HOW COMPETITION IDEALS ARE EMASCULATED IN KEY CHINA INDUSTRIES

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ABSTRACT

China's adoption of its EU-style Anti-Monopoly Law 2007 was heralded with great fanfare. However, some 13 years following adoption, the 2007 Law's aims are seen to have been neutered by the 2007 Law's so-called "public interest" feature: normal competition protection objectives appear to be sidelined in the pursuit of wider industrial policy goals, even to the extent that obviously anti-competitive market practices are tolerated across the industrial and services landscape. Demonstrating via a series of case studies how China's approach markedly diverges from EU competition ideals, this article questions whether Competition philosophy has been accepted in China, and proposes steps to be taken to address the current unsatisfactory situation, making detailed substantive and structural proposals for reform, aimed at enhancing the regulatory institutions so that their enforcement competence is not compromised. The article also makes proposals designed to enhance the capacity of the enforcement institutions' professional staff, all with a view towards enhancing the acceptance of Competition norms in China's political and administrative-dominated business culture.

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I. INTRODUCTION

This article seeks to answer the important question of whether the China Anti-Monopoly Law 2007[1] has succeeded in introducing a competition ("antitrust") philosophy in China by examining practices in a number of key industries. Back in 2007, when China was deciding what form of competition law to adopt, China decided to follow the EU antitrust approach to a significant extent.[2] However, as this article shall demonstrate, since 2007 anti-competitive activities have been tolerated in China which appear to be contrary to the competition principles proclaimed in the 2007 Act. Regard for the 2007 Act's "normal" competition principles[3] appear to have been relegated to the sideline.[4] This article shall examine the source of this divergence, which appears to be

1. The Anti-Monopoly Law 2007, titled Zhonghua Renmin Gongheguo Fanlongduanfa (中华人民共和国反垄断法) [The Anti-Monopoly Law of the People's Republic of China] (promulgated by the Standing Committee of the National People's Congress on August 30, 2007, and came into force on August 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 [hereinafter "the 2007 Act"].

2. For example, several concepts in the 2007 Act use similar terminology and concepts to those used in EU competition law, for example, the prohibition of anti-competitive agreements (arts. 13-15, 2007 Act); the prohibition of the abuse of a dominant position (arts. 17-19, 2007 Act); the restraint of mergers that bring about excessive market concentration (e.g., arts. 20-22, 2007 Act), etc.: all are key elements in the EU competition legal framework as well. See further Yong Ren, Fengyi Zhang & Jie Liu, *Insights of China's Competition Law and its Enforcement: the Structural Reform of Anti-Monopoly Authority and the Amended Anti-Unfair Competition Law*, 10 J.E. COMP. L. & PRAC. 35 (2019); Giacomo Di Federico, *The New Anti-Monopoly Law in China from a European Perspective*, 32 WORLD COMP. 249 (2009); H. Stephen Harris Jr., *The Making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China*, 7 CHICAGO J. INT'L L. 169 (2006); Eleanor M. Fox, *An Anti-Monopoly Law for China – Scaling the Walls of Government Restraints*, 75 ANTITRUST L.J. 173 (2008).

3. The authors refer to art. 1 2007 Act's reference to the "protection of fair market competition, enhancing economic efficiency, maintaining the consumer interests" as "normal" competition principles.

4. China's chief antitrust policy-maker and regulatory authority for the enforcement of antitrust law in China – State Administration for Market Regulation [hereinafter "SAMR"], has also raised this concern: in its 2020 reform proposals titled "Draft (for public comment) on the Amendment of the Anti-Monopoly Law 2007 of China" (published January 2020) SAMR drew attention to this development and its reform proposals call for the 2007 Act to make it clear that the primary focus of the 2007 Act should be the protection of competition, rather than other interests. In this respect, SAMR has proposed that the Competition criteria set out in the 2007 Act ("fair market competition, enhancing economic efficiency, maintaining the consumer interests") should predominate in the observance of the 2007 Act, with interventions in the public interest to be confined only to situations where intervention would be "limited and necessary", thus making it clear that SAMR is concerned about the manner in which excessive intervention by State authorities has prioritized the interests of State-owned market players and in the process relegated the competition focus of the 2007 Act to an inferior position: see art. 9 of SAMR's reform proposals which call for the establishment of a "fair competition review system" so that markets *will comply with competition rules, with intervention henceforth by administrative authorities only to be limited and where necessary*: *see* SAMR, Fanlongduanfa Xiuding Cao'an (Gongkai Zhengqiu Yijiangao) (《反垄断法》修订草案(公开征求意见稿)) [Draft (for public comment) on the Amendment of the Anti-Monopoly Law 2007 of China] (2 January 2020): http://www.samr.gov.cn/hd/zjdc/202001/t20200102_310120.html.

grounded in the presence in the 2007 Act of a quite distinct feature, quite unlike that found in the EU regime.[5] This distinct feature is the reference to the "public interest" in the Act.[6] In this regard, this article shall demonstrate that China tolerates practices *even though they run counter to the protection of competition*, unlike the EU where protection of competition has status akin to the 'rule of law'.[7] China's approach to competition appears different. Therefore, this article seeks to make a contribution to the important question of whether China has accepted the introduction of Competition philosophy into its economy at all, and suggests proposals for reform should China wish to move in a more pro-Competition direction.

To address this question, Part Two of this article will consider the different and contrasting meanings in China and the EU of the "public interest". Part Three will exhibit case studies[8] undertaken by the authors in key China industries[9] in order to illustrate how public interest considerations (in the form of industrial policy priorities) frequently defeat adherence to competition norms, and compare how such practices would be treated under EU competition law. Part Four considers what reforms are needed in order to elevate the enforcement of competition law to become a key priority in China, and in Part Five we

5. The EU Competition criteria (TFEU art. 101) include the protection of efficiency, innovation, and consumer welfare, with no mention of any criterion that can be said to equate to a "public interest" criterion (or indeed anything like it) such as appears in China's 2007 Act when it refers to "the public interest" (art. 1).

6. Art. 1, 2007 Act also refers to the need to protect the protection of "the public interest, and promote the healthy development of the socialist market economy" (as well as "protection of fair market competition, enhancing economic efficiency, maintaining the consumer interests"). For the purpose of this article we shall use the term "public interest", to include references to the terms "public interest" and "social public interest" and "the interests of the society as a whole" as all such terms have been used in various official translations to describe the public interest within the meaning of art. 1 of the 2007 Act. In the original Chinese version, art. 1 refers to "the social public interest" (社会公共利益): http://www.gov.cn/flfg/2007-08/30/content_732591.htm. PEKING UNIVERSITY'S LAWINFOCHINA LEGAL DATABASE translates to read as follows: art. 1: 'This Law is enacted for the purpose of preventing and curbing monopolistic conducts, protecting fair market competition, enhancing economic efficiency, maintaining the consumer interests and *the public interest*, and promoting the healthy development of the socialist market economy': http://www.lawinfochina.com/display.aspx?lib=law&id=0&CGid=96789. The MOFCOM website (Ministry of Commerce, China) refers to inter alia 'safeguarding the interests of consumers and *social public interest*': http://www.fdi.gov.cn/1800000121_39_1899_0_7.html. The translation published in COMPETITION LAW IN CHINA: LAWS, REGULATIONS, AND CASES (Peter J. Wang, Sébastien J. Evrard, Yizhe Zhang & Baohui Zhang eds., 2014) states that art. 1 of the 2007 Act is enacted for the purposes of 'protecting consumers and *the public interest*'.

7. See details below in the Part Three Case Studies.

8. Given that China's economy is one where frequent State intervention is a regular occurrence, the authors opted to use the case study method as a useful approach to study how competition ideals are frequently disregarded in favor of State monopolies' anti-competitive administrative activities which are frequently demonstrated to act contrary to the detriment of private businesses in China, e.g. whether forcing privately-owned steel mills to merge with their State-owned competitors in the China steel industry; or, by way of the discriminatory reduction of gasoline fuel supplies to privately-owned gasoline retailers by State-owned refineries, with preference given to State-owned gasoline retailers; or, by way of margin-squeezing, discriminatory pricing or denial of access on equal terms, to privately-owned broadband suppliers to broadband infrastructure, in contrast to how favorably State-owned broadband suppliers are treated.

9. The gasoline retail, telecom and steel industries were selected because of their strategic interest to the national economy in China.

present our Conclusions.

II. VARYING UNDERSTANDINGS OF THE NOTION OF "PUBLIC INTEREST" IN CHINA AND EU COMPETITION LAW REGIMES

A. China's Public Interest Approach: What could it mean?

While Article 1 of the 2007 Act posits safeguarding the "public interest" in China as one of the four major objectives[10] of the 2007 Law, there is no consensus in the literature as to its true meaning. The meaning of the public interest among academics writing on the subject varies widely.[11] Several views are put forward. Some scholars maintain that the pursuit of the State's industrial policy[12] is the "public interest", particularly in the context of achieving the hyper-development of the Chinese economy.[13] For others, the "public interest" should mean reconciling the competing interests of the State, market participants and consumers, with the public interest being achieved when there is harmony between these competing interests.[14] Others take another view, regarding the concept as a simultaneously vague, yet flexible, concept[15] which should only be resorted to sparingly[16], so as not to frustrate the achievement of national competition objectives as set out in the 2007 Act[17], and that its presence in the Act is reflective of an older political culture that is

10. The other three objectives listed in art. 1 being "protecting fair market competition, enhancing economic efficiency, and maintaining the consumer interests".

11. Weiping Ye, *China's Choice of Analytical Models for Its Anti-Monopoly Law*, 39 SOCIAL SCIENCES IN CHINA 34 (2018); Joseph E. Stiglitz, *Towards a Broader View of Competition Policy*, *in* COMPETITION POLICY FOR THE NEW ERA: INSIGHTS FROM THE BRICS COUNTRIES 4, 20, (Tembinkosi Bonakele, Eleanor Fox and Liberty Mncube eds., 2017); Daniel C.K. Chow, *China's Enforcement of Its Anti-Monopoly Law and Risks to Multinational Companies*, 14 SANTA CLARA J. INT'L L. 99, 101-3 (2016); Fred S. McChesney, Michael Reksulak & William F. Shughart II, *Competition Policy in Public Choice Perspective*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS vol. 1, 147-55 (Roger D. Blair & D. Daniel Sokol eds., 2015); XIAOYE WANG, THE EVOLUTION OF CHINA'S ANTI-MONOPOLY LAW 161-7 (2014).

12. Margaret M. Pearson, *State-Owned Business and Party-State Regulation in China's Modern Political Economy*, *in* STATE CAPITALISM, INSTITUTIONAL ADAPTATION, AND THE CHINESE MIRACLE 27, 28 (Barry Naughton & Kellee S. Tsai eds., 2015); D. Daniel Sokol, *Tensions Between Antitrust and Industry Policy*, 22 GEO. MASON L. REV. 1247 (2015); NIAMH DUNNE, COMPETITION LAW AND ECONOMIC REGULATION (2015); Joseph E. Stiglitz, *Government Failure vs. Market Failure: Principles of Regulation*, *in* GOVERNMENT AND MARKETS: TOWARD A NEW THEORY OF REGULATION 13, 35 (Edward J. Balleisen & David A. Moss eds., 2012).

13. Shouwen Zhang, *Lun Jingjifa de Xiandaihua* (*论经济法的现代化*) [*Study on the Modernity of Economic Law*], *in* JINGJIFA LUNWEN XUANCUI (经济法论文选粹) [SELECTED PAPERS ON ECONOMIC LAW] 158 (Law Press, China, 2004).

14. Jing Wang, *A Maze of Contradictions: Chinese Law and Policy in the Development Process of Privately Owned Small and Medium-Sized Enterprises in China*, 25 MICHIGAN STATE INT'L L. REV. 491, 552 (2017); Yane Svetiev & Lei Wang, *Competition Law Enforcement in China: Between Technocracy and Industrial Policy*, 79 L. & CONTEMPORARY PROBLEMS 187, 198-9 (2016).

15. Ariel Ezrachi, *Sponge*, 5 J. ANTITRUST ENFORCEMENT 49, 56-7 (2017); Wang, *supra* note 11, 351-2.

16. Thomas J. Horton, *Antitrust or Industrial Protectionism?: Emerging International Issues in China's Anti-Monopoly Law Enforcement Efforts*, 14 SANTA CLARA J. INT'L L. 109, 118 (2016).

17. Art. 1 provides that the Act seeks to prevent and restrain monopolistic conduct, protect fair competition in the market, enhance economic efficiency, safeguard the interests of consumers and the social public interest, and promote the healthy development of the socialist market economy.

lagging behind China's progress toward a market economy.[18] Others say that the "public interest" is equivalent to consumer welfare.[19]

In summary therefore, there is no consensus in the current literature on the subject: some consider the public interest as equating to consumer welfare; others equate the State's industrial policy interest with the public interest; while for others, the public interest is a tool for reconciling the competing interests[20] of State, market participants and consumers.[21] The debate in the disparate literature addresses the issue on an almost philosophical level, looking at legislative texts, rather than actual outcomes.

In an attempt to answer this question, this article takes a different approach: in order to understand what the public interest means in China, and its position among the hierarchy of typical competition norms China proclaims to protect[22], our case studies (detailed in Part Three below) will examine anti-competitive occurrences in several key industries. Our studies come to a clear conclusion: the public interest concept in the 2007 Act means that practices in China are acceptable notwithstanding their often clear contravention of competition objectives (namely consumer welfare, economic efficiency, and fair competition[23]). The evidence cited in support of this claim in Part Three below will clearly show that, time after time, the State has advanced policies and practices that allow State-Owned Enterprises (hereinafter, "SOEs" – enterprises funded, owned or controlled by different levels of Chinese government) to engage in transactions or activities that *not only do not* achieve some kind of harmony between the competing interests, but instead exclusively advance the commercial interests of SOEs, often *to the detriment of* fair competition, efficiency and consumer welfare.[24]

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18. Xiaoye Wang, *Six Severe Challenges in Implementing China's Anti-Monopoly Law*, 14 COMP. POL'Y INT'L 1 (2018); Angela Huyue Zhang, *Strategic Public Shaming: Evidence from Chinese Antitrust*, 238 CHINA Q. 1 (2019); Jingyuan Ma & Mel Marquis, *Business Culture in East Asia and Implications for Competition Law*, 51 TEXAS INT'L L.J. 1, 18 (2016); Nicholas Calcina Howson, *Protecting the State from Itself?*, *in* REGULATING THE VISIBLE HAND?: THE INSTITUTIONAL IMPLICATIONS OF CHINESE STATE CAPITALISM 49 (Benjamin L. Liebman & Curtis J. Milhaupt eds., 2015).

19. Wuzhen Jiang, *Fanlongduanfa Zhongde Gonggong Liyi Jiqi Shixian* (*反垄断法中的公共利益及其实现*) [*The Public Interest in the Chinese Anti-Monopoly Law and its Implementation*], 4 ZHONGWAI FAXUE (中外法学) PEKING UNIVERSITY L.J. 551 (2010); Antonio Capobianco & Aranka Nagy, *Public Interest Clauses in Developing Countries*, 7 J.E. COMP. L. & PRAC. 46 (2016). It is noteworthy that recent reform proposals put forward by China's antitrust body, SAMR, do not elaborate on what is meant by the public interest concept: SAMR, Draft (for public comment) on the Amendment of the Anti-Monopoly Law 2007 of China, *supra* note 4.

20. Either to be used sparingly, or at will: there are different camps, as discussed above.

21. Johan W. van de Gronden, *Services of General Interest and the Concept of Undertaking: Does EU Competition Law Apply?*, 41 WORLD COMP. 197 (2018); Ezrachi, *supra* note 15; MIKE FEINTUCK, THE PUBLIC INTEREST IN REGULATION 225 (2004).

22. The 2007 Act, art. 1: 'This Law is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair market competition, enhancing economic efficiency, safeguarding the interests of consumers and the interests of the society as a whole, and promoting the healthy development of socialist market economy'.

23. All are mentioned as key objectives to be safeguarded, as per art. 1 of the 2007 Act.

24. Chinese government intervention prefers to develop SOEs as a matter of priority: *see, e.g.,* Lei Zheng, Benjamin L. Liebman & Curtis J. Milhaupt, *SOEs and State Governance*, *in* REGULATING THE VISIBLE HAND?: THE INSTITUTIONAL IMPLICATIONS OF CHINESE STATE CAPITALISM 203 (Benjamin L. Liebman & Curtis J. Milhaupt eds., 2015); Ines Willemyns, *Disciplines on State-Owned Enterprises in International Economic Law: Are we moving in the*

B. Contrast with the EU Approach

This approach can be contrasted with the very different approach taken in the European Union both in the general competition field, and also in the market concentration (i.e., merger control) field.

First, in the general competition arena, TFEU articles 101 and 102[25] jurisprudence assesses the legality of anti-competitive agreements[26] or abuses of dominance[27] *by way of a competition compatibility* test.[28] There are no explicit public interest criteria (nor industrial policy criteria[29]) in the EU competition compatibility test that can be used to justify State action departing from competition norms.[30] The only way that Competition

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right direction?, 19 J. INT'L ECON. L. 657 (2016); Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEORGETOWN L.J. 665, 668 (2015).

25. Consolidated Version of the Treaty on the Functioning of the European Union arts. 101 & 102, 2008 O.J. (C 115) 88-9 [hereinafter "TFEU"]. TFEU art. 101 prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between EU Member States and which have as their object or effect the prevention, restriction or distortion of competition within the EU Internal Market. *However*, exemption from the prohibition is possible where it can be demonstrated that the production or distribution of goods is improved, or technical or economic progress is promoted; that consumers benefit, and that the possibility of eliminating competition in respect of a substantial part of the products in question is not likely to occur. TFEU art. 102 prohibits any abuse by one or more undertakings of a dominant position within the Internal Market or in a substantial part of it, shall be prohibited in so far as it may affect trade between Member States. Unlike practices that breach art. 101, there is no equivalent exemption for abuses contrary to art. 102 – they cannot be exempted.

26. TFEU art. 101.

27. TFEU art. 102.

28. In short, (as per TFEU arts. 101 & 102) the EU competition compatibility test is whether the anti-competitive agreement or alleged abuse of dominance adversely affects competition in a substantial part of the EU.

29. For example, attempts to invoke industrial policy considerations as a ground to justify mergers are not usually acceptable to the European Commission: *see* Case M.8677 – Siemens/Alstom, Comm'n Decision, 2019 O.J. (C 300) 7 [hereinafter "*Siemens/Alstom*"]: for criticisms of this approach, *see* Bruno Deffains, Olivier d'Ormesson & Thomas Perroud, *Competition Policy and Industrial Policy: for a reform of European Law*, ROBERT SCHUMAN FOUNDATION 1 (2020); Ioannis Lianos, *The Future of Competition Policy in Europe – Some Reflections on the Interaction between Industrial Policy and Competition Law*, 5 COMP. L. INT'L (2019). Notwithstanding the criticisms, the EU Commission has been very clear that an EU State's national industrial policy should not be used to justify mergers since its very first Merger control prohibition decision in 1991, in Case IV/M.53 – Aerospatiale-Alenia / De Havilland, Comm'n Decision, 1991 O.J. (L 334) 42 [hereinafter "*Aerospatiale-Alenia / De Havilland*"] which attracted the ire of both the UK and France when the Commission prohibited the takeover of a failing aerospace firm (De Havilland) on competition grounds, and would not allow it proceed on industrial policy grounds, because the test for merger approval is a purely competition-based test. Although the Commission appeared to relax its position somewhat in the subsequent Decision Case IV/M.308 – Kali-Salz/MdK/Treuhand, Comm'n Decision, 1994 O.J. (L 186) 38 [hereinafter "*Kali-Salz/MdK/Treuhand*"] finding that it could consider industrial policy considerations if three criteria were satisfied: (1) the failing firm must be in imminent danger of being forced out of the market because of financial difficulties if not taken over by another undertaking; (2) there is no less anti-competitive alternative than the proposed takeover, and (3) in the absence of a merger, the assets of the failing firm would inevitably exit the market, nevertheless the Commission made it clear that its starting point is that absent such considerations, it will not consider considerations other than competition considerations.

30. Some claim that there are public policy considerations applied by the EU Commission *in the sense that* it sets institutional priorities (as to which competition cases it will, and will not investigate) but this interesting perspective cannot be said to mean that the Commission applies a public interest test, and indeed no such test appears in either TFEU arts. 101 or 102: see for example, Or Brook, *Priority Setting as A Double-Edged Sword: How Modernization Strengthened the Role of Public Policy*, 14 J. COMP. L. & ECON. 1 (2020) who takes the view

norms can be relegated to the sideline by the State in the EU sphere, is where it can be demonstrated that the contested activity is either a non-economic activity pursued by the State (or its nominees) in the exercise of the State's "official authority" (e.g., monitoring pollution[31], data privacy[32], collecting taxation[33], etc.), or, where the activity (even if economic in nature) is intrinsically linked to some official authority activity or social solidarity-enhancing activity that is, in itself, non-economic in nature.[34] On the other hand, where anti-competitive arrangements have no such "official authority" flavor, then they are subject to the rigors of competition law, such that, anti-competitive agreements between undertakings only merit *exemption* from the prohibition in TFEU article 101 *only if* it can be demonstrated that they have substantial pro-economic/pro-consumer welfare effects, and not (unlike China) because the pursuit of some particular State industrial policy is desired.[35] Apart therefore from those situations, it is not possible for the EU Member States to permit or promote otherwise anti-competitive practices "in the public interest", because there is no such exception contained in either the EU Treaties or within secondary legislation. Such

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that when the EU Commission sets its investigation enforcement priorities, it is in effect making public policy decisions when deciding which cases it shall investigate. However this is far removed from the subject matter of the current article which concerns the fact that China *has* a public interest test in its 2007 Act, whereas EU competition law *does not*.

31. Case C-343/95, Diego Calí & Figli Srl v. Servizi ecologici porto di Genova SpA, 1997 E.C.R. I-01547 [hereinafter "*Diego Calí*"], where the Court of Justice of the European Union [hereinafter "CJEU" or "Court of Justice"] held that the collection of fees to pay for anti-pollution monitoring surveillance was not an economic activity as it was intrinsically linked with an exercise of official authority (anti-pollution monitoring) to protect the public interest in maintaining a safe environment. See further on environmental protection: Suzanne Kingston, *Competition Law in an Environmental Crisis*, 9 J. EUR. COMP. L. & PRACTICE 517 (2019).

32. Case C-238/05, Asnef-Equifax, 2006 E.C.R. I-11125, ¶ 63 states that "[a]ny possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law […]' See further on data privacy: John M. Newman, *Antitrust in Digital Markets*, 72 VAND. L. REV. 1497 (2019); Ariel Ezrachi, *EU Competition Law Goals and the Digital Economy*, 17 OXFORD LEGAL STUDIES RESEARCH PAPER (2018).

33. Case C-207/01, Altair Chimica SpA v. ENEL Distribuzione SpA, 2003 E.C.R. I-08875 [hereinafter "*Altair Chimica*"], where the CJEU held that the collection of taxes could not be regarded as an economic activity but instead was a manifestation of the exercise of official authority and any anti-competitive impact thereby arising did not arise as a result of the autonomous actions of a market operator but rather as a result of the dictates of the legislator governing the collection of taxes.

34. In Case T-319/99, Federación Española de Empresas de Tecnología Sanitaria (FENIN) v. Commission, 2003 E.C.R. II-357 the General Court of the European Union held that the purchase of hospital equipment for Spanish public hospitals, although ostensibly a commercial transaction, could not be viewed as an end in itself, instead the end was the pursuit of social solidarity in providing properly equipped public hospitals, and so the purchasing activity was not within the ambit of competition law, even though it had anti-competitive (monopoly) features. See also Niamh Dunne, *Public Interest and EU Competition Law*, 65 ANTITRUST BULLETIN 256, 257-260 (2020).

35. So far as TFEU art. 102 is concerned – prohibition of abuses of dominance – there is no legal competence *to permit* abuses of dominance in EU Law, and while art. 6 of China's 2007 Act contains a similar prohibition, a point of distinction between the two systems is that although China's 2007 Act *prohibits* abuses of dominance on its face, however *in practice* the fact is that the State *does frequently permit* such abuses to take place: *see* further the three case studies in Part Three below which exhibit such examples, e.g., the fixed broadband access case study below will show how margin squeezing is tolerated in China even though it makes market entry unattractive to private downstream competitors, and harms consumers; while in the filling station case study, oil shortages (engineered by upstream SOE's refusal to supply) force private operators to sell-out to SOEs, thereby reducing competition for consumers, and inducing smaller competitors to unfairly exit the market.

limited exceptions as there are, namely the aforementioned official authority or social solidarity exceptions, have been created by the European Court of Justice in its case law, and are governed by rigorous conditions before disregard for Competition law can be accepted.[36] By contrast, Part Three case studies considered later below will illustrate the contrast with China, as they shall illustrate how, in China, adherence to fundamental competition norms (such as non-discriminatory treatment of suppliers or abusive leverage of upstream dominance in downstream markets) is often cast to one side, in favor of the "public interest", thereby posing harm for competition, competitors, and ultimately consumers.

Second, another major departure between the EU and China regimes can be seen in the stark contrast between the different approaches taken by China and the European Union in their respective approaches to controlling market concentration. The primary test of compatibility of a merger with a community dimension[37] in the EU is whether the merger will significantly adversely affect competition in the Internal Market[38], with Member States only free to "interfere" with a proposed merger in a limited number of narrowly defined *non-competition* situations, in defense of what are known as "legitimate interests".[39] This is a very different approach from the China approach[40]: our Part Three case studies below will

36. *See* Case T-216/15, Dôvera zdravotná poist'ovňa v. Commission, ECLI:EU:T:2018:64 (2018); Case T-138/15, Aanbestedingskalender and Others v. Commission, ECLI:EU:T:2017:675 (2017); *Altair Chimica*, *supra* note 33; *Diego Calí*, *supra* note 31; Case C-475/99, Ambulanz Glöckner v. Landkreis Südwestpfalz, 2001 E.C.R. I-8089; Case C-364/92, SAT Fluggesellschaft mbH v. European Organization for the Safety of Air Navigation (Eurocontrol), 1994 E.C.R. I-43.

37. Council Regulation 139/2004, on the Control of Concentrations between Undertakings, art. 1, 2004 O.J. (6 (EC) L 24) [hereinafter "the EC Merger Regulation" or "MCR"], obliges merging parties to notify a proposed merger to the EU Commission for prior approval where the proposed merger ("concentration") has a "Community dimension", i.e., possessing either a turnover of either more than EUR 5 billion worldwide, with at least two of the merging entities having an EU turnover of more than EUR 250 million each, in different Member States; or, mergers with a EUR 2.5 billion turnover worldwide, and significant turnover in at least 3 EU Member States, etc.: see art. 1 for further turnover test granularity.

38. The EC Merger Regulation, art. 2 provides the following appraisal test: a concentration which does not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market. A concentration which would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.

39. The 3 legitimate interests explicitly mentioned in art. 21(4) MCR are: Public security, plurality of the media, or prudential interests. Such "legitimate interests" can be used to justify Member State intervention in the national elements of a proposed merger on non-competition grounds, but the State has no competence to regulate the EU competition aspects of the merger (that remains with the Commission). *See* further Bruce Lyons, David Reader & Andreas Stephan, *UK Competition Policy Post-Brexit: Taking Back Control While Resisting Siren Calls*, 5 J. ANTITRUST ENFORCEMENT 347, 355 (2017); JONATHAN PARKER & ADRIAN MAJUMDAR, UK MERGER CONTROL 145-8 (2d ed. 2016); *see* also generally, CORPORATE ACQUISITIONS AND MERGERS IN THE EUROPEAN UNION (Riccardo Celli, Christian Riis-Madsen, Philippe Noguès & Stéphane Frank, eds., 2014); IOANNIS KOKKORIS & HOWARD SHELANSKI, EU MERGER CONTROL: A LEGAL AND ECONOMIC ANALYSIS (2014).

40. As Deffains, d'Ormesson & Perroud, *supra* note 29, 14-15 point out: "China supports its national champions without constraint". See also Guowuyuan Guanyu Jingyingzhe Jizhong Shenbao Biaozhun de Guiding (国务院关于经营者集中申报标准的规定) [Provisions of the State Council on Thresholds for Prior Notification of Concentrations of Undertakings] (promulgated by the 20th Executive Meeting of the State Council, Aug. 1, 2008, effective Aug. 1, 2008) http://www.gov.cn/zwgk/2008-08/04/content_1063769.htm, Mar. 2, 2009: art. 3 of the Provisions obliges mergers occurring in China that satisfy large financial thresholds

show how pursuit of the public interest promotes the carrying out of many *forced* mergers in China, notwithstanding their threat to, or indeed their adverse impact on, competition.[41] It is clear that mergers have been encouraged in China, ostensibly on the grounds that they are not anti-competitive[42], but rather because they advance the achievement of the State's industrial policy, for example to consolidate certain industries such as the steel and gasoline station industries, by allowing SOEs take over private competitors, often to the detriment of competition.[43] This is in contrast to the European Union, where only a *significant reduction in competition,* not the public interest[44]*,* is the compatibility test for mergers. Such anti-competitive mergers are not permitted to proceed on competition grounds, and they certainly cannot be permitted on grounds that they in some way advance State industrial policy[45] or on the basis of any other State consideration such as the public interest.

While the EC Merger Regulation (hereinafter, 'MCR') does provide a procedure whereby if a Member State has concerns about a proposed merger, the State can seek to interfere with it on *non-competition grounds* to protect "legitimate interests"[46], Member States are only able to take action on such grounds where the Member State can either

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to be notified to the Ministry of Commerce for prior approval. For specific information on the size of the turnover thresholds, *see* further art. 3. Art. 4 provides that mergers that do not reach these art. 3 turnover thresholds can nevertheless still be investigated by the competent commerce department of the State Council and prohibited if they adversely affect, or are likely to affect, the elimination or restriction of competition in China.

41. Sector case studies considered (Part Three below) on the Filling Stations, Telecoms & Steel sectors illustrate.

42. The 2007 Act, art. 28: Where a concentration has or may have the effect of eliminating or restricting competition, the Anti-Monopoly Authority under the State Council shall make a decision to prohibit the concentration. However, if the business operators concerned can prove that the concentration will bring more positive impact than negative impact on competition, or the concentration is pursuant to public interests, the Anti-Monopoly Authority may decide not to prohibit the concentration; art. 29: Where the concentration is not prohibited, the Anti-Monopoly Authority may decide to attach restrictive conditions for reducing the negative impact of such concentration on competition; art. 30: Where the Anti-Monopoly Authority decides to prohibit a concentration or attaches restrictive conditions to the concentration, it shall publicize such to the general public in timely manner.

43. *See* below in Part Three the case studies on the Steel and Filling Stations sectors. On China's approach, *see* Mark Furse, *Evidencing the Goals of Competition Law in the People's Republic of China: Inside the Merger Laboratory*, 41 WORLD COMP. 129, 168 (2018), pointing out merger control in China links industrial policy and national economic development.

44. Such as, the pursuit of industrial policy – this is not part of the merger clearance test: see Commission declaration of incompatibility of proposed concentration Siemens and Alstom: *see Siemens/Alstom*, *supra* note 29. The EU Commission prohibited Siemens (German) merging with Alstom (French) due to the foreseeable reduction in competition in the high-speed trains production market and was unwilling to consider arguments seeking to justify the merger on non-competition industrial policy grounds as the EU merger clearance test is a purely competition-based test.

45. *See Aerospatiale-Alenia / De Havilland*, *supra* note 29, where as early as 1991 inter alia the EU Commission made it clear that the EU merger compatibility test could not be based on a State's industrial policy.

46. MCR art. 21(4): Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law. Public security, plurality of the media and prudential rules shall be regarded as legitimate interests within the meaning of the first subparagraph.

advance a legitimate interest that is explicitly mentioned in the MCR article 21[47], or, advance a new legitimate interest ground that the EU Commission is prepared to accept[48] (and if the State does advance such legitimate interests grounds, it is *not to approve* the merger on legitimate interest grounds, but rather *to inhibit some element of the merger* on non-competition grounds[49]). It is clear therefore, that the MCR article 21 legitimate interests concept, is in no way analogous to the "public interest" concept found in China's 2007 Act[50]: the EU's "legitimate interests" and China's "public interest" concepts serve totally opposite purposes. In the EU, legitimate interests cannot serve a State's domestic industrial policy aims; whereas in China the public interest concept clearly does.[51] By maintaining the supremacy of competition as the test of legality, it is clear that in the EU merger clearance system, *it is only on competition grounds that mergers can proceed* – with non-competition grounds ("legitimate interests") being used only to regulate or prohibit the

47. The 3 legitimate interests explicitly mentioned in MCR art. 21(4) are: Public security, plurality of the media, or prudential interests.

48. MCR art. 21(4) also provides that any proposed new public interest advanced by a Member State must be communicated to the Commission and shall be recognized by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law, before the measures referred to above may be taken: In C-42/01, Portuguese Republic v Commission, 2004 E.C.R. I-06079 [hereinafter "*Portuguese Republic*"] the CJEU held that Portugal has erred in not giving the Commission the opportunity to consider whether to recognise a new legitimate interest in a case where Portugal took steps to prevent the takeover of a cement producer in which the State has an interest, by a Swiss/Portuguese consortium, on economic policy grounds. The Court did not accept that a new legitimate interest had been advanced by the Member State and it held that the State was obliged to notify the use of art. 21(4) to the Commission in order to give the Commission the opportunity to consider the proposal by the Member State (Portugal) to invoke a new legitimate interest.

49. Such legitimate interests can be used to justify Member State intervention in a merger on non-competition grounds, but the State has no competence to regulate the EU competition aspects of the merger (that remains with the Commission): MCR art. 21(4). See Case No IV/M.336 – IBM France / CGI, Comm'n Decision, 1993 O.J. (C 151) 5, was the first invocation of art. 21(4) (invoking "public security" as a legitimate interest) by France seeking to protect military interests (the merger itself was cleared by the Commission, as it did not affect competition: European Commission, XXIIIrd Report on Competition Policy 1993, para 321 (Mar. 26, 1995)). *See* also, e.g., Case No IV/M.423 – Newspaper Publishing, Comm'n Decision, 1994 O.J. (C 85) 5, where the Commission, approving a proposed concentration in the UK newspaper industry, accepted that the UK separately could take steps under its own domestic media legislation to protect its own domestic legitimate interest, namely measures to protect the plurality of the UK media sector; in Case M.759 – Sun Alliance / Royal Insurance, Comm'n Decision, 1996 O.J. (C 225) 12, the Commission accepted that the UK could apply its own domestic insurance legislation to a proposed concentration. Other examples of where the Commission recognized Member States were acting in pursuit of legitimate interests include Case M.1346 – EdF/ London Electricity, Comm'n Decision, 1999 O.J. (4064) 89. Member State claims they need to take steps to protect legitimate interests are not always accepted: Case M.1616 – BSCH / Champaliaud, Comm'n Decision, 1999 O.J. (C 306) 37, where the Commission did not accept that Portugal had established a legitimate interest to interfere with a takeover of one of its major banks; *Portuguese Republic*, *supra* note 48 where the Court of Justice did not accept Portugal has advanced a new legitimate interest. For an example of where the Commission cleared a merger at EU level but a Member State (the UK) prohibited it at national level on art. 21 (legitimate interest) grounds: *see* Case COMP/M.5932, News Corp/ BSkyB, Comm'n Decision, 2011 O.J. (C 37) 5.

50. Because clearly, as the three case studies below in Part Three will each demonstrate, China permits transactions to proceed *even though* they have anti-competitive effects; whereas in the EU the concept of legitimate interests is (1) narrowly defined, and (2) is rarely invoked by Member States, as it felt that competition (not national interests) should be the main parameter against which major mergers are assessed.

51. *See* case studies in Part Three below.

non-competition aspects of major mergers. The EU's legitimate interests concept is therefore not consonant with the "public interest" concept, which China relies on, *to approve* the entire transaction in itself, notwithstanding its adverse impact on competition.

III. THE SECTORAL CASE STUDIES AND METHODOLOGY

Owing to the specific history of the Chinese economy's development[52], the State had become accustomed to using administrative directions, and State industrial policy, to prime its economic development approach. In the absence of a western-style separation of powers judicial model and the lack of a significant body of accessible domestic competition jurisprudence in China, the case study method is seen to be a reliable method to demonstrate how competition ideals are frequently disregarded in favor of State monopoly administrative action. In our three sectoral case studies, we sought to ascertain whether the enactment of the 2007 Act was having any impact on altering this historical approach?

In order to conduct the case studies for the purpose of observing the evolving elements of the State's industrial policy and whether the 2007 Act's protection-of-competition stance had any impact on the State's traditional approach, three sectors were selected for analysis in different regions in China: the filling station sector in *Beijing*, *Guangzhou*[53] and *Cangzhou*[54]; the fixed-broadband sector in *Beijing*, *Cangzhou* and *Jimo*[55]; and the steel sector in *Hebei province*. These sectors were chosen because they have a history of intervention which has continued past the adoption of the 2007 Act. Research for this field exercise was carried out by way of semi-structured interviews conducted in several cities across China, and additionally surveys were also conducted in the filling station industry case study.[56] The objective was to obtain factual data, and examine the genuine attitudes of SOEs and privately-owned SMEs to the public interest and the 2007 Act.

Separately, we also interviewed leading professors on a series of questions based around whether the 2007 Act provides sufficient protection for privately-owned SMEs against encroachment or restriction by SOEs and administrative agencies of their economic activities?[57] Chinese anti-monopoly enforcement agency staff were not interviewed

52. After practicing a "Planned Economy Model" for more than 30 years from 1952, starting in 1978 China spent many years transforming into the "Market Economy Model". The Central Government asserted that the State should pay more attention to market mechanisms and the competitive order: XIAOJING ZHANG & XIN CHANG, THE LOGIC OF ECONOMIC REFORM IN CHINA (2016).

53. *Guangzhou* (广州), is the capital of *Guangdong Province* (广东省). It is the largest city in the south-eastern part of China, with a population of some 14.04 million people, and covers a total area of 7,434 square kilometres.

54. *Cangzhou* (沧州) city in north-eastern part China, in *Hebei Province* (河北省), has a population of 7.37 million people and covers an area of 14,000 square kilometres.

55. *Jimo* (即墨) is a county-level city in the north-eastern part of China, in *Shandong Province* (山东省). This city has 1.2 million people and covers a total area of 1,780 square kilometres.

56. Interviews were semi-structured and surveys were also conducted.

57. In general, these six professors' responses exhibited strong symmetry: their responses can be summarized as follows: (1) The provisions of the 2007 Act in their current form are unable to prevent inappropriate administrative intervention against privately-owned small and medium-sized enterprises

because they could not receive permission to be interviewed, but a number were interviewed informally at conferences, and provided helpful observations.

- **What the Case Studies Show:**

Notwithstanding that the 2007 Act proclaims that *the Anti-Monopoly Law of China 2007* was enacted with the objective of preventing and restraining monopolistic conduct on inter alia "public interest" grounds, our cases studies below will demonstrate that what actually happens is that when the Chinese authorities consider this question in the context of the activities of SOEs in several key industries in China, the meaning of public interest clearly accommodates actions that are *antithetical to the Act's proclaimed competition objectives*, namely "protecting fairness of competition", "enhancing economic efficiency", and "safeguarding the interests of consumers".[58] Examples will be discussed below, emanating from different sectors of the Chinese economy[59], where either mergers or the acquisition of dominance, or anti-competitive market practices, were not only permitted, but actively encouraged to proceed, notwithstanding their detriment to efficiency, consumer welfare or fair competition.[60]

Indeed, these case studies will furnish evidence to demonstrate how SOEs, facilitated by domestic SOE-biased industrial policies[61], have engaged in market practices *which work against the very notion of competition*, to the detriment of both competitors and consumer welfare. In other words, the sectors we examine reveal that SOEs' steps to achieve market

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[hereinafter "SMEs"], which is partially caused by the State's industrial policy; (2) The State's industrial policy is pre-eminent, rather than the 2007 Act; (3) The multi-agency system in China wastes enforcement resources and lacks effective functionality (a response to this: the Chinese Anti-Monopoly Enforcement Agency has been upgraded recently, *see* Chart 2 *infra* note 142).

58. The 2007 Act, art. 1.

59. Filling Stations, Fixed-Broadband and Steel Mills.

60. Our research, set out in the case studies below, finds convincing evidence which leads us to conclude, that the concept is an empty formula in a protection of competition context, i.e., the "public interest" appears to be ineffective when it comes to regulating activities which achieve the advancement or attainment of dominance by SOEs over SMEs in China.

61. The following State policies, known as Plans, apply in the Filling Station, Telecoms and Steel Production sectors and still affect the relevant sectors' structure: (1) *Filling Stations*: Guanyu Qingli Zhengdun Xiaolianyouchang he Guifan Yuanyou Chengpinyou Liutong Zhixu de Yijian (关于清理整顿成品油流通企业和规范成品油流通秩序的实施意见) [On the Liquidating and Restructuring of the Small Oil Refining Factories and Standardizing the Circulation Order of Crude Oil and Petroleum Products] [hereinafter "Order No.38 of 1999"] (promulgated by the SETC, the Ministry of Foreign Trade and Economic Cooperation [hereinafter "MOFTE"], the State Administration for Industry and Commerce [hereinafter "SAIC"], the State Administration of Taxation [hereinafter "SAT"] and the Quality and Technical Supervision Bureau, July 7, 1999, effective July 7, 1999), http://www.mofcom.gov.cn/aarticle/b/d/200304/20030400082182.html; (2) *Telecoms:* Guanyu Guli he Yindao Minjian Ziben Jinyibu Jinru Dianxinye de Shishi Yijian (关于鼓励和引导民间资本进一步进入电信业的实施意见) [Implementing Opinions to Encourage and Guide Further Investment of Private Capital in the Telecommunications Industry] (promulgated by the MIIT of China, June 28, 2012, effective June 28, 2012), http://www.gov.cn/zwgk/2012-06/28/content_2171772.htm; (3) *Steel Industry*: Guangyu Tuijin Gangtie Chanye Jianbing Chongzu Chuzhi Jiangshi Qiye Gongzuo Fang'an (关于推进钢铁产业兼并重组处置僵尸企业工作方案) [Guiding Opinions on Promoting the Merger and Reorganization of the Steel Industry to Mange Zombie Enterprises] (promulgated by the State Council of China, Sept., 2016, effective Sept., 2016), http://www.ocn.com.cn/chanjing/201609/avszt21121311.shtml.

dominance/monopoly by way of exclusionary practices or forced concentration, are *not regarded* as being contrary to the public interest, nor to be regarded as detrimental to economic efficiency, consumer welfare, or competitors. Subjecting the public interest concept to assessment variously against these three criteria in the sectoral case studies, we shall see, that in each instance, the public interest which any one of these three objectives might be assumed to convey, was disregarded, in preference for advancement of SOEs monopolistic or exclusionary behavior. This outcome does seem to be at variance with the common international understanding of the wider public interest concept in the competition regulation context[62], and raises the key question about whether the 2007 Act can ever be effective to protect competition in China.

A. The Filling Station Case Study – The Promotion of Exclusionary Conduct and Unfair Competition

Practices in the gasoline filling station industry in China present an interesting laboratory for undertaking a case study.[63] The concept of fair competition includes the notion that neither the State nor its agencies should engage in unfair competition against private sector competitors. EU Law reflects this in TFEU Article 106[64] when it proclaims that State-appointed services of general economic interest, or revenue producing monopolies, cannot use their State-appointed privileged position to engage in acts that constitute a violation of EU competition law – unless EU competition law's application would prevent them fulfilling the core mission entrusted to them by public law.[65] By comparison, while it

62. In EU national legal systems for example, market behavior of corporations is regulated by traditional competition norms such as consumer welfare, economic efficiency, etc. No longer can market practices or transactions such as mergers be prohibited on national protectionist grounds based on nebulous public interest grounds.

63. This case study was undertaken on *the filling station sector* in *Beijing* (北京), *Guangzhou* (广州) and *Cangzhou* (沧州), three cities of different sizes, all in different provinces. Staff members working in oil refining SOEs were interviewed; questionnaires were designed for privately-owned filling stations in specific areas, in order to examine the reality of their operating conditions as domestic privately-owned filling stations. This gave good insight and better understanding of the attitudes of SOEs and the private operators to "oil shortages" (reductions in supply to filling stations caused by the anti-competitive behavior of upstream oil refining SOEs). The survey of privately-owned filling stations was very useful, revealing some interesting information – First, privately-owned filling stations occupied less than 15% of all filling stations in the survey areas; second, more than half of them have suffered from "oil shortages" since 2008; third, most of them have faced operating challenges arising from the behavior of gasoline SOEs, but most of them still try to remain in the market; fourth, although the State released a policy, 'Gasoline and Chemical Industry 12th Five-Year Development Plan' (2011), to promote the growth of privately-owned filling stations, the private operators were not optimistic that this would bring any genuinely positive change for the private sector.

64. TFEU art. 106. *See* generally, Grith Skovgaard Ølykke & Peter Møllgaard, *What is a service of general economic interest*, 41 E.J.L. & ECON. 205 (2016); Gérard Marćou, *The Impact of EU Law on Local Public Service Provision: Competition and Public Service*, *in* PUBLIC AND SOCIAL SERVICES IN EUROPE: FROM PUBLIC AND MUNICIPAL TO PRIVATE SECTOR PROVISION 13-26 (Hellmut Wollmann, Ivan Koprić & Gérard Marćou eds., 2016).

65. *See* generally, TFEU art. 106 and jurisprudence: Case C-320/91, Corbeau, 1993 E.C.R. I-2533 [hereinafter "*Corbeau*"]; C-260/89, ERT v. DEP, 1991 E.C.R. I-2925; Case C-179/90, Merci Convenzionali Porto di Genova v. Siderurgica Gabriella SpA, 1991 E.C.R. I-5889; Case C-18/88, RTT v. GB-INNO-BM SA, 1991 E.C.R. I-5973 [hereinafter "*RTT*"]. On literature, *see* generally, Grith Skovgaard Ølykke, *Exclusive Rights and State Aid*, 16 E.ST.A.L. 164 (2017); MARKET INTEGRATION AND PUBLIC SERVICE IN THE EU (Marise Cremona ed., 2011); THE EU LAW

could be said that the position of China's SOEs is somewhat less constrained (by virtue of a combined reading of Articles 4, 5 and 7 of the 2007 Act[66]), nevertheless Article 5 of the 2007 Act does require mergers ("concentrations") to occur by means of "fair competition"; and Article 7 prohibits mergers from damaging the interests of consumers by virtue of their dominant position or exclusive appointment.[67] A great example of *how these statutory prohibitions have not been observed in practice* in China can be seen in the way in which, over the last decade, SOEs in China have engaged in anti-competitive practices leading to the mass elimination of privately-owned filling stations in cities around China. This will now be considered.

At least two strategies have been deployed by SOEs in China to eliminate private competition in the filling station industry by the three major oil SOEs (Sinopec, PetroChina and China National Offshore Oil Corp) which can be said to occupy a joint dominant position[68] that is, in EU terms, akin to, a collectively dominant position[69]: *Strategy One* has been the practice of SOEs preventing non-SOE (private) filling stations from being able to react to international oil prices changes on the garage forecourt as promptly as SOE-owned filling stations could (SOE-owned filling stations (unlike their privately-owned competitors) were cushioned against the impact of input price rises via refining subsidies granted to their parent oil refining operation); and *Strategy Two* whereby SOEs restricted oil supplies to private filling stations (creating so-called "oil shortages"), in order to encourage their market exit. What we can say about each of these strategies is that they are antithetical to fair competition; they adversely affect consumer welfare (by elimination of private retail

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OF COMPETITION Ch. 6 (Jonathan Faull & Ali Nikpay, eds., 3d ed. 2014).

66. The 2007 Act, art. 4: The State constitutes and carries out competition rules which accord with the socialist market economy, perfects macro-control, and advances a unified, open, competitive and orderly market system; art. 5: Business operators may, through fair competition or voluntary alliance, concentrate themselves according to law, expand the scope of business operations, and enhance competitiveness. [Authors' note: "business operators" include SOEs]; art. 7: With respect to the industries controlled by the State-owned economy and concerning the lifeline of national economy and national security or the industries implementing exclusive operation and sales according to law, the 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 operate lawfully, be honest and faithful, be strictly self-disciplined, accept social supervision, and shall not damage the interests of consumers by virtue of their dominant or exclusive positions.

67. Additionally, art. 8 of the 2007 Act prohibits the State's administrative organs from abusing their administrative powers to eliminate or restrict competition.

68. By the end of 2017, the number of Sinopec and PetroChina's filling stations is over 53% of all filling stations in China: Angela Huyue Zhang, *The Antitrust Paradox of China Inc.*, 50 N.Y.U. J. INT'L L. & POL. 159 (2017).

69. The notion of collective dominance has been elaborated upon by the EU Courts and EU Commission in TFEU art. 102 cases such as: Joined Cases T-68,77&78/89, Societa Italiana Vetro SpA v. Commission, 1992 E.C.R. II-1403; Joined Cases C-395 & 396/96P, Compagnie Maritime Belge Transports SA v. Commission, 2000 E.C.R. I-1365; Joined Cases T-191&212-214/98, Atlantic Container Line AB and Others v. Commission, 2003 E.C.R. II-3275; Case T-193/02, Laurent Piau v Commission, 2005 E.C.R. II-209; Case T-228/97, Irish Sugar plc v. Commission, 1999 E.C.R. II-2969; and under the EC Merger Regulation: Case T-102/96, Gencor Ltd v. Commission, 1999 E.C.R. II-753; Case T-342/99, Airtours plc v. Commission, 2002 E.C.R. II-2585 [hereinafter "*Airtours*"].

competitors); they are promoting the extension of SOEs' dominance from the production level down to the retail level; and they inhibit the enhancing of efficiency by forcing private owners' market exit. Yet notwithstanding these adverse impacts, the State tolerated this development which can only mean that the public interest is clearly consonant with the enhancing the position of the oil SOEs, to the detriment of consumers and competitors, which is the very antithesis of competition in the classic sense.

- **Casestudy:**

We shall now discuss two case studies to illustrate the impact of these two strategies on competition. The first case study demonstrates *Strategy One* (toleration of discriminatory pricing practices that would not be tolerated in the EU). In the period between 1992-98 there was rapid growth of privately-owned filling stations.[70] However, with the advent of Order No. 38 of 1999[71], the Central Government allowed refined oil prices to float for the first time from June 2000 in accordance with international oil prices to a certain extent.[72] The problem with this mechanism was that when oil prices fell internationally, China's SOEs – because they are also oil importers – could adjust their retail outlets' prices immediately, with consequent benefits for their own filling stations, whereas *privately-owned* filling stations were not permitted to lower their prices to reflect the new lower international price for another ten days,[73] thereby rendering their retail sales' prices at such (higher) prices unattractive to consumers during that critical ten day price-change period. This constitutes *discriminatory pricing*, which would not be tolerated under EU competition jurisprudence.[74] Under EU competition law (TFEU Article 106), publicly owned undertakings or undertaking entrusted with the operation of a service of general economic

70. Between 1992 and 1998, a significant measure of fair competition emerged in the Chinese refined oil retail market because many privately-owned refineries and filling stations came into operation, and refined oil prices partially relied on market mechanisms: *see, e.g.,* Yong Huang, Shan Jiang, Diana Moss & Randy Stutz, *Application of Anti-Monopoly Law in China's Petroleum Sector*, 4 MODERN LAW SCIENCE, CHINA 79 (2011); Shu-Ching Jean Chen, *China's Private Oil Force*, FORBES (Aug. 23, 2017, 05:45pm), https://www.forbes.com/sites/shuchingjeanchen/2017/08/23/chinas-private-oil-force/#678dc7e673da.

71. *See* Order No.38 of 1999, *supra* note 61.

72. Prices were first allowed to float in mid-2000 and a formal mechanism to allow this to be conducted was subsequently adopted in November 2001. Under this mechanism, Chinese refined oil prices could be adjusted when the difference between the global oil market and the domestic oil market lasted for ten days.

73. Guojia Fazhan Gaigewei Guanyu Jinyibu Wanshan Chengpinyou Jiage Xingcheng Jizhi Youguan Wenti de Tongzhi (Fu: Shiyou Jiage Guanli Banfa) (国家发展改革委关于进一步完善成品油价格形成机制有关问题的通知(附：石油价格管理办法)) [Notice of the National Development and Reform Commission on Issues concerning Further Improving the Price Formation Mechanism of Refined Oil (Annex: Administrative Measures for Oil Prices)] (promulgated by the National Development and Reform Commission of China, Jan. 13, 2016, effective Jan. 13, 2016), http://en.pkulaw.cn/display.aspx?cgid=262409&lib=law.

74. Case C-242/95, GT Link A/S Danske Staatsbanen, 1997 E.C.R. I-4449, where a port operator was not permitted to waive port charges for its own downstream ferry operator while continuing to charge such charges to competitor ferry companies; Case C-340/99, TNT Traco v. Poste Italiane, 2001 E.C.R. I-4109 [hereinafter "*TNT Traco*"], where the General Court held that the national postal company could not charge private competitors in the express mail sector fees (to compensate it for business lost to its (normal) next-day delivery postal service) that it does not charge its own express mail subsidiary as well – to do so would constitute discriminatory pricing contrary to TFEU art. 102.

interest would only (for example) be allowed to operate cross-subsidization models if they can show such operational model is necessary in order to enable them to carry out their State-assigned task under the operational conditions set for them by the State[75] *(and crucially)*, in so doing, the EU Court of Justice has made it clear that, in such circumstances, the undertaking cannot charge *discriminatory prices* to private competitors than they charge their own affiliates who compete with the private competitors in the relevant downstream market.[76]

The failure to protect fair competition was exacerbated when the refined oil pricing mechanisms *interacted with* State oil refining subsidies, such subsidies being paid to oil importers, which naturally, are the SOEs. The oil refining subsidies distort fair competition in the gasoline retail market in China because the interaction between the refined oil pricing mechanisms and the oil refining subsidies, promotes the interests of SOEs and SOE-owned filling stations, but not those of the privately-owned filling stations.[77] Again this constitutes discriminatory pricing or cross-subsidization of SOE-affiliated downstream actors (the oil refining SOE's own affiliated filling stations) to the detriment of their private competitors.[78] Few privately-owned filling stations could cope with this loss from within their own resources to the same extent: so much for the protection of fair competition.[79] Instead the "public interest" clearly favored one category of competitor – the SOE-owned filling station retailer – over the privately-owned filling station retailer. No "balancing" of interests has taken place, again demonstrating that the 2007 Act's public interest criterion is simply a way for the State to put its own interest first, with no consideration given to fair competition (distortions caused by the cross-subsidization of SOE-owned filling station affiliates) or consumers interests (reduction in diversity of ownership of filling stations).

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75. *See, e.g.,* provide a universal telephone service – *RTT*, *supra* note 65; a universal postal service – *TNT Traco*, *supra* note 74; provide an international postal service – Joined Cases C-147&148/97, Deutsche Post AG v. Gesellschaft für Zahlungssysteme mbH GZS) and Citicorp Kartenservice GmbH, 2000 E.C.R. I-825.

76. *See Corbeau* and *RTT*, *supra* note 65; *TNT Traco*, *supra* note 74.

77. When import prices of crude oil were allowed float with international oil prices, then when international prices rose, the retail prices that private filling stations had to sell at could not be adjusted upwards for at least ten days (causing all sales to be at a loss for that period, whereas sales (by contrast) by SOE-owned stations were insulated from this loss because their refining parent was able to use State subsidies for refining oil to cushion their retail outlets from the international price rise).

78. By contrast under EU competition law, TFEU art. 106 jurisprudence, the protection of cross-subsidisation is only acceptable where it is necessary to ensure that the appointed undertaking (that is entrusted with the provision of a service of general economic interest) can operate under "economically acceptable conditions" set for it by the State (e.g., provision of a universal service (the entrusted task) to all citizens, at a price that is not related to the actual cost of providing the service to each individual citizen), *but* that does not permit the appointed undertaking to, as part of the provision of that service, to engage in discriminatory pricing in downstream markets that are subject to competition from private operators against the appointed undertaking's own downstream affiliates: *see Corbeau*, *supra* note 65; *TNT Traco*, *supra* note 74.

79. Biao Liu, *Jiayouzhan Zhengduozhan: Yichang Qudao Zhongduan Zhizheng* (*加油站争夺战：一场渠道终端之争*) [*Filling Stations in Battle: Competing for Distribution Channels*], JINAN (济南) TIMES, CHINA, July 31, 2017, at A4; Hui Feng, "*Youjia Wenti" de Falv Guizhi – yi Chanyefa yu Jingzhengfa de Gongneng Zuhe wei Hexin* ("油价问题"的法律规制 – 以产业法与竞争法的功能组合为核心) [*Legal Regulations for China's Oil Prices – Based on Cooperative Functions between Industrial Policy and Competition Law*], 3 FALV KEXUE (法律科学) [SCIENCE OF LAW] 122 (2012).

Strategy Two (targeted reductions in supply) is illustrated by the manner in which unfair competition is tolerated arising from the "oil shortages" which meant that frequently, privately-owned filling stations could not have access to sufficient supplies from the SOE refineries. Periodic "oil shortages" would occur. This in effect constitutes a refusal to supply long-standing customers where orders are in no way out of the ordinary: this would not be tolerated in the European Union.[80] This was made clear by the EU, both in its Communication[81] on the topic as far back as 2009, and also from long-standing Court of Justice jurisprudence. The EU Court of Justice has long held that dominant suppliers using refusal or restriction of supplies to attempt to force an existing customer from the market in order to dominate a downstream or neighboring market, in circumstances where the customer cannot source alternative supplies, is to be condemned as an abuse of dominance.[82] A refusal to supply in such circumstances would be condemned under EU competition law[83], yet it appears to be one that appears not to raise such similar concerns in

80. The restriction of supplies to private competitors by a vertically integrated undertaking, which itself competes against those competitors in a downstream market (retailing), is regarded as a serious abuse by the EU Commission, unless it can be objectively justified: Frances Dethmers & Jonathan Blondeel, *EU Enforcement Policy on Abuse of Dominance: Some Statistics and Facts*, 38 E.C.L. REV. 147 (2017); Damien Geradin & Evi Mattioli, *The Transactionalization of EU Competition Law: A Positive Development?*, 8 J.E. COMP. L. & PRAC. 634, 643 (2017); M. Kellerbauer, *The Commission's New Enforcement Priorities in Applying Article 82 EC to Dominant Companies' Exclusionary Conduct: A Shift Towards a More Economic Approach?*, 31 E.C.L. REV. 175 (2010); Rossella Incardona, *Modernization of Article 82 EC and Refusal to Supply*, 2 E. COMP. J. 337 (2006). See note 83 below for leading CJEU case law on the subject.

81. Commission Guidance on Enforcement Priorities in Applying Article 82 EC [now TFEU art. 102] to abusive exclusionary conduct by dominant undertakings, ¶¶ 75-90, 2009 O.J. (C 45) 2; *see also* Anne Witt, *The Commission's Guidance Paper on Abusive Exclusionary Conduct – More Radical Than it Appears?*, 35 E.L. REV. 214 (2010).

82. Case 27/76, United Brands v. Commission, 1978 E.C.R. 207 [hereinafter "*United Brands*"] where refusal to supply could not be used as a weapon to "discipline" a long-standing customer who was not acting out of the ordinary; Joined Cases 6&7/73, Istituto Chemioterapico Italiano Spa & Commercial Solvents v. Commission, 1974 E.C.R. 223 [hereinafter "*Commercial Solvents*"] where the Court condemned a refusal to supply whose objective was to eliminate a competitor from a downstream market, in circumstances where there were few other suitable alternative sources of supply.

83. The European Court of Justice has elaborated how refusal to supply is abusive when practised by a dominant supplier in the following contexts: (a) elimination of a competitor in a downstream market: *see Commercial Solvents*, *supra* note 82 where the EU Court of Justice condemned a refusal to supply whose objective was to eliminate a competitor from a downstream market, in circumstances where there were few, if any, other suitable alternative sources of supply; (b) elimination of a competitor unless they gain access to key infrastructure when no other substitutes possible: Case C 7/97, Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs-Und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG, ECLI:EU:C:1998:569 (1998) where the Court of Justice held that a refusal to supply access to the dominant player's nationwide delivery infrastructure would be abusive where (1) the refusal would likely eliminate all competition in the market, in particular from the person requesting access; (2) there is no objective justification for the refusal; (3) having access to the infrastructure must be essential to the competitor continuing in business; and (4) there must be no other possible substitute for such access; (c) insistence on not sharing the subject of intellectual property rights is ordinarily not abusive, yet the EU courts have held it can become abusive where the refusal to share the subject of intellectual property rights prevents the emergence of a new product for which there is consumer demand: *see* Joined Cases C-241&242/91P, RTE & ITP v Commission, 1995 E.C.R. I-743 which held that refusal to supply access to the subject of an IP right is abusive (1) where refusal eliminates all competition from a competitor seeking to supply a new product for which there is consumer demand (which the IP owner did not itself produce); (2) in circumstances where the refusal would eliminate all competition in that market; and (3) where the refusal

China, notwithstanding the provisions of the 2007 Act.[84] Such activity, were it to occur in the EU would be condemned under EU competition law because it could lead to a number of prohibited outcomes: (1) consumer harm (rising prices or reduced sources of supply[85]); or (2) elimination of effective competition in downstream markets (i.e., the removal of competitive constraint arising from the consequent elimination of private competitors in the downstream filling station market[86]); or (3) the refusal to supply could lead to private operators losing customers and going out of business due to inability to meet consumer demand arising from reduced supplies, thereby allowing the dominant supplier to eliminate all effective competition from the downstream retail market.[87] By contrast, the Chinese authorities do not appear to regard see such outcomes posing a threat to the public interest requirement set out in the 2007 Act.

B. The Telecoms Case Study – Inhibiting Fair Competition and Consumer Welfare: Margin Squeezing and Inhibiting Competitors' Market Access

What has occurred in the Chinese telecoms market since the mid-1990s demonstrates that the recent literature is currently in either a state of denial or confusion, and that the 2007 Act competition principles are not being adhered to in the regulation of the market. The authors' make this observation because the argument that the "public interest" equates to the balancing of the State's interest in economic modernization, with the simultaneous attainment of consumer welfare, is prevalent in China's competition literature[88], *yet* the State's *actions* (taken purportedly in pursuit of advancing consumer welfare) often conflict with, and indeed negate, the "public interest" of promoting consumer welfare and fair competition as shall now be highlighted in the telecoms market.[89]

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cannot be justified by objective considerations. In Case T-201/04, Microsoft v Commission, ECLI:EU:T:2007:289 (2007) the (then) EU Court of First Instance (since retitled the General Court of the EU) held that refusal to supply the subject of an IP right can be abusive where it prevents competition in a neighbouring market; further the Court held that the refusal does not have to eliminate all competition, but merely risk the elimination of effective competition, in order for it to be abusive (and in 2012 the Court of Justice rejected Microsoft's appeal against the Court of First Instance's 2007 judgment).

84. Art. 6 prohibits the abuse of a dominant position.

85. Condemned by the CJEU (then the ECJ) in *Commercial Solvents*, *supra* note 82.

86. Condemned by the European Commission in Case IV/32.279 – BBI/Boosey and Hawkes (Interim Measures), Comm'n Decision, 1987 O.J. (L 286) 36.

87. Condemned by the CJEU (then the ECJ) in *United Brands*, *supra* note 82. *See* further Commission Guidance on Enforcement Priorities in Applying Article 82 EC [now TFEU art. 102] to abusive exclusionary conduct by dominant undertakings, ¶¶ 75-90, 2009 O.J. (C 45) 2.

88. *See, e.g.,* Liyang Hou, *When Competition Law Meets Telecom Regulation: The Chinese Context*, 31 C.L.S. REV. 689 (2015); Chun Liu, *Building the Next Information Superhighway: A Critical Analysis of China's Recent National Broadband Plan*, 39 COMMUNICATIONS OF A. INFO. SYSTEMS 176, 181 (2016).

89. *The telecom network access and broadband competition sector* was examined in three cities of varying sizes, *Beijing* (北京), *Cangzhou* (沧州) and *Jimo* (即墨) where China Telecom and China Unicom dominate the network and downstream markets. Focus was placed on the question of ease of allowing network interoperability, and the attractiveness or otherwise of network access terms for private competitors in the fixed-broadband market. Interviews were sought with telecommunications SOEs and privately-owned fixed-broadband operators in these cities, However, this met with some unexpected difficulties. First, privately-owned fixed-broadband operators operating in the survey areas did not wish to participate. Second,

The modernization process of the Chinese telecommunications industry presents an excellent example. Two massive SOEs (China Telecom and China Unicom) form a duopoly in the domestic fixed-broadband (telecommunications) market. Private competitors cannot access their networks on attractive terms. The inevitable outcome has not been the promotion of competition between service providers (to thereby advance the 2007 Act's fair competition and consumer welfare objectives), *but instead* what has happened is that the duopoly has taken advantage of their incumbent dominant position to offer unattractive access terms, and segment the market in order to inhibit the emergence of competition, with consequent adverse impact, for both fair competition and consumer welfare.[90]

To exacerbate matters, the two telecom SOEs are permitted to control broadband access terms, and so without legal consequence, can restrict market entry by new competitors by depriving them of sufficiently attractive access terms. This means that new potential competitors who might seek to enter the broadband market are deterred, hence negating fair competition, and also negating the benefits for consumer welfare that flow from competition between suppliers.

The European Union, by contrast, takes a directly opposite approach.[91] In a series of cases over the last decade (e.g., C-208/08P, *Deutche Telekom v. Commission*, 2010; Case T-336/07, Te*lefonica and Telefonica de Espana v. Commission*, 2012; and Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, 2011[92]) the EU courts have condemned

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meaningful data could only be extracted from the SOEs in *Cangzhou* (沧州) and *Jimo* (即墨), but what was extracted makes for very uncomfortable reading from a competition perspective. In these two cities, telecoms SOEs accounted for more than 90% of the market share in the local fixed-broadband retail market, without achieving "network interoperability" in residential broadband. For local privately-owned fixed-broadband operators, the only way to enter this market was to purchase network usage rights from the local branches of the dominant telecoms SOEs. However, hardly any local branches of SOEs wished to sell *any part* of their fixed-broadband facilities.

90. In 2011 the NDRC (National Development and Reform Commission) announced that China Telecom and Unicom accounted for 90% of China's broadband business. Consumer welfare in the sector has not advanced. This will be shortly considered in more detail below. Angela Huyue Zhang, *The Role of Media in Antitrust: Evidence from China*, 41 FORDHAM INT'L L.J. 473, 475 (2017).

91. RICHARD FEASEY & MARTIN CAVE, POLICY TOWARDS COMPETITION IN HIGH-SPEED BROADBAND IN EUROPE, IN AN AGE OF VERTICAL AND HORIZONTAL INTEGRATION AND OLIGOPOLIES 13-31 (Centre on Regulation in Europe (CERRE), 20 February 2017); P. Ibanez Colomo, *Exclusionary Discrimination under Article 102 TFEU*, 51 COMM. MKT. L. REV. 141 (2014).

92. In Case C-208/08P, Deutche Telekom v. Commission, 2010 E.C.R. I-955 [hereinafter "*Deutche Telekom*"] (affirming the General Court ruling in Case T-271/03, Deutche Telekom v. Commission, 2008 E.C.R. II-477) the Court of Justice upheld the Commission Decision condemning Deutche Telkom for "margin squeezing" its competitors in Germany for access to the local loop, while charging lower prices to its own retail end-user customers. As a consequence, this was inhibiting the emergence of competitors, as it meant they would trade at a loss *even if* they were an efficient competitor, hence the practice was condemned as abusive. Other judgments that took a similar approach include the *Telfonica* Judgment, upholding the Commission's fine of 152m euros in *Telefonica* (Case T-336/07, Telefonica and Telfonica de Espana v. Commission, 2012 E.C.R. I-172 [hereinafter "*Telefonica*"] upheld by the Court of Justice in 2014 in Case C-295/12P, Telefonica SA v. Commission, 2014 E.C.R. I-2062). Also *see* Case C-52/09, Konkurrensverket v. TeliaSonera Sverige AB, 2011 E.C.R. I-527 [hereinafter "*Konkurrensverket*"] where the Court of Justice emphasized that unfair access pricing offered to competitors by a network incumbent is an abuse of dominance because it has the potential to drive them from the market: the Court emphasized that the pricing practice does not have to have achieved the desired result (market exclusion) before it can be deemed to be abusive, and added that in order for it not to

practices by network incumbents which inhibited fair competition and harmed consumers by abusing their incumbent position, by offering unattractive wholesale access terms to broadband competitors (while offering lower prices to their own customers), thereby restricting the development of competition in downstream markets. As a consequence, where network owners, who have an obligation to supply access, do so on unfavorable terms, then that will be condemned by the EU authorities as constituting an abusive practice, and can lead to huge fines.[93]

This is in direct contrast to the position in China, as the case study about to be discussed shall reveal a classic example of where similar practices had *no such consequences* for the dominant duopoly involved, notwithstanding that their exclusionary activity effectively has inhibited the emergence of any significant private competition in the residential broadband market in China. In this circumstance, the promotion of fair competition, market efficiency and consumer welfare cannot be said to be uppermost in the minds of the Chinese regulator: instead the public interest that triumphed was the protection of the duopoly from private competition.

- **Casestudy**:

In 2011 the National Development and Reform Commission (hereinafter, "NDRC") opened an investigation into allegations[94] that China Unicom and Telecom were: (1) abusing their dominant position to create differential pricing (i.e., charging different prices to different customers without objective justification); (2) refusing to facilitate "network interoperability" in the Chinese fixed-broadband market; and (3) maintaining high-level access costs with a low level internet speed, much to the dissatisfaction of consumers.[95] The NDRC investigated the anti-competitive conduct of these two SOEs in 2011[96], and the outcome does not bode well for the protection of competition in China.[97]

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be abusive, it should not make competitors, penetration of the market any more difficult. *See* further David Bailey, *The New Frontiers of Article 102 TFEU: Antitrust Imperialism or Judicious Intervention?*, 6 J. ANTITRUST ENFORCEMENT 25, 31 (2018); Annalies Azzopardi, *No Abuse Is An Island: The Case of Margin Squeeze*, 13 E. COMP. J. 228 (2017); Niamh Dunne, *Margin Squeeze: Theory, Practice, Policy, Part I and II*, 33 E.C.L. REV. 29 & 61 (2012).

93. *e.g.,* the EU Commission imposed a fine of 152m euros on Telefonica in *Telefonica*, *supra* note 92 for margin squeezing its competitors in Spain.

94. In 2011, two large-scale telecommunication SOEs, namely China Telecom and China Unicom, faced an anti-monopoly probe: *Anti-Monopoly Probe into Telecom Giants Confirmed*, CHINA DAILY (Nov. 9, 2011, 15:28 PM), http://www.chinadaily.com.cn/business/2011-11/09/content_14066568.htm; Alexandr Svetlicinii, *Private Litigation under China's Anti-Monopoly Law: Empirical Evidence and Procedural Developments*, 7 KLRI J.L. & LEG. 163, 177 (2017). It was alleged, inter alia, that the duopoly was charging differential fees contrary to the provisions of the Telecommunications Regulations of China 2016, and the 2007 Act.

95. *See* Zhang, *supra* note 90.

96. Chun Liu, *An Evaluation of China's Evolving Broadband Policy: AN Ecosystem's Perspective*, 41 TELECOMM. POL'Y. 1 (2017); Thomas K. Cheng, *Competition and the State in China*, *in* COMPETITION AND THE STATE 170 (Thomas K. Cheng, Ioannis Lianos & D. Daniel Sokol eds., 2014).

97. Xingyu Yan, *The Jurisdictional Delimitation in the Chinese Anti-Monopoly Law Public Enforcement Regime: The Inevitable Overstepping of Authority and the Implications*, 6 J. ANTITRUST ENFORCEMENT 123, 144-5 (2018); Xiaoye Wang & Adrian Emch, *Five Years of Implementation of China's Anti-Monopoly Law –*

The NDRC initially proposed fines[98] for violation of the 2007 Act, but did not address the network interoperability problem[99], nor the detriment for consumers of the high-price low-speed broadband service. What the NDRC did do was ostensibly attempt to introduce competition to the sector, by giving was a small slice of the fixed-broadband market to China Broadcasting Network (*another SOE*, established in 2014)[100], heralding it as an opportunity to introduce competition by way of "triple-play interoperability" of telecommunications networks, radio networks and Internet convergence.[101] However, in reality this inadequate level of intervention has not boosted competition. The outcome is that this government-initiated probe has, first, enhanced the position of the two incumbent SOE duopolists (by not enhancing "network interoperability" for non-SOEs); and, second, it has not enhanced consumer welfare by requiring the lowering of entry barriers for others who could supply improved quality broadband service or lower prices for consumers. In other words, no steps were taken to prohibit the duopoly's practices, such as prohibiting *the charging of different prices to different customers*, *or prohibiting the offering of network access only on unattractive terms*, both of which are essential in order to promote fair competition by privately-owned fixed-broadband operators. Neither was achieved. The market is growing, but the competition is not.[102]

Achievements and Challenges, 1 J. ANTITRUST ENFORCEMENT 247, 258-9 & 266 (2013).

98. China Unicom and Telecom faced fines of up to 10% of their annual revenues from Internet services (up to RMB 1 billion Yuan (EUR 100m approx.)). However, the NDRC did not eventually impose fines because in 2014 China Telecom and Unicom submitted that (1) they had implemented a settlement-free peer sharing agreement since 2013, and (2) they had nearly tripled the interconnection capacity for fixed-broadband all over the country. Although the NDRC was satisfied with the above outcome, there was much criticism of the outcome because, between 2011 and 2014 the reduction in the price for terminal access for fixed-broadband (30% reduction) was still not as significant as was expected, and furthermore, the problem of high-priced low-speed fixed-broadband services was not adequately addressed. The settlement-free peering agreement did not guarantee full "network interoperability" in the fixed-broadband sector, because it *only* benefited telecoms SOEs rather than privately-owned broadband operators; and commitments made under the 2007 Act did not compensate for the damage caused by the anti-competitive behavior of China Unicom and Telecom: *see, e.g.,* Zhang, *supra* note 18; WENDY NG, THE POLITICAL ECONOMY OF COMPETITION LAW IN CHINA 254 (2018).

99. Even though network interoperability of the *broadband mainline* (the Chinese public network infrastructure offering network access to broadband suppliers) was 'encouraged' since 2012, telecommunications SOEs showed no enthusiasm for enhancing interoperability for residential broadband network providers. Without network interoperability, potential fixed-broadband competitors were easily constrained from entering the market, while existing fixed-broadband competitors were unable to obtain sufficient stable network bandwidth from telecoms SOEs. For example, in *Cangzhou* (沧州) (in *Hebei Province* (河北省)) there were only two non-State-owned operators which had only a combined total of less than 10% of the local market; Telecom *Cangzhou* (沧州), the *broadband mainline* supplier to these two non-State-owned operators, was unwilling to assist them with favorable access terms because the SOEs wished to protect their own interests: Jing Wang, *Fostering or Suppression? Reluctance of Chinese Privately- Owned Fixed Broadband Operators to Enter the Market from the Perspective of the Anti-Monopoly Law of China 2007*, PROCEEDINGS OF THE 6TH ANNUAL INT'L CONFERENCE ON L., REG. & PUBLIC POL'Y, June 2017, http://dx.doi.org/10.5176/2251-3809_LRPP17.12.

100. Feifei Fan, *CBN Gets Nod As 4th Telecom Operator*, CHINA DAILY (May 6, 2016, 07:50 AM), http://www.chinadaily.com.cn/business/2016-05/06/content_25098535.htm.

101. Fei Jiang, Kuo Huang & Yanran Sun, *The Triple-Network Convergence in China: Implementation and Challenges*, *in* MEDIA CONVERGENCE AND DECONVERGENCE 305-328 (Sergio Sparviero, Corinna Peil & Gabriele Balbi eds., 2017).

102. In 2013, the Central Government of China decided to further promote non-State-owned operators to

In this regard, the NDRC decision has critical weaknesses that are to the detriment of both consumer welfare and fair competition: *vis consumer welfare*, expensive low-speed broadband services remain; and *vis fair competition,* private competitors cannot take advantage of the NDRC decision because it only gave preference to *another SOE* to enter the market. It did not lower entry barriers for private operators.[103] It did not restore competition: the third SOE has not made the market substantially more competitive than it was before.[104] Consumer welfare has not been safeguarded, nor has fair competition been promoted or protected[105]: the interoperability obstacles remain, and private competitors cannot take advantage of the NDRC decision in this case.[106]

Thus, we conclude that the above presents a clear example of where the nationwide-sanctioned duopoly is not regarded as a threat to *consumer welfare* (when it clearly is); and that *promoting fair competition* is not taken seriously (as is evidenced by the toleration of the duopoly, which clearly restricted network access for competitors).

Crucially, this decision highlights how the idea that the public interest is a kind of "balancing mechanism" between competing interests[107], *is clearly an illusion*. It seems clear that the "public interest" can clearly tolerate a situation whereby the attainment of dominance and all of the attendant dangers for consumer welfare and fair competition that comes with that, is not seen as contrary to the State's interests (and not apparently to the "public interest" either) particularly when, as this case shows, restriction of *unfair* competition (exclusionary conduct leading to severe restriction of competition in the downstream market) is not seen as a problem for regulators to take effective measures to solve. This is a clear example of where, SOE action, taken in the name of consumer welfare

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operate fixed-broadband services in order to promote competition. However, because telecommunication SOEs still dominated the market, without granting genuine network interoperability, high entry barriers continued to militate against the prospects of non-State-owned fixed-broadband operators. The following example is instructive: in *Cangzhou* (沧州) (in *Hebei Province* (河北省)) only one non-State-owned operator operated in 2015, with a mere 0.18% local market share, at a time when China Telecom's fixed-broadband users increased by more than 10-million across China by 2017 (10% growth): *Duibi Sanda Yunyingshang "Qimo Chengjidan", Cong Shujuzhong Kan Pinsha* (*对比三大运营商"期末成绩单"，从数据中看拼杀*) [*Compare the 3 Major Operators' "Final Transcripts": see the competition from the Data*], PEOPLE'S POST & TELEGRAPH, CHINA (Feb. 1, 2018, 08:24 AM), http://tc.people.com.cn/n1/2018/0201/c183008-29799490.html.

103. Unlike the path taken in similar cases in the EU by the European Commission and EU courts: *see, e.g., Deutche Telekom*; *Telefonica; Konkurrensverket*, *supra* note 92.

104. Attempts by the State to make the market more competitive continue to be thwarted by SOEs, e.g., although the State initiated the *Mixed-Ownership Reform* (announced by Official Government news agency *China Ventures into SOE Mixed-Ownership Reform*, XINHUA (July 11, 2014, 16:24 PM), http://www.chinadaily.com.cn/business/2014-07/11/content_17733005.htm) announcing that private funds would be permitted to invest in telecom SOEs, however, the opposite actually occurred: only the massive Chinese private enterprises (listed immediately below) were allowed make these substantial investments into the incumbent telecom SOEs, and this in turn encouraged the creation of vertical super-monopolies between major incumbent SOE broadband provider (China Unicom), the leading Chinese search engine (Baidu (百度)), the largest online retail platform (Alibaba (阿里巴巴)), and the largest social media provider (Tencent (腾讯)): *see* Yu Zheng, *China's State-Owned Enterprise Mixed Ownership Reform*, 4 E. ASIAN POL'Y. 39 (2014).

105. Contrast with the approach taken by the EU in Cases discussed above: *see e.g., Telefonica*; *Konkurrensverket*; *Deutche Telekom*, *supra* note 92.

106. *See supra* note 98 as to why private competitors could not take advantage of the NDRC ruling.

107. Wang, *supra* note 11, 351-2.

(allowing duopoly), in fact achieves the opposite outcome (lack of competition, to the detriment of consumer welfare, and additionally promotion of unfair competition *vis-a-vis* potential new market entrants), retarding efficiency, innovation and consumer welfare.

C. The Steel Mills Rationalization Program – Economic Efficiency and Fair Competition: An Example of Where Neither Objective was Achieved

The case study on the steel industry[108] presents an immediate contrast with the European position on the question of the public interest and *forced mergers*. In China, notwithstanding that the 2007 Act[109] refers to concentrations occurring by way of *fair competition or voluntary alliance*, the State's administrative agencies[110] frequently bring about *forced* mergers of otherwise profitable corporations, irrespective of the adverse impact on competition (forced consolidation eliminating competitors); irrespective of the impact on consumers (potentially rising prices due to elimination of competing sources of supply); and irrespective of the fact that the strategy (to reduce sector output) failed! The 2007 Act's proclamation in its opening Article that it seeks to protect and safeguard the interests of consumers (e.g., from rising prices); market efficiency (e.g., maintaining sources of supply); and particularly the maintenance of fair competition, appears to have had no role to play in preventing such forced mergers. Instead, in China, State policy to promote industry rationalization (in pursuit of China's ambition to dominate the global steel industry) trumped all the above-mentioned competition considerations, demonstrating that the 2007 Act's public interest objective has nothing to do with maintaining competition in the marketplace. The contrast with the EU approach is instructive.[111]

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108. In the steel sector, the focus was on "administrative mergers" (what we call "forced mergers") to assess the extent to which private competitors had been wiped out by State-sanctioned takeovers. The 'Steel Industry Revitalization Plan' (2009) proposed a government-driven merger regime to enhance the industry's concentration, and the 'Guiding Opinions on Promoting the Merger and Reorganization of the Steel Industry to Mange Zombie Enterprises' (2016), *supra* note 61 streamlined the process. Chinese mainstream media reported that mergers under this Plan were *"administrative mergers"*. For example, Bao Steel and Wu Steel were merged in 2016 to secure its position as the world's second biggest steel maker: *see* Luo Guoping, Taozi Wei & Ke Dawei, *Steel Giants Forge Merger as China Moves to Strengthen State Sector*, CAIXIN, CHINA (Sept. 28, 2018, 09:01 PM), https://www.caixinglobal.com/2018-09-28/steel-giants-forge-merger-as-china-moves-to-strengthen-state-sector-101331148.html. We examined instances of where State policy has been to approve steel takeovers in pursuit of a policy to seriously reduce the number of private producers, *irrespective of the fact that they were both productive and profitable*, which naturally resulted in an increase in market concentration, and consequently, less competition. *Hebei province* (河北省) (Northeast China, near Beijing (北京), population 74.70 million people) was selected for the study: CHINA STATISTICAL YEARBOOK 2017 2-6 (China Statistics Press 2017); Gangtie Chanye Tiaozheng he Zhenxing Guihua (钢铁产业调整和振兴规划) [Steel Industry Revitalization Plan] (promulgated by the SETC, Mar. 20, 2009, effective Mar. 20, 2009), http://www.gov.cn/zwgk/2009-03/20/content_1264318.htm.

109. Art. 5: Business operators may, through fair competition or voluntary alliance, concentrate themselves according to law, expand the scope of business operations, and enhance competitiveness.

110. *e.g.,* The State-owned Assets Supervision and Administration Commission of the State Council [hereinafter "SASAC"].

111. Case M.8444 – ArcelorMittal/Ilva, Comm'n Decision, 2018 O.J. (C 351) 6, is an illustrative recent example showing how the EU regulatory authorities were very conscious of the potential impact on consumers

By contrast to China, in the EU mergers of private corporations *cannot be forced, particularly so of profitable corporations against their wishes*. In the EU, the only situation where a State is permitted to interfere with a proposed merger is where it either (1) poses a distinct competition threat in that State's market (Article 9 MCR)[112] or (2) where it can legitimately invoke "legitimate interests" within the meaning of Article 21(4) MCR to take action against some non-competition aspect of the merger, i.e., to protect plurality of the media, public security or prudential rules.[113] But in neither case are the State's powers exercisable for the purpose of *forcing a merger*, rather it is to interfere with a proposed merger's terms on either distinct local competition or prudential grounds, so, in neither case can the EU or its constituent Member States *force* mergers of private corporations to occur in pursuit of EU/State economic objectives or industrial policy.[114]

Here the contrast with China is immediate: forced mergers in Europe would be seen as *unfair competition*, only to be tolerated where a grave economic meltdown was imminent.[115] Whereas in China forced mergers of otherwise profitable and healthily trading

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and competition when they examined the proposed takeover by Arcelor Mittal of its second largest competitor, Ilva. The Commission cleared the takeover, but conditional on Arcelor divesting key production assets in no less than 6 EU countries in order to assure the Commission that prices would not rise after the merger, as competitors would acquire these productive assets under a proposed remedy package. Arcelor is the largest producer in Europe of flat carbon steel. It was acquiring Ilva, the largest single-site carbon flat carbon steel plant in Europe. The Commission confirmed it was happy to accept the commitments as it would ensure that prices did not rise for consumers in the hot rolled steel, cold rolled steel and galvanised steel markets following the implementation of the disinvestments: the Commission cleared ArcelorMittal's acquisition of Ilva, subject to the above conditions.

112. The EC Merger Regulation, art. 9, provides inter alia that the EU Commission may refer a proposed concentration notified to it, back to the competent authorities of a Member State concerned, in the following circumstances, where either (1) the concentration threatens to significantly affect competition in a market within that Member State, which presents all the characteristics of a distinct market, or (2) the concentration affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market. The Member State concerned may take only the measures strictly necessary to safeguard or restore effective competition in the State market concerned. *See* generally, Philipp Werner, Serge Clerckx & Henry de la Barre, *Commission Expansionism in EU Merger Control – Fact and Fiction*, 9 J.E. COMP. L. & PRAC. 133-45 (2018); Parker & Majumdar, *supra* note 39.

113. *e.g.,* making sure that unfit persons do not become media owners, or owners of key institutions, such as banks, e.g., criminals.

114. This should not be confused with the failing firm defence where in exceptional circumstances the EU can approve mergers of failing firms provided that certain strict criteria are satisfied: in *Aerospatiale-Alenia / De Havilland*, *supra* note 29, the EU Commission did not allow a take-over of a failing firm to go through on the basis that although it was a failing firm, the proposed merger would threaten competition in the market for turboprop commuter aircraft in the EU. However, the Commission relaxed its position somewhat in the subsequent Decision *Kali-Salz/MdK/Treuhand*, *supra* note 29, specifying three criteria must be satisfied: (1) The failing firm will be in imminent danger of being forced out of the market because of financial difficulties if not taken over by another undertaking; (2) There is no less anti-competitive alternative than the proposed takeover, and (3) In the absence of a merger, the assets of the failing firm would inevitably exit the market.

115. There can be highly exceptional circumstances where the State may seek to invoke emergency powers or nationalize private corporations to protect against vital strategic economic collapse or systemic market failure (e.g., the 2008 U.K. banking crisis, whereby Lloyds TSB Bank was induced to take over the failing HBOS bank (which faced a liquidity meltdown) in return for Government promises not to scrutinize the takeover deal from a competition perspective, but examples such as that apart, EU States cannot force mergers to occur.

corporations are tolerated, in fact they are actively pursued by the State[116] notwithstanding that they may reduce competition; lead to increased prices; not achieve desired efficiencies; or promote unfair competition: all demonstrating that fair competition, market participants' welfare and consumer welfare all yield to the public interest in pursuing State industrial policy to reduce the number of players in the industry.

The case study below will show that there was no "balancing act'" between the different interests: clearly the public interest and the State's interest (forcing industry consolidation to further China's dominance ambitions in the global steel sector) were one and the same. The Steel Mills Revitalization Program (since 2005) provides an excellent example of where the elimination of many private competitors from the steel milling industry occurred over a seven-year period; it was directly attributable to State action, which favored steel milling SOEs, and yet did not achieve the hoped-for efficiencies.

With the advent of the 'Steel Industry Revitalization Plan' (2009), small and medium-scale mills numbering in the thousands, were either closed down or forced to merge with SOEs all across China over a short period (by 2016). Those not forcibly closed were subsumed into large-scale SOE enterprises, not voluntarily, but rather by way of "administrative intervention" (i.e., forced mergers).[117] The outcome of this rationalization was to rapidly reduce the number of Steel mills operating across China from over 7,000 to less than 900 by 2016, with the ultimate objective to ultimately have no more than 200 enterprises operating in the sector by 2025.[118]

- **Casestudy:**

We will look at the following example, first to demonstrate how unscientific this process was, but also record how it has failed to enhance economic efficiency, because the sector output has in fact declined, a chief reason being that competitors were forced to exit the market, by means of either by forced mergers or forced closures, in either case as a result of administrative intervention.

The *provincial merger* regime in *Hebei province*[119] provides a useful example of a

116. The starting point of the Ministry of Industry and Information Technology [hereinafter "MIIT"]'s 'Guiding Opinions on Promoting the Merger and Reorganization of the Steel Industry to Mange Zombie Enterprises' (2016) can be traced back to 2005 when 'Policies for the Development of the Iron and Steel Industry' (2005) was launched, followed by the 'Steel Industry Revitalization Plan' (2009) 4 years later.

117. The 'Guiding Opinions on Promoting the Merger and Reorganization of the Steel Industry to Manage Zombie Enterprises' (2016) set the following targets (1) steel industrial concentration achieving 60% by 2025; (2) the output of the top ten large steel undertakings to rise to 60-70% of total Chinese steel output by 2025; (3) the formation of three or four steel groups, with a production capacity of 80 million tonnes; (4) the formation of six to eight steel groups with a production capacity of 40 million tonnes: *see* Liang Qian, *2018 nian Gangtieye Jianbing Chongzu jiang Jiasu* (*2018 年钢铁业兼并重组将加速*) [*M&A in the Steel Industry Will Be Accelerate in 2018*], ECON. INFO. DAILY, Jan. 10, 2018, at A2.

118. 'The Chinese Steel Industry Revitalization Plan' was launched in 2009, whereby by way of so-called administrative intervention, the State "encouraged" steel companies to either shut down or merge. This policy continued with the 'Guiding Opinions on Promoting the Merger and Reorganization of the Steel Industry to Mange Zombie Enterprises' (2016), *ibid*.

119. *Hebei province* (河北省), the biggest steel-producing region in China, covers a total area of 187,700 square kilometres. In *Hebei province* (河北省) the local government guided the forced merger / closures

government-led merger process that had poor outcomes. Because of the lack of familiarity with industry knowledge, the local provincial government often acts both as a driver and as a manipulator of forced mergers, taking merger decisions subjectively, without taking market conditions into account.[120] Mill operators' views are frequently ignored.[121] In 2010, the local *Hebei province* government proposed that 88 local steel enterprises (both State-owned and privately-owned operators) should be restructured, by way of either forced closure or forced mergers, so that there would be only approximately 15 enterprises operating in that province by the end of 2015.[122] What this meant was that, apart from two steel SOEs (namely *Hebei* Iron & Steel Group Company Limited (HBIS) and *Shougang* Group), the province's privately-owned steel enterprises had to compete for the remaining 13 places, otherwise, their fate was either a forced merger or forced closure.[123] In order to protect their own interests, privately-owned steel enterprises in the local market often undertook non-violent resistance in order to interfere with the smooth progress of their government-led mergers.[124] The actual outcome of these forced mergers made two steel SOEs (*Hebei* Steel and *Shougang* Group larger[125], but not necessarily stronger, because following the plan's implementation, those private operators that managed to remain active[126] in the market continued to produce the majority of the sector's output in *Hebei province*![127] Faced with this somewhat embarrassing situation, the Central Government re-intensified efforts to force mergers in China's steel industry in 2018[128]: with the result

process along the lines set out in the 'Steel Industry Revitalization Plan' (2009) and the subsequent '12th Five-Year Plan (2011-15) for China's Iron and Steel Industry'.

120. In particular, each provincial government makes proposals on steel mergers within its own province and then submits each proposal individually to the MIIT. If the local government receives a positive reply, the proposed merger proceeds.

121. Privately-owned steel enterprises would prefer to reduce government intervention: Pengfei Gao, *Hebeisheng Gangtie Qiye Lianhe Chongzu Moshi Fenxi* (*河北省钢铁企业联合重组模式分析*) [*Analysis on the Restructuring Mode of Steel Enterprises in Hebei Province*], 10 CHINA STEEL 14, 17 (2011)

122. This unachievable aim for 2015 has been set as a new target for *Hebei province* (河北省) to achieve by 2020: Qian Liang, *Gangtieye Xinyibo Jianbing Chongzu Jiangqi* (*钢铁业新一波兼并重组将启*) [*New Wave of M&A's in the Steel Industry Coming*], JINGJI CANKAO BAO (经济参考报) [ECONOMIC INFORMATION DAILY], Sept. 28, 2018, at A1.

123. *ibid*.

124. Ruimin Zhai, *Hebei Gangtie Jituan Zhudong Tichu Jieyue* (*河北钢铁集团主动提出解约*) [*Hebei Steel Group Proposes to Terminate Previously-Announced Merger Agreements*], 454 Wangyi Caijing (网易财经) [NETEASE] (2014), http://money.163.com/special/view454/.

125. Qian Liang, *2018 nian Gangtieye Jianbing Chongzu Jiangjiasu* (*2018 年钢铁业兼并重组将加速*) [*2018 Sees the Speeding up of M&A's in the Steel Industry*], JINGJI CANKAO BAO (经济参考报) [ECONOMIC INFORMATION DAILY], Jan. 10, 2018, at A2.

126. By now, private operators in *Hebei province* (河北省) have reduced to around 100 in number, and this number will be reduced to 60 by 2020 by way of forced merger: ibid.

127. For example, in the first ten months of 2017, in *Hebei* province, privately-owned steel enterprises actually produced 70.64% of local steel production, demonstrating they continue to be very successful compared to their SOE counterparts: *Qianshiyue Hebei Gangqi Yingli chao 520yi, Zuigao Dungang Yingli jin 900yuan* (*前 10 月河北钢企盈利超 520 亿 最高吨钢盈利近 900 元*) [*Hebei Steel Enterprises' Profit over 5,200 million, Highest Profit for One Ton of Steel nearly 900 Yuan RMB*], SINA, CHINA (Dec. 15, 2017, 16:22 PM), http://finance.sina.com.cn/money/future/indu/2017-12-15/doc-ifypsvkp3612303.shtml.

128. Z.C. Li and R.Q. Dong, *BaoWu Hebing Yixiaobu Xinban Gnagtieye Zhenghe Luxiantu Chushui* (*宝武合并一小步新版钢铁业整合路线图出水*) [*One Small Step for Bao Steel and Wu Steel, One Big Step for the New*

that over one-third of the total number of privately-owned steel enterprises in China have now undergone forced mergers.[129] Accordingly, gradual withdrawal of privately-owned steel enterprises will become an inevitable result in the Chinese steel sector.

So, from this example (and there are many others[130]), it can be readily observed that "administrative mergers" are the method favored to achieve the State's consolidation requirements in the steel sector. This approach does not treat different types of interests in either a fair-minded manner (e.g., due to the forced mergers of otherwise productive and profitable companies, as seen in the *Hebei province* between 2009-16); nor does it take the practical demands of the Chinese steel industry into account.

The State's policy seems to be the sole basis driving consolidation in this industry, with no role played by competition law and policy, which ought to regulate competition in the steel market, protect the "public interest" and restrict potentially anti-competitive steel mergers. The restructuring of steel enterprises arose *from administrative intervention, not market forces*. And most surprisingly, the forced merger process did not help the steel industry to improve its *productivity or efficiency*, notwithstanding its increased industrial concentration, because after over 10 years of intensive restructuring starting in 2005, we observe that *both the output of the top ten largest steel enterprises* and *the output of the top four largest steel enterprises has failed to show improvement* during the restructuring period (see Chart 1 below).[131] Such a trend illustrates that administrative intervention

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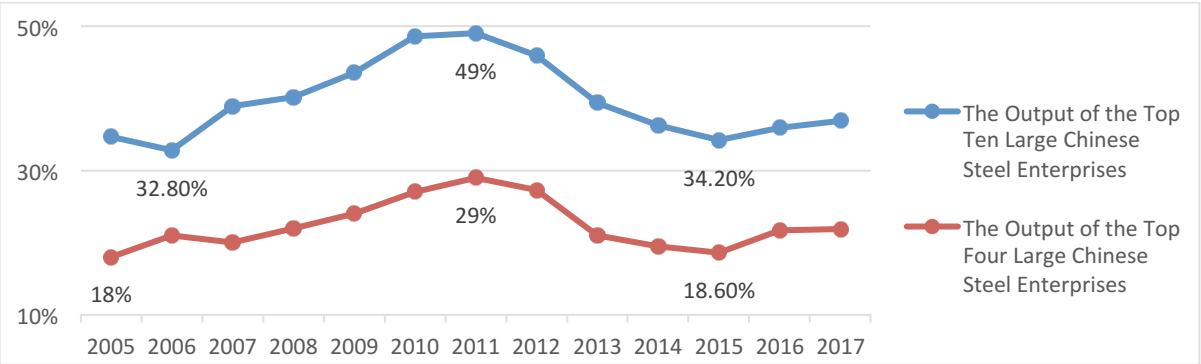
Version of the Steel Industry Integration Roadmap], JINGJI GUANCHA (经济观察) [ECONOMIC OBSERVER], Sept. 24, 2016, at 1 & 5.

129. Qian Liang, *Gangqi jiang Kaiqi Xinyilun Daguimo Chongzu* (*钢企将开启新一轮大规模重组*) [*A New Round of Large-Scale Restructuring of Steel Companies is Coming*], JINGJI CANKAO BAO (经济参考报) [ECONOMIC INFORMATION DAILY], Apr. 4, 2018, at A2.

130. Forced mergers have been taking place all around the country, e.g., as per the targets set by the MIIT's 'Guiding Opinions on Promoting the Merger and Reorganization of the Steel Industry to Manage Zombie Enterprises' (2016). In addition, in 2008, an administrative merger (i.e., a forced merger) took place in *Shandong* province between two large-scale steel enterprises, *Shandong* Steel (an SOE with heavy losses) and *Rizhao* Steel (a profitable privately-owned enterprise). It was mandated and supervised by the local provincial government. Without regard for the 2007 Act, the loss-making SOE gained possession of 67% of the new merged company, and therefore controlled its destiny: *see* Jason Dean, Andrew Browne & Shai Oster, *China 'State Capitalism' Sparks Backlash*, THE WALL STREET J. (ASIA), Nov. 17, 2010, at 1 & 16; *Crowded Out*, CHINA ECONOMIC REVIEW (Oct. 15, 2012), https://chinaeconomicreview.com/crowded-out/.

131. **Chart 1: The Output of the Top Ten and the Top Four Largest Chinese Steel Enterprises (out of the China's entire annual steel output between 2005-17)**



Sources: This chart was compiled by the authors arising from the combination of data from multiple sources for particular years as follows: ZHONGGUO CHANYE ZHENGCE BIANDONG QUSHI SHIZHENG YANJIU 2000-2010 (中国产业

promoting industrial concentration, did not achieve the 2009 Plan's target for the top ten largest steel enterprises to produce 60% of the country's entire steel production output by 2015.[132]

Finally, although outside the scope of this article, it is worth noting that the primacy of State industrial policy over competition law adherence, is most amply demonstrated by the fact that these forced mergers are proceeding without any detailed decisions being published to demonstrate how they are regarded *as being compatible* with the 2007 Act.[133] Under the 2007 Act only *merger prohibition* decisions or *conditional clearance* decisions are required to be published[134], i.e., a published decision is produced when a merger is either prohibited[135] or conditionally cleared subject to conditions[136], yet those that are cleared

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政策变动趋势实证研究) [THE EMPIRICAL ANALYSIS OF CHINESE INDUSTRY POLICY CHANGING TENDENCY 2000-2010] 176 (Ying Zhao & Yueju Ni eds., 2012); Gangtie Gongye "Shierwu" Fazhan Guihua (钢铁工业"十二五"发展规划) [The 12th Five-Year Plan (2011-15) for China's Iron and Steel Industry] (promulgated by the MIIT of China, Oct. 24, 2011, effective Oct. 24, 2011); Y.J. Li, *2011nian Woguo Gangtie Jizhongdu Zhuangkuang Fenxi Zongjie* (*2011 年我国钢铁集中度状况分析总结*) [*Analysis of Concentration Ratio of the Chinese Steel Industry in 2011*], 5 MONTHLY STATISTICS OF THE CHINESE STEEL INDUSTRY 27 (2012); Q. Xia, *Gangtie Hangye Yinglai Jianbing Chongzu Haoshiji* (*钢铁行业迎来兼并重组好时机*) [*Good Time for Mergers and Acquisitions in the Chinese Steel Industry*], ZHENGQUAN RIBAO (证券日报) [SECURITIES DAILY], Jan. 25, 2013, at A3; B.B. Song, *Jizhongdu Busheng Fanjiang, Gangtieye Jianbing Chongzu jiang Tisu* (*集中度不升反降, 钢铁业兼并重组将提速*) [*Concentration Drops, Mergers and Acquisitions in the Steel Industry to Grow Faster*], CHINA INDUSTRY NEWS, Apr.15, 2014, at A3; Liang, *supra* note 129; *2014nian Gangtie Hangye Yunxing Qingkuang he 2015nian Zhanwang* (*2014 年钢铁行业运行情况和 2015 年展望*) [*Operating Conditions of the Chinese Steel Industry in 2014 and 2015 Outlook*], MIIT, CHINA (Feb. 5, 2015), http://finance.china.com.cn/roll/20150205/2948051.shtml; *2016nian Gangtie Hangye Yunxing Qingkuang he 2017nian Zhanwang* (*2016 年钢铁行业运行情况和 2017 年展望*) [*Operating Conditions of the Chinese Steel Industry in 2016 and 2017 Outlook*], MIIT, CHINA (Mar. 1, 2017), http://www.miit.gov.cn/n1146285/n1146352/n3054355/n3057569/n3057572/c5505058/content.html.

132. However, notwithstanding this, the State's steel intervention program presses ahead, with intensive restructuring ongoing in this sector: Liang, *supra* note 129.

133. In reality, not all domestic mergers are notified to the Ministry of Commerce of China [hereinafter "MOFCOM"]: Deborah J. Healey & Zhang Chenying, *Bank Mergers in China: What Role for Competition?*, 12 ASIAN J. COMP. L. 81 (2017); Wang & Emch, *supra* note 97, 267.

134. Art. 30, 2007 Act: SAMR's 2020 proposals to reform the 2007 Act propose no change to this state of affairs: *see* Draft (for public comment) on the Amendment of the Anti-Monopoly Law 2007 of China (2020), art. 35. A minor is proposed in the case of conditional clearance decisions in a separate SAMR 2020 merger reform proposal document, where it is proposed that, where SAMR decides to change or remove conditions in a conditional clearance decision, it shall publicize such decision to the general public in a timely manner: *see* SAMR, Jingyingzhe Jizhong Shencha Zanxing Guiding (Zhengqiu Yijiangao) (经营者集中审查暂行规定(征求意见稿)) [Draft (for comment) on Interim Provisions on the Review of Concentrations of Business Operators] (7 January 2020), art. 68: http://www.moj.gov.cn/news/content/2020-01/07/zlk_3239243.html). At the time of writing, these proposals have not been legislated into Law.

135. *See, e.g.*, MOFCOM Announcement (2009) No.22 prohibiting Coca-Cola's proposed acquisition of Huiyuan on account of concerns that Coca-Cola would leverage its dominance in the carbonated soft drinks market in China, to the juice market in China. Notwithstanding the scale of this transaction, the decision is not very detailed, less than ten pages in length (often typically MOFCOM Announcements are less than five pages long); another example would be the MOFCOM Announcement (2014) No. 46 prohibiting the proposed concentration of undertakings by Maersk, MSC and CMA CGM seeking to establish a network centre (this was only a four-page decision, and is the most recent prohibition decision that can be found either on the MOFCOM website (prior to 2019), or on the SAMR website (2019 onwards): the authors are aware that since 2014 only a relatively small number of mergers have been prohibited by MOFCOM, yet only one of those prohibition decisions could be found on the MOFCOM official website: *see Shangwubu Gonggao 2014nian Di46hao [商务部公告 2014 年第 46 号] (MOFCOM Announcement (2014) No. 46)*, MOFCOM, CHINA (June. 17,

annually *without conditions* are many times more numerous *and are not accompanied by any form of published decision* other than to announce the fact of their clearance[137], so we cannot say whether those mergers that were approved outright have ever been assessed on competition compatibility grounds under the 2007 Act at all, when clearly the 2007 Act requires that they should be.

D. Summary Conclusions from the Case Studies

The above three case studies illuminate how across different industries in China, the toleration of anti-competitive practices (clearly contrary to the 2007 Act) is widespread and embedded in both State industrial policy and in the market practices of SOEs. Whether margin-squeezing; or refusals to supply without objective justification; or the leveraging of upstream dominance to acquire downstream dominance; or discriminatory pricing; or forced acquisition of profitable companies: all such practices are frequent features of the legal and business landscape in China, undertaken in the name of industrial policy and economic development. The protection of consumers; the promotion of market efficiency; or the prohibition of unfair competitive practices, do not appear to be key objectives of China's antitrust regulators. None of these values appear to pose inhibitory obstacles to the adoption of anti-competitive State policies or the pursuit of anti-competitive activities by SOEs. The only conclusion that can be reached therefore, is that the public interest concept in the 2007 Act equates to the State's pursuit of industrial policy, it is the superior norm over traditional competition values as we know them in the EU, and that norm thereby relegates the protection of competition norms to the sideline.

2014), http://fldj.mofcom.gov.cn/article/ztxx/201406/20140600628586.shtml, and no prohibition decisions could be found on SAMR's official website: *see* http://www.samr.gov.cn/fldj/tzgg/ftjpz/index.html.

136. e.g., *see* MOFCOM Announcement (2009) No.28 regarding the conditional approval of Mitsubishi Rayon's acquisition of Lucite-International; MOFCOM Announcement (2013) No.58 regarding the conditional approval of the acquisition of Gambro AB by Baxter International Inc.; MOFCOM Announcement (2018) No.31 regarding the conditional approval of Bayer Aktiengesrllschaft, Kwa Investment Co.'s acquisition of Monsanto Company.

137. e.g., in 2018, 444 mergers have been approved, without being accompanied by any form of published decision other than the fact that the merger has been approved; by comparison over the same period there were four conditional clearances. In 2017 there were 325 clearance decisions, none accompanied by any published competition clearance assessment or indeed any form of published decision; seven were approved subject to conditions, 12 were either prohibited or withdrawn, with the second category (conditional clearances in 2017) accompanied by a published decision in each case (though, as we point out in *supra* note 135, none of the prohibition decisions in the year of 2017 were published, and indeed not for other years either apart from the odd one or two): *2017nian Shangwu Gongzuo Nianzhong Zongshu Zhijiu* (*2017 年商务工作年终综述之九*) [*The 2017 Year-End Business Work Review No 9*], MOFCOM (Jan. 9, 2018, 10:23 AM), http://www.mofcom.gov.cn/article/zt_swxs/lanmunine/201801/20180102696433.shtml; Zhengping Gu & Sihui Sun, *2017nian Zhongguo Fanlongduan Zhifa Huigu yu Zhanwang* (2017 年中国反垄断执法回顾与展望) [*Retrospect and Prospects for China's Anti-Monopoly Law Enforcement in 2017*], ANJIE LAW FIRM, CHINA (Jan. 9, 2018), http://www.anjielaw.com/uploads/soft/180109/1-1P1091I616.pdf; Zhengping Gu & Sihui Sun, *2018 nian Zhongguo Fanlongduan Zhifa Huigu – Jingyingzhe Jizhong* (*2018 年中国反垄断执法回顾——经营者集中篇*) [*Retrospect for China's Anti-Monopoly Law Enforcement in 2018 – Merger*] , ANJIE LAW FIRM, CHINA (Jan. 11, 2019), http://www.anjielaw.com/uploads/soft/190115/1-1Z115112Q8.pdf.

IV. LEGAL AND RESOURCE REFORMS TO ENABLE ANTI-MONOPOLY ENFORCEMENT TO BECOME EFFECTIVE AGAINST ANTI-COMPETITIVE SOE PRACTICES IN CHINA

Before concluding we shall give consideration to three essential steps that are needed in order to enhance the role and effectiveness of China's anti-monopoly agency, the reformed ministerial-level SAMR (State Administration of Market Regulation) ministry (2018) which oversees the newly established sub-ministerial level enforcement agency the National Anti-Monopoly Agency. This new structure was designed to replace three other sub-ministerial agencies, all of whom were regulated under different ministerial level authorities, and who, although charged with conducting various aspects of competition enforcement, were often largely absent from the theatre of enforcement operations.[138]

Although on its face the 2007 Act prohibits SOEs and administrative agencies from abusing their exclusive rights or dominant position to restrict or eliminate competition in the market[139], we have shown above that the reality is otherwise: SOEs and government industrial policies often advance anti-competitive objectives. Absent the taking of effective punitive measures, the 2007 Act's prohibition of anti-competitive behavior therefore remains an empty threat in the minds of China's SOEs.[140] Therefore, a number of specific regulations and resource capacity-building measures are called for, in order to restrain the excessive exercise of administrative powers: otherwise respect for anti-monopoly compliance and enforcement of the 2007 Act will not strengthen. The proposed measures, in strengthening anti-monopoly compliance, could additionally have the knock-on effect of strengthening the rule of law in China, by elevating respect for competition to the level of a superior norm, superior to administrative intervention, and this will in turn enhance the position of privately-owned SMEs in China, which have long sought equal parity with SOEs in China.[141]

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138 . The three sub-ministerial-level anti-monopoly enforcement agencies were namely, the Anti-Monopoly Bureau supervised by the ministerial-level MOFCOM; the Price Supervision and Anti-Monopoly Bureau, supervised by the ministerial-level NDRC, and the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau, supervised by the ministerial-level SAIC. In theory, the Anti-Monopoly Bureau (MOFCOM) was supposed to focus mainly on merger control; the Price Supervision and Anti-Monopoly Bureau (NDRC) to focus on tackling price-related anticompetitive conduct; and the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau (SAIC) was to focus on breaking up administrative monopolies. However, in practice, these three agencies' powers frequently overlapped, and conflicts frequently occurred in the enforcement process. Faced with this multi-agency overlap in China's anti-monopoly enforcement system (aggravated by deficiencies such as the lack of relevant judicial interpretations, lack of sufficient properly qualified professionals; and the multi-agency operating system's failure to combat competition infractions by administrative monopolies) China announced in early 2018 that the three anti-monopoly enforcement agencies listed above would be merged into one new super-regulator, the National Anti-Monopoly Agency (which under the supervision of the SAMR) came into effect in May 2018: Yuan Lin and Shaohua Sun, *Fanlongduan Jigou 'Sanheyi' Quanmian Tisu* (*反垄断机构'三合一'全面提速*) [*China Speeding Up the Process of Merging Three Anti-Monopoly Agencies into One*], JINGJI CANKAO BAO (经济参考报) [ECONOMIC INFORMATION DAILY], May 25, 2018, at A1-3.

139. Arts. 7, 32-37 & 50. *See*, William E. Kovacic, *Competition Policy and State-Owned Enterprises in China*, 16 WORLD T.R . 693, 695 (2017).

140. Wang, *supra* note 18.

141. Jinbiao Xia, *Yi "Jingzheng Zhongli" Yingzao Guoqi, Minqi Gongping Jingzheng Huanjing* (*以"竞争中立"*

A. Regulation Enhancement

The specific regulations the authors' propose should be promulgated by the new anti-monopoly enforcement agency, SAMR[142], and should be directed towards achieving at least three objectives: (1) first, a normative objective (to make it explicit that Competition is a superior norm over administrative intervention), reversing the status quo whereby the pursuit of industrial policy currently trumps respect for competition ideals; (2) second, reporting channels should be established, to allow lower level administrative agencies[143] and market participants[144] to have safe channels made available to them to inform competition regulators about competition infringements perpetrated by SOEs, or where high-level State bodies apply and pursue non-competition-compliant industrial policies; and (3) third, strengthening enforcement powers and reform of the legislative text of the 2007 Act, removing provisions that currently allow the State to bypass competition in favor of the so-called public interest. We shall now elaborate each of these three sets of proposals in turn:

1. Normative Elevation Reform

The *first* regulation required would demand a reversal of current norms: one that recognizes the supremacy of the 2007 Act, *such that* the abuse of special or exclusive rights by dominant SOEs and administrative agencies would be clearly regarded as illegal. This would mean that competition law compliance would become a superior norm in China, and thereby align Chinese competition enforcement with the EU approach (where competition is not trumped by industrial policy). In order to bring this about, two steps are needed, in

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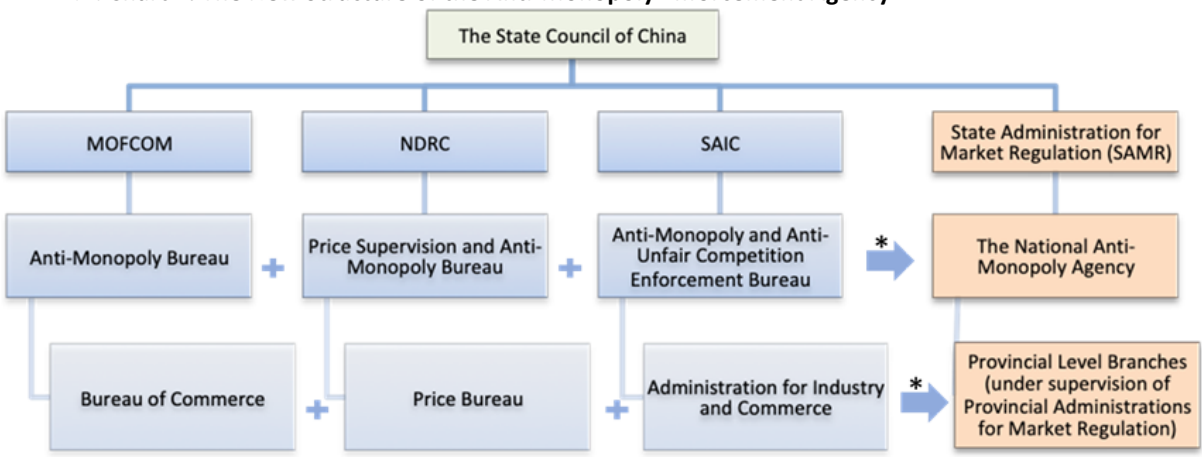
营造国企、民企公平竞争环境) [*Create a Level Playing Field for SOEs and Private Enterprises via Competitive Neutrality*], ZHONGGUO JINGJI SHIBAO (中国经济时报) [CHINA ECONOMIC TIMES], Nov. 8, 2018, at 6.

142. **Chart 2: The New Structure of the Anti-Monopoly Enforcement Agency**



The first three columns in the chart above (reading from left to right) illustrate how the anti-monopoly multi-agency system in China was structured prior to its reorganization in April 2018, while the column on the extreme right illustrates the new updated anti-monopoly enforcement structure since April 2018.

* The arrows indicate the transfer of powers and functions from the bodies in cols 1-3, to the corresponding-level body in the extreme right col 4.

143. Lower level administrative agencies denote provincial level administrative agencies or (even lower) city or town-level agencies.

144. Market participants in this context include both SOEs and SMEs.

order to change the current dynamic between industrial policy-makers and competition compliance / enforcement:

The first step is a structural one – SAMR (the State Administration for Market Regulation Ministry) should be positioned higher in the State hierarchy so that it can order the key higher-level agencies with industrial policy-issuing powers (such as the Ministry of Industry and Information Technology (hereinafter, "MIIT"), the NDRC,[145] and the Ministry of Commerce (hereinafter, "MOFCOM"), not to issue industrial policy in China that conflicts with the 2007 Act.

Accordingly, SAMR should be given statutory power to examine and assess, *for competition-compatibility*, any existing or new proposed industrial polices, including the power to call for their amendment or abandonment, prior to their adoption; and, where the supremacy of the 2007 Act would be likely to be negatively affected by any industrial policies, then SAMR should be empowered to stop the release or implementation of such policy. This would be the ideal situation. However, even if SAMR's role is not elevated in the fashion proposed, the current situation could yet be significantly improved by the fact that the three anti-monopoly enforcement agencies (Anti-Monopoly Bureau; Price Supervision and Anti-Monopoly Bureau; Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau) have recently (2018) all been subsumed into the new National Anti-Monopoly Agency, which will itself fall under the direct supervision of SAMR. This structural change could enable the desired norm reversal to take place, because under the new 2018 structural reforms SAMR does not see the merging of anti-monopoly enforcement agencies (named above) as having any industrial policy making capacity once they come under its sphere of influence, following their recent extraction from the orbit of their former higher level supervisors (the industrial policy-makers, MOFCOM, NDRC and MIIT[146]). However, only time will tell whether these recently integrated agencies will now allow industrial policy to take a back-seat and instead focus on the implementation of competition enforcement as their primary mission.[147]

The second step needed to achieve the first objective of norm change, is a veto-power. A veto-power should be granted to lower-level administrative agencies (e.g., provincial or city level bodies) to allow them invoke the 2007 Act as the basis for refusing to implement industrial policies which violate the terms of the 2007 Act. This currently does not happen because there is no explicit statutory veto power that lower level agencies could point to, giving them explicit authority not to follow non-competition compliant policies or anti-competition administrative interventions.

2. Reporting Channels Reforms

145. *See* Svetiev & Wang, *supra* note 14, 194.

146. Peter J. Wang, Yizhe Zhang & Qiang Xue, *The Integration of Chinese Anti-Monopoly Enforcement Authorities*, 17 THE ANTITRUST SOURCE 1, 5-6 (2018).

147. *ibid*; F. Deng, *Fanlongduan "Sanheyi"* (*反垄断"三合一"*) [*Merging Three Anti-Monopoly Agencies into One*], CAIJING MAGAZINE, CHINA, Aug. 6, 2018, at 113-115.

The *second* set of regulations proposed would be regulations to establish clear reporting channels, on a statutory basis, to help both lower level administrative agencies and SMEs as follows: simultaneously, with reform initiative (1) above, lower-level administrative agencies should be granted legal powers to report instances of higher level agencies' failure to respect (or recognize) the jurisdiction of the Chinese anti-monopoly enforcement agencies. Analogous to developments in the EU, direct reporting channels[148] for lower-level administrative agencies ought to be established by SAMR in order to help it prohibit the adoption or implementation of anti-competitive industrial policies. In addition, the same rights and protection for lower-level administrative agencies should also be conferred on SOEs, with the aim of allowing them to deflect from having to comply with or carry out attempted anti-competitive administrative interventions.

This *second* set of specific regulations would also provide market participants, such as privately-owned SMEs (with mechanisms to report) and the right to refuse to engage with, anti-competitive administrative interventions instigated by SOEs, or anti-competitive industrial policies launched by both higher-level and lower-level administrative agencies.[149] Given the fact that the majority of privately-owned SMEs are local enterprises, it may be difficult for them to report unfair situations directly to the newly established SAMR in Beijing. However, conferring on them the ability to report administrative contraventions to the new local (provincial) anti-monopoly enforcement agencies which came into being in Autumn 2018, namely the new Provincial Administrations for Market Regulation (hereinafter, "PAMR")[150], could be helpful and effective. In other words, the PAMRs should be the first contact point for local SMEs to report any unfair situations, as PAMRs will be best placed to deal with the competition concerns of locally based SMEs.

3. Law Reform

The *third* objective of specific regulations would be regulations designed to first, embolden anti-monopoly enforcement agencies to halt SOE competition infringements so that the objectives set by Article 7 of the 2007 Act[151] are not frustrated, and second, a clear legislative prohibition prohibiting administrative agencies abusing their special or exclusive rights to intervene in privately-owned SMEs operating in traditional State-controlled industries, or industries into which SOEs wish to gain control. Despite the fact that article 7

148. Examples of reporting channels in the EU and the UK can be found at: *Reporting Anti-Competitive Behaviour*, EUROPEAN COMMISSION (Sept. 28, 2018), https://europa.eu/youreurope/business/selling-in-eu/competition-between-businesses/anti-competitive-behaviour/index_en.htm; Tell the CMA about A Competition or Market Problem, UK GOVERNMENT (Jan. 14, 2016), https://www.gov.uk/guidance/tell-the-cma-about-a-competition-or-market-problem.

149. Xueliang Sha, *Fanlongduan Zhuanjia Huangyong: Yanjiu Luoshi Jingzheng Zhongli Zhidu, Wending Shichang Xinxin* (*反垄断专家黄勇：研究落实竞争中立制度，稳定市场信心*) [*Anti-Monopoly Law Expert Huang Yong: Study and Implementation in Competitive Neutrality, Promoting Stability and Confidence in the Market*], BEIJING NEWS (Nov. 11, 2018, 17:36 PM), http://www.bjnews.com.cn/news/2018/11/11/520320.html; Zhanjiang Zhang & Baiding Wu, *Governing China's Administrative Monopolies Under the Anti-Monopoly Law: A Ten-Year Review (2008-2018) and Beyond*, 15 J. COMP. L. & ECON. 718 (2019).

150. All provincial PAMRs were established by the end 2019.

151. Kovacic, *supra* note 139; the 2007 Act, art. 7.

(and article 8) of the 2007 Act injuncts SOEs from abusing their dominant position or harming consumers, article 7 is currently understood to create a position of privilege for SOEs in the market (see several such examples in the case studies considered earlier above in Part Three). This legislative change is required (i.e., amendment of the current article 7) because, currently the higher-level corrective measures mechanisms set out in article 51 of the 2007 Act[152] which are designed to rectify lower level non-compliance with the Act, are not being used adequately because in China's civil service culture the bureaucrats (not unlike elsewhere) traditionally tend to shield one another from blame or public scrutiny.[153]

Therefore, it is vital for SAMR to first, call for the aim and scope of article 7 of the 2007 Act to be refocused solely on prohibiting harm to competitors and consumers and remove the current protection it is perceived to grant SOEs who engage in such actions; and second, provide specific sanctions for SOEs and administrative agencies to halt their fostering of anti-competitive practices; and third, start enforcing deterrent effect by making the persons responsible for infringements personally responsible, such as by demotion.[154] If one harks back to the Part Three case studies earlier above, a situation could be foreseen whereby adoption of the forgoing reforms listed immediately above, could lead to a situation developing whereby the number of privately-owned filling stations would be allowed increase again (once discriminatory practices in that sector could be brought to an end); anti-competitive exclusionary incumbent barriers would be removed in the broadband market (which currently inhibit private operators from entering into the fixed-broadband market, to the detriment of consumers and competition); and the pace of "administrative mergers" (for example) in the steel industry should be confined only to those where firms were demonstrably financially unviable, in circumstances where competition would not be threatened.[155]

Finally, it goes without saying, the reference to "the public interest" in article 1 of the 2007 Act should be repealed if the understanding of that term cannot be distinguished from

152. Art. 51 of the 2007 Act: Where any administrative organ or an organization empowered by a law or administrative regulation to administer public affairs abuses its administrative power to eliminate or restrict competition, the superior authority thereof shall order it to make correction and impose punishments on the directly liable person(s)-in-charge and other directly liable persons. The anti-monopoly authority may put forward suggestions on handling according to law to the relevant superior authority. A minor revision to this article has been proposed in art.58 of the SAMR's 2020 "Draft (for public comment) on the Amendment of the Anti-Monopoly Law 2007 of China" reform proposals, which propose that a superior authority should report to SAMR that relevant corrections have been taken by the relevant lower-level administrative organ. However, at the time of writing, SAMR's 2020 proposals have not been legislated into Law.

153. Zhang, *supra* note 18.

154. In Chinese culture, demotion at work would be seen as a very severe (even career-ending) penalty to suffer, and would undoubtedly affect one's prospect of seeking employment elsewhere, hence it is proposed as an effective deterrent.

155. Furthermore, anti-monopoly enforcement agencies would have the right to determine who will gain from the award of compensation arising from the anti-competitive acts of administrative monopoly, with the aim of compensating privately-owned SMEs who have suffered from the consequences of inappropriate administrative intervention. In order to ensure smooth implementation, specific regulations would also be required to provide a detailed compensation calculation mechanism: *see* arts. 46-8 of the 2007 Act for the current inadequate mechanism.

the pursuit of the State's industrial policy. That would be the capstone of the proposed reforms, as its removal would remove "legislative cover" for anti-competitive industrial policy models and inhibit SOEs from actively engaging in blatantly anti-competitive activities. Without this final step, China cannot embrace competition philosophy as a core economic and societal value.

B. Capacity-Enhancement

1. Institutions and Personnel Resources

In addition to the above, both new institutions and personnel resources are needed.[156] First, personnel: new blood needs to be injected into the anti-monopoly enforcement agencies (the SAMR and the PAMRs), by the training or hiring of additional discipline-specific professionals, suitably trained to conduct sophisticated and complex anti-monopoly investigations, with particular experience in combatting unfair practices by administrative monopolies. For example, having sufficiently qualified competition lawyers and in-house expert economists[157], or employing external competition economists and involving them in the investigation process would build anti-monopoly agency understanding of what should be regarded as either fair (or unfair) competition in the market.[158] The courts in China will accommodate such experts: the Judicial Interpretation *Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in Hearing Civil Cases Caused by Monopolistic Conducts [2012] No.5* held that 'parties shall apply to the People's Court to have one or two specialists with relevant knowledge appear in Court to make explanations on specialty issues about the case'.[159]

In addition, it would be useful to allow more anti-monopoly scholars to participate in anti-monopoly investigations, because such scholars may often be more familiar with the

156. Alfonso Lamadrid de Pablo, *Competition Law as Fairness*, 8 J.E. COMP. L. & PRAC. 147 (2017); XUEGUO WEN, YANBEI MENG & CHONGYING GAO, FANLONGDUANFA ZHIXING ZHIDU YANJIU (反垄断法执行制度研究) [RESEARCH ON ANTI-MONOPOLY LAW ENFORCEMENT SYSTEM] 67 (2011).

157. For example, with regard to the first successful case against an administrative monopoly, decided by Guangdong High People's Court in 2015, economics professionals participated in the Court proceedings as *amicus curiae* (friend of the court) to help the Court to understand the complex economic argumenta: *see, e.g.,* Jing Wan, *Fanlongduan Zhifa Liangge "Shouli" Zhangxian Fazhi Jingshen* (*反垄断执法两个"首例"彰显法治精神*) [*The First Two Specific Cases of Anti-Monopoly Enforcement Highlighting the Spirit of the Rule of Law*], FAZHI RIBAO (法制日报) LEGAL DAILY, CHINA, Dec. 24, 2015, at 6; Diarmuid Rossa Phelan, *The Effect of Complexity of Law on Litigation Strategy*, *in* LEGAL STRATEGIES: HOW CORPORATIONS USE LAW TO IMPROVE PERFORMANCE 335, 341 (Antoine Masson & Mary J. Shariff eds., 2010) points out that 'the legal system is one which can only be run by professionals'.

158. Ariel Ezrachi & Maurice E. Stucke, *The Fight Over Antitrust's Soul*, 9 J.E. COMP. L. & PRAC. 1 (2018); Giorgio Monti, *EC Competition Law: The Dominance of Economic Analysis?*, *in* THE DEVELOPMENT OF COMPETITION LAW: GLOBAL PERSPECTIVES 3, 4 (Roger Zäch, Andreas Heinemann & Andreas Kellerhals eds., 2010); *Guidelines on the Application of Article 81(3) of the Treaty [now TFEU art. 101(3)]*, 2004 O.J. (C 101) 2.21.

159. Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in Hearing Civil Cases Caused by Monopolistic Conducts [2012] No. 5 (promulgated by the 1539th meeting of the Judicial Committee of the Supreme People's Court, May 3, 2012, effective June 1, 2012), art. 12.

2007 Act than are current anti-monopoly enforcement staff.[160] Hence, training professionals[161], as well as introducing more economists[162] and legal scholars to participate in the work of China's anti-monopoly enforcement agencies, could help bring about a more professional and less discretionary perspective to the work of the anti-monopoly agencies, particularly when faced with cases involving administrative monopolies' unlawful interference with competition in the marketplace.[163] These potential reforms for Chinese competition practice should be carried out with the aim of reducing administrative influence and increasing the independence of anti-monopoly enforcement.[164]

2. Institutional Reform

So far as institutional reform is concerned, two key institutions are missing from the current China legal framework: an independent competition authority and a dedicated competition law court.

a An independent competition enforcement authority

Based on the EU experience, *an independent competition enforcement authority* is essential.[165] The 2018 institutional reform changes described above – combining the previously three Chinese anti-monopoly enforcement agencies into one (the SAMR) – does not bring about the creation of *a truly independent* competition authority, because the new Anti-Monopoly Agency (supervised by SAMR) has been positioned at the original administrative level (the sub-ministerial-level) formerly occupied by its forebears.[166] Accordingly, the new agency will come up against resistance when it seeks to challenge

160. Although Chinese anti-monopoly enforcers and Anti-Monopoly Law scholars have had many opportunities to exchange views, e.g. academic conferences, scholars rarely consulted by those conducting anti-monopoly investigations.

161. de Pablo, *supra* note 156; ZHONGGUO JINGZHENG ZHENGCE YU FALV YANJIU BAOGAO (2013NIAN) (中国竞争政策与法律研究报告(2013 年)) [REPORT ON COMPETITION LAW AND POLICY OF CHINA 2013] 69-71 (Competition Policy and Law Commission of China Society for World Trade Organization Studies ed., Law Press, China, 2013).

162. Marcel Boyer, Thomas W. Ross & Ralph A. Winter, *The Rise of Economics in Competition Policy: A Canadian Perspective*, 50 CAN. J. ECON. 1489 (2017); DONG ZHAO, FANLONGDUAN MINSHI ZHENGJU ZHIDU YANJIU (反垄断民事证据制度研究) [RESEARCH ON CIVIL ANTI-MONOPOLY EVIDENCE SYSTEM] 4, 16-8 & 58-62 (2014).

163. The reason is that cooperation would close the loopholes in China's anti-monopoly enforcement approach, as Monti mentioned in the area of EU Competition Law 'no economist would ever have written Article 81 and 82 [TFEU arts. 101 & 102] in the way that they have been': Giorgio Monti, *EC Competition Law: The Dominance of Economic Analysis?*, *in* THE DEVELOPMENT OF COMPETITION LAW: GLOBAL PERSPECTIVES 3, 13 & 21-3 (Roger Zäch, Andreas Heinemann & Andreas Kellerhals eds., 2010); Weiying Zhang, Chongxin Shenshi Fanlongduan Zhengce de Jingjixue Jichu (重新审视反垄断政策的经济学基础) [Re-Examining the Economic Basis of Anti-Monopoly Policies], COMP. POL'Y, DIGITAL ECON. & INNOVATION CONFERENCE (Nov. 30, 2017, 12:26 AM), http://opinion.caixin.com/2017-11-30/101178184.html.

164. Wang, *supra* note 18.

165. Wouter P.J. Wils, *Competition Authorities: Towards More Independence and Prioritisation? – The European Commission's 'ECN' Proposal for a Directive to Empower the Competition Authorities of the Member States to Be More Effective Enforcers*, 2017 PROCEEDINGS OF THE NEW FRONTIERS OF ANTITRUST 8TH INTERNATIONAL CONCURRENCES REVIEW CONFERENCE; Johan W. van de Gronden & Sybe A. de Vries, *Independent Competition Authorities in the EU*, 2 UTRECHT L. REV. 32 (2006).

166. *See* Chart 2, *supra* note 142.

ministerial-level authorities' market interventions, e.g., by MOFCOM or the NDRC.[167] In order to carry out "fair competition review"[168], in a competition-neutral fashion, the new Anti-Monopoly Agency should either be elevated to *above* ministerial level (the most desirable position); or alternatively (though less preferably if this cannot be achieved) the new Anti-Monopoly Agency should be moved out from under the ministerial-level wing of SAMR and become a ministerial-level authority in its own right (admittedly a less strategic position to occupy in the battle between industrial policy application and respect for competition norms, but certainly better that where it is currently positioned, lower in the hierarchy at sub-ministerial level).

b A competition law court

A competition law court is required, which can give *neutral judgments* in cases contesting administrative intervention in China[169], because (1) *competitive neutrality* is the "new creed" promoted by SAMR[170]; (2) Judges of Civil Division and Intellectual Property Tribunal of the People's Court may not yet have the desired level of specialist knowledge required to enable them make sophisticated market assessments or apply sophisticated competition law economic concepts such that their decisions are authoritative and constitute a correct application of competition principles[171]; and (3) the People's Court cannot be regarded as a truly independent authority (when dealing with anti-monopoly lawsuits involving challenges to the deployment of administrative powers[172]) because the

167. Wang, *supra* note 18.

168. Meaning a competition regulator not biased in favor of State priorities, but instead governed only by competition norms: *see* Yong Huang & Baiding Wu, *China's Fair Competition Review: Introduction, Imperfections and Solutions*, 13 COMP. POL'Y INT'L 1 (2017); indeed, in its 2020 reform proposals, SAMR agrees with this suggestion, in that it proposes the State shall establish and implement a fair-competition review system, in order to regulate government administrative actions and prevent industrial policies from restricting competition (Draft (for public comment) on the Amendment of the Anti-Monopoly Law 2007 of China, art. 9).

169. The way how the EU's judicial organ (CJEU and General Court of the EU) works provides a useful model for China to follow: both EU courts follow the rule of law to ensure the supremacy of EU law and respect by both State and non-State actors for the fundamental importance of competition law in the EU: Renato Nazzini, *Level Discrimination and FRAND Commitments Under EU Competition Law*, 40 WORLD COMP. 213 (2017); Thomas von Danwitz, *The Rule of Law in the Recent Jurisprudence of the ECJ*, 37 FORDHAM INT'L L.J. 1311 (2014); Mark A. Pollack, *The Legitimacy of the Court of Justice of the European Union*, *in* LEGITIMACY AND INTERNATIONAL COURTS 143-73 (Harlan Grant Cohen, Nienke Grossman, Andreas Follesdal & Geir Ulfstein eds., 2018); Michael Blauberger & Susanne K. Schmidt, *The European Court of Justice and its Political Impact*, 40 W. EUR. POL. 907 (2017).

170. Gairong Hu, *Jingzheng Zhongli dui Woguo Guoyou Qiye de Yingxiang ji Fazhi Yingdui* (*竞争中立对我国国有企业的影响及发展应对*) [*The Impact of Competitive Neutrality on SOEs and the Legal Response*], 6 FALV KEXUE (法律科学) [SCIENCE OF LAW] 165 (2014); Xia, *supra* note 141.

171. The judgment of *Qihoo 360 v. Tencent (2013)* (e.g., Tencent (occupied 87.6% market share in the Chinese instant messaging market in 2010) did *not* hold a dominant position in global instant messaging market) clearly indicates that a proper and correct understanding of the concepts of relevant market and dominant position is urgently needed, even in the Supreme Court of China. *See,* Qihu Gongsi yu Tengxun Gongsi Longduan Jiufen Shangsuan (奇虎公司与腾讯公司垄断纠纷上诉案) [Qihoo 360 v. Tencent], 2013 SUP. PEOPLE'S CHINA CIVIL JUDGMENT No. Minsanzhongzi 4/2013, Chinese version available at: http://www.competitionlaw.cn/info/1061/22179.htm.

172. Wang, *supra* note 18; Svetiev & Wang, *supra* note 14, 195; THE POLITICAL ECONOMY OF COMPETITION LAW IN ASIA 96 (Mark Williams ed. 2013).

anti-monopoly lawsuit could turn into a battle for supremacy between administrative intervention and the 2007 Act, hence, an independent competition law court should be established in order to maintain the balance between the interests of the competing groups (consumers, competitors and State) in order to best serve the public interest.

Setting up an independent competition court, modeled on the General Court of the European Union would be a further manifestation of how government influence could be removed from competition regulation. The General Court (for example) on occasion overturns EU Commission competition[173] or merger regulation decisions.[174] It cannot be accused of being a biased adjudicator. Establishing a similar mechanism in China would serve as a further example of how China could demonstrate how its competition-regulating practice could become divorced from State policy: at present, one cannot say this of the People's Court, which is naturally charged with serving the State's interests.

V. CONCLUSION

In seeking to prevent monopolistic conduct, *the Anti-Monopoly Law of China 2007* inter alia claims to safeguard the "public interest". This article has attempted to assess the true meaning of this concept. This is against the background that the concept is undefined in the 2007 Act itself, has not been interpreted in the domestic case law, and there is no consensus as to its meaning in the academic literature. The importance of understanding what the concept means arises because this article has established that the Act's other proclaimed objectives (of protecting consumer welfare, enhancing efficiency and safeguarding fair competition) are merely a paper formula when it comes to the State advancing its industrial policies via the preferential treatment it affords SOEs or via its administrative interventions in the marketplace via administrative authorities, such as provincial governments.

China's approach to the notion of the public interest is totally different from that taken in market economies: in the EU, market behavior between undertakings is regulated based on competition criteria not dissimilar to the aforementioned three criteria (consumer welfare, efficiency, fair competition), and the EU only allows non-competition based criteria, such as "official authority", "social solidarity"[175], or "legitimate interests"[176] to be involved

173. e.g., the Apple Judgment (2020) where the General Court annuled the Commission's decision that Ireland had granted Apple 13 billion euro in unlawful tax advantages: *see* Cases T-778/16 and T-892/16, Ireland and Others v European Commission, ECLI:EU:T:2020:338 (2020); *see also* Case T-13/03, Nintendo and Nintendo of Europe v. Commission, 2009 E.C.R. II-975; Case C-338/00, P. Volkswagen AG v. Commission, 2003 E.C.R. I-9189.

174. *See Airtours*, *supra* note 69.

175. For the case law on "official authority" and "social solidarity" exceptions, *see supra* Part Two.

176. On the concept of legitimate interests (art. 21(4) MCR), see further Parts Two & Three above. For relatively recent examples, see further the UK Enterprise Act 2002, sec. 58, permitting the Secretary of State to prohibit transactions which threaten national security, which was invoked in the examination of the proposed merger between British Aerospace plc. (subsequently re-named BAE Systems) and General Electric, which, although initially opposed, was ultimately approved upon the granting of follow-up remedies: see further, David Reader, *Extending 'National Security' in Merger Control and Investment: A Good Deal for the UK*, 14

only in highly exceptional situations to either modulate certain aspects of a proposed merger or permit certain transactions to proceed in the "public interest". In other words, in the context of national and European competition law, it is relatively rare where such "extra-Competition" criteria are invoked to prevent specific transactions from proceeding in order to protect some vital national or wider public interest that is perceived to be under threat, which competition criteria, on their own, cannot be relied upon to protect.[177]

It has been demonstrated from the analysis in this article that the 2007 Act's "public interest" concept is very different to what we would understand it to be in the EU, and consequently, it was evident that China's toleration of various anti-competitive practices in different commercial sectors that were examined demonstrates how the public interest frequently trumps the other three competition criteria (promoting fair competition between competitors, enhancing efficiency and enhancing consumer welfare) and certainly is not intended to be (solely) a sparingly-used control mechanism for protecting vital national sectors (as is the case in the EU), nor is it a form of balancing mechanism between the interests of consumers, competitors and the State.

Instead, in China the public interest operates to frustrate the attainment of the 2007 Act's competition objectives, which therefore calls into question the legitimacy of the 2007 Act in the first place.[178] Consequently, this article concludes that the concept of public interest is a superior norm in China, and that if this is to be reversed, certain steps are needed in order for the 2007 Act to attain what was intended to be its place, namely that of a superior norm in the China, rather than one that is bypassed at regular intervals by the State's SOEs and administrative agencies.

The case studies that underpin this conclusion all pointed towards this conclusion, with outcomes that could not be tolerated under EU competition law. In the fixed-broadband industry case study, non-State-owned fixed-broadband operators currently suffer high barriers to entry to the SOE-incumbent-dominated market place, hence consumers in China have very limited choice of reasonably priced fast fixed-broadband services.[179] This

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COMP. L. INT'L 35 (2018); Alison Jones & John Davies, *Merger Control and the Public Interest: Balancing EU and National Law in the Protectionist Debate*, 10 EURO. C.J. 453 (2014); Michael Harker, *Cross-Border Mergers in the EU: The Commission v. The Member States*, 3 EURO. C.J. 503, 505 (2007); *Merger between British Aerospace plc. and the Marconi Electronic Systems Business of the General Electric Company plc.*, UK GOVERNMENT (2006), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/518289/baes-marconi-undertakings-2006.pdf. On the takeover of HBOS Bank by Lloyds Bank, see *Anticipated acquisition by Lloyds TSB plc. of HBOS plc.*, OFFICE OF FAIR TRADING (OFT) (Oct. 24 2008) https://assets.publishing.service.gov.uk/media/5592bba440f0b6156400000c/LLloydstsb.pdf_jsessionid_4EBCDA0A4B36535AF8355B90D18E00A2.pdf. Also see British Sky Broadcasting Group plc. v. Competition Commission, 2010 EWCA Civ. 2.

177. *e.g.,* prevent the acquisition of a key piece of national infrastructure by a hostile power or foreign corporation aligned to such power or sensitive technology.

178. ROBERT H. BORK, ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 50 (1978) pointing out that 'antitrust policy cannot be made rational until we are able to give a firm answer to one question: what is the point of the law – what are its goals'? This statement suits the application of the 2007 Act as well. See also Jonathan M. Jacobson, *Another Take on the Relevant Welfare Standard for Antitrust*, 2015 THE ANTITRUST SOURCE 1.

179. Edward Wong, *China's Internet Speed Ranks 91st in the World*, N.Y. TIMES, June 3, 2016, https://www.nytimes.com/2016/06/04/world/asia/china-internet-speed.html.

situation ought to be regulated by the 2007 Act, but it cannot be, because the "public interest" concept is disregarding the elimination of market entry barriers facing non-SOEs seeking to enter that market. Neither is the advancing of measures that promote consumer welfare a priority (e.g., allowing more choice of service providers). The balance between the interests of SOEs and non-SOEs has been contaminated by market entry barriers, created by the telecoms SOEs *themselves* in the fixed-broadband industry.

Other examples were examined in the steel industry case study, where the balance between the interests of SOEs and non-SOEs has been lop-sided in favor of SOEs for many years, due to forced "administrative mergers" and government-led closures of *profitable* private sector steel mills. Little thought is given to whether the pursuit of such industrial policy will lead to a *competitive* steel production market. Instead of the *efficiency and output of SOEs increasing in that market*, the case study demonstrated that both have in fact *declined*.[180] Forced mergers and forced closures of profitable competitive private competitors are encouraged, something that would not be countenanced under European Union merger control law.

In the refined gasoline retail market case study, the balance between the interests of SOEs and non-SOEs and consumer welfare, was demonstrated to be skewed by SOEs' exclusionary and discriminatory activities, where State subsidies for refining gasoline and price change mechanisms are regularly deployed to give the SOEs' gasoline retail outlets in downstream markets an unfair competitive advantage over their private retail competitors: the result, exit from the market by private retailers, leading to strengthening of SOE vertical monopolies. This can hardly be regarded as a good outcome for consumer welfare or competition in that sector in China. Such discriminatory practices would be condemned as being contrary to Articles 102 and 106 TFEU, were they to occur in the EU.

The overall conclusion is that, after having due consideration of the implementation of the 2007 Act, it is not difficult to conclude that "normal" competition objectives are not being pursued in China, because the State's interest is to promote the dominance of SOEs, to the detriment of the interests of non-SOEs, fair competition and consumer welfare. In the Chinese marketplace, government intervention is an element which never loses focus, because China's development model, through its many phases, is government-led, with administrative intervention by government agencies often biased against effective competition and the wider public interest in the long term. Examples were not hard to find in the sectors examined. Currently, the interests of SOEs, which are a conduit for the State's interest, are given top priority in the Chinese market. The interests of non-SOEs and consumer welfare are squeezed by government-driven industrial policy intervention, unrestrained by weak antitrust enforcement agencies. Therefore, in order to achieve marketplace fairness and the achievement of consumer welfare, new regulations and future institutional reforms are needed in order to restore the legitimacy of the 2007 Act's application to protect fair competition. The regulatory proposals advanced in this article will strengthen the hand of the different actors who seek to curtail unbridled anti-competitive

180. *See* Chart 1, *supra* note 131.

interventions by SOEs and State policies, which currently distort or eliminate competition in the various marketplaces in China.

Until such reforms are implemented, China's approach will not only be contrary to what a market economy would understand the public interest to mean in the competition context, but it also undermines China's stated aims[181] to modernize its economy, develop a strong SME sector, enhance consumer welfare and protect fair competition. Therefore, in the struggle for supremacy between "consumer welfare" / "fair competition" versus the State's interests, the "public interest" (in the China context) does not serve as maintaining some measure of balance between the interests of the competing groups (consumers, competitors and State) in the market. Instead, our case studies revealed that where there is a supremacy-contest between protecting the needs of consumer welfare, fair competition between competitors and the short-term national interest (which relates to the development of SOEs), the State does not adopt a neutral position with regard to the "public interest".[182] Instead, it supports and encourages, through its SOE's and State policies, anti-competitive practices and market activities[183] that neuter the 2007 Act's competition objectives. There is clear evidence that the "public interest" concept *will not be used to prevent* monopolistic attainment by SOEs by way of their pursuit of anti-competitive exclusionary practices, contrary to the express aspirations proclaimed by the 2007 Act. What trumps fair competition, market efficiency and consumer welfare, are actions by SOEs or the State's administrative agencies, acting solely in what the State perceives as its short-term interests (e.g., promoting SOE dominance or concentration of markets), which frequently are antithetical to fair competition, market efficiency and consumer welfare. The case for removing the public interest criterion from the 2007 Act is established, and without such a step, China's "competition" law will remain a pale shadow of what it was originally intended to be.

181. Most recently, Chinese President Xi Jinping promised support for the development of the private sector: *see China's Xi Promises Support for Private Firms as Growth Cools*, REUTERS (Nov. 1, 2018, 10:31 AM), https://uk.reuters.com/article/us-china-economy-xi/chinas-xi-promises-support-for-private-firms-as-growth-cools-idUKKCN1N64IQ; the Government also stated the importance of competitive neutrality: *see* Sha, *supra* note 149; the Government official news agency Xinhua announced *China Intensifies Efforts to Protect Consumer Rights*, XINHUA, (Mar. 15, 2018, 17:51 PM), http://www.chinadaily.com.cn/a/201803/15/WS5aaa420ca3106e7dcc141e5a.html, which emphasized the Government's desire to break up monopolies, introduce competition across the economy, as well as enhance consumer welfare. Only time will tell if this happens.

182. Xianlin Wang, *Some Key Issues Concerning Further Development of China's Anti-Monopoly Law*, *in* COMPETITION POLICY FOR THE NEW ERA: INSIGHTS FROM THE BRICS COUNTRIES 219, 219-24 (Tembinkosi Bonakele, Eleanor Fox & Liberty Mncube eds., 2017); Horton, *supra* note 16.

183. See further the three sector case studies discussed in Part Three above where both anti-competitive SOE practices and State policies were discussed.