists of Chicago School. *See* Richard A. Posner, "The Chicago School of Antitrust Analysis," *University of Pennsylvania Law Review*, no. 4 (1979): 948.

[187] The supremacy status of the competition policy and law in the economic law system is a common faith and insistence shared by the competition communities in the world. In U.S., it has chosen antitrust law to provide governing provisions in economy. The Supreme Court has called Sherman Act "a comprehensive charter of economic liberty" in the case Northern Pacific R. Co. v. United States, 356 U.S. 1 Justia Law (United States supreme.court 1958). In Europe, it is argued that competition law and policy as the "economic constitution". *See* Knut Wolfgang Nörr, "Economic Constitution: On the Roots of a Legal Concept" *Journal of Law and Religion* no.1 (1994). In China, since the Constitution Law contains the clause of "socialist market economy", the competition law, as the sole delegate of the Constitution Law in implementing this clause and protect competition, shall be the center of the economic law system that watches the market economy. *See* Zhang and Wu, "Governing China's Administrative Monopolies Under the Anti-Monopoly Law":18-19.

Therefore, this chapter first explored this conventional wisdom, competition advocacy, by looking at its definition, presumptions, differences with law enforcement, and rationale. It also introduced the U.S. experience on competition advocacy program, which is acknowledged as a model which primarily utilizes competition advocacy to control government restraints. The introduction of the U.S. experience included its historical development, antitrust immunity doctrines in case law, the example of advocacy activities in e-commerce, and its effectiveness and shortcomings.

However, this chapter finds that the current framework against government restraints in China can all be categorized into competition advocacy, rather than law enforcement. Compared with the U.S. experience of the advocacy program, it is the fundamental difference in the social context of the U.S. and China that leads to the opposite results with applying the advocacy. Taking the pervasive and severe problem of government restraints into considerations, it is apparently not enough to rely on advocacy to efficiently address the government restraints in China. In this sense, this chapter suggests a new direction for China to follow: establishing law enforcement to address the government restraint issue.

Following this new direction this chapter proposes, the next chapter will demonstrate its necessity and possibility to establish law enforcement in the sphere of government restraints in China.

Chapter IV: Necessity and Feasibility of Enforcement

As the previous chapters have manifested, on the one hand, the prominent drawback existing in the current framework in China is that the competition authority plays an insignificant role. On the other hand, among the two basic instruments for the competition authority, it is apparently not enough to just rely on advocacy to address the government restraints in China. This study thus proposes a new direction for China, which is establishing law enforcement to address the government restraint issue.

Following this direction, this chapter adopts an empirical and a comparative study to provide insights on the necessity and feasibility of establishing law enforcement in China. The empirical study examines 99 cases concluded by the competition authority from public resources. The comparative study introduces the experiences of the EU and Russia struggling with government restraints.

4.1 Empirical Study

4.1.1 Introduction

In spite of the exploratory academic discussions that have been conducted on whether it is necessary to adopt law enforcement against government restraints in China, there is no empirical evidence or statistic to support their standpoints.[188] It is necessary to have an empirical study to

[188] *See, e.g.*, Qi Lin (林琦), "Suggestions on Improving Control on Administrative Monopoly in China" [我国行政垄断规制的完善建议], *Legality Vision* [法制博览], no. 23 (2018): 73–75; Shiying Xu (徐士英), "Regulating Administrative Monopoly in Competition Law" [以竞争法规制行政性垄断:把权力关

understand how ineffective the control on government restraints under current advocacy framework in China is, which provides insight on the necessity to embrace a robust enforcement by the competition authority. Accordingly, in order to achieve this goal, this section takes an empirical study on all the published 99 cases concluded by the competition authority from Aug. 1, 2008 to Dec. 31, 2018. For the objectivity of this empirical study, most cases by the competition authority are collected from the websites of the authorities and their local divisions,[189] and a few cases are also gathered from academic books and articles, as well as media reports.[190]

It should be noted that since the Anti-Monopoly Law has not forced the competition authority to disclose cases, there are undisclosed cases that exist simply because the competition authority had not publicized them. According to the statement by the head of the Anti-Monopoly Bureau of SAMR in a press release, there are 193 cases that had been concluded in the ten years, from August 1st, 2008 to October 31, 2018.[191] There is still a gap in 99 cases this study has collected and all the cases

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进制度笼子的有效路径], *Price Supervision and Anti-Monopoly in China* [中国价格监管与反垄断], no. 01 (2015): 17–20; Yong Huang (黄勇), "Enforcement and Judiciary Against Administrative Monopoly in New Era: Challenge, Reflection, and Prospect" [新形势下反行政垄断执法与司法:挑战、思考与展望], *Price Theory and Practice* [价格理论与实践], no. 01 (2015): 32–34.

[189] Prior NDRC cases are available at http://jjs.ndrc.gov.cn/gzdt/, prior SAIC cases are available at http://home.saic.gov.cn/fldyfbzdjz/dxal/ and recent SAMR cases are available at http://samr.saic.gov.cn/gg/.

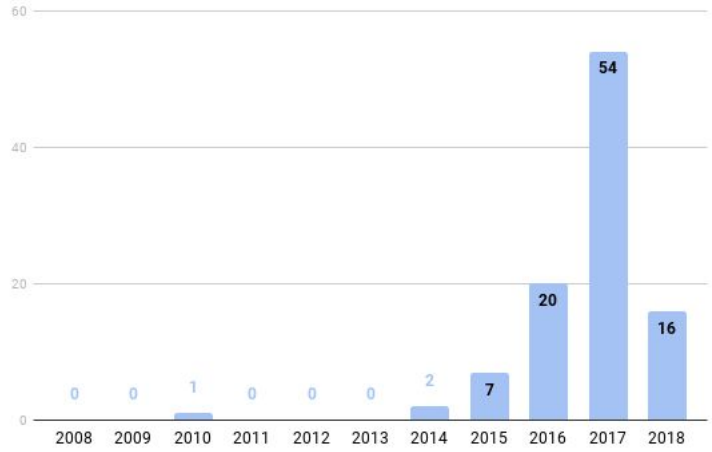
[190] *See* Jianzhong Shi (时建中), Haitao Jiao (焦海涛), and Long Dai (戴龙), *Analysis and Interpretation of Typical Cases Concluded by China's Competition Agencies (2008-2018)* [反垄断行政执法典型案件分析与解读: 2008-2018] (Beijing: China University of Political Science and Law Press, 2018) :533-579; Lin Wen (林文), *China's Administrative Enforcement of Anti-Monopoly Law (2008-2015)* [中国反垄断行政执法（2008~2015）], 1st ed. (Beijing: Intellectual Property Publishing House, 2016); Lin Wen (林文), 甘蜜, and Gan Mi, "China's Administrative Enforcement of Anti-Monopoly Law (2008-2015)" [中国反垄断行政执法大数据分析报告(2008—2015)], *Competition Law and Policy Review* [竞争法律与政策评论] 2, no. 1 (2016): 2008–2201; Lin Wen (林文) and Gan Mi (甘蜜), "A Report of China's Anti-Monopoly Administrative Enforcement in 2016" [2016 年度中国反垄断行政执法报告], *Competition Law and Policy Review* [竞争法律与政策评论] 3 (2016): 213–80; Xin Hong (辛红), "Anti-Monopoly Law Stepping into Deep Water after 3 Year's Implementation" [反垄断法实施 3 年步入深水区--法制网], Beijing, *Legal Daily*, December 28, 2011, www.legaldaily.com.cn.

[191] Gan Lin, "The Ten-Year Enforcement of China's Anti-Monopoly Law and Perspectives"[中国《反垄

concluded by the authority during the period. Despite this imperfection, the 99-case base is the maximum for the author to collect from public sources to do such empirical study and actually provides enough data to ensure its objectivity. For detailed cases information of the 99 cases, please refer to the "Appendix I".

4.1.2 Research Finding

4.1.2.1 Ineffectiveness of the Prohibitive Provisions of AML



Graph 1: Case in Each Year[192]

In order to understand the effectiveness of the prohibitive provisions in AML, this study counts the number of cases occurred in each year from 2008 to 2018. As shown in Graph 1, the first case occurred in 2010,[193] already 2 years later than the promulgation of the AML. Just around 10 cases were concluded during 2008 to 2015. The total number, 193 cases, in ten years is a tiny number

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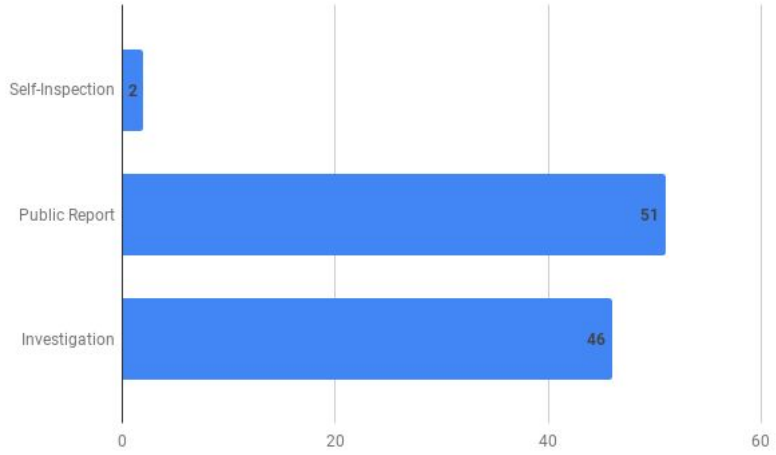
断法》实施十周年有关情况及展望], *China.Org.Cn*, (November 16, 2018, 10:00am) , accessed June 23, 2019 http://www.gov.cn/xinwen/2018-11/16/content_5341034.htm#allContent.

[192] Source: developed by the author.

[193] Hong Xin (辛红), "Anti-Monopoly Law Stepping into Deep Water after 3 Year's Implementation" [反垄断法实施 3 年步入深水区--法制网], Beijing, *Legal Daily*, December 28, 2011, www.legaldaily.com.cn.

given the background of prevalent and serious government intervention in China into consideration. Most cases (54) were concluded in 2017. It is mostly because attacking abusive government restraints was a major task for the competition authority in that year in response to the promulgation of Opinion by the State Council.[194] However, the case number soon decreased to 16 in the 2018. Such violent fluctuation implies that the heightened advocacy activities in 2017 possibly is campaign-style and unsustainable. From the above data, this study concludes that the prohibitive provisions of AML on government restraints are ineffective for they are seldom utilized by the competition authority.

4.1.2.2 Lack of Incentive for Self-Censorship



Graph 2: Case Source[195]

As analyzed, the current framework in China is advocacy-based, thus current cases concluded

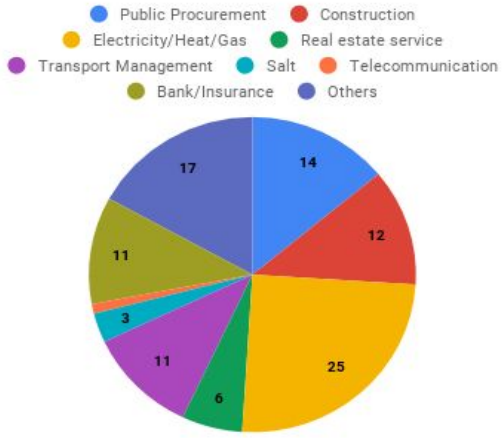
[194] The Opinion was issued by the State Council in 2016. In order to implement this central policy, in October 2017, the then competition agencies (NDRC, MOFCOM, and SAIC), together with other two national agencies jointly published the implementation document, *Rules on Implementation of the Fair Competition Review System*. Please refer to Part 2.2.3 "Fair Competition Review System". This year the competition authority devoted a considerable attention to implement the fair competition review system and suppress the government intervention in market.

[195] Source: developed by the author.

by the competition authority are of advocacy activities like the FTC's advocacy program in the U.S. Competition advocacy relies on the persuasive power of the competition authority, rather than a coercive power, which at the end relies on the consciousness of government agencies. Therefore, whether the government agency has enough incentives to inspect and rectify their own acts is a key factor to evaluate the effectiveness of the current advocacy framework. In order to understand the incentive for government agencies self-censorship in China, this study counts on the number of cases from different original sources, how the cases are revealed at the first place. As Graph 2 shows, just two cases were self-inspected by infringing agencies, 51 cases were reported at first place by the public or the interested entity, and the other 46 cases were initiatively investigated by competition agencies. Furthermore, there is no illegal case where relevant officials got sanctioned, but only one case gave a warning conversation to the official.[196] From the above data, this study finds that government agencies have not enough incentives to review and correct their own conducts for very few cases are self-inspected, and the cost of infringing the prohibitive provisions in AML is low for there are no public cases show any responsible official receiving any substantial punishment.

[196] State Administration for Market Regulation [国家市场监督管理总局], *Announcement on Publication of the Typical Cases of Abuse of Administrative Power on Eliminating or Restricting Competition Concluded by the Offices of SAMR in 2018* [市场监管总局关于发布 2018 年市场监管部门制止滥用行政权力排除、限制竞争行为典型案例的公告], (October 2018), accessed June 23, 2019 http://www.samr.gov.cn/fldj/tzgg/qlpc/201903/t20190313_291971.html.

4.1.2.3 Space for Law Enforcement



Graph 3: Case in Sector[197]

As a common practice, there are certain laws regulating specific sectors in China, such as railway and banking. Some of these sectors are regulated for efficiency concerns in economics, particularly economies of scale; while some are regulated for other important public reasons, such as national security. The issue how to adjust the relation of sector regulations and the competition law in these regulated sectors is a hotly debated one.[198] Thus, a critical issue is whether it is possible to apply law enforcement on the conduct of regulators in these specific sectors, which will be discussed later. Except the regulated sectors, other economic sectors can be regarded as ordinary competitive

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[197] Source: developed by the author.

[198] *See, e.g.*, Phedon Nicolaides, "The Enforcement of Competition Rules in Regulated Sectors," *World Competition* 21, no. 3 (1997): 5–28; Stuart M. Chemtob, "The Role of Competition Agencies in Regulated Sectors," Beijing, China 5th International Symposium on Competition Policy and Law, held November 5–12, 2017, Institute of Law, Chinese Academy of Social Sciences, 2017; Cornelius Dube, *Competition Authorities and Sector Regulators: What Is the Best Operational Framework?*, Viewpoint Paper, (Consumer Unity and Trust Society, October 2008), www.cuts-international.org.

sectors. There is little doubt competition should prevail in competitive sectors, which provides a potential space for law enforcement on distortive government intervention.

Therefore, in order to understand the potential space for law enforcement, this study counts the number of cases which occurred in different sectors. As Graph 3 shows, 40 cases occurred in regulated sectors: 25 in electricity/heat/gas, 11 in bank/ insurance, 3 in salt, 1 in telecommunication. Other 59 cases in ordinary competitive sectors, where public procurement (14), construction (12), transport management (11) are the top three sectors. From the data above, this study finds that even in ordinary competitive sectors, the anti-competitive government intervention is abusive in China, which provides proof that there is potential space for enforcement.

It is noteworthy that these 40 cases occurred in regulated sectors, many infringing agencies were not the specialized sector agencies which have the statutory power to regulate certain sectors. For example of the 11 cases occurring in the field of banking and insurance service, none of the infringing agencies were the China Banking and Insurance Regulatory Commission nor its local bureaus, which has the statutory power to regulate the sectors of banking and insurance services.[199] The wrongful conducts in the 11 cases were all made by ordinary local administrative agencies in the form of forcing participants to deal with their designated service providers. In this regard, this anti-competitive conduct may even occur in regulated sectors, but are made by the infringing agencies in excess of authority, which could be applied by law enforcement as well for their apparent

[199] China Banking and Insurance Regulatory Commission's statutory regulatory power is derived from the Bank Supervision Law and the Insurance Law. *See* Bank Supervision Law [银行业监督管理法] (promulgated by the Standing Committee of National People's Congress, amended October 31,2006, effective January01,2007). Insurance Law [保险法] (promulgated by the Standing Committee of National People's Congress, amended April 24,2015, effective April 24,2015).

illegalities.

4.1.3 Summary of Research Finding

To make a brief summary, this empirical case study implies the necessity of law enforcement in China. First, the data from the number of cases vividly shows the ineffectiveness of the prohibitive provisions in AML for that they are seldom utilized. The violent fluctuation in the last three years implies that the advocacy activities by the competition authority are campaign-style and unsustainable. Second, government agencies have not enough incentives to review and correct their own conduct for very few cases are self-inspected, and the cost of infringing the prohibitive provisions of AML is low for there is no public case that illustrates any responsible official receiving any substantial punishment. The above two points prove the argument that just relying on the current advocacy framework is not enough to address the issue. Additionally, the data of the cases in sectors implies that the government agencies' anti-competitive intervention is pervasive in ordinary competitive sectors, and much government conduct even occurs in regulated sectors but are acted in excess of authority. This provides potential space for law enforcement, demonstrating the need to utilize law enforcement to complement the advocacy.

4.2 Comparative Study

4.2.1 Introduction

This section focuses on the comparative study on the regulatory framework of EU and Russia against government restraints, which sheds insights on how to establish law enforcement. The

significant reason to choose these two jurisdictions to do a comparative study is: both jurisdictions have recognized the serious problem of anti-competitive government conducts in their social context, and they all have developed effective and efficient enforcement mechanisms countering this issue.

The EU is committed to creating a common internal market, with the objective to realize the "four freedoms", the free flow of goods, services, people and capital.[200] By the adoption of Single European Act, Europe officially began its experiment with a common market from January of 1993.[201] For the internal market's basic effectiveness, the 1957 Treaty of Rome explicitly obligates the member states "abstain from measure which could jeopardize the objectives of [the] Treaty". The EU treaties provide the European Commission ("Commission") a set of tools to control such state intervention as tariffs, trade quotas, and state aids. Now it can be said with certainty that the EU experiment of the internal market has been a thrilling success. According to the European Commission estimates in 2019, the EU market is one of the world's largest economies with a GDP of 15 trillion euro, and the economic benefits of the single market amount to 8.5% of EU GDP.[202] Among its key factors to the success, the trade and competition policy plays a significant role to ensure a level economic field and governs state intervention.[203]

Russia is also a transitional economy from a socialist system. For the transitional countries, bodies of government at all levels controlled all aspects of the economy and held financial interests

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[200] EU3doms Project, *The Four Freedoms of the European Union*, (November 2017), accessed June 23, 2019 http://www.bos.rs/ei-eng/uploaded/EU3_ENG_webre_1.pdf.
[201] The Single European Act was the first major revision of the 1975 Treaty of Rome, which aimed to create a single market in the Community by 1992.
[202] European Commission, *The Single Market: Europe's Best Asset in a Changing World*, (European Commission, March 2019), accessed June 23, 2019 https://ec.europa.eu/commission/priorities/internal-market_en#background.
[203] Achim Wambach, "The EU Single Market – 25 Years of Success with Room for Improvement," *ZEW*, May 25, 2018, www.zew.de.

in major businesses during the past period of a planned economy. Since the transition, the agencies and officials commonly protected their interests and habitually intervened in the market, blocking competition and threatening market reforms. Thus, in transitional and developing countries, government restraints easily overwhelm restraints in the private channel.[204] This is also the case in Russia. According to the Federal Anti-Monopoly Service ("FAS") 2010's report, "In 2010 as well as in 2009 the biggest number of violations of competition law was committed by the state and local authorities."[205] In order to defend the emerging and growing market, Russia's competition law has adopted broad provisions outlawing government restraints and has established a robust enforcement mechanism, which will be analyzed in this part later. The evidence shows those prohibitive provisions had been heavily enforced by the FAS. As the FAS's annual report in 2017 shows, it considered 6078 applications against public agencies' anti-competitive conduct (5780 in 2016, 5301 in 2015) and initiated investigations on 531 cases thereof (498 in 2016, 2885 in 2015). Among the 531 cases, 436 cases were recognized as violations (336 in 2016, 2542 in 2015) and 316 binding decisions were issued (213 in 2016, 1958 in 2015). Among the 316 binding decisions by the FAS, 109 decisions were appealed in court (94 in 2016, 430 in 2015).[206]

The phenomenon of government restraints inevitably exists in every country, but other developed countries have not developed systematic mechanism to tackle this issue in the competition

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[204] A. E. Rodriguez and Malcolm B. Coate, "Competition Policy in Transition Economies: The Role of Competition Advocacy," *Brooklyn Journal of International Law*, no. 2 (1997): 367–370.
[205] Federal Antimonopoly Service, *Report of the Federal Antimonopoly Service on Competition Policy in 2010* (Russia Federal Antimonopoly Service 2011), accessed May 29, 2019 http://en.fas.gov.ru/documents/documentdetails.html?id=13903.
[206] Federal Antimonopoly Service, *Annual Report on Competition Policy Developments in the Russian Federation-2017*, No. DAF/COMP/AR(2018)26 (Russia 2018), accessed May 29, 2019 https://one.oecd.org/document/DAF/COMP/AR(2018)26/en/pdf.

law.[207] Take Japan for example, its Anti-Monopoly Act, which is highly influenced by the U.S. antitrust law, just regulates private anti-competitive conducts.[208] Fearing that government agencies may utilize the administrative direction[209] unreasonably intervene in competition as well, the competition authority, Fair Trade Commission, issued the Guideline on Administrative Direction Regarding with Anti-Monopoly Act.[210] However, this guideline mainly advocates the agencies to abstain from anti-competitive administrative direction, while not prescribing any legal liability or enforcement measures on the agencies or responsible officials which do wrong. Additionally, there is a law prohibiting government agencies and officials from bid rigging which harms fair bidding procedure in Japan.[211] Even though this law has stipulated compensation liability of infringing agencies and strict punishment on responsible officials, it is limited in the field of bidding, rather than targeting the anti-competitive government conduct in general.

Therefore, comparatively speaking, the vigorous enforcement mechanisms in the EU and Russia provide suitable objects to learn how to establish law enforcement in the sphere of public restraints. To give a full view of their regulatory framework on government restraints, this study will

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[207] Fox and Healey, "When the State Harms Competition": 770–775.

[208] Min Shen (沈敏), "Legislative Comparison on the Administrative Restriction of Competition Between China and China" [中日行政性限制竞争行为法律规制比较研究], Changsha China (Master [硕士], Hunan University [湖南大学], 2015):10.

[209] Administrative direction [行政指導] is a kind of administrative conduct which is made to specific person to persuade, direct, or advise the person to make certain action or inaction. See Price Bureau of National Development and Reform Commission (国家发展改革委员会价格监督局) , "Relevant Practice and Implications of Japanese Anti-Monopoly" [日本反垄断有关做法及启示], *Price Supervision and Anti-Monopoly in China* [中国价格监管与反垄断], no. 3 (2015): 32.

[210] Guideline on Administrative Direction Regarding with Anti-Monopoly Act [行政指導に関する独占禁止法上の考え方] (issued by the Fair Trade Commission [公正取引委員会] June 6,1994, amended January 1,2010).

[211] Act on Elimination and Prevention of Involvement in Bid Rigging, and Punishments for Acts by Employees that Harm Fairness of Bidding [入札談合等関与行為の排除及び防止並びに職員による入札等の公正を害すべき行為の処罰に関する法律] (promulgated by the National Diet, amended June 13,2014).

introduce it from three aspects: legislation, enforcement, and advocacy.

4.2.2 EU's Framework

4.2.2.1 Legislation

Presently, the EU is a political and economic union of 28 member states. For its objective of establishing an internal market, the EU treaties have broad rules prohibiting states' barriers to movement of goods, service, labor, and investment. These internal market rules, like other common economic treaties between nations, targeting state conducts which intervenes in trade and investment between nations.[212] For instance, Article 30 of the Treaty on the Functioning of the European Union ("TFEU")[213] prohibits custom duties on imports and exports and of other charges of equivalent effect between member states,[214] Article 34 prohibits quantitative restriction or other equivalent measures on imports and exports,[215] Article 45 prohibits discrimination based on nationality between workers,[216] Article 49 prohibits restrictions on the freedom of establishment of nationals of a member state in the territory of another state,[217] and Article 56 prohibits restrictions on freedom to

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[212] Fox and Healey, "When the State Harms Competition": 771.
[213] European Union, "Treaty on the Functioning of the European Union." *See* "Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union Information and Notice," *Official Journal of the European Union*, Information and Notices, 59 (July 6, 2016).
[214] Article 30 of TFEU (consolidated version 2016) stipulates: "Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature."
[215] Article 34 of TFEU stipulates: "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States."
[216] Article 45 of TFEU stipulates: "1. Freedom of movement for workers shall be secured within the Union. 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment. 3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health: ... 4.The provisions of this Article shall not apply to employment in the public service."
[217] Article 49 of TFEU stipulates: "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State

provide services within the union.[218]

The competition rules mostly fall under Title VII Chapter I "Rules on Competition" in TFEU. These rules are largely different from traditional antitrust laws which had been confined to constraining private undertakings.[219] In the first place, Article 106 (1) provides that states shall refrain from adopting anti-competitive measures with respect to public enterprises and enterprises granted special or exclusive rights.[220] This article was drafted on the background that in some member states, the major businesses were owned by the state itself or the firms with exclusive rights granted by the state, thus the state could intervene the competition indirectly through these firms. In this regard, Article 106 (1) takes a holistic approach to regulate this "hybrid" restraint.[221]

Additionally, the competition rules of TEFU have a state aid control discipline, which prohibits member states from granting subsidies or any other aid to certain undertakings unless they pass through a narrow gateway of justification. The state aid jurisprudence was deemed necessary by the founders of the European Community particularly because of the unfair and anti-competitive advantages created by the member states giving preferences to "its own" domestic firms.[222] Article

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shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State..."

[218] Article 56 of TFEU stipulates: "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended..."

[219] Article 101 of TFEU prohibits anti-competitive agreements, and Article 102 of TFEU prohibits abuse of a dominant position.

[220] Article 106(1) of TFEU stipulates: "1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109."

[221] Fox and Healey, "When the State Harms Competition": 771-72.

[222] Claus-Dieter Ehlermann, "State Aid Control in the European Union: Success or Failure," *Fordham International Law Journal*, no. 4 (1994): 1217–18.

107(1) of TFEU prevents the state aid in principle.[223] It also leaves room for exemptions. Article 107(2) enumerates what aids "shall be compatible", including aid to individual consumers , aid to recover from natural disasters or exceptional occurrences, and aid to certain areas in Germany in compensation for its division in history;[224] Article 107(3) defines aids "may be considered to be compatible" which need to be verified by the Commission in relation to promotion the development of areas with abnormally low living standard, important project of common European interest, certain economic activities or areas without adverse impact on common interest, culture and heritage conversation, or decision by the Council.[225] According to Article 108(3), the Commission has strong investigative and decision-making powers on state aid. New aid measures must be notified to the Commission and can only be implemented after approval.[226]

4.2.2.2 Enforcement Mechanism

As the "guardian of Union Law", the European Commission is the administrative governing body to ensure that EU law is properly applied in all the member countries. Inside it has the

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[223] Article 107(1) of TFEU stipulates: "1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

[224] Article 107(2) of TFEU stipulates:" 2.The following shall be compatible with the internal market: (a) [aid to individual consumers].., (b) [aid to recover from natural disasters or exceptional occurrences]..., (c) [aid to certain areas in Germany in compensation for its division in history]..."

[225] Article 107(3) of TFEU stipulates: "3.The following may be considered to be compatible with the internal market: (a) [promotion the development of areas with abnormally low living standard] ..., (b) [important project of common European interest]..., (c) [certain economic activities or areas without adverse impact on common interest]..., (d) [culture and heritage conversation]..., (e) [decision by the Council]..."

[226] Article 108(3) of TFEU stipulates: "3.The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision."

Directorate General for Internal Market, Industry, Entrepreneurship and SMEs in charge of monitoring implementation of the internal market rules in EU law,[227] and the Directorate General for Competition ("DG Competition") is responsible for enforcing competition rules.[228]

As for the Commission's institutional set-up, it is a politically independent executive arm serving no interests other than those of the Union.[229] The Commission has 28 Commissioners now. The member of the Commission is selected on the basis of an equal rotation system between the member states established unanimously by the European Council.[230] The budget of the Commission is decided by the European Parliament and the Council.[231] Furthermore, the independent status of the Commission for serving the Union interests is enshrined in the treaties. Article 17(3) of the Treaty on European Union[232] ("TEU") requires the Commission to "be completely independent" in carrying its responsibilities.[233] Similarly, Article 245 of TFEU explicitly requires the Commission's

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[227] "Directorate-General: Internal Market, Industry, Entrepreneurship and SMEs," *European Commission*, accessed July 18, 2019 https://ec.europa.eu/info/departments/internal-market-industry-entrepreneurship-and-smes_en.

[228] "Directorate-General: Competition," *European Commission*, accessed July 18, 2019 https://ec.europa.eu/info/departments/competition_en.

[229] Klaus-Dieter Borchardt and Directorate-General for Communication, *The ABC of the EU Law*, Manuscript completed in December 2016 (Luxembourg: Publications Office of the European Union, 2018): 77.

[230] Article 244 of TFEU stipulates: "In accordance with Article 17(5) of the Treaty on European Union, the Members of the Commission shall be chosen on the basis of a system of rotation established unanimously by the European Council and on the basis of the following principles:..."

[231] Article 314 of TFEU stipulates: "The European Parliament and the Council, acting in accordance with a special legislative procedure, shall establish the Union's annual budget in accordance with the following provisions..."

[232] European Union, "Treaty on European Union." *See* "Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union Information and Notice," *Official Journal of the European Union*, Information and Notices, 59 (July 6, 2016).

[233] Article 17(3) of TEU (consolidated version 2016) stipulates: "3.The Commission's term of office shall be five years. The members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt. In carrying out its responsibilities, the Commission shall be completely independent. Without prejudice to Article 18(2), the members of the Commission shall neither seek nor take instructions from any Government or other institution, body, office or entity. They shall refrain from any action incompatible with their duties or the performance of their tasks."

members to refrain from any action incompatible with their duties, and prohibits the states from influencing the members in the performance of their task.[234]

If a state breaches the EU law, on its own initiative or complaints from interested parties, the Commission may launch a formal infringement procedure stipulated in Article 258 of TFEU.[235] At first, the Commission sends a letter of formal notice requesting information, and the concerned state must send a detailed reply within a specific period.[236] If the Commission concludes that the state breaches the EU law, it may send a reasoned opinion, which explains why it considers that the state fails to fulfill its obligation under the EU law and requires the state to inform the Commission about the measures taken to rectify it within a specified period. If the member state still does not comply with the opinion within the specified period, the Commission may refer the matter to the Court of Justice. If the court adjudicates that the state has violated the EU law, the national authorities must take action to comply with the court judgment. If the state still fails to comply with the court judgment, the Commission may refer this matter back to the court and propose the court to impose financial penalties.

4.2.2.3 Advocacy

As U.S. experience of competition advocacy program suggested, the advocacy could play an

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[234] Article 245 of TFEU stipulates: "Member States shall respect their independence and shall not seek to influence them in the performance of their tasks..."

[235] Article 258 of TFEU stipulates: "If the Commission considers that a Member State has failed to fulfill an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union..."

[236] "Infringement Procedure," *European Commission*, accessed July 18, 2019 https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en.

important role in the legislative process to ensure that the legislator is aware of competition considerations when it formulates the law or regulation. In the EU, DG Competition is an integral part of the Commission which enforces the competition rules among the member states. It also can play an advocacy role in the Union's legislative process.

The Commission has an exclusive right to propose an Union-level legislative process.[237] The legislative proposals that are expected to have significant economic, social or environmental impact are subject to Regulatory Impact Assessment.[238] The Commission has guidelines and toolbox which provides guidance and tools on how to conduct impact assessments.[239] The toolbox includes a separate instrument for competition screening, "Tool #23. Competition",[240] which borrowed from OECD's toolkit on competition assessment.[241] As a part of the overall assessment, the drafters of legislation are asked to consider what restrictions of competition may directly or indirectly result from the proposal and whether there are less restrictive measures. DG Competition, as an integral department of the Commission, could screen and provide comments and suggestions on proposals from other Directorates-General.[242] This role has been recognized by the Commissioner for Competition, who stated that "proactive competition advocacy.... is essentially a toolkit which can

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[237] Article 17(2) of TEU (consolidated version 2016) stipulates: "2.Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide. "

[238] Geraldine Emberger, "How to Strengthen Competition Advocacy through Competition Screening," *Competition Policy Newsletter*, no. 1 (2006): 30.

[239] "Better Regulation: Guidelines and Toolbox," *European Commission*, accessed July 18, 2019 https://ec.europa.eu.

[240] European Commission, "TOOL #23 Competition," accessed June 23, 2019 https://ec.europa.eu.

[241] The Commission's guidance to competition assessment directly adopts the Competition Checklist from OECD's Competition Assessment Toolkit, follows the similar evaluation process, and list the OECD's documents as the primary information source.

[242] Gal and Faibish, "Six Principles for Limiting Government-Facilitated Restraints on Competition": 69–100.

improve the overall quality of legislation, and help make it more sensitive to competition concerns".[243]

With regards to national level legislative procedure, DG Competition does not have an institutional role to conduct an ex ante competition screening.[244] Nevertheless, DG Competition has taken active measures in order to call on member states to take a pro-competitive review of the existing regulations within each state. The example is its advocacy endeavors for de-regulation on professional services at the national level.[245] The DG Competition has sponsored a thorough study on this sector, and adopted two reports, Competition in Professional Services in 2004[246] and a follow-up report Scope for More Reform in 2005.[247] By the reports, the Commission invited regulatory authorities in the nations to voluntarily review whether existing rules restrain competition, and whether they are proportionate and justified for the good practice of professions, and to reform the unjustified national rules.

4.2.3 Russia's Framework

4.2.3.1 Legislation

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[243] Neelie Kroes, "Introductory Paper," Bonn, Germany, in *The Principle of Competition as a Guideline for Legislation and State Action - The Responsibility of Politics - The Role of Competition Authorities* 12th International Conference on Competition, held June 6, 2005.

[244] But it is possible for the national law of some states to grant the competition review power to its competition agency. For example, in Italy, the Italian Competition and Fair Trading Act grants the competition enforcement agency the power to notify Parliament and the Government concerning the provisions of law or regulations.

[245] *See* "Professional Services: Commission Reports," *European Commission*, accessed July 18, 2019 http://ec.europa.eu/competition/sectors/professional_services/reports/reports.html.

[246] European Commission, *Report on Competition in Professional Services*, Brussels, COM(2004) 83 (European Commission, September 2, 2004), accessed July 18, 2019 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004DC0083&from=EN.

[247] European Commission, *Professional Services - Scope for More Reform*, Brussels, COM(2005) 405 (European Commission, September 5, 2005), accessed July 18, 2019 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0405&from=EN.

In Russia's competition law, the Federal Law on Protection of Competition ("FLPC"), adopted in 2006,[248] is its cornerstone legislation.[249] As introduced before, because of the severe government intervention problem in the social context, FLPC not only governs the traditional domain of competition law (abuse of dominance, anti-competitive agreements and merges by private parties), but also includes clauses prohibiting government anti-competitive conduct. The relevant clauses of FLPC are stipulated in a similar structure to the relevant provisions in China's AML, which is in a three-tier way (from general provision to detailed types of unlawful conduct, and to legal responsibilities). Thus, the following analysis of the clauses of FLPC will be unfolded with a comparison of China's AML provisions.

In first place, the Article 1[250] and Article 3[251] of the FLPC provide the objective and sphere of this federal law. Like AML's Article 8, these two articles explicitly prohibit anti-competitive government conduct in principle.

Second, FLPC's Chapter 3 provides a comprehensive definition and enumeration of public anti-competitive conducts, which is broader than AML's Chapter 5 in China. This chapter includes

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[248] No.135-FZ Federal Law on Protection of Competition (promulgated by the Federal Assembly, amended January 5, 2016). The Federal Assembly is the parliament of the Russian Federation. *See* "Federal Law 'On Protection of Competition' (as Amended in 2016), Adopted by the State Duma on July 8, 2006, Approved by the Federation Council on July 14, 2006," unofficial translation, *Federal Antimonopoly Service of the Russian Federation*, (July 22, 2016), http://en.fas.gov.ru.

[249] Jifeng Liu (刘继峰), "Learning from Russia's Experience on Regulating Administrative Monopoly in Anti-Monopoly Law" [俄罗斯反垄断法规制行政垄断之借鉴], *Global Law Review* [环球法律评论] 32, no. 02 (2010): 124.

[250] Article 1 of FLPC stipulates: "1.This Federal Law determines organizational and legal basis for protection of competition including prevention and restriction of: monopolistic activity and unfair competition; prevention, restriction, elimination of competition by federal executive authorities, public authorities of the subjects of the Russian Federation, bodies of local self-government, other bodies or organizations exercising the functions of the aforementioned bodies, as well as public extra-budgetary funds, the Central Bank of the Russian Federation [hereafter is referred as "the public authorities"]."

[251] Article 3 of FLPC stipulates: "1.This Federal Law is applied to the relations with respect to protection of competition including prevention and restriction of monopolistic activity and unfair competition, and in which Russian legal persons and foreign legal persons, organizations, [the public authorities]..., physical persons (including individual entrepreneurs) are involved."

two articles: Article 15 prohibits action or inaction of public authorities that restrict competition,[252] and Article 16 prohibits anti-competitive agreements or concerted practices of public authorities.[253] The infringing public authorities[254] not only include bodies of federal and regional governments and the public organizations executing public duties like China, but also is comprised of federal subjects[255] and local autonomous legislative bodies. Thus, it only excludes the Federal Assembly of Russian Federation, the Government of Russian Federation and the judicial bodies. The unlawful conduct could be in the form of action or inaction, and carried out individually or by agreement or in concerted practice with other government agencies or economic entities, notwithstanding that the consequences are real or just potential. In contrast, China's AML literally just cover the government conduct in the form of action conducted individually by a certain agency which has a substantial consequence. Further, in the Chapter 3 of FLPC, the detailed types of unlawful government conduct not only includes the general restrictions on the entry of market, the movement of products, business activities of economic entities, and bid like China, but also includes granting state or municipal

[252] Article 15 of FLPC stipulates: "1. It is forbidden to pass acts and (or) exercise actions (lack of action) which lead or can lead to prevention, restriction, elimination of competition, except the cases provided for by the Federal Laws, in particular, the following is forbidden:[the concrete unlawful conducts] ... 2.It is forbidden to vest [the public authorities]...with powers execution of which lead or can lead to prevention, restriction or elimination of competition, except cases provided for by Federal Laws...3.It is forbidden to combine functions of [the public authorities]...and functions of economic entities, except the cases provided for by Federal Laws, Decrees of the President of the Russian Federation, Regulations of the Government of the Russian Federation, as well as granting economic entities with functions and rights of the above-mentioned bodies, including the functions and the rights of the bodies of state control and supervision."

[253] Article 16 of FLPC stipulates: "Agreements between [the public authorities]...or between them and economic entities or execution of concerted practices by these bodies and organizations are forbidden if such agreements or such execution of concerted practices lead or can lead to prevention, restriction or elimination of competition, in particular, to: [the concrete unlawful conducts] ..."

[254] The infringing authorities could be "federal executive authorities, authorities of the subjects of the Russian Federation, bodies of local self-government, other bodies or organizations exercising the functions of the aforementioned bodies, as well as public extra budgetary funds, the Central Bank of the Russian Federation".

[255] The "federal subjects" of Russia refer to the constituent units of the Russian Federation. The Russian Constitution recognizes 85 federal subjects since March 18, 2014, although two of the most recent subjects are recognized by most states as part of Ukraine.

preferences[256] and combining public duties with functions of economic entities[257], which are common conducts in China, but not covered by the AML. Additionally, Chapter 3 generally exempts the government conduct in circumstances "provided by the Federal Laws, Decrees of the President of the Russian Federation, Regulations of the Government of the Russian Federation". For example, because there is a Federal Law on Natural Monopoly,[258] the prescribed regulations and control measures on the specified natural monopoly sectors[259] are exempted from the law enforcement of the FLPC. In this sense, the sector regulator's measures such as entry restrictions, price-setting, productions control on the business of oil transportation is not under the purview of FLPC.

Third, like AML's Article 53, FLCP's Article 37 prescribes that the officials of the infringing agencies may bear administrative responsibilities.[260] Violating the provisions of the competition law is regarded as an administrative offence, where the Code of the Administrative Offences of the Russian Federation would quote.[261] According to Article 14.9 of this code, the responsible official

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[256] Article 15.1 of FLPC stipulates: "It is forbidden ...10) giving instructions to economic entities about acquiring the goods, except cases provided for by the law of the Russian Federation..." In this regards, Chapter 5 of FLPC prescribes how to control on granting state or municipal preferences. Resembling EU's state aid control, all state or municipal preferences must file applications to FAS for consent before being granted, and FAS has the power to stop and recover an unlawful grant of preferences.

[257] It refers to that an entity plays a dual role of public administration and profit-making operation in a market, for example, public agencies doing business by themselves to make profits, or they granting the profit-making entities with power to administer public affairs. *See* Liu, "Learning from Russia's Experience on Regulating Administrative Monopoly in Anti-Monopoly Law": 126.

[258] No.147-FZ Federal Law on Natural Monopoly (promulgated by the Federal Assembly, amended December 30, 2001). *See* "Federal Law No. 147-FZ (I) 'On Natural Monopolies,'" unofficial translation, *Federal Antimonopoly Service of the Russian Federation*, (March 16, 2006), http://en.fas.gov.ru.

[259] According to the Article 4 of Federal Law on Natural Monopoly, the natural monopoly sectors includes: "transmission of oil and oil products through trunk pipelines; pipeline transportation of gas; services on the transmission of electric power and heat energy; railroad transportation; transportation terminal, port and airport services; public telecommunications and postal services".

[260] Article 37 of FLPC stipulates: "Officials... bear responsibility provided for by legislation of the Russian Federation. Imposing responsibility on persons stated in Part 1 of this Article do not exempt them from the duty to fulfill the decision and determination of the anti-monopoly body, to submit to the anti-monopoly body application or notices for examination or carry out other actions provided by the anti-monopoly law..."

[261] No.195-FZ Code of the Administrative Offences of the Russian Federation (promulgated by the

may be directly imposed administrative fines by the FAS, or even disqualified for civil service by the court.[262]

4.2.3.2 Enforcement

Federal Anti-monopoly Service ("FAS") is the only authority in Russia empowered with control over compliance with anti-monopoly legislation. It enjoys an independent and authoritative position in the Russian government framework. FAS is directly subordinate to the federal government, but is not a ministry. This status provides an opportunity for FAS to be independent even when initiating investigations against federal bodies.[263] The FAS has 84 Regional Offices, which are directly subordinate to it. The budget for the FAS and its regional offices is all provided by the federal budget.[264] Such institutional setup insures a degree of accountability and standardization in FAS's enforcement.

FAS has a full range of authorities to control anti-competitive conduct whether from private or public parties. Pursuant to Chapter 6 and other relevant provisions of FLPC, FAS has the power to deal with complaints, investigate and collect evidence, consider and try cases, issue warnings and

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Federal Assembly amended January 5, 2016). *See* "Extracts from the Code of the Administrative Offences," unofficial translation, *Federal Antimonopoly Service of the Russian Federation*, (January 28, 2016), http://en.fas.gov.ru.

[262] Article 14.9 of Code of the Administrative Offences stipulates: "The actions (omissions) of officials...which are inadmissible under the anti-monopoly legislation...shall cause the imposition of an administrative fine on the officials at the rate of 15,000 to 50,000 roubles. The actions of the officials mentioned in Part 1 of this Article, which are inadmissible under the antimonopoly legislation...if such officials have been earlier subjected to an administrative penalty for a similar administrative offence...shall cause disqualification for a term of up to three years."

[263] Federal Antimonopoly Service, "General Information," *Federal Antimonopoly Service*, accessed July 18, 2019 http://en.fas.gov.ru/about/what-we-do/general-information.html.

[264] Federal Antimonopoly Service, *Report on Competition Policy in Russian Federation in 2017 to Organization for Economic Co-operation and Development* (Russia Federal Antimonopoly Service 2018): 40, accessed June 23, 2019 http://en.fas.gov.ru/international-cooperation/oecd/oecd-annual/.

notifications, make binding determinations, and impose administrative sanctions. Chapter 9 of FLPC sets the procedure for FAS to initiate, investigate, consider, and make decisions in relevant cases.

Specifically, the officials of FAS have the right of an unimpeded access to the data and information held by the public authorities as well as by the economic entities, and all of the latter are obligated to provide such information to FAS.[265] FAS also has the power to access the offices of public authorities and do on-site inspections.[266] During consideration of the cases, the FAS can send written warnings to the involved government agencies to stop actions that have signs of violating the competition law or announce that their proposed legislation or regulation can lead to violations.[267] After consideration of cases, FAS can make binding determinations to the public authorities to cancel, amend or terminate their conduct, or fulfill certain actions.[268] Further, FAS can order administrative fines to the liable official in the determination.[269] The binding determination is

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[265] Article 25 of FLPC stipulates: "1. Commercial organizations and non-commercial organizations (their management), [the public authorities (their officials)]..., physical persons (including individual entrepreneurs) are obliged to provide to the anti-monopoly body, upon its reasonable request within the established period, and in accordance with its scope of reference, documents, explanations, and information, orally or in writing (including information constituting commercial, official, other legally protected secrets), including acts, contracts, certificates, business correspondence, other documents and materials in the form of digital recording or in electronic format..."

[266] Article 25.1 of FLPC stipulates: "To control compliance with the anti-monopoly law, an anti-monopoly body can carry out scheduled and unscheduled inspections of [the public authorities]..., commercial and non-commercial organizations, physical persons (including individual entrepreneurs)..."

[267] Article 39.1 of FLPC stipulates: "1.To suppress actions (inaction) that lead or can lead to preventing, restricting, eliminating competition and (or) infringing the interests of economic entities in the field of business activities or infringing the interests of indefinite range of consumers, the anti-monopoly authority issues a written warning to an economic entity, [the public authorities]... to terminate actions (inaction), abolish or amend acts that have elements of violating the anti-monopoly law, or eliminate the cause and conditions that facilitated such a violation, and to undertake measures to eliminate the consequences of the violation ... "

[268] Fulfilling certain actions is ordered by FAS to correct public authorities' inaction or require them to do certain actions. Article 23 of FLPC stipulates: "1.The anti-monopoly body fulfills the following authorities: ...3)issues binding determinations to [the public authorities]..., as well as their officials, except the cases established by Clause 4 of this Article: on cancellation or amendment of acts; on cancellation or amendment of contracts; on terminating other violations of the anti-monopoly law, in particular, undertaking measures to return property or other objects of civil rights transferred as a state or a municipal preference; on fulfillment of actions aimed at ensuring competition. ..."

[269] Article 23 of FLPC stipulates: "1.The anti-monopoly body fulfills the following authorities: ...

obligatory for public authorities and their officials. Despite this, public authorities and their officials can appeal to an arbitration court[270] within three months from the day the determination was issued.

It is worthy to note that, there is an exception of government conduct on which FAS can issue binding determination directly: the legislative conduct. As before introduced, the infringing authorities are broad even including legislative authorities of federal subjects or autonomous regions. However, for statutory acts and other legal acts issued by public authorities, the FAS needs to apply to the arbitration court to confirm that they are inoperative, invalid, or contradict to the anti-monopoly legislation fully or partially, rather than issuing binding determination directly as on non-normative conduct.[271] This different treatment is not difficult to understand from the aspect of power separation and balance. It is not reasonable for a federal administrative body to directly announce invalid or illegal the statutory acts or other legal acts, but rather it is justifiable for the neutral and detached judicial body to make such judgment to ensure the uniformity of federal laws.

4.2.3.3 Advocacy

Among FAS's various advocacy activities, first and foremost is its role of competition assessment in the legislative and regulatory process. Resembling EU's Regulatory Impact Assessment, according to the Resolution No.1318 of the Government of the Russian Federation in

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5)brings to responsibility for violation of the anti-monopoly law commercial organizations, non-commercial organizations, their officials, officials of [the public authorities]...,physical persons (including individual entrepreneurs) in the cases and in accordance with the procedure established by legislation of the Russian Federation ..."

[270] Arbitration court is one type of court in Russia, rather an arbitration institution. This type court mainly hears cases on anti-monopoly, advertising, and other commercial issues.

[271] Article 23 of FLPC stipulates: "1.The anti-monopoly body fulfills the following authorities: ...6) applies to arbitration court with claims and applications concerning violations of the anti-monopoly law, including claims and applications: a) on pronouncing statutory acts or other legal acts inoperative or invalid, fully or partially, or contradicting to the anti-monopoly law..."

2012, all laws and regulations that affect or may affect terms of conducting business in Russia need to do regulatory impact assessment.[272] Furthermore, the FAS regulation requires that public authorities are obliged to coordinate with FAS when their proposed legislative acts or regulations would directly impact on competition. This has already been a major advocacy activity of FAS in the legislative process, which is highlighted in FAS's annual reports during the reporting period.[273]

In order to implement the competition policy and suppress regional protectionism, the FAS also has conducted several productive advocacy measures, according to its propaganda in its official website.[274] For example, FAS has signed 29 agreements on cooperation with higher regional authorities. These agreements assign mutual consultations, working meetings, workshops and information exchanges aiming at elimination of administrative barriers and effective functioning of commodities' markets. Furthermore, the FAS creates and publicizes "White and Black Books" which help to reduce violations by regional public authorities and stimulate pro-competitive activities.[275] The white book includes the best practices of regional and municipal authorities, while the black book includes the worst practices of anti-competitive nature.

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[272] Resolution No. 1318 of the Government of the Russian Federation "On the Procedure for Carrying Out Regulatory Impact Assessments by the Federal Executive Authorities of Regulatory Legal Acts, Draft Amendments to Federal Bills and Draft Decisions of the Eurasian Economic Commission, and on the Introduction of Amendments to Certain Acts of the Government of the Russian Federation" (issued by the Government of the Russian Federation December 17, 2012). Center for Strategic Research, *Regulatory Policy in Russia: Key Trends and the Architecture of the Future*, Moscow (Center for Strategic Research, May 2018): 20.

[273] According to the Article 23 (12.1) of the FLPC, FAS is obliged to submit an annual report on the state of competition to the federation government and publicize the report on its official website.

[274] "General Information", *FAS.org.ru*.

[275] *Ibid.*

4.2.4 Implications of Comparative Study

From the above introduction of the regulatory frameworks of the EU and Russia against government restraints, at least three implications on the law enforcement could hereby be summarized.

First, the establishment of law enforcement on government restraints has a deep social background. The EU is committed to creating the internal market while realizing the four freedoms since the union's establishment. Besides the internal market rules, because many member states owned the major businesses in their nations and broke the equal competition by granting subsidies or privileges to their owned enterprises, the competition rules are also drafted to monitor the hybrid restraint on competition by the state and private entities and control state aid. Russia is a transitional country with numerous constituent subjects where the government restraint issue is more overwhelming than the private restraint traditional competition law targets. Based on their own social background, the two jurisdictions build efficient law enforcement on government restraints. Even though they all have advocacy measures at the same time, it is clear that vigorous enforcement activities by the competition authority remains the most efficient way to counter this competition issue. China has a similar social background to Russia, where the government restraints are a prevalent social issue in this large transitional country. Thus, this implication again indicates the necessity for China to establish law enforcement to control anti-competitive government restraints.

Second, it is also unrealistic to give the competition law enforcement primacy in all fields and sectors without limitation. On the one hand, even though the competition is the organizing principle in a market economy, the democratic politics mandates that the legislature should be given the final

words as to how the markets should be regulated. Hence it is unreasonable for a competition law and its enforcement to precede the legislation by parliament or the regulation by the supreme administrative body even though they may have negative impact on competition. In the EU, competition rules apparently are not given the precedence over other treaties rules, and the DG competition mostly plays an advocacy role at the Union-level legislation. In Russia, Chapter 3 have a general exemption in cases: "provided by the Federal Laws, Decrees of the President of the Russian Federation, Regulations of the Government of the Russian Federation".

On the other hand, it is better for a specialized agency to exercise regulations and control on several industrial sectors where highly specialized and continual knowledge of regulation is necessary to ensure the existence of conditions that constantly increase public welfare. Applying coercive law enforcement on government regulations in these special sectors might be problematic for it would obstruct the relevant specialized agencies to balance competition and other public interests. As mentioned above, according to the Federal Law on Natural Monopoly in Russia, the sector regulator's conduct such as entry restriction, price-setting, and productions control is not under the law enforcement of the FLPC. Likewise, it is still possible for the competition authority to play a advocacy role in these sectors to inform and consult with the sector regulators about competition considerations. To conclude the second implication, it indicates the importance to draw a clear line for law enforcement, namely, it is necessary to formulate a definite exemption when designing a law enforcement mechanism against anti-competitive government conduct.

Third, it is indispensable for the competition authority to have substantial enforcement power and procedure in designing the law enforcement mechanism. Even though China's AML have

prohibitive provisions like Russia's FLPC, its prominent drawback is lacking of its enforcement power, which can only make suggestions and rely on the superior agency to rectify the infringing agency's conduct.[276] Different from China's institutions, EU's Commission can send a formal letter of reasoned opinion to the state agency. If the alleged agency fails to comply with the opinion, the Commission could bring the matter into the Court of Justice. In Russia, FAS seems to enjoy a more authoritative status in exercising the law enforcement than EU's Commission. FAS can send written warning to the suspected agency and can directly make a binding determination. Even though the alleged agencies and officials have a right to appeal, the determination is deemed obligatory at first. In other words, the FAS has the first instance to determine the legality of a conduct and impose administrative penalties.

4.3 Summary

Following that the previous chapters conclusion of a new direction, establishing law enforcement against government restraints, this chapter further has analyzed the empirical study and the comparative study to demonstrate the necessity and feasibility of this direction.

The empirical study examines 99 cases concluded by the competition authority from public resources. Based on its findings, this study reveals the ineffectiveness of the current advocacy framework and on the other hand, proves potential space for the law enforcement.

The comparative study analyzes the regulatory framework of the EU and Russia against anti-competitive conduct. Arguably, the comparative study has three main implications. First, an

[276] Refer to Part 2.3 "Prominent Drawback".

enforcement mechanism on government restraints is built with a deep social background, which further indicates the necessity for China to establish law enforcement because of its social context. Second, it is also unrealistic to give the competition law enforcement primacy in all fields and sectors without limitation, thus it is necessary to formulate a clear exemption rule when designing enforcement mechanisms. Third, it is indispensable for the competition authority to have substantial enforcement power and procedure in the enforcement mechanism.

Chapter V: Proposed Framework Against Government Restraints

Since the enactment of Anti-Monopoly Law ten years ago in 2008, China's competition regime has developed and matured while facing the problem of backward legal provisions not keeping up with the times. China has considered amending this law for its inconsistency with development. On September 7th, 2018, the legislative agenda of China's 13th National People's Congress was published, and the Anti-Monopoly Law is on the priority basis to be reviewed and amended in the coming five years.[277] Under this background, this study finds it is an excellent opportunity to propose a new effective framework to efficiently control anti-competitive government conduct.

As previous chapters have analyzed, the prominent drawback is that the competition authority has not played a substantial part in the current framework. After examining and rethinking the conventional wisdom of competition advocacy against government restraints, this study suggests a new direction of law enforcement for China. The empirical study of 99 cases concluded by the competition authority vividly revealed the necessity to establish law enforcement. Meanwhile, the comparative study of Russia's and EU's regulatory framework further provided implications on how to establish law enforcement. Based on the work above, this chapter will propose a new framework with establishing a competent and workable law enforcement in China.

According to the implications from the comparative study, this chapter will solve two main problems with regards to the law enforcement mechanism. First, it is the scope of law enforcement:

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[277] "Legislative Plan of the Standing Committee of 13rd National People's Congress" [十三届全国人大常委会立法规划], *Xinhua*, August 9, 2018, www.xinhuanet.com.

what government conduct is within the reach of law enforcement by the competition authority, and what are exempted from enforcement. Second, it is the enforcement procedure and power, how does the competition authority analyze and identify illegal government conduct, what enforcement power the competition authority has to address illegal government conduct, and how to enforce it.

5.1 Scope of Enforcement

As the comparative study implies, it is impractical for giving law enforcement absolute precedence over government conduct in all fields without frontiers. Thus, to design a coercive mechanism of law enforcement in the sphere of government restraints, the first critical step is to carefully identify its scope and exemption. Though the AML literally prohibits anti-competitive government conduct, it has no relevant article to illustrate what government regulations and conducts are "exempted". The reason is simply that there are only advocacy measures, rather than law enforcement, against government restraints in AML, and there is no need to set up concrete limitations on advocacy activities. In this regard, this part will analyze what scope for law enforcement China should adopt.

The object of law enforcement is government conduct, which is identical with government regulation on the market in economics. As discussed in the Part 3.3 "Rationale for Advocacy", market failures, such as economy of scale, externality and information asymmetry, make government regulation indispensable in certain areas.[278] In order to identify the scope for law enforcement, it is helpful to look into the fundamental relationship between government regulation and market

[278] Refer to Part 3.3 "Rationale for Advocacy".

competition in economics. The relationship between regulation and market competition is a fundamental research focus in economic discipline. A large body of economic studies have examined this relationship by distinguished economists. For example, the classical literature by Adam Smith,[279] Keynes,[280] Hardin,[281] Stigler,[282] and Coase[283] have all done ground-breaking studies on this topic. The economic studies over the past decades has offered enlightening suggestions and influenced regulation reform in the world, from Smith's laissez-faire, to Keynes's government intervention, then to neo-liberalist' de-regulation.

Generally, economists distinguish between two types of government regulation: economic regulation and social regulation.[284] "Economic regulation" is aimed at specific sectors, particularly natural monopoly sectors, where the government utilizes entry controls, price and production controls and other measures to supervise certain industrial sectors. Whereas, social regulation is trans-sector, for the sake of public interests, especially labor and consumer's safety and health, environment protection and disaster prevention, where the government sets up certain standards for commodities and services, prohibiting or restraining certain economic activities.

What follows will analyze these two kinds of regulations in China and its scope for enforcement. It is emphasized that the economic discussion is not the focus of this study. However,

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[279] *See generally* Adam Smith, *The Wealth of Nations: An Inquiry into the Nature and Causes of the Wealth of Nations* (Harriman House Limited, 2010).
[280] *See generally* John Maynard Keynes, *The General Theory of Employment, Interest, and Money* (Springer, 2018).
[281] *See generally* Garrett Hardin, "The Tragedy of the Commons," *Science* 162, no. 3859 (December 13, 1968): 1243–48.
[282] *See generally* George J. Stigler, "The Theory of Economic Regulation," *The Bell Journal of Economics and Management Science* 2, no. 1 (1971): 3–21.
[283] *See generally* Ronald H. Coase, "The Problem of Social Cost," in *Classic Papers in Natural Resource Economics*, ed. Chennat Gopalakrishnan (London: Palgrave Macmillan UK, 2000), 87–137.
[284] Masu Uekusa (植草益), *Microeconomics of Regulation* [微观规制经济学], trans. Shaowen Zhu (朱绍文) (Beijing: China Development Press [中国发展出版社], 1992): 22, 287.

to some extent, the economic studies on government regulations reveal the rationale and essence of government regulation. Therefore, it is helpful to better understand the object of law enforcement, government conduct, and to identify the scope in the law thereupon.

5.1.1 Exemption of Regulated Sectors

Sector-specific economic regulation is primarily and traditionally applied to natural monopolies as economists suggest.[285] A natural monopoly refers to an industry where production by multiple competing firms is more costly than by a monopoly.[286]

A natural monopoly arises when an industry requires an extremely high fixed costs at the onset.[287] A firm with high fixed cost needs a large number of customers in order to have a meaningful return on investment. This characteristic makes economies of scale extremely important in a natural monopoly, where a natural monopolist can produce the entire output at a cost lower than it would be if there were multiple firms. Therefore, it is unavoidable and necessary to set up a monopoly and restrain competition in natural monopoly sectors from the economic perspective. In China, the sectors of natural monopoly characteristics include electricity, telecommunication, railway, navigation, public utilities, postal service, port facilities, and so on.[288]

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[285] Roger Sherman, "Optimal Regulation: The Economic Theory of Natural Monopoly," *Southern Economic Journal* 59, no. 4 (1993), http://link.galegroup.com.
[286] Richard A. Posner, "Natural Monopoly and Its Regulation," *Journal of Reprints for Antitrust Law and Economics*, no. 2 (1978): 769.
[287] Fixed costs, or sunk costs, are those that remain the same regardless of the number of goods or services produced.
[288] Xingzhi Xiao (肖兴志) and Chao Han (韩超), "Reform and Development of Monopolized Industries in China from 1978 to 2017: Retrospect and Prospect" [中国垄断产业改革与发展 40 年:回顾与展望], *Research on Economics and Management* [经济与管理研究] 39, no. 07 (2018): 6.

Government economic regulation is needed for natural monopolies in two dimensions.[289] On one hand, entry control by the government can maintain an appropriate market structure to ensure economies of scale and prevent the waste of social resources by disordered competition. On the other hand, without competitors, monopolistic firms typically may abuse their market power and set higher prices. In this case, government regulation, mainly price and production control, is needed to ensure the monopolistic firms do not overcharge. In China, generally there are sector-specific laws or regulations to control the entry, price and economic activities in a sector of natural monopolies, such as Electric Power Law,[290] Railway Law,[291] Civil Aviation Law,[292] Postal Law,[293] and Port Law promulgated by the Standing Committee of National People's Congress ("Standing Committee");[294] Regulations on Telecommunication,[295] Regulation for Administration on Urban Gas by State Council.[296]

Additionally, for other industrial sectors which are not natural monopolies, the government may also set laws or regulations to erect barriers to entry and prohibit competition in those sectors not because of economies of scale, but for other public interests. These sectors could be called "statutory

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[289] Xianlin Wang (王先林), "The Coordination between Regulations on Monopolized Sectors and Competition Law Enforcement" [垄断行业监管与反垄断执法之协调], *Legal Science* [法学], no. 02 (2014): 113–14.

[290] Electric Power Law [电力法] (promulgated by the Standing Committee of National People's Congress, amended December 29,2018, effective December 29,2018).

[291] Railway Law [铁路法] (promulgated by the Standing Committee of National People's Congress, amended April 24,2015, effective April 24,2015).

[292] Civil Navigation Law [民用航空法] (promulgated by the Standing Committee of National People's Congress, amended December 29,2018, effective December 29,2018).

[293] Postal Law [邮政法] (promulgated by the Standing Committee of National People's Congress, amended April 24,2015, effective April 24,2015).

[294] Port Law [港口法] (promulgated by the Standing Committee of National People's Congress, amended December 29,2018, effective December 29,2018).

[295] Regulations on Telecommunication [电信条例] (issued by the State Council, revised February 06,2016, effective February06,2016).

[296] Regulations for Administration on Urban Gas [城镇燃气管理条例] (issued by the State Council, amended February 06,2016, effective February 06,2016).

monopoly" in economics.[297] The statutory monopolies are different among countries. In China, to protect public health and ensure national income from the tobacco industry, Tobacco Monopoly Law[298] is promulgated by the Standing Committee; as a long tradition of state monopoly on table salt, Measures on Table Salt Monopoly[299] is issued by State Council; for communist party's special concerns about social media, Regulations for Administration on Broadcasting and Television[300] is issued by State Council; to ensure the stability of the financial market, Banking Supervision Law,[301] Securities Law[302] and Insurance Law[303] are promulgated by the Standing Committee.

Regardless of natural monopoly or statutory monopoly sectors, it is justifiable for the government to sets up the administrative licensing for market entry, to control the price and production of a commodity or service, and adopts other measures to supervise economic operation in these sectors. The sector regulator generally has been accumulating specialized experience and expertise in a regulated sector, whereas the competition authority lacks this. Applying coercive law enforcement on the government regulations in these special sectors might be problematic for it would obstruct the relevant specialized agencies to balance competition and other public interests. Instead, it is only reasonable for the competition authority to utilize the competition advocacy to

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[297] Nigar Hashimzade, Gareth Myles, and John Black, "Statutory Monopoly," London, *A Dictionary of Economics* (London: Oxford University Press, 2017): 157.
[298] Tobacco Monopoly Law [烟草专卖法] (promulgated by the Standing Committee of National People's Congress, amended April 24,2015, effective April 24,2015).
[299] Measures on Table Salt Monopoly [食盐专营办法] (issued by the State Council, amended December 26,2017, effective December 26,2017).
[300] Regulations for Administration on Broadcasting and Television [广播电视管理条例] (issued by the State Council, amended March 01,2017, effective March 01,2017).
[301] Bank Supervision Law [银行业监督管理法] (promulgated by the Standing Committee of National People's Congress, amended October 31,2006, effective January 01,2007).
[302] Securities Law [证券法] (promulgated by the Standing Committee of National People's Congress, amended August 31,2014, effective August 31,2014).
[303] Insurance Law [保险法] (promulgated by the Standing Committee of National People's Congress, revised April 24,2015, effective April 24,2015).

inform and consult with the sector regulators about competition considerations.[304] This argument has been verified by Russian experience, where the Federal Law on Natural Monopoly has established that the sector agency's regulatory conduct is not under the enforcement of the FLPC. Hence, this study suggests that the conduct of the specialized sector agencies in regulated sectors are exempted from law enforcement against government conduct.

This suggestion is also in accordance with the Article 7 of AML.[305] Even though this article is generally considered to provide exemption for "business operators" in the regulated sectors, rather than administrative agencies, this article actually has implied the law-maker's attitudes towards the relevant agencies' control in these special sectors. Article 7 stipulates that in "industries controlled by the state-owned economy and concerning the lifeline of national economy and national security, and the industries implementing exclusive operation according to laws", the relevant agencies, not the competition authority, control the business operation and the price of commodities and services. To put it another way, AML recognizes and accepts other government agencies' regulating power in regulated sectors.

The above has discussed the rationale in economics for regulation on certain sectors and concluded their exemption from law enforcement. The critical legal problem is what constitutes a "regulated sector". In this regard, the Russian Federal Law on Natural Monopoly again illustrates it.

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[304] Gal and Faibish, *Six Principles for Limiting Government-Facilitated Restraints on Competition*, 10.

[305] Article 7 of the AML stipulates: "With respect to the industries controlled by the state-owned economy and concerning the lifeline of national economy and national security, and the industries implementing exclusive operation according to laws, the state protects the lawful business operations conducted by the business operators therein. The state also lawfully regulates and controls their business operations and the prices of their commodities and services so as to safeguard the interests of consumers and promote technical progresses. The business operators as mentioned above shall lawfully operate, be honest and faithful, be strictly self-disciplined, accept social supervision, shall not damage the interests of consumers by virtue of their dominant or exclusive positions."

In this law, the natural monopoly sectors are defined in two ways: by a general definition, and by the provision of a list of specific sectors.[306] On the one hand, Article 3 adopts a definition much more from its key economic characteristics, economies of scale and rigid demand.[307] This complex definition obviously still needs a proper evaluation to identify concrete sectors of a natural monopoly. For this concern, on the other hand, Article 4 provides a list of specific sectors, including transportation of oil and oil products via trunk pipelines, transportation of gas via pipelines, and railroad transportation.[308] Inspired by Russia's institution on natural monopoly sectors, this study suggests a bifurcated way to discern "regulated sector" in China's legal system.

First, this study suggests a general conceptual definition to identify regulated sectors, which invokes the term from Article 7 of AML, "industries controlled by the state-owned economy and concerning the lifeline of the national economy and national security, and the industries implementing exclusive operation and sales according to laws". This definition comprises two components: industries controlled by the state-owned economy on the lifeline of national economy and national security, and industries implementing exclusive operation according to laws. The first component, related to China's political claim to ensure state-owned enterprises to control strategic

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[306] FindLaw Attorney Writers, "The Russian Law 'On Natural Monopolies,'" *Findlaw*, accessed August 22, 2019 https://corporate.findlaw.com/litigation-disputes/the-russian-law-on-natural-monopolies.html.

[307] Article 3 of the Russian Federal Law on Natural Monopoly stipulates: "...natural monopoly shall mean the state of the commodity market in which demand is more effectively satisfied when due to technological peculiarities of production there is no competition (due to substantial reduction of the production cost per unit of commodity as a result of increasing output), and in which commodities manufactured by natural monopoly entities cannot be substituted with other commodities in the market, thus causing the demand in the given commodity market to be less responsive to changes in price compared to the demand for other types of commodities…"

[308] Article 4 of the Russian Federal Law on Natural Monopoly stipulates: "This Federal Law shall regulate the activities of natural monopoly entities in the following fields: transmission of oil and oil products through trunk pipelines; pipeline transportation of gas; services on the transmission of electric power and heat energy; railroad transportation; transportation terminal, port and airport services; public telecommunications and postal services."

industries, includes sectors like national defense, strategic energy, and telecommunication, which largely overlap with the second component. The second component could be deemed a collective of natural monopoly and statutory monopoly sectors discussed above, which shares the similarity of having laws to control the entry by granting exclusive rights to operate in certain sectors. However, there is an important restriction to the "law" which can be statutory grounding to implement exclusive operations. Granting exclusive rights to operate is in the form of awarding administrative license in law. According to Article 15 of the Administrative License Law,[309] only the law promulgated by the National People's Congress or its Standing Committee, or the administrative regulations or provisional decision issued by the State Council can set up administrative license.[310] In other words, only National People's Congress, its Standing Committee, and the State Council have the statutory authority to set up administrative license and increase new regulated sectors, whereas neither ministries of the State Council nor the provincial congresses can do so.

Second, to complement the general definition of "regulated sector", this study suggests having an exhaustive list of all specific regulated sectors published by State Council or its authorized agency. The approach of making a list could efficiently improve the certainty and credibility of law enforcement. This approach is not only an insight from Russia's Federal Law on Natural Monopoly, but also borrows the idea from the worldwide accepted regulation model of negative list in the field

[309] Administrative License Law [行政许可法] (promulgated by the Standing Committee of National People's Congress, amended April 23,2019, effective April 23,2019).

[310] Article 15 of the Administrative License Law stipulates: "...No local decree or administrative rule of the provinces, autonomous regions, and municipalities may establish any administrative license for the qualifications of the citizens, legal persons or other undertakings that shall be determined by the state; nor to establish any administrative license or pre-administrative license for the establishment and registration of enterprises or other undertakings. The administrative licenses established thereby shall not hinder the individuals or enterprises of other regions from dealing in production and business and providing services in one region, shall not restrict the commodities of other regions from entering into the market of the local region."

of foreign investment law, which has also been adopted by China in recent reforms.[311] On March 15, 2019, China's new Foreign Investment Law was adopted and set to come into force at the beginning of 2020.[312] The negative list mode is formally prescribed in Article 4 of this new law.[313] This negative list[314] exclusively enumerates industrial sectors that are limited or restricted for foreign investors, while any sectors not appearing on the list are open to foreign investors. Therefore, by issuing a similar list exhaustively enumerating all the specific regulated sectors, the scope for law enforcement would be clear not appearing on the list.

Even though it is suggested that government regulation in regulated sectors are exempt from enforcement, this does not mean that the competition authority should not play any role in those fields. Rather, it is important for the competition authority to utilize advocacy measures for two main reasons. On the one hand, just as the regulation theory revealed,[315] there is a risk that the sector regulator will be "captured" by the industrial interest groups and promulgate the regulations for their own interests at the cost of the disadvantaged groups, particularly consumers. The competition authority can inform the regulators and advocate for pro-competition regulations on behalf of the competitors and consumers. The EU Commission's advocacy endeavors on professional services is

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311 Xuequan Mu, "China to Update Negative List for Foreign Investment," Beijing, *Xinhua*, April 29, 2019, www.xinhuanet.com.

312 Foreign Investment Law [外商投资法] (promulgated by the Standing Committee of National People's Congress, revised March 15,2019, effective January 01,2020).

313 Article 4 of the Foreign Investment Law stipulates: "The state shall implement a foreign investment management system addressing pre-entry national treatment to include a foreign investment negative list. Pre-entry national treatment referred to in the preceding paragraph is defined as treatment given to foreign investors at the stage of entry in which the investment standards are not lower than that of domestic investors and their investments; the negative list refers to state regulations for foreign investment in specific areas to include special management measures for investment implementation approval. The state shall ensure equal national treatment to foreign investment excluded from the negative list..."

314 As a reform measure to promote foreign investment environment, NDRC and MOFCOM jointly released the negative list, with the official name "Special Administrative Measures on Access to Foreign Investment (Negative List) (2018 Version)", on June 30, 2018.

315 Refer to Part 3.3 "Rationale for Advocacy".

just an example, which has encouraged more reform on the restrictive regulations in these service sectors.[316]

On the other hand, whether a sector is necessary to be regulated is not constant. Especially, technological developments may wipe out or weaken economies of scale where they used to be strong in natural monopolies, so that competition becomes feasible where it was not before.[317] For example, public utilities have long been considered to be necessary for government regulation or state ownership. Due to the technological innovation, the necessity of regulation on several public utilities came under fire since the 1970s.[318] In developed countries, public utilities have been progressively opened up to competition.[319] It is usually not an easy job to remove a regulated sector or segment because the regulator may be resistant to give up its power. The evidence shows that the de-regulation reform process needs massive efforts from academia and the competition authority on raising public awareness and advocating competition.[320] This provides another stage for the competition authority to utilize the advocacy instrument.[321]

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316 Refer to Part 4.2.3 "Advocacy" of EU's Framework.
317 Advocacy Working Group, "Advocacy and Competition Policy": 30.
318 *See, e.g.*, Mark Knight and Nora Brownell, "How Does Smart Grid Impact the Natural Monopoly Paradigm of Electricity Supply?" Chicago, America Grid-Interop Forum 2010, held December 2010, 2010, 22, www.gridwiseac.org.
319 Organization for Economic Cooperation and Development, *Restructuring Public Utilities for Competition 2001* (October 8, 2001), www.oecd-ilibrary.org.
320 *See, e.g.*, David Coen and Chris Doyle, "Liberalisation of Utilities and Evolving European Regulation," *Economic Outlook* 24, no. 3 (2000): 18–26; Paul L. Joskow, "Restructuring, Competition and Regulatory Reform in the U.S. Electricity Sector," *Journal of Economic Perspectives* 11, no. 3 (September 1997): 119–38; Robert W. Crandall and Thomas W. Hazlett, *Telecommunications Policy Reform in the United States and Canada*, Rochester, NY, SSRN Scholarly Paper ID 259787 (Social Science Research Network, January 12, 2000), https://papers.ssrn.com.
321 At the meantime, the changing boundary of regulated sectors further manifests the importance and necessity to regularly review and publicize the list. By strictly examining the regulated sectors and their necessity for government regulation, this list could be an instrument to expand the competitive area to the most extent.

5.1.2 Social Regulation and Law Enforcement

Social regulation, in economics, is not confined to certain industrial sectors, and refers to a broad category of rules identifying permissible and impermissible economic activities as well as accompanying sanctions or rewards for such activities.[322] Different from economic regulation focusing on economic efficiency, social regulations generally aim to protect public interests, particularly health and safety, environment and disasters prevention. Traditionally, the government and economists focused on economic regulation. Since 1970s, it has witnessed a quiet explosion in the scope and pervasiveness of social regulations in developed countries.[323]

In economics, the theory of externality and information asymmetry accounts for the demand for social regulation. First, externality problems occur when an economic entity's activities adversely affect the social welfare but does not need to pay its damage on public welfare.[324] Such adverse activities will be pursed intensely which leads to huge losses of public welfare. For example, if without regulation, a manufacturing plant may spew harmful chemicals and sewage into the air and water, which causes severe harm on the environment.[325] It is argued that government intervention is necessary to solve such externality problems. Second, the information asymmetry between producers and consumers causes adverse selection and moral hazards, which leads to a loss of consumer

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322 Hui Zheng (郑慧), "An Overview of the Social Regulation" [社会性规制述评], *Productivity Research* [生产力研究], no. 09 (2009): 166.

323 Lilley William and Miller James C., "The New Social Regulation," *The Public Interest* 47 (Spring 1997): 49–50.

324 This is a situation of negative externality. Positive externality also exists and occurs when economic entity's activities have benefits for social welfare but not able to get paid. In this case, the economic entity will have less incentives to undertake these beneficial activities. The externality theory is firstly theorized by Alfred Marshall. *See* Alfred Marshall, *Principles of Economics*, 8th ed. (New York, NY: Cosimo Books, 2009): 54-57.

325 *See generally* J. E Meade, *The Theory of Economic Externalities: The Control of Environmental Pollution and Similar Social Costs* (Leiden; Genève: Institut Universitaire de Hautes Études Internationales, 1973).

interests.[326] For example, the manufactures of goods such as cars and computers have much better information of their products than consumers. Since consumers can hardly recognize differences between products, the manufacture has an incentive to use parts of poor quality. If such practice goes on, the relevant market will be filled with low-quality products because consumers will just compare the price without having sufficient information about quality.

To correct the externality and information asymmetry problems, the government may adopt regulatory measures[327] mainly including: (1)setting up standards which serves as benchmarks such as product quality and labor standard, (2)licensing by quota or qualifications to undertake certain activities, such as marine fishing and sewage, (3)forcing information disclosure, such as the information of possible side effects of the drug, (4)imposing tax on activities with harms on social welfare, and awarding subsidy on activities with benefits to social welfare, and (5)setting up prohibitive rules and imposing sanctions for non-compliance. In China, social regulation includes a broad range of laws and regulations such as Environmental Protection Law,[328] Food Safety Law,[329] Product Quality Law,[330] Pharmaceutical Administration Law,[331] Labor Law,[332] and Production

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[326] Agnar Sandmo, "Asymmetric Information and Public Economics: The Mirrlees-Vickrey Nobel Prize," *Journal of Economic Perspectives* 13, no. 1 (March 1999): 173–74.
[327] Xinhua Huang (黄新华) , "On Promotion of the Government Function on Social Regulation" [论政府社会性职能的完善], *Cass Journal of Political Science [政治学研究]* no.2 (2007): 63-66.
[328] Environmental Protection Law [环境保护法] (promulgated by the Standing Committee of National People's Congress, amended April 24, 2014, effective January 01, 2015).
[329] Food Safety Law [食品安全法] (promulgated by the Standing Committee of National People's Congress, amended December 29, 2018, effective December 29, 2018).
[330] Product Quality Law [产品质量法] (promulgated by the Standing Committee of National People's Congress, amended December 29, 2018, effective December 29, 2018).
[331] Pharmaceutical Administration Law [药品管理法] (promulgated by the Standing Committee of National People's Congress, amended April 24, 2015, effective April 24, 2015).
[332] Labor Law [劳动法] (promulgated by the Standing Committee of National People's Congress, amended December 29, 2018, effective December 29, 2018).

Safety Law.[333]

Despite the economic rationale for social regulation in competitive sectors, from the legal perspective, the defense of public interest is easily overused. Government agencies generally own the administrative power and assume public duties. In practice, all conduct from government agencies are in the name of public interests.[334] Since law enforcement is established based on the essential concern that government conduct may distort competition, the competition authority has to ask if it is reasonable. Therefore, in competitive sectors, it should be competition that prevails. The competition authority could utilize law enforcement to defend competition, while other agencies must justify the necessity for their intervention.[335] Put another way, government conduct in the competitive field are subject to review and law enforcement by the competition authority.

Nevertheless, it is should be noted that the legislation made by government should be an exception to law enforcement. In China, government agencies can make administrative decisions targeted at specific entity, and issue normative documents with general binding force such as notices and orders. Certain government agencies also have the legislative power to make administrative regulations and administrative rules following the legislation form, procedure and provisions stipulated in Legislation Law. As the EU's and Russian experience shows, the DG Competition can investigate any member state's law except the laws prescribed by the Union institutions;[336] FAS in

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[333] Production Safety Law [安全生产法] (promulgated by the Standing Committee of National People's Congress, amended August 31,2015, effective December 01,2015).
[334] Gal and Faibish, *Six Principles for Limiting Government-Facilitated Restraints on Competition*, 2–8.
[335] This further requires the competition authority to do a competition analysis to examine the justification for government conduct: if it has a restriction on competition, whether it is unavoidable for fulfilling its goal; whether there is a less restrictive alternative; and whether the public interest it protects exceed its adverse effect on competition. Such process of competition analysis will be talked in next part.
[336] Refer to Part 4.2.2.3 "Advocacy" of EU's Framework. The DG Competition plays an advocacy role in Union-level legislative process.

Russia can review legislation by the Russian subjects and the regulations by the federal agencies, except the Federal Assembly's laws, President's decrees, and regulations of the Government of the Russian Federation.[337] But the exception should be larger in China. The whole legislation, whether made by the national or provincial government or congress, should not be under the review and enforcement by the competition authority which will be explained below.

Differing from the EU or Russia, the judiciary (including the Supreme Court) in China has no power to review and adjudicate any legislation despite being passed by the congress or issued by the administrative bodies. In the sphere of judicial review, the courts can review concrete and abstract administrative conduct,[338] but is obliged to apply legislation according to Article 63, without power to judge its validity.[339] It is unreasonable for the competition authority to have a review scope broader than the judiciary. Furthermore, if there is any dispute occurred concerning the law enforcement, the only possible arbitrator between the competition authority and the alleged agency is the neutral judiciary. In this case, the scope of judicial review on government conduct is maximum allowable for law enforcement by the competition authority. Thus this study suggests that law enforcement adopt the same scope with judicial review on government conduct, with removing

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[337] Refer to Part 4.2.3.1 "Legislation" of Russia's Framework. The general exemption are the "Federal Laws, Decrees of the President of the Russian Federation, Regulations of the Government of the Russian Federation".

[338] Refer to Part 2.2.2 "Administrative Litigation". Concrete acts are administrative conducts usually in the form of administrative decisions targeting at specific entities, whereas abstract acts refer to those normative documents usually in the form of notice or policy measures published by administrative agencies which have "general binding force" without targeting at certain entities.

[339] Article 63 of the Administrative Litigation Law stipulates: "The people's courts shall try administrative cases based on laws, administrative regulations, and local decrees. Local decrees shall be applicable to administrative cases occurring within the respective administrative regions. For administrative cases in an ethnic autonomous region, the people's courts shall also try such cases based on the autonomous or special decrees of the ethnic autonomous region. In trying administrative cases, a people's court may refer to administrative rules."

legislation.

The table below is constructed to show legislation structure according to the Legislation Law.

Table 3: Legislation Structure in China[340]

	People's Congress	**Government Agencies**
National Level	Basic Law made by National People's Congress ("NPC")	Administrative Regulation made by the State Council
	General Law made by Standing Committee of NPC	Administrative Rule made by the ministries of State Council
Provincial/ Local Level	Local, Autonomous and Special Decree made by provincial, municipal and special economic zone's congresses	Local Administrative Rule made by provincial and municipal governments

5.1.3 Brief Summary

To make a brief summary of the scope for law enforcement, this study suggests that the government agencies' conduct in the sphere of competitive sectors should be under review and law enforcement by the competition authority, with the exception of legislation.

The sector regulatory agencies' conduct in regulated sectors should be exempted from law enforcement, but left for competition advocacy. The regulated sector may be defined as "industries controlled by the state-owned economy and concerning the lifeline of national economy and national security, and the industries implementing exclusive operation and sales according to law." Furthermore, in order to ensure the certainty of the enforcement scope, the State Council or its authorized agency shall regularly publicize and review an exhaustive list of specific regulated

[340] Source: developed by the author.

sectors.

5.2 Enforcement Mechanism

After identifying the scope and exemption of law enforcement, this part continues to explore how to establish the mechanism for law enforcement against anti-competitive government conducts. To establish an enforcement mechanism, it has to solve two questions: how to analyze and identify illegal government conducts, and what kind of enforcement power the competition authority has to address illegal government conducts.

5.2.1 Competition Analysis

As discussed in Part 2.2.1 “Prohibitive Provisions of Anti-Monopoly Law”, currently the standard to identify anti-competitive government conducts is obscure because there is no interpretation rules on what constitutes an “abuse of administrative power to eliminate or restrict competition”.[341] The courts adopts a standard of legitimacy when reviewing government conduct in administrative litigation, which mainly looks at whether there is a legal grounding for government conduct. However, anti-competitive government conduct share one key similarity with private conduct: their adverse effect on market competition. This point is just the reason why the competition law needs to investigate and govern this kind of conduct. Instead of looking at whether there is a legal grounding or not, the competition authority should center on analyzing the effect of government’s conduct on competition. Therefore, this study suggests the standard of competition

[341] Refer to Part 2.2.1 “Prohibitive Provisions of Anti-Monopoly Law”.

effect to identify illegal government conduct.

With the adoption of standard of competition effect, the question becomes how to do competition analysis on a government conduct. In this regards, the OECD's Competition Assessment Toolkit ("Toolkit") provides valuable guidance on how to analyze the effect on competition by government effects.[342] As mentioned before, the Toolkit presents a model for conducting competition assessment on drafted or existing laws and regulations, which has been learned and transplanted into EU's competition screening[343] and fair competition review system in China.[344] According to the Toolkit's *Volume2. Guidance*, the competition assessment contains two stages: an initial evaluation and a full evaluation.[345] The initial evaluation is reviewing a checklist of a series of simple questions in order to quickly examine whether the proposed regulation has a significant potential for having any anti-competitive impact. The questions are centered on four fields: whether the regulation limits the number or range of suppliers, limits the ability of suppliers to compete, reduces the incentive of suppliers to compete, or reduces the choices and information available to customers. If a "yes" answers to any of the questions, it will trigger a full evaluation. The full evaluation will conduct a more detailed analysis on the cost imposed by the regulation, assess whether such cost is asymmetric or reasonable, and determine whether there are any other alternative options which is less restrictive. Such competition assessment provides insights on how to do competition analysis in law enforcement.

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[342] Organization for Economic Cooperation and Development, "Competition Assessment Toolkit" (2010), accessed July 17, 2019 https://www.oecd.org/competition/assessment-toolkit.htm.
[343] Refer to Part 4.2.2.3 "Advocacy" of EU's Framework.
[344] Refer to Part 2.2.3 "Fair Competition Review System".
[345] Organization for Economic Cooperation and Development, "Competition Assessment Toolkit: Volume 2. Guidance" (2010), accessed July 17, 2019 https://www.oecd.org/competition/assessment-toolkit.htm.

This study suggests, resembling to the competition assessment on laws and regulations, the competition analysis in law enforcement against government conduct could also follow similar steps. In the first place, the competition authority could quickly identify whether a conduct harms competition by checking whether it has an adverse effect on the main parts of business operations, such as market entry and exit, movement of commodities, production costs, and enterprise's management. If there is a restriction, then it comes to a detailed analysis on the cost of the investigated conduct and determine whether there is a justification for public interest. If there is a justification, the authority needs to analyze whether it is cost effective and whether there is a less restrictive alternative. If the competition authority finds that the conduct has no justification or causes unreasonably harm on competition though it has a justification, the authority can deem such conduct illegal for violating the Anti-Monopoly Law. With the adoption of a competition-effect standard and the comprehensive analysis process, the competition authority can identify illegal anti-competitive government conduct and make appropriate decisions on how to rectify it.[346]

In order to exemplify how to do competition analysis in practice, the following provides an example of the eye-catching case concluded by the SAMR against the Public Security Department of the Inner Mongolia Autonomous Region ("Department").[347] In this case, the Department issued a notice ("Notice") that designated Jinfeng Network Seal Technology Co., Ltd ("Jinfeng") as the sole supplier for a new type of anti-counterfeiting seal system software within Inner Mongolia. The

[346] Zhang and Wu, *Governing China's Administrative Monopolies Under the Anti-Monopoly Law*: 15-16.
[347] State Administration for Market Regulation [国家市场监督管理总局], "The Advice Letter of the General Office of the State Administration for Market Regulation on the Correction of Abuse of Administrative Power That Restricted Competition by the Public Security Department of Inner Mongolia Autonomous Region" [市场监管总局办公厅关于建议纠正内蒙古自治区公安厅滥用行政权力排除限制竞争有关行为的函], Administrative Advice, (June 22, 2018) accessed May 6,2019 http://www.samr.gov.cn/fldj/tzgg/qlpc/201903/t20190313_291969.html.

Department then adopted various measures to compel its subordinate agencies and local seal firms into uninstalling other existing qualified seal software in order to facilitate the installation of the Jinfeng's software. Additionally, the Department ordered all seal firms to buy equipment and materials with encrypted electronic chip exclusively from Jinfeng.

The SAMR made a sound competition analysis in this case on its public advice letter to the Government of Inner Mongolia, the superior of the Department.[348] In the first place, the Department's Notice and other administrative measures had restricted the entry of seal software and equipment market within Inner Mongolia, which triggered a detailed investigation and evaluation procedure by the SAMR. In further comprehensive analysis, the SAMR held that the Department had eliminated free competition in the seal software and equipment market, which created a monopoly by Jinfeng. As a result, it was found that the seal price increased from 200RMB to 280 RMB each, which imposed an extra cost on consumers. Meanwhile, the SAMR did not find any reasonable justifications for the Department's anti-competitive conduct. The seal market is an open and ordinary competitive market though with a national standard on qualification. What's more, there is even a normative document issued by the Ministry of Public Security which explicitly prohibits granting exclusive operation in the seal market.[349] Based the above analysis, the SAMR concluded that the Department conduct violated Article 32[350] and Article 37[351] of the AML, and suggested stopping the implementation, withdraw the anti-competitive parts of the Notice, and

[348] State Administration for Market Regulation, "The Advice Letter of the General Office of the State Administration for Market Regulation on the Correction of Abuse of Administrative Power That Restricted Competition by the Public Security Department of Inner Mongolia Autonomous Region"
[349] In this case, maybe it is because the Department's conducts violated the document of the Ministry, SAMR was more confident to challenge the violations.
[350] Article 32 outlaws designated deals by government agencies.
[351] Article 37 bars the administrative agencies from publishing anti-competitive regulations.

cancel its contract with Jinfeng.

5.2.2 Enforcement Power

As the comparative study of EU and Russia implies, it is indispensable for the competition authority to have substantial enforcement power in the enforcement mechanism. Hereby this part discusses what enforcement power should be granted to the SAMR, and what enforcement procedure it could follow.

It should be noted that the institutional set-up of competition authority is an important factor for effectively exercising its power, thus it needs to be taken into consideration when designing the enforcement power and procedure.[352] As illustrated before, to some extent the EU's Commission and the Russia's FAS enjoy an independent and authoritative position in the political structure.[353] The appointment and budget of the Commission are determined by the Union's institutions, and EU treaties strictly prohibit member states from influencing the Commission or its members' exercising duties. The FAS directly subordinates to the Russia's federal government and independent from the ministries. FAS's regional offices are directly subordinate to it, and their budgets are all provided by the federal budget.

Contrary to the EU and Russia, the balance of power in China is not in the favor of the competition authority. The institutional set-up of the competition authority in China has been always

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[352] Organization for Economic Cooperation and Development, "The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency," *OECD Journal: Competition Law and Policy* 5, no. 1 (2003): 7.

[353] Refer to Part 4.2.2.2 "Enforcement" of EU's regulatory framework and Part 4.2.3.2 "Enforcement" of Russia's regulatory framework.

criticized for a lack of independence and authority.[354] Before the recent consolidation of the competition agencies in 2018, the enforcement power was shared by three units of NDRC, SAIC and MOFCOM respectively. Now the three units are consolidated into the Anti-Monopoly Bureau under the State Administration for Market Regulation.[355] Though the consolidation is a breakthrough to increase the uniformity of enforcement, there are three weaknesses that can still be identified. First, the Anti-Monopoly Bureau is not directly subordinate to the State Council, which just forms a part of the SAMR. Except for the function of competition law enforcement, SAMR also assumes other duties of market regulation,[356] which is also a source of anti-competitive government conduct. Therefore, the work by the Anti-Monopoly Bureau may conflict with and be influenced by other bureaus under the SAMR. Second, though SAMR is directly subordinate to the State Council, its position is lower than the ministries. The minister is appointed by the national congress and has the right to present and speak at the council of ministers, whereas the head of SAMR is appointed by the Prime Minister and cannot speak at the council of ministers.[357] Third, though the provincial divisions of SMAR are supervised by SAMR, they are part of provincial governments and supported by provincial budgets.[358] This inevitably leads to that the enforcement of those provincial divisions

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354 *See, e.g.*, Angela Huyue Zhang, *The Enforcement of the Anti-Monopoly Law in China: An Institutional Design Perspective*, Rochester, NY, SSRN Scholarly Paper ID 1783037 (Social Science Research Network, October 3, 2011), https://papers.ssrn.com; John Wan, "2008-2018: A Retrospect of China's Anti-Monopoly Law Enforcement System and Prospect and Commentary on the New System," *Competition Policy International*, December 6, 2018, www.competitionpolicyinternational.com.

355 Refer to Part 2.1 "Historical Development".

356 SAMR also assumes the duties of market entity registration, commodity price, commercial bribery, trademark and patent infringement, food and industrial product safety, drug administration, quality inspection, certification, and accreditation.

357 *See* "Institution Setup" [机构设置], *State Administration for Market Regulation*, accessed July 18, 2019 http://www.saic.gov.cn/jg/#jgsz.

358 Notice of the State Administration for Market Regulation on the Empowerment of Anti-monopoly Law Enforcement [市场监管总局关于反垄断执法授权的通知] (issued by the State Administration for Market Regulation December 28, 2018, effective December 28, 2018).

cannot get rid of the influence from their provincial governments.

Based on the current institutional set-up of SAMR in China, this study finds it impractical to directly transplant Russia's integrated approach of law enforcement, where the FAS has a full range of authorities and can directly make mandatory determinations.[359] It is unrealistic to expect a quasi-dependent and relatively powerless SAMR and its divisions in China to exercise the power to issue mandatory determination to other public authorities like FAS in Russia. Binding orders issued by the competition authority on other powerful agency are not politically feasible in China. This point is exemplified in the case of the Public Security Department of the Inner Mongolia, which "bravely" resisted SAMR's suggestion to withdraw its notice and stop its violations.[360] In practice, in order to avoid such enforcement failures, the investigations by competition agencies in the past ten years mostly targeted the conduct of lower level government agencies. Just as the empirical study of 99 cases concluded by competition agencies showed, no cases involved national agencies or provincial governments, just five cases involved the departments of provincial governments, and the rest of the cases were all lower-level agencies.[361]

The EU's approach seems more suitable for China to learn. After an investigation, the Commission can send a formal letter of reasoned opinion to the state. Taking into full consideration that the alleged state may resist or fail to comply with the Commission's instructions, the EU law grants the Commission the power to file a lawsuit in Court of Justice, which lets the neutral judiciary

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[359] Refer to Part 4.2.3.2 "Enforcement" of Russia's Framework.

[360] The Department only orally accepted the suggestions without taking any substantial measure to correct its violations. Finally, SAMR had to send the advice letter to its superior, the Inner Mongolia Autonomous Region Government, and published the letter on website to arise nationwide public attention. *See also* Zhang and Wu, "Governing China's Administrative Monopolies Under the Anti-Monopoly Law": 9.

[361] Refer to Part 4.1 "Empirical Study".

make judgment.[362]

Learning from the EU's experience, this study suggests a bifurcated enforcement procedure: after investigation and competition analysis of cases, the competition authority has the power to make decision to confirm the government conduct illegal for violating the competition law; if the alleged agency refuses or fails to rectify or stop the violation as the competition authority required, the competition authority has the power to bring an administrative lawsuit to the court against the violation.

In the first place, after investigation and competition analysis, SAMR should have the power to make a decision to confirm whether the government conduct violates the Anti-Monopoly Law, and require the agency to stop or adopt a less restrictive alternative. Currently, the competition authority can only persuade the agency or its superior agency to rectify wrongdoing, and can do nothing if they refuse to do so. Under the new mechanism, the competition authority would conclude the case and give a decision directly based on its expertise and understanding of competition, without the need to negotiate and coordinate with the alleged agency or its superior agency. This change is an essential step in the shift from competition advocacy to law enforcement.

As illustrated above, SAMR is not a powerful authority in China's political system. For certainty, SAMR and its divisions' decisions would encounter strong resistance from other public agencies and interested groups. In terms of improving the compliance by other public agencies, a transparent enforcement is an important way for the competition authority to build public trust and call for more supervision and pressure from outside of the administrative system. This study

[362] Refer to Part 4.2.2.2 "Enforcement" of EU's Framework.

suggests that SAMR could establish an information sharing network and disclose to the public the cases information including the infringing conduct, the SAMR's decision, and the agency's violation and compliance. This will compel the agencies to comply, especially nowadays as the value of market competition is highly accepted in academia and society of China.[363] Such information network can also stimulate the exchange between SAMR and its provincial offices, which is helpful to increase the uniformity of enforcement. What's more, the data regarding violation and compliance by government agencies in the network is a good source to evaluate the relevant agencies and their officials' work on protecting market competition. This information could be a reference factor to decide the responsible officials' promotion or punishment, which will greatly increase their incentive to comply.[364]

Secondly, if the government agency fails or refuses to comply with the decision, the competition authority shall have the power to bring an administrative lawsuit on it. This power to sue would effectively complement the enforcement of a decision if taking the political status of SAMR and the strong resistance into consideration. Under current framework, the courts, as a neutral branch in the political system, already have the power to adjudicate in administrative litigation against anti-competitive government conducts brought by private entities.[365] The enforcement of the competition authority's decisions would be guaranteed if the courts are in favor

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[363] This consensus can be seen from the statements in top documents from the communist party and national congress. In January 2014, the Central Committee of Communist Party of China passed the Decision on Some Major Issues Concerning Comprehensively Deepening the Reform. This Decision required the market to play a decisive role in resource allocation, so as to maximumly maintain competition mechanism. In March 2016, the Outline of the 13th Five-Year Plan for Economic and Social Development that passed by the National People's Congress proposed to "clear and abolish regulations and conducts that hinder the establishment of a unified market with fair competition".

[364] Li, "The Paradox of Fair Competition Self-Review and Its Solutions": 125.

[365] Refer to Part 2.2.2 "Administrative Litigation".

of those decisions.[366] Furthermore, The courts have already accumulated the expertise and experience from competition cases against government agencies brought up by private entities, which can be applied to the litigation filed by the competition authority as well.

One administrative agency, like SAMR, to sue another agency in administrative litigation is fairly new in China, even though it is common in developed countries. In this regard, the innovative reform of procuratorate administrative litigation offers some insights. Environmental pollution, food safety incidents, and other severe social problems are also pressing challenges facing China. To supervise and compel the relevant regulatory agencies to assume duties in these fields, the procuratorate, on behalf of the state and public interest, may file administrative litigation against the agencies for their abuse of power or nonfeasance.[367] In July 2015, the Supreme People's Procuratorate began a two-year pilot program allowing prosecutors in 13 provincial divisions to institute procuratorate administrative litigation.[368] By the end of June in 2017, procuratorate had filed 1,029 administrative lawsuits.[369] The success of this pilot program prompted the amendment to the Administrative Litigation Law in 2017.[370] The amendment in 2017 for the first time allows the prosecutor to file administrative litigation for abuse of administrative power or nonfeasance in cases

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[366] According to the Administrative Litigation Law, for illegal concrete government conducts, the courts will directly decide to revoke, confirm void or illegal, or modify the conducts, and also can order to take remedial measures or assume compensatory liability. While for abstract acts issued by administrative agencies, the courts may confirm its illegality and require the agencies to rectify or revoke.

[367] Alex L. Wang and Jie Gao, "Environmental Courts and the Development of Environmental Public Interest Litigation in China," *Journal of Court Innovation* 3 (2010): 37.

[368] Zhiguo Wang (王治国) et al., "Procuratorate Had Filed 7886 Public Interest Litigations Since Empowerment on July of 2015" [自 2015 年 7 月授权以来试点地区检察机关共办理公益诉讼案件 7886 件], *Procuratorate Daily* [检察日报], June 23, 2017, http://newspaper.jcrb.com.

[369] Yangfei Zhang, "Prosecutors at All Levels Have Embraced Public Interest Litigation," *China Daily*, December 25, 2018, www.chinadaily.com.cn.

[370] Yamei, "Procuratorates Initiate 4,597 Public Interest Litigations in 4 Month," *Xinhua*, March 12, 2017, www.xinhuanet.com.

concerning the protection of environment and resources, food and drug safety, preservation of state assets, and transfer of state-owned land use rights.[371] Prosecutors should make suggestions to government agencies and push them to fulfill their duties before filing lawsuits, the amendment added.[372]

The litigation against government agencies by the competition authority can be constructed in a similar way to the procuratorate administrative litigation. It is because they are similar in their key aspects. SAMR and its provincial divisions are on behalf of the competitors and consumer interests. It combats the abuse of administrative power or nonfeasance which has an adverse effect on market competition. Before filing any litigation, SAMR and its provincial divisions would make and publicize decisions to confirm illegal conducts, and require it to stop or adopt alternatives. Lawsuits can be filed if the relevant agencies fail or refuse to comply.

5.3 Summary

This chapter proposes to a new framework with establishing a competent law enforcement against anti-competitive government conduct in China. It gives answers and suggestions to the main problems thereof: what is the scope of law enforcement, how to identify a illegal government

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[371] Administrative Litigation Law [行政诉讼法] (promulgated by the Standing Committee of National People's Congress, amended June 27, 2017, effective July 1, 2017).

[372] Article 25 (3) of the Administrative Litigation Law 2017 stipulates:" Where the people's procuratorate finds in the performance of functions that any administrative authority assuming supervision and administration functions in such fields as the protection of the ecological environment and resources, food and drug safety, protection of state-owned property, and the assignment of the right to use state-owned land exercises functions in violation of any law or conducts nonfeasance, which infringes upon national interest or public interest, it shall offer procuratorial recommendations to the administrative authority, and urge it to perform functions in accordance with the law. If the administrative authority fails to perform functions in accordance with the law, the people's procuratorate shall file a lawsuit with the people's court in accordance with the law."

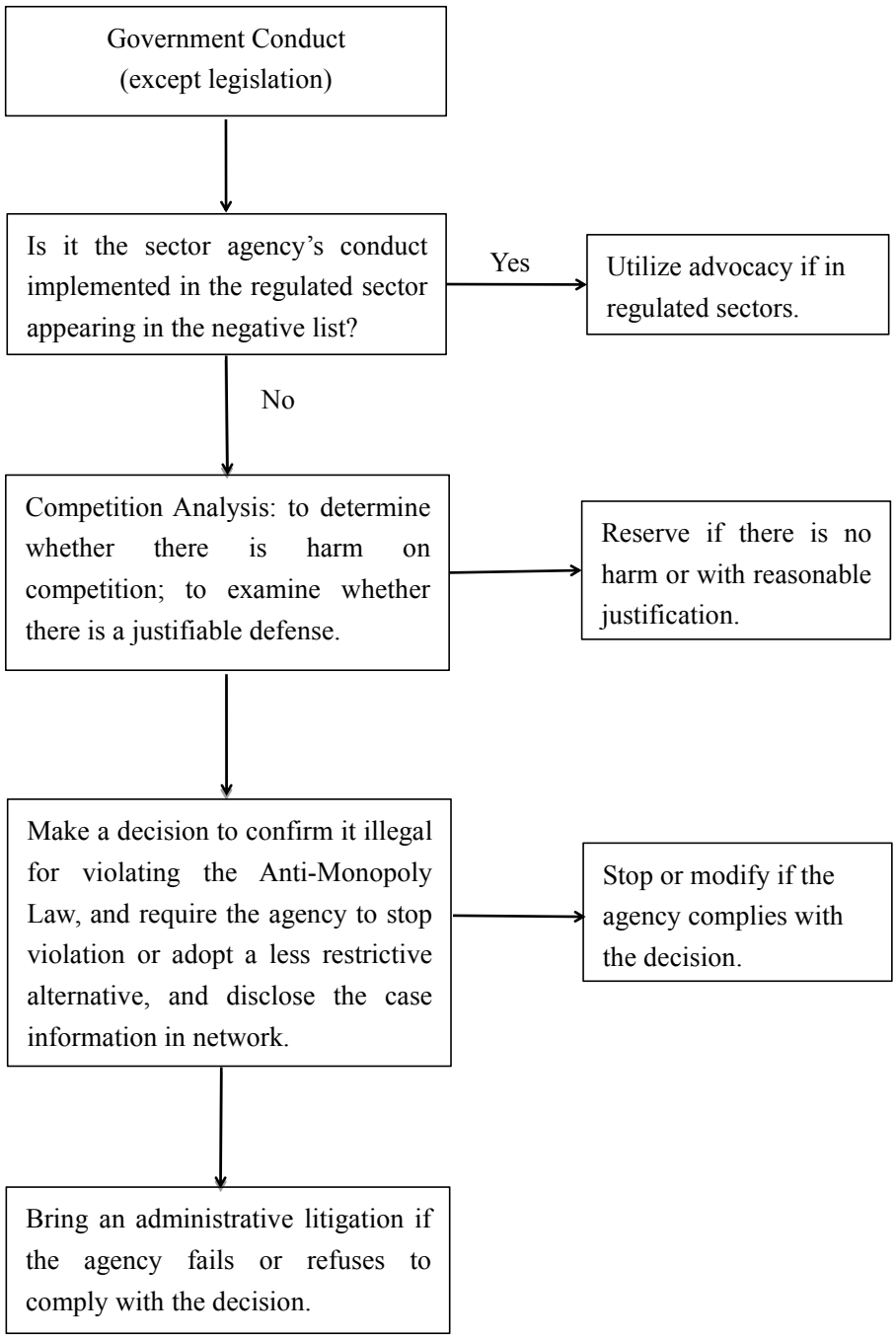
conduct, and how to enforce it.

As to the scope of law enforcement, it is suggested that regulated sectors should be exempted. The regulated sectors can be defined as "industries controlled by the state-owned economy and concerning the lifeline of national economy and national security, and the industries implementing exclusive operation and sales according to law". In order to clearly identify the regulated sectors, the State Council or its authorized agency shall regularly publicize and review an exhaustive list of specific regulated sectors. In competitive sectors not appearing on the list, the government conduct is all within the scope of law enforcement by the SAMR and its provincial divisions, with the exception of government legislation.

As to identifying illegal government conduct, this chapter suggested adopting the standard of competition effect and undertaking a competition analysis to determine whether there is harm to competition and to examine whether there is a justifiable defense.

After a competition analysis, the SAMR and its provincial divisions can make the decision to confirm whether the government conduct violates the Anti-Monopoly Law, and require the agency to stop violation or adopt a less restrictive alternative. In order to promote compliance, it is suggested that building an information sharing network and disclosing to the public case information including the government conduct, decisions, requirements, and compliance. If the government agency fails or refuses to comply with the decision, the SAMR and its provincial divisions should bring up a administrative litigation on the infringement.

Chart 1. Law Enforcement Against Government Restraints[373]



[373] Source: developed by the author.

Chapter VI: Conclusion

The government restraints on competition is a prevalent and severe problem in China. Even though China has adopted prohibitive provisions in the AML, it still has not established an effective framework to address this issue. The current legal framework against anti-competitive government conducts is comprised of three parts: the prohibitive provisions under the AML, the administrative litigation by private entities, and the fair competition review stipulated in Opinion. Looking into the performance and weaknesses of each component, the prominent drawback in the current framework is identified that the competition authority has not play a core, nor even an active, role in the framework.

International studies and experience have concluded that law enforcement and competition advocacy are the two fundamental functions of the competition authority to promote market competition. Especially, competition advocacy is considered to be the primary, if not the only, the approach to combat government restraints on competition. However, after analyzing this conventional wisdom of advocacy with China's current framework, it is found that primarily or only utilizing advocacy apparently is not enough to efficiently address the government restraint issue in China.

This research creatively proposes a new direction: establishing law enforcement in China's framework against government restraints. The empirical study of 99 cases concluded by the competition authority strongly indicates the necessity for enforcement. In the meantime, the comparative study of the regulatory frameworks of EU and Russia provides implications on how to

design a law enforcement mechanism.

Taking China's context into full consideration, this research proposes a potential enforcement mechanism. As to the enforcement scope, the government agencies' conduct in the sphere of competitive sectors shall be under review and law enforcement by the competition authority, with the exception of legislation. Whereas, the sector regulatory agencies' conduct in regulated sectors should be exempted. The regulated sector may be defined as "industries controlled by the state-owned economy and concerning the lifeline of national economy and national security, and the industries implementing exclusive operation and sales according to law". Furthermore, the State Council or its authorized agency shall regularly publicize and review an exhaustive list of specific regulated sectors.

As to the enforcement procedure and power, firstly, the competition authority shall adopt the standard of competition effect and conduct competition analysis to determine whether there is harm on competition and to examine whether there is a justifiable defense. Secondly, after the competition analysis, the competition authority may make the decision to confirm whether government conduct violates the AML, and require the infringing agency to stop violation or adopt a less restrictive alternative. In this step, building an information sharing network and disclosing the cases information is an important method to increase compliance. Thirdly, if the infringing agency fails or refuses to comply with the decision, the competition authority should bring up an administrative litigation on the infringement.

Even though the proposed law enforcement mechanism is delicately designed in this research, there are two related matters to its adoption and implementation in China. On the one hand,

establishing a competition law enforcement mechanism would be a radical reform on the current advocacy framework which relies on the self-censorship and correction within the administrative system. There is no doubt this proposal will encounter strong resistance from vested interested groups, which had been fully displayed in the long draft period of the AML. Thus whether to adopt the proposed enforcement mechanism would still depend on the central government's political will to reform to a large extent. On the other hand, compared with advocacy activities, law enforcement is resource-intensive and time-consuming. Together with this, the local competition law enforcement resources are quite uneven in China. In other words, the competition divisions in underdeveloped regions has many fewer officials and other available resources than the divisions in developed regions. Consequently, capacity building for the competition authority to ensure the credibility and uniformity is a critical question which needs further research.

Additionally, this study with its special emphasis utilizing law enforcement to combat with government restraints in China provides insights to other transitional or developing countries as well. Government restraints exist in every country, but is probably strongest in the transition context.[374] Competition authority has a strong stake in defending the emerging market. Conventional wisdom of advocacy suggests to primarily utilize the instrument of advocacy.[375] The innovation of this study is that by examining this wisdom with the context in China, it proposes a new direction of law enforcement for addressing the government restraints, and designs the enforcement mechanisms tailored to China's context. This creative thinking provides implications to other transitional and

[374] John Clark, "Restraints by Regional and Local Governments on Competition: Lessons from Transition Countries," *Brooklyn Journal of International Law* 25, no. 2 (1999): 371.
[375] Refer to Part 3.1 "Conventional Wisdom of Competition Advocacy".

developing countries facing the common severe competition issues. In order to establish a comprehensive framework against government restraints, it is time for those countries to rethink conventional wisdom, and design a workable enforcement mechanism while taking the social context into full consideration. In this regard, this study could spur a further research into various developing and transitional countries in this field.

Appendix I: List of Cases Concluded by the Competition Authority

In the Part 4.1 "Empirical Study", this research adopts a study on the 99 cases concluded by the competition authority in the period from Aug. 1, 2008 to Dec. 31, 2018. Hereby this appendix of cases list to provide the comprehensive information of the 99 cases.

	Year[376]	Source[377]	Industrial Sector[378]	Competition Agency[379]	Infringing Agency[380]	Illegal Conduct[381]	Result[382]
1.	2010	Public report	GPS service in Transportation	Guangdong AIC[383]	Heyuan City Government	Force to deal with the designated GPS service provider	Rectify the administrative conduct
2.	2014	Public report	Telecommunication	Yunan DRC[384]	Yunnan Province	Force economic entities to	Rectify the conduct, and

[376] The column "Year" refers to at which year the competition agency began the investigation on the case.
[377] The column "Source" refers to how the case was founded at the first place.
[378] The column "Industrial Sector" refers to which sector market was influenced by the government intervention.
[379] The column "Competition Agency" refers to the agency which did the investigation. It could be the NDRC or the SIAC, or their provincial division, or the price bureau which subordinates to the NDRC or its provincial division.
[380] The column "Infringing Agency" refers to the government agency which made the anti-competitive conduct.
[381] The column "Illegal Conduct" indicates how the alleged conduct affected the competition. It includes concrete conduct and normative document.
[382] The column "Result" indicates how the illegal conduct was handled after the case concluded.
[383] "Guangdong AIC" is in short for "Guangdong Province's Administration for Industry and Commerce", which is the provincial division of the National Administration for Industry and Commerce in Guangdong Province.
[384] "Yunnan DRC" is in short "Yunan Province Development and Reform Commission", which is the provincial division of the National Development and Reform Commission in Yunan Province.

					Communication Administration	engage in anti-competitive agreements	punish the enterprises implementing monopolistic conducts
3.	2014	Public report	Passenger transportation	NDRC	Hebei Province Department of Transportation; Department of Finance, and Price Control Administration	Impose discriminatory measures (fee charging standard) to non-local passenger vehicles	Rectify the administrative conduct
4.	2015	Public report	Public procurement on drugs	NDRC	Sichuan Province Family Planning Commission	Impose restrictions on bidding from non-local drug operators	Amend the normative document, and rectify the conduct
5.	2015	Public report	Public procurement on drugs	NDRC	Zhejiang Province Family Planning Commission	Impose restrictions on bidding from non-local drug operators	Amend the normative document, and rectify the conduct
6.	2015	Investigation	Transportation monitoring system	NDRC	Shandong Province Department of	Force to deal with the designated provider of	Amend the normative document, and rectify

			software		Transportation	monitoring software	the conduct
7.	2015	Investigation	Public procurement on drugs	NDRC	Bangbu City's Family Planning Commission	Impose restrictions on bidding from non-local drug operators	Amend the normative document, and rectify the conduct
8.	2015	Public report	Concrete production	Hunan DRC	Yongjiang County Government	Force to deal with the designated GPS service provider	Rectify the conduct
9.	2015	Investigation	Vehicle maintenance	Gansu DRC	Wuwei City's Road Transportation Bureau	Force economic entities to engage in anti-competitive agreements	Rectify the conduct, and punish some enterprises implementing monopolistic conducts
10.	2015	Public report	Transportation monitoring system software	Gansu DRC	Gansu Province Road Transportation Bureau	Force to deal with the designated provider of monitoring software	Rectify the conduct
11.	2016	Public report	Gas installation	Sichuan DRC	Zizhong County's Housing Construction Bureau	Force to deal with the designated provider of monitoring software	Amend the normative document, and rectify the conduct

12.	2016	Investigation	Photo service	Qinghai DRC	Xining City's Road Transportation Bureau	Force to deal with the designated photo service provider in procedures	Rectify the conduct
13.	2016	Public report	Concrete production	NDRC and Beijing DRC	Beijing Housing Construction Commission	Force economic entities to engage in anti-competitive agreements	Rectify the conduct
14.	2016	Investigation	Gas installation	Henan DRC	Ruzhou City Government	Force to deal with the designated provider of monitoring software	Amend the normative document, and rectify the conduct
15.	2016	Investigation	Insurance agent service	Sichuan DRC	Dujiangyan City's Fiance Bureau	Force to deal with the designated provider of insurance service	Cancel the contract achieved, and rectify the conduct
16.	2016	Public report	Tourism service	NDRC and Shanghai DRC	Shanghai Transportation Commission	Force economic entities to engage in anti-competitive agreements	Rectify the conduct
17.	2016	Investigation	Gas installation	Heilongjiang DRC	Longjiang County Government	Force to deal with the designated provider	Amend the normative document

18.	2016	Public report	Electricity installation	NDRC	Chongqing Housing Construction Commission	Force to deal with the designated provider	Amend the normative document, and rectify the conduct
19.	2016	Public report	Electricity installation	NDRC	Guizhou Province Housing Construction Department	Force to deal with the designated provider	Amend the normative document, and rectify the conduct
20.	2016	Public report	Electricity installation	NDRC	Shanxi Province Housing Construction Department	Force to deal with the designated provider	Amend the normative document, and rectify the conduct
21.	2016	Public report	Electricity installation	NDRC	Jiangxi Province Housing Construction Department	Force to deal with the designated provider	Amend the normative document, and rectify the conduct
22.	2016	Public report	Electricity installation	NDRC	Liaoning Province Housing Construction Department	Force to deal with the designated provider	Amend the document, and rectify the conduct
23.	2016	Public report	Electricity installation	NDRC	Jilin Province Housing Construction Department	Force to deal with the designated provider	Amend the normative document, and rectify

							the conduct
24.	2016	Public report	Electricity installation	NDRC	Heilongjiang Province Housing Construction Department	Force to deal with the designated provider	Amend the normative document, and rectify the conduct
25.	2016	Public report	Electricity installation	NDRC	Hebei Province Housing Construction Department	Force to deal with the designated provider	Amend the normative document, and rectify the conduct
26.	2016	Public report	Electricity installation	NDRC	Gansu Province Housing Construction Department	Force to deal with the designated provider	Amend the normative document, and rectify the conduct
27.	2016	Public report	Electricity installation	NDRC	Guangxi Province Housing Construction Department	Force to deal with the designated provider	Amend the normative document, and rectify the conduct
28.	2016	Public report	Electricity installation	NDRC	Qinghai Province Housing Construction Department	Force to deal with the designated provider	Amend the normative document, and rectify the conduct
29.	2016	Public report	Electricity	NDRC	Tianjing City Housing	Force to deal with the	Amend the normative

			installation		Construction Department	designated provider	document, and rectify the conduct
30.	2016	Public report	School uniform	NDRC and Guangdong DRC	Shenzhen City's Education Bureau	Impose restrictions on bidding from non-local drug operators	Rectify the conduct
31.	2017	Public report	Public procurement on drugs	NDRC and Guangdong DRC	Shenzhen City's Family Planning Commission	Force to deal with the designated provider	Amend the normative document, and rectify the conduct
32.	2017	Investigation	Tourism service	Xinjiang DRC	Kanasi Reserve's Administrative Commission	Force economic entities to engage in anti-competitive conducts	Amend the normative document, and rectify the conduct
33.	2017	Investigation	Public procurement on drugs	Xinjiang DRC	Tacheng District's Health and Family Planning Commission	Force to deal with the designated provider	Cancel the contract achieved, and rectify the conduct
34.	2017	Investigation	Insurance card reader	Qinghai DRC	Qinghai Province Human Resources and Social Security	Force to deal with the designated provider	Amend the normative document, and rectify the conduct

					Department		
35.	2017	Public report	Property services	Gansu DRC	Suzhou District's Real Estate Bureau	Force economic entities to engage in anti-competitive conducts	Amend the normative document
36.	2017	Investigation	Internet-access equipment	Gansu DRC	Baiying City's Housing Construction Bureau	Force to deal with the designated provider	Amend the normative document, and rectify the conduct
37.	2017	Investigation	Electricity installation	NDRC	Fujian Province Housing Construction Department and Energy Supervision Office	Force to deal with the designated provider	Amend the normative document, and rectify the conduct
38.	2017	Investigation	Drugs and medical consumables delivery	Sichuan DRC	Anjiang County's Health and Family Planning Bureau	Force to deal with the designated provider	Rectify the conduct
39.	2017	Investigation	Public procurement	Chongqing DRC	Yongchuan District's Public Resources Trading Administration	Impose anti-competitive restrictions on bidding	Amend the normative document

					Office		
40.	2017	Public report	Gas equipment	Guangdong DRC	Zhongshan City's Housing Construction Bureau	Limit the number of suppliers	Amend the normative document
41.	2017	Investigation	Gas installation	Heilongjiang DRC	Mudanjiang City's Urban-Rural Construction Bureau	Limit the number of suppliers	Rectify the conduct
42.	2017	Investigation	Gas installation	Heilongjiang DRC	Suifenhe City's Urban-Rural Construction Bureau	Limit the number of suppliers	Rectify the conduct
43.	2017	Investigation	Gas installation	Heilongjiang DRC	Gannan County's Urban-Rural Construction Bureau	Limit the number of suppliers	Rectify the conduct
44.	2017	Investigation	Gas installation	Heilongjiang DRC	Zhaoyuan County's Urban-Rural Construction Bureau	Limit the number of suppliers	Rectify the conduct
45.	2017	Investigation	Audit service	Liaoning Price	Jinzhou City's	Force to deal with the	Amend the normative

				Bureau	Commerce Bureau	designated provider	document
46.	2017	Investigation	Health checkup service	Liaoning Price Bureau	Jinzhou Guta District's Health Supervision Office	Force to deal with the designated provider	Rectify the conduct
47.	2017	Investigation	Drugs and medical consumables delivery	Shanxi Price Bureau	Yanan City's Health and Family Planning Bureau	Impose discriminatory quality standard to non-local suppliers	Rectify the conduct
48.	2017	Public report	Registry agency service	Jiangsu price bureau	Lianyungang City's Vehicles Administration Office	Force to deal with the designated provider	Rectify the conduct
49.	2017	Investigation	Bidding service	Inner Mongolia DRC	Baotou City's Housing Security and Real Estate Bureau	Force to deal with the designated provider	Cancel the contract achieved, and rectify the conduct
50.	2017	Public report	Sealing service	Hubei price bureau	Wuhan Jiangxia District's Public Security Bureau	Force to deal with the designated provider	Rectify the conduct
51.	2017	Public report	Procurement on	NDRC and	Chengdu City's State	Limit the number and	Amend the normative

			insurance	Sichuan DRC	Asset Regulatory Commission	range of suppliers	document
52.	2017	Investigation	Bidding service	Anhui Price Bureau	Woyang County's Government	Force to deal with the designated provider	Amend the normative document
53.	2017	Public report	Procurement on insurance	Henan DRC	Luoning County's Agriculture Bureau	Force to deal with the designated provider	Rectify the conduct
54.	2017	Investigation	Procurement on medical consumables	Anhui Price Bureau	Wuhu City's Medical Consumables Administration center	Impose restrictions on bidding from non-local drug operators	Amend the normative document
55.	2017	Investigation	River sand transport	Hainan Price Bureau	Qionghai City's Transportation Bureau	Force to deal with the designated provider	Rectify the conduct
56.	2017	Investigation	Concrete products	Tianjing DRC	Tianjing City's Urban-Rural Construction Bureau	Limit the number and of suppliers	Amend the normative document
57.	2017	Investigation	Loan service	Hebei Price Bureau	Wei County Government	Give special privileges to certain bank	Amend the normative document
58.	2017	Investigation	Policy-guided	Hebei Price	Wei County Government	Give special privileges to	Amend the normative

			agriculture insurance	Bureau		certain insurance company	document
59.	2017	Investigation	Special equipment liability insurance	Shanxi Price Bureau	Datong City's Finance Administration Office	Force to deal with the designated provider	Amend the normative document
60.	2017	Investigation	occupational health service	Gansu DRC	Lanzhou City's Safe-Production Supervision Bureau	Limit the number and of suppliers	Amend the normative document
61.	2017	Investigation	Environment monitoring service	Qinghai DRC	Qinghai Environment Protection Department	Limit the service price	Amend the normative document
62.	2017	Public report	engineering consulting	Zhejiang Price Bureau	Lishui City's Engineering Cost Management Office	Force to deal with the designated provider	Rectify the conduct
63.	2017	Investigation	Medical liability insurance	Jilin Price Bureau	Baishan City's Family Planning Commission	Force to deal with the designated provider	Amend the normative document, and rectify the conduct
64.	2017	Public report	Online pay service	Beijing DRC	Securities Association of China	Force to deal with the designated provider	Rectify the conduct
65.	2017	Public report	Electricity	Shandong Price	Weifang City's Housing	Force to deal with the	Amend the normative

			installation	Bureau	Construction Bureau and Finance Bureau	designated provider	document, and rectify the conduct
66.	2017	Public report	Training monitoring system	Guangxi Price Bureau	Guangxi Province Road Transportation Bureau	Force to deal with the designated provider	Amend the normative document, and rectify the conduct
67.	2017	Public report	Housing maintenance	Shanxi Price Bureau	Xian City's Real Estate Bureau	Give special privileges to certain companies	Amend the normative document, and rectify the conduct
68.	2017	Investigation	Bidding service on property management	Guangxi Price Bureau	Baise City's Real Estate Bureau	Force to deal with the designated provider	Amend the normative document, and rectify the conduct
69.	2017	Public report	Remittance service in land transaction	Hubei Price Bureau	Huanggang City's Land Resources Bureau	Force to deal with the designated provider	Amend the normative document
70.	2017	Investigation	Elevator liability insurance	Jiangsu Price Bureau	Jiangsu Province Quality Supervision Bureau	Force to deal with the designated provider	Amend the normative document, and rectify the conduct
71.	2017	Investigation	Environment	Ningxia AIC	Yingchuan City's	Force to deal with the	Amend the normative

			monitoring equipment		Environment Protection Bureau	designated provider	document, and rectify the conduct
72.	2017	Investigation	Equipment quality inspecting service	Shandong Price Bureau	Zaozhuang City's Quality and Technology Supervision Bureau	Impose restrictions on non-local operators	Rectify the conduct
73.	2017	Public report	Salt retail and wholesale	Yunnan Price Bureau	Diqing Tibetan Autonomous Region Government	Restricts salt sale which produced outside	Amend the normative document, and rectify the conduct
74.	2017	Investigation	engineering investigation service	Zhejiang Price Bureau	Taizhou City's Housing Construction Bureau	Impose discriminatory requirement on non-local entities	Amend the normative document
75.	2017	Public report	Construction	Jiangxi DRC	Xinjian District Government	Impose restrictions on entry from non-local operators	Amend the normative document
76.	2017	Investigation	Industrial land transfer	Beijing DRC	Chaoyang District's Agriculture Working Commission	Impose restrictions on market entry	Amend the normative document

77.	2017	Investigation	Construction	Shanxi Price Bureau	Taiyuan City's Housing Construction Commission	Impose discriminatory requirement on non-local entities	Amend the normative document
78.	2017	Public report	Medical drug	Tianjin DRC	Tianjin Human Resources and Social Security Bureau	Impose restrictions on entry to insurance payment	Rectify the conduct
79.	2017	Public report	Garbage transport	Jiangxi DRC	Boyang County's City Administration Bureau	Impose restrictions on entry from non-local operators	Amend the normative document
80.	2017	Public report	Construction	Jiangxi DRC	Shangrao Guangfeng District Government	Impose restrictions on entry from non-local operators and provide privilege to local operators	Amend the normative document
81.	2017	Investigation	Construction	Chongqing Price Bureau	Qianjiang District's Development and Reform Commission	Impose discriminatory restrictions on non-local suppliers	Amend the normative document
82.	2017	Investigation	Safe-production	Anhui AIC	Liuan City's Safety	Limit the number and of	Amend the normative

			liability insurance		Production Supervision Bureau	suppliers	document, and cancel contracts
83.	2017	Public report	Driving training	Jiangsu AIC	Suzhou Road Transportation Bureau	Limit the number of suppliers	Amend the normative document, and rectify the conduct
84.	2017	Self-inspecti on	Tourism		Zhangjiajie City's Tourism and External Affairs Commission	Impose restrictions on price of tourist groups	Amend the normative document
85.	2018	Investigation	Loan assessment service	Beijing DRC	Beijing Housing Fund Management Center	Limit the number of suppliers and restrict the price	Amend the normative document
86.	2018	Self-inspecti on	Audit service		Shanghai City's Commerce Commission	Force to deal with the designated provider	Amend the normative document
87.	2018	Investigation	Estate mapping	Inner Mongolia DRC	Wuhai City's Housing and Construction Commission	Force to deal with the designated provider	Amend the normative document
88.	2018	Investigation	solar water heating	Shandong AIC	Jinan City's Housing and	Limit the number of	Amend the normative

			system		Construction Bureau	suppliers and restrict the price	document
89.	2018	Investigation	Seal material, equipment and software	SAMR	Inner Mongolia Public Security Department	Force to deal with the designated provider	Amend the normative document, and rectify the conduct
90.	2018	Public report	Electricity supply	Hunan AIC	Hunan Province Economy and Information Technology commission	Limit the number and range of suppliers	Amend the normative document
91.	2018	Public report	Estate mapping	Shanxi Price Bureau	Xian City's Land Resources Bureau	Force to deal with the designated provider	Amend the normative document, and rectify the conduct
92.	2018	Public report	Heat supply	Gansu DRC	Qingyang Xifeng District's	Force to deal with the designated provider	Amend the normative document, and give a warning conversation to the official.
93.	2018	Public report	Salt sale	Jiangxi DRC	Yichun City's Salt	Impose restrictions on	Rectify the conduct

					Bureau	entry from certain operators	
94.	2018	Public report	Salt sale	Jiangxi DRC	Yantan City's Salt Bureau	Impose restrictions on entry from certain operators	Rectify the conduct
95.	2018	Public report	Gas project construction	Beijing DRC	Fangshan District's Gas Development Center	Force to deal with the designated provider	Rectify the conduct
96.	2018	Investigation	Construction design service	Shanxi DRC	Jinzhong City's Housing and Urban-Rural Construction Bureau	Force to deal with the designated provider	Rectify the conduct
97.	2018	Public report	Drugs and medical consumables delivery	Henan DRC	Fengqiu County Government	Force to deal with the designated provider	Amend the normative document, and rectify the conduct
98.	2018	Investigation	Remittance service in employment payment	Hubei DRC	Tianmen City's Human Resources and Social Security Bureau	Force to deal with the designated provider	Amend the normative document, and rectify the conduct

99.	2018	Public report	Drugs and medical consumables delivery	Sichuan DRC	Nanchong County Government	Force to deal with the designated provider	Amend the normative document, and cancel the contract

Appendix II: List of Cases Adjudicated by the Court

This study collected the cases adjudicated by the courts where the plaintiff's petition or the court's judgment quotes the prohibitive provisions of the AML on abusive anti-competitive government conducts in the ten years, from August 1st, 2008 to December 31st, 2018. If a case's disputes do not involved anti-competitive government conduct, though its petition or judgment quotes the AML prohibitive provisions, such case would be excluded from the list for research accuracy.

0.	Date[385]	Court[386]	Plaintiff[387]	Defendant[388]	Third Party[389]	Relevant Fact and Judgment[390]
1.	2008.09.02	Beijing City First Intermediate People's Court (First Instance)	Zhaoxin Information Technology	State Quality Supervision Bureau		The Bureau issued a notice which forced certain products should attach electronic monitoring code which is developed by a designated supplier. The court found the suit had run out of the statute of limitations,

[385] The column "Date" refers to the date when the final judgment was made.
[386] The column "Court" refers to the court which made the final judgment, this column also includes the information of trial level: first instance, second instance or retrial.
[387] The column "Plaintiff" refers to the entity which filed the administrative litigation in the first instance.
[388] The column "Defendant" refers to the party which is accused of doing something illegal in the first instance.
[389] The column "Third Party" refers to the party which is neither plaintiff nor defendant in the first instance, but is affected or involved into the lawsuit in some way.
[390] The column "Relevant Fact and Judgment" includes the information what anti-competitive government conduct is in dispute and how it is adjudicated by the court. To emphasize it, it does not include full information of fact and judgment, but just parts relevant to the anti-competitive government conduct in dispute.

			LLC[391], and other three companies[392]			thus rejected the plaintiff's petition.
2.	2009. 06.29	Jiaxing City Intermediate People's Court (Second Instance)	Nanshi Termite control station	Pinghu City's Planning and Construction Bureau		The Bureau's formal reply restricted the plaintiff from providing the service of termite prevention and ensured the monopoly by the Bureau's subordinate termite control company. The court held that the Bureau's formal reply illegally infringed the plaintiff's operation right.[393]
3.	2014. 04.10	Zhengzhou City Intermediate People's Court (Second Instance)	Changzheng Wang	Zhengzhou City's Passenger Transport Management Office	Dacheng Taxi Service LLC	The Office made a reply which rejected the plaintiff's application for renewing its license of taxi service. The court revoked the reply and ordered the Office to make a decision again.[394]
4.	2014.	Haikou Maritime	Nongliu Wang	Dongfang City's		The Bureau reached a contract with the Haisheng LLC which

[391] "LLC" is in short for "Limited Liability Company".

[392] The other three companies included: Oriental Huike Anti-Fake Technology LLC; Zhongshewangmeng Information Technology LLC; and Hengxin Digital Technology LLC

[393] Though the plaintiff claimed that the reply violated Article 8 and 32 of the AML as well. But the court judgment did not refer to the AML's articles in the judgment directly.

[394] Similar to last case. Though the plaintiff claimed that the reply violated articles of the AML as well. But the court judgment did not apply the AML's articles in the judgment directly.

	05.26	Court (First Instance)		Ocean and Fishery Bureau, and other two companies[395]		endowed the company to monopolize the diesel sale in the certain eight fishery ports, and restricted the plaintiff to sell in those area. The court held that the bureau performed its statutory administrative duties and the contract was valid, thus rejected the plaintiff's petition.
5.	2014. 06.25	Songyuan City Intermediate People's Court (Second Instance)	Zhengxing Taxi Service LLC	Songyuan City's Passenger Transport Management Center		The Center rejected the plaintiff's application for the permission to supply taxi service with the reason that total quantity of taxi cars was controlled at 2177. The court found that the taxi service permission implements total quantity control according to the local administrative rule, thus rejected the petition.
6.	2014. 08.26	Wucheng District People's Court (First Instance)	Wenhua Ma	Jinhua City's AIC		The Wuyi County AIC (subordinate to the defendant) imposed fine on an entity (owned by the plaintiff) for selling a unregistered drug on ulcers treatment. The court held that Wuyi County AIC's decision was made on

[395] The other two companies were Hainan Brach of China Petrochemical Corporation and Oriental Haisheng Fishery Port Management LLC.

						March of 1993 before the enactment of the AML, thus rejected the plaintiff's petition.
7.	2014. 09.30	Fuzhou City Intermediate People's Court (Second Instance)	Qiyang Zhong	Fujian Road Transportation Management Bureau	Jianfeng Lin and Xueling Wang	The Bureau rejected the plaintiff's application to set up a enterprise to supply the service of inter-provincial passenger transport with the reason that the relevant market was in oversupply. The court held that the Bureau made the decision with legal grounding and due procedure, thus rejected the plaintiff's petitions.
8.	2014. 10.11	Shaoguan City Intermediate People's Court (Second Instance)	Leyi Internet Cafe	Shaoguan City's Security Bureau		The Bureau's formal notice force the plaintiff to buy the cafe security management system software from a designated supplier. The court found that the lawsuit had run out of the statute of limitations, thus rejected the plaintiff's petitions.
9.	2014. 11.24	Lixia District People's Court (First Instance)	Aojina Pharmacy LLC	Shandong Province Health and Family Planning		The 2013's public procurement project on drugs set requirements which discriminated non-local and small drug companies.

				Commission		The court held that according to Public Procurement Law, the plaintiff should make a complaint to the procurement supervision department before filing a lawsuit, thus rejected the petition.
10	2014. 12.12	Yutai County People's Court (First Instance)	Weifa Jin	Yutai County's Transportation Management Office		The Office rejected the plaintiff's application to set up a new driving school with the reason that the market is saturated according to a normative document issued by Huaian City's Transportation Department. The court held that the normative document unreasonably increased extra requirements on market entry, thus revoked the Office's decision.[396]
11	2015. 02.13	Fengtai District People's Court (First Instance)	Waste Energy Utilization Tech. LLC	Fengtai District's Municipal Management Commission		The Commission rejected to adopt the plaintiff application to adopt garbage sorting automatic technology. The court held that the utilizing which sorting technology was the Commission's internal management, which was beyond the scope of administrative litigation. Thus the court rejected the

[396] Though the plaintiff claimed that the reply violated Article 8 and 37 of the AML as well. But the court judgment did not apply the two articles in the judgment, but referred to the laws and administrative rules in the field of transportation management.

						petition.
12	2015.04.24	Foshan City Intermediate People's Court (Second Instance)	Lilin He	Chancheng Public Security Sub-Bureau		The Bureau's officer made a warning on the plaintiff's business operations via motorbike in the urban area according to a normative document issued by the municipal government. The court held that the warning had no material impact on the plaintiff's interest, thus rejected the petition.
13	2015.6.18	Nanjing City Intermediate People's Court (Second Instance)	Faershi New Energy LLC	Jiangning District Government	Lisheng Renewable Resources Development LLC	The defendant issued a normative document which designated the third party as the exclusive supplier for disposal of kitchen waste. The court held that normative document illegally violated the Article 32 of the AML and revoked the relevant administrative decision.
14	2015.07.31	Zhongyuan District People's Court (First Instance)	Chunmei Sun	Zhengzhou City's Passenger Transport Management Office	Zhengfa Taxi LLC.	The Office made a reply which rejected the plaintiff's application for renewing its license of taxi service. The court revoked the reply and ordered the Office to make a decision again.[397]

[397] Though the plaintiff claimed that the reply violated Article 8 of the AML. But the court judgment did not apply the article in the judgment directly.

15	2015.07.31	Zhongyuan District People's Court (First Instance)	Lianbei Wang	Zhengzhou City's Passenger Transport Management Office	Zhengfa Taxi LLC.	The Office made a reply which rejected the plaintiff's application for renewing its license of taxi service. The court revoked the reply and ordered the Office to make a decision again.[398]
16	2015.07.31	Zhongyuan District People's Court (First Instance)	Tao Liu	Zhengzhou City's Passenger Transport Management Office	Zhengfa Taxi LLC.	The Office made a reply which rejected the plaintiff's application for renewing its license of taxi service. The court revoked the reply and ordered the Office to make a decision again.[399]
17	2015.07.31	Zhongyuan District People's Court (First Instance)	Gangyong Yang	Zhengzhou City's Passenger Transport Management Office	Zhengfa Taxi LLC.	The Office made a reply which rejected the plaintiff's application for renewing its license of taxi service. The court revoked the reply and ordered the Office to make a decision again.[400]
18	2015.07.31	Zhongyuan District People's Court	Kaifang Wang	Zhengzhou City's Passenger Transport Management Office	Zhengfa Taxi LLC.	The Office made a reply which rejected the plaintiff's application for renewing its license of taxi service. The court revoked the reply and ordered the Office to make a

[398] Though the plaintiff claimed that the reply violated Article 8 of the AML. But the court judgment did not apply the article in the judgment directly.
[399] *Ibid.*
[400] *Ibid.*

		(First Instance)				decision again.[401]
19	2015. 07.31	Zhongyuan District People's Court (First Instance)	Yufang Liu	Zhengzhou City's Passenger Transport Management Office	Zhengfa Taxi LLC.	The Office made a reply which rejected the plaintiff's application for renewing its license of taxi service. The court revoked the reply and ordered the Office to make a decision again.[402]
20	2015. 07.31	Zhongyuan District People's Court (First Instance)	Xuehua Wang	Zhengzhou City's Passenger Transport Management Office	Zhengfa Taxi LLC.	The Office made a reply which rejected the plaintiff's application for renewing its license of taxi service. The court revoked the reply and ordered the Office to make a decision again.[403]
21	2015. 10.13	Gaomishi People's Court (First Instance)	Xiangrui Salt & Chemical LLC	Gaomi City's Salt Bureau		The Bureau made a decision (No. 2075) which confiscated the plaintiff's property of industrial salt for without administrative permission. The court held that the notice was legally made by authorized institution with due procedure, thus rejected the petition.
22	2015.	Gaomishi	Haide Salt	Gaomi City's Salt		The Bureau made a decision (No. 3091) which confiscated the

[401] Though the plaintiff claimed that the reply violated Article 8 of the AML. But the court judgment did not apply the article in the judgment directly.
[402] *Ibid.*
[403] *Ibid.*

	10.13	People's Court (First Instance)	Product Sales LLC	Bureau		plaintiff's property of industrial salt for without administrative permission. The court held that the notice was legally made by authorized institution with due procedure, thus rejected the petition.
23	2015. 10.13	Gaomishi People's Court (First Instance)	Haide Salt Product Sales LLC	Gaomi City's Salt Bureau		The Bureau made a decision (No. 1075) which confiscated the plaintiff's property of industrial salt for without administrative permission. The court held that the notice was legally made by authorized institution with due procedure, thus rejected the petition.
24	2015. 10.13	Gaomishi People's Court (First Instance)	Haide Salt Product Sales LLC	Gaomi City's Salt Bureau		The Bureau made a decision (No. 1069) which confiscated the plaintiff's property of industrial salt for without administrative permission. The court held that the notice was legally made by authorized institution with due procedure, thus rejected the petition.
25	2015. 10.13	Gaomishi People's Court (First Instance)	Haide Salt Product Sales LLC	Gaomi City's Salt Bureau		The Bureau made a decision (No. 3092) which confiscated the plaintiff's property of industrial salt for without administrative permission.

						The court held that the notice was legally made by authorized institution with due procedure, thus rejected the petition.
26	2015. 11.30	Zunyi City Intermediate People's Court (Second Instance)	Guangping Xu	Kuankuo Town Government	Zhonghui Liu	The Town Government made a contract with the third party which traded off the bazaar operation rights. The court held that the contract trading the Government's property was not an administrative conduct, which was beyond the scope of administrative litigation, thus rejected the petition.
27	2015. 11.30	Zunyi City Intermediate People's Court (Second Instance)	Jinlu Fang	Kuankuo Town Government	Zhonghui Liu	The Town Government made a contract with the third party which traded off the bazaar operation rights. The court held that the contract trading the Government's property was not an administrative conduct, which was beyond the scope of administrative litigation, thus rejected the petition.
28	2015. 11.30	Zunyi City Intermediate People's Court (Second Instance)	Ronggui Xu	Kuankuo Town Government	Zhonghui Liu	The Town Government made a contract with the third party which traded off the bazaar operation rights. The court held that the contract trading the Government's property was not an administrative conduct, which was beyond the scope of administrative litigation, thus rejected the petition.

29	2015.12.14	Suprme People's Court (Retrial)	Yuechao Sports Development LLC	Guangdong Province Football Association and Zhuchao Sports Management LLC		The Association granted exclusive rights to Zhuchao LLC for organizing five-a-side football games and enjoying business development rights from games. The court held that such grant was a "civil" conduct, rather than administrative permission, thus rejected the petition.
30	2015.12.31	Fengtai District People's Court (First Instance)	Dingya Wu	Fengtai Traffic Detachment of Beijing Public Security Bureau		The Detachment imposed a fine on the plaintiff's business operation via motorbike with non-local license according to a normative document issued by the Beijing Public Security Bureau. The court held the fine was imposed with legal grounding and due procedure, thus rejected the petition.
31	2016.05.12	Hanjiang City Intermediate People's Court (Second Instance)	Yanbing Wei	Tianmen City's Safety Production Supervision Bureau		The Bureau confiscated the plaintiff's property of fireworks for that these products were not purchased from three designated local wholesale companies. The plaintiff and the Bureau reached a settlement agreement and withdrew the petition.
32	2016.	Yueyang City	Jing Wang	Yueyang County		The Government made a contract with a company to trade off

	06.22	Intermediate People's Court (First Instance)		Government		the right of sand mining on river channel. The court held that the contract had no material impact on the plaintiff's interest, thus rejected the petition.
33	2016. 06.28	Haicheng District People's Court (First Instance)	Ruiming Huang and Qian Yang	Beihai City Public Security Bureau		The City Vehicle Management Office rejected the plaintiffs' applications to register their cars with the reason for not meeting the emission standard. The court held that the responsible agency should be the vehicle management office, rather than the defendant, thus rejected the petition.
34	2016. 07.10	Gulou District People's Court (First Instance)	Aojina Pharmacy LLC	Fujian Province Health and Family Planning Commission		The 2015's public procurement project on drugs set requirements which discriminated certain drug companies including the plaintiff. The court found the project was promulgated by Province Leading Group on Drug Procurement, rather than the defendant, thus rejected the petition.
35	2016. 08.31	Jiangsu Province High People's	Changyun Jiang	Yutai County's Safety Production		The Bureau rejected the plaintiff's application to sell fireworks according to a normative document issued by itself.

		Court (Retrial)		Supervision Bureau		Since the plaintiff refused to change the defendant to the Administrative Approval Bureau which took over the alleged administrative duty, the court rejected the plaintiff's petition.
36	2016.09.05	Weifang City Intermediate People's Court (Second Instance)	Honghua Salt LLC	Gaomi City's Salt Bureau		The Bureau made a decision (No. 1014) which confiscated the plaintiff's property of industrial salt for without administrative permission. The court held that the decision was legally made by authorized institution with due procedure.
37	2016.10.17	Chongqing City Third Intermediate People's Court (Second Instance)	Dongyu Gas LLC	Dianjiang County Economic and Information Commission	Dingfa Industrial LLC	The Commission's meeting minutes forced the plaintiff to transfer the gas installment in Shankoxin Town to the third party. The court confirmed the meeting minutes was illegal for violating the Article 32 of the AML, and ordered the Commission to compensate.
38	2016.12.15	Wen County People's Court (First Instance)	Shengbao Steelmaking LLC	Boai County Housing and Urban-Rural	Boai Petrochina Kunlun Gas	The Bureau reached an exclusive operation contract with the third party and restricted the plaintiff from choosing other gas supplier.

				Construction Bureau	LLC	Gas is the industry controlled by the state-owned economy and concerning the lifeline of national economy and national security, which obviously is exempted from Article 8 of the AML. Thus the court rejected the petition.
39	2016.12.26	Nanjing City Intermediate People's Court (Second Instance)	Weifa Jin	Jiangsu Province Commerce Department		The Department made a formal reply that there is no legal grounding to accept the plaintiff application to establish a company providing recycling service on end-of-life vehicles. The court held that the reply is correct and reasonable.
40	2017.01.03	Nanning City Intermediate People's Court (Second Instance)	Longqi Computer Technology LLC	Guangxi Zhuang Autonomous Region Health and Family Planning Commission		The Commission made a notice which designated supplier for the health service information management system software. The court held that the notice was made to the Commission's subordinate divisions, which had no material impact on the plaintiff's interest, thus rejected the petition.
41	2017.03.20	Hubei Province High People's Court (Second Instance)	Hehe Investment LLC	Yingcheng City Government	Yingcheng City Electronical & Building	The Government made a memo which changed the responsible entity for operating the construction project on shantytowns transformation. The court revoked the memo for without due process of hearing

					& Textile Company	from interested parties.[404]
42	2017.05.26	Guangdong Province High People's Court (Second Instance)	Saidi Electronic Technology LLC	Guangdong Province Economic and Information Commission	Jieyang City Government and Beidou Navigation Technology LLC	The Commission and the third party reached a contract which designated the Beidong LLC as the exclusive supplier for monitoring and management system on vehicles in Jieyang City. The court held that the public procurement contract was reached with due process, thus rejected the petition.
43	2017.06.15	Liunan District People's Court (First Instance)	Chengxing Driver Training LLC	Liuzhou City Road Transport Office	Xingwei Transport Technology LLC	The Office replied to the plaintiff to buy the driver training software and equipment from the third-party. The court found that the plaintiff lacked standing for company registration reasons, thus rejected the petition.
44	2017.06.19	Yueyang County People's Court (First Instance)	Tongda Transport LLC	Yueyang County Road Transport Management Office		The Office rejected the plaintiff's application to increase transport vehicles according to its meeting minutes. The court confirmed that the meeting minutes was illegal for violating Article 8 of the AML, thus revoked the office's

[404] Though the plaintiff claimed the Government conduct violated the Chapter 5 of the AML as well, the court did not refer to those articles in the judgment directly.

						decision.
45	2017.06.22	Baohe District People's Court (First Instance)	Ming Zhang	Wuhu City's Tobacco Monopoly Bureau		The Bureau made a decision which confiscated the plaintiff's property of non-local cigarette for without local anti-fake label. The court held that the decision was made with legal grounding and due process, thus rejected the petition.
46	2017.06.27	Yangzhou City Intermediate People's Court (Second Instance)	Changyun Jiang	Gaoyou City's Safety Production Supervision Bureau		The Bureau rejected the plaintiff's application for fireworks sales with the reason that the market supplier number reached the limit. The court held that the decision is legal and reasonable, thus rejected the petition.
47	2017.06.28	Guangdong Province High People's Court (Second Instance)	Siweier Tech. LLC	Guangdong Education Department	Lianda LLC	The Department designated the third party to provide the software and equipment for the Construction Skill Competition of Vocational Colleges. The court confirmed that the administrative conduct was illegal for violating Article 8 and 32 of the AML.
48	2017.11.02	Liunan District People's Court	Chengxing Driver Training	Liuzhou City Road Transport Office	Xingwei Transport	The Office reached a contract with the third-party which designated it as the only supplier for the driver training software

		(First Instance)	LLC		Technology LLC	and equipment. The court found that the contract had no material impact on the plaintiff's interest, thus rejected the petition.
49	2017.10.25	Huhehaote City Intermediate People's Court (Second Instance)	Zhongnietu	Huhehaote City's Vehicle Management Office		The City Vehicle Management Office rejected the plaintiff's application to register his second-hand car with the reason for not meeting the emission standard. The court held that the Office's decision was legal and reasonable.
50	2017.12.06	Zhejiang Province High People's Court (Retrial)	Tianping Property Appraisal LLC	Wenzhou City's State-owned Assets Supervision and Administration Commission	Zhongan Real Estate Appraisal & Consulting LLC and other four companies[405]	The Commission issued a notice to establish a supplier base which designated five companies (the third party) to provide appraisal service. The court revoked the notice for that it infringed the plaintiff's fair competition rights.[406]

[405] The other four companies included: Bada Guorui Real Estate Appraisal LLC; Huazheng Real Estate Appraisal LLC; Dadi Shengye Real Estate Appraisal LLC; and Dongou Land Price Appraisal LLC.

[406] Though the plaintiff claimed the Government conduct violated Article 8 of the AML as well, the court did not refer to it in the judgment directly.

51	2018.03.28	Xian Railway Transport Court	Yongping Zhang	Niliang District's Taxi Management Office		The Office made a normative document which designated the updated car model eligible for license. The court held that there is no concrete administrative conduct which materially affected the plaintiff's interests.
52	2018.03.29	Yangjiang City Intermediate People's Court (Second Instance)	Nenglong Education LLC	Yangjiang City's Education Bureau		The Bureau made a notice (No. 59) to advocate the schools to make contract with a designated supplier to purchase the school management system software. The court held that the notice did not compel the schools, nor affect the plaintiff existed contracts, thus had not infringe the plaintiff's competition rights.
53	2018.03.29	Yangjiang City Intermediate People's Court (Second Instance)	Nenglong Education LLC	Yangjiang City's Education Bureau		The Bureau made a notice (No. 61) to advocate the schools to provide facilities for installing the school management system established by a designated supplier. The court held that the notice did not affect the plaintiff existed contracts, thus had not infringe its competition rights.
54	2018.03.29	Yangjiang City Intermediate	Nenglong Education LLC	Yangjiang City's Education Bureau		The Bureau made a notice (No. 27) to advocate the schools to actively utilize the school management system established by a

		People's Court (Second Instance)				designated supplier. The court held that the notice did not affect the plaintiff existed contracts, thus had not infringe its competition rights.
55	2018. 03.29	Xianning City Intermediate People's Court (First Instance)	Hongjing Muck Transport LLC	Tongcheng County Government		The Government granted exclusive operation rights of construction garbage transport to three companies after bidding procedure. The court held that bidding procedure was not administrative conduct, which is beyond the scope of administrative litigation, thus rejected the petition.
56	2018. 05.28	Jiangsu Province Province High People's Court (Second Instance)	Hongtaiyang Logistics Market LLC	Lianshui Economic Development District Administration Commission and Lianshui County Government		The Commission reached a contract with a logistic company where the Commission promise would not accept new investment on logistics center. The court held that the contract terms was invalid for violating Article 8 of the AML.
57	2018.	Kuniming City	Bosailuo	Kunming City's	Daojun	In the bidding procedure, the Commission restricted the

	06.12	Intermediate People's Court (Second Instance)	Pharmacy LLC	Health and Family Planning Commission	Pharmacy LLC and Miaochun Pharmacy LLC	plaintiff's offer price. The court held that the alleged bidding had legal grounding with due process, thus rejected the petition.
58	2018. 07.27	Guangdong Province High People's Court (Second Instance)	Zhencheng Bus Transport LLC	Shanwei City Government	Yueyun Bus Transport LLC	The Government's meeting minutes withdrew the bus transport rights from the plaintiff and designated the third party to operate. The court confirmed that the meeting minutes was illegal for not following due process and violating the AML.
59	2018. 08.13	Hunan Province High People's Court (Second Instance)	Yulong Industrial Development LLC	Xiangyin Couty Government		The Government reached a contract with the plaintiff to trade off the right of sand mining, but required to designate the working ships. The plaintiff withdrew the lawsuit, thus the court rejected the petition.
60	2018. 12.03	Beijing City High People's Court	Zheng Liu	Ministry of Justice		The Ministry issued a normative document which restricted legal professions after reform on providing legal service in

		(Second Instance)				certain limited area. The court found the normative document was made according to an administrative rule, which was beyond the judicial review scope, thus rejected the petition.
61	2018.12.03	Beijing City High People's Court (Second Instance)	Sujie Internet Technology Service LLC	China Internet Network Information Center	Xinwang Digital Information Technology LLC	The Center rejected the plaintiff's application for registering network domain name. The court held that the defendant was not an administrative agency nor public organization authorized with administrative duties, thus rejected the petition.

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