ARTICLE

HOW COMPETITION IDEALS ARE EMASCULATED IN KEY INDUSTRIES IN CHINA, AND PATHWAYS TO REFORM

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ABSTRACT

China's adoption of its European Union-style Anti-Monopoly Law 2007 was heralded with great fanfare. However, some thirteen years following adoption, the 2007 Law's aims appear 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. Via a series of original case studies, the Authors demonstrate how China's approach markedly diverges from European Union competition ideals, in turn raising the significant question of whether competition philosophy has been accepted in China. The Authors address the current unsatisfactory situation, setting out detailed proposals for substantive and structural reform, aimed at enhancing the regulatory institutions so that their enforcement competence is not compromised. Drawing on European Union judicial architecture and practice, the Article also makes proposals designed to enhance the capacity of the enforcement institutions, all with a view towards enhancing the acceptance of universally understood 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. In 2007, when China was deciding what form of competition law to adopt, China decided to follow the European Union antitrust approach to a significant extent.[2] However, as this Article shall demonstrate, since 2007, China has tolerated anti-competitive activities which appear to be contrary to the competition principles proclaimed in the 2007 Act. Regard for the 2007 Act's commonly understood competition objectives[3] appear to have been relegated to the sideline.[4] This Article shall examine the source of this divergence,

1. 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 Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (China).

2. For example, several concepts in the 2007 Act use similar terminology and concepts to those used in European Union competition law. *See, e.g.*, *id.* arts. 13-15, 17-19, 20-22. All of these Articles are key elements in the European Union competition legal framework, as well. *See generally* 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. EUR. COMPETITION L. & PRAC. 35 (2019); Giacomo Di Federico, *The New Anti-Monopoly Law in China from a European Perspective*, 32 WORLD COMPETITION 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 CHI. 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. Article 1 of the 2007 Act refers to the competition objectives of "protection of fair market competition, enhancing economic efficiency, [and] maintaining the consumer interests." These competition objectives are commonly found in modern competition legal frameworks worldwide. 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 Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 1, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (China).

4. China's chief antitrust policy-maker and regulatory authority for the enforcement of antitrust law in China—State Administration for Market Regulation ("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 Jan. 2020), SAMR drew attention to this development. Its reform proposals call for the 2007 Act to clarify 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 objectives set out in the 2007 Act ("fair market

which appears to be grounded in the presence in the 2007 Act of a distinct feature, quite unlike that found in the European Union 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 European Union where

competition, enhancing economic efficiency, maintaining the consumer interests") should be the predominate consideration 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, SAMR is making it clear that it is concerned about the manner in which excessive intervention by State authorities has prioritized the interests of State-owned market players. In the process, it has relegated the competition focus of the 2007 Act to an inferior position. Article 10 of SAMR's reform proposals call for the establishment of a "fair competition review system" so that markets will comply with competition rules, with limited intervention by administrative authorities only where necessary. *See* 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] (promulgated by the State Admin. for Mkt Regul., Jan. 2, 2020).

5. The European Union Competition criteria include the protection of efficiency, innovation, and consumer welfare, with no mention of any criterion constituting a "public interest" criterion (or indeed anything like it), unlike China's 2007 Act referencing "the public interest." 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 Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 1, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (China). For the European Union Competition criteria, see Consolidated Version of the Treaty on the Functioning of the European Union art. 101, May 9, 2008 O.J. (C 115) 47 [hereinafter TFEU].

6. Article 1 of the 2007 Act also refers to the importance of protecting "the public interest," and [promoting] the healthy development of the socialist market economy" (as well as "protection of fair market competition, enhancing economic efficiency, maintaining the consumer interests"). The Authors shall use the term "public interest" to include references to the terms "public interest," "social public interest" and "the interests of the society as a whole" as terms that have been used in various official translations to describe the public interest within the meaning of Article 1 of the 2007 Act. In the original Chinese version, Article 1 refers to "the social public interest." *See* 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 Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 1, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (referring to "the social public interest" and "safeguarding the interests of consumers and *social public* interest," and explaining that "[t]his 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"); COMPETITION LAW IN CHINA: LAWS, REGULATIONS, AND CASES A-1 (Peter J. Wang, Sébastien J. Evrard, Yizhe Zhang & Baohui Zhang eds., 2014) (stating that Article 1 of the 2007 Act is enacted for the purposes of "protecting the consumers and *public interests* . . . .").

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 II of this Article will consider the different meanings in China and the European Union of the "public interest." Part III will explain case studies[8] undertaken by the Authors in several 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 European Union competition law. Part IV considers what reforms are needed in order to elevate the enforcement of competition law to become a key priority in China. In Part V the Authors present conclusions.

II. VARYING UNDERSTANDINGS OF THE NOTION OF "PUBLIC INTEREST" IN CHINA AND EUROPEAN UNION 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

7. See discussion *infra* Part III.

8. Because 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 China to the detriment of private businesses, and in favor of State monopolies. Examples include forcing privately-owned steel mills to merge with their State-owned competitors in the China steel industry; or discriminatory reduction of gasoline fuel supplies to privately-owned gasoline retailers by State-owned refineries, with preference given to State-owned gasoline retailer competitors; or margin-squeezing, discriminatory pricing, or denial of access on equal terms, to privately-owned broadband suppliers to broadband infrastructure. This contrasts with the favorable treatment of State-owned broadband suppliers.

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

10. The other three objectives listed in Article 1 are "protecting fair market competition, enhancing economic efficiency, and maintaining the consumer interests." Zhonghua Renmin Gongheguo Fanlongduanfa (中华人民共和国反垄断法) [The Anti-

the 2007 Law, there is no consensus in the literature as to its true meaning. The meaning of "public interest" among academics writing on the subject varies widely.[11] 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, arguing that while the concept is simultaneously vague and flexible,[15] it may be difficult for antitrust regulators to choose between the public interest and consumer welfare, because they may not be in alignment with each other.[16] This could frustrate the

Monopoly Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 1, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68.

11. *See* Weiping Ye, *China's Choice of Analytical Models for Its Anti-Monopoly Law*, 39 SOC. SCI. 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 & 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, 101-03 (2016); Fred S. McChesney, Michael Reksulak & William F. Shughart II, *Competition Policy in Public Choice Perspective*, *in* 1 OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS 147, 147-55 (Roger D. Blair & D. Daniel Sokol eds., 2015); XIAOYE WANG, THE EVOLUTION OF CHINA'S ANTI-MONOPOLY LAW 161-67 (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. *See* 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, 2004) (China).

14. *See generally* 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 MICH. ST. INT'L L. REV. 491, 552 (2017); Yane Svetiev & Lei Wang, *Competition Law Enforcement in China: Between Technocracy and Industrial Policy*, 79 L. & CONTEMP. PROBS. 187, 198-99 (2016).

15. *See* Ariel Ezrachi, *Sponge*, 5 J. ANTITRUST ENFORCEMENT 49, 56-7 (2017); WANG, *supra* note 11, at 351-52.

16. *See* WANG, *supra* note 11, at 323. Horton goes further, stating: "There should be little doubt that broad macroeconomic concerns are given priority over competition

achievement of national competition objectives set out in the 2007 Act[17], and its presence in the Act is reflective of an older political culture that is lagging behind China's progress toward a market economy.[18] Others say that the "public interest" is equivalent to consumer welfare.[19] In summary, there is no consensus in the current literature on the subject. 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[20], the

concerns in China today." *See* 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, 127 (2016).

17. Article 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. 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 Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 1, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (China).

18. *See generally* 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 TEX. 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., 1st ed. 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 U. L.J. 551 (2010) (pointing out "反垄断法中公共利益的界定应该在与《宪法》所保护的公民的生存权、安全权、私有财产权等不抵触的情况下，突出以"保护与增进消费者福利"为中心价值而形成反垄断法中的公共利益" which translates as meaning that although the public interest concept has a necessarily different focus under China's Constitution in various contexts, e.g., right to life, right to security, right to property, etc., it is the protection and promotion of consumer welfare that equates to the public interest value in the AML context). For a discussion of public interest in developing countries, see 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. Draft (for public comment) on the Amendment of the Anti-Monopoly Law 2007 of China, *supra* note 4.

20. *See* 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

Authors' case studies (detailed in Part III below) will examine anti-competitive occurrences in several key industries. The Authors' 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).[21] The evidence cited in support of this claim in Part III below will clearly show that, time after time, the State has advanced policies and practices that allow State-Owned Enterprises ("SOEs")—enterprises funded, owned or controlled by different levels of the Chinese government) to engage in transactions or activities that *not only fail to* 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.[22]

B. Contrast with the European Union Approach

This approach can be contrasted with the significantly 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, the Treaty on the Functioning of the European Union ("TFEU") Articles 101 and 102[23] assess the legality of anti-

Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 1, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (China). ("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.").

21. All are mentioned as key objectives to be safeguarded under Article 1 of the 2007 Act. *Id.*

22. The Chinese government prefers to develop SOEs as a matter of priority. *See, e.g.*, Lei Zheng et al., *SOEs and State Governance*, *in* REGULATING THE VISIBLE HAND?: THE INSTITUTIONAL IMPLICATIONS OF CHINESE STATE CAPITALISM 203 (Benjamin L. Liebman & Curtis J. Milhaupt eds., 1st ed. 2015); Ines Willemyns, *Disciplines on State-Owned Enterprises in International Economic Law: Are we moving in the right direction?*, 19 J. INT'L ECON. L. 657, 679 (2016); Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665, 668 (2015).

23. TFEU, *supra* note 5, arts. 101-102. TFEU Article 101 prohibits all agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between European Union Member States and which have as their object or effect, the prevention, restriction or distortion of competition within the European Internal Market. However, exemption from the prohibition is

competitive agreements[24] or abuses of dominance[25] by way of a competition compatibility test.[26] There are no explicit public interest criteria (nor industrial policy criteria[27]) in the European Union competition compatibility test that can be used to justify State action departing from competition norms.[28] The only way

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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 with respect to a substantial part of the products in question will likely not occur. TFEU Article 102 prohibits any abuse by one or more undertakings of a dominant position within the Internal Market or in a substantial part of it. This is prohibited insofar 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. *See id.*

24. TFEU, *supra* note 5, art. 101.

25. *Id.* art. 102.

26. In short, (as per TFEU Articles 101-102) the European Union competition compatibility test is whether the anti-competitive agreement or alleged abuse of dominance adversely affects competition in a substantial part of the European Union. *See id.* arts. 101-102.

27. 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) [hereinafter Siemens / Alstom]. For criticisms of this approach, see BRUNO DEFFAINS ET AL., 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 European Commission has been very clear that a European Union State's national industrial policy should not be used to justify mergers since its very first Merger control prohibition decision in 1991. *See* Case IV/M.53, Aerospatiale-Alenia / De Havilland, Comm'n Decision, 1991 O.J. (L 334) 42 [hereinafter Aerospatiale-Alenia / De Havilland]. This 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 to proceed on industrial policy grounds, because the test for merger approval is a purely competition-based test. However, the Commission appeared to relax its position somewhat in the subsequent 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 factors unrelated to competition.

28. Brook asserts that there are public policy considerations applied by the European Commission in the sense that it sets institutional priorities (as to which competition cases it will and will not investigate). This perspective does not mean that the Commission applies a public interest test, and indeed no such test appears in either TFEU articles 101 or 102. *See, e.g.*, Or Brook, *Priority Setting as A Double-Edged Sword: How Modernization Strengthened the Role of Public Policy*, 14 J. COMP. L. & ECON. 1 (2020). Brook

that competition norms can be relegated to the sideline by the State in the European Union 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,[29] data privacy,[30] collecting taxation,[31] 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.[32] On the other hand, where anti-competitive arrangements have no such "official authority" flavor, then they are subject to the rigors of competition law. This means that anti-competitive agreements between enterprises are prohibited, but can be eligible for *exemption* from the prohibition in TFEU Article 101 if it can be demonstrated that they have

takes the view that when the European Commission sets its investigation enforcement priorities, it is in effect making public policy decisions when deciding which cases it will investigate. *See id.* However, this is far removed from the subject matter of this Article, which focuses on the fact that China *has* a public interest test in its 2007 Act, whereas European Union competition law does not.

29. *See* Case C-343/95, Diego Calí & Figli Srl v. Servizi Ecologici Porto di Genova SpA, 1997 E.C.R. I-1580 [hereinafter Diego Calí]. In Diego Calí, the Court of Justice of the European Union ("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 id.* For a discussion of environmental protection, see Suzanne Kingston, *Competition Law in an Environmental Crisis*, 9 J. EUR. COMP. L. & PRAC. 517 (2019).

30. *See* Case C-238/05, Asnef-Equifax, v. Asociación de Usuarios de Servicios Bancarios (Ausbanc), 2006 E.C.R. I-11145 ¶ 63 (stating that "[a]ny possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law . . . ."). On data privacy, see 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 STUD. RES. PAPER (2018).

31. *See* Case C-207/01, Altair Chimica SpA v. ENEL Distribuzione SpA, 2003 E.C.R. I-8894 [hereinafter Altair Chimica]. In Altair Chimica, 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. Any anti-competitive impact therefore did not arise as a result of the autonomous actions of a market operator; rather, it resulted from the dictates of the legislator governing tax collection. *See id.*

32. In Case T-319/99, Federación Española de Empresas de Tecnología Sanitaria ("FENIN") v. Eur. Comm'n, 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. The purchasing activity was not within the ambit of competition law, even though it had anti-competitive (monopoly) features. *See* Niamh Dunne, *Public Interest and EU Competition Law*, 65 ANTITRUST BULL. 256, 262 (2020).

substantial pro-economic/pro-consumer welfare effects, and not (unlike China) because the pursuit of some particular State industrial policy is desired.[33] Apart from those situations, it is not possible for the European Union Member States to permit or promote otherwise anti-competitive practices "in the public interest", because there is no such exception contained in either the European Union Treaties or within secondary legislation. Such limited exceptions, 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 is acceptable.[34] By contrast, the case studies in Part III will illustrate the contrast with China, as they shall demonstrate how adherence to fundamental competition norms (such as non-discriminatory treatment of suppliers or abusive leverage of upstream dominance in downstream markets) is often cast aside, in favor of the "public interest", thereby posing harm for competition, competitors, and ultimately consumers.

Second, another major departure between the European Union and China's regime can be seen in their respective approaches to controlling market concentration. The primary test of compatibility of a merger with a community dimension[35]

33. So far as TFEU Article 102 (prohibition of abuses of dominance) is concerned, there is no legal ability *to permit* abuses of dominance in European Union Law. While Article 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, *in practice* the State *does frequently permit* such abuses to take place. *See* TFEU, *supra* note 5, art. 102; 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 Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 6, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (China). For case studies which exhibit such examples, see *infra* Part III (e.g., the fixed broadband access case study will show how margin squeezing is tolerated in China even though it makes market entry unattractive to private downstream competitors, and harms consumers). *See id.*

34. *See* Case T-216/15, Dôvera zdravotná poist'ovňa v. Comm'n, ECLI:EU:T:2018:64 (2018); Case T-138/15, Aanbestedingskalender v. Eur. Comm'n, ECLI:EU:T:2017:675 (2017); Altair Chimica, *supra* note 31; Diego Calí, *supra* note 29; Case C-475/99, Ambulanz Glöckner v. Landkreis Südwestpfalz, 2001 E.C.R. I-8137; Case C-364/92, SAT Fluggesellschaft mbH v. Eur. Org. for the Safety of Air Navigation (Eurocontrol), 1994 E.C.R. I-55.

35 . Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, arts. 1, 4, 2004 O.J. (L 24) 6, 8 (EC) [hereinafter EC Merger Regulation]. This European Union Regulation obliges merging parties to notify the European Union Commission of a proposed merger for prior approval where

in the European Union is whether the merger will significantly adversely affect competition in the Internal Market,[36] 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."[37] This is a very different approach from the China approach:[38] the Part III case studies will show how pursuit of the public interest promotes many *forced* mergers in China, notwithstanding the resulting diminution of competition.[39] It is clear that mergers are

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the proposed merger ("concentration") has a "Community dimension." A concentration has a "Community dimension" when the parties possess either (1) a combined turnover of more than EU€5 billion worldwide, with at least two of the merging entities having a European Union turnover of more than EU€250 million each, in different Member States; or (2) concentrations with a EU€2.5 billion turnover worldwide, and significant turnover in at least 3 European Union Member States, etc.). For further turnover test specificity, see *id.* art. 1.

36. The EC Merger Regulation, art. 2, provides the concentration 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. *See* EC Merger Regulation, *supra* note 35, art. 2.

37. The 3 legitimate interests explicitly mentioned in art. 21(4) MCR are: public security, plurality of the media, or prudential interests. *See* EC Merger Regulation, *supra* note 35. 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 European Union competition aspects of the merger (that remains with the Commission). *See* Bruce Lyons et al., *UK Competition Policy Post-Brexit: Taking Back Control While Resisting Siren Calls*, 5 J. ANTITRUST ENFORCEMENT 1, 10, 11, 32 (2017); JONATHAN PARKER & ADRIAN MAJUMDAR, UK MERGER CONTROL 145-48 (Hart Publ'g, 2d ed. 2016); *see generally* RICCARDO CELLI ET AL., CORPORATE ACQUISITIONS AND MERGERS IN THE EUROPEAN UNION (Wolters Kluwer Law & Bus., 1st ed. 2014); IOANNIS KOKKORIS & HOWARD SHELANSKI, EU MERGER CONTROL: AN ECONOMIC AND LEGAL ANALYSIS (Oxford Univ. Press, 1st ed. 2014).

38. DEFFAINS ET AL., *supra* note 27, at 14-15 (pointing out that "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) ST. COUNCIL GAZ., Mar. 2, 2009, at 1-2. Article 3 of the Provisions obliges merging parties in China that satisfy large financial thresholds to notify to the Ministry of Commerce for prior approval. *See id.* For specific information on the size of the turnover thresholds, see *id.* art. 3. Article 4 provides that mergers that do not reach these Article 3 turnover thresholds can 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. *See id.* art. 4.

39. *See infra* Part III.

encouraged in China, ostensibly on the grounds that they are not anti-competitive,[40] but in reality they advance the achievement of the State's industrial policy. For example, certain industries such as the steel and gasoline station industries are consolidated, by allowing SOEs take over private competitors, often to the detriment of competition.[41] This is in contrast to the European Union, where only a *significant reduction in competition,* not the public interest,[42] 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[43] or on the basis of any other State consideration such as the public interest.

While the EC Merger Regulation ("MCR") does provide a procedure whereby if a Member State has concerns about a

40. *See* 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 Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 28, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (China). Where a concentration has or may have the effect of eliminating or restricting competition, the Anti-Monopoly Authority via the State Council makes a decision to prohibit the concentration. However, if the business operators involved can prove that the concentration will bring more positive impact than negative impact on competition, or that the concentration is in public interest, the Anti-Monopoly Authority may decide not to prohibit the concentration. *Id.* 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. *Id.* art. 30. Where the Anti-Monopoly Authority decides to prohibit a concentration or attaches restrictive conditions to the concentration, it must publicize the prohibition/attachment to the general public in timely manner.

41. *See infra* Part III (explaining the case studies on the Steel and Filling Stations sectors). For a description of 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. L. & ECON. REV. 129, 168 (2018) (pointing out that merger control in China links industrial policy and national economic development).

42. For example, unlike China, in the European Union the pursuit of non-competition objectives, such as industrial policy, is not part of the merger clearance test. *See generally* Siemens / Alstom, *supra* note 27. The European 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 merger clearance test in the European Union is a purely competition-based test. *See id.*

43. *See* Aerospatiale-Alenia / De Havilland, *supra* note 27 (as early as 1991 the European Commission made it clear that the merger compatibility test in the European Union could not be based on a State's industrial policy).

proposed merger, the State can seek to interfere with it on *non-competition grounds* to protect "legitimate interests,"[44] Member States are only able to take action on such grounds where the Member State can either advance a legitimate interest that is explicitly mentioned in the MCR Article 21,[45] or advance a new legitimate interest ground that the European Commission is prepared to accept[46] (and if the State does advance such legitimate interests grounds, it is *not for the purpose of seeking to approve* the merger on such grounds, but rather *to inhibit some element of the merger* on non-competition grounds[47]). It is clear

44. *See* EC Merger Regulation, *supra* note 35. Art. 21(4) provides that Member States may take appropriate measures to protect legitimate interests other than those set out in the Regulation, provided any such newly proposed legitimate interests are compatible with the General Principles of European Union Law. Public security, plurality of the media, and prudential rules are listed as legitimate interests within the meaning of Article 21. Article 21 leaves the way open for recognition of new legitimate interests, proposed by the Member States to the European Commission from time to time, with their acceptance depending on the agreement of the Commission and compliance with the foregoing requirements. *See id.*

45. The 3 legitimate interests explicitly mentioned in MCR art. 21(4) are public security, plurality of the media, and prudential interests. *See id.* art. 21(4).

46. MCR art. 21(4) also provides that any proposed new public interest advanced by a Member State must be communicated to the Commission and must 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. *See* EC Merger Regulation, *supra* note 35, art. 21(4). *See* Case C-42/01, Portuguese Republic v. Comm'n, 2004 E.C.R. I-06079 [hereinafter Portuguese Republic] (The CJEU held that Portugal had erred in not giving the Commission the opportunity to consider whether to recognize a new legitimate interest in a case where Portugal took steps to prevent the takeover of a cement producer in which the State had 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. 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).

47. 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 European Union competition aspects of the merger (that remains with the Commission). *See* EC Merger Regulation, *supra* note 35, art. 21(4); *see* Case IV/M.336, IBM France v. CGI, Comm'n Decision, 1993 O.J. (C 151) 5 (invoking art. 21(4) for the first time, and invoking "public security" as a legitimate interest); *see XXIIIrd Report on Competition Policy 1993*, COM (Mar. 26, 1995), https://op.europa.eu/en/publication-detail/-/publication/7db4a243-39f3-4ba4-a5b7-1cb48f8ca6d3 [https://perma.cc/WZ3W-PKM7]; *see* Case IV/M.423, Newspaper Publishing, Comm'n Decision, 1994 O.J. (C 85) 5 (approving a proposed concentration in the UK newspaper industry, accepting that the UK separately could take steps under its own domestic media legislation to protect its own domestic legitimate interests, namely measures to protect the plurality of the UK media sector); *see* Case M.759, Sun Alliance v. Royal Ins., Comm'n Decision, 1996 O.J.

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:[48] the European Union's "legitimate interests" and China's "public interest" concepts serve totally opposite purposes. In the European Union, legitimate interests cannot serve a State's domestic industrial policy aims, whereas in China the public interest concept clearly does.[49] By maintaining the supremacy of competition as the test of legality, it is clear that in the European Union 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 non-competition aspects of major mergers. The European Union's legitimate interests concept is therefore inconsistent 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,[50] the State has become accustomed to using

(C 225) 12 (accepting that the UK could apply its own domestic insurance legislation to a proposed concentration). Case IV/M.1346, EdF v. London Electricity, Comm'n Decision, 1999 O.J. (4064) 89 (an example of the Commission recognizing that Member States were acting in pursuit of legitimate interests). Member State claims that they need to take steps to protect legitimate interests are not always accepted. *See, e.g.*, Case IV/M.161, BSCH v. Champaliaud, Comm'n Decision, 1999 O.J. (C 306) 37 (rejecting the argument that Portugal had established a legitimate interest to interfere with a takeover of one of its major banks). In Portuguese Republic, *supra* note 46, the Court of Justice did not accept that Portugal has advanced a new legitimate interest. Finally, for an example of where the Commission cleared a merger at European Union level but a Member State (the United Kingdom) prohibited it at national level on art. 21 (legitimate interest) grounds, see Case COMP/M.5932, News Corp v. BSkyB, Comm'n Decision, 2011 O.J. (C 37) 5.

48. As the three case studies in Part III will each demonstrate, China permits transactions to proceed *even though* they have anti-competitive effects; whereas in the European Union the concept of legitimate interests is (1) narrowly defined, and (2) rarely invoked by Member States, as the European Union's policy is that competition (not national interests) should be the main parameter against which major mergers are assessed. *See infra* Part III.

49. *See infra* Part III.

50. 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

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 regarded as a reliable method to demonstrate how competition ideals are frequently disregarded in favor of State monopoly administrative action. In the three sectoral case studies, the Authors seek to ascertain whether the enactment of the 2007 Act had 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, the Authors selected three sectors for analysis in different regions in China: the filling station sector in *Beijing*, *Guangzhou*,[51] and *Cangzhou*;[52] the fixed-broadband sector in *Beijing*, *Cangzhou*, and *Jimo*;[53] 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; surveys were also conducted in the

market mechanisms and the competitive order. *See generally* XIAOJING ZHANG & XIN CHANG, THE LOGIC OF ECONOMIC REFORM IN CHINA (2016).

51. *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 15.3 million people, and covers a total area of 7,434 square kilometres. *See Guangzhou Gaikuang (广州概况)* [*Guangzhou Overview*], GUANGZHOU MUN. CULTURE, RADIO, TELEVISION & TOURISM BUREAU (Jan. 29, 2021), http://wglj.gz.gov.cn/wlzx/hsgz/gzgk/index.html [https://perma.cc/26PT-7N9F].

52. *Cangzhou* (沧州), a city in north-eastern part China in *Hebei Province* (河北省), has a population of 7.54 million people and covers an area of 14,304 square kilometres. *See Cangzhou Gaikuang: Ziran Dili (沧州概况: 自然地理)* [*Cangzhou Overview: Physical Geography*], CANGZHOU GOV'T (Mar. 6, 2020), http://www.cangzhou.gov.cn/zjcz/czgk/dllz/index.shtml [https://perma.cc/T56C-AZRC]; *Cangzhou Gaikuang: Renkou Minzu (沧州概况: 人口民族)* [*Cangzhou Overview: Population and Ethnic Groups*], CANGZHOU GOV'T (Mar. 27, 2020), http://www.cangzhou.gov.cn/zjcz/czgk/rkymc/index.shtml [https://perma.cc/GS2R-XPMU].

53. *Jimo* (即墨) is a county-level city in the north-eastern part of China, in *Shandong Province* (山东省). This city has nearly 1.25 million people and covers a total area of 1,780 square kilometres. *See Jimo Gaikuang (即墨概况)* [*Jimo Overview*], JIMO GOVT' (2020), http://www.jimo.gov.cn/n3204/n3217/191127174547027163.html [https://perma.cc/9V3D-M4K7].

filling station industry case study. The objective was to obtain factual data, and to examine the genuine attitudes of SOEs and private enterprises towards the public interest and the 2007 Act.

Separately, the Authors also interviewed leading professors on a series of questions based around whether the 2007 Act provides sufficient protection for private enterprises against encroachment or restriction by SOEs and administrative agencies of their economic activities.[54] Chinese antitrust enforcement agency staff were not interviewed because they could not receive permission to be interviewed, but a number were interviewed informally at conferences, and provided helpful observations.

A. What the Case Studies Reveal

Although 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, the Authors' case studies below will demonstrate that in reality, 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".[55] Examples will be discussed below, emanating from different sectors of the Chinese economy,[56] where either mergers or the acquisition of dominance or anti-competitive market practices were not only permitted, but also actively encouraged to proceed,

54. 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, 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 (note that the Chinese antitrust enforcement agency has been upgraded recently (2018), though efficacy concerns still remain). *See* Chart 2, *infra* note 155; *see infra* Section IV.B.2.

55. 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 Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 1, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (China).

56. *See infra* Part III (discussing Filling Stations, Fixed-Broadband, and Steel Mills).

notwithstanding their detriment to efficiency, consumer welfare, or fair competition.[57]

Indeed, these case studies will furnish evidence to demonstrate how SOEs, facilitated by domestic SOE-biased industrial policies,[58] 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 the Authors examine reveal that SOEs' steps to achieve market dominance/monopoly by way of exclusionary practices or forced concentration, are *not* regarded as being contrary to the public interest, nor are they regarded as detrimental to economic efficiency, consumer welfare, or competitors. Subjecting the public interest concept to assessment against these three criteria in the sectoral case studies demonstrates that in each instance, the public interest which any one of these three objectives might be assumed to promote, was disregarded in favor of advancement of SOE's monopolistic or exclusionary behavior. This outcome seems to be at odds with the common international understanding of the wider public interest concept in the competition regulation context,[59] and raises the key question of

57. The Authors' research, set out in the case studies below, finds convincing evidence which leads the Authors 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 private enterprises in China.

58. 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 ("MOFTE"), the St. Admin. for Industry and Commerce ("SAIC"), the St. Admin. of Taxation ("SAT") and the Quality and Technical Supervision Bureau, July 7, 1999, effective July 7, 1999); (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); (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 Manage Zombie Enterprises] (promulgated by the St. Council of China, 2016, effective 2016).

59. For example, in European Union national legal systems, market behavior of corporations is regulated by traditional competition norms such as consumer welfare

whether the 2007 Act can ever be effective to protect competition in China.

B. 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.[60] The concept of fair competition includes the notion that neither the State nor its agencies should engage in unfair competition against private sector competitors. European Union Law reflects this in TFEU Article 106[61] 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 European Union competition law—unless European Union competition law's application would prevent them from fulfilling the core mission entrusted to them by public law.[62] By comparison, while it could

and economic efficiency. No longer can market practices or transactions such as mergers be prohibited on national protectionist grounds based on the nebulous concept of public interest.

60. 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 toward "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" in 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.

61. TFEU, *supra* note 5, art. 106. *See generally* Grith Skovgaard Ølykke & Peter Møllgaard, *What is a service of general economic interest*, 41 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, 13-26 (Hellmut Wollmann, Ivan Koprić & Gérard Marćou eds., 2016).

62. *See generally* TFEU *supra* note 5, art. 106; *see also* Case C-320/91, Corbeau, 1993 E.C.R. I-2533 [hereinafter Corbeau]; Case 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

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[63]), nevertheless Article 5 of the 2007 Act does require mergers ("concentrations") to occur by means of "fair competition"; Article 7 prohibits mergers from damaging the interests of consumers by virtue of their dominant position or exclusive appointment.[64] A prime example of how these statutory prohibitions have not been observed in practice in China is 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.

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 occupy a joint dominant position[65] that is, in European Union terms, akin to a collectively

E.C.R. I-5889; Case C-18/88, RTT v. GB-INNO-BM SA, 1991 E.C.R. I-5973 [hereinafter RTT]. For more on this issue, see Grith Skovgaard Ølykke, *Exclusive Rights and State Aid*, 16 EUR. ST. AID Q. 164 (2017); MARKET INTEGRATION AND PUBLIC SERVICE IN THE EU (Marise Cremona ed., 2011); THE EU LAW OF COMPETITION ch. 6 (Jonathan Faull & Ali Nikpay, eds., 3d ed. 2014).

63. The State shall make and implement competition rules which accord with the socialist market economy, perfects macro-control, and advances a unified, open, competitive and orderly market system. 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 Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 4, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (China); 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]. *Id.* art. 5. 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. *Id.* art. 7.

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

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

dominant position:[66] *Strategy One* has been the practice of SOEs preventing non-SOE (private) filling stations from being able to react to international oil price 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); *Strategy Two* involves SOEs' restricting oil supplies to private filling stations (creating so-called "oil shortages"), in order to encourage their market exit.[67] These strategies are antithetical to fair competition; they adversely affect consumer welfare (by elimination of private retail competitors); they are promoting the extension of SOEs' dominance from the production level down to the retail level; and they inhibit efficiency enhancement by forcing private owners' market exit. Notwithstanding these adverse impacts, the State tolerated this development. This means that the public interest is clearly consonant with 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.

1. Case Studies

This Section discusses 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 European Union). In the period between 1992-1998 there was rapid growth of privately-

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66. The European Union Courts elaborate on the notion of collective dominance in TFEU art. 102 cases such as: Joined Cases T-68,77&78/89, Societa Italiana Vetro SpA v. Comm'n, 1992 E.C.R. II-1403; Joined Cases C-395 & 396/96P, Compagnie Mar. Belge Transps. SA v. Comm'n, 2000 E.C.R. I-1365; Joined Cases T-191&212-214/98, Atl. Container Line AB and Others v. Comm'n, 2003 E.C.R. II-3275; Case T-193/02, Laurent Piau v. Comm'n, 2005 E.C.R. II-209; Case T-228/97, Irish Sugar plc v. Comm'n, 1999 E.C.R. II-2969. The General Court of the European Union elaborates on the notion in several EC Merger Regulation cases: Case T-102/96, Gencor Ltd v. Comm'n, 1999 E.C.R. II-753; Case T-342/99, Airtours plc v. Comm'n, 2002 E.C.R. II-2585 [hereinafter Airtours].

67. Chen Aizhu, *Chinese State Oil Giants Take Petrol Price Battle to the Pumps*, REUTERS (June 19, 2017), https://www.reuters.com/article/us-china-petrol/chinese-state-oil-giants-take-petrol-price-battle-to-the-pumps-idUSKBN19912D [https://perma.cc/M24S-4AHT].

owned filling stations.[68] However, with the advent of Order No. 38 of 1999[69], the Central Government allowed refined oil prices to float for the first time from June 2000 onward in accordance with international oil prices.[70] 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. This benefited 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.[71] Consequently, private filling stations retail sales were unattractive to consumers during that critical ten-day price-change period. This constitutes *discriminatory pricing*, which would not be tolerated under European Union competition jurisprudence.[72] Under European

68. 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 began operating, and refined oil prices partially relied on market mechanisms. *See* Yong Huang, Shan Jiang, Diana Moss & Randy Stutz, *Application of Anti-Monopoly Law in China's Petroleum Sector*, 33 MODERN L. SCI., CHINA 79 (2011). However, from 1998 onward the Government reasserted control of the market by a variety of means. For example, Forbes describes how starting in 1998, the Government voided all of the operating licenses of private oil importers and wholesalers of finished gasoline product. *See* Shu-Ching Jean Chen, *China's Private Oil Force*, FORBES (Aug. 23, 2017), https://www.forbes.com/sites/shuchingjeanchen/2017/08/23/chinas-private-oil-force/#678dc7e673da [https://perma.cc/5PET-UAVN].

69. *See* Order No. 38 of 1999, *supra* note 58.

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

71. *See* 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)([2016]64 号)) [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)] No. 64 [2016] (promulgated by the Nat'l Dev. and Reform Comm. of China, Jan. 13, 2016, effective Jan. 13, 2016), http://en.pkulaw.cn/display.aspx?cgid=262409&lib=law [https://perma.cc/8DCH-DF33].

72. *See* Case C-242/95, GT Link A/S Danske Statsbanen, 1997 E.C.R. I-4453, 4465-66 (holding that 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 SpA v. Poste Italiane SpA, 2001 E.C.R. I-4142, 4152, 4158-60 [hereinafter TNT Traco] (holding 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

Union competition law, publicly-owned undertakings entrusted with the operation of a service of general economic interest by the State (pursuant to TFEU Article 106) would only be allowed to (for example) operate cross-subsidization models if they are obliged to operate within certain operational parameters, e.g., to balance the publicly-owned undertaking's books each year.[73] Such parameters would be imposed by the State to oblige the publicly-owned undertaking to provide their State-assigned service of general economic interest under the operational conditions set for them by the State.[74] However, in so doing, the European Court of Justice has made it clear that in such circumstances, the undertaking cannot charge discriminatory prices to private competitors compared to what is charged to their own affiliates who compete with the private competitors in the relevant downstream market.[75]

The failure to protect fair competition was exacerbated when the refined oil pricing mechanisms interacted with State oil refining subsidies. Such subsidies were paid to oil importers, which naturally, are the SOEs. The oil refining subsidies distort fair competition in the gasoline retail market in China because

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express mail subsidiary as well. To do so would constitute discriminatory pricing, which violates TFEU Article 102).

73. The service of general economic interest is typically obliged by its State mandate to provide a universal service across the State at the same price to all consumers, irrespective of the commercial viability of each individual transaction, e.g., the national postal service is mandated to charge the same price to deliver a letter in the capital city and to the most remote corner of the State. In order to maintain the viability of this State mandated model, the State will oblige the service provider to subsidize its less profitable activities or activities that incur losses (e.g., postal deliveries to remote areas) with profits generated by its profitable activities (e.g., postal deliveries in densely populated cities). Consequently, the service provider will argue that cross-subsidization between profitable activities and activities that incur losses is necessary in order for it to carry out its mandate under the operational parameters set for it by the State (furthermore, this imperative to cross-subsidize can be put forward as a reason to justify prohibiting the provision of competing services). *See* Corbeau, *supra* note 62.

74. Typical operational parameters imposed by the State on the service provider can include the obligation to provide the service within certain operational conditions. Corbeau, *supra* note 62. The State may require the service to be provided on a universal basis. *See, e.g.*, RTT, *supra* note 62 (concerning the provision of a universal telephone service). A universal service in the *RTT* context meant the provision of a national telephone service in every home in the State using a uniform pricing mechanism for all users irrespective of the cost of providing the services to each individual user. For another example of a universal service is the national postal service, see TNT Traco, *supra* note 72.

75. *See* Corbeau, *supra* note 62; RTT, *supra* note 62; TNT Traco, *supra* note 72.

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.[76] 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.[77] 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.[78] 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).

Strategy Two (targeted reductions in supply) is illustrated by the manner in which unfair competition arising from the "oil shortages" is tolerated. This meant that frequently, privately-owned filling stations could not have access to sufficient supplies

76. When import prices of crude oil were allowed to float with international oil prices, and international prices subsequently rose, the retail prices of private filling stations could not be adjusted upward 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).

77. By contrast, under European Union TFEU art. 106 jurisprudence, the protection of cross-subsidization 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. An example is the provision of a universal service to all citizens, at a price that is not related to the actual cost of providing the service to each individual citizen. But this does not permit the appointed service provider to engage in discriminatory pricing in favor of its own affiliates in downstream markets that are subject to competition from private operators. *See generally* Corbeau, *supra* note 62; TNT Traco, *supra* note 72.

78. 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); 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) [SCI. L.] 122 (2012).

from the SOE refineries.[79] Periodic oil shortages would occur.[80] 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.[81] This was made clear by the European Union, both in its Communication[82] on the topic as far back as 2009, and also from long-standing European Court of Justice jurisprudence. The European 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 condemnable as an abuse of dominance.[83] A refusal to supply in such circumstances would be condemned under European Union competition law,[84] yet it appears to be one that

79. Chen, *supra* note 67; *China's Private Refineries Blame Oil Shortage on Monopoly*, CHINA DAILY (Dec. 2, 2010), https://www.chinadaily.com.cn/business/2010-12/02/content_11643367.htm [https://perma.cc/2GRH-SX7W].

80. *PetroChina, Sinopec Stop supplying Oil to Private Stations*, GLOBAL TIMES (May 6, 2011), https://www.globaltimes.cn/content/652217.shtml [https://perma.cc/GQM2-8BA7].

81. The restriction of supplies to private competitors (operating in a downstream market) by a vertically integrated undertaking, which operates both the raw material level and the retail level, is potentially a serious abuse when it competes in the downstream market (e.g., retail) in circumstances where alternative sources of raw materials are scarce, unless it can be objectively justified. *See* Frances Dethmers & Jonathan Blondeel, *EU Enforcement Policy on Abuse of Dominance: Some Statistics and Facts*, 38 EUR. COMP. L. REV. 147, 151 (2017); Damien Geradin & Evi Mattioli, *The Transactionalization of EU Competition Law: A Positive Development?*, 8 J. EUR. COMP. L. & PRAC. 634, 643 (2017); Manuel 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 EUR. COMP. L. REV. 175, 182-84 (2010); Rossella Incardona, *Modernisation of Article 82 EC and Refusal to Supply: Any Real Change in Sight?*, 2 EUR. COMP. J. 337, 344-45, 361 (2006). For leading CJEU case law on the subject see *infra* note 84.

82. *See* Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty (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 EUR. L. REV. 214, 218-19 (2010).

83. *See generally* Case 27/76, United Brands v. Comm'n, 1978 E.C.R. 207 (holding that 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 & Com. Solvents v. Comm'n, 1974 E.C.R. 223 (condemning 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).

84. 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

appears not to raise such similar concerns in China, notwithstanding the provisions of the 2007 Act.[85] Such activity, were it to occur in the European Union, would be condemned under European Union competition law because it could lead to a number of prohibited outcomes: (1) consumer harm (rising prices or reduced sources of supply[86]); (2) elimination of effective competition in downstream markets (i.e., the removal of competitive constraint arising from the consequent elimination of private competitors in downstream markets,[87] which is what occurred in the filling station case study); or (3) private operators

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competitor in a downstream market. *See* Instituto Chemioterapico Italiano, *supra* note 83, at 250-51, (condemning 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 are possible. *See* Case C-7/97, Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG, & Mediaprint Anzeigengesellschaft mbH & Co. KG, ECLI:EU:C:1998:569 (1998) (holding 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 ("IP") rights is ordinarily not abusive, yet the European Union 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. Comm'n, 1995 E.C.R. I-743, 804-05 (holding 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 cannot be justified by objective considerations). *See generally* Case T-201/04, Microsoft Corp. v Comm'n, ECLI:EU:T:2007:289 (2007) (holding that refusal to supply the subject of an IP right can be abusive where it prevents competition in a neighboring 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).

85. 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 Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 6, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (China) (prohibiting the abuse of a dominant position).

86. The CJEU condemned a dominant raw materials supplier's refusal to supply to downstream competitors in circumstances where alternative source of supply were not easily available to the downstream competitors. *See, e.g.*, Com. Solvents, *supra* note 83.

87. *See* United Brands, *supra* note 83*;* Com. Solvents, *supra* note 83.

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.[88] By contrast, the Chinese authorities do not appear to see such outcomes posing a threat to the public interest requirement set out in the 2007 Act.

C. 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, because the 2007 Act's 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.[89] 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 context of the telecoms market.[90]

88. *See, e.g.*, United Brands, *supra* note 83. *See also* Commission Guidance on Enforcement Priorities in Applying Article 82 EC (now TFEU art. 102), 2009 O.J. (C 45) 2 (discussing abusive exclusionary conduct by dominant undertakings).

89. *See, e.g.*, Liyang Hou, *When Competition Law Meets Telecom Regulation: The Chinese Context*, 31 COMPUTER L. & SECURITY REV. 689, 696 (2015). *See also* Chun Liu, *Building the Next Information Superhighway: A Critical Analysis of China's Recent National Broadband Plan*, 39 COMM. ASS'N INFO. SYS. 176, 181 (2016).

90. The telecom network access and broadband competition sector were examined in three cities of varying sizes: *Beijing* (北京), *Cangzhou* (沧州) and *Jimo* (即墨). These are cities where China Telecom and China Unicom dominate the network and downstream markets. The question of ease of allowing network interoperability, and the attractiveness of network access terms for private competitors in the fixed-broadband market is the focus. Interviews sought with telecommunications SOEs and privately-owned fixed-broadband operators in these cities met with some unexpected difficulties. First, privately-owned fixed-broadband operators operating in the survey areas did not wish to participate. Second, data extracted from the SOEs in *Cangzhou* (沧州) and *Jimo* (即墨) raised serious competition concerns. 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

The modernization process of the Chinese telecommunications industry presents an excellent example. Two massive SOEs (China Telecom and China Unicom) formed a duopoly in the domestic fixed-broadband (telecommunications) market for decades.[91] Private competitors could not access their networks on attractive terms.[92] The inevitable outcome was not the promotion of competition between service providers (to thereby advance the 2007 Act's fair competition and consumer welfare objectives); rather, the duopoly took advantage of their incumbent dominant position to offer unattractive access terms, and segmented the market to inhibit the emergence of competition, with an adverse impact for both fair competition and consumer welfare.[93] To exacerbate matters, the two telecom SOEs were permitted to control broadband access terms, and therefore without legal consequence, restricted market entry by new competitors by depriving them of sufficiently attractive access terms.[94] 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.[95] In a series of cases over the last decade (e.g., C-280/08P, *Deutche Telekom v. Commission*, 2010 E.C.R. I-9555; Case T-336/07, *Telefonica and Telefonica de Espana v. Commission*, 2012

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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.

91. The case study demonstrates that the market is dominated by the two providers: China Telecom and China Unicom. An investigation launched into China Unicom and China Telcom in 2011 by the National Development and Reform Commission ("NDRC") found that between them, the two SOEs held 90% of China's broadband market. *See infra* Section III.C.1.

92. *See generally* 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).

93. *See infra* Section III.C.1; *see also* Angela Huyue Zhang, *The Role of Media in Antitrust: Evidence from China*, 41 FORDHAM INT'L L.J. 473, 475 (2017).

94. This was confirmed in the NDRC decision in 2014. *See infra* Section III.C.1.

95. 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"), 2017); Pablo Ibanez Colomo, *Exclusionary Discrimination under Article 102 TFEU*, 51 COMM. MKT. L. REV. 141, 144 (2014).

E.C.R. I-172; and Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB*, 2011 E.C.R. I-527[96]) the European Union courts have condemned 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 European Union authorities as an abusive practice, and can lead to massive fines.[97]

This is in direct contrast to the position in China, as the case study below shall reveal a classic example of similar practices having *no such consequences* for the dominant duopoly involved, despite the fact that their exclusionary activity has effectively 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 a top priority in the minds

96 . 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. *See* Case T-336/07, Telefonica and Telfonica de Espana v. Commission, 2012 E.C.R. I-172 [hereinafter Telefonica]; Case C-295/12P, Telefonica SA v. Commission, 2014 E.C.R. I-2062). *See also* 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 be abusive, it should not make competitors, penetration of the market any more difficult. *See* David Bailey, *The New Frontiers of Article 102 TFEU: Antitrust Imperialism or Judicious Intervention?*, 6 J. ANTITRUST ENF'T 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, Parts I and II*, 33 E. C. L. REV. 29, 61 (2012).

97. Telefonica, *supra* note 96 (the European Union Commission imposed a fine of EU€152 million on Telefonica for margin squeezing its competitors in Spain).

of the Chinese regulator: instead the public interest that triumphed was the protection of the duopoly from private competition.

1. Case Study

In 2011 the National Development and Reform Commission ("NDRC") opened an investigation into allegations[98] 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.[99] The NDRC investigated the anti-competitive conduct of these two SOEs in 2011,[100] and the outcome did not bode well for the protection of competition in China.[101]

The NDRC initially proposed fines[102] for violation of the 2007 Act, but did not address the network interoperability

98. In 2011, two large-scale telecommunications SOEs, namely China Telecom and China Unicom, faced an anti-monopoly probe into the charging differential fees contrary to the 2007 Act. *See* Xinhua, *Anti-Monopoly Probe into Telecom Giants Confirmed*, CHINA DAILY (Nov. 9, 2011), http://www.chinadaily.com.cn/business/2011-11/09/content_14066568.htm [https://perma.cc/UQR7-L4FR]; Alexandr Svetlicinii, *Private Litigation under China's Anti-Monopoly Law: Empirical Evidence and Procedural Developments*, 7 KLRI J.L. & LEGIS. 163, 177 (2017); Hou, *supra* note 89, at 693-94.

99. *See* Zhang, *supra* note 93.

100. Chun Liu, *An Evaluation of China's Evolving Broadband Policy: AN Ecosystem's Perspective*, 41 TELECOMM. POL'Y 1 (2017); Cheng, *supra* note 92, at 170-86.

101. 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 ENF'T 123, 144-45 (2018); Xiaoye Wang & Adrian Emch, *Five Years of Implementation of China's Anti-Monopoly Law – Achievements and Challenges*, 1 J. ANTITRUST ENF'T 247, 258-66 (2013).

102. China Unicom and Telecom faced fines of up to 10% of their annual revenues from Internet services (up to China¥1 billion (approximately EU€100 million)). However, the NDRC did not 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. Furthermore, the decision ignored the problem of high-priced low-speed fixed-broadband services. 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.

problem,[103] nor the detriment to consumers of the high-price low-speed broadband service. The NDRC did however ostensibly attempt to introduce competition to the sector by giving a small slice of the fixed-broadband market to China Broadcasting Network (*another SOE*, established in 2014),[104] heralding it as an opportunity to introduce competition by way of "triple-play interoperability" of telecommunications networks, radio networks and Internet convergence.[105] 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.[106] 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.

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).

103. From 2012 onwards, network interoperability of the *broadband mainline* (the Chinese public network infrastructure offering network access to broadband suppliers) was encouraged. However, 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 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, did not offer 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*, PROCESS 6TH ANNUAL INT'L CONF. L., REG. & PUB. POL'Y (June 2017), http://dx.doi.org/10.5176/2251-3809_LRPP17.12 [https://perma.cc/47FC-DG7G].

104. Feifei Fan, *CBN Gets Nod As 4th Telecom Operator*, CHINA DAILY (May 6, 2016), http://www.chinadaily.com.cn/business/2016-05/06/content_25098535.htm [https://perma.cc/VL3L-MRA6].

105. Fei Jiang, Kuo Huang & Yanran Sun, *The Triple-Network Convergence in China: Implementation and Challenges*, *in* MEDIA CONVERGENCE AND DECONVERGENCE 305, 305-28 (Sergio Sparviero, Corinna Peil & Gabriele Balbi eds., 2017).

106. Zhang, *supra* note 18.

Neither was achieved. The market is growing, [107] but the competition is not.[108]

In this regard, the NDRC decision has critical weaknesses that are detrimental to both consumer welfare and fair competition: *vis-a-vis consumer welfare,* expensive low-speed broadband services remain; and *vis-a-vis fair competition,* private competitors cannot take advantage of the NDRC decision because it only gave preference to *another SOE* to enter the market. The NDRC decision did not lower entry barriers for private operators.[109] It did not restore competition: the third SOE has not made the market substantially more competitive than it was before.[110] Consumer welfare and fair competition fail to be promoted or protected[111] because the interoperability obstacles

107. China Telecom's fixed-broadband users increased by more than 10 million across China (10% growth). *See, e.g.*, *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 (Feb. 1, 2018), http://tc.people.com.cn/n1/2018/0201/c183008-29799490.html [https://perma.cc/X44H-BQ4E].

108. Because telecommunication SOEs still dominated the market, without granting genuine network interoperability, high entry barriers continued to militate against the prospects for the non-State-owned fixed-broadband operators. *See* Hou, *supra* note 89, at 692. The Authors' case study provides an illustrative example: in *Cangzhou* (沧州) (in *Hebei Province* (河北省)) two private broadband operators holding 10% of the market between them in 2012, ceased to operate by 2015, leaving only one private operator in the market, a new entrant which held a mere 0.18% market share.

109. This outcome contrasts with the outcome in similar cases decided by the European Commission and European Union courts. *See, e.g.*, Deutche Telekom, *supra* note 96; Telefonica, *supra* note 96; Konkurrensverket, *supra* note 96.

110. This Decision presents a prime example of how the State's attempts to make the market more competitive continue to be thwarted not only by SOEs but also by its own actions. Another example is seen in the State-initiated *Mixed-Ownership Reform* (2013), permitting private funds to invest in telecom SOEs. This has not resulted in an increase in market competition. In fact, the opposite occurred because the outcome is the emergence of super-monopolies which further extend SOEs market dominance. For example, major incumbent SOE broadband provider China Unicom received substantial investment from 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)). This investment gives the SOE increased influence over these new emerging powerful technology-based consumer retail and social media platforms. For an analysis of the Mixed-Ownership Reform, see Yu Zheng, *China's State-Owned Enterprise Mixed Ownership Reform*, 4 E. ASIAN POL'Y. 39 (2014).

111. Contrast this approach with the approach taken by the European Union in the Cases discussed above. *See, e.g.*, Telefonica, *supra* note 96; Konkurrensverket, *supra* note 96; Deutche Telekom, *supra* note 96.

remain, and private competitors cannot take advantage of the NDRC decision in this case.[112]

Thus, the Authors conclude that the above presents a clear example where the nationally 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 that the idea that the public interest is a kind of "balancing mechanism" between competing interests[113], *is clearly an illusion.* It seems clear that the "public interest" tolerates a situation whereby attaining dominance and all of the attendant dangers[114] that follow for protection of consumer welfare and fair competition is not seen as contrary to the State's interests. Nor is it contrary 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 (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.

D. 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[115] presents an immediate contrast with the European position on the question of the public

112. *See* NG, *supra* note 102 (pointing out that that private competitors could not take advantage of the NDRC ruling).

113. WANG, *supra* note 11, at 351-52.

114. Abusive pricing, illegal rebates, refusal to supply, market sharing, etc.

115. For the purposes of this steel study, the Authors focused on "administrative mergers" (which the Authors call "forced mergers") to assess the extent to which private competitors had been greatly reduced in number 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 Manage Zombie Enterprises" (2016), streamlined the process. Chinese mainstream media reported that

interest and *forced mergers*. In China, notwithstanding that the 2007 Act[116] refers to concentrations occurring by way of *fair competition or voluntary alliance*, the State's administrative agencies[117] 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

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 (Sept. 28, 2018), https://www.caixinglobal.com/2018-09-28/steel-giants-forge-merger-as-china-moves-to-strengthen-state-sector-101331148.html [https://perma.cc/UTK4-U93F]. The Authors examined instances 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 Stat. Press 2017); 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 Manage Zombie Enterprises] (promulgated by the St. Council of China, 2016, effective 2016).

116. Business operators may, through fair competition or voluntary alliance, concentrate themselves according to law, expand the scope of business operations, and enhance competitiveness. 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 Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 5, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (China).

117. An example is the State-owned Assets Supervision and Administration Commission of the State Council ("SASAC").

competition in the marketplace. The contrast with the European Union approach is illuminating.[118]

In contrast to China, mergers of private corporations in the European Union *cannot be forced, especially if a corporation is profitable*.[119] In the European Union, 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)[120] or (2) where it can 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

118. Case M.8444, ArcelorMittal/Ilva, Comm'n Decision, 2018 O.J. (C 351) (an illustrative recent example showing how the European Union regulatory authorities were very conscious of the potential impact on consumers and competition when they examined the proposed takeover by Arcelor Mittal of its second largest competitor, Ilva). The Commission cleared the takeover, conditioned on Arcelor divesting key production assets in no less than 6 European Union Member States 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.

119. Forced mergers are not the norm in European Union Member States which are free market economies. Apart from 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, private enterprises can operate without fear of being forced into a merger with a State-owned enterprise. An example is the 2008 UK banking crisis, where 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. *See* Council Regulation 139/2004, 2004 O.J. (EC) (the European Union's Merger Regulation) (which does not provide any legal basis for the promotion of forced mergers).

120. Council Regulation 139/2004, art. 9, 2004 O.J. (EC). The European Union's Merger Regulation provides inter alia that the European Commission may refer a proposed concentration notified to it, back to the competent authorities of a concerned Member State, 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 concerned Member State 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. EUR. COMP. L. & PRAC. 133-45 (2018); PARKER & MAJUMDAR, *supra* note 37.

rules.[121] But in neither case are the State's powers exercisable for the purpose of *forcing a merger*. The MCR merely allows a State to interfere with a proposed merger's terms on either distinct local competition or prudential grounds. So, in neither instance can the European Union or its constituent Member States *force* mergers of private corporations to occur in pursuit of European Union/State economic objectives or industrial policy.[122]

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;[123] whereas in China, forced mergers of otherwise profitable and healthily trading corporations are tolerated—in fact they are actively pursued by the State[124]—notwithstanding that they may reduce competition; lead to increased prices; not achieve desired efficiencies; or promote unfair competition. This demonstrates 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.

121. An example is making sure that unfit people (such as criminals) do not become media owners, or owners of key institutions, such as banks.

122. This should not be confused with the failing firm defence where in exceptional circumstances the European Union can approve mergers of failing firms provided that certain strict criteria are satisfied. *See* Aerospatiale-Alenia / De Havilland, *supra* note 27. The European Union 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 European Union. However, the Commission relaxed its position somewhat in the subsequent Decision. *See* Kali-Salz/MdK/Treuhand, *supra* note 27 (specifying that 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).

123. 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). However, European Union Member States cannot force mergers to occur.

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

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" (commenced in 2005) provides an excellent example of the elimination of many private competitors from the steel milling industry occurring between 2005 and 2010.[125] It was directly attributable to State action, which favored steel milling SOEs, and yet did not achieve the hoped-for efficiencies.[126]

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).[127] Those not forcibly closed were subsumed into large-scale SOE enterprises,

125. During these years, the number of steel mills operating in China was reduced from over 7,000 to under 900 under the "Policies for the Development of the Iron and Steel Industry" (2005) and the "Steel Industry Revitalization Plan" (2009) sponsored by the Ministry of Industry and Information Technology. *See Guoxinban Juxing Shangbannian Gongye Tongxinye Jingji Yunxing deng Qingkuang Fabuhui* (*国新办举行上半年工业通信业经济运行等情况发布会*) [*Press Conference Held by the State Council Information Office on Economic Performance of China's Industry and Communication Industry in the First Half Year*], ST. COUNCIL INFO. OFF., CHINA (July 20, 2010), http://www.scio.gov.cn/xwfbh/xwbfbh/wqfbh/2010/0720/ [https://perma.cc/PL9N-UALF].

126. Ambitious targets for industry consolidation were first set in 2005 ("Policies for the Development of the Iron and Steel Industry" (2005)) but were not met. More specific targets were set in 2009 ("Steel Industry Revitalization Plan" (2009)), and restated again (along with some additional targets) in 2016 in the "Guiding Opinions on Promoting the Merger and Reorganization of the Steel Industry to Manage Zombie Enterprises" (2016), which sets the following targets for achievement by 2025: (1) steel industrial concentration achieving 60% (still not achieved); (2) the output of the top ten large steel undertakings to rise to 60-70% of total Chinese steel output (still not achieved); (3) the formation of three or four steel groups, with a production capacity of 80 million tonnes (approaching target achievement by end 2021); (4) the formation of six to eight steel groups with a production capacity of 40 million tonnes (approaching target achievement by end 2021). *See* 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 Manage Zombie Enterprises] (promulgated by the St. Council of China, 2016, effective 2016).

127. This was achieved under the "Steel Industry Revitalization Plan (2009)." *See Press Conference Held by the State Council Information Office on Economic Performance of China's Industry and Communication Industry in the First Half Year*, *supra* note125; 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).

not voluntarily, but rather by way of "administrative intervention" (i.e., forced mergers). 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 2010,[128] with an ultimate objective of having no more than 200 enterprises operating in the sector by 2025.[129]

1. Case Study

First, the following example demonstrates how unscientific this process has been. Second, this Section argues that the process has failed to enhance economic efficiency. Sector output has declined, mainly because competitors were forced to exit the market, by means of either forced mergers or forced closures, in either case as a result of administrative intervention.

The *provincial merger* regime in Hebei province[130] provides a useful example of a 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.[131] Mill operators' views are frequently ignored.[132] In 2010, the local Hebei provincial government proposed that 88 local steel enterprises (both State-owned and privately-owned

128. *See Press Conference Held by the State Council Information Office on Economic Performance of China's Industry and Communication Industry in the First Half Year*, *supra* note 125.

129. *See* 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 Manage Zombie Enterprises] (promulgated by the St. Council of China, 2016, effective 2016) (setting this target).

130. *Hebei province* (河北省) is China's biggest steel-producing region. Implementing the rationalization strategy set out in the "Steel Industry Revitalization Plan" (2009) and the subsequent "12th Five-Year Plan (2011-2015) for China's Iron and Steel Industry," the *Hebei* provincial government played an active part in the steel mills' forced mergers/closures process. *See* Liang, *supra* note 127.

131. 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.

132. 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).

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.[133] This meant 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.[134] 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.[135] The actual outcome of these forced mergers made two steel SOEs (*Hebei* Steel and *Shougang* Group) larger[136], but not necessarily stronger, because by following the plan's implementation, those private operators that managed to remain active[137] in the market continued to produce the majority of the sector's output in Hebei province.[138] Faced with this somewhat embarrassing situation, the Central Government re-intensified efforts to force mergers in

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133. This draconian target set in 2015 for *Hebei province* (河北省) for achievement by 2020 was not realized, and has now been deferred to 2025. 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) [ECON. INFO. DAILY] (Sept. 28, 2018); Liu Heng, *Gangqi Jianbing Chongzu, Tisu Gengyao Tizhi* (*钢企兼并重组 提速更要提质*) [*Merger and Reorganization of Steel Enterprises, Quality over Speed*], ZHONGGUO KUANGYE BAO (中国矿业报) [CHINA MINING NEWS] (Jan. 7, 2021), http://www.zgkyb.com/yuqing/20210107_65911.htm [https://perma.cc/QD5Z-EN2Q].

134. Liang, *supra* note 127.

135. 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/ [https://perma.cc/TVT3-4BQN].

136. Liang, *supra* note 127.

137. 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 via forced merger. *See id.*

138. 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 (Dec. 15, 2017), http://finance.sina.com.cn/money/future/indu/2017-12-15/doc-ifypsvkp3612303.shtml [https://perma.cc/M8X9-ZX4Z].

China's steel industry in 2018:[139] as a result, over one-third of the total number of privately-owned steel enterprises in China have now undergone forced mergers.[140] 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[141]), 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 2009-2016). Nor does it take the practical demands of the Chinese steel industry into account.

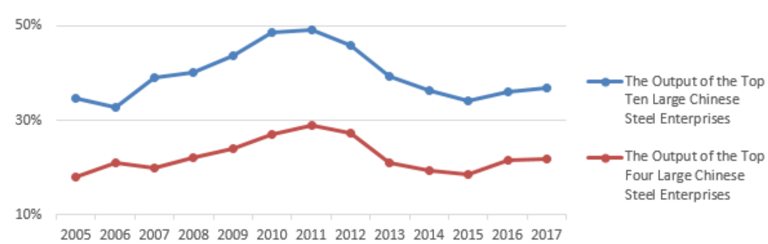
139. Z.C. Li & R.Q. Dong, *BaoWu Hebing Yixiaobu Xinban Gnagtieye Zhenghe Luxiantu Chushui* (*宝武合并一小步新版钢铁业整合路线图出水*) [*One Small Step for Bao Steel and Wu Steel, One Big Step for the New Version of the Steel Industry Integration Roadmap*], JINGJI GUANCHA (经济观察) [ECON. OBSERVER] (Sept. 24, 2016).

140. Liang, *supra* note 127.

141. Forced mergers have been taking place all around the country, 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 a Global Backlash*, WALL STREET J. (ASIA) (Nov. 17, 2010), https://www.wsj.com/articles/SB10001424052748703514904575602731006315198#:~:text=Foreign%20companies%20dominated%20production%20and,was%20declared%20a%20national%20priority [https://perma.cc/3BXW-KRWF]; *Crowded Out*, CHINA ECON. REV. (Oct. 15, 2012), https://chinaeconomicreview.com/crowded-out/ [https://perma.cc/Y9LG-3VFJ].

The State's policy seems to be the sole basis driving consolidation in this industry, with no effective role for 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. Analysis of industry data (starting from 2005) covering 12 years of intensive restructuring reveals that both *the output of the top ten largest steel enterprises* and *the output of the top four largest steel enterprises* failed to show improvement during the restructuring period (Chart 1 below).[142] Such a trend illustrates that administrative intervention promoting industrial concentration did not achieve the 2009 Plan's target for the top ten largest steel

142. **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, and is composed of the combination of data from multiple sources for particular years as follows: For data for 2005-2008, see ZHONGGUO CHANYE ZHENGCE BIANDONG QUSHI SHIZHENG YANJIU 2000-2010 (中国产业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). For data on 2009, see (1) Du Lihui, Chen Guangjie & Shi Guirong, *Dui Woguo Gangcai Chanpin Jizhongdu de Fenxi* (*对我国钢材产品集中度的分析*) [*Analysis on the Concentrations of Steel Products in China*], 4 CHINA STEEL 13 (2010) (China); and (2) Liu Long, *Gangtie Chanye Shichang Shili yu Jiegou Fenxi* (*钢铁产业市场势力与结构分析*) [*Analysis on the Market Power and Structure of the Iron and Steel Industry*], 454 CO-OPERATIVE ECON. & SCI. 1, 2 (2012) (China). For data for 2010-2017, see Ding Tingting, *Gangtie* (*钢铁*) [*Steel*], GUOSHENG SEC., CHINA (Nov. 16, 2019), http://pdf.dfcfw.com/pdf/H3_AP201911181370836883_1.pdf [https://perma.cc/SU24-X87V].

enterprises to produce sixty percent of the country's entire steel production output by 2015.[143]

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 aptly demonstrated by these forced mergers proceeding without any detailed decisions published to demonstrate how they are compatible with the 2007 Act.[144] Under the 2007 Act only *merger prohibition* decisions or *conditional clearance* decisions require publication;[145] i.e., a published decision is produced when a merger is either

143. However, the State's steel intervention program presses ahead, with intensive restructuring ongoing in this sector. *See* Liang, *supra* note 127.

144. In reality, the Ministry of Commerce of China ("MOFCOM") is not notified about all domestic mergers. Deborah J. Healey & Zhang Chenying, *Bank Mergers in China: What Role for Competition?*, 12 ASIAN J. COMP. L. 81 (2017); Wang & Emch, *supra* note 101, at 267.

145. 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 Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 30, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (China). SAMR's 2020 proposals to reform the 2007 Act propose no change to this publication requirement. *See* SAMR's 2020 reform proposals: 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] (promulgated by the State Admin. for Mkt Regul., Jan. 2, 2020), art. 35 (China). A minor change 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* 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] (promulgated by SAMR, Jan. 7, 2020), art. 68 (China). At the time of writing, these proposals have not been passed.

prohibited[146] or conditionally cleared subject to conditions.[147] Those that are cleared annually without conditions are many times more numerous and yet they are not accompanied by any form of published decision other than an announcement of their clearance,[148] so it is unclear whether those mergers that were

146. *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. MOFCOM Announcement No. 22 of 2009 (promulgated by the Ministry of Commerce, Mar. 18, 2009), http://www.gov.cn/zwgk/2009-03/18/content_1262233.htm [https://perma.cc/Z2JY-63PN] (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 No. 46 of 2014] (promulgated by the Ministry of Commerce, *)*, Jun. 17, 2014), http://fldj.mofcom.gov.cn/article/ztxx/201406/20140600628586.shtml [https://perma.cc/T9UH-S5Y6] (China). No prohibition decisions could be found on SAMR's official website. *See* SAMR, *Conditional Approval/Prohibition of Concentration Cases*, SAMR, http://www.samr.gov.cn/fldj/tzgg/ftjpz/index.html [https://perma.cc/5GX8-U2C8] (last visited Dec. 22, 2020).

147. *See, e.g.*, MOFCOM Announcement (2009) No. 28 (promulgated by the Ministry of Commerce, Apr. 24, 2009), http://fldj.mofcom.gov.cn/aarticle/ztxx/200904/20090406198805.html?4168590711=3683028003.%201/3 [https://perma.cc/GQ39-E4E4] (China) (regarding the conditional approval of Mitsubishi Rayon's acquisition of Lucite-International); MOFCOM Announcement (2013) No. 58 (promulgated by the Ministry of Commerce, Aug. 12, 2013), http://english.mofcom.gov.cn/article/policyrelease/buwei/201308/20130800259186.shtml [https://perma.cc/AET7-BL2S] (China) (regarding the conditional approval of the acquisition of Gambro AB by Baxter International Inc); MOFCOM Announcement (2018) No. 31 (promulgated by the Ministry of Commerce, Mar. 15, 2018), http://english.mofcom.gov.cn/article/policyrelease/buwei/201803/20180302719967.shtml [https://perma.cc/K9WE-2YVQ] (China) (regarding the conditional approval of Bayer Aktiengesrllschaft, Kwa Investment Co.'s acquisition of Monsanto Company).

148. As an illustration, in 2018, 4 mergers were granted conditional clearance, accompanied by a detailed decision in each case. By contrast, 444 mergers approved without conditions in the same year contained no published narrative, other than a notice confirming merger approval, e.g., no description of either the main features of the mergers nor the reasons why they were approved. There were no prohibition decisions in 2018. In 2017, 325 mergers were approved without conditions, with (again) none accompanied by any published competition clearance assessment nor any detailed information about the merger. In the same year, 7 mergers approved subject to

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.

E. Summary of Conclusions from the Case Studies

The above three case studies illuminate how 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 across different industries in China. Whether the practice is margin-squeezing; refusals to supply without objective justification; the leveraging of upstream dominance to acquire downstream dominance; 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; and 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 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

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conditions were accompanied by published decisions. In the case of the 12 mergers either prohibited or withdrawn in that year, no detailed decision accompanied any of those 12 prohibition decisions. This reflects a familiar pattern (not publishing merger prohibition decisions) apart from a small number of exceptions where prohibition decisions were published. *See supra* note 146. *See 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), http://www.mofcom.gov.cn/article/ae/ai/201801/20180102696433.shtml [https://perma.cc/AKC7-PLE5] (China); 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 L. FIRM (Jan. 9, 2018), http://www.anjielaw.com/uploads/soft/180109/1-1P1091I616.pdf [https://perma.cc/AET7-BL2S]; 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 L/ FIRM (Jan. 11, 2019), http://www.anjielaw.com/uploads/soft/190115/1-1Z115112Q8.pdf [https://perma.cc/K9WE-2YVQ].

know them in the European Union; and that norm relegates the protection of competition norms to the sideline.

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

Before concluding, the Authors shall discuss three essential regulatory reforms[149] that are needed in order to enhance the role and effectiveness of China's antitrust agency, the reformed ministerial-level State Administration of Market Regulation ("SAMR") ministry (2018). SAMR oversees the newly established sub-ministerial level enforcement agency, the National Anti-Monopoly Agency.[150] This new structure was designed to replace three other sub-ministerial agencies.[151] Previously, all three agencies were regulated under different ministerial level authorities, charged with conducting various aspects of competition enforcement. Reform was necessary because they

149. (1) Normative Elevation Reform; (2) Reporting Channels Reform; (3) Law Reform. *See infra* Section IV.A.

150. In 2018 the three antitrust enforcement agencies listed in *infra* note 151 merged into one new super-regulator, the National Anti-Monopoly Agency (the national antitrust enforcement agency) under the supervision of the SAMR. *See* Zhan Hao, Song Ying & Yang Zhan, *A New Era Comes – Highlights of the Anti-Monopoly Law of China in 2018*], ANJIE L/ FIRM (2018), https://www.anjielaw.com/uploads/soft/190201/1-1Z2011P339.pdf [https://perma.cc/2GCZ-DKCK].

151. The three sub-ministerial-level antitrust enforcement agencies were, the Anti-Monopoly Bureau ("MOFCOM") 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, 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 antitrust enforcement system (aggravated by deficiencies such as the lack of applicable judicial interpretations, lack of sufficiently qualified experienced professionals; and the multi-agency operating system's failure to combat competition infractions by administrative monopolies) China announced in early 2018 that the three antitrust enforcement agencies would be merged into one new super-regulator, the National Anti-Monopoly Agency (which, under the supervision of the SAMR) was created in May 2018. *See* Yuan Lin & 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) [ECON. INFO. DAILY] (May 25, 2018).

had overlapping jurisdiction leading to jurisdictional rivalries, while they were often absent from the theatre of enforcement operations.

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[152], the Authors have shown above that the reality is otherwise: SOEs and government industrial policies often advance anti-competitive objectives. Without enforcement 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.[153] Therefore, a number of specific regulations and resource capacity-building measures are required in order to restrain the excessive exercise of administrative powers—otherwise respect for antitrust compliance and enforcement of the 2007 Act will not strengthen. In strengthening antitrust compliance, the proposed measures would strengthen the rule of law in China by elevating respect for competition to the level of a superior norm. Superior to administrative intervention, this will in turn enhance the position of private enterprises in China, which have long sought equal parity with SOEs in China.[154]

152. 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 Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) arts. 7, 32-37, 50, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (China); *See* William E. Kovacic, *Competition Policy and State-Owned Enterprises in China*, 16 WORLD TRADE REV. 693, 695 (2017).

153. Wang, *supra* note 18.

154. Jinbiao Xia, *Yi "Jingzheng Zhongli" Yingzao Guoqi, Minqi Gongping Jingzheng Huanjing* (*以"竞争中立"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 ECON. TIMES] (Nov. 8, 2018).

A. Regulation Enhancement

The specific regulations the Authors propose should be promulgated by the new antitrust enforcement agency, SAMR,[155] 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[156] and market participants[157] to have safe channels 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 reforming 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. The Authors shall now elaborate each of these three sets of proposals in turn.

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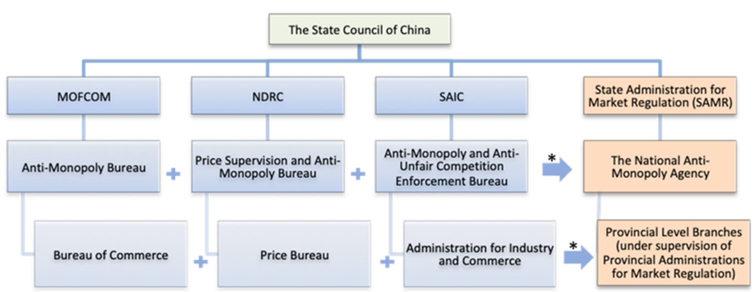
155. **Chart 2: The New Structure of the Antitrust Enforcement Agency**



The first three columns in the chart above (reading from left to right) illustrate how the antitrust multi-agency system in China was structured prior to its reorganization in April 2018, while the column on the extreme right illustrates the updated antitrust enforcement structure which came into effect in May 2018. The arrows indicate the transfer of powers and functions from the bodies in columns 1-3, to the corresponding-level body in the extreme right column 4.

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

157. Market participants in this context include both SOEs and private enterprises.

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, thereby aligning Chinese competition enforcement with the European Union approach (where competition is not trumped by industrial policy). Two steps are needed in order to change the current dynamic between industrial policy-makers and competition compliance/enforcement.

The first step is structural—SAMR should be positioned higher in the State hierarchy so that it can prohibit the key higher-level Ministries responsible for industrial policy (such as the Ministry of Industry and Information Technology ("MIIT"), the NDRC, and the Ministry of Commerce ("MOFCOM")) from issuing 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. This should include the power to call for their amendment or abandonment, prior to their adoption. Where any industrial policies negatively affect the 2007 Act's supremacy, then SAMR should stop the release or implementation of such policy. This would be the ideal situation. However, even if SAMR's role is not elevated in this fashion, the current situation has been significantly improved because the three antitrust enforcement agencies (the Anti-Monopoly Bureau; the Price Supervision and Anti-Monopoly Bureau; and the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau) were all subsumed into the new National Anti-Monopoly Agency in 2018, which comes under the direct supervision of SAMR.[158] This structural change could support the desired norm reversal because under the new 2018 structural reforms SAMR does not envisage any industrial policy-influencing role for the newly merged enforcement agencies (named above) now that

158. *See* Lin & Sun, *supra* note 151 and accompanying text.

they come under its sphere of influence.[159] However, only time will tell whether these recently integrated agencies will now allow industrial policy to take a rear seat and instead focus on the implementation of competition enforcement as their primary mission.[160]

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, which prohibits them from adhering to non-competition compliant industrial policies or promoting anti-competition administrative interventions.

2. Reporting Channels Reform

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 private enterprises 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 antitrust enforcement agencies. Analogous to developments in the European Union, direct reporting channels[161] 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 protections

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

160. *Id.*; F. Deng, *Fanlongduan "Sanheyi"* (*反垄断"三合一"*) [*Merging Three Anti-Monopoly Agencies into One*], CAIJING MAG. 113-15 (Aug. 6, 2018).

161. The reporting channel to the European Commission is an example of a reporting channel in the European Union. *Reporting Anti-Competitive Behaviour*, EUR. COMM'N (Sept. 28, 2018), https://europa.eu/youreurope/business/selling-in-eu/competition-between-businesses/anti-competitive-behaviour/index_en.htm [https://perma.cc/P7F9-FLP6]. *Tell the CMA about A Competition or Market Problem*, UK GOV'T (Jan. 14, 2016), https://www.gov.uk/guidance/tell-the-cma-about-a-competition-or-market-problem [https://perma.cc/AKC7-PLE5] (an example of a reporting channel at country-level).

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 private enterprises with mechanisms for the reporting of, and the right to refuse to comply with, anti-competitive administrative interventions instigated by SOEs, or anti-competitive industrial policies launched by administrative agencies.[162] Given the fact that the majority of private enterprises are local, 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) antitrust enforcement agencies, namely the new Provincial Administrations for Market Regulation ("PAMR"),[163] could be helpful and effective. In other words, the PAMRs should be the first contact point for local enterprises to report any unfair situations, as PAMRs will be best placed to deal with the competition concerns of locally based private enterprises.

3. Reform of the 2007 Act

The *third* objective of regulatory reform would be regulations designed to achieve two key objectives. First, regulations to embolden antitrust enforcement agencies to halt SOE competition infringements are required. This will ensure that the objectives desired by Article 7 of the 2007 Act[164] are not

162. 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), http://www.bjnews.com.cn/news/2018/11/11/520320.html [https://perma.cc/4Y8C-PSPY]; 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, 725 (2019).

163. The first PAMRs commenced operations in late 2018 (e.g., in provinces such as Hainan, Guangdong, Zhejiang) and the remaining PAMRs were established by the end of 2019.

164. Kovacic, *supra* note 152; 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 Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 7, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (China).

frustrated. Second, a clear legislative prohibition is required to prohibit administrative agencies abusing their special or exclusive rights, and to prevent them from intervening in privately-owned enterprises operating in traditional State-controlled industries, or industries in which SOEs wish to gain control. Third, 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 the pursuit of the State's industrial policy.

Despite the fact that Article 7 (in addition to Article 8) of the 2007 Act prohibits 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 (several such examples are the case studies considered in Part III). This amendment of the current Article 7 is required because currently the corrective mechanisms set out in Article 51 of the 2007 Act[165] (which are designed to rectify lower level administrative agencies non-compliance with the Act) are not being used adequately. This is because under China's civil service culture, the bureaucrats (not unlike elsewhere) traditionally tend to shield one another from blame or public scrutiny.[166]

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. Second, SAMR should call for the provision of

165. 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 Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 51, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (China). 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 (i.e., now SAMR) may put forward suggestions on handling according to law to the relevant superior authority. A minor revision to this Article has been proposed in Article 58 of the SAMR's 2020 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 yet been adopted into Law. *See* 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] (promulgated by the State Admin. for Mkt Regul., Jan. 2, 2020), art. 58 (China).

166. Zhang, *supra* note 18.

specific sanctions for SOEs and administrative agencies to halt their fostering of anti-competitive practices. Third, SAMR should commence enforcing deterrent effects by making the persons responsible for infringements personally responsible, such as by demotion. [167] As demonstrated in the Part III case studies, adoption of the reforms listed above would open the way for (1) the number of privately-owned filling stations to increase again (once discriminatory practices in that sector could be brought to an end); (2) the removal of anti-competitive exclusionary barriers in the broadband market, which would encourage private operators to enter the fixed-broadband market, to the benefit of consumers and competition; and (3) the pace of "administrative mergers" in the steel industry, which would be limited only to those firms who are demonstrably financially unviable and thereby remove healthy competitors from its reach.[168]

Finally, 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 the pursuit of the State's industrial policy. That would be the capstone of the proposed reforms, as its repeal would remove "legislative cover" for anti-competitive industrial policies 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.

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

168 . Furthermore, antitrust enforcement agencies would have the right to determine who would gain from compensation awards arising from the anti-competitive acts of administrative monopoly, with the aim of compensating private enterprises which have suffered from the consequences of inappropriate administrative intervention. In order to ensure smooth implementation, specific regulations would also require a detailed compensation calculation mechanism. *See* 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 Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), arts. 46-48, 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68 (China) (detailing the current inadequate mechanism).

B. Capacity-Enhancement

1. Institutions and Personnel Resources

In addition to the above, both new institutions and personnel resources are needed. [169] First, personnel: highly experienced policy and regulatory expertise is needed in the antitrust policy and enforcement agencies (e.g., in SAMR and in PAMRs). Training or hiring additional discipline-specific professionals, suitably trained to conduct sophisticated and complex antitrust investigations, with particular experience in combatting unfair practices, will greatly enhance capacity. For example, having sufficiently experienced competition lawyers and in-house expert economists, [170] or employing external competition economists and involving them in the antitrust investigation process, would build antitrust agency understanding of what is fair (or unfair) competition in the market.[171]

The courts in China will accommodate expert witnesses. 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*[172] held that parties

169. Xiaoye Wang, *Retrospective and Prospects of China's Anti-Monopoly Law*, in RESEARCH HANDBOOK ON ASIAN COMPETITION LAW 227-29 (Steven Van Uytsel, Shuya Hayashi & John O Haley eds., 2020); XUEGUO WEN, YANBEI MENG & CHONGYING GAO, FANLONGDUANFA ZHIXING ZHIDU YANJIU (反垄断法执行制度研究) [RES. ON ANTI-MONOPOLY L. ENFORCEMENT SYS.] 67 (2011).

170. For example, with regard to the first successful case against an administrative monopoly, decided by Guangdong High People's Court in 2015, economists participated in the Court proceedings as expert witnesses for the parties to help the Court to understand the complex economic arguments. *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 6 (Dec. 24, 2015); 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) (pointing out that "the legal system is one which can only be run by professionals").

171. Ariel Ezrachi & Maurice E. Stucke, *The Fight Over Antitrust's Soul*, 9 J. EUR. COMPETITION. 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.

172. Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in Hearing Civil Cases Caused by Monopolistic Conducts, No. 5, art.

shall apply to the People's Court to have one or two specialists with relevant knowledge appear in Court as expert witnesses. Consideration should also be given to allowing SAMR experts to act as *amicus curiae*, to help the courts understand complex antitrust concepts. Such a facility has been authorized in the European Union under its 2004 antitrust enforcement modernization program, which allows European Commission antitrust expertise to be available to national courts hearing antitrust cases with European Union dimensions.[173]

In addition, it would be useful to involve antitrust scholars in antitrust investigations, since they may often be more familiar with the 2007 Act and competition philosophy than civil service antitrust enforcement staff.[174] Hence, training professionals[175] as well as introducing more economists[176] and legal scholars to participate in the work of China's antitrust enforcement agencies could help bring about a more professional and less discretionary perspective to the work of the antitrust agencies. This shall be particularly relevant in antitrust investigations involving SOEs or administrative monopolies' unlawfully interfering with

12 (2012) (promulgated by the 1539th meeting of the Judicial Committee of the Supreme People's Court, May 3, 2012, effective June 1, 2012).

173. Council Regulation 1/2003/EC of Dec. 16, 2002, Implementation of the Rules on Competition Laid down in Articles 101 and 102, 2003 O.J. (L 1/1) (providing that the European Commission may, with the permission of the national court, appear before the national court and give its view on European Union antitrust law's interpretation where a case before the national court raises such issues). The Regulation obliges national competition authorities and the Commission to cooperate closely with each other to ensure the uniform application of European Union competition law across the Member States. *See generally* DERMOT CAHILL, THE MODERNISATION OF EU COMPETITION ENFORCEMENT IN THE EUROPEAN UNION (2004).

174. Although Chinese antitrust enforcers and Anti-Monopoly Law scholars have had many opportunities to exchange views, (e.g., at academic conferences), scholars are rarely consulted by those conducting antitrust investigations.

175. Alfonso Lamadrid de Pablo, *Competition Law as Fairness*, 8 J. E. COMP. L. & PRAC. 147, 147 (2017) (pointing out that "Competition law is a legal discipline that is particularly permeable to changes in economic and political opinions."); 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 Comm'n of China Soc'y for World Trade Org. Studies ed., Law Press, China 2013).

176. Marcel Boyer et al., *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).

competition in the marketplace.[177] These reforms will reduce administrative agencies' influence and increase the independence of antitrust enforcement.[178]

2. Institutional Reform

With respect to institutional reform, two key institutions are missing from the current China legal framework: an independent competition authority and a dedicated competition law court.

i. An Independent Competition Enforcement Authority

Based on the European Union experience, *an independent competition enforcement authority* is essential.[179] The 2018 institutional reform changes described above—combining the three previous Chinese antitrust enforcement agencies into one—does not bring about the creation of *a truly independent* competition authority. This is because the new National Anti-Monopoly Agency is positioned at the original administrative level (the sub-ministerial-level) formerly occupied by its forebears.[180] Accordingly, the new agency will come up against resistance when it seeks to challenge *ministerial-level* authorities' market interventions, e.g., interventions by MOFCOM or the NDRC.[181] In order to carry out "fair competition review,"[182] the

177. This is because cooperation between enforcement agencies and scholars would help enforcement agencies develop a more sophisticated approach to overcoming deficiencies in China's anti-monopoly enforcement approach. *See* 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], COMPETITION POL'Y, DIG. ECON. & INNOVATION CONF. (Nov. 30, 2017), https://finance.sina.com.cn/china/gncj/2020-11-05/doc-iiznezxs0160564.shtml [https://perma.cc/SK9T-LRKS]. As Monti observes in the context of European Union Competition Law, "no economist would ever have written Article 81 and 82 [TFEU arts. 101 & 102] in the way that they have been [written] . . . ." Monti, *supra* note 171, at 3, 13.

178. Wang, *supra* note 18.

179. 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*, *in* 2017 PROCEEDINGS OF THE NEW FRONTIERS OF ANTITRUST 8TH INTERNATIONAL CONCURRENCES REVIEW CONFERENCE (2017); Johan W. van de Gronden & Sybe A. de Vries, *Independent Competition Authorities in the EU*, 2 UTRECHT L. REV. 32 (2006).

180. *See* Chart 2, *supra* note 155.

181. Wang, *supra* note 18.

182. This means 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*

new National Anti-Monopoly Agency should be elevated *above* ministerial level (the most desirable position). Alternatively, though less preferably if this cannot be achieved, the National 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, this is a less strategic position to occupy in the battle between industrial policy adherents and those calling for the primacy of competition principles, but it is certainly better than where the Agency is currently positioned, lower in the hierarchy at sub-ministerial level.

ii. A Competition Law Court

A competition law court is required, which can give neutral judgments in cases contesting administrative intervention in China,[183] because (1) *competitive neutrality* is the "new creed" promoted by SAMR;[184] (2) Judges of the Civil Division and Intellectual Property Tribunal of the People's Court (who hear competition cases) may not yet have the desired level of specialist knowledge required to enable sophisticated market assessments

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Competition Review: Introduction, Imperfections and Solutions, 13 COMPETITION POL'Y INT'L 1 (2017). Indeed, in its 2020 reform proposals, SAMR agreed with this suggestion, in that it proposed 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. 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] (promulgated by the State Admin. for Mkt Regul., Jan. 2, 2020), art. 9 (China).

183. The way the European Union's judicial organ (CJEU and General Court of the EU) works provides a useful model for China to follow: both European Union courts follow the rule of law to ensure the supremacy of European Union law and respect by both State and non-State actors for the fundamental importance of competition law in the EU. *See, e.g.*, 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'Y 907 (2017).

184. 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) [SCI. L.] 165 (2014); Xia, *supra* note 154.

or apply sophisticated competition law economic concepts;[185] and (3) the People's Court cannot be regarded as a truly independent authority (when dealing with antitrust lawsuits involving challenges to the deployment of administrative powers).[186] This is because the antitrust lawsuit could turn into a battle for supremacy between administrative intervention and the 2007 Act's competition objectives. 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. For example, the General Court on occasion overturns European Commission competition[187] or merger regulation decisions.[188] It cannot be accused of being a biased adjudicator. Establishing a similar institutional structure in China would allow China to demonstrate how its regulation of competition would be divorced from State policy—at present, this is not true 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

185. The judgment in *Qihoo 360 v. Tencent (2013)* found Tencent not dominant (even though it held 87.6% market share in the Chinese instant messaging market) on the ground that it 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 CT. GAZ. No. Minsanzhongzi 4/2013 (Sup. People's Ct. 2013) (China).

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

187. For example, the General Court in the Apple Judgment (2020) annulled the Commission's decision that Ireland had granted Apple EU€13 billion in unlawful tax advantages. *See* Cases T-778/16 and T-892/16, Ireland and Others v. Comm'n, ECLI:EU:T:2020:338 (2020). *See also* Case T-13/03, Nintendo Co., Ltd v. Comm'n, 2009 E.C.R. II-975; Case C-338/00, Volkswagen AG v. Comm'n, 2003 E.C.R. I-9189.

188. *See* Airtours, *supra* note 66.

"public interest." This Article assessed the true meaning of this concept. This is against the background of the concept not being defined in the 2007 Act itself, not being interpreted in the domestic case law, and having no consensus as to its meaning in the academic literature. This Article has established the importance of understanding what the concept means. The Act's other proclaimed objectives (of protecting consumer welfare, enhancing efficiency, and safeguarding fair competition) are merely an empty formula when the State advances non-competition-neutral industrial policies. Whether via the preferential treatment industrial policy affords SOEs, or via administrative authorities' interventions in the marketplace, State policy does not prioritize competition objectives.

China's notion of the public interest is totally different from that of market economies. In the European Union, market behavior between undertakings is regulated based on competition criteria similar to the aforementioned three criteria (consumer welfare, efficiency, and fair competition) mentioned above. The European Union only allows non-competition based criteria, such as "official authority," "social solidarity,"[189] or "legitimate interests"[190] invocable only in highly exceptional

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

190. On the concept of legitimate interests (art. 21(4) MCR), see *supra* Parts II & III. For relatively recent examples, see Enterprise Act 2002, § 58 (Eng.) (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* David Reader, *Extending 'National Security' in Merger Control and Investment: A Good Deal for the UK*, 14 COMPETITION 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 EUR. COMPETITION J. 453 (2014); Michael Harker, *Cross-Border Mergers in the EU: The Commission v. The Member States*, 3 EUR. COMPETITION J. 503, 504-06 (2007); *Merger between British Aerospace plc and the Marconi Electronic Systems Business of the General Electric Company plc*, UK GOV'T, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/518289/baes-marconi-undertakings-2006.pdf [https://perma.cc/MYE9-RLLX] (last visited Nov. 13, 2020). *See Anticipated acquisition by Lloyds TSB plc of HBOS plc*, OFF. FAIR TRADING (Oct. 24, 2008), https://assets.publishing.service.gov.uk/media/5592bba440f0b6156400000c/LLloydstsb.pdf_jsessionid_4EBCDA0A4B36535AF8355B90D18E00A2.pdf. [https://perma.cc/B3UJ-42WJ] (discussing the takeover of HBOS Bank by Lloyds

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 European competition law, it is relatively rare to find "extra-Competition" criteria invoked to prevent specific transactions from proceeding in order to protect some vital national security or wider public interest[191] which competition criteria, on their own, cannot be relied upon to protect.

The analysis in this Article has demonstrated that the 2007 Act's "public interest" concept is very different from what its understanding is in the European Union. It is evident that the public interest frequently trumps the Act's other three competition objectives (promoting fair competition between competitors, enhancing efficiency and enhancing consumer welfare). This is demonstrated through China's toleration of various anti-competitive practices in the commercial sectors discussed above. It certainly is not intended to be (solely) a sparingly used control mechanism for protecting vital national prudential interests (as is the case in the European Union), nor is it a 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 calls into question the acceptance of the 2007 Act in the first place.[192] Consequently, this Article concludes that the concept of public interest is a superior principle in China. If this is to be reversed, certain steps are needed in order for the 2007 Act to attain what was intended to be its rightful place, namely that of a superior principle in China, not to be bypassed at regular intervals by the State's SOEs and administrative agencies.

Bank). *See also* British Sky Broad. Grp. plc v. Competition Comm'n [2010] EWCA (Civ) 2 (Eng.).

191 . This includes preventing the acquisition of a key piece of national infrastructure or sensitive technology by a hostile power, or a foreign corporation aligned with such power.

192. 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*, ANTITRUST SOURCE 1 (2005).

The case studies point towards this conclusion, with outcomes that could not be tolerated under European Union competition law. In the fixed-broadband industry case study, non-State-owned fixed-broadband operators currently suffer high barriers to entry in the SOE-incumbent-dominated market place. Hence consumers in China continue to suffer expensively priced low speed broadband.[193] This situation ought to be regulated by the 2007 Act, but regulation is not possible because the "public interest" concept is disregarding the need to eliminate SOE-created market entry barriers facing non-SOEs seeking to enter that market. Advancing measures that promote consumer welfare (e.g., allowing more choice of service providers) is not a priority. The balance between the interests of SOEs and non-SOEs has been contaminated by market entry barriers, created by the telecom SOEs *themselves* in the fixed-broadband industry.

Other examples examined in the steel industry case study reveal the lop-sided balance between the interests of SOEs and non-SOEs, which weighs heavily in favor of SOEs, due to forced "administrative mergers" and government-led closures of *profitable* private sector steel mills. The State gives little consideration 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*.[194] Forced mergers and forced closures of profitable competitive private competitors are practices that would not be countenanced under European Union merger control law.

In the refined gasoline retail market case study, the balance between SOEs' interests, non-SOEs, and consumer welfare was skewed by SOEs' exclusionary and discriminatory activities. 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. As a result, exit from the market by private retailers leads to strengthening of SOE vertical monopolies. This is not a good outcome for consumer welfare or

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193. 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 [https://perma.cc/4APS-CDYV].

194. *See* Chart 1, *supra* note 142.

competition in that sector in China. Such discriminatory practices would be condemned as contrary to Articles 102 and 106 TFEU, were they to occur in the European Union.[195]

This Article's overall conclusion is that, after considering implementation of the 2007 Act, it is not difficult to conclude that "normal" competition objectives are not 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 market place, government intervention is an element which never loses focus, because China's development model, through its many phases, is government-led. Administrative intervention by either government or provincial-level agencies is often biased against effective competition. Examples of such intervention were demonstrated in the case studies. Currently, the interests of SOEs, which are a conduit for the State's interests, are given top priority in the Chinese market. The interests of non-SOEs and consumer welfare are squeezed by government-driven industrial policy intervention, and unrestrained by weak antitrust enforcement agencies. In order to achieve marketplace fairness and consumer welfare, new regulations and future institutional reforms are needed. If implemented, these reforms will make a significant contribution to restoring the legitimacy of the 2007 Act's objective to protect fair competition. The regulatory proposals advanced in this Article will strengthen the hands of the different actors who seek to curtail unbridled anti-competitive 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 is not only contrary to how a market economy would characterize the public interest in the competition context, but it also undermines China's stated aims[196] to modernize its economy,

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195. *See* discussion *supra* Part III (discussing European Union jurisprudence).

196. 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), https://uk.reuters.com/article/us-china-economy-xi/chinas-xi-promises-support-for-private-firms-as-growth-cools-idUKKCN1N64IQ [https://perma.cc/64HZ-PNBH]. The Government also stated the importance of competitive neutrality. *See* Sha, *supra* note 162. The Government official news agency Xinhua announced "China Intensifies Efforts to Protect Consumer Rights." *See China Intensifies Efforts to Protect Consumer Rights*, XINHUA (Mar. 15, 2018),

develop a strong private 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 maintain balance between the interests of the competing groups (consumers, competitors, and State) in the market. Instead, our case studies reveal that where there is a supremacy-contest between protecting the needs of consumer welfare, fair competition between competitors, and the short-term national interest (i.e., the development of SOEs), the State does not adopt a neutral position with regard to the "public interest".[197] Instead, it supports and encourages, through its SOEs and State policies, frequently anti-competitive practices and market activities[198] 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. Actions by SOEs and State administrative agencies trump fair competition, market efficiency, and consumer welfare. The State, acting in pursuit of what it perceives as its interests, prioritizes objectives antithetical to fair competition, market efficiency, and consumer welfare. By not removing the public interest criterion from the 2007 Act, China's "competition" law will remain a pale shadow of what it was originally intended to be.

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http://www.chinadaily.com.cn/a/201803/15/WS5aaa420ca3106e7dcc141e5a.html [https://perma.cc/AMX2-Z4LM] (emphasizing 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.

197. Xianlin Wang, *Some Key Issues Concerning Further Development of China's Anti-Monopoly Law, in* COMPETITION POL'Y FOR THE NEW ERA: INSIGHTS FROM THE BRICS COUNTRIES 219, 219-24 (Tembinkosi Bonakele et al. eds., 2017); Horton, *supra* note 16.

198. *See* cases cited *supra* Part III (discussing both anti-competitive SOE practices and State policies).