

**Bangor University**

## **DOCTOR OF PHILOSOPHY**

Threats to Privately-Owned Small and Medium-Sized Enterprises (SMEs) in China from the State-Owned Enterprise Policy and the State's Interest: Towards Developing an Effective Legal Framework for the Protection of Chinese Privately-Owned SMEs

Wang, Jing

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Enterprise Policy and the State's Interest:**

**Towards Developing an Effective Legal Framework for  
the Protection of Chinese Privately-Owned SMEs**

By

**JING WANG**

**B.A. (China), LL.M (China), LL.M (with Merit, U.K.)**

**School of Law**

**Bangor University**

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**Supervised by Professor Dermot Cahill**

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## Abstract

The research presented here investigates State intervention in the marketplace in China, by way of certain laws and industrial policies, to assess how various aspects of these interventions have impacted on the development of privately-owned small and medium-sized enterprises (SMEs) in certain traditional State-controlled industries, namely the steel, gas station, and fixed-broadband sectors. This thesis demonstrates weaknesses in the legal framework of Chinese laws designed to promote competition and advance the interests of SMEs, and identifies reasons why this framework has failed, as well as providing recommendations for improvement.

During China's economic transition era, the State-market relationship has been tightly controlled by the Central Government. The Economic Charter, namely *the Anti-Monopoly Law of China 2007*, did not come into force until 2008. However, although dynamic enforcement of this Law commenced in 2014, it has so far failed to alter the parameters of the State-market relationship: industrial policy retains its traditional prominence and dominance in State intervention, and continues to protect the anti-competitive exercise of specific or exclusive rights by administrative agencies and State-owned enterprises (SOEs). Therefore, privately-owned SMEs often experience confrontations with SOEs. This tendency not only prejudices fair competition, but also harms the uneven-balance between different types of interest groups in the Chinese marketplace. Privately-owned SMEs and consumers suffer discrimination from the anti-competitive application of State industrial policies and the administrative actions of implementation agencies. Accordingly, the "public interest", the reconciliation between the State's interest, the interests of enterprises, and consumer welfare, has not been advanced under the 2007 Act.

Hence, this thesis proposes key reforms which are necessary in order to establish, and bring about the operation of an effective legal framework for the promotion of the interests of Chinese privately-owned SMEs, in order to ensure their sound growth, and in order to bring about the realisation of the "public interest": First, this work recommends measures designed

to improve the enforcement of *the Anti-Monopoly Law of China 2007*, by proposing to restrain inappropriate administrative intervention, in order to restrict the State's industrial policies and the abuse of administrative rights from adversely impacting on SME-generated growth and competition. Second, the work suggests increasing the alignment between *the Anti-Monopoly Law of China 2007* and other elements, such as administrative discretion and corporate social responsibility, in order to establish a fair competition environment for privately-owned SMEs in traditional State-controlled industries.

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## UK Legislation

Communications Act 2003, Sec 4

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Telecommunications Act 1984, Sec 8

The Competition Act of 1998, Sec 47B

The Consumer Rights Act 2015, Sec 81

The Fair Trading Act 1973, Sec 84

## China Legislation

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Administrative Procedure Law of China 2015, Art 13

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Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No.54 of 14 April 1947), Japan, Art 1	Telecommunications Act of 1996, US, Sec 251  The Clayton Antitrust Act of 1914, US, Sec 15(a)
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C-260/89 *Elliniki Radiophonia Tiléorassi v Dimotiki Etairia Pliroforissis* [1991] ECR I-2925  
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*Yunnan Yingding Bio-energy Co., Ltd. v Sinopec and the Yunnan Branch of Sinopec's Trading Company* [2015] Kunming Intermediate People's Court No. 3

## List of Abbreviations

AML	The Anti-Monopoly Law of China 2007
BIMC	Beijing International Media Center, China
BIT	Bilateral Investment Treaties
CASS	Chinese Academy of Social Sciences
CBN	China Broadcasting Network
CC	The Competition Commission, UK
CMA	The Competition and Markets Authority, UK
China Telecom	China Telecommunications Corporation
China Unicom	China United Network Communications Group Co., Ltd.
CPC	The Communist Party of China
CPI	Competition Policy International
CPPCC	The Chinese People's Political Consultative Conference
CSR	Corporate Social Responsibility
CUP	Cambridge University Press
Dir	Directive
DOJ	The United States Department of Justice
DG Competition	Directorate-General for Competition
EC	European Commission
ECJ	European Court of Justice
ECR	European Court Reports
EIB	European Investment Bank
EPRS	European Parliamentary Research Service
EU	European Union
FTC	Federal Trade Commission
GDP	Gross Domestic Product
GVA	Gross-Value Added
HBIS	Hebei Iron & Steel Group Company Limited, China
HKTDC	Hong Kong Trade Development Council
HMSO	Her Majesty's Stationery Office, London
ICSB	The International Christian School of Budapest
ICT	Information Communication Technology
IEA	International Energy Agency
IIEC	Information Engineering and Electronic Commerce
IEEE	The Institute of Electrical and Electronics Engineers
IISI	International Iron and Steel Institute
IMF	International Monetary Fund
ITU	International Telecommunication Union
IRET	Investors Real Estate Trust
JPRS	Joint Publications Research Service
KMU	Kleine und Mittlere Unternehmen – SME
LBS	Location Based Service



MASS	Management and Service Science
MCC Group	Metallurgical Corporation of China Ltd.
MFG	Mittelstandsförderungsgesetz, Mittelstand Support Law
MIIT	Ministry of Industry and Information Technology, China
MIT	Massachusetts Institute of Technology
MOFCOM	Ministry of Commerce of China
NBS	National Bureau of Statistics of China
NDRC	National Development and Reform Commission of China
NSFNET	National Science Foundation Network
NPC	The National People's Congress of China
OECD	Organisation for Economic Co-operation and Development
OFT	Office of Fair Trading of the United Kingdom
OJ	The Official Journal of the European Union
OUP	Oxford University Press
PetroChina	PetroChina Company Limited
POEs	Privately Owned Enterprises
PRC	The People's Republic of China
R&D	Research and Development
RMB	Renminbi (The Official Currency of China)
ROE	Return on Common Stockholders' Equity
SAIC	State Administration for Industry & Commerce of China
SARFT	The State administration of Radio Film and Television, China
SASAC	State-Owned Assets Supervision and Administration Commission of the State Council of China
SBA	Small Business Act for Europe
S-C-P Paradigm	The 'Structure-Conduct-Performance' Paradigm
SETC	The State Council Transmitted the State Economic and Trade Commission of China
SGEIs	Services of General Economic Interests
Sinopec	China Petrochemical Corporation
SME(s)	Micro, Small and Medium-Sized Enterprise(s)
SOE(s)	State-Owned Enterprise(s)
TEC	Treaty Establishing the European Community
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
USD	United States Dollar
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

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# Chapter One: Introduction<sup>1</sup>

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The abuse of executive power to distort or restrict competition is a phenomenon that exists among state agencies and organisations which are authorized by the law and regulations to control public affairs, albeit to a various degree. The AML [*the Anti-Monopoly Law of China 2007*] needs to tackle this problem seriously.

– Cao Kangtai<sup>2</sup>

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<sup>1</sup> The framework of this thesis was presented as a poster at the Society of Legal Scholars (SLS) 2016 Annual Conference, entitled 'Threats to Privately-Owned SMEs in China from the State-Owned Enterprise Policy and the State's Interest: Towards an Effective Legal Framework for the Protection of Chinese Privately-Owned SMEs', held in Oxford, UK on 6-9 September 2016; and this study will be presented at the Socio-Legal Studies Association (SLSA) 2017 Annual Conference, entitled 'Why *the Anti-Monopoly Law of China 2007* Fails to Protect Privately-Owned SMEs: Struggling against Administrative Intervention', held in Newcastle upon Tyne, UK on 5-7 April 2017; some will be presented at the International Meeting on Law and Society (LSA 2017), entitled 'Why *the Anti-Monopoly Law of China 2007* Fails to Protect Privately Owned Small and Medium-Sized Enterprises: Struggling against Collusion between Administrative Agencies and State-Owned Enterprises', held in Mexico City, Mexico on 20-23 June 2017; and some also will be presented at the XXVIII World Congress of the International Association for the Philosophy of Law and Social Philosophy (IVR 2017), entitled 'Threats to Privately-Owned SMEs in China from the State-Owned Enterprise Policy and the State's Interest: Towards Developing an Effective Legal Framework for the Protection of Chinese Privately-Owned SMEs', held in Istanbul, Turkey on 16-21 July 2017.

<sup>2</sup> See Cao Kangtai (the Former Director/Minister of the Legislative Affairs Office of the State Council, China), 'Notes to the Draft PRC Anti-Monopoly Law', cited in Yong Huang, 'Pursuing the Second Best: the History, Momentum, and Remaining Issues of *China's Anti-Monopoly Law*' (2008) 75 *Antitrust Law Journal* 117, 121.

## 1.1 Background to the Issue

This thesis<sup>3</sup> argues that *the Anti-Monopoly Law of China 2007 (the Chinese Anti-Monopoly Law 2007)* rather than the Chinese State’s industrial policy,<sup>4</sup> should occupy in a predominant position to balance the growth between State-owned-enterprises (SOEs)<sup>5</sup> and privately-owned small and medium-sized enterprises (SMEs)<sup>6</sup> in China.<sup>7</sup> In general, because of

<sup>3</sup> Four issues must be clearly mentioned at the beginning of this thesis: (a) Because of the unique economic and legal characteristics, the term “China” in this research refers solely to Mainland China. (b) The basis for comparison of State-owned-enterprises (SOEs) and privately-owned SMEs in China is that the State-owned economy exited from SMEs by the end of the Eleventh Five-Year Plan period (2006-2010): Shao Ning, ‘Shiyiwu Yangqi Gaige he Shierwu Silu’ [Central SOE Reform during 11th Five-Year Plan and the Process for 12th Five-Year Plan (author’s translation)] (Press Conference of the State Council Information Office, Beijing, 22 February 2011) <[www.china.com.cn/zhibo/2011-02/22/content\\_21944421.htm?show=t](http://www.china.com.cn/zhibo/2011-02/22/content_21944421.htm?show=t)> accessed 30 January 2017. (c) This research involved a significant number of references written in Chinese, the majority of which do not have official translations. Thus, the author reorganised and translated the texts or paraphrased the arguments and discussion from Chinese. The author included both Chinese *pinyin* and English names for the original Chinese materials in footnotes and bibliography. (d) The official translation of Chinese legislation has been slightly adjusted in the interests of clarification.

<sup>4</sup> See Faez Samadi, ‘China’s Industrial Policy Part of Its Transition’ (2014) *Global Competition Review* <<http://globalcompetitionreview.com/article/1060422/china’s-industrial-policy-part-of-its-transition>> accessed 30 January 2017; and Erika Szyszczak, *The Regulation of the State in Competitive Market in the EU* (Hart Publishing 2007) 15 (the latter points out that “[c]ompetition law has played a central role in the economic constitution in fashioning an industrial policy for the EU”). However, despite Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2013 [Report on Competition Law and Policy of China 2013]* (Law Press, China 2013) 34 (pointing out that *the Chinese Anti-Monopoly Law 2007* chooses a suitable way to establish “a free market-based economy” by promoting industrial policies), the reality shows the opposite approach.

<sup>5</sup> In this thesis, SOEs include Chinese enterprises funded, owned, or controlled by different levels of Chinese governments.

<sup>6</sup> In 2003, the publication ‘Interim Provisions on the Standards for Medium and Small Enterprises’ (2003) gave the first definition of standards for classification of SMEs in China: SMEs are companies with turnover between RMB 30 million Yuan (approximately £3.05 million) and RMB 400 million Yuan (approximately £40.56 million), and between 400 and 3,000 employees. In 2011, the new regulation, ‘Provisions on the Classification Standards for Small and Medium-Sized Enterprises’ (2011), not only stated that SMEs included micro, small and medium-sized enterprises, but also offered more categories of SMEs by industry. Because this research takes privately-owned SMEs in the steel, gas station and fixed-broadband sectors for reference, the following table 1-1 solely includes three relevant categories of SMEs in China.

**Table 1-1: Samples of Categories of Chinese SMEs in Different Industries**

Industry Category	Enterprise Category	Headcount	Turnover (RMB Yuan)
<b>Manufacture (Heavy Industry)</b>	Medium-Sized	< 1000	< 400 million
	Small	< 300	< 20 million
	Micro	< 20	< 3 million
<b>Retail</b>	Medium-Sized	< 300	< 200 million
	Small	< 50	< 5 million
	Micro	< 10	< 1 million
<b>Information Transmission</b>	Medium-Sized	< 2000	< 1000 million
	Small	< 100	< 10 million
	Micro	< 10	< 1 million

Source: ‘Provisions on the Classification Standards for Small and Medium-Sized Enterprises’ (2011); table devised by the author.

See the Law of China on Promotion of Small and Medium-Sized Enterprises 2002, Art 2; ‘Zhongxiao Qiye Huaxing Biaozhun Guiding’ [Provisions on the Classification Standards for Small and Medium-Sized

government failure,<sup>8</sup> one of essential functions of industrial policies, boosting economic growth through a variety of *appropriate interventions*,<sup>9</sup> is difficult to achieve.<sup>10</sup> Thus, *the Chinese Anti-Monopoly Law 2007* ought to be available to effectively prevent SOEs and State administrative agencies from abusing specific or exclusive rights (granted by the State's industrial policy)<sup>11</sup> in order to create a fair competition environment for privately-owned

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Enterprises] (2011) <[www.gov.cn/zwggk/2011-07/04/content\\_1898747.htm](http://www.gov.cn/zwggk/2011-07/04/content_1898747.htm)> accessed 30 January 2017; and 'Interim Provisions on the Standards for Medium and Small Enterprises' (Expired) <[www.lawinfochina.com/display.aspx?lib=law&id=2636&CGid=>](http://www.lawinfochina.com/display.aspx?lib=law&id=2636&CGid=>) accessed 30 January 2017.

<sup>7</sup> See Frédéric Jenny, 'Globalization, Competition and Trade Policy: Convergence Divergence and Cooperation' in Clifford A Jones and Mitsuo Matsushita (eds), *Competition Policy in the Global Trading System* (Kluwer Law International 2002) 300 (pointing out that "[t]he legal environment of business in any country will be an important determinant of actual competition"); Curtis J Milhaupt and Wentong Zheng, 'Beyond Ownership: State Capitalism and the Chinese Firm' (2015) 103 *Georgetown Law Journal* 665, 666 (pointing out that "[t]he Chinese state has less control over SOEs and more control over POEs (privately owned enterprises) than its ownership interest in the firms suggests"); World Bank and Development Research Center of the State Council, the People's Republic of China, *China 2030: Building a Modern, Harmonious, and Creative Society* (The World Bank 2013) 110-15; and Angela Huyue Zhang, 'Bureaucratic Politics and China's Anti-Monopoly Law' (2014) 47 *Cornell International Law Journal* 671, 673.

<sup>8</sup> Although in theory State intervention ought to "[a]chieve a more satisfactory balance between the demands of proper protection from market failure and inequality, on the one hand, and commercial freedom and the potential for innovation on the other", governments often fail to achieve this: see, e.g., Stephen Weatherill, 'The Challenge of Better Regulation' in Stephen Weatherill (ed), *Better Regulations* (Hart Publishing 2007) 4; Ekaterina Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart Publishing 2010) 28 (pointing out that "[a] strong state may also imply a threat to individual economic order"); Zhang Weiyang, *Shichang yu Zhengfu: Zhongguo Gaige de Hexin Boyi [Market and Government: The Core Game of Chinese Reform]* (author's translation) (Northwest University of China Press 2014) 98-99; Charles Wolf, 'A Theory of "Non-Market Failure": Framework for Implementation Analysis' (1979) 22 *Journal of Law and Economics* 107; Julian Le Grand, 'The Theory of Government Failure' (1991) 21 *British Journal of Political Science* 423; and Clifford Winston, *Government Failure versus Market Failure: Microeconomics Policy Research and Government Performance* (AEI-Brookings Joint Center for Regulatory Studies 2006) 3 & 75.

<sup>9</sup> The author assumes that *appropriate interventions* mean that Chinese administrative agencies use their powers effectively to enhance competition and ensure sound and sustainable economic development. This idea was enlightened by the point of view that "[t]hose who utilize an underlying "rationality model," in short, believe Chinese policies result from an effort of the leaders to match national resources to national objectives and to relate national means to national ends [from the perspective of the "public interest"]": Kenneth Lieberthal and Michel Oksenberg, *Policy Making in China: Leaders, Structures, and Processes* (Princeton University Press 1988) 13.

<sup>10</sup> See Susan L Shirk, *The Political Logic of Economic Reform in China* (University of California Press 1993) 98-99 (pointing out that "where you stand is where you sit"); Yun Chen, *Transition and Development in China: Towards Shared Growth* (Ashgate 2009) 151 (pointing out that "[t]he government would basically maximize its self-interest"); Vito Tanzi, *Government versus Markets: The Changing Economic Role of the State* (CUP 2011) Preface (maintaining that "[t]he government has often shown a preference to replace the market rather than to correct its genuine shortcomings"); Zhao Ying and Ni Yueju (eds), *Zhongguo Chanye Zhengce Biandong Qushi Shizheng Yanjiu (2000-2010) [The Empirical Analysis of Chinese Industrial Policy Changing Tendency 2000-2010]* (Economic & Management Publishing House, China 2012) 1; Wang Jian, *Zhongguo Zhengfu Guizhi Lilun yu Zhengce [Chinese Government Regulation: Theory and Policy]* (Economic Science Press, China 2008) 7-33; Friedrich August von Hayek, *The Road to Serfdom: With the Intellectuals and Socialism* (Institute of Economic Affairs 2005) 59-61; Wu Jinglian, 'Jingji Gaige Xinzhengcheng' [A New Journey of Economic Reform (author's translation)] in Hu Lishu (ed), *Xinchangtai Gaibian Zhongguo: Shouxi Jingjixuejia tan Daqushi [The New Normal Changes in China: Chief Economists Discussing the Big Trends]* (author's translation) (Democracy and Construction Press, China 2014) 42; and Thomas K Cheng, Ioannis Lianos and Daniel Sokol (eds), *Competition and the State* (Stanford University Press 2014) 1.

<sup>11</sup> "The state plays important roles in affecting conditions of competition in the marketplace": Wentong Zheng, 'State-Owned Enterprises versus the State: Lessons from Trade Law' in Thomas K Cheng, Ioannis Lianos and

SMEs.<sup>12</sup>

Hitherto, although SMEs<sup>13</sup> have accounted for a high proportion of all enterprises (about 99 percent) in the Chinese market,<sup>14</sup> they have often lacked competitive competence and have expected positive State intervention<sup>15</sup> from industrial and competition policies<sup>16</sup>. However, as will be seen, State intervention largely ignores privately-owned SMEs, while always focusing strongly on SOEs<sup>17</sup>: thereby privately-owned SMEs are accustomed to being the “second-class citizen” so far as the State’s industrial policy is concerned.<sup>18</sup> Furthermore, unlike Western economies in which both Government policies and Laws could influence SMEs’ development together, *the Chinese Anti-Monopoly Law 2007* echoes the policies but lacks a key presence<sup>19</sup>: it will be seen how, frequently, when Chinese SOEs or administrative agencies abuse their specific or exclusive rights in order to obstruct the development of privately-owned SMEs,<sup>20</sup> there is almost no effective legal sanction.<sup>21</sup>

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D Daniel Sokol (eds), *Competition and the State* (Stanford University Press 2014) 75.

<sup>12</sup> See Deborah Healey, ‘A Comparative Look at the Competition Law Control of State-Owned Enterprises and Government in China’ in Josef Drexler and others (eds), *More Common Ground for International Competition Law?* (Edward Elgar Publishing 2011) 127; and Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed) (n 4).

<sup>13</sup> The statistical data on China’s privately-owned SMEs in this thesis is divided into two parts: between 1976 and 2002, and 2003 onwards. *Before 2002 (including 2002)*, since there was no clear definition of SMEs, the author assumes that privately-owned SMEs included individual economies/businesses (*getihu* in Chinese) and private enterprises within the country. Article 26 of *General Principles of the Civil Law of China 1986*, makes it clear that the term “‘individual businesses refers’ to businesses run by *individual citizens* who have been lawfully registered and approved to engage in industrial or commercial operations within the sphere permitted by law”. *After 2003 (including 2003)*, the statistical data collection is restricted by the definition of SMEs (see footnote 6 above): see, e.g., *General Principles of the Civil Law of China 1986*, Art 26; Neil Gregory, Stoyan Tenev and Dileep Wagle, *China’s Emerging Private Enterprises: Prospects for the New Century* (International Finance Corporation 2000) Preface; and Lauren Hilgers, ‘SMEs in China’ (2009) Industry Outlook <[www.amcham-shanghai.org/amchamportal/InfoVault/Library/2009/SMEs\\_in\\_China.pdf](http://www.amcham-shanghai.org/amchamportal/InfoVault/Library/2009/SMEs_in_China.pdf)> accessed 30 January 2017.

<sup>14</sup> See Zhiqiang Lu, ‘Features and Financing Difficulties of Chinese SMEs’ (Fourth-Annual China’s SME Financing Forum, Shenzhen, China, 1 December 2005).

<sup>15</sup> See ‘Shierwu Zhongxiao Qiye Chengzhang Guihua’ [The 12th Five-Year Plan for SME Growth] (2011) <[www.gov.cn/gzdt/2011-09/23/content\\_1955213.htm](http://www.gov.cn/gzdt/2011-09/23/content_1955213.htm)> accessed 30 January 2017.

<sup>16</sup> “Antitrust constitutes one of the most elaborate deployments of governmental force...”: Robert H Bork, *Antitrust Paradox: A Policy at War with Itself* (Basic Books 1978) 3.

<sup>17</sup> See Simon Rabinovitch, ‘China Watchers More Optimistic after Unveiling of Reform Plans’ *Financial Times (Asia)* (Shanghai, 19 November 2013) 3; and Milhaupt and Zheng (n 7) 671 (the latter points out that “[i]n all economies, the boundary between public and private ownership of enterprise is more porous than conventional analysis assumes because the state retains control rights over firms even in the absence of ownership interests”).

<sup>18</sup> See Chapter 2.2 below.

<sup>19</sup> The “policy as law and law as policy” approach has never been realised in the Chinese market: Jianfu Chen, ‘Policy as Law and Law as Policy: The Role of Law in China’s Development Strategy’ in Christoph Antons (ed), *Law and Development in East and Southeast Asia* (Routledge 2005) 255-57.

<sup>20</sup> See Chapter 4 below.



‘The Reform and Opening Up’ policy (1978)<sup>22</sup> was a turning point in Chinese history as regards State intervention and the private sector. Prior to this policy, plans for the State’s economic development controlled virtually the whole economic development approach. However, after 1978, with the adoption of this new policy, the State started to recognise the importance of introducing competitive mechanisms in the market,<sup>23</sup> and to allow the emergence of the private sector.<sup>24</sup> Concurrently, the Central Government followed the advice of Chinese researchers and scholars to focus on the role of “industrial policy” in the promotion of economic development.<sup>25</sup> Thereafter, the State’s industrial policies were implemented explicitly and consciously in the economic management and regulation.<sup>26</sup>

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<sup>21</sup> See Chapter 3 below.

<sup>22</sup> Deng Xiaoping, the former Chairman of the Communist Party of China (CPC), led ‘the Reform and Opening Up’ from December 1978. This reform occurred in two stages: the first stage (between the late 1970s and early 1980s) “[i]nvolved the de-collectivisation of agriculture, the opening up of the country to foreign investment, and permission for entrepreneurs to start up businesses. However, most industries remained state owned”. The second stage (between the late 1980s and 1990s) “[i]nvolved the privatisation and contracting out of many state-owned enterprises (SOEs) and the lifting of price controls, protectionist policies, and redundant regulations, although state monopolies in sectors such as banking and petroleum remained state owned”: see, e.g., Vincenzo Atella and others, ‘Chinese Healthcare system Reform and Household Saving Patterns: Some Stylised Facts’ in Robert Taylor (ed), *The Globalization of Chinese Business: Implications for Multinational Investors* (Chandos Publishing 2014) 190; and Henk R Randau and Olga Medinskaya, *China Business 2.0: Analyze the Economy, Understand the Society, and Manage Effectively* (Springer 2015) Ch 1.

<sup>23</sup> See Zhou Shulian, Pei Shuping and Chen Shuxun, *Zhongguo Chanye Zhengce Yanjiu [Research on China’s Industrial Policy* (author’s translation)] (Economic Organisation Press, China 1990) 37-38.

<sup>24</sup> See Gregory, Tenev and Wagle (n 6) 7.

<sup>25</sup> The first official appearance of the term “industrial policy” appeared in China in 1986, with reference to adjusting the industry structure. The State Council declared that “the industrial policy always intends to achieve some specific goals in the course of China’s economic development within a particular time period...” However, up to the present time, although “industrial policy” has generally been understood as a intervention approach to speed up the economic development within a country, it still lacks an exact definition in China: see, e.g., Wang Xianlin, ‘Chanye Zhengcefa Chulun’ [Preliminary Study on the Industrial Policy Law (author’s translation)] (2003) 113 *Zhongguo Faxue [China Legal Science]* 112; Han Xiaowei, *Jingji Quanqiuhua Beijingxia de Zhongguo Chanye Zhengce Youxiaoxing Wenti Yanjiu [Study on the Effectiveness of China’s Industrial Policy under the Circumstances of Economic Globalisation* (author’s translation)] (China Economic Publishing House 2008) 94; Karl Aiginger, ‘Industrial Policy: Past, Diversity, Future: Introduction to the Special Issue on the Future of Industrial Policy’ (2007) 7 *Journal of Industry Competition and Trade* 143; Ling Liu, *China’s Industrial Policy and the Global Business Revolution: The Case of the Domestic Appliance Industry* (Routledge 2005) 22; and Wang Feimin, *Fanlongduanfa Shiye Zhongde Zhongguo Chanye Zhengcefa [Industrial Policy Law in China: From the Perspective of Antimonopoly Law]* (Law Press, China 2013) 33-39.

<sup>26</sup> For example, three vital Chinese industrial policies were released: in 1978, the State launched the ‘Preliminary Views on Economic Reform’ (1978), the first market reform programmatic document; in 1980 the first competition policy, namely ‘the Interim Provisions on Carrying Out and Protecting Socialist Competition’ (1980), appeared; and in 1984, China launched an influential national policy, namely ‘the Decision of the CPC Central Committee on Economic Reform’ (1984), to promote economic development: see, e.g., ‘Guanyu Jingji Tizhi Gaige de Chubu Yijian’ [Preliminary Views on Economic Reform] (1980) in Peng Sen and Zheng Dingquan, *Zhongguo Gaige 20nian Guihua Zongji [Complete Works of 20 Years of China’s Reform* (author’s translation)] (Reform Press, China 1999) 16-24; ‘Guowuyuan Guanyu Kaizhan he Baohu Shehui Zhuyi Jingzheng de Zanzheng Guiding’ [The Interim Provisions on Carrying Out and Protecting Socialist Competition] (1980) <[www.gov.cn/gongbao/shuju/1980/gwyb198016.pdf](http://www.gov.cn/gongbao/shuju/1980/gwyb198016.pdf)> accessed 30 January 2017; and ‘Zhonggong

Although the Chinese private sector underwent exciting expansion in the late 20th century,<sup>27</sup> State intervention did not achieve as much as it should have: except for a few industrial policies<sup>28</sup> that indirectly affected the growth of SMEs, there was no dedicated SME policy. However, at the very beginning of the 21st century, substantial change finally occurred in SME policy and law, and heralded a period of rapid development of privately-owned SMEs.<sup>29</sup> However, several years later, the prosperity dream of Chinese privately-owned SMEs was not realised because, although pro-SME policies became increasingly common day-after-day, this could not change the fact that the State's *industrial policy* often regarded the growth of SOEs as the priority, with little consideration for the advancement of privately-owned SMEs. A fair regulatory environment did not create a level playing-field for SOEs and privately-owned SMEs: the fate of privately-owned SMEs was often placed in the hands of State intervention.<sup>30</sup>

Because development cannot be realised without a supporting legal framework,<sup>31</sup> another kind of State intervention, in the form of relevant laws to enhance and promote SMEs' development, such as competition policy and law,<sup>32</sup> came to the fore. In 1980, the first

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Zhongyang Guanyu Jingji Tizhi Gaige de Jueding' [The Decisions of the CPC Central Committee on Economic Reform (author's translation)] (1984) <<http://cpc.people.com.cn/GB/64162/64168/64565/65378/4429522.html>> accessed 30 January 2017.

<sup>27</sup> See Gregory, Tenev and Wagle (n 6) 9.

<sup>28</sup> Such as 'CPC Central Committee and State Council (1987) Document No.1', 'Several Statements of the State Council on Supporting the Development of Individual and Private Economy' (1993), 'Grasp the Big, Release the Small' policy (1995), 'Report on the Work of the Government (1999)', and so on: see Chapter 2.3.2.1 below.

<sup>29</sup> In 2000, China enacted its first individual SME policy, 'Several Statements of the State Council on Encouraging and Promoting the Development of SMEs' (2000), which was upgraded to *the Chinese Law on Promotion of SME 2002* two years later. Both of these, and other relevant policies created almost the best-ever growth conditions for privately-owned SMEs between 2002 and 2007: see, e.g., Chapter 3.1.1 below; Ma Jiantang, *Jiegou yu Xingwei: Zhongguo Chanye Zuzhi Yanjiu* [*Structure and Behaviour: Research on the Industrial Organisation of China* (author's translation)] (Renmin University Press, China 1993) 190; and Han (n 25) 110-16.

<sup>30</sup> Chinese former Premier Wen Jiabao mentioned that the State promoted SMEs. However, their growth needed to coincide with the State's industrial policy at all times: Wang Yue, 'Wen Jiabao: Dui Hongguan Zhengce Shishi Shidu Yutiao Weitiao' [Wen Jiabao: Timely and Appropriate Presetting and Fine-Tuning of the State's Industrial Policies (author's translation)] *Zhengquan Shibao* [*Securities Times*] (Shanghai, 26 October 2011) A01.

<sup>31</sup> See David Kennedy and Joseph E Stiglitz, 'Introduction' in David Kennedy and Joseph E Stiglitz (eds), *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century* (OUP 2013) 1.

<sup>32</sup> "Competition policy consists of those policies and actions of the state intended to prevent certain restraints of trade by private firms... [I]t is policy intended to promote rivalry among, firms, buyers, and sellers...": G Bruce Doern, 'Comparative Competition Policy: Boundaries and Levels of Political Analysis' in G Bruce Doern and Wilks (eds), *Comparative Competition Policy: National Institutions in a Global Market* (OUP 1996) 7.

Chinese Competition Policy, ‘the Interim Provisions on Carrying Out and Protecting Socialist Competition’ (1980), came into force and was committed to protecting fair competition, albeit within the context of highly centralised State planning guidance.<sup>33</sup> Subsequently, several Chinese competition policies were launched.<sup>34</sup> *The Chinese Anti-Monopoly Law 2007* (the Economic Charter)<sup>35</sup> with its interdisciplinary nature<sup>36</sup> evolved slowly, finally coming into effect in 2008 (after a 13 year incubation period) as “[a] holistic framework for the regulation of competition”<sup>37</sup>. However, it has not developed as well as the State or the market expected<sup>38</sup>: the need for *competition*, or *competition policy*, rarely occupies predominant position, when “competing” with the State’s *industrial policy*. Whilst Article 7 of *the Chinese Anti-Monopoly Law 2007* does assert that SOEs must not damage consumer welfare by abusing their dominant position, or specific or exclusive rights,<sup>39</sup> SOEs’ actions frequently conflict with this prohibition, usually without any adverse consequence for the SOEs.

In reality, Article 7 was not effectively tested until 2011, when China Telecom and

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<sup>33</sup> See ‘Guowuyuan Guanyu Kaizhan he Baohu Shehui Zhuyi Jingzheng de Zanxing Guiding’ [The Interim Provisions on Carrying Out and Protecting Socialist Competition] (1980) (n 26).

<sup>34</sup> China enacted several laws and policies to regulate the competition order in the market from 1980. For instance, the publication ‘Comments on the Establishment and Development of Enterprise Groups’ (1987) aimed to encourage competition, as well as generally preventing monopoly and oligopoly. The publication ‘the Circular on Breaking Regional Market Blockades and Further Promoting the Circulation of Commodities’ (1990) aimed to ensure the smooth flow of goods in the Chinese market. *The Law of China against Unfair Competition 1993* is committed to encouraging and protecting fair market competition. The publication ‘the Provisions on the Prohibition of the Restriction on Competition by Public Utility Enterprises’ (1993) intended to prevent SOEs from abusing their specific or exclusive rights in transactions. The publication ‘State Council Regulations Prohibiting the Implementation of Regional Barriers in the Course of Market Economy Activities’ (2001) basically prohibited local administrative agencies and local enterprises from obstructing or interfering with the entry of non-local enterprises and products in the local market: Charles A Pigott, *China in the World Economy: The Domestic Policy Challenges* (Brookings Institution 2002) 383.

<sup>35</sup> See H Stephen Harris and others (eds), *Anti-Monopoly Law and Practice in China* (OUP 2011) Forward.

<sup>36</sup> See Maher M Dabbah, ‘Measuring the Success of a System of Competition Law: A Preliminary View’ (2000) 21 *European Competition Law Review* 369, 370.

<sup>37</sup> See Yong Huang and others, ‘China’s 2007 Anti-Monopoly Law: Competition and the Chinese Petroleum Industry’ (2010) 31 *Energy Law Review* 337.

<sup>38</sup> China needs competition law to forbid “administrative monopolies” (see footnote 167 below) and establish competition in the market for both non-SOEs and SOEs. However, “Antitrust, like other aspects of economic law, has always been influenced by cohesive as well as *ad hoc* economic and political theories”: Eleanor M Fox and Lawrence A Sullivan, ‘Antitrust – Retrospective and Prospective: Where Are We Coming from? Where Are We Going?’ (1987) 62 *New York University Law Review* 936; and Harris and others (n 35) Preface.

<sup>39</sup> See the Anti-Monopoly Law of China, Art 7; Rachel Evans, ‘Transparency Creates Expectations’ (2009) 28 *International Financial Law Review* 21; and Thomas K Cheng, ‘Competition and the State in China’ in Thomas K Cheng, Ioannis Lianos and D Daniel Sokol (eds), *Competition and the State* (Stanford University Press 2014) 177.

Unicom (two telecommunications SOEs) faced an anti-monopoly probe.<sup>40</sup> In this case, these two SOEs abused their dominant positions in relevant markets to create different transaction terms for different buyers and refused to allow “network interoperability” to occur.<sup>41</sup> This negatively affected the growth of privately-owned broadband SMEs and potential operators wishing to enter the fixed-broadband market.<sup>42</sup> However, this probe did not achieve a satisfactory ending because, although the National Development and Reform Commission (NDRC) approved the giving of commitment by the SOEs to alter their conduct, SMEs hardly benefited from the commitment.<sup>43</sup> This is just one of many examples which demonstrate how *the Chinese Anti-Monopoly Law 2007* does not provide adequate and effective legal support or remedies for privately-owned SMEs which could challenge the abuse of dominance by Chinese SOEs.

Furthermore, when we consider *inertia* in Chinese history, it is not surprising that the conflict between two essential methods of State intervention, *the Chinese Anti-Monopoly Law 2007* and the State’s industrial policy,<sup>44</sup> has been a long-standing situation. *The Chinese Anti-Monopoly Law 2007* appears to regard competition mechanisms seriously, while the State’s industrial policy (by contrast) usually considers “administrative powers” (powers for

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<sup>40</sup> See China Daily, ‘Anti-Monopoly Probe into Telecom Giants Confirmed’ *China Daily* (Beijing, 9 November 2011 <[www.chinadaily.com.cn/business/2011-11/09/content\\_14066568.htm](http://www.chinadaily.com.cn/business/2011-11/09/content_14066568.htm)> accessed 30 January 2017.

China is investigating its two telecommunications giants, China Telecom and China Unicom, over their suspected monopolistic practices in the broadband access business, the country’s top economic planner said Wednesday.

The National Development and Reform Commission (NDRC)’s probe into the two operators is the first anti-monopoly case involving large enterprises since China implemented its first anti-monopoly law in 2008.

<sup>41</sup> “Network Interoperability is the continuous ability to send and receive data between interconnected networks providing the level of quality expected by the end user customer without any negative impact to the sending and or receiving networks”: the Institute of Electrical and Electronics Engineers (IEEE) Technical Committee on Communications Quality and Reliability, ‘Gives a Working Definition for the Interoperability Study Group’, cited in Paulo Teixeira de Sousa and Peter Stuckmann, ‘Telecommunication Network Interoperability’ in Paolo Bellavista (ed), *Telecommunication Systems and Technologies* (EOLSS Publishers 2009) 267.

<sup>42</sup> See Wang Wenjie, ‘Making Room for the Private Sector: Private Economy Needs More Support from the Government’ (2013) 14 *Beijing Review* 38.

<sup>43</sup> The commitment aimed to create a 35 percent reduction in the terminal access price for fixed-broadband within 5 years, only with an emphasis on “network interoperability” between China Unicom and Telecom (two SOEs), rather than paying attention to the “network interoperability” between SOEs and privately-owned broadband SMEs: see, e.g., Xiaoye Wang, *The Evolution of China’s Anti-Monopoly Law* (Edward Elgar Publishing 2014) 393-400; and Chapter 4.3 below.

<sup>44</sup> See Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed) (n 4) 40.

governments to intervene in markets)<sup>45</sup> as paramount. With respect to functions of the market and the government during the development of the economy, both of them are imperfect.<sup>46</sup> Redressing one imbalance not only creates another but also requires assistance from another.<sup>47</sup> Similarly, for the rational growth of both privately-owned SMEs and SOEs, balancing the relationship between the market and the government, as well as avoiding confrontation, would be a challenge. Inefficiency results, which are not only harmful to privately-owned SMEs, but also to the market activity and competitive mechanisms, would arise occasionally.<sup>48</sup>

Running counter to the balancing theory, the negative development trend of Chinese privately-owned SMEs has been intensifying since the 2007 global financial crisis began.<sup>49</sup> China, like many other countries and regions all over the world in this scenario, treated State intervention as a last resort to counteract against the deteriorating global economic situation.<sup>50</sup> Even when State intervention did eventually happen, it did not really help.<sup>51</sup> The

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<sup>45</sup> In this thesis, an examination of “administrative powers” with regard to the Chinese economic development means that administrative organs could rely on the State’s supreme power to obtain a realisation of the very notion of State in the market.

<sup>46</sup> See Henry Sidgwick, *The Principles of Political Economy* (2nd edn, MacMillan and Co. 1887) 414; and Edward Balleisen and Davia Moss, ‘Introduction’ in Edward J Balleisen and Davia A Moss (eds), *Government and Markets: Toward a New Theory of Regulation* (CUP 2012) 2.

<sup>47</sup> See Charles Wolf, *Market or Governments: Choosing between Imperfect Alternatives* (2nd edn, MIT Press 1993) 12.

<sup>48</sup> See Michael E Porter, *The Competitive Advantage of Nations* (Free Press 1990) Chs 3 & 12.

<sup>49</sup> It is commonly believed that the global financial crisis of the 21st century began in *July 2007* caused by the real estate bubble with the credit crunch in the US. From a combination of circumstances and interconnections in the global economy, this financial crisis quickly caused market turmoil all over the world: Robert J Shiller, *The Subprime Solution: How Today’s Global Financial Crisis Happened, and What to Do about It* (Princeton University Press 2012) Ch1.

<sup>50</sup> Because the market is imperfect, market failure becomes obvious and unavoidable. This provides a reasonable excuse for government intervention to hamper the balloon of the private interest caused by market competition and to boost the public interest in the market: see, e.g., Joseph E Stiglitz, ‘Government Failure vs. Market Failure: Principles of Regulation’ in Edward J Balleisen and Davia A Moss (eds), *Government and Markets: Toward a New Theory of Regulation* (CUP 2012) 18; Harry M Trebing, ‘Government Regulation and Modern Capitalism’ (1969) 3 *Journal of Economic Issues* 87; and Chang Ha-Joon ‘The Economics and Politics of Regulation: A Critical Survey’ (1997) 21 *Cambridge Journal of Economics* 703, 704.

<sup>51</sup> See Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Industrial Policy: Reinforcing Competitiveness’ COM (2011) 642 final.

Trade promotion by Member States improves the global presence of European firms and most Member States support the internationalisation of SMEs, providing finance, information and support on market access and regulation. SMEs that use these services are relatively satisfied, although only 27% of internationalised SMEs said that they were aware of existing public support measures and 7% actually used them. These results suggest that the awareness and accessibility of public support could be further improved.

already weak SMEs are experiencing a tougher time to develop because, for the sake of partially protecting the State's economic interests, Chinese industrial policy continues to grant specific or exclusive rights to SOEs,<sup>52</sup> to the detriment of competition from SMEs. Lamentably, SOEs are not only using these specific or exclusive rights to develop themselves and advance their own interests, but they are also abusing them to obstruct privately-owned SMEs. Thus, advancing the interests of SMEs is often difficult to guarantee. When we examine such a situation with regard to *the Chinese Anti-Monopoly Law 2007*, it is clear that its ultimate objective, advancing the "public interest",<sup>53</sup> cannot be satisfied. The author assumes that the "public interest" in *the Chinese Anti-Monopoly Law 2007* is the reconciliation between *the State's interest, interests of SOEs, interests of privately-owned SMEs and consumer welfare*,<sup>54</sup> which has "three characteristics: commonality, reasonableness, and legitimacy"<sup>55</sup>. Therefore, developing SOEs as a matter of priority, not

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<sup>52</sup> In the Chinese market, the functions of the State should contain two sides on behalf of the State's economic interest: (a) as a manager, the State has responsibilities to protect the national independence and ensure the State's economic development; (b) as an economic activity participant, the State should obey the market mechanisms and regulations to get interests. However, only the former attitude prevails in the meaning of the State's interest in today's China: see, e.g., Hu Jinguang and Wang Kai, 'Woguo Xianfashang Gonggong Liyi de Jieding' [On the Classification of the Public Interest in China's Constitution (author's translation)] (2005) 1 *Zhongguo Faxue* [China Legal Science] 18; and Xing Yue, 'Guojia Liyi de Keguanxing yu Zhuguanxing' [Objectivity and Subjectivity in the State's Interest (author's translation)] (2003) 55 *Shijie Jingji yu Zhengzhi* [World Economics and Politics] 29.

<sup>53</sup> See the Anti-Monopoly Law of China 2007, Art 1;

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

Harris and others (n 35) 83 (points out that the "public interest" can increase economic efficiency and promote consumer welfare); and Wolf Sauter, *Coherence in EU Competition Law* (OUP 2016) 221 (points out that "using SGEIs [Services of General Economic Interests] can promote coherence as it applies across the EU rules (both concerning competition and, in principle, the internal market)"). However, a paradox appears, in that the "public interest" in *the Chinese Anti-Monopoly Law 2007* refers to consumer welfare because *the Anti-Monopoly Law* aims to satisfy consumers with better-quality goods and services: see, e.g., Chapter 3.3.2.1 below; and Mark Furse, *Antitrust Law in China, Korea and Vietnam* (OUP 2009) 69.

<sup>54</sup> With regard to State intervention in the Chinese market, industrial policies often override the market players in order to promote the development of SOEs. In order to overcome such a situation from the perspective of *the Chinese Anti-Monopoly Law 2007*, the "public interest" is selected for this study to be defined from four aspects: the State's interest (somehow be realised by certain interests of SOEs), interests of SOEs, interests of privately-owned SMEs (including their employee welfare) and consumer welfare. This thesis argues that the "public interest" cannot be realised if State intervention fails to treat these four aspects in a reasonable and balanced way, simply because the "public interest" in the Chinese Anti-Monopoly Law context should benefit society as a whole: *the definition of the "public interest"* will be published as Jing Wang, 'A Maze of Contradictions: Chinese Law and Policy in the Development Process of Privately Owned Small and Medium-Sized Enterprises in China' (2017) 25 *Michigan State International Law Review* (forthcoming).

<sup>55</sup> See Zhaojing Luo, 'Development of Abuse of Administrative Power to Eliminate or Restrict Competition in *the Anti-Monopoly Law of the People's Republic of China* and the Impact of Article 106 of EU Competition

only brings a negative influence to bear upon privately-owned SMEs, but also reduces the authority and application of *the Chinese Anti-Monopoly Law 2007* itself.

Fortunately, a significant change took place at the end of 2011: the Central Government of China began to realise it was not wise to focus on the State's economic interest only from the point of view of developing SOEs. This was the right time to change the non-equilibrium growth trend between SOEs and privately-owned SMEs, as well as achieving the "public interest".<sup>56</sup> Additionally, China's new government (2012) headed by President Xi Jinping holds that State-led investment is no longer sustainable for the State's economy.<sup>57</sup> Now stimulus, deleveraging, and structural reform are three key pillars for the Chinese economy in the following years.<sup>58</sup> Since China's economic development slowed its pace since 2015,<sup>59</sup> to continue solely promoting SOEs, to the detriment of SMEs, became a danger sign for the Central Government,<sup>60</sup> so the State's change in approach to restrain anti-competitive practices by SOEs (at least at political level) appeared encouraging of a brighter future for privately-owned SMEs. As the State's attitude towards transformation needs to be strengthened and underpinned by law, Chinese laws ought not to let the State's industrial policy continue unrestrained as before. There is thus an immediate challenge to seek an approach to promote privately-owned SMEs, by reconciling the balance of application

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Law and Free Movement Rules' (PhD thesis, University of Glasgow 2012).

<sup>56</sup> China's SOEs must focus on the "public interest" during the period of development. SOEs in China should be divided into two kinds: (a) "Public Welfare SOEs", including SOEs in the gas and chemical industry, telecommunications industry, etc.; (b) "Competitive SOEs", including SOEs in the steel industry, etc.: see, e.g., Shao Ning, 'Fangzhi Guoqi Liyong Longduan Diwei Sunhai Gonggong Liyi' [Prohibiting the Abuse of SOEs' Dominant Position towards the Public Interest (author's translation)] *Securities Daily* (Beijing, 12 December 2011) A2; and Wei Xiangyun, *Guoqi Gaige Xinsilu: Ruhe ba Zhengque de Shi Zuodui* [New Thinking on SOE Reform: How to Do the Right Thing Properly] (Publishing House of Electronics Industry, China 2013) 25.

<sup>57</sup> See Lan Lan, 'State-Led Investment 'Not Sustainable': Chamber' *China Daily* (Beijing, 7 September 2012) <[www.chinadaily.com.cn/bizchina/2012-09/07/content\\_15742107.htm](http://www.chinadaily.com.cn/bizchina/2012-09/07/content_15742107.htm)> accessed 30 January 2017.

<sup>58</sup> See Yiping Huang, Jian Chang and Joey Chew, 'Likonomics Targets Health of Growth' *Shanghai Daily* (Shanghai, 11 July 2013) A7.

<sup>59</sup> See Louis Brennan and Diarmuid Rossa Phelan, 'Editorial Introduction to the China–EU Law Journal Special Issue on the EU–China Investment Treaty in Interdisciplinary Perspective' (2013) 5 *China–EU Law Journal* 1, 2.

<sup>60</sup> See Gabriel Wildau, 'Beijing Rebuts Criticism on Bad Debt and 'Zombie Companies'' *Financial Times (Asia)* (Beijing, 14 Monday 2016) 4; BBC, 'China Economic Growth Slowest in 25 Years' (*BBC*, 19 January 2016) <[www.bbc.co.uk/news/business-35349576](http://www.bbc.co.uk/news/business-35349576)> accessed 30 January 2017; Justin McCurry, 'China Economy Grows at Slowest Pace in 25 years, Latest GDP Figures Show' *The Guardian* (Tokyo, 19 January 2016) <[www.theguardian.com/world/2016/jan/19/china-economy-grows-at-slowest-pace-in-25-years-latest-gdp-figure-s-show](http://www.theguardian.com/world/2016/jan/19/china-economy-grows-at-slowest-pace-in-25-years-latest-gdp-figure-s-show)> accessed 30 January 2017; and Mark Magnier, 'China's Economic Growth in 2015 Is Slowest in 25 Years' *The Wall Street Journal* (19 January 2016) <[www.wsj.com/articles/china-economic-growth-slows-to-6-9-on-year-in-2015-1453169398](http://www.wsj.com/articles/china-economic-growth-slows-to-6-9-on-year-in-2015-1453169398)> accessed 30 January 2017.

between *the Chinese Anti-Monopoly Law 2007* and the State's industrial policy, principally by restricting SOEs from abusing their specific or exclusive rights and limiting the ballooning of the State's interest.

## 1.2 Research Questions

The overarching research question in this thesis is how could an effective legal framework for the protection of Chinese privately-owned SMEs come into being, to overcome the influence of the application of administrative powers of domestic State agencies and SOEs, from the perspective of *the Chinese Anti-Monopoly Law 2007*. As derivatives of this research question, the following sub-questions will be clearly answered in each chapter:

The first sub-question is: Why, historically, has the State's industrial policy in China preferred to treat the development of SOEs and the State's economic interests as vital issues to advance, while having disastrous consequences for privately-owned SMEs? Although privately-owned SMEs began to emerge in the Chinese market at the end of the 1970s, and play a more and more important role in the State's economy, State industrial policies have refused to pursue the "balanced approach" in order to grow the economy. As a result, industrial policy continues to make SOEs "stronger and stronger"<sup>61</sup> while making privately-owned SMEs weaker and weaker. This sub-question is considered in Chapters Two and Four below.

The second sub-question is: Why does Chinese law fail to satisfy the State's economic requirement to develop privately-owned SMEs? The special position of SOEs heightens the lack of harmonious application between relevant laws, such as *the Chinese Law on Promotion of SMEs 2002* and *the Chinese Anti-Monopoly Law 2007*, and the State's industrial policy. This sub-question is examined in Chapters Three and Four.

The third sub-question is: What features should *the Chinese Anti-Monopoly Law 2007* have, in order to provide an effective counter-balance to SOEs and the State's industrial

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<sup>61</sup> "Strong SOEs" in China, which like protected infants, are unable to grow up and be truly strong: see, e.g., Wei (n 56) 27; and see further below in footnote 91, Chapter 3.



policy, so that privately-owned SMEs can flourish in China? When we examine the reality of the situation, with the aim of developing SOEs as a matter of priority and considering the fates of privately-owned SMEs in recent times, it will be seen that industrial policy does not offer better economic prospects for the State, as it engenders harm to competition and threatens long-term economic development within the country. Even worse, because of a failure to ensure fair competition in the domestic market, key objectives of *the Chinese Anti-Monopoly Law 2007*, such as the protection and advancement of consumer welfare and the “public interest”, face major challenges. Consequently, *the Chinese Anti-Monopoly Law 2007* should be improved both from the inside (self-improvement), and from the outside (cooperation with other legal regimes), in order to improve its current weak applicability in the market. This sub-question is examined in Chapter Five.

### **1.3 Objectives**

The main objective of this research is to assess what key elements would be required in order for China to develop an appropriate legal framework to enable, which would be based on the achievement of fair competition and the advancement of the “public interest” at the same time, thereby preventing SOEs and several administrative agencies from abusing their specific or exclusive rights, to the detriment of China’s SME sector. Hence, this research pays particular attention to the conditions necessary for the survival of privately-owned SMEs and SOEs in traditional State-controlled industries, and focuses particularly on two driving forces arising from State interventions: *the Chinese Anti-Monopoly Law 2007* and the State’s industrial policy.

Even though privately-owned SMEs and SOEs are not direct rivals *per se*, nevertheless competition between them has never disappeared in the State’s economic development planning approach during past decades. However, in the interests of pursuing China’s objective of continuous economic growth, SOEs and SMEs must seek common ground while putting aside differences. Thus, the first sub-objective of the thesis is to explore the root causes of the conflict between the objectives contained in *the Chinese Anti-Monopoly Law*

2007 and the State's industrial policy *from the perspective of privately-owned SMEs*. When these SMEs are faced with their fatal obstacles in the market, namely SOEs, it becomes clear that the enhancement of the effective functions of *the Chinese Anti-Monopoly Law 2007* to limit the abusive exercise of administrative powers, should be a way to reduce this SMEs/SOEs conflict.

Furthermore, the development of SOEs (which is inextricably linked to the State's economic development interests) overemphasises the importance of SOEs, while overlooking the interests of privately-owned SMEs, and this not only affects fair competition, but also affects other kinds of interests in the market, such as consumer welfare and the "public interest". Thus, another sub-objective of this thesis is to consider possible solutions to enable *the Chinese Anti-Monopoly Law 2007* to become an effective legal framework in the process of defending privately-owned SMEs and the "public interest".

## **1.4 Outline of the Study**

This thesis includes six chapters in order to answer the core research question: How could an effective legal framework for the protection of privately-owned SMEs in China come into being, from the perspective of *the Chinese Anti-Monopoly Law 2007*? Chapter One has been an introductory chapter, offering a brief description of the background to this research, the research questions and objectives, the research outline, the literature review, the research methodologies, the challenges and limitations of this study, and an overview figure for the thesis. Chapter Six, the final chapter, provides a set of conclusions to the thesis, as well as answering the core research question and each sub-question presented in Chapter One. In addition, possible future research directions are also mentioned in the concluding chapter.

Apart from the introductory and concluding chapters, this thesis is divided into three parts, over four chapters, to answer the different sub-questions. The first part, comprising Chapters Two and Three, follows the theoretical analysis approach, in order to examine why two essential methods of State intervention, namely the State's industrial policy and the economic law, especially *the Chinese Law on Promotion of SMEs 2002* and *the Chinese*

*Anti-Monopoly Law 2007*, do not produce effective support for privately-owned SMEs.

Chapter Two focuses on SOE growth-promoting intervention, which brings challenges for privately-owned SMEs. Both description and critical analysis of this scenario answer two sub-questions for this research: (a) Does the State's industrial policy ruin the growth trajectory of privately-owned SMEs? (b) Does the ballooning of SOEs influence equate to enhancing the State's economic prosperity? The analysis focuses on a historical review of 'the State's Five-Year Plan System' and industrial policies, and then makes it clear that both of these have replaced the dominant position of market mechanisms, with hardly any legal limitations, for a long period of time. Before 1978, 'the State's Five-Year Plan System' was more accustomed to promoting SOEs because there was a general consensus that China's economic situation urgently needed an exceptional level of prosperity for SOEs.<sup>62</sup> However, for continued prosperity, a market dominated by SOEs is not sufficient.<sup>63</sup> The State expects privately-owned enterprises to exist in some form. Therefore, since the beginning of the 1980s, industrial policies relating to market mechanisms and privately-owned enterprises have been launched repeatedly.<sup>64</sup> Whilst the growth of privately-owned SMEs is unprecedented since the establishment of the People's Republic of China in 1949, SOEs market behaviour and exalted position in the eye of the State presents a number of major challenges for SMEs.<sup>65</sup> Although since 2000 SME policy statements have been released, they are unable to compete with often irrational SOE policies, or overcome the specific or exclusive rights of SOEs.<sup>66</sup> Thus, from the 1950s up to the present time, Chinese industrial intervention has not worked well for privately-owned SMEs, or for developing the robust economic growth of the State as a whole.

Chapter Three identifies why the current legal framework does not offer effective protection for privately-owned SMEs to compensate for the deficiencies in the State's industrial policy. In order to speed up economic growth and to make the Chinese economy

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<sup>62</sup> See Chapter 2.1.1.1 below.

<sup>63</sup> See Jin Zeng, *State-Led Privatization in China: The Politics of Economic Reform* (Routledge 2013) 30-32.

<sup>64</sup> See Chapter 2.1.2 below.

<sup>65</sup> See Chapter 2.2 below.

<sup>66</sup> See Chapter 2.3.2 below.

more suitable for globalisation, the Central Government of China has constantly been hovering between the market economy and the political economy over the past three decades. Thus, Chinese economic law is given “rich connotation”: i.e., laws for the further improvement of privately-owned SMEs have to make concessions, for the sake of synchronisation with the State’s industrial policy. *The Chinese Law on Promotion of SMEs 2002* does not pay adequate attention to market mechanisms, because this Act emphasises State powers (e.g. Article 33) in promoting SMEs and requires that the development approach of SMEs should be consistent with industrial policies. Despite the fact that in the six-year period 2002 to 2007, SMEs rose at their fastest pace since 1978,<sup>67</sup> partially because of the combination of the application of this Law and relevant policies,<sup>68</sup> such a trend did not endure.<sup>69</sup> Although there was an expectation that as soon as *the Chinese Anti-Monopoly Law 2007* came into force such a vulnerable situation for SMEs would be improved, the reality has been harsh. Set against the might of the State’s industrial policy, *the Chinese Anti-Monopoly Law 2007* fails to gain superiority, so that fair competition opportunities for privately-owned SMEs are not realised.<sup>70</sup> Thus it is an unavoidable conclusion that SME policies and relevant laws can only rarely overcome administrative powers possessed by SOEs and administrative agencies. Therefore privately-owned SMEs have no choice but to continue to suffer discrimination.<sup>71</sup>

The second part of this thesis contains Chapter Four. This chapter adopts an empirical method to address the obstacles which *the Chinese Anti-Monopoly Law 2007* fails to address for privately-owned SMEs in three selected traditional State-controlled industries: namely, the *steel industry*, the *petrol station (gas station) industry* and the *fixed-broadband industry*. Focusing on the stifled development of privately-owned SMEs, this chapter demonstrates the discriminatory application of the State’s industrial policy in these three industries. The first

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<sup>67</sup> See Li Zibin and others, *Zhongguo Zhongxiaoqiye Fazhan Baogao (2008-2009)* [*China’s SME Development Report (2008-2009)*] (China Economic Publishing House 2009) 7.

<sup>68</sup> Chinese SME promotion policies include ‘Several Statements of the State Council on Cultivating the Social Service System of SMEs’ (2000), ‘Several Statements of the State Council on Encouraging and Promoting the Development of SMEs’ (2000), etc.: see Chapter 2.3.2.1 below.

<sup>69</sup> See Chapter 3.1 below.

<sup>70</sup> See Chapter 3.2 below.

<sup>71</sup> See Chapter 3.3 below.

section focuses its attention on administrative directives in the steel industry, to show the relationship between SOEs and privately-owned SMEs. It draws a complete picture of the historic approach towards the growth of privately-owned steel SMEs, from initially a major uncontrolled increase in number, to an unfair disappearance between the 1950s and the present day.

The second section gives details of market share changes between SOE-owned gas (petrol) stations and privately-owned gas stations in three selected local refined oil retail markets across China, as well as highlighting the difficult conditions for privately-owned gas stations which are caused by the State's industrial policy. In order to provide a reliable analysis of privately-owned gas stations, two situations engendered by petrol SOEs, namely "oil shortages" and high-priced acquisitions, occupy a key part of this section.

The third section focuses on "network interoperability" in the fixed-broadband market, because this is the key point for analysing whether privately-owned fixed-broadband SMEs can survive in this market. Since telecommunications SOEs often abuse their dominant position in relevant markets to refuse "network interoperability" for privately-owned fixed-broadband operators, the original objective of certain industrial policies, namely encouraging private funds to enter the fixed-broadband market, is a mere slogan.

In addition, because the State's economic interest always has special status in the growth process of Chinese SOEs, competition between the State's interest, the interests of privately-owned SMEs, and consumer welfare, also needs to be mentioned in each section of this chapter. The relationship between SOEs and privately-owned SMEs in these three selected State-controlled industries provides valuable examples of the conflict over the "public interest" from the perspective of *the Chinese Anti-Monopoly Law 2007*. Therefore, *the Chinese Anti-Monopoly Law 2007*, which has been in "hibernation" since it came into force, cannot maintain fair competition in the market or achieve its ultimate aim, which is the "public interest".

Chapter Five, the third part of this thesis, seeks to suggest an effective way of providing

legal protection for privately-owned SMEs, as well as suggesting features which *the Chinese Anti-Monopoly Law 2007* should have when set against seemingly impregnable administrative directives (in favour of SOEs). First, this chapter proposes how to ensure that *the Chinese Anti-Monopoly Law 2007* has top priority in the procedure of working with the State's industrial policy towards privately-owned SMEs. It includes three elements: (a) the Chinese anti-monopoly enforcement agencies should be upgraded to an independent level, directly under the State Council.<sup>72</sup> (b) Before the upgrading of anti-monopoly enforcement agencies occurs, certain specific regulations for SOEs and administrative agencies will be necessary in order to limit the excessively wide application of their specific or exclusive rights.<sup>73</sup> (c) In order to support privately-owned SMEs, private anti-monopoly enforcement should be encouraged. However, it is also important to focus on both positive and negative sides of this remedy, on behalf of the "public interest".<sup>74</sup>

Second, Chapter Five focuses on the functions of legal cooperation when developing both SOEs and privately-owned SMEs and maintaining a balance among *the State's interest*, *the interests of privately-owned SMEs*, and *consumer welfare*. Following this suggestion, the *limitations of administrative directives* and *Corporate Social Responsibility (CSR)* in Chinese laws will be considered in this chapter. Because of the use of biased and impregnable administrative directives, the relationship between Chinese SOEs and privately-owned SMEs has been severely damaged. However, although *the Chinese Anti-Monopoly Law 2007* grants large discretionary powers to anti-monopoly enforcement agencies to redefine those administrative directives, the 2007 Act cannot get rid of the dilemma by itself, because it is the norm for officials to shield one another. The author recommends cooperation between this Law and *Chinese Administrative Law* to ensure the appropriate use of discretionary powers by anti-monopoly enforcers.<sup>75</sup>

Furthermore, concerning privately-owned SMEs, cooperation between *the Chinese Anti-Monopoly Law 2007* and CSR will improve awareness of SOEs of the importance of fair

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<sup>72</sup> See Chapter 5.1.1 below.

<sup>73</sup> See Chapter 5.1.2 below.

<sup>74</sup> See Chapter 5.1.3 below.

<sup>75</sup> See Chapter 5.2.1 below.

competition, and will emphasise the importance of social returns to other market participants.<sup>76</sup> In sum, recommendations mentioned in Chapter Five will enhance the terms of *the Chinese Anti-Monopoly Law 2007*, as well as offering better survival conditions for privately-owned SMEs; thereby providing realistic opportunities for the achievement of the “public interest” by the way of balancing SOEs and privately-owned SMEs.

## 1.5 Literature Review

Historically, Chinese privately-owned SMEs, which only began to appear in numbers towards the end of the 1970s, were not always important elements for the State’s economy.<sup>77</sup> However, in recent decades, the growth of SMEs, especially privately-owned market participants, became one of the most important and effective measures of “social awareness” (a realisation of majority of Chinese people)<sup>78</sup> in the State’s economic development approach.<sup>79</sup> Because of their number, SMEs have been able to provide more opportunities to increase marketing activities and to achieve greater benefits for more persons.<sup>80</sup> Even more significantly, their development has also been able to contribute to the State’s industrial

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<sup>76</sup> See Chapter 5.2.2 below.

<sup>77</sup> See Ronald H Coase, ‘China’s Market Transformation: Beginning of Market Economy’ (The 2012 Caijing Annual Conference, Beijing, 14-15 December 2011:

Nonetheless, it was not the Chinese government but what we call the ‘marginal revolutions’ that brought private entrepreneurship and market forces back to China. Private farming was introduced by starving peasants; rural industrialization was introduced by township and village enterprises; the first urban private sector emerged after self-employment was allowed; foreign direct investment and labor markets were first confined to Special Economic Zones. In contrast to the state owned enterprises, all these actors were marginal players in China’s socialist economy.

Ronald H Coase and Ning Wang, *How China Became Capitalist* (Palgrave Macmillan 2013) 46-50; and Huang Yasheng and Li Huafang (eds), *Zhenshi de Zhongguo: Zhongguo Moshi yu Chengshihua Biange de Fansi [The Real China: Reflections on the Chinese Model and Urbanisation* (author’s translation)] (China CITIC Press 2013) VIII.

<sup>78</sup> “Social awareness” in China in this context is defined as, being aware of the importance of developing the private sector, and is an imperative faced by the whole of society (e.g., administrative agencies, SOEs, privately-owned SMEs, consumers, scholars, etc.) on a day-to-day basis.

<sup>79</sup> See Bogdan Piasecki, ‘Dilemmas of the SME Sector Promotion Policy during the Transformation Period’ in Bogdan Piasecki and Daniel S Fogel (eds), *Regional Determinants of SME Development in the Central and Eastern European Countries* (Lodz University Press 1995) 250; and John Eveleigh Bolton, *Small Firms: Report of the Committee of Inquiry on Small Firms* (Her Majesty’s Stationery Office (HMSO) 1971) 28 & 40.

<sup>80</sup> SMEs “[a]re flexible and have strong relationships with customers, enabling rapid response to technical and market shifts. Small firms usually have good internal communications and many have a dynamic and entrepreneurial management style”: Roy Rothwell, ‘Industrial Innovation: Success, Strategy, Trends’ in Mark Dodgson and Roy Rothwell (eds), *The Handbook of Industrial Innovation* (Edward Elgar 1994), cited in Barbara Scozzi, Claudio Garavelli and Kevin Crowston, ‘Methods for Modeling and Supporting Innovation Processes in SMEs’ (2005) 8 *European Journal of Innovation Management* 120, 124.

restructuring and update the industrial chain, thereby helping Chinese industry prepares for long-term development.<sup>81</sup> However, their scale is a double-edged sword: SMEs also face challenges in the process of growth, and hence, need to constantly argue for promotion, and protection from State intervention.<sup>82</sup> As regards fair competition in China, State intervention ought to embody functions to support privately-owned SMEs: e.g., by stopping discriminatory practices by SOEs and mitigating the advance impact of the State's industrial policy.

### 1.5.1 China's Privately-Owned SMEs in a Difficult Survival Condition

In China, difficulties for privately-owned SMEs always arise from both inside and outside. Taking *inside challenges* for example, similar to almost all SMEs in Western countries,<sup>83</sup>

small firms face constraints associated with: lack of technically qualified labour; poor use of external information and expertise; difficulty in attracting/securing finance and relating inability to spread risk; unsuitability of original management beyond initial prescription; and, high cost of regulatory compliance.

These shortcomings may lead to a situation whereby SMEs, which struggle with enterprise management and organisational structures, are hardly a source of innovation in any area.<sup>84</sup>

Regarding *outside challenges*, amongst other things, discrimination towards SMEs by both SOEs and administrative agencies is a major and constant feature of the experience of Chinese privately-owned SMEs<sup>85</sup> because the State's industrial policy, which grants specific or exclusive rights to SOEs, often influences the survival prospects of privately-owned SMEs.<sup>86</sup> After a period of rapid economic expansion and a tremendous boost in the number

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<sup>81</sup> See David Smallbone and Friederike Welter, 'The Role of Government in SME Development in Transition Economies' (2001) 19 *International Small Business Journal* 63.

<sup>82</sup> See Roy Rothwell and Walter Zegveld, *Innovation and the Small and Medium-Sized Firm* (Frances Pinter 1982) Preface.

<sup>83</sup> See Mark S Freel, 'Barriers to Product Innovation in Small Manufacturing Firms' (2000) 8 *International Small Business Journal* 60, 61.

<sup>84</sup> See Scozzi, Garavelli and Crowston (n 80) 125.

<sup>85</sup> Competition between government and private firms is even more important overseas, where many countries historically have had greater government involvement in economic activity: R Richard Geddes (ed), *Competing with the Government: Anticompetitive Behavior and Public Enterprises* (Hoover Institution Press 2004) xi-xii.

<sup>86</sup> See Yasheng Huang, *Inflation and Investment Controls in China: The Political Economy of Central-Local Relations during the Reform Era* (CUP 1996) 157; Nicholas R Lardy, *China's Unfinished Economic Revolution* (Brookings Institution 1998) 29; and Kellee S Tsai, *Back Alley Banking: Private Entrepreneurs in China* (Cornell University Press 2004) 33-35.



of SMEs in the 1980s,<sup>87</sup> the Chinese government planned to change the industrial growth plan from the beginning of the 1990s, to help industrial planners to achieve their dream of modern large-scale factories.<sup>88</sup> Hence, a *nationalisation trend of privately-owned enterprises* occurred in the 1990s and resulted in SOEs merging with some privately-owned SMEs by means of the invoking of administrative powers.<sup>89</sup> Accordingly, SOEs made up a substantial portion of total enterprises,<sup>90</sup> while the proportion of small-scale enterprises decreased by 10 percent.<sup>91</sup> In the 21st century, the difficult survival and development situation of privately-owned SMEs continues. In order to describe it clearly, the author accessed a considerable amount of literature in the three selected traditional State-controlled industries:

In *the Chinese steel industry*, the State's industrial policy still regards privately-owned SMEs as a thorn in its side when considering the question of industrial scale,<sup>92</sup> notwithstanding that steel SMEs have been successful.<sup>93</sup> Thus, in the 21st century, the State has approved "administrative mergers" among large-scale steel enterprises, as well as enacting a shutting-down policy for privately-owned steel SMEs.<sup>94</sup> In *the Chinese gas station industry*, the nationalisation campaign, which commenced in 1999, continues to the present day.<sup>95</sup> Subsequently, because of "oil shortages" and "high-priced acquisitions" by

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<sup>87</sup> See Yanzhong Wang, 'Financing Difficulties and Structural Characteristics of SMEs in China' (2004) 12 *China & World Economy* 34, 35.

<sup>88</sup> See Edwin E Moise, *Modern China: A History* (3rd edn, Pearson/Longman 2008) 214.

<sup>89</sup> For example, in the gas station industry, because a policy named 'Order No.38 of 1999' released in 1999, certain privately-owned gas stations were merged or acquired by petrol SOEs (see further below in Chapter 4.2.1.1): see, e.g., *Ibid.*, 241-43; and 'Guanyu Qingli Zhengdun Xiaolianyouchang he Guifan Yuanyou Chengpinyou Liutong Zhixu de Yijian' [On the Liquidating and Restructuring of the Small Oil Refining Factories and Standardizing the Circulation Order of Crude Oil and Petroleum Products' ('Order No.38 of 1999')] (1999) <<http://finance.sina.com.cn/chanjing/b/20050816/08301890025.shtml>> accessed 30 January 2017.

<sup>90</sup> *Id.*

<sup>91</sup> See Wang, 'Financing Difficulties and Structural Characteristics of SMEs in China' (n 87).

<sup>92</sup> One mission of the Chinese steel industry is to raise the output of the top ten large steel undertakings to over 60 percent of total Chinese steel output by 2015, from 44 percent in 2009: 'Gangtie Chanye Tiaozheng he Zhenxing Guihua' [Steel Industry Revitalisation Plan of China] (2009)

<[www.gov.cn/zw/gk/2009-03/20/content\\_1264318.htm](http://www.gov.cn/zw/gk/2009-03/20/content_1264318.htm)> accessed 30 January 2017, the English version is available at <[www.lawinfochina.com/display.aspx?lib=law&id=7529&CGid=>](http://www.lawinfochina.com/display.aspx?lib=law&id=7529&CGid=>)> accessed 30 January 2017.

<sup>93</sup> See Clayton M Christensen and Michael E Raynor, *The Innovator's Solution: Creating and Sustaining Successful Growth* (Harvard Business School Press 2003) 35-59; and Gao Qingju, 'Guanyu Woguo Gangtie Gongye Shengcun Fazhan de Jidian Kanfa' [Some Opinions on the Survival and Development of the Chinese Steel Industry (author's translation)] (2006) 9 *Yejin Guanli* [China Steel Focus] 16.

<sup>94</sup> See Yang Jiang, 'Qianzuo Xiaogaolu Guanting Xuannian' [The Shutdown of 1,000 Chinese Small Blast Furnaces (author's translation)] (2010) 10 *Zhongguo Jingji he Xinxihua* [China Economy & Informatisation] 48.

<sup>95</sup> At the turn of the 20th and the 21st centuries, two petrol SOEs, PetroChina and Sinopec proposed growth

petrol SOEs,<sup>96</sup> privately-owned gas stations have faced increasing challenges and a shrinking market share.<sup>97</sup> As regards *the Chinese fixed-broadband industry*, the State proposed to reform it by following the model of Western countries: building interoperability cooperation among all network operators within the country and enhancing competition in the fixed-broadband market.<sup>98</sup> However, because Chinese telecommunications SOEs are chiefly concerned with their own growth and interests, while ignoring the State's requirements, "network interoperability" cannot be established smoothly. Thus, although the State encourages privately-owned fixed-broadband operators (or SMEs) to take part in the market, for example through the "last mile" programme,<sup>99</sup> it is probably a utopian aspiration in China.

In brief, in the face of challenges from both *inside* and *outside* over recent decades, the ups and downs of Chinese privately-owned SMEs have been shown many times in three selected traditional State-controlled industries. Since privately-owned SMEs are unable to overcome the current situation by themselves, they await assistance from the State. Thus, the literature search process for this thesis focused on two important methods of State intervention, the State's industrial policy and *the Chinese Anti-Monopoly Law 2007*. Because this research discusses problems in the growth processes of privately-owned SMEs and also

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plans: respectively occupying 30 percent and 60 percent market shares in the Chinese oil retail market by 2005: see, e.g., Waichung Lo, 'Recent Development of Petroleum Industry in China' in Hung Gay Fung in Changhong Pei and Kevin H Zhang (eds), *China and the Challenge of Economic Globalization: The Impact of WTO Membership* (M.E. Sharpe 2006) 293; and 'Guanyu Qingli Zhengdun Xiaolianyouchang he Guifan Yuanyou Chengpinyou Liutong Zhixu de Yijian' [On the Liquidating and Restructuring of the Small Oil Refining Factories and Standardizing the Circulation Order of Crude Oil and Petroleum Products' ('Order No.38 of 1999')] (1999) (n 89).

<sup>96</sup> Chinese petrol SOEs are willing to pay above market value for privately-owned gas stations in order to expand their market share in the refined oil retail market.

<sup>97</sup> See Wang Dan, *Zhongguo Shiyou Chanye Fazhan Lujing: Guazhan Jingzheng yu Guizhi* [*Chinese Oil Industry Development Path: Oligopolistic Competition and Regulation* (author's translation)] (China Social Sciences Press 2007) 180-84.

<sup>98</sup> See Stephen C Littlechild, *Regulation of British Telecommunications' Profitability* (Department of Industry 1983) para 4.11; Jon Stern, 'What the Littlechild Report Actually Said' (Proceedings of a joint LBS Regulation Initiative, CRI and City University Business School Conference, London, 9 April 2003); Ian Walden (ed), *Telecommunications Law and Regulation* (4th edn, OUP 2012) Ch 2.8; Robert W Crandall, *Competition and Chaos: U.S. Telecommunications Since the 1996 Telecom Act* (Brookings Institution Press 2005) 72-73; and James B Speta, 'Antitrust and Local Competition under the Telecommunications Act' (2003) 71 *Antitrust Law Journal* 99, 122.

<sup>99</sup> The "last mile" programme is a government requirement for the fixed-broadband network in China, started in 2012. It intends to offer network access ports for all new homes and a proportion of old homes: Wang Xiaotao, 'Minqi neng Chixia Liugei Ziji de Kuandai Dangao ma?' [Could Privately-Owned Fixed-Broadband SMEs Take Part in the "Last Mile" Programme? (author's translation)] *Zhongguo Jingji Daobao* [*China Economic Herald*] (Beijing, 27 September 2012) B03.

the Chinese economy, the author researched supportive literature written both in English and in Chinese (slightly under half of the literature used in this thesis was originally written in Chinese). All of this literature has been translated and/or paraphrased by the author.

### **1.5.2 Support for Chinese Privately-Owned SMEs – State Intervention**

“There is no more fundamental question in economics than what role the State or the government should play in a country’s economy.”<sup>100</sup> During the past three decades, China has used the State’s industrial policy and economic law to frequently promote the State’s economic growth to ensure development in particular areas, such as SOEs and privately-owned SMEs. However, these two methods are not always harmonious in their impact: they may either increase integration or affect competition.

#### *1.5.2.1 Chinese SME Policy and Law*

As a traditional support method for the Chinese economy, policies began to be initiated in the private sector from 1978, when the ‘Reform and Opening Up’ policy (1978) was implemented. Compared with other countries, such as Japan and Germany, although SME policy only has a short history in China, the Chinese Government followed in the footsteps of these countries, by upgrading SME policies to the status of SME promotion law.

In the immediate post-war period (1945-1952), Japan realised that the State’s economy needed SMEs and established the ‘Small and Medium Enterprise Agency’ in 1948. Subsequently, Japan published a series of laws to provide guidance and support for SMEs, which created the first high-growth period (1955-1962) of SMEs.<sup>101</sup> In the second

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<sup>100</sup> See Tanzi (n 10) Preface; and Milton Friedman, *Capitalism and Freedom* (The University of Chicago Press 1962) 15 (the latter points out that “[t]he existence of a free market does not of course eliminate the need for government. On the contrary, government is essential both as a forum for determining the ‘rule of the game’ and as an umpire to interpret and enforce the rules decided on”).

<sup>101</sup> See Ronald Tamangan, Frances Josef and Cielito Habito, ‘Small and Medium Enterprise Development Experience and Policy in Japan and the Philippines: Lessons and Policy Implications’ (Japan-Philippines Economic Partnership Research Project, 2004) xi.

In the area of financial support for SMEs, *the Law on Financial Assistance for Promoting Small and Medium Enterprises* was enacted in 1956 with the aim of improving the productivity of SMEs through the usage of modern equipment. *The Law Concerning the Organisation of Small and Medium Enterprises* was enacted in 1957 to ‘adjust businesses’ activities. *The Law on Organizing Commerce and Industry Association*, enacted by the government in 1960, aimed to broadly diffuse management programs.

high-growth period (1963-1972) of SMEs, “the old basic law of SMEs” (*the Small and Medium-Sized Enterprise Basic Act (No.154 of 1963)*) came into force in order to improve the business structure and trading conditions for SMEs.<sup>102</sup> Because SMEs have been stagnating since the collapse of the Japanese bubble economy (1990-1995),<sup>103</sup> “the old basic law of SMEs” was amended in 1999 to promote business start-ups and innovation management.<sup>104</sup>

SMEs in Germany have also attracted special attention from the State’s industrial policy since the post-war period, although “[t]here is no single programme especially dedicated to SME policies but a wide range of different approaches within different policy fields attempting to strengthen SMEs”<sup>105</sup>. Since the beginning of the 1980s, “[t]he German government has provided increased support for SMEs... This has involved programs which address concerns about the access of SMEs to finance... [P]olicies have also sought to improve the technological and research capabilities of SMEs”<sup>106</sup>. After Europe established the Internal Market (1986-1992), policies and laws in the European Union (EU) for Member States developed increasingly strong similarities.<sup>107</sup> In 2010, the European Commission (EC) confirmed that all Member States had a responsibility to improve the business environment for SMEs.<sup>108</sup>

In China, the Central Government accepted a very similar approach to support SMEs. Before 1978 ‘the Five-Year Plan System’<sup>109</sup> led and reflected the growth trend of different

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<sup>102</sup> See the Small and Medium-Sized Enterprise Basic Act (No.154 of 1963), Japan.

<sup>103</sup> See Hidenobu Tokuda, ‘Searching for Clues to the Low Profitability and Competitiveness of Japanese SMEs: An Analysis Based upon International Comparisons’ (Mizuho Research Institute, 2011) <[www.mizuho-ri.co.jp/publication/research/pdf/rp/MRP1105.pdf](http://www.mizuho-ri.co.jp/publication/research/pdf/rp/MRP1105.pdf)> accessed 30 January 2017.

<sup>104</sup> See SME Agency, Japan, ‘New SME Basic Law: Outline of Revisions and Detailed Explanation of Each Article’ (2000), cited in Go Shimada, ‘A Brief Introduction to SME policies of Japan’ (Addis Ababa, Ethiopia, 2009) 6.

<sup>105</sup> See Helmut Karl, Antje Möller and Rüdiger Wink, *Regional Industrial Policies in Germany* (Ceris-Cnr 2003) 13.

<sup>106</sup> See Rachel Parker, ‘From National Champions to Small and Medium Sized Enterprises: Changing Policy Emphasis in France, Germany and Sweden’ (1999) 19 *Journal of Public Policy* 63, 74.

<sup>107</sup> See Commission, ‘Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - “Think Small First” - A “Small Business Act” for Europe’ COM (2008) 394 final.

<sup>108</sup> See Commission, ‘Communication from the Commission Europe 2020: A Strategy For Smart, Sustainable and Inclusive Growth’ COM (2010) 2020 final.

<sup>109</sup> See Chapter 2.1.1 below.

industries. Each Five-Year Plan set percentage targets for industrial growth on a macro-level and adopted a specific output target for each kind of product on a micro-level.<sup>110</sup> Subsequently, the State's industrial policy relating to privately-owned SMEs started its work from the early 1980s in order to increase market activities;<sup>111</sup> thereby privately-owned SMEs ushered in a spring of hope.<sup>112</sup> However, the first individual SME policy, 'Several Statements of the State Council on Encouraging and Promoting the Development of SMEs' (2000), which was upgraded to *the Chinese Law on Promotion of SMEs 2002*, did not emerge until the beginning of the 21st century.

However, due to historical inertia, intervention on behalf of Chinese privately-owned SMEs has become complicated. Although the State's industrial policy is implemented explicitly and consciously in the area of economic management and regulation,<sup>113</sup> it often fails to achieve the desired objective. Most industrial policies prefer to consider the State's short-term economic interest and the development of SOEs as priority matters, but leave privately-owned SMEs to face unfavourable conditions.<sup>114</sup> Because the Chinese SME policy and law cannot prevail over such a situation in the development approach, this thesis argues for an effective legal framework to be developed in order to adequately protect the interests of privately-owned SMEs.

#### 1.5.2.2 Competition Law and Policy in China for SMEs

To review functions of the market and the government in economic development, both market-ineffectiveness and policy-ineffectiveness occur.<sup>115</sup> Wolf referred to "[t]he more or less predicated shortcomings of government no less than those of markets"<sup>116</sup>. Similarly, the Chinese SME policy should not be the sole measure of State intervention to ensure sound

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<sup>110</sup> See Liu (n 25) 24.

<sup>111</sup> See Chapter 2.3.2 below.

<sup>112</sup> See Patricia Buckley Ebrey, *The Cambridge Illustrated History of China* (2nd edn, CUP 2010) 332.

<sup>113</sup> See Zhou, Pei and Chen (n 23).

<sup>114</sup> For example, in 1996, the State decided to encourage State-owned small-scale enterprises to explore their own approaches to reform, such as privatisation. This might be understood as an *abandoned programme*. Although privatisation increased market activities, it also helped SOEs or State-owned assets to avoid risks: Qi Chu, 'Guojia Tigaiwei Zhiding Jiakuai Guoyou Xiaoqiye Gaige de Yijian, Guli Xiaoguoqi Tansuo Shihe Ziji de Gaige Fangshi' [Encouraging State-Owned Small Enterprises to Explore New Approaches to Reform (author's translation)] (1996) 9 *Zhongguo Jidian Gongye* [China Machinery and Electronics Industry] 5.

<sup>115</sup> See Sidgwick (n 46).

<sup>116</sup> See Wolf (n 47).

development of SMEs. *The Anti-Monopoly Law (2007)* that ought to take market mechanisms seriously and regulate monopolies of SOEs should be another support method for privately-owned SMEs.<sup>117</sup>

There are a number of different views regarding the role of competition law or policy (antitrust/anti-monopoly law or policy) as regards SMEs. Bork maintained that maximising consumer welfare and efficiency should be the objectives of an antitrust law.<sup>118</sup> Posner stated that<sup>119</sup>

antitrust enforcement is not only an ineffectual, but a perverse, instrument for trying to promote the interests of small business as a whole. Antitrust objectives and the objectives of small businesspeople are incompatible at a very fundamental level. The best overall antitrust policy from a small-business standpoint is no antitrust policy.

However, it is commonly believed that protecting SMEs was “[a] key reason for the adoption of antitrust law in the US”<sup>120</sup>. With the success of the Structure-Conduct-Performance Paradigm (S-C-P Paradigm),<sup>121</sup> SMEs became important elements for competition law or

<sup>117</sup> “[A]ntitrust law is an aspect of broader competition policy, which seeks to promote private competitive markets as alternatives to State-owned enterprises or regulated monopolies”: Bruce M Owen, Su Sun and Wentong Zheng, ‘China’s Competition Policy Reforms: The Anti-Monopoly Law and Beyond’ (2008-2009) 75 *Antitrust Law Journal* 231; and Development Research Center of the State Council, *Zhongxiao Qiye Fazhan [The Development of Small and Medium Enterprises]* (China Development Press 2011) 15.

<sup>118</sup> See Bork (n 16) 51 & 90-106.

<sup>119</sup> See Richard A Posner, *Antitrust Law* (2nd edn, The University of Chicago 2001) 26.

<sup>120</sup> See Christopher Townley, *Article 81 EC and Public Policy* (Hart Publishing 2009) 25; Jonathan B Baker, ‘Competition Policy as a Political Bargain’ (2006) 73 *Antitrust Law Journal* 483, 494; and Zheng Pengcheng, ‘Xiangguan Shichang Jieding zhong de Liyi Boyi yu Jiben Yuanze’ [The Gaming Interests and the Basic Principle Surrounding the Market Definition] in Wang Xiaoye (ed), *Fanlongduanfa zhong de Xiangguan Shichang Jieding [Market Definition in the Antitrust Law]* (Social Sciences Academic Press, China 2014) 84.

<sup>121</sup> The S-C-P Paradigm (see Table 1-2 below) emerged in the 1930s at Harvard University, developed in the 1950s, and flourished in the 1960s.

**Table 1-2: Brief Table of the Structure-Conduct-Performance Paradigm**

Structure (Number and Size Distribution of Firms) →	Conduct (Behavior of Firms) →	Performance (Market Power)
Number of firms	Pricing	Production efficiency
Number of buyers	Research and development (R&D)	Allocative efficiency
Number of products	Advertising	Product quality
Entry barriers	Choice of technology	Profits

Source: *Competition and Monopoly: Analysis from Perspective of Process Competition Theory*; table devised by the author.

\* This table will be published as Wang, ‘A Maze of Contradictions: Chinese Law and Policy in the Development Process of Privately Owned Small and Medium-Sized Enterprises in China’ (n 54).

See Leonard W Weiss, ‘The Structure-Conduct-Performance Paradigm and Antitrust’ (1979) 4 *University of Pennsylvania Law Review* 1104; Barry J Rodger, ‘The Oligopoly Problem and the Concept of Collective Dominance: EC Developments in the Light of U.S. Trends in Antitrust Law and Policy’ (1995/96) 2 *Columbia Journal of European Law* 25, 28-29; Alison Jones and Brenda Sufrin, *EC Competition Law* (5th edn, OUP 2014)

policy (antitrust/anti-monopoly law or policy).<sup>122</sup> Hovenkamp concluded that “[a]ntitrust without structural analysis has become impossible, thanks largely to the S-C-P writers”<sup>123</sup>. In 1936, *the Robinson-Patman Act of 1936* that concerned small businesses came into force in the US.<sup>124</sup> Furthermore, Chaffetz, a leading antitrust lawyer, held that “[s]mall businesses are increasingly concerned about the problems of compliance with the antitrust laws...”<sup>125</sup> If we treat SMEs’ development and competition law or policy (antitrust/anti-monopoly law or policy) separately, this will occasionally result in inefficiency, which is harmful to market activity and competitive mechanisms.<sup>126</sup> To date, most scholars agree that competition law or policy (antitrust/anti-monopoly law or policy) should protect SMEs,<sup>127</sup> and treat them differently from other enterprises.<sup>128</sup>

Although it has become increasingly clear that the Chinese Anti-Monopoly Law should protect SMEs,<sup>129</sup> privately-owned SMEs have not acquired better survival conditions

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22-28; and Wang Tinghui, *Jingzheng yu Longduan: Guocheng Jingzheng Lilun Shijiao de Fenxi* [*Competition and Monopoly: Analysis from Perspective of Process Competition Theory*] (Economic Science Press, China 2007) 22.

<sup>122</sup> See Edward S Mason, ‘Price and Production Policies of Large-Scale Enterprise’ (1939) 29 *The American Economic Review* 61, 62-63.

<sup>123</sup> See Herbert Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practices* (3rd edn, West Group 2005) 46.

<sup>124</sup> See Ross E Elford, ‘The Robinson-Patman Act’ (*American Bar Association*) <[www.americanbar.org/groups/young\\_lawyers/publications/the\\_101\\_201\\_practice\\_series/robinson\\_patman\\_act.html](http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/robinson_patman_act.html)> accessed 30 January 2017; and Rudolph J R Peritz, *Competition Policy in America: History, Rhetoric, Law* (Revised edn, OUP 2000) 157.

<sup>125</sup> See Hammond E Chaffetz, ‘The Antitrust Laws and Small Business’ (1953) 41 *Section of Antitrust Law* 77.

<sup>126</sup> See Porter (n 48).

<sup>127</sup> See Wolf Sauter, *Competition Law and Industrial Policy in the EU* (Clarendon Press 1997) 47, 117 & 147; Barry J Rodger, ‘Competition Policy, Liberalism and Globalization: A European Perspective’ (2000) 6 *Columbia Journal of European Law* 289, 304 (the latter points out that “the promotion of SMEs... is a particular goal of the Community authorities as it is believed that such companies may start to compete across national frontiers and hence indirectly support the market integration policy”); Giorgio Monti, ‘EC Competition Law: The Dominance of Economic Analysis?’ in Roger Zäch, Andreas Heinemann and Andreas Kellerhals (eds), *The Development of Competition Law: Global Perspectives* (Edward Elgar Publishing 2010) 10; and John B Kirkwood, ‘The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct’ (2013) 81 *Fordham Law Review* 2425.

<sup>128</sup> See Pranvera Këllezi, Bruce Kilpatrick and Pierre Kobel, *Antitrust for Small and Middle Size Undertakings and Image Protection from Non-Competitors* (Springer 2014) 3; Sakda Thanitculr, ‘SMEs and Competition Law: A Case Study on Suppliers of Goods to Large Retail Stores’ (2008) 15 *Journal of International Cooperation Studies* 31, 32; Commission, ‘Putting Small Businesses First: Europe is Good for SMEs, SMEs are Good for Europe’ (2008) <<http://ec.europa.eu/DocsRoom/documents/2278/attachments/1/translations/en/renditions/pdf>> accessed 30 January 2017; and the Office of Fair Trading (OFT) of the United Kingdom, ‘SMEs Missing out on Benefits of Competition: Campaign Launched to Highlight Importance of Competition Law’ (2005) <<http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.of.gov.uk/news-and-updates/press/2005/92-05>> accessed 30 January 2017.

<sup>129</sup> See Harris and others (n 35) 90;

China’s approach is likely to be more consistent with the historical approach taken by the European

through the Law. Apart from Article 15(3) of *the Chinese Anti-Monopoly Law 2007*, which makes exemptions for monopoly agreements among SMEs, this Law lacks a direct protection system for privately-owned SMEs with regard to the indiscriminate use of administrative powers.<sup>130</sup> Therefore, faced with inappropriate administrative intervention<sup>131</sup> authorised by the State's industrial policy, *the Chinese Anti-Monopoly Law 2007* pays only lip service to the protection of privately-owned SMEs.

To date, there has been only one piece of State-led research undertaken in China focusing on this situation.<sup>132</sup> Apart from providing general recommendations for *the Chinese*

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Commission and the EU courts, with greater government intervention in the markets, and an enforcement policy not focused solely on consumer welfare, but also directed at preserving market structure and policing the “fairness” of competitive conduct.

and Xinzhu Zhang and Vanessa Yanhua Zhang, ‘The Antimonopoly Law in China: Where Do We Stand?’ (2007) 3 *Competition Policy International* 185.

<sup>130</sup> See Xiaoye Wang, *Fanlongduanfa [Anti-Monopoly Law]* (Law Press, China 2011) 5-9; and the Anti-Monopoly Law of China 2007, Arts 13-15.

Article 13: Any of the following monopoly agreements among the competing business operators shall be prohibited:

- (1) fixing or changing prices of commodities;
- (2) limiting the output or sales of commodities;
- (3) dividing the sales market or the raw material procurement market;
- (4) restricting the purchase of new technology or new facilities or the development of new technology or new products;
- (5) making boycott transactions; or
- (6) other monopoly agreements as determined by the Anti-monopoly Authority under the State Council.

For the purposes of this Law, ‘monopoly agreements’ refer to agreements, decisions or other concerted actions that eliminate or restrict competition.

Article 14: Any of the following agreements among business operators and their trading parties are prohibited:

- (1) fixing the price of commodities for resale to a third party;
- (2) restricting the minimum price of commodities for resale to a third party; or
- (3) other monopoly agreements as determined by the Anti-monopoly Authority under the State Council.

Article 15: An agreement among business operators shall be exempted from application of Articles 13 and 14 if it can be proven to be in any of the following circumstances:

... (3) for the purpose of enhancing operational efficiency and reinforcing the competitiveness of small and medium-sized business operators...

<sup>131</sup> “Administrative intervention” in this thesis, which is *not* synonymous with “State intervention”, could be defined as follows: the State uses “administrative powers” (see the explanation in footnote 45 above) to supervise and intervene in the operation of the market in China. The intervention oversteps legal restrictions, particularly *the Chinese Anti-Monopoly Law 2007*, occasionally. For example, in order to establish the predominant position of SOEs in the Chinese market, certain administrative agencies and SOEs interrupt the market system and squeeze the living space for the private sector, by the way of implementing certain State industrial policies (see further in Chapter 4 below).

<sup>132</sup> See Development Research Center of the State Council (n 117).



*Anti-Monopoly Law 2007*, such as emphasising anti-monopoly enforcement to forbid the abuse of dominant position, this has made a limited contribution.<sup>133</sup> Moreover, one of the most important departments doing research on SME policy, the ‘China Centre for Promotion of SME Development, Ministry of Industry and Information Technology’, has never involved SMEs’ growth in the field of Anti-Monopoly Law.<sup>134</sup> In the Chinese reality, two measures of government intervention, namely the State’s industrial policy and the Anti-Monopoly Law, do not work together harmoniously in the interests of privately-owned SMEs.

### 1.5.3 Advantages of State Support for SMEs in Several States

From the end of the 1970s to the present time, arguments against State intervention in the economic development process have never disappeared. The first reason is that State intervention may damage resource allocation and long-term growth within the country.<sup>135</sup> The second reason is that State intervention, which is biased, has been unable to balance the interests of all enterprises in specific periods.<sup>136</sup> Hence in the past, “the combined effect of competition and of political and economic inequality was that the strong would get stronger, the weak would get weaker, and the strong would use their strength to take from the weak”<sup>137</sup>. “As a result, the IMF and the World Bank invited developing countries to reduce or stop support for business... [F]ew people still seriously think that state planning and intervention can act as the main driving force of economic development.”<sup>138</sup>

However, State intervention does not always present a pessimistic scenario. Apart from successful industrialisation without government promotion,<sup>139</sup> successful precedents for

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<sup>133</sup> *Id.*

<sup>134</sup> Interview with Huiyong Shang, Researcher of Policy Planning Office, China Centre for Promotion of SME Development, Ministry of Industry and Information Technology of China (Beijing, China, 2012).

<sup>135</sup> See Pierre-Andre Buigues and Khalid Sekkat, *Industrial Policy in Europe, Japan and the USA: Amounts, Mechanisms and Effectiveness* (Palgrave Macmillan 2009) Introduction.

<sup>136</sup> For instance, see Parker (n 106) 63-64:

In the post-war period, in many European countries, industry policy was directed to particular sectors of industry or it involved support for particular firms on the point of bankruptcy because of their importance to national employment or production. Industry policy was based on strategic interventions, designed to manage structural change in the broader national interest.

<sup>137</sup> See David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP 2001) 33.

<sup>138</sup> See Buigues and Sekkat (n 135).

<sup>139</sup> See Chang Ha-Joon, *Kicking Away the Ladder* (Anthem Press 2002), cited in United Nations Conference on

SME policies can still be found. For example, since the 1980s, the UK has been devoted to developing better policies to support businesses. “Small businesses have been one of the major intended beneficiaries...”<sup>140</sup> In the case of Japan, because SMEs in manufacturing industries obtained 50 percent of the total State’s public support for SMEs between 1989 and 1993,<sup>141</sup> these industries increased the most out of fifteen OECD member countries.<sup>142</sup> Another positive case of State intervention for the development of SMEs occurred in Germany:<sup>143</sup>

*Strukturpolitik* has positively influenced the performance and industrial capacity of the German economy through the introduction of SME legislation designed to support the performance of a diverse range of competent small and medium-sized business owners. ‘Mittelstand’ enterprises are those KMU or German SMEs subject to the *Mittelstandsförderungsgesetz (MFG)* (*Mittelstand Support Law*).

Although the whole country faced severe difficulties during the global financial crisis of 2007 onwards, domestic SMEs continued to evolve due to the on-going support from the German government.<sup>144</sup> Similarly, the attractive situation of German SMEs has also existed elsewhere in Europe over the past decade: the development of SMEs has never stopped in spite of economic turmoil. In 2010,

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Trade and Development, ‘Rethinking Industrial Policy’ (April 2007) UNCTAD/OSG/DP/2007/2.

<sup>140</sup> See John Kitching, ‘Is Less More? Better Regulation and the Small Enterprise’ in Stephen Weatherill (ed), *Better Regulations* (Hart Publishing 2007) 172.

<sup>141</sup> See Buigues and Sekkat (n 135) 184.

<sup>142</sup> See OECD, *Spotlight on Public Support to Industry* (Organization for Economic 1998) Ch 14.

<sup>143</sup> See Alan Joseph Halner, ‘A Study of the Environmental Consciousness of Small and Medium-Sized Enterprises in the United Kingdom and Germany’ (PhD thesis, The Open University 2001).

In general terms *Strukturpolitik* aims at promoting opportunities to secure national economic wealth as well as neutralising quantitative and qualitative socio-economic disadvantages, which arise primarily from industrial activities practised within German national boundaries. *Strukturpolitik* legislatively guides the thematic content and direction of national policy by determining what socio-economic interests cannot be excluded in the exercise of party politics. This process equally legitimises and justifies commitment to socio-economic engagements in keeping with the principles of *Strukturpolitik*.

<sup>144</sup> **Table 1-3: Data of German SMEs in 2008 and 2010**

Year	Number of SMEs		Number of Employees in SMEs		SMEs Value Added	
	Number	Share (%)	Number	Share (%)	Billion (EUR €)	Share (%)
2008	1,657,194	99.5	12,436,906	60.1	553	53.2
2010	1,862,476	99.5	13,616,742	60.9	657	53.8

Source: ‘SBA Fact Sheet Germany 2008’ for 2008 data, ‘SBA Fact Sheet Germany 2010-2011’ for 2010 data; table devised by the author.

Email from the SME Performance Review of European Commission Enterprise and Industry to author (17 June 2015).

SMEs retained their position as the backbone of the European economy... [A]ltogether these SMEs provided more than two-thirds (87.5 million) of all employment opportunities in the private sector in EU-27. Also, 58.4 percent of the total Gross-value Added (GVA) produced by private businesses in the EU in 2010 was accounted for by SMEs.<sup>145</sup>

Consequently, whilst State intervention has multiple disadvantages, it still has a positive side. The experiences of the UK, Japan, Germany, and even other European countries, show that if State intervention is suitable, it can without doubt promote SMEs. As regards the core research question of this thesis, it will go back to the reality of the Chinese situation and retrieve literature to investigate why State intervention does not avoid its drawbacks in the process of promoting privately-owned SMEs.

#### **1.5.4 The Suffering of Discrimination by Chinese Privately-Owned SMEs from State Intervention**

Regarding “the change of the ‘State-market’ yardstick”<sup>146</sup>, “China has a great chance, as it reforms, downsizes and divests itself of its State assets, to foster an environment that nurtures the development of sustainable SMEs”<sup>147</sup>. In general, both the State’s industrial policy and the Anti-Monopoly Law should create a joint force to promote both SOEs and privately-owned SMEs. However, with the protection of the State’s economic security and interests being considered as the most important interest, privately-owned SMEs have never received adequate attention from the State.<sup>148</sup> Therefore, China should strengthen legal support and revise the discriminatory policies for privately-owned SMEs.<sup>149</sup>

First, the State intervention approach in China fails to offer authentic growth opportunities for privately-owned SMEs. Although SMEs, especially privately-owned SMEs,

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<sup>145</sup> See Paul Wymenga and others, ‘Are EU SMEs Recovering from the Crisis? – Annual Report on EU Small and Medium Sized Enterprises 2010/2011’ (Rotterdam and Cambridge, 2011) <<http://ec.europa.eu/DocsRoom/documents/15770/attachments/1/translations/en/renditions/native>> accessed 30 January 2017.

<sup>146</sup> See Yong Huang and Shan Jiang, ‘Thirty Years of PRC Anti-Monopoly Law under ‘State-Market’ Yardstick: From Retrospective and Prospective Viewpoints’ in Roger Zäch, Andreas Heinemann and Andreas Kellerhals (eds), *The Development of Competition Law: Global Perspectives* (Edward Elgar Publishing 2010) 143.

<sup>147</sup> See Lige Shao, ‘The SME Challenge in China’ (2005) AmCham China Brief <<http://web.resource.amchamchina.org/wysiwyg/20050318170359.pdf>> accessed 30 January 2017.

<sup>148</sup> See Development Research Center of the State Council (n 117) 150-52.

<sup>149</sup> See Zhang Weiyong, *Jingzengli yu Qiye Chengzhang* [*Core Competence and Growth of the Firm*] (Peking University Press, China 2006) 223; and Zhao and Ni (n 10) 52-53.

had an exciting period of growth after 1978, the State placed more weight on the formation and development of SOEs.<sup>150</sup> From the end of the Seventh Five-Year Plan (1986-1990), China maintained the previous policy of promoting industrial concentration and ignoring privately-owned SMEs.<sup>151</sup> Although State intervention speeded up economic growth, China achieved outcomes which were in conflict with the initial goals of the industrial policy: profit, innovation and growth of certain State-controlled industries were at comparatively low levels.<sup>152</sup> In reality, “[g]overnments are seen as incapable of successfully ‘picking winners’ and the protected infants are believed never to grow up...”<sup>153</sup> Compared with certain developed countries, the further weakening of industrial competitiveness has continued in China since 2011.<sup>154</sup>

Second, Chinese SOEs indulge in abusing their specific or exclusive rights, which result from the State’s industrial policy, by obstructing the growth of privately-owned SMEs. Although Article 7 of *the Chinese Anti-Monopoly Law 2007* holds that SOEs “[s]hall not damage the interests of consumers by virtue of their dominant or exclusive positions”<sup>155</sup>, the State’s industrial policy virtually ignores this requirement. For instance, the ‘Steel Industry Revitalisation Plan of China’ (2009) allowed every provincial government to make its own merger plan for local steel enterprises.<sup>156</sup> Chinese anti-monopoly enforcement agencies had no responsibility for examining whether provincial governments’ merger plans were

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<sup>150</sup> During the period of the Fifth Five-Year Plan (1976-1980), the energy and transportation sectors, which were owned by the State, absorbed about one-half of the State’s total capital investment. In the Sixth Five-Year Plan (1981-1985), this tendency was further emphasised; in the Seventh Five-Year Plan (1986-1990), the State supported more State-controlled industries, such as telecommunications and construction industries: see, e.g., Liu (n 25) 26; William A Byrd and Lin Qingsong (eds), *China’s Rural Industry: Structure, Development, and Reform* (OUP 1990) 93-94; and ‘Zhonghua Renmin Gongheguo Guojia Tongjiju Guanyu 1986 nian Guomin Jingji he Shehui Fazhan de Tongji Gongbao’ [National Economic and Social Development Statistics Bulletin 1986] (*National Bureau of Statistics of China (NBS)*, 20 February 1987) <[www.stats.gov.cn/statsinfo/auto2074/201311/P020131107372415754406.pdf](http://www.stats.gov.cn/statsinfo/auto2074/201311/P020131107372415754406.pdf)> accessed 30 January 2017.

<sup>151</sup> See Han (n 25) 94-99.

<sup>152</sup> See Wu Jinglian and Ma Guochuan, *Chongqi Gaige Yicheng: Zhongguo Jingji Gaige Ershijiang* [Restart Reform Agenda: China’s Economic Reform 20 Points] (Shenghuo-Dushu-Xinzhishi Joint Publishing Company, China 2013) 2-3; and Moise (n 88) 241.

<sup>153</sup> See United Nations Conference on Trade and Development (n 139) 7.

<sup>154</sup> See Zhang Qizai, Guo Chaoxian and Yuan Lei (eds), *Chanye Lanpishu: Zhongguo Chanye Jingzhengli Baogao No.3 (2013)* [Blue Book of Industry: Annual Report on Industrial Competitiveness of China (2013) No.3] (Social Sciences Academic Press, China 2013) 2-3; and Moise (n 88) 241.

<sup>155</sup> See the Anti-Monopoly Law of China 2007, Art 7.

<sup>156</sup> See ‘Gangtie Chanye Tiaozheng he Zhenxing Guihua’ [Steel Industry Revitalisation Plan of China] (2009) (n 92).

compatible or not with the *2007 Anti-Monopoly Law*.<sup>157</sup>

Without any effective legal protection, privately-owned steel SMEs had to comply with the administrative intervention and placed their fate into the hands of local governments and steel SOEs. Since such a situation is totally contrary to the terms of *the Chinese Anti-Monopoly Law 2007*, during the same period the essential aims of this Law (e.g., expanding market activities, maintaining fair competition, promoting long-term development, and safeguarding the “public interest”) were overlooked.<sup>158</sup> However, this is senseless because “[s]ociety benefits from effective competition: it helps to create the conditions for long-term growth by companies – including SMEs”<sup>159</sup>.

Fortunately, China realised that emphasising the State’s interest exclusively during the development period of SOEs would eventually damage the economy. The former Vice Chairman of the State-Owned Assets Supervision and Administration Commission of the State Council (SASAC), Ning Shao, asserted that SOEs should focus on the “public interest” in the development approach.<sup>160</sup> Accordingly, governments and SOEs should not sacrifice the interests of privately-owned SMEs or challenge the ultimate objective of *the Chinese Anti-Monopoly Law 2007*, the “public interest”, any further.

In order to help this objective be achieved, this thesis also examines the legal environment that could foster the positive development of privately-owned SMEs and the “public interest” in China in the context the practices of anti-monopoly enforcement agencies. Relying on the requirements of *the Chinese Anti-Monopoly Law 2007*, the State has established one Anti-Monopoly Commission and three anti-monopoly enforcement agencies since 2008 (see Figure 5-1 in Chapter 5 below).<sup>161</sup> Contrary to the original intention, this

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<sup>157</sup> *Id.*

<sup>158</sup> See the Anti-Monopoly Law of China 2007, Art 1.

<sup>159</sup> See Joaquín Almunia, ‘EU Antitrust policy: the Road Ahead’ (International Forum on EU Competition Law, Brussels, 9 March 2010) <[http://europa.eu/rapid/press-release\\_SPEECH-10-81\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-10-81_en.htm?locale=en)> accessed 30 January 2017.

<sup>160</sup> See Shao (n 56).

<sup>161</sup> See the Anti-Monopoly Law of China 2007, Arts 9 & 10.

Article 9: The State Council shall establish the Anti-monopoly Commission, which is in charge of organising, coordinating, and guiding anti-monopoly work, and performs the following functions:  
(1) studying and drafting related competition policies;

multi-agencies system does not enforce *the Chinese Anti-Monopoly Law 2007* appropriately.<sup>162</sup> Thus, the author draws on the experience of Western countries, to stress the importance of establishing a *unique* and “*independent*” anti-monopoly enforcement agency in China.<sup>163</sup>

To summarise the literature review process, the author encountered several challenges. With regard to the existing research works on the survival and growth situation of Chinese SMEs, most of them consider SMEs from the perspective of their scale, such as the dilemma of financing of research and development (R&D) and innovation. Literature on privately-owned SMEs from the viewpoint of State intervention and the conflict with SOEs was limited. Whilst Japan prefers to focus on the relationship between SMEs and large-scale enterprises in the economic growth approach, the author has only utilised a small number of literature references from that source because of the different characteristics of the countries and the language issue. Furthermore, although the EU has a positive model on promoting SMEs, China has its own unique development approach, and therefore the author did not

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- (2) organising the investigation and assessment of overall competition situations in the market, and issuing assessment reports;
  - (3) constituting and issuing anti-monopoly guidelines;
  - (4) coordinating anti-monopoly administrative law enforcement; and
  - (5) other functions as assigned by the State Council.

The State Council shall stipulate composition and working rules of the Anti-monopoly Commission.

Article 10: The anti-monopoly authority designated by the State Council (hereinafter referred to as the Anti-monopoly Authority under the State Council) shall be in charge of anti-monopoly law enforcement in accordance with this Law.

The Anti-monopoly Authority under the State Council may, when needed, authorize the corresponding authorities in the people’s governments of the provinces, autonomous regions and municipalities directly under the Central Government to take charge of anti-monopoly law enforcement in accordance with this Law.

<sup>162</sup> See Ren Xue and Zhao Chenxi, ‘Fanlongduan Zhize Huafen Buqing Huozhi Zhifa Chongtu’ [Multi-Agency Working May Cause Conflicts for Anti-Monopoly Investigation (author’s translation)] *Legal Daily* (Beijing, 7 March 2011) 4.

<sup>163</sup> See Adam Jasser, ‘Independence and Accountability’ (2015) 2 *Journal of European Competition Law & Practice* 71; Philip Elman, ‘Retrospect and Prospect’ in Boston Bar Association, Antitrust Committee and Greater Boston Chamber of Commerce (eds), *A Primer on Unlawful Restraints in Marketing and Distribution* (Warren, Gorham & Lamont 1967) 58; Johan W Van de Gronden and Sybe A de Vries, ‘Independent Competition Authorities in the EU’ (2006) 2 *Utrecht Law Review* 32; Robert N Cook and Robert A Skitol, ‘Fresh Thinking About the FTC/DOJ Interface: Return to the Wilson-Brandeis-Elman Vision’ (2002) July *The Antitrust Source* <[www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/cookskitol.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/cookskitol.authcheckdam.pdf)> accessed 30 January 2017; Commission on Investment, Technology and Related Financial Issues Intergovernmental Group of Experts on Competition Law and Policy, *Independence and Accountability of Competition Authorities* (OUP 2001) Executive Summary; and Abel M Mateus, ‘Why Should National Competition Authorities be Independent and How Should They be Accountable?’ (2007) 3 *European Competition Journal* 17.

consider the “borrow-for-use” approach was appropriate. Hence, literature references in this thesis concerning the EU are also limited in number. Conversely, because the scope of the research is within China, many Chinese literature references are used to analyse the legal framework for the protection of privately-owned SMEs.

## 1.6 Research Methodology

### 1.6.1 The Black-Letter Law Approach and Semi-Structured Interviews

The black-letter law approach<sup>164</sup> matches the approach taken in this research closely. This methodology has been chosen to answer the following questions: (a) Why did *the Chinese Anti-Monopoly Law 2007* not offer effective protection for privately-owned SMEs against administrative agencies and SOEs? (b) What flaws does *the Chinese Law on Promotion of SMEs 2002* and *the Chinese Anti-Monopoly Law 2007* have towards SMEs’ protection? (c) Why should the principles underlying *the Chinese Anti-Monopoly Law 2007* occupy a pre-eminent position in the development of the Chinese market, as well as providing a framework for other relevant laws and policies to guide the State’s economic development approach? (d) Since the reality is the opposite, what features should be incorporated into *the Chinese Anti-Monopoly Law 2007* in the future to reverse such a situation?

In order to obtain clearer answers to the questions mentioned above, the author originally planned to interview several top Chinese scholars on the Chinese Anti-Monopoly Law (AML) and officers working in Chinese anti-monopoly enforcement agencies. However, it became difficult to complete the original project because the author was not granted any permission to interview officers working in anti-monopoly enforcement agencies. Hence, the implementation plan was adjusted, and divided into two stages.

In the first stage, the author interviewed six leading Chinese professors on the Anti-Monopoly Law.<sup>165</sup> Three of these professors are working in Beijing; a fourth is a

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<sup>164</sup> “The ‘black-letter’ research aims to systematise, rectify and clarify the law on any particular topic by a distinctive mode of analysis to authoritative texts that consist of primary and secondary sources”: Mike McConville and Wing Hong Chui, *Research Methods for Law* (University of Edinburgh Press Ltd 2007) 4.

<sup>165</sup> These interviews were conducted in Chinese, and the answers were translated into English by the author.

professor whose research area is on the Anti-Monopoly Law and the State's industrial policy; a fifth is a professor whose research focuses on both the Anti-Monopoly Law and EU competition law; and the sixth is a professor whose research focuses on the "public interest" element of *the Chinese Anti-Monopoly Law 2007*.

Semi-structured interview questions involved four major aspects of *the Chinese Anti-Monopoly Law 2007*: (a) the position of the "public interest"; (b) administrative intervention in China; (c) the relationship between the Chinese Anti-Monopoly Law and the State's industrial policy; and (d) the practical functions of the current anti-monopoly enforcement agencies.

In general, these six professors had similar basic ideas on these four questions, their responses can be summarised as follow to each of the fore Questions: (a) *the Chinese Anti-Monopoly Law 2007*, with the ultimate goal of the "public interest", always emphasises the importance of consumer welfare. (b) The provisions of *the Chinese Anti-Monopoly Law 2007* are unable to prevent inappropriate administrative intervention, which is partially caused by the State's industrial policy. (c) The State's industrial policy occupies the dominant position, rather than *the Chinese Anti-Monopoly Law 2007* in the market. (d) The present multi-agency system in China wastes enforcement resources and lacks actual functions, and should be upgraded in the future.<sup>166</sup>

In the second stage, the author attended the 'Asia Competition Association Beijing Conference' (21 October 2012, Beijing) and the 'International Seminar on Assessing Economic and Legal Arguments in Antitrust Cases' (9 November 2012, Shanghai) because four officers working in the Chinese anti-monopoly enforcement agencies and the Supreme People's Court of China presented at these conferences. Thus, the author was able to assess their attitudes about anti-monopoly enforcement directly. Two officers from anti-monopoly enforcement agencies emphasised that recently the agencies pay more attention to "administrative monopoly"(abusing administrative powers to intervene the market)<sup>167</sup> and

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<sup>166</sup> See the interview summary in Appendix 3: Part I.

<sup>167</sup> *Administrative monopoly* in China includes two types: (a) local protection (regulated by Articles 33-35 of



SOE mergers than previously. However, *the Chinese Anti-Monopoly Law 2007* is difficult to implement in order to fight against administrative intervention. Two other officers, working in the Intellectual Property Tribunal of the Supreme People's Court of China, not only provided data on civil anti-monopoly cases, but also pointed out how the current anti-monopoly civil procedure has many problems.<sup>168</sup>

### 1.6.2 Theoretical Analysis: Law and Economics

Because this research is an interdisciplinary study, other disciplines, such as economics and

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*the Chinese Anti-Monopoly Law 2007*), and (b) State-led monopoly, which in general means abusing the State's administrative powers to intervene economic development by forming monopolies in some unnatural monopoly industries. This is somehow regulated by Article 7 of *the Chinese Anti-Monopoly Law 2007*. This research pays particular attention to State-led monopoly: see, e.g., Xu Guangyao, 'Fanlongduanfa shangde Xingzheng Longduan Fenxi' [An Analysis of Administrative Monopoly in *Chinese Anti-Monopoly Law* (author's translation)] (2014) 11 Xingzheng Guanli Gaige [Administration Reform, China] 42; Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2015* [Report on Competition Law and Policy of China 2015] (Law Press, China 2015) 99; Sheng Hong, Zhao Nong and Yang Junfeng, *Administrative Monopoly in China: Cases, Behaviors, and Termination* (World Scientific Publishing Company 2015) 1 (pointing out that "[a]n administrative monopoly is defined as a monopoly granted to a business agent – an enterprise or profit-making administrative body – through the issuance of regulations or statutes by administrative department"); Wang Shang, 'Xingzhengxing Longduan ji Fanlongduan Falv Guizhi Shuping' [A Review of Administrative Monopoly and Anti-Monopoly Law Regulation] (2014) 20 Xuelulun [Theory Research, China] 102; Ou Changmei, 'Fagaiwei Mingnian Zhugong Xingzheng Longduan' [The NDRC of China Focuses on Administrative Monopoly in 2015 (author's translation)] *Dongfang Zaobao* [Dongfang Daily] (Shanghai, 4 December 2014) A18; and the Anti-Monopoly Law of China, Arts 7 (see footnote 155 above) & 33-35.

Article 33: Any administrative organ or organization empowered by a law or an administrative regulation to administer public affairs may not have any of the following conducts in an attempt to abuse its administrative power to block free circulation of commodities between regions:

- (1) imposing discriminative charge items, discriminative charge standards or discriminative prices upon commodities from outside the locality,
- (2) imposing such technical requirements and inspection standards upon commodities from outside the locality as different from those upon local commodities of the same classification, or taking such discriminative technical measures as repeated inspections or repeated certifications to commodities from outside the locality, so as to restrict them from entering the local market,
- (3) exerting administrative licensing, especially on commodities from outside the locality so as to restrict them from entering the local market,
- (4) setting barriers or taking other measures so as to hamper commodities from outside the locality from entering the local market or local commodities from moving outside the local region, or
- (5) other conducts for the purpose of hampering commodities from free circulation between regions.

Article 34: Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power to reject or restrict business operators from outside the locality from participating in local tendering and bidding activities by such means as imposing discriminative qualification requirements or assessment standards or releasing information in an unlawful manner.

Article 35: Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power to reject or restrict business operators from outside the locality from investing or setting up branches in the locality by imposing unequal treatment thereupon compared to that upon local business operators.

<sup>168</sup> See the summary in Appendix 3: Part II.

economic policies, will also be considered. In the case of economics, theoretical analysis is indispensable. Why do privately-owned SMEs expect the State's support? The theory of invisible hand<sup>169</sup> appeared as far back as the 18th Century. Philosopher and economist Adam Smith emphasised the self-regulating nature of the marketplace.<sup>170</sup> However, the self-regulation was destined to fail. In China, because SOEs and administrative agencies are not required to prohibit themselves from engaging in the abuse of their specific or exclusive rights (which are fostered by the State's own industrial policy), privately-owned SMEs suffer many obstacles as a result. Facing such ineffective self-regulation, fair competition has had no chance to be established in China. Hence, drawing relevant theories of market structure into the research to explain the non-equilibrium growth of SOEs, compared to privately-owned SMEs, is useful and helpful.

### **1.6.3 Empirical Research Methods and Semi-Structured Interviews and Surveys in Three Traditional State-Controlled Industries**

In order to analyse “law in the real world”<sup>171</sup> and the influence of Chinese economic policies in the State's economic development approach, empiricism adds a further dimension to this research. Owing to the specific history of the Chinese economy,<sup>172</sup> having a law such as *the Chinese Anti-Monopoly Law 2007* was absent for a long period. The State became accustomed to using administrative directions, and the State's industrial policy, to adjust its economic development approach. Therefore, for this research, it was necessary to observe the changing elements of the State's industrial policy, especially in a number of traditional State-controlled industries. In order to obtain factual data and examine genuine attitudes of

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<sup>169</sup> The first appearance of the term “invisible hand” was in 1759. Adam Smith held that “[F]ire burns, and water refreshes; heavy bodies descend, and lighter substances fly upwards, by the necessity of their own nature; nor was the invisible hand of Jupiter ever apprehended to be employed in those matters”: Adam Smith, *The Theory of Moral Sentiments*, reprinted in David Daiches Raphael and Alexander Lyon Macfie (eds) (OUP 1979) 184.

<sup>170</sup> See Sullivan Arthur and Steven M Sheffrin, *Economics: Principles in Action* (Pearson Prentice Hall 2003) 32.

<sup>171</sup> See Caroline Morris and Cian Murphy, *Getting a PhD in Law* (Hart Publishing 2011) 35.

<sup>172</sup> After practising a “Planned Economy Model” for more than 30 years from 1952, China spent many years transforming its “Planned Economy Model” into the “Market Economy Model”. In 1993, the Central Government asserted that the State should pay more attention to market mechanisms and the competitive order: Lowell Dittmer and Guoli Liu (eds), *China's Deep Reform: Domestic Politics in Transition* (Rowman & Littlefield Publishers 2006) 239.

SOEs and privately-owned SMEs, the author selected the steel industry, the gas station<sup>173</sup> industry, and the fixed-broadband industry, in which to conduct semi-structured interviews and surveys in several cities across China.<sup>174</sup>

Concerning the feature of “administrative mergers”<sup>175</sup> in the Chinese steel industry, which makes privately-owned SMEs become defenceless, the author chose two provinces to sample: Yunnan province (population 46.87 million people in 2013) and Hebei province (population 73.33 million people in 2013)<sup>176</sup>. In Yunnan province, the author selected Kun Steel Holding (the biggest steel SOE in this area) in which to conduct a telephone interview, because it had experienced both the provincial and interprovincial merger regimes with other steel SOEs. Remarkably, whilst Kun Steel Holding is an SOE (and so, one would expect it to give priority to the State’s economic interest and to directly support State intervention), it surprisingly gave negative feedback on the question of “administrative mergers” (a government-oriented merger regime, see footnote 175 below).<sup>177</sup> In Hebei province, private capital played an important role in the local steel industry, and offered much effect; the author finally contacted an appropriate person, a steel policy researcher working in the People’s Government of Hebei Province, and had a short conversation with him. He maintained that the local government had done everything to be consistent with the State’s steel policy.

The second industry looked at was the gas station industry.<sup>178</sup> The author interviewed staff members working in petrol SOEs; and questionnaires were designed for privately

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<sup>173</sup> In this thesis, “gas station” means “petrol station” in British English.

<sup>174</sup> These semi-structured interviews and surveys were conducted in Chinese, and then their answers were translated into English by the author.

<sup>175</sup> In order to enhance the industrial concentration, the document ‘Steel Industry Revitalisation Plan of China’ (2009) proposed a government-oriented merger regime in the steel industry. Chinese mainstream media reported that mergers under this Plan were “*administrative mergers*” (see footnote 163 in Chapter 3); see, e.g., ‘Gangtie Chanye Tiaozheng he Zhenxing Guihua’ [Steel Industry Revitalisation Plan of China] (2009) (n 92); and Hao Rongliang, ‘Gangtie Dachongzhu de Sige Yinyou’ [Four Worries on the Steel Mergers in China (author’s translation)] *Jingji Guancha* [*The Economic Observer*] (Beijing, 8 September 2012) <[www.eeo.com.cn/observer/shelun/2009/09/08/150519.shtml](http://www.eeo.com.cn/observer/shelun/2009/09/08/150519.shtml)> accessed 30 January 2017.

<sup>176</sup> See National Bureau of Statistics of China (NBS), *China Statistical Yearbook 2014* (China Statistics Press 2014) 2-5.

<sup>177</sup> Since the interviewee mentioned that there were no privately-owned steel enterprises to participate in the merger process of Kun Steel Holding, the author only used a small portion of this interview in the thesis to show the harm of “administrative mergers” (see Appendix 4).

<sup>178</sup> See further Chapter 4.2 below.

-owned gas stations in specific areas, within three selected cities, of different sizes, in order to examine survival conditions of domestic privately-owned gas stations. These cities were Beijing, Guangzhou<sup>179</sup> and Cangzhou.<sup>180</sup> As a result, the author obtained not only market share data from interviewees working in petrol SOEs, but also gained a better understanding of attitudes of these SOEs to “oil shortages” and why exorbitantly high-priced acquisitions have occurred in the Chinese refined oil retail market.<sup>181</sup>

During the process of conducting surveys with privately-owned gas stations, the author faced an exceptional level of resistance. Approximately half of the privately-owned gas stations where the author sought to conduct the survey refused to participate. Most of them rejected the request outright. In the case of some cooperative interviewees, some of them refused to answer several questions. Furthermore, when the author felt their answers were quite interesting and asked for further explanations, generally, no more information would be given. However, the results of the surveys are still useful and reveal some interesting information relevant to the research: First, according to the completed questionnaires, privately-owned gas stations occupied lower than 15 percent of all gas stations in the survey areas;<sup>182</sup> Second, for privately-owned gas stations from 2006 to the end of 2012, the number of consumers and their profitability remained at almost the same level, with only a small ebb and flow; Third, more than half of them have suffered from “oil shortages” since 2008,<sup>183</sup> without an idea as to what is causing it; Fourth, most of them consider they have faced many

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<sup>179</sup> Guangzhou, a well-developed city, is the capital of Guangdong Province. It is the largest city in the south-eastern part of China, with a population of some 13 million people, and covers a total area of 7434.40 square kilometres: see, e.g., The People’s Government of Guangzhou City, ‘Renkou Minzu’ [Population and Ethnic Groups] (*The People’s Government of Guangzhou City, China*, 2015) <[www.gz.gov.cn/gzgov/s2771/zjgzlistcon.shtml](http://www.gz.gov.cn/gzgov/s2771/zjgzlistcon.shtml)> accessed 30 January 2017.

<sup>180</sup> Cangzhou is an underdeveloped prefecture-level city, in the north-eastern part of China, Hebei Province. Cangzhou City had a population of more than 7.2 million people in 2012 and covers an area of about 14,000 square kilometres: The People’s Government of Cangzhou City, ‘About Cangzhou’ (*The People’s Government of Cangzhou City, China*, 18 April 2012) <[www.cangzhou.gov.cn/english/aboutcity/index.shtml](http://www.cangzhou.gov.cn/english/aboutcity/index.shtml)> accessed 30 January 2017.

<sup>181</sup> Although petrol SOEs already occupy more than half the market in the survey areas, they are still not satisfied. They continue to execute a high-priced acquisition programme to acquire more privately-owned gas stations, in the name of stopping “oil shortages” in the local markets. This is discussed further in Chapter 4.2.2 below.

<sup>182</sup> All results of the surveys mentioned in this paragraph are explained further in Appendix 5.

<sup>183</sup> “Oil shortages”, which occurred several times in China during the first decade of the 21st century, means that some refined oil products in the Chinese petroleum retail market are in short supply. This is caused by the anti-competitive behaviour of petrol SOEs.

difficulties and challenges from the behaviour of petrol SOEs, but most of them still try to remain in the market; Fifth, although the State released a policy, ‘Petrol and Chemical Industry 12th Five-Year Development Plan’ (2011),<sup>184</sup> to promote the growth of privately-owned gas stations, they do not think this will bring any genuinely positive change for the private sector.<sup>185</sup>

The third industry examined was the current situation concerning “network interoperability” in the Chinese fixed-broadband industry.<sup>186</sup> The author sought to interview staff members working in telecommunications SOEs and in privately-owned fixed-broadband operators. However, the author met with some unexpected difficulties. First, there was no response from any privately-owned fixed-broadband operators operating in the survey areas. Second, the author contacted six members of staff working in telecommunications SOEs in four cities, Beijing, Guangzhou, Cangzhou and Jimo.<sup>187</sup> Although the author had a short conversation with two staff members in Beijing and Guangzhou branches and obtained some useful information, neither of them agreed to sign the ‘Participant Consent Form’. Hence, the interview results that were usable for this thesis came from interviews with four members of staff in telecommunications SOEs in Cangzhou and Jimo branches.<sup>188</sup> To sum up, in these two cities, telecommunications SOEs accounted for more than 90 percent of the market share in the local fixed-broadband retail market, without achieving “network interoperability” in residential broadband, at the end of 2012. For local privately-owned fixed-broadband operators, the only way to enter this market was to purchase network usage rights from local branches of telecommunications SOEs. However, according to the attitudes of interviewees, as regards self-interests, hardly any local branches of SOEs wished to sell *any part* of their

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<sup>184</sup> See ‘Shihua he Huaxue Gongye Shierwu Fazhan Guihua’ [Petrol and Chemical Industry Twelfth Five-Year Development Plan] (2011) <[www.ce.cn/cysec/ny/zcjd/201302/01/t20130201\\_21331819.shtml](http://www.ce.cn/cysec/ny/zcjd/201302/01/t20130201_21331819.shtml)> accessed 30 January 2017.

<sup>185</sup> The outcomes of the survey from privately-owned gas stations in three cities of China would support the researcher’s arguments stated in Chapter 4.2.

<sup>186</sup> See Chapter 4.3 below.

<sup>187</sup> Jimo City is a county-level underdeveloped city in the north-eastern part of China, Shandong province. This city had nearly 1.2 million people by the end of 2012, and has a total area of about 1,780 square kilometres: The People’s Government of Jimo City, ‘Jimo Gaikuang’ [About Jimo (author’s translation)] (*The People’s Government of Jimo City, China*, 28 January 2013) <[www.jimo.gov.cn/zoujinjimo/Columns/1521.asp?typeid=2862&parentid=2759&videos=&jms=277](http://www.jimo.gov.cn/zoujinjimo/Columns/1521.asp?typeid=2862&parentid=2759&videos=&jms=277)> accessed 3 January 2017.

<sup>188</sup> All results of the surveys mentioned in this paragraph receive further explanation in Appendix 6.

fixed-broadband facilities.<sup>189</sup> As a result, without “network interoperability”, encouraging private capital into the fixed-broadband market is simply an empty phrase for State intervention in China.<sup>190</sup>

## 1.7 Challenges and Limitations of this Study

Although legal protection for SMEs is not a new research area in China, little scholarship has been devoted to conflicts between “law” and “policy” from a relationship standpoint between SOEs and privately-owned SMEs in the context of *the Chinese Anti-Monopoly Law 2007*.

With regard to the scope of this research, on the one hand, the author has excluded a major part of *the Chinese Anti-Monopoly Law 2007*: (a) although horizontal monopolies and vertical monopolies are core areas in this Law and hardly any monopoly behaviour can escape from one of these, the author has carried out only basic research on these issues, without examining them in great depth. Conversely, this work focuses on how administrative intervention *damages the growth of* privately-owned SMEs in China. (b) Although abuse of market dominance and concentration of business operators are involved in certain parts of this research, the author does not devote attention to the quantification of identifying these two issues in SOEs, such as defining the relevant market<sup>191</sup> and the dominant position.<sup>192</sup> (c) It is common to examine SMEs in China in the context of the exemption for anti-competitive agreements in *the Chinese Anti-Monopoly Law 2007*, which may expand the development space for them. However, little focus is placed on this point in this thesis, because it falls outside the scope of this research. When investigating a relationship between Chinese SOEs

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<sup>189</sup> For rational individuals and firms in the market, a fairly obvious and straightforward principle is pursuit of their self-interest: Maurice E Stucke, ‘Are People Self-Interested? – The Implications of Behavioral Economics on Competition Policy’ in Josef Drexler and others (eds), *More Common Ground for International Competition Law?* (Edward Elgar Publishing 2011) 4.

<sup>190</sup> The outcomes of the interviews with staff member working in different branches of telecommunications SOEs in two cities of China would support the researcher’s arguments in Chapter 4.3.

<sup>191</sup> In general, see Wang Xiaoye (ed), *Fanlongduanfa zhong de Xiangguan Shichang Jieding [Market Definition in the Antitrust Law]* (Social Sciences Academic Press, China 2014).

<sup>192</sup> Because SOEs frequently occupy a dominant position indeed, in many markets in China (e.g., the gas station industry) by application of the *single entity theory*, we will see how an SOE can dominate a market in a particular industry once we combine its different applications into a single whole using the *single entity theory*: Angela Huyue Zhang, ‘The Single Entity Theory: An Antitrust Time-Bomb for Chinese State-Owned Enterprises?’ (2012) 4 *The Antitrust Bulletin* 805, 810; and Diarmuid Rossa Phelan, ‘The Dynamic Unprohibited Nature of Dominance’ (2013) 6 *European Competition Law Review* 337.

and privately-owned SMEs, a specific area, namely *administrative intervention in the Chinese Anti-Monopoly Law 2007*, becomes much more important than the other elements excluded above. However, (d) this thesis does not involve the whole spectrum of administrative intervention in China<sup>193</sup>: instead it focuses on inappropriate administrative directions granted by the Central Government via the way of launching industrial policies, as well as the abuse of administrative powers when implementing these policies.

On the other hand, although the relationship between SOEs and privately-owned SMEs is more than simply a legal issue,<sup>194</sup> this research selects only *the Chinese Anti-Monopoly Law 2007* as a mechanism for balancing the relationship between State and market. Furthermore, when examining unilateral interventions for SOEs, this research limits its scope to straightforward conduct of government towards SOEs, but excludes cooperation and conflict between governments at different levels across China (see Table 3-1 in Chapter 3 below).<sup>195</sup>

As regards challenges and limitations in research methodologies, the following aspects cannot be avoided: (a) although the author adopts a theoretical analysis approach towards the economy, such as the “invisible hand”, the “partnership dance” principle (see Figure 2-1 in Chapter 2 below), Marshall’s trees and forest theory,<sup>196</sup> and so on, this thesis carries out limited research on these areas: instead they are treated as analysis tools to analyse the relationship between the government and the market in China. (b) Although a considerable amount of data is involved in this study to show changing trends for SOEs and privately-owned SMEs in China, the author nevertheless feels that the conclusions reached in this thesis would have had stronger validity if more data had been obtained. However, data collection (as outlined earlier above) was never an easy task. (c) Because the author chose only four Chinese cities in which to conduct semi-structured interviews and surveys in three

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<sup>193</sup> See Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed) (n 4) 108; and Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2014* [Report on Competition Law and Policy of China 2014] (Law Press, China 2014) 246.

<sup>194</sup> See Goordon YM Chan, ‘Administrative Monopoly and the Anti-Monopoly Law: An Examination of the Debate in China’ (2009) 18 *Journal of Contemporary China* 263; and Harris and others (n 35) 180.

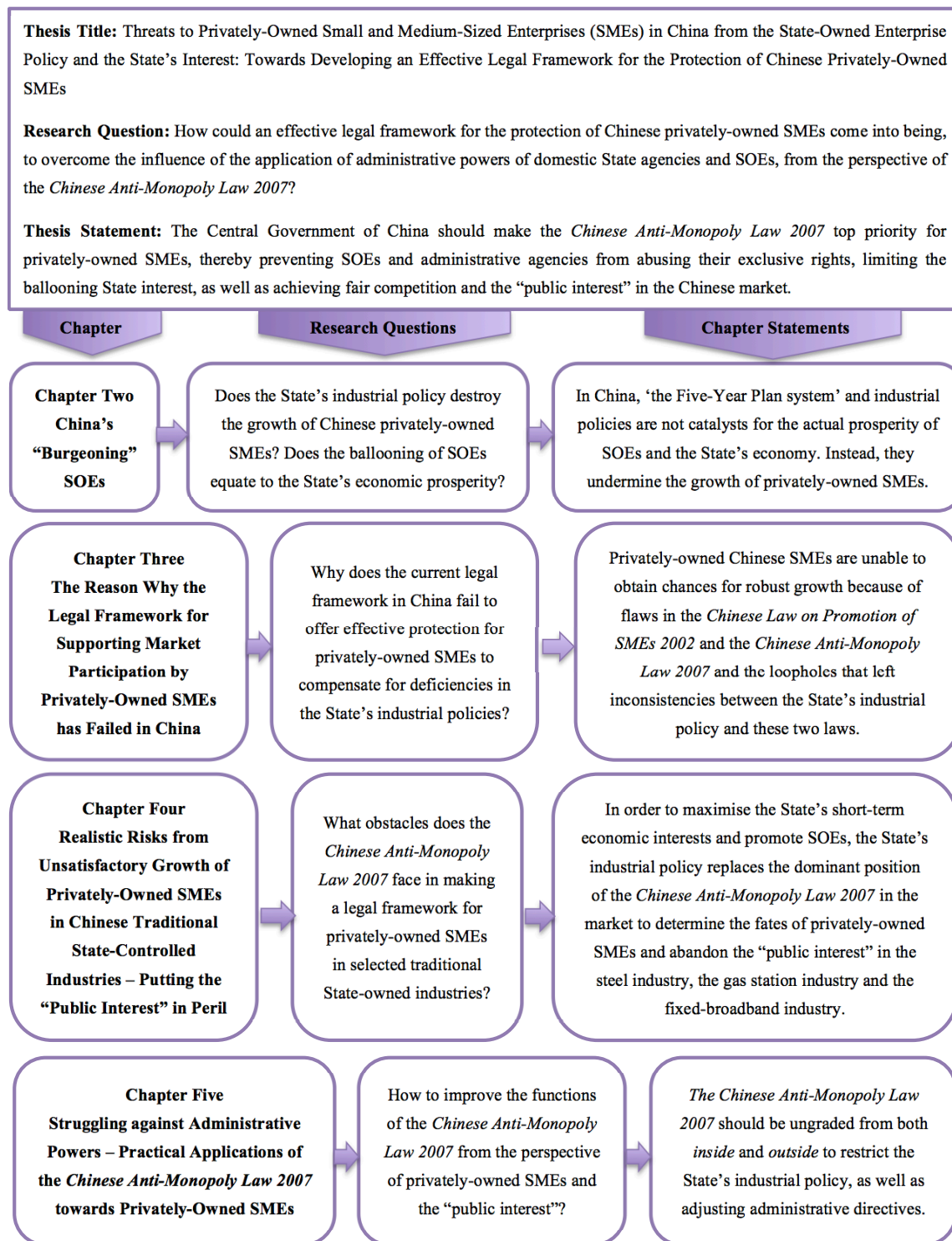
<sup>195</sup> See Coase and Wang (n 77) 69-72.

<sup>196</sup> See Chapter 2.3.1 below.

traditional State-controlled industries, these are *simply samples* and may not carry enough weight to represent the whole administrative intervention throughout the country.

## 1.8 Overview Figure

\* Figure 1-4: Overview Figure of the Thesis





## Chapter Two: China’s “Burgeoning” SOEs<sup>1</sup>

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For at least two centuries businesses and governments have performed a complicated partnership dance, at times switching parts of their roles, watching each other’s spheres of influence expand and contract.

– James Bradford DeLong<sup>2</sup>

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<sup>1</sup> Some of the ideas presented in the present Chapter was presented at the Socio-Legal Studies Association Annual Conference (SLSA 2016), entitled ‘When the Chinese Economic Law Facing Administrative Powers: Regarding Survival Conditions of Chinese Privately-Owned Small and Medium-Sized Enterprises’, held in Lancaster, UK on 5-7 April 2016; and some were also presented at the UK Annual Conference of the International Association of Legal and Social Philosophy (IVR) 2016, entitled ‘When Chinese Economic Law Faces Administrative Powers: How Fairness Between Economic Actors Can Be Promoted Through Law in China’, held in Leeds, UK on 29-30 October 2016; and some will be presented at the XXVIII World Congress of the International Association for the Philosophy of Law and Social Philosophy (IVR 2017), entitled ‘Supreme Administrative Power: Why Chinese Economic Law Fails with Regard to Privately-Owned SMEs’, held in Istanbul, Turkey on 16-21 July 2017.

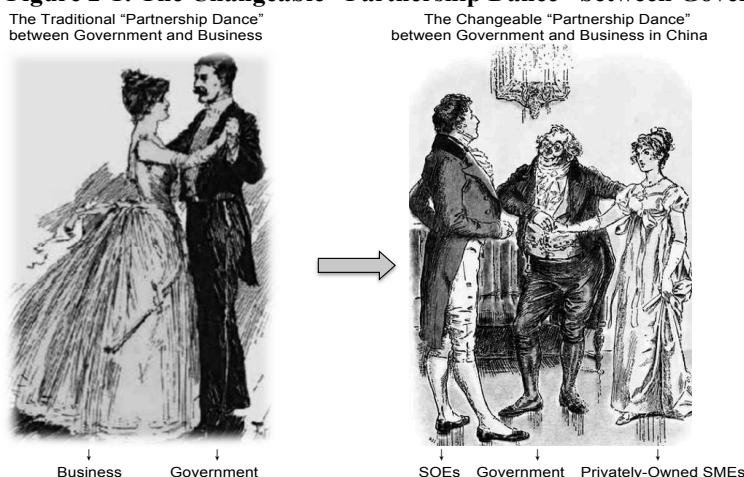
<sup>2</sup> See James Bradford DeLong, ‘The Partnership Dance Between Business and Government’ (*University of California, Berkeley*, 1 February 2002) <[http://delong.typepad.com/delong\\_long\\_form/2002/02/brad-delong-the-partnership-dance-between-governments-and-business.html](http://delong.typepad.com/delong_long_form/2002/02/brad-delong-the-partnership-dance-between-governments-and-business.html)> accessed 30 January 2017.

The approach to economic growth in China has pursued the “partnership dance” principle between enterprises and the government for many years. After ‘the Reform and Opening Up’ policy (1978) was enacted, many Chinese enterprises aspired to operate independently, following the market mechanism. However, because of the specific situation in China, SOEs, which are closely intertwined with the State’s economic interest, always take a dominant position in the relationship between enterprises and the government within the country.<sup>3</sup> Hence, with regard to the “partnership dance” principle in China, keeping an appropriate balance between the government, SOEs and privately-owned SMEs should be considered in this light:<sup>4</sup> because there is a consistency between SOEs and the government on economic matters, the changeable “partnership dance” is likely to be harmful to the interests of privately-owned SMEs.<sup>5</sup>

This chapter examines how the State’s industrial policies prefer to develop SOEs as a matter of priority, and to consider the fate of privately-owned SMEs at a later stage. Inevitably in China, SOEs are frequently an obstacle to the development of privately-owned SMEs.<sup>6</sup> Since the 1950s, SOEs have been regarded as a tonic to rescue the State from

<sup>3</sup> See Curtis J Milhaupt and Wentong Zheng, ‘Beyond Ownership: State Capitalism and the Chinese Firm’ (2015) 103 *Georgetown Law Journal* 665, 668; and Bing Song, ‘Competition Policy in a Transitional Economy: The Case of China’ (1995) 31 *Stanford Journal of International Law* 387.

<sup>4</sup> **Figure 2-1: The Changeable “Partnership Dance” between Government and Business in China**



The author downloaded two pictures from websites for academic purpose only to devise the above figure.

<sup>5</sup> See Ju Jinwen, *Feiguoyou Jingji Jinru Longduan Chanye Yanjiu* [*Studies in Non-State-Owned Units Enter into the Monopoly Industries*] (Economic & Management Publishing House, China 2009) 13-14.

<sup>6</sup> See Gao Xu, ‘State-Owned Enterprises in China: How Big are They’ (*The World Bank*, 19 January 2010 <<http://blogs.worldbank.org/eastasiapacific/state-owned-enterprises-in-china-how-big-are-they>> accessed 30 January 2017; Yukon Huang, ‘Rethinking China’s State-Owned Enterprises’ (*Financial Times*, 21 November 2014) <<http://carnegieendowment.org/publications/?fa=57298>> accessed 30 January 2017; and Nicholas Lardy, ‘China’s Rise is a Credit to Private Enterprise not State Control’ *Financial Times (Asia)* (Beijing, 16 September

poverty. As a result, ‘the State’s Five-Year Plan System’ (see Table 2-2 below) and SOE policy are more accustomed to promoting SOEs’ growth. It cannot be denied that SOEs have had a great effect on the economic growth over the past decades. However, nowadays, “Chinese SOEs are best described as dying dinosaurs that continuously absorb resources from the economy but produce little economic value”<sup>7</sup>. It seems therefore that the incomplete development of SOEs cannot satisfy all the demands of long-term economic growth. By contrast, China’s prosperity expectations may depend on the flourishing of privately-owned SMEs.

## 2.1 Drivers for SOEs’ Development in China

In the past six decades (starting in the 1950s), SOEs have had an overwhelming advantage in China.<sup>8</sup> From the State’s point of view, it has done more or less all that it has been able to do in order to support SOEs’ development, such as using ‘the Five-Year Plan System’<sup>9</sup> and publishing a series of SOE promotion policies.<sup>10</sup> Consequently, SOEs, a key player in the Chinese economy,<sup>11</sup> have grown “stronger and stronger” day by day.<sup>12</sup>

Basically, China’s economy model can be divided into two parts between 1953 until the present. No matter how the economy model has changed, SOEs have been following the

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<sup>7</sup> See Jichun Shi, ‘How Chinese Enterprises to Live in Freedom and Competition: Further Integration of the Corporate Law and Competition Law of China with Global Standards’ (New York University Global Fellows Forum, New York, 25 October 2006) <[www.law.nyu.edu/sites/default/files/upload\\_documents/gffjshipaper.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/gffjshipaper.pdf)> accessed 30 January 2017.

<sup>8</sup> Because the Central Government of China chose the centralisation approach to developing its economy, the private sector only contributed up to five percent of the industrial output by the end of 1952 (the eve of the First Five-Year Plan, down from more than fifty percent in previous years). Conversely, between 1952 and 1978, industries in China were almost totally controlled by the State: see, e.g., Ronald H Coase and Ning Wang, *How China Became Capitalist* (Palgrave Macmillan 2013) 5; Angela Huyue Zhang, ‘The Single Entity Theory: An Antitrust Time-Bomb for Chinese State-Owned Enterprises?’ (2012) 4 *The Antitrust Bulletin* 805, 810; Roderick MacFarquhar and John K Fairbank (eds), *The Cambridge History of China: Volume 14, The People’s Republic, Part 1: The Emergence of Revolutionary China, 1949-1965* (CUP 1987) 152; Bruce M Owen, Su Sun and Wentong Zheng, ‘Antitrust in China: The Problem of Incentive Compatibility’ (2005) 1 *Journal of Competition Law and Economics* 123, 126-27; and Thomas K Cheng, ‘Competition and the State in China’ in Thomas K Cheng, Ioannis Lianos and D Daniel Sokol (eds), *Competition and the State* (Stanford University Press 2014) 172.

<sup>9</sup> See Chapter 2.1.1 below.

<sup>10</sup> See Chapter 2.1.2 below.

<sup>11</sup> See Bruce M Owen, Su Sun and Wentong Zheng, ‘China’s Competition Policy Reforms: The Anti-Monopoly Law and Beyond’ (2008-2009) 75 *Antitrust Law Journal* 231, 232.

<sup>12</sup> See John Knight and Sai Ding, *China’s Remarkable Economic Growth* (OUP 2012) 269.

models all the way in the last six decades. The first economy model can be called *the State-controlled economy (1953-1978)*, and the second model can be described as *the market economy of semi-freedom (1979-present time)*. In the first stage, between 1953 and 1978, ‘the Five-Year Plan System’ can be considered as the only guide to SOEs’ development;<sup>13</sup> while in the second stage, from 1979 to the present, a distinct SOE policy emerged as an issue to be reckoned with. This section focuses on both ‘the Five-Year Plan System’ and SOE policy, in order to identify the actual development approach of Chinese SOEs and real functions of these two intervention methods.

### 2.1.1 The Ally of China’s SOEs – ‘The Five-Year Plan System’

The ‘Chinese Five-Year Plan System’ (see Table 2-2 below) which was announced in December 1952 and started in 1953 was an emblem of the State’s intention.<sup>14</sup> It was able to provide a good reflection of the country’s allocation of resources among different industries. In brief, the primary objective of this system was to promote the State’s short-term and long-term economic development. ‘The Five-Year Plan System’ has devoted itself to supporting industrial and economic growth, and China’s economic development has been following this system over a long period.

\* Table 2-2: An Outline of ‘The Five-Year Plan System’ in China 1953-2020

The Five-Year Plan System	Period	Distinguishing Features
The 1st Five-Year Plan	1953-1957	<ul style="list-style-type: none"> <li>Industrial growth and industrialisation<sup>15</sup></li> <li>“Established the basic framework of the Chinese Central Planning System” by the end of 1956<sup>16</sup></li> </ul>

<sup>13</sup> See Joseph E Stiglitz, ‘Creating the Institutional Foundations for a Market Economy’ in David Kennedy and Joseph E Stiglitz (eds), *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century* (OUP 2013) 78.

<sup>14</sup> The ‘Chinese Five-Year Plan System’ was committed to (a) making the peasants became mechanised and then transforming them into agricultural workers, (b) moving ahead simultaneously with social transformation and accelerated industrialisation, (c) building a harmonious socialist society, (d) improving the living standards of people, and so on: Robett M Rosse, ‘The Working of Communist China’s Five Year Plan’ (1954) 27 *Pacific Affairs* 16.

<sup>15</sup> See Tiejun Cheng and Mark Selden, ‘The Origins and Social Consequences of China’s *Hukou* System’ (1994) 139 *The China Quarterly* 644, 652.

<sup>16</sup> See Yingyi Qian, ‘The Process of China’s Market Transition (1978-98): The Evolutionary, Historical, and Comparative Perspectives’ (The Journal of Institutional and Theoretical Economics Symposium on ‘Big-Bang Transformation of Economic Systems as a Challenge to New Institutional Economics’, Wallerfangen/Saar, Germany, 9-11 June 1999); and Lowell Dittmer and Guoli Liu (eds), *China’s Deep Reform: Domestic Politics in Transition* (Rowman & Littlefield Publishers 2006) 243.

		<ul style="list-style-type: none"> <li>Proposed to balance the relationship between large-scale enterprises and SMEs in the Second Five-Year Plan<sup>17</sup></li> </ul>
<b>The 2nd Five-Year Plan</b> <sup>18</sup>	1958-1962	<ul style="list-style-type: none"> <li>The Great Leap Forward (1958-1960): the highest industrial output growth rate was 54.8 percent</li> <li>The Great Retrogression (1961-1962): the lowest industrial output growth rate was -38.2 percent</li> </ul>
<b>The 3rd Five-Year Plan</b> <sup>19</sup>	1966-1970	<ul style="list-style-type: none"> <li>Improving the distribution of industry</li> <li>Preparing for natural disasters and war</li> </ul>
<b>The 4th Five-Year Plan</b> <sup>20</sup>	1971-1975	<ul style="list-style-type: none"> <li>Chinese economy seriously out of control</li> <li>Adjusting strategy for Chinese economic development</li> </ul>
<b>The 5th Five-Year Plan</b> <sup>21</sup>	1976-1980	<ul style="list-style-type: none"> <li>A major turning point in 1978: from <i>Class Struggle</i> to <i>Economic Development</i> (the main objective for the Communist Party of China (CPC)<sup>22</sup>)</li> </ul>
<b>The 6th Five-Year Plan</b> <sup>23</sup>	1981-1985	<ul style="list-style-type: none"> <li>A new era of ‘the Reform and Opening Up’<sup>24</sup></li> </ul>
<b>The 7th Five-Year Plan</b>	1986-1990	<ul style="list-style-type: none"> <li>“It was the first time in China’s history that an all-round plan for social and economic development was created at the start of a new five-year plan.”<sup>25</sup></li> </ul>
<b>The 8th Five-Year Plan</b> <sup>26</sup>	1991-1995	<ul style="list-style-type: none"> <li>Marking the start of a new phase in China’s development: GDP annual growth rate was 11 percent.<sup>27</sup></li> </ul>

<sup>17</sup> See Zhou Enlai, ‘Guanyu Fazhan Guomin Jingji de Dierge Wunian Jihua de Jianyi de Baogao’ [Report on Recommendations for the Second Five-Year Plan for National Economic Development (author’s translation)] (The Eighth National Congress of the Communist Party of China, Beijing, 16 September 1956) <<http://cpc.people.com.cn/GB/64184/64186/66663/4493134.html>> accessed 30 January 2017.

<sup>18</sup> See Li Songtao, ‘Erwu Jihua (1958-1962)’ [The Second Five-Year Plan (1958-1962) (author’s translation)] *China Youth Daily* (Beijing, 20 March 2006) 1; and Diarmuid Rossa Phelan, ‘Major Events in European and Chinese International Development 1947-2013’ (2015) *Zeitschrift für Chinesisches Recht* 359, 362.

<sup>19</sup> See Michael Y M Kau and John K Leung (eds), *The Writings of Mao Zedong, 1949-1976* (M. E. Sharpe 1986) 425; and ‘Welcoming 1966 – The First Year of China’s Third Five-Year Plan – New Year’s Day Message’ (1966) *Peking Review* 5.

<sup>20</sup> See Li Zhu, ‘Siwu Jihua (1971-1975)’ [The Fourth Five-Year Plan (1971-1975) (author’s translation)] *China Youth Daily* (Beijing, 20 March 2006) 2.

<sup>21</sup> See Ye Tieqiao, ‘Wuwu Jijua (1976-1980)’ [The Fifth Five-Year Plan (1976-1980) (author’s translation)] *China Youth Daily* (Beijing, 20 March 2006) 2.

<sup>22</sup> The CPC, established in 1921, has been the only ruling party in China since 1949, when the People’s Republic of China (PRC) was founded. “[F]rom the very start in 1949 the CPC was saddled with a gargantuan task: Its legitimacy as a regime would rest, like that of its predecessors, on making good its claim to rule all China”. The CPC Central Committee, which is elected by the Party National Congresses every five years, has been the highest authority within the CPC and has held the authority of paramount leader in China: MacFarquhar and Fairbank (eds), *The Cambridge History of China: Volume 14, The People’s Republic, Part 1: The Emergence of Revolutionary China, 1949-1965* (n 8) 10 & 22.

<sup>23</sup> See Ye Tieqiao, ‘Liuwu Jihua (1981-1985)’ [The Sixth Five-Year Plan (1981-1985) (author’s translation)] *China Youth Daily* (Beijing, 20 March 2006) 3.

<sup>24</sup> Although the Chinese First Five-Year Plan first proposed industrialisation in 1952, the State’s economy was almost entirely agriculture-oriented before the 1980s. The agricultural population in 1980 was approximately 819 million, accounting for more than 80 percent of the total population within the country. Because of ‘the Reform and Opening Up’ policy (1978), China finally became an authentic industrial-oriented State by the end of the Sixth Five-Year Plan (1981-1985): see, e.g., Michael F Martin, ‘Defining China’s Rural Population’ (1992) 130 *The China Quarterly* 392, 394; Thomas G Moore, *China in the World Market: Chinese Industry and International Sources of Reform in the Post-Mao Era* (CUP 2002) 255-56; and Justin Lin, ‘China: Farming Institutions and Rural Development’ in Mieke Meurs (ed), *Many Shades of Red: State Policy and Collective Agriculture* (Rowman & Littlefield Publishers 1999) 154.

<sup>25</sup> See Letian Pan (ed), ‘The Seventh Five Year Plan (1986-1990)’ (*Chinese Government’s Official Web Portal*, 5 April 2006) <[www.gov.cn/english/2006-04/05/content\\_245695.htm](http://www.gov.cn/english/2006-04/05/content_245695.htm)> accessed 30 January 2017.

<sup>26</sup> See the Central Government of China, ‘The Eighth Five-Year Plan (1991-1995)’ (*Chinese Government’s Official Web Portal*) <[www.china.org.cn/english/MATERIAL/157625.htm](http://www.china.org.cn/english/MATERIAL/157625.htm)> accessed 30 January 2017.

<sup>27</sup> See Tang Yonglin, ‘Bawu Jihua (1991-1995)’ [The Eighth Five-Year Plan (1991-1995) (author’s translation)] *China Youth Daily* (Beijing, 20 March 2006) 3.

<b>The 9th Five-Year Plan</b> <sup>28</sup>	1996-2000	<ul style="list-style-type: none"> <li>• Strengthening and improving macro-control</li> <li>• China's economy attempting to achieve a soft landing</li> </ul>
<b>The 10th Five-Year Plan</b> <sup>29</sup>	2001-2005	<ul style="list-style-type: none"> <li>• Allocation of marketing resources becoming acceptable</li> <li>• Taking the market-oriented approach</li> </ul>
<b>The 11th Five-Year Plan</b> <sup>30</sup>	2006-2010	<ul style="list-style-type: none"> <li>• The Scientific Concept of Development: namely "putting people first and aiming at comprehensive, coordinated and sustainable development"<sup>31</sup></li> <li>• Building a Harmonious Socialist Society</li> </ul>
<b>The 12th Five-Year Plan</b> <sup>32</sup>	2011-2015	<ul style="list-style-type: none"> <li>• Decreasing the GDP growth rate</li> <li>• Increasing the per capita income</li> </ul>
<b>The 13th Five-Year Plan</b> <sup>33</sup>	2016-2020	<ul style="list-style-type: none"> <li>• "Maintaining medium-high growth"</li> <li>• "Highlighting the ideas of innovation, coordination, green development, opening up and sharing to fulfill its goals"<sup>34</sup></li> </ul>

Source: 'The Origins and Social Consequences of China's *Hukou* System' and 'The Process of China's Market Transition (1978-98): The Evolutionary, Historical, and Comparative Perspectives' for the 1st Five-Year Plan, 'The Second Five-Year Plan' for the 2nd Five-Year Plan, 'Welcoming 1966 – The First Year of China's Third Five-Year Plan – New Year's Day Message' for the 3rd Five-Year Plan, 'The Fourth Five-Year Plan' for the 4th Five-Year Plan, 'The Fifth Five-Year Plan' and *The Cambridge History of China: Volume 14, The People's Republic, Part 1: The Emergence of Revolutionary China, 1949-1965* for the 5th Five-Year Plan, 'The Sixth Five-Year Plan' and 'Characteristics and Experiences of the Incremental Reform in China on Transition Economies' for the 6th Five-Year Plan, 'The Seventh Five Year Plan (1986-1990)' for the 7th Five-Year Plan, 'The Eighth Five-Year Plan (1991-1995)' for the 8th Five-Year Plan, 'The Ninth Five-Year Plan' for the 9th Five-Year Plan, 'The Tenth Five-Year Plan' for the 10th Five-Year Plan, 'The Eleventh Five-Year Plan: Targets, Paths and Policy Orientation' and 'Scientific Concept of Development & Harmonious Society' for the 11th Five-Year Plan, 'Key Targets of China's Twelfth Five-Year Plan' and 'What China's Five-Year Plan Means for Business' for the 12th Five-Year Plan, 'China's 13th Five-Year Plan to Unleash More Opportunities for Global Development' for the 13th Five-Year Plan; table devised by the author.

#### 2.1.1.1 Chinese SOEs in the State-Controlled Economy (1953-1976)

From the end of 1952 until 1978, the whole country was a politically-oriented State.

Almost every aspect of life, and especially economic development, followed the intentions of

<sup>28</sup> See Tang Yonglin, 'Jiuwu Jihua (1996-2000)' [The Ninth Five-Year Plan (1996-2000) (author's translation)] *China Youth Daily* (Beijing, 20 March 2006) 4.

<sup>29</sup> See Li Songtao, 'Shiwu Jihua (2001-2005)' [The Tenth Five-Year Plan (2001-2005) (author's translation)] *China Youth Daily* (Beijing, 20 March 2006) 4.

<sup>30</sup> See Ma Kai, 'The Eleventh Five-Year Plan: Targets, Paths and Policy Orientation' (Press Conference of National Development and Reform Commission, Beijing, 23 March 2006) <[http://en.ndrc.gov.cn/newsrelease/200603/t20060323\\_63813.html](http://en.ndrc.gov.cn/newsrelease/200603/t20060323_63813.html)> accessed 30 January 2017.

<sup>31</sup> See the Central Government of China, 'Scientific Concept of Development & Harmonious Society' (*Chinese Government's Official Web Portal*, 8 October 2007) <[www.china.org.cn/english/congress/227029.htm](http://www.china.org.cn/english/congress/227029.htm)> accessed 30 January 2017.

<sup>32</sup> "China's recently announced 12th Five-Year Plan aims to transform the world's second-largest economy from an investment-driven dynamo into a global powerhouse with a steadier and more stable trajectory": see e.g., Xinhua News, 'Key Targets of China's Twelfth Five-Year Plan' *Xinhua News* (Beijing, 5 March 2011) <[http://news.xinhuanet.com/english2010/china/2011-03/05/c\\_13762230.htm](http://news.xinhuanet.com/english2010/china/2011-03/05/c_13762230.htm)> accessed 30 January 2017; and Guangyu Li and Jonathan Woetzel, 'What China's Five-Year Plan Means for Business' (*McKinsey Quarterly*, July 2011) <[www.mckinsey.com/global-themes/china/what-chinas-five-year-plan-means-for-business](http://www.mckinsey.com/global-themes/china/what-chinas-five-year-plan-means-for-business)> accessed 30 January 2017.

<sup>33</sup> See 'Zhonggong Zhongyang Guanyu Zhiding Guomin Jingji he Shehui Fazhan di Shisange Wunian Guihua de Jianyi' [The Proposal of the CPC Central Committee for the Formulation of the Thirteenth Five-Year Plan for National Economic and Social Development] *China Daily* (Beijing, 4 November 2015) 1-4.

<sup>34</sup> See Xinhua News, 'China's 13th Five-Year Plan to Unleash More Opportunities for Global Development' (*Xinhua, China*, 9 November 2015) <[www.chinadaily.com.cn/china/2015cpeplenarysession/2015-11/09/content\\_22406135.htm](http://www.chinadaily.com.cn/china/2015cpeplenarysession/2015-11/09/content_22406135.htm)> accessed 30 January 2017.

the Central Government. Faced with an impoverished situation in the middle of the last century, the Central Government chose a unique economic development path, ‘the Five-Year Plan System’, which was neither similar to the Western capitalism model, nor close to the path of Eastern Europe or the former Soviet Union.

From 1953 to 1978, ‘the Five-Year Plan System’ contributed to nationalisation<sup>35</sup> and the establishment of SOEs. By the end of the First Five-Year Plan (1953-1957), the Central Government had managed 9,300 enterprises, which accounted for nearly 54 percent of the total number of Chinese enterprises.<sup>36</sup> The industrial output of China had risen by 130 percent, and therefore the First Five-Year Plan (1953-1957) is considered as an unusual but hugely successful programme in the process towards the State’s economic growth.<sup>37</sup> Until 1978, SOEs contributed approximately 78 percent of the annual gross output value of industry in China.<sup>38</sup>

In the same period of SOEs’ nationalisation and establishment, the State also focused on SOEs’ development, the growth of industries, and even the structure among different industries. In 1956, Chairman Mao Zedong asserted that as regards the economic situation, “we can develop heavy industry with greater and better results...”<sup>39</sup> Although he also stated that “the relationship between heavy industry on the one hand and light industry and agriculture on the other must be properly handled”<sup>40</sup>, this national guideline was not fully implemented. During the First Five-Year Plan era (1953-1957), approximately 85 percent of industrial investment went into heavy industry.<sup>41</sup>

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<sup>35</sup> Nationalisation in fact started before the first Five-Year Plan (1953-1957): China was committed to nationalising banks and enterprises from 1949 to 1952. Since the process went smoothly, by the end of 1952, the number of the Central Government controlled enterprises had reached 2,800: Qian (n 16) 22.

<sup>36</sup> See the Central Government of China, ‘The First Five-Year Plan (1953-1957)’ (*Chinese Government’s Official Web Portal*) <[www.china.org.cn/english/MATERIAL/157602.htm](http://www.china.org.cn/english/MATERIAL/157602.htm)> accessed 30 January 2017; and Dong Wei, ‘Yiwu Jihua (1953-1957)’ [The First Five-Year Plan (1953-1957) (author’s translation)] *China Youth Daily* (Beijing, 20 March 2006) 1.

<sup>37</sup> See MacFarquhar and Fairbank (eds), *The Cambridge History of China: Volume 14, The People’s Republic, Part 1: The Emergence of Revolutionary China, 1949-1965* (n 8) 155 & 174.

<sup>38</sup> See Ligang Song and Wing Thye Woo, *China’s Dilemma: Economic Growth, the Environment, and Climate Change* (Brookings Institution Press 2008) 162.

<sup>39</sup> See Mao Zedong, ‘On the Ten Major Relationships’ in *The Selected Works of Mao Tse-tung* (Foreign Languages Press, China 1977) 285-86.

<sup>40</sup> *Id.*

<sup>41</sup> See Ling Liu, *China’s Industrial Policy and the Global Business Revolution: The Case of the Domestic*

Moreover, in the First Five-Year and the Second Five-Year Plans (1953-1962),<sup>42</sup> apart from State investment, about 60 million people contributed to producing iron and steel and built up an illusion of prosperity.<sup>43</sup> However, in the case of unsuccessful transformations (see footnote 42), after the Great Leap Forward the Great Retrogression occurred in the following years. Chinese steel production fell by two-thirds between 1960 and 1962.<sup>44</sup> The influence of these transformations on Chinese life continues up to the present time: because countless small-scale and ineffective steel mills were established during the Second Five-Year Plan era (1958-1962), the steel industry concentration has been extremely low. Since 2005, an ongoing programme has started to fix this scenario;<sup>45</sup> however, up to the present time, efforts to do so have led the sector from one sad episode to another, and the process is not yet over.<sup>46</sup>

In the Third and Fourth Five-Year Plans (1966-1975), the main objective of the CPC and the State turned to *class struggle*.<sup>47</sup> The State's economy was facing unprecedented

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*Appliance Industry* (Routledge 2005) 25.

<sup>42</sup> At the beginning of the Second Five-Year Plan (1958-1962), China changed the development programme: (a) the State sought “[t]o reduce the emphasis on rapid industrial development in less developed regions”; (b) the State again took the private sector seriously: MacFarquhar and Fairbank (eds), *The Cambridge History of China: Volume 14, The People's Republic, Part 1: The Emergence of Revolutionary China, 1949-1965* (n 8) 183.

<sup>43</sup> “The industrial component of the Great Leap Forward strategy was distinctly different. Great attention has been given to the program of ‘backyard’ steel furnaces and other smaller-scale industrial plants that embodied the spirit of ‘walking on two legs’.” By the end of 1957, China possessed owned 3 large-scale steel enterprises, 5 medium-scale steel enterprises and 18 small-scale steel enterprises (see Table 4-1 in Chapter 4). The output of steel production had reached 5.35 million tonnes. Concurrently, the Central Government began *the backyard iron-smelting movements*, which not only “increased” production, but also wasted huge quantities of materials, labour and money. One year later, 240 thousand backyard steel furnaces had been built. The output of steel production had reached more than 8 million tonnes by 1959. Because some of the country leaders were blinded by the “success” of the First Five-Year Plan (1953-1957), they created an impossible dream in the steel industry at that time: to overtake Britain within fifteen years: see, e.g., Kwok Sing Li, *A Glossary of Political Terms of the People's Republic of China* (Chinese University Press 1995) 40; MacFarquhar and Fairbank (eds), *The Cambridge History of China: Volume 14, The People's Republic, Part 1: The Emergence of Revolutionary China, 1949-1965* (n 8) 156 & 364; Qibin Ma, *40 Years of Chinese Communist Party Rule* (Chinese Communist Party History Publishing House 1989) 136; Wentian Ye, ‘Gangtieye Liushinian: Jianying de Zhuigan’ [Chinese Steel Industry 60 Years: Hard to Catch Up (author’s translation)] *Chinese Business* (Beijing, 8 August 2009) A08; Cai Jing, ‘Gangtieye Liushinian’ [Chinese Steel Industry 60 Years (author’s translation)] (*The Central Government of China*, 29 July 2009) <[www.china.com.cn/news/60years/2009-07/29/content\\_18229765.htm](http://www.china.com.cn/news/60years/2009-07/29/content_18229765.htm)> accessed 30 January 2017; and Chris Coggins, *The Tiger and the Pangolin: Nature, Culture, and Conservation in China* (University of Hawaii Press 2003) 49.

<sup>44</sup> See MacFarquhar and Fairbank (eds), *The Cambridge History of China: Volume 14, The People's Republic, Part 1: The Emergence of Revolutionary China, 1949-1965* (n 8) 387.

<sup>45</sup> See Dou Bin and Tang Guosheng (eds), *Gangtie Hangye Touzi Guodu Channeng Guosheng Yuanyin ji Duice* [Excessive Investment and Overcapacity in the Steel Industry: Causes and Countermeasures (author’s translation)] (Economic Science Press, China 2009) 131.

<sup>46</sup> See Chapter 4.1.1 below.

<sup>47</sup> See Jonathan D Spence, *The Search for Modern China* (2nd edn, Norton 2001) 607; and Roderick MacFarquhar and John K Fairbank (eds), *The Cambridge History of China: Volume 15, The People's Republic, Part 2: Revolutions within the Chinese Revolution, 1966-1982* (CUP 1991) 475.



difficulties and challenges. An examination of the steel output in 1967, which was always considered as the most difficult year in the domestic economic disruption, reveals that production in the steel industry fell by 18 percentage points compared to previous years.<sup>48</sup> After this disastrous period, leader Deng Xiaoping declared that “the lessons from this disaster are too profound”<sup>49</sup>. “There is no other solution for us than economic reform.”<sup>50</sup>

#### 2.1.1.2 SOEs – A Constant Attraction to China’s Five-Year Plan System (from 1976 onwards)

After the Third Plenary Session of the Eleventh CPC Central Committee,<sup>51</sup> ‘the Reform and Opening Up’ policy came into effect at the end of 1978. At that time, China began to realise that the State’s economic development was partially dependent on the non-State sector, such as privately-owned and foreign-owned enterprises. However, the State-owned sector remained the dominant actor in the economy.<sup>52</sup> Therefore, in order to enhance the State’s economic vitality, SOE reform, in the form of extending SOEs’ autonomy, was pursued at the end of the 1970s.<sup>53</sup> Concurrently, the State began in order to use SOE policy to adjust SOE

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<sup>48</sup> See MacFarquhar and Fairbank (eds), *The Cambridge History of China: Volume 15, The People’s Republic, Part 2: Revolutions within the Chinese Revolution, 1966-1982* (n 47) 480.

<sup>49</sup> See Qian (n 16) 4; and Wu Jinglian, ‘China’s Economy: 60 Years of Progress’ (2009) *Caijing Magazine*, China <<http://english.caijing.com.cn/upload/coverstory247.pdf>> accessed 30 January 2017.

<sup>50</sup> See Xiaoping Deng, *Fundamental Issues in Present-Day China* (Pergamon Press 1987) 187; and Barry Naughton, ‘Deng Xiaoping: The Economist’ (1993) 135 *The China Quarterly* 491, 512.

<sup>51</sup> The Third Plenary Session of the Eleventh CPC Central Committee (1978), which stopped the insane situation in China and brought society back to order, decided to move the State’s attention from *class struggle-oriented* to *economic construction-oriented*: People’s Daily Online, ‘30th Anniversary of China’s Reform and Opening-Up: Third Plenary Session of 11th Central Committee of CPC Held in 1978’ *People’s Daily Online* (Beijing, 9 October 2008) <<http://english.people.com.cn/90002/95589/6512371.html>> accessed 30 January 2017.

<sup>52</sup> A Chinese industrial policy, ‘Preliminary Views on Economic Reform’ (1980), maintained that in the present stage of the socialist economy, China was “[o]n the basis of the public ownership of the means of production, and...develops diversified economic forms and ways of operation...” The State should give more decision-making autonomy to certain SOEs: see, e.g., Muqiao Xue, ‘Postscript to the Japanese Translation of the Revised Edition of China Socialist Economy’ (1986) 10 *Jingji Yanjiu* 31, reproduced by Joint Publications Research Service (JPRS), *China Report: Economic Affairs* (JPRS 1987) 6; ‘Guanyu Jingji Tizhi Gaige de Chubu Yijian’ [Preliminary Views on Economic Reform] (1980) in Peng Sen and Zheng Dingquan, *Zhongguo Gaige 20 nian Guihua Zongji [Complete Works of 20 Years of China’s Reform* (author’s translation)] (Reform Press, China 1999) 16-24; and Wu (n 49).

<sup>53</sup> Chinese SOEs had extremely limited autonomy before 1978. In order to change this situation, six SOEs in Sichuan province were selected as pilot enterprises at the end of 1978. One year later, an additional 94 SOEs in Sichuan province were chosen to participate in the reform of extending the autonomy. By the end of 1979, the value of gross industrial output of those reformed enterprises had increased by 14.9 percent over the previous year, which was higher than other unreformed enterprises in the same area. In addition, ‘the Interim Provisions on Further Extending the Autonomy of State Industrial Enterprises’ (1984) was launched, and covered production management planning, product distribution, product price, material purchase, etc.: see, e.g., Editorial Board of China Economic Yearbook, *Zhongguo Jingji Nianjian: Disanjuan [China Economic Yearbook*, vol 3]

growth. However, even though new kinds of policies<sup>54</sup> appeared, ‘the Five-Year Plan System’ has remained the leading guideline for China’s economic development and has partially determined SOEs’ continuing dominance.

After about ten years of economic disruption, the Chinese economy made a decisive shift during the period of the Fifth Five-Year Plan (1976-1980). Not only heavy industry, but also light industry and agriculture became a national concern again.<sup>55</sup> By the end of 1979, the State’s capital investment in heavy industry was less than 50 percent, and had declined by 7.9 percent compared to the same period the previous year.<sup>56</sup> However, the good times did not last long. Although the establishment of the ‘Economic Law Research Center of the State Council’ of China (est. 1981) was committed to drafting and amending economic legislation and policy so as to coordinate relationships in the Chinese economic development, its impact was not as salutary as had been expected. In 1980, State-owned energy and transportation industries absorbed *one half of all the State’s capital investment*.<sup>57</sup> In the period of the Sixth

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(Economic Management Press, China 1981) 55-59; Wang Haibo, ‘Zhongguo Guoyou Qiye Gaige de Shijian Jincheng’ [The Reform Process of China’s State-Owned Enterprises (author’s translation)] (2005) 3 Zhongguo Jingjishi Yanjiu [Researches in Chinese Economic History] 55; Daniel Z Ding and Malcolm Warner, ‘China’s Labour-Management System Reforms: Breaking the ‘Three Old Irons’ (1978–1999)’ (2001) 18 Asia Pacific Journal of Management 315; Knight and Ding (n 12) 27; ‘Guowuyuan Guanyu Jinyibu Kuoda Guoying Gongye Qiye Zizhuquan de Zanxing Guiding’ [The Interim Provisions on Further Extending the Autonomy of State Industrial Enterprises] (1984) <<http://cpc.people.com.cn/GB/64184/64186/66678/4493872.html>> accessed 30 January 2017; Zhang Wenkui and Yuan Dongming, *Zhongguo Jingji Gaige 30 nian: Guoyou Qiye juan (1978-2008)* [China’s 30 Years of Reform: Volume of SOEs 1978-2008 (author’s translation)] (Chongqing University Press, China 2008) 7-10; and Jin Zeng, *State-Led Privatization in China: The Politics of Economic Reform* (Routledge 2013) 25.

<sup>54</sup> Since 1978, economic reform policies which focused on SOE reform and introduced competition rules to the Chinese market, as well as awakening private funds, had been released one by one to promote the State’s economy, such as ‘Preliminary Views on Economic Reform’ (1980), ‘the Interim Provisions on Carrying Out and Protecting Socialist Competition’ (1980), ‘The Decision of the CPC Central Committee on Economic Reform’ (1984), and so on: see, e.g., ‘Guanyu Jingji Tizhi Gaige de Chubu Yijian’ [Preliminary Views on Economic Reform] (1980) (n 52); ‘Guowuyuan Guanyu Kaizhan he Baohu Shehui Zhuyi Jingzheng de Zanxing Guiding’ [The Interim Provisions on Carrying Out and Protecting Socialist Competition] (1980) <[www.gov.cn/gongbao/shuju/1980/gwyb198016.pdf](http://www.gov.cn/gongbao/shuju/1980/gwyb198016.pdf)> accessed 30 January 2017; and ‘Zhonggong Zhongyang Guanyu Jingji Tizhi Gaige de Jueding’ [The Decisions of the CPC Central Committee on Economic Reform (author’s translation)] (1984) <<http://cpc.people.com.cn/GB/64162/64168/64565/65378/4429522.html>> accessed 30 January 2017.

<sup>55</sup> See Yu Qiuli, ‘Guanyu 1979 nian Guomin Jingji Jihua Caoan de Baogao’ [Report on the 1979 Draft National Economic Plan (author’s translation)] (The Second Session of the Fifth National People’s Congress, Beijing, 21 June 1979) <<http://book.theorychina.org/upload/36981bfd-1aa5-4b76-828e-7b50b8a668b6/>> accessed 30 January 2017.

<sup>56</sup> See MacFarquhar and Fairbank (eds), *The Cambridge History of China: Volume 15, The People’s Republic, Part 2: Revolutions within the Chinese Revolution, 1966-1982* (n 47) 498.

<sup>57</sup> See Han Xiaowei, *Jingji Quanqiuhua Beijingxia de Zhongguo Chanye Zhengce Youxiaoxing Wenti Yanjiu* [Study on the Effectiveness of China’s Industrial Policy under the Circumstance of Economic Globalisation (author’s translation)] (China Economic Publishing House 2008) 94-99.

Five-Year Plan (1981-1985), this tendency became increasingly common. Promoting industrial concentration and enhancing the growth of heavy industry were the objectives of the Seventh Five-Year Plan (1986-1990). Although an enormous amount of the State's capital investment went into Chinese heavy industry, the telecommunications and construction industries were added to the list in the State capital investment programme in the Seventh Five-Year Plan.<sup>58</sup> However, contrary to the State's expectations, the change in the input to heavy industries was disproportionate to the change in the output.<sup>59</sup>

At the beginning of the 1990s, China's Five-Year Plan was partially changed. It now showed solicitude for all kinds of SOEs, as well as economic restructuring.<sup>60</sup> Accordingly, during the period of the Eighth Five-Year Plan (1991-1995), the value of industrial gross output of SOEs increased from RMB 1.3 trillion Yuan (approximately £0.11 trillion) to RMB 3.1 trillion Yuan (approximately £0.26 trillion), and achieved an average annual growth of 18.4 percent.<sup>61</sup> Continuing this trend, the Ninth Five-Year Plan (1996-2000) was committed to SOE reform, to adjust and optimise industry structure, and to gain firm control of the national economy.<sup>62</sup> Thus, the 'Grasp the Big, Release the Small' policy (1995)<sup>63</sup> was in full

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<sup>58</sup> See William A Byrd and Lin Qingsong (eds), *China's Rural Industry: Structure, Development, and Reform* (OUP 1990) 93-94; Liu (n 41) 26; and National Bureau of Statistics of China (NBS), 'Zhonghua Renmin Gongheguo Guojia Tongjiju Guanyu 1986 nian Guomin Jingji he Shehui Fazhan de Tongji Gongbao' [National Economic and Social Development Statistics Bulletin 1986] (NBS, 20 February 1987) <[www.stats.gov.cn/statsinfo/auto2074/201311/P020131107372415754406.pdf](http://www.stats.gov.cn/statsinfo/auto2074/201311/P020131107372415754406.pdf)> accessed 30 January 2017.

<sup>59</sup> Compared with the Chinese light industry, whose output was higher than the input from the State's capital investment, the situation in the heavy industry was the reverse: MacFarquhar and Fairbank (eds), *The Cambridge History of China: Volume 15, The People's Republic, Part 2: Revolutions within the Chinese Revolution, 1966-1982* (n 47) 507.

<sup>60</sup> See 'Zhonghua Renmin Gongheguo Guomin Jingji he Shehui Fazhan Shinian Guihua he Dibage Wunian Jihua Gangyao' [Report on China's Ten-Year Plan and the Outline of the Eighth Five-Year Plan for National Economic and Social Development (author's translation)] (1991) <[www.sdpc.gov.cn/fzgggz/fzgh/ghwb/gjjh/200506/W020050715581806145575.pdf](http://www.sdpc.gov.cn/fzgggz/fzgh/ghwb/gjjh/200506/W020050715581806145575.pdf)> accessed 30 January 2017.

<sup>61</sup> See Wu Wenkun, 'Guoqi Guquan Jili Shangxian Queding' [Determined the Upper Limit of Equity Incentive for China's SOEs (author's translation)] *China Industry News* (Beijing, 17 December 2008) A02.

<sup>62</sup> See Long-Range Planning Division of the State Planning Commission, 'Jiuwu Qijian Guoyou Qiye Gaige he Fazhan de Silu' [The Process of SOE Reform and Development during the Ninth Five-Year (author's translation)] (1996) 3 *Management World* 151.

<sup>63</sup> The 'Grasp the Big, Release the Small' policy (1995), which was carried out by the 'CPC Central Committee's Decision on a Number of Major Issues Establishing the Socialist Market Economic System' (1993), meant that the State focused on a few large-scale SOEs that concerned the lifeline of the national economy and national security, while releasing the rest of SOEs, especially State-owned SMEs, pushing them into the market, and allowing bankruptcy and privatisation: see, e.g., Xi Jieren (ed), *Kexue Fazhanguan Baikexue Cidian [Encyclopedic Dictionary of the Scientific Concept of Development]* (Shanghai Lexicographical Publishing House, China, 2007) 82; Wang Yushao and Huang Daoxia, 'Guanyu Jianli Shehui Zhuyi Shichang Jingji Tizhi Ruogan Wenti de Jueding' 50 ti Wenda [50 Q & A on 'Decision of the CPC Central Committee on

swing. In the Tenth Five-Year Plan (2001-2005), *the organisation of SOEs, as well as the improvement of the mechanisms for entry and withdrawal*, became a new principle for SOE development. Because this tendency led to the privatisation of SOEs, which had previously been poorly managed, part of the State's assets was revitalised. Accordingly, the dominant position of SOEs was further enhanced in the Chinese economy, especially in the petrol and chemical industries, the electric industry, the telecommunications industry and the transportation industry.<sup>64</sup>

In the period of the Eleventh Five-Year Plan (2006-2010), central SOEs<sup>65</sup> ushered in the best-ever period of reform and development,<sup>66</sup> because the Eleventh Five-Year Plan paid attention to the market-oriented reform of SOEs at the right time. Hence, the vitality of SOEs increased.<sup>67</sup> The Twelfth Five-Year Plan (2011-2015) has continued to devote much attention to the market-oriented reform of SOEs. However, concurrently, a new tendency in the process of China's economic development has become ready to be put into practice. In Chinese, this is called "Guojin Mintui"<sup>68</sup>: "the State advances while the private sector retreats"<sup>69</sup>.

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*Some Issues Concerning the Establishment of a Socialist Market Economic Structure* (author's translation) (Xinhua Press, China 1994) Introduction; and Zeng (n 53) 37-39.

<sup>64</sup> See Li Rongrong, 'Guanyu Guoyou Qiye Gaige he Fazhan de Baogao' [Report on SOE Reform and Development] *Study Times, China* (Beijing, 22 April 2008) 01.

<sup>65</sup> Central SOEs are a small group of Chinese SOEs which are under the direct supervision of the Central Government.

<sup>66</sup> See Shao Ning, 'Shiyiwu Yangqi Gaige he Shierwu Silu' [Central SOE Reform during 11th Five-Year Plan and the Process for 12th Five-Year Plan] (Press Conference of the State Council Information Office, Beijing, 22 February 2011) <[www.china.com.cn/zhibo/2011-02/22/content\\_21944421.htm?show=t](http://www.china.com.cn/zhibo/2011-02/22/content_21944421.htm?show=t)> accessed 30 January 2017.

<sup>67</sup> In 2010, profits of Chinese SOEs increased by 37.9 percent over the previous year. SOEs accounted for 62 percent of the value of Chinese industrial gross output: see, e.g., Xinhua News, 'China's State-Owned Enterprises Post nearly 40 Percent Rise in Profits Last Year' *People's Daily Online* (Beijing, 7 January 2011) <<http://english.people.com.cn/90001/90778/90862/7263702.html>> accessed 30 January 2017; and Stanley Lubman, 'China's State Capitalism: the Real World Implications' (*The Wall Street Journal*, 1 March 2012) <<http://blogs.wsj.com/chinarealtime/2012/03/01/chinas-state-capitalism-the-real-world-implications/>> accessed 30 January 2017.

<sup>68</sup> See Chapter 2.1.2.2 below.

<sup>69</sup> "Guojin Mintui" ("The State advances while the private sector retreats") was a new Chinese phrase has been widely used since 2009 by some Chinese scholars to describe an economic tendency within the country. Although the Central Government denied the tendency of "Guojin Mintui", it did in fact occur. Scholars consider that it occurred not only in China, but also on a global scale during the global financial crisis of 2007. In this thesis, this phrase has no political undertones. The author uses it solely to track the development of SOEs: see, e.g., Wentong Zheng, 'State-Owned Enterprises versus the State: Lessons from Trade Law' in Thomas K Cheng, Ioannis Lianos and D Daniel Sokol (eds), *Competition and the State* (Stanford University Press 2014) 78; Hu Angang, "Guojin Mintui" Xianxiang de Weizheng' [The Falsification Concept towards 'Guojin Mintui']

Reviewing China's development history, although 'the Five-Year Plan System' has made a big impact on SOEs and even the State's economic development, at the same time it has engendered difficulties. The unrealistic dream of developing the steel industry ruined this sector's growth and prejudiced people's daily lives.<sup>70</sup> The continuous emphasis on heavy industry hampered the balance between different Chinese industries. And the 'Grasp the Big, Release the Small' policy (1995) caused the loss of State assets.<sup>71</sup> Hence, because 'the Five-Year Plan System' cannot possibly cover everything in the actual implementation process, since 1978, SOE policy has been a complement to SOEs' reform and development.

### 2.1.2 Influences on Chinese SOEs' Development – SOE Policy

After SOE policy emerged in the second half of 1978, the continuously increasing trend in the number of SOEs gradually started to slow down; and although China has been engaged in supporting SOE development over the past thirty years, SOE growth has not been particularly smooth, especially in the 1990s.<sup>72</sup> In other words, the SOE development approach could be described as a process of ebb and flow. Why has the development of Chinese SOEs shown a fluctuating rate of growth? In order to ascertain the causes and consequences, several of SOE policies over the last two decades will be discussed below.

#### 2.1.2.1 *The Industrial Scale and the Reforms of Chinese SOEs*

One of the most fundamental reasons why SOEs have flourished in China is that the emphasis on the scale of the industry has provided more development room for SOEs of different scales. With regard to 'the Five-Year Plan System' in the 1990s, the State's

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(author's translation)] in Propaganda Bureau of State-Owned Assets Supervision and Administration Commission of the State Council (China), *Guoqi Redian Mianduimian [The Hot Topics Face to Face]* (China Economic Publishing House 2012) 135-39; Wei Xinghua and Zhang Fujun, 'Dangqian 'Guojin Mintui' Zhishuo Buneng Chengli' ['Guojin Mintui' is A False Statement in Today's China (author's translation)] (2010) Academy of Marxism 5; and Adrian Wooldridge, 'The Visible Hand: The Crisis of Western Liberal Capitalism has Coincided with the Rise of a Powerful New Form of State Capitalism in Emerging Markets' in Adrian Wooldridge, *The Economist: State Capitalism (Penguin Specials): The Visible Hand* (Penguin 2012).

<sup>70</sup> See Chapter 4.1.1.1 below.

<sup>71</sup> See Geoff Dyer and Richard McGregor, 'China's answer to Larry King' (*Financial Times*, 31 January 2005) <[www.ft.com/cms/s/1/99f657ba-73b4-11d9-b705-00000e2511c8.html#axzz3uVQJARa7](http://www.ft.com/cms/s/1/99f657ba-73b4-11d9-b705-00000e2511c8.html#axzz3uVQJARa7)> accessed 30 January 2017; and Zeng (n 53) 105-06.

<sup>72</sup> See Zhong Zhang, 'Legal Deterrence: The Foundation of Corporate Governance – Evidence from China' in David Kennedy and Joseph E Stiglitz (eds), *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century* (OUP 2013) 360.

industrial policy showed good consistency on the issue of treating industrial scale as a priority and caused dramatic changes for SOEs.<sup>73</sup>

For instance, the ‘Grasp the Big, Release the Small’ policy (1995) appeared, followed by two opposing voices: in one respect, this not only contributed to the concentration of State resources onto the front burner, but also introduced market competition mechanisms for SMEs and enhanced their vitality without the State’s protection. In another respect, the privatisation of SOEs was not always a welcome development. *First*, because the sale value of the privatised SOEs was often lower than the actual value, the ‘Grasp the Big, Release the Small’ policy (1995) might result in the loss of State assets.<sup>74</sup> Although there are no official data for the loss of State assets in this process, releasing ‘Measures for Assets and Capital Verification of State-Owned Enterprises’ (2003)<sup>75</sup>, formulating ‘the Draft of State Assets Assessment Act’ (2012)<sup>76</sup> and launching *the Asset Appraisal Law of China 2016*<sup>77</sup> would be able to illustrate that the loss did occur. *Second*, because most privatised SOEs were not following well-managed models,<sup>78</sup> this policy might be considered as transferring the failure risk of former small and medium-scale SOEs<sup>79</sup> into private funds within the country.

In addition, the publication ‘1990s National Industrial Policy Framework of China’

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<sup>73</sup> See David EM Sappington and J Gregory Sidak, ‘Anticompetitive Behavior by State-Owned Enterprises: Incentives and Capabilities’ in R Richard Geddes (ed), *Competing with the Government: Anticompetitive Behavior and Public Enterprises* (Hoover Institution Press 2004) 6-7; and World Bank and Development Research Center of the State Council, the People’s Republic of China, *China 2030: Building a Modern, Harmonious, and Creative Society* (The World Bank 2013) 109.

<sup>74</sup> See Ju (n 5) 64; and Zhang and Yuan (n 53) 204-05.

<sup>75</sup> The policy ‘Measures for Assets and Capital Verification of State-Owned Enterprises’ (2003) aims to discourage and prevent the loss of State assets in China: ‘Measures for Assets and Capital Verification of State-Owned Enterprises’ (2003) <[www.lawinfochina.com/display.aspx?lib=law&id=3103&CGid=>](http://www.lawinfochina.com/display.aspx?lib=law&id=3103&CGid=>) accessed 30 January 2017.

<sup>76</sup> ‘The Draft of State Assets Assessment Act’ (2012) aims to further discourage and prevent the loss of State assets in China: Cui Jing and He Yuxin, ‘Zhongguo ni Lifa Guifan Zichan Pinggu Xingwei’ [China Proposes Legislation to Formulate Asset Valuation (author’s translation)] (*Xinhua, China*, 27 February 2012) <[www.npc.gov.cn/huiyi/cwh/1125/2012-02/28/content\\_1691275.htm](http://www.npc.gov.cn/huiyi/cwh/1125/2012-02/28/content_1691275.htm)> accessed 30 January 2017.

<sup>77</sup> See the Asset Appraisal Law of China 2016, Art 3.

Article 3: [W]here the matters involving state-owned assets or public interest, among others, are subject to appraisal in accordance with laws and administrative regulations (hereinafter referred to as “statutory appraisal”), an appraisal institution shall be legally authorized to conduct appraisal.

<sup>78</sup> See Xinqiang Sun, ‘Reform of China’s State-Owned Enterprises: A Legal Perspective’ (1999) 31 *St. Mary’s Law Journal* 19; and Guanghua Yu, ‘Using Western Law to Improve China’s State-Owned Enterprises: Of Takeovers and Securities Fraud’ (2004) 39 *Valparaiso University Law Review* 339, 341.

<sup>79</sup> Before 2010, Chinese SOEs existed in large, medium and small scales: Shao (n 66).

(1994) promised that the State's industrial policy would adjust the industrial structure and the industrial scale.<sup>80</sup> Affected by this framework, the vitality and strength of SOEs were improved in the second half of the 1990s. Essentially, these improvements not only existed in the SOE proportion of total enterprises, but also in the gross industrial output value.<sup>81</sup> However, although this framework focused on the characteristics of different industries, it ignored the suitability of scale in a variety of industries.<sup>82</sup> From then on, this framework became an effective driver to create SOEs of a larger scale than before.

Industrial scale continued to be considered by the State as vital to SOEs' growth and the overall economic development.<sup>83</sup> In 1995, the publication 'Implementation Guidelines on the economic system reform' (1995) was adopted. The guidelines considered that State-owned large and medium-sized enterprises must be the backbone of the economy and ought to play the leading role in China.<sup>84</sup> However, the guiding ideology of the Chinese industries and economic development, namely "Big is best", was beginning to shake,<sup>85</sup> and a more positive policy came into effect in 1996. This new policy, 'Notice of Opinions on 1996's SOE Reform Implementation' (1996), explicitly mentioned the economic scale of SOEs, and considered that suitable industrial scale was good for SOEs' growth and the State's economic

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<sup>80</sup> On the one hand, in the case of industries of significant scale, the objectives and strategy of industrial policy in China included (a) forming the industry structure with a small number of large-scale enterprises, (b) encouraging SOEs to merge and then achieving significant industrial scale. On the other hand, for industries of a lesser scale, the objectives and strategy of industrial policy was to promote SMEs' development: 'Jiushi Niandai Guojia Chanye Zhengce Gangyao' [1990s National Industrial Policy Framework of China (author's translation)] (1994) <[www.gov.cn/gongbao/shuju/1994/gwyb199412.pdf](http://www.gov.cn/gongbao/shuju/1994/gwyb199412.pdf)> accessed 30 January 2017.

<sup>81</sup> By 1992, SOEs comprised over half of the total number of enterprises and the gross industrial output value in China. Yet, by 1996, the SOE proportion of total enterprises had fallen sharply to less than 17 percent, while the proportion of their gross industrial output value occupied nearly 40 percent: NBS, 'Diyici Quanguo Jiben Danwei Pucha Gongbao' [The First Communiqué on Major Data of Basic Units of National Economic Census] (NBS, 24 February 1998) <[www.stats.gov.cn/tjsj/tjgb/jbdwpcgb/qgjbwpcgb/200203/t20020331\\_30412.html](http://www.stats.gov.cn/tjsj/tjgb/jbdwpcgb/qgjbwpcgb/200203/t20020331_30412.html)> accessed 30 January 2017.

<sup>82</sup> Based on the '1990s National Industrial Policy Framework of China' (1994), significant industrial scale, is the ultimate goal. However, various industries have different requirements which determine their suitable scales. Efficiency optimisation and effective competition would make more sense for different Chinese industries than the scale of production.

<sup>83</sup> See Han (n 57) 106.

<sup>84</sup> See '1995 nian Jingji Tizhi Gaige Shishi Yaodian' [Implementation Guidelines on the Economic System Reform (author's translation)] (1995) <[www.gov.cn/xxgk/pub/govpublic/mrlm/201011/t20101112\\_62570.html](http://www.gov.cn/xxgk/pub/govpublic/mrlm/201011/t20101112_62570.html)> accessed 30 January 2017.

<sup>85</sup> "[G]overnment intervention... must be specific [on its face or in its application to an enterprise, an industry, or groups thereof]: Diarmuid Rossa Phelan, *The Application of United States and European Community Domestic Trade Laws to the Imports of Nonmarket Economy GATT Contracting Parties – A Time for Change* (European University Institute, Florence 1992) 109.

development.<sup>86</sup> This was exactly the right time for China to recognise that for SOEs' development, quantity did not necessarily equate to quality. However, things did not change significantly. After this policy was announced, China promoted concentration on production in order to achieve economic strength in later years.<sup>87</sup>

In order to coincide with the establishment of Chinese industrial scale, the State has pushed forward a series of SOE reforms over the last two decades. In 1993, the CPC Central Committee maintained the guiding ideology of SOE reform in the 'CPC Central Committee's Decision on a Number of Major Issues Establishing the Socialist Market Economic System' (1993) (see footnote 63 above). Subsequently, the 'Grasp the Big, Release the Small' policy (1995) became a principle in the process of SOE development<sup>88</sup>: namely the privatisation strategy of small-scale SOEs (pushing small-scale SOEs into the market and allowing them to go bankrupt and face privatization).<sup>89</sup> Following this policy, a package of reforms for small-scale SOEs was launched in the following years. Relying on the publication 'Several Statements of the State Council on Speeding Up the Reform of the State-Owned Small Enterprises' (1996), the State encouraged small-scale SOEs to explore their own approaches to reform, in particular privatisation.<sup>90</sup> In 1999, the State reiterated that SOE reform should focus on "[v]igorously developing large enterprises and enterprise groups, and relaxing the control over and invigorating small and medium-sized SOEs"<sup>91</sup>. This policy once again not only placed the emphasis on large-scale SOEs, but also re-emphasised the privatisation strategy of small and medium-scale SOEs. Owing to those policies and the Five-Year Plan, by 2001 SOEs comprised only 12.2 percent of the total number of enterprises in China,<sup>92</sup> but

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<sup>86</sup> See 'Guanyu 1996 nian Guoyou Qiye Gaige Gongzuo de Shishi Yijian' [Implementation Opinions on SOE Reform 1996 (author's translation)] (1996) <[www.gov.cn/gongbao/shuju/1996/gwyb199609.pdf](http://www.gov.cn/gongbao/shuju/1996/gwyb199609.pdf)> accessed 30 January 2017.

<sup>87</sup> See Han (n 57) 94.

<sup>88</sup> See Wang and Huang (n 63).

<sup>89</sup> See Zeng (n 63).

<sup>90</sup> See Qi Chu, 'Guojia Tigaiwei Zhiding Jiakuai Guoyou Xiaoqiye Gaige de Yijian, Guli Xiaoguoqi Tansuo Shihe Ziji de Gaige Fangshi' [Encouraging State-Owned Small Enterprises to Explore New Approaches to Reform (author's translation)] (1996) 9 *Zhongguo Jidian Gongye* [China Machinery and Electronic Industry] 5.

<sup>91</sup> See 'The Decision of the Central Committee of the Communist Party of China on Major Issues Concerning the Reform and Development of State-Owned Enterprises' (1999) <[www.lawinfochina.com/display.aspx?lib=law&id=991](http://www.lawinfochina.com/display.aspx?lib=law&id=991)> accessed 30 January 2017.

<sup>92</sup> See NBS, 'Dierci Quanguo Jiben Danwei Pucha Gongbao' [The Second Communiqué on Major Data of Basic Units of National Economic Census] (*NBS*, 17 January 2003) <[www.stats.gov.cn/tjsj/tjgb/jbdwpcgb/qgjbwpcgb/200301/t20030117\\_30413.html](http://www.stats.gov.cn/tjsj/tjgb/jbdwpcgb/qgjbwpcgb/200301/t20030117_30413.html)> accessed 30 January 2017.



contributed 44 percent of the gross industrial output value.<sup>93</sup> However, the development space for privately-owned SMEs remained squeezed because large-scale SOEs would abuse their dominant position in order to reduce competition in the market.

In 2003 the CPC Central Committee released the publication ‘CPC Central Committee’s Resolution on Several Issues on Improvement of Socialist Market Economic System’ (2003)<sup>94</sup> to continue the reform of small-scale SOEs.<sup>95</sup> In the long term, even though this policy seemed to provide a suitable catalyst for SOE reform, outcomes were not always positive in subsequent years.<sup>96</sup> In addition, there was an unbalanced development in certain specific industries: the number of SOEs increased and their scale enlarged, while the number of privately-owned enterprises decreased. Taking the gas station sector as an example, privately-owned gas stations occupied more than 60 percent of the total number in China’s petroleum retail market in 1998,<sup>97</sup> while by the end of 2006 SOE-owned gas stations

<sup>93</sup> See Unirule Institute of Economics, ‘Guoyou Qiye de Xingzhi, Biaoxian yu Gaige’ [The Nature, Performance, and Reform of the State-Owned Enterprises] (Unirule Institute of Economics, China, 12 April 2011) <[http://paper.usc.cuhk.edu.hk/webmanager/wkfiles/8067\\_1\\_paper.pdf?lang=zh](http://paper.usc.cuhk.edu.hk/webmanager/wkfiles/8067_1_paper.pdf?lang=zh)> accessed 30 January 2017.

<sup>94</sup> The publication ‘CPC Central Committee’s Resolution on Several Issues on Improvement of Socialist Market Economic System’ (2003), which emphasised the necessity for deepening reform, aimed to (a) develop SOEs and encourage privately-owned enterprises; (b) continue SOE reform; (c) establish competition, and so on: ‘Zhonggong Zhongyang Guanyu Wanshan Shehui Zhuyi Shichang Jingji Tizhi Ruogan Wenti de Jueding’ [CPC Central Committee’s Resolution on Several Issues on Improvement of Socialist Market Economic System] (2003) <<http://cpc.people.com.cn/GB/64162/64168/64569/65411/4429165.html>> accessed 30 January 2017.

<sup>95</sup> See *id.*; and Li Rongrong, ‘Aggressively Advance SOE Reform and Development Enhance China’s Sustainable Economic Development and Overall Social Progress’ (World Economic Development Declaration Conference, Zhuhai, China, 7 November 2003) <<http://en.sasac.gov.cn/n1461859/c1463723/content.html>> accessed 30 January 2017.

<sup>96</sup> **Table 2-3: Proportions of Chinese SOEs in Industries in 2002, 2006 and 2008**

Year	2002	2006	2008
<b>SOEs’ Proportion of Total Industrial Enterprises (%)</b>	22.65	8.27	5.00
<b>SOEs’ Proportion of the Gross Industrial Output Value (%)</b>	40.78	31.24	28.37
<b>SOEs’ Proportion of Value Added (%)</b>	48.30	35.78	N/A

Source: *China Statistical Yearbook 2007* for data in 2002 and 2006, *China Statistical Yearbook 2009* for data in 2008; table devised by the author.

See Li Zibin and others (eds), *Zhongguo Zhongxiaoqiye Fazhan Baogao (2008-2009)* [China’s SME Development Report (2008-2009)] (China Economic Publishing House 2009) 105; Zhang Weiyong and Li Shuhe, ‘Diqujian Jingzheng yu Zhongguo Guoyou Qiye de Mingyinghua’ [Interregional Competition and the Privatisation of State-Owned Enterprises in China (author’s translation)] (1998) 12 *Economic Research Journal* 13; NBS, *China Statistical Yearbook 2007* (China Statistics Press 2007) 14-4 & 14-8; and NBS, *China Statistical Yearbook 2009* (China Statistics Press 2009) 13-4 & 13-8.

<sup>97</sup> See Liu Changjie and Zhang Xiangdong, ‘Zhongshiyou Zhongshihua Jie Youjia Kuozhang, Niansui Banshu Mingying Jiayouzhan’ [Oil Prices Provide Opportunities for PetroChina and Sinopec to Expand, thereby They Crushed Half of Privately-Owned Gas Stations (author’s translation)] *Jingji Guancha* [The Economic Observer] (Changchun, Shenyang and Beijing, 10 April 2006) <<http://finance.sina.com.cn/chanjing/b/20060408/11192485151.shtml>> accessed 30 January 2017.

accounted for more than 50 percent of the total number in China.<sup>98</sup>

In brief, from 1978 to the first decade of the 21st century, SOEs benefited from the State's industrial policies which aimed to expand their scale and market shares. However, these policies failed to create robust growth for them. Because the industrial policies granted too much support to SOEs to achieve large-scale status, they were unable to offer balanced support for other market participants, such as privately-owned SMEs.

#### 2.1.2.2 A New Tide of Chinese SOEs – “Guojin Mintui”

After more than ten years of “shrinkage” of SOEs,<sup>99</sup> SOE development has presented a rebound trend in gross industrial output value in China since 2009. SOEs have again become the leading force for growth in the Chinese economy, and in turn SOEs' growth has promoted the State's economic development.<sup>100</sup> Accordingly, this was the ideal time for a new tendency in the process of economic development, namely “Guojin Mintui”, to emerge.

Since the global financial crisis of the late-2000s began to affect Chinese economic development in late 2007 and early 2008, the Chinese market has faced a difficult situation and has looked forward to more State intervention. Consequently, the State followed a previous development principle, *the organisation of SOEs as well as the improvement of the mechanisms for entry and withdrawal*, and attempted to exploit SOEs' advantages under this background. Since then, China has invested trillions of dollars to rouse SOEs and this has helped to drive the economy.<sup>101</sup> It is akin to a tonic administered to alleviate the Chinese

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<sup>98</sup> See Department of Circulation Industry Development, ‘2006 nian Guonei Jiayouzhān Shuliang Jiegou Fenxi’ [Quantitative Structural Analysis of Domestic Gas Stations in 2006 (author's translation)] (*Department of Circulation Industry Development, Ministry of Commerce of China*, 28 April 2007) <<http://ltfzs.mofcom.gov.cn/aarticle/af/200704/20070404623746.html>> accessed 30 January 2017.

<sup>99</sup> The “shrinkage” of SOEs means that, in general, the proportions of SOEs considered by both quantity and the gross industrial output value showed a downward trend between 1995 and 2005. However, the gross industrial output value per SOE continued with an upward trend at the same time: see Chapter 2.1.2.1 above.

<sup>100</sup> From then on, the gross industrial output value of Chinese SOEs enjoyed double-digit-value growth, and gave the State an indication of their development. In 2010, all SOEs accounted for over 60 percent of the gross industrial output value in China. By the end of the same year, the growth rate of central SOEs comprised more than 50 percent: see, e.g., Lubman (n 67); Xinhua News, ‘Centrally Administered SOEs Profits Rise 3.6% in Jan-Nov’ (*Xinhua, China*, 19 December 2011) <[www.china.org.cn/business/2011-12/19/content\\_24192570.htm](http://www.china.org.cn/business/2011-12/19/content_24192570.htm)> accessed 30 January 2017; and Zheng Yongnian, *Buqueding de Weilai: Ruhe jiang Gaige Jinxing Xiaqu* [*The Uncertainty of the Future: How to Continue the Reform* (author's translation)] (China CITIC Press 2014) 167.

<sup>101</sup> See Michael Wines, ‘China Fortifies State Businesses to Fuel Growth’ *The New York Times* (New York, 30 August 2010) A1.

economic situation, and seems at first sight to be a sensible move.

However, for the long-term economic development, it may not have been a wise move because this trend equates to a decrease in size of the privately-owned sector in the Chinese economy.<sup>102</sup> For instance, in 2008, an administrative merger took place between two large-scale steel enterprises, Shandong Steel (an SOE with heavy losses) and Rizhao Steel (a profitable privately-owned enterprise), in a local steel market (Shandong province), supervised by the local government. Without regard for the market rules, the money-losing SOE gained possession of about 67 percent of the new company and therefore controlled its destiny. In contrast, the profitable privately-owned enterprise could do nothing except accept its fate.<sup>103</sup> With regard to the onset of “Guojin Mintui”, a prominent Chinese economist, Yingyi Qian, has maintained that anxiety outcomes from excessive intervention might reverse the long-term market-oriented reforms in China.<sup>104</sup>

Therefore, the Central Government has pushed for a “mixed-ownership reform” (using private funds to improve the development of SOEs, see further in footnote 133 in Chapter 3) since the end of 2013, in order to invite private investments into SOEs.<sup>105</sup> However, the voice criticism has simultaneously appeared because “[n]o matter how many shares are privately owned, the decision lies with the state”<sup>106</sup>. In 2015, the Central Government

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<sup>102</sup> See World Bank Office, Beijing, ‘China Quarterly Update’ (World Bank, November 2010) <[http://siteresources.worldbank.org/CHINAEXTN/Resources/318949-1268688634523/cqu\\_Nov\\_2010.pdf](http://siteresources.worldbank.org/CHINAEXTN/Resources/318949-1268688634523/cqu_Nov_2010.pdf)> accessed 30 January 2017.

<sup>103</sup> See Junfeng Yang, ‘How Private Entrepreneurs Become Political Victims: Crowded out’ *China Economic Review* (Shanghai, 15 October 2012) <[www.chinaeconomicreview.com/crowded-out](http://www.chinaeconomicreview.com/crowded-out)> accessed 30 January 2017.

<sup>104</sup> See Jason Dean, Andrew Browne and Shai Oster, ‘China ‘State Capitalism’ Sparks Backlash’ *The Wall Street Journal (Asia)* (Beijing, 17 November 2010) 1 & 16.

<sup>105</sup> See Aaron Back, ‘China’s Corporate Reform is Mixed Up’ *The Wall Street Journal* (22 August 2014) <[www.wsj.com/articles/chinas-corporate-reform-is-mixed-up-heard-on-the-street-1408696605](http://www.wsj.com/articles/chinas-corporate-reform-is-mixed-up-heard-on-the-street-1408696605)> accessed 30 January 2017; Xinhua News, ‘China Ventures into SOE Mixed-Ownership Reform’ *Xinhua News* (Beijing, 11 July 2014) <[http://news.xinhuanet.com/english/china/2014-07/11/c\\_133477278.htm](http://news.xinhuanet.com/english/china/2014-07/11/c_133477278.htm)> accessed 30 January 2017; Lan Hongguang, ‘China to Tackle Monopolies, Introduce Competition: CPC’ (*Xinhua, China*, 15 November 2013) <[http://news.xinhuanet.com/english/china/2013-11/15/c\\_132892076.htm](http://news.xinhuanet.com/english/china/2013-11/15/c_132892076.htm)> accessed 30 January 2017; Gabriel Wildau, ‘Beijing Identifies SOEs for Reform Pilot’ *Financial Times (Asia)* (Shanghai, 16 July 2014) 4; and Liu Liliang, ‘Jin Shixiang Guoqi Gaige Fangan Youwang Shuaixian Chutai’ [Nearly Ten SOE Reform Programmes are Expected to Come into Force (author’s translation)] *Zhongguo Zhengquan Bao [China Securities Journal]* (Beijing, 28 January 2015) A01 & 02.

<sup>106</sup> See Marshall W Meyer, ‘China’s Mixed-Ownership Enterprise Model: Can the State Let Go?’ (*The Wharton School of the University of Pennsylvania*, 26 September 2014) <<http://knowledge.wharton.upenn.edu/article/will-chinas-mixed-ownership-enterprise-model-work/>> accessed 30 January 2017; and Milhaupt and Zheng (n 3) 673 (the latter points out that “[w]hen the percentage of state

launched a plan for further reform of SOEs, titled ‘CPC Central Committee’s and the State Council’s Guidance on Deepening SOE Reform’ (2015).<sup>107</sup> However, because this reform has refused privatization of large-scale SOEs, it will still enhance government control of the Chinese economy.<sup>108</sup> Further, regarding the current rate of Chinese economic growth, the Central Government has decided to retard economic liberalisation since the last quarter of 2015.<sup>109</sup>

Reviewing the Chinese economic growth path demonstrates that SOEs have always been on the State’s agenda for the last six decades. Although the development of SOEs has presented a good situation day by day,<sup>110</sup> it cannot satisfy the State’s economic growth and demands perpetually. Even though SOEs are the pillar of China’s economy,<sup>111</sup> the development of SOEs ought to be taking place within a legitimate scope; otherwise, SOEs may become obstacles to other market participants, such as privately-owned SMEs.

## 2.2 SOEs in China – Obstacles for Privately-Owned SMEs

In general, the promotion of SOEs’ growth is an essential contributory factor in China’s economic development. However, it is certainly not the only factor. Economic development requires a balance.<sup>112</sup> Indeed, the intensive promotion of SOEs is not only accelerating

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shares in a mixed-ownership firm is relatively large, the firm could, at least in theory, still be classified as an SOE”).

<sup>107</sup> See ‘Zhonggong Zhongyang Guowuyuan Guanyu Shenhua Guoyou Qiye Gaige de Zhidao Yijian’ [CPC Central Committee’s and the State Council’s Guidance on Deepening SOE Reform] (2015) <[www.gov.cn/zhengce/2015-09/13/content\\_2930440.htm](http://www.gov.cn/zhengce/2015-09/13/content_2930440.htm)> accessed 30 January 2017; and Yang Ye, ‘Shenhua Guoqi Gaige Zhidao Yijian Huo Tongguo’ [Guidance on Deepening SOE Reform Agreed (author’s translation)] *Economic Information Daily, China* (Beijing, 8 September 2015) A01.

<sup>108</sup> See Lingling Wei, ‘China Economic Plan Calls for Mergers, Public Listings By 2020: Plan Takes Large-Scale Privatization off the Table’ *The Wall Street Journal* (Beijing, 7 September 2015) <[www.wsj.com/articles/china-reform-plan-calls-for-mergers-public-listings-by-2020-1441635645?tesla=y&cb=logged0.30037145782262087](http://www.wsj.com/articles/china-reform-plan-calls-for-mergers-public-listings-by-2020-1441635645?tesla=y&cb=logged0.30037145782262087)> accessed 30 January 2017.

<sup>109</sup> See Lingling Wei, ‘China Delays Economic Liberalization: As Beijing Debates how to Quickly Boost Economy, It Delays Long-Term Plans to Loosen Financial Grip’ *The Wall Street Journal* (Beijing, 6 November 2015) <[www.wsj.com/articles/china-delays-economic-liberalization-1446865113?tesla=y](http://www.wsj.com/articles/china-delays-economic-liberalization-1446865113?tesla=y)> accessed 30 January 2017.

<sup>110</sup> See Wines (n 101).

<sup>111</sup> See ‘1995 nian Jingji Tizhi Gaige Shishi Yaodian’ [Implementation Guidelines on the Economic System Reform (author’s translation)] (1995) (n 84); and ‘The Decision of the Central Committee of the Communist Party of China on Major Issues Concerning the Reform and Development of State-Owned Enterprises’ (1999) (n 91).

<sup>112</sup> See Ju (n 5) 35.

Chinese economic growth, but is also creating difficulties for the development of other kinds of enterprises. In today's China, *vis-à-vis* SOEs' development, the output value is less than the input value; and this works to the detriment of privately-owned SMEs, which may feel that they are being taken for granted to some extent. Consequently, the aims of this section are (a) to follow the history of China's unilateral industrial policies on both SOEs and SMEs from the 1980s until the present, and explain the State's inclinations towards SOEs' and SMEs' development, and then (b) to analyse the "Pyrrhic Victory" for SOE development.

### 2.2.1 The Ballooning of SOEs and Impediments for Privately-Owned SMEs

For Chinese economic growth, which has been guided by the State's industrial policy, the structure and scale of industries are the most important issues. In order to adjust the industrial structure and expand industrial scale in a short time, SOEs' growth takes primacy. Therefore, in the eyes of SOEs, privately-owned SMEs might be regarded as the "rebels". Although privately-owned SMEs underwent a sudden blossoming in the last two decades of the twentieth century,<sup>113</sup> the strong momentum of their development was stifled in the cradle by the 'Grasp the Big, Release the Small' policy (1995). Because this policy seems to have changed little up to the present time, China's industrial structure appears to be the ballooning of SOEs and the retardation of privately-owned SMEs.

#### 2.2.1.1 The Blossoming of Privately-Owned SMEs in China – A Worthless Development

After 'the Reform and Opening Up' policy (1978) came into effect, an array of laws and policies initially provided a boost for the development of privately-owned SMEs. Accordingly, privately-owned SMEs appeared in large numbers<sup>114</sup> and output value

<sup>113</sup> See Wu Jinglian and Ma Guochuan, *Chongqi Gaige Yicheng: Zhongguo Jingji Gaige Ershijiang* [Restart Reform Agenda: China's Economic Reform 20 Points] (Shenghuo-Dushu-Xinzhì Joint Publishing Company, China 2013) 1.

<sup>114</sup> **Table 2-4: Numbers of Chinese Individual Economies and Private Enterprises in 1976, 1989 and 1992**

Year	1976	1989	1993
<b>Numbers of Individual Economies and Private Enterprises (Million)</b>	< 0.19	12.6	17.9
<b>Individual Economies' and Private Enterprise' Proportion of Total Enterprises in China (%)</b>	< 1	N/A	63

Source: China's SME Development Report (2008-2009) for data in 1976 and 1989, '1993 Annual Statistical Bulletin of China' for data 1993; table devised by the author.

See Li and others (eds) (n 96); and NBS, 'Guanyu 1993 nian Guomin Jingji he Shehui Fazhan de Tongji Gongbao' [1993 Annual Statistical Bulletin of China] (NBS, 28 February 1994)

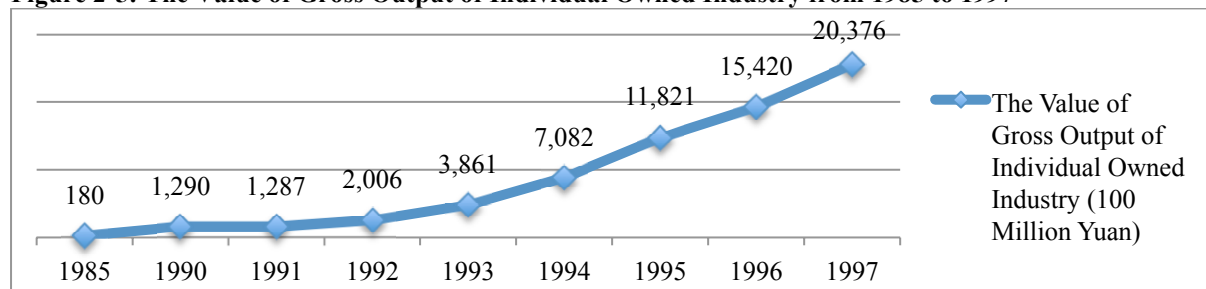
increased<sup>115</sup> through the 1980s and the first half of the 1990s. However, in fact, Chinese privately-owned SMEs were in a perilous situation.

In 1982, the individual economy (one section of privately-owned SMEs before 2003)<sup>116</sup> was fully legitimised in China for the first time since 1949.<sup>117</sup> From 1982 to 1984, the number of the individual economies doubled, and it reached 9.33 million in 1984. Concurrently, the output value of individual economies finally broke through the one percent barrier of value of gross Chinese output.<sup>118</sup> However, because the *Amendment to the Constitution of China 1988* holds that the State guides, helps and supervises the development of individual economies,<sup>119</sup> individual economies are unable to escape the tragic fate of

[www.stats.gov.cn/tjsj/tjgb/ndtjgb/qgndtjgb/200203/t20020331\\_30007.html](http://www.stats.gov.cn/tjsj/tjgb/ndtjgb/qgndtjgb/200203/t20020331_30007.html) accessed 30 January 2017.

<sup>115</sup> By the end of the 20th century, the number of Chinese individual economies and private enterprises was over 10 times greater than the number in 1985. Their value of gross output grew over 100 times greater than the value in 1985.

**Figure 2-5: The Value of Gross Output of Individual Owned Industry from 1985 to 1997**



Source: China Statistical Yearbook 1998; Figure 2-5 devised by the author.

See Neil Gregory, Stoyan Tenev and Dileep Wagle, *China's Emerging Private Enterprises: Prospects for the New Century* (International Finance Corporation 2000) 11; and NBS, *China Statistical Yearbook 1998* (China Statistics Press 1998) 13-3.

<sup>116</sup> In 2003, the publication 'Interim Provisions on the Standards for Medium and Small Enterprises' (2003) gave the first definition of small and medium-sized enterprises in China. Thus, the author uses the term "Chinese privately-owned SMEs" to present matters that occurred from 2003. However, when presenting matters that occurred between 1976 and 2002, the author assumes that privately-owned SMEs include individual economies (*getihu* in Chinese) and private enterprises within the country. Article 26 of *General Principles of the Civil Law of China 1986*, gives a definition of individual economies (also se known as individual businesses): "individual businesses refers to businesses run by *individual citizens* who have been lawfully registered and approved to engage in industrial or commercial operation within the sphere permitted by law": see, e.g., the Law of China on Promotion of Small and Medium-Sized Enterprises 2002, Art 2; General Principles of the Civil Law of China 1986, Art 26; and 'Interim Provisions on the Standards for Medium and Small Enterprises' (Expired) [www.lawinfochina.com/display.aspx?lib=law&id=2636&CGid=](http://www.lawinfochina.com/display.aspx?lib=law&id=2636&CGid=) accessed 30 January 2017.

<sup>117</sup> See the Constitution of China (1982 Revision), Art 11.

Article 11: The non-public sectors of the economy such as the individual and private sectors of the economy, operating within the limits prescribed by law, constitute an important component of the socialist market economy.

<sup>118</sup> See Li and others (eds) (n 96); and Zhang Houyi, *Zhongguo Siying Qiye Fazhan Baogao (1978-1998)* [Report on the Development of China's Private Economy (1978-1998) (author's translation)] (Social Sciences Academic Press, China 1999) 66.

<sup>119</sup> See the Amendment to the Constitution of China 1988, Art 1.

being controlled by the State.

In the years following 1987, not only individual economies, but also private enterprises (another section of privately-owned SMEs before 2003),<sup>120</sup> caught the State's attention. The signal was given in 1987, when the 'CPC Central Committee and State Council Document No.1' (1987) *first* transferred its attention from farmers and agriculture to private enterprises.<sup>121</sup> This No.1 Document declared that it was important to recognise that the advantages of private enterprises outweigh the disadvantages. One year later, the *Amendment to the Constitution of China 1988*<sup>122</sup> and the 'Provisional Regulations of China on Private Enterprises' (1988) reaffirmed and strengthened the idea that "the private economy shall be seen as a complement to the socialist publicly owned economy. The State shall protect the legal rights and interests of private enterprises".<sup>123</sup> From then on, Chinese private enterprises began to appear in large numbers.<sup>124</sup> In 1993, before the State determined once again to give SOEs priority, the Central Government emphasised that the State intended to promote the healthy development of the individual and private economies once again, in 'Several Opinions of the State Council on Supporting the Development of Individual and Private Economies' (1993).<sup>125</sup>

However, contrary to expectations, by the end of 1993, whereas the individual and private economies' proportion of total enterprises had climbed to 63 percent, the value of

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Article 1: Adding a new paragraph in Article 11, of Constitution of the People's Republic of China (1982 Revision): "The State protects the lawful rights and interests of the non-public sectors of the economy such as the individual and private sectors of the economy. The State encourages, supports and guides the development of the non-public sectors of the economy and, in accordance with law, exercises supervision and control over the non-public sectors of the economy."

<sup>120</sup> Although individual economies and private enterprises are all established by private funds, they are different. Individual economies are self-employed, while the employment relationship exists in private enterprises.

<sup>121</sup> Between 1982 and 1986, all 'CPC Central Committee and State Council Documents No.1' concerned the agriculture industry because the CPC Central Committee and the State Council believed that this industry determined people's livelihood.

<sup>122</sup> See the Amendment to the Constitution of China 1988, Art 1.

<sup>123</sup> See the Provisional Regulations of China on Private Enterprises 1988, Art 3.

<sup>124</sup> By the end of 1990, the number of private enterprises was close to 0.1 million, and their output value occupied 0.51 percent of the total value of gross output: State Economic and Trade Commission of China, *Zhongguo Gongye Wushi nian: 1985-1992* [Five Decades of Chinese Industry: 1985-1992 (author's translation)] (China Economic Publishing House 2000) vol 7.

<sup>125</sup> See 'Several Statements of the State Council on Supporting the Development of Individual and Private Economies' (1993) <[www.saic.gov.cn/fldyfbzdjz/zcfg/200705/t20070523\\_57789.html](http://www.saic.gov.cn/fldyfbzdjz/zcfg/200705/t20070523_57789.html)> accessed 30 January 2017.

gross output had only reached 5.76 percent.<sup>126</sup> Although the individual and private economies' proportion of the value of gross output increased rapidly between 1994 and 1996, this development did not continue.<sup>127</sup> In brief, an examination of the Chinese individual economy and private enterprise in the 1990s indicates that although a series of policies and laws aimed to promote their growth, their value of gross output did not increase as salutary as had been expected.<sup>128</sup>

### 2.2.1.2 Chinese SOEs – The Weathervane for SME Development

For China's privately-owned SMEs, even though their development was partially caused by SMEs policies and relevant laws, the growth did not meet all expectations of these policies and laws. This is because SOEs have always been one of the most important pillars of the national economy,<sup>129</sup> and are commonly considered as the eldest son of the State.<sup>130</sup> SOEs have two tasks: (a) they have responsibilities to obey the State's strategy. (b) They need to offer their assistance to other Chinese market participants as needed.<sup>131</sup> However, since the selfishness of "Economic Man" is their essential nature, SOEs, as the weathervane

<sup>126</sup> See China Development Gateway, 'Zhongguo Jianli Xiandai Qiye Zhidu Chengxiao Mingxian' [An Obvious Change on Establishing the Modern Enterprise System in China (author's translation)] (*China Development Gateway*, 12 April 2008) <[http://cn.chinagate.cn/enterprises/2008-04/12/content\\_14940710.htm](http://cn.chinagate.cn/enterprises/2008-04/12/content_14940710.htm)> accessed 30 January 2017; and NBS, 'Guanyu 1993 nian Guomin Jingji he Shehui Fazhan de Tongji Gongbao' [1993 Annual Statistical Bulletin of China] (n 114).

<sup>127</sup> **Table 2-6: Data of China Individual Economies and Private Enterprises from 1995 to 1999**

Year	1995	1996	1997	1998	1999
<b>The Individual and Private Economies' Proportion of Total Enterprises (%)</b>	77.48	77.76	75.41	75.66	77.26
<b>The Individual and Private Economies' Proportion of the Value of Gross Output (%)</b>	12.86	15.48	17.92	17.11	18.18

Source: *China Statistical Yearbook 2000*; table devised by the author.

See NBS, *China Statistical Yearbook 2000* (China Statistics Press 2000) 13-1.

<sup>128</sup> See Zeng Wei, *Zhongxiao Qiye Shengcun Zhuangkuang Diaocha Baogao* [An Investigation on the Status of Medium and Small Enterprises] (China Economic Publishing House 2009) 15.

<sup>129</sup> See '1995 nian Jingji Tizhi Gaige Shishi Yaodian' [Implementation Guidelines on the Economic System Reform (author's translation)] (1995) (n 84); 'The Decision of the Central Committee of the Communist Party of China on Major Issues Concerning the Reform and Development of State-Owned Enterprises' (n 91); and Yong Huang, 'Coordination of International Competition Policies – An Anatomy Based on Chinese Reality' in Andrew T Guzman (ed), *Cooperation, Comity, and Competition Policy* (OUP 2011) 246.

<sup>130</sup> See Shu Juan, Ju Yang and Yu Yang, 'Yangqi: Gongheguo Zhangzi Yaodang Juxing' [Central SOEs: China's Eldest Son Want to Be a Superstar (author's translation)] *Guangzhou Daily, China* (Guangzhou, 5 August 2009) A1 & A7.

<sup>131</sup> See Zhou Haibin and Wang Yongfu, 'Zhang Meiyong Quanguo Zhengxie Fuzhuxi: Gaige Buneng Bumenhua Suipianhua' [Zhang Meiyong, Vice Chairman of the National Committee of the Chinese People's Political Consultative Conference (CPPCC): Reform Cannot be Departmentalization and Fragmentation (author's translation)] (2011) 28 *China Economic Weekly* 42; and Sappington and Sidak (n 73) 1 (the latter points out that "SOEs are required to pursue goals other than pure profit maximization").



for the development of other Chinese market participants, such as individual economies and private enterprises, may prefer to offer opportunities that are more useful to their own interests and growth. On the other hand, these opportunities may not be positive for others.

As a prelude to the development of individual economies and private enterprises, China published ‘Preliminary Views on Economic Reform’ in 1978.<sup>132</sup> This policy held that the State should give “more decision-making autonomy to major SOEs”<sup>133</sup> in order to strengthen the vitality of SOEs and promote Chinese economic development. To a country that had just abandoned “the State-controlled economy” model, enlivening SOEs was a positive sign for the development of diversified economic forms. However, it was who granted the dominant position in the Chinese economy to SOEs.

In the 1990s, under the ‘Grasp the Big, Release the Small’ policy (1995), the State began to develop large-scale SOEs as a matter of priority, and consider the fate of SMEs at a later stage.<sup>134</sup> Since one of the core methods was the privatisation strategy, a large number of small-scale SOEs had been turned into private enterprises since 1993.<sup>135</sup> However, the “lucky” change was a surface phenomenon and did not presage a bright future for Chinese private enterprises: because most privatised small-scale SOEs were mismanaged, they might suffer financial losses in the very near future. In reality, the ‘Grasp the Big, Release the Small’ policy (1995) was a tool for the State to protect large-scale SOEs.

Since the beginning of the 21st century, the State published several SME policies and ‘SME Growth Projects’ one after another.<sup>136</sup> Privately-owned SMEs are becoming

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<sup>132</sup> See Wu (n 49).

<sup>133</sup> *Id.*

<sup>134</sup> See Wang and Huang (n 63) Introduction.

<sup>135</sup> In 1998, the total number of individual economies and private enterprises was 32.4 million, and they created half the value of gross output in China. By 2002 the SME proportion of the gross industrial output value has steadily increased to 53.8 percent: see, e.g., Li and others (eds) (n 96); Zhang (n 118); and Joint Research Group on SMEs’ Development, ‘2003 nian Zhongguo Feigong Jingji Chengzhangxing Zhongxiao Qiye Fazhan Baogao’ [Report on Non-State-Owned SMEs in China (2003) (author’s translation)] *China Economic Times* (Beijing, 18 December 2003) A01.

<sup>136</sup> See ‘Zhonggong Zhongyang Guanyu Wanshan Shehui Zhuyi Shichang Jingji Tizhi Ruogan Wenti de Jueding’ [CPC Central Committee’s Resolution on Several Issues on Improvement of Socialist Market Economic System] (2003) (n 94); ‘Guanyu Guli he Cujin Zhongxiao Qiye Fazhan de Ruogan Zhengce Yijian’ [Several Statements of the State Council on Encouraging and Promoting the Development of SMEs] (2000) <[www.gov.cn/gongbao/content/2000/content\\_60460.htm](http://www.gov.cn/gongbao/content/2000/content_60460.htm)> accessed 30 January 2017; ‘Guowuyuan Guanyu Jinyibu Cujin Zhongxiao Qiye Fazhan de Ruogan Yijian’ [Several Statements of the State Council on Further

increasingly important to the State's economy. However, the outlook for them has not changed. The development of privately-owned SMEs still needs to comply with the State's SOE policy, and SOEs remain the weathervane for SMEs.<sup>137</sup> It is uncertain whether this tendency actually favours Chinese economic development all the time. When a complete administrative reform took place in the steel industry,<sup>138</sup> a number of privately-owned steel enterprises of medium scale and steel SOEs were merged, while other privately-owned steel enterprises of small scale were closed by intervention policies.<sup>139</sup> Consequently, privately-owned SMEs do not always develop as expected, and the development of SOEs has been a victory gained only at a very costly price for China.

### 2.2.2 A Pyrrhic Victory for China's SOEs

A review of SOEs' growth history indicates that despite the State tending to place more and more weight on SOEs' support, the result turns out to be rather worse than expected.<sup>140</sup> In particular, SOEs used to receive higher investment from the State, but provided slower growth. Moreover, SOEs frequently ignored their responsibilities to help other non-SOEs with their growth. Even worse, SOEs liked to treat privately-owned SMEs as serious obstacles to their own progress. Therefore, the irrational development of SOEs affected

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Promoting the Development of SMEs] (2009) <[www.gov.cn/zwgk/2009-09/22/content\\_1423510.htm](http://www.gov.cn/zwgk/2009-09/22/content_1423510.htm)> accessed 30 January 2017; 'Zhongxiao Qiye Huaxing Biaozhun Guiding' [Provisions on the Classification Standards for Small and Medium-Sized Enterprises] (2011) <[www.gov.cn/zwgk/2011-07/04/content\\_1898747.htm](http://www.gov.cn/zwgk/2011-07/04/content_1898747.htm)> accessed 30 January 2017; 'Fagaiwei: Shiyiwu Shishi Zhongxiao Qiye Chengzhang Gongcheng Jiuxiang Neirong' [9 Issues in Implementing 'the 11th Five-Year Plan for SME Growth' (author's translation)] *China Business Times* (Beijing, 30 December 2005) <[http://news.xinhuanet.com/fortune/2005-12/30/content\\_3987580.htm](http://news.xinhuanet.com/fortune/2005-12/30/content_3987580.htm)> accessed 30 January 2017; and 'Shierwu Zhongxiao Qiye Chengzhang Guihua' [The 12th Five-Year Plan for SME Growth] (2011) <[www.gov.cn/gzdt/2011-09/23/content\\_1955213.htm](http://www.gov.cn/gzdt/2011-09/23/content_1955213.htm)> accessed 30 January 2017.

<sup>137</sup> See Wang Yue, 'Wen Jiabao: Dui Hongguan Zhengce Shishi Shidu Yutiao Weitiao' [Wen Jiabao: Timely and Appropriate Presetting and Fine-Tuning of the State's Industrial Policies (author's translation)] *Zhengquan Shibao* [*Securities Times*] (Shanghai, 26 October 2011) A01; Shaofeng Chen, 'Are Chinese Small and Medium Enterprises Victims of Institutional Pitfalls?' in Gungwu Wang and Yongnian Zheng (eds), *China: Development and Governance* (World Scientific 2013) 240-42; and Diarmuid Rossa Phelan, 'Can the State Sell the Nation?' in Eddie Hobbs, Dominic Sherlock and Amanda Slevin (eds), *Own Our Oil - The Fight for Irish Economic Freedom* (Liberties Press 2014) 121 (pointing out that "[r]egime change, not legal challenge, is the solution").

<sup>138</sup> See 'Gangtie Chanye Tiaozheng he Zhenxing Guihua' [Steel Industry Revitalisation Plan of China] (2009) <[www.gov.cn/zwgk/2009-03/20/content\\_1264318.htm](http://www.gov.cn/zwgk/2009-03/20/content_1264318.htm)> accessed 30 January 2017, the English version is available at <[www.lawinfochina.com/display.aspx?lib=law&id=7529&CGid=>](http://www.lawinfochina.com/display.aspx?lib=law&id=7529&CGid=>)> accessed 30 January 2017.

<sup>139</sup> See Chapter 4.1 below.

<sup>140</sup> Economic development *should not* depend on industrial policies: Zhang Weiyong, 'Zhongguo Jingji Zhuanxing yu Qiyejia Jingshen' [China's Economic Transition and Entrepreneurship (author's translation)] in Hu Lishu (ed), *Xinchangtai Gaibian Zhongguo: Shouxi Jingjixuejia tan Daqushi* [*The New Normal Changes in China: Chief Economists Discussing the Big Trends* (author's translation)] (Democracy and Construction Press, China 2014) 214-16.

industrial organisation and structures in China, and the pace of economic growth gradually slowed down. Nowadays, an unbalanced development of SOEs and privately-owned SMEs has emerged in some traditional State-controlled industries. This section of the chapter tackles this issue and focuses on the main cause of the unbalanced growth, namely SOEs, as well as analysing the drawbacks of SOEs' unilateral development.

### 2.2.2.1 Disappointing Brother to Privately-Owned SMEs

Tracking SOEs' development since 1978 shows that SOEs' proportion of total enterprises has to date decreased by over ten times. On the other hand, the value of gross output per SOE has increased in the last three decades.<sup>141</sup> From this perspective, the development of Chinese SOEs seems to have achieved some degree of success. However, after an analysis of data on a range of SOE-related criteria, such as the State's investment, the rate of return on common stockholders' equity (ROE), profit increase, employment rate, and wages, the growth of SOEs may be described as disappointing.

With regard to the State's investment, ROE, and profit increase, even though Chinese energy and transportation industries accounted for half of the State's investment in 1980, ROE and profit increase in these two industries were lower than those of light industry.<sup>142</sup> Although SOEs comprised more than half of the State's investment in 1990, the value of gross output of SOEs rose by merely 2.9 percent over the previous year, which was much less than the increase of all Chinese enterprises.<sup>143</sup> Moreover, the ROE of SOEs seems lower when compared with non-SOEs.<sup>144</sup> SOEs accounted for over 30 percent of the State's

<sup>141</sup> See Zhou Liqun and Xie Siquan (eds), *Zhongguo Jingji Gaige 30 nian: Minying Jingji juan (1978-2008)* [*China's 30-Year Reforms: Volume of the Private Economy 1978-2008* (author's translation)] (Chongqing University Press, China 2008) Ch3.

<sup>142</sup> See Yao Yilin, '1980 nian Zhengfu Gongzuo Baogao' [Report on the Work of the Government (1980)] (The Third Session of the Fifth National People's Congress, Beijing, 30 August 1980) <[www.gov.cn/test/2006-02/16/content\\_200778.htm](http://www.gov.cn/test/2006-02/16/content_200778.htm)> accessed 30 January 2017.

<sup>143</sup> See NBS, 'Guanyu 1990 nian Guomin Jingji he Shehui Fazhan de Tongji Gongbao' [1990 Annual Statistical Bulletin of China] (NBS, 22 February 1991)

<[www.stats.gov.cn/tjsj/tjgb/ndtjgb/qgndtjgb/200203/t20020331\\_30003.htm](http://www.stats.gov.cn/tjsj/tjgb/ndtjgb/qgndtjgb/200203/t20020331_30003.htm)> accessed 30 January 2017.

<sup>144</sup> **Table 2-7: ROE of Chinese SOEs and Private Sector between 2006 and 2010**

Year	2006	2007	2008	2009	2010
<b>ROE of SOEs (%)</b>	15.53	16.97	12.42	11.42	16.07
<b>ROE of Private Sector (%)</b>	22.12	26.08	30.06	26.36	32.59

Source: NBS; table devised by the author.

See Zhao Changwen, 'Guoqi Xiaolv Shi Gao Haishi Di: Guoqi Xiaolv Wenti Touxi' [SOE Efficiency, High or

investment in 2009.<sup>145</sup> However, the ROE of those SOEs was only close to one half of non-SOEs'.<sup>146</sup> Additionally, compared with 2007, the profits of Chinese non-SOEs in January and February increased five times by the same period in 2012. In contrast, the same statistical data for SOEs showed an increase of less than 30 percent.<sup>147</sup>

In the case of employment rate and wages, from 1995 to 2010 the percentage of employment opportunities in SOEs and total wages paid by SOEs in China's urban communities decreased continuously.<sup>148</sup> However, the per capita income for each worker in SOEs rose.<sup>149</sup> For non-SOE workers, the situation was different:<sup>150</sup> they were not so fortunate as regards wages. In recent years, although there have been announcements that the wages of privately-owned SME workers have had a higher growth rate than those of SOE

Low: Analysis of SOE Efficiency (author's translation)] (2012) 15 People's Tribune, China 32.

<sup>145</sup> See Andrew Szamosszegi and Cole Kyle, 'An Analysis of State-Owned Enterprises and State Capitalism in China' (The US-China Economic and Security Review Commission, 26 October 2011)

<[http://origin.www.uscc.gov/sites/default/files/Research/10\\_26\\_11\\_CapitalTradeSOEStudy.pdf](http://origin.www.uscc.gov/sites/default/files/Research/10_26_11_CapitalTradeSOEStudy.pdf)> accessed 30 January 2017.

<sup>146</sup> See Liu Xueshan, 'Guoyou Qiye Xiaolv Pingjia ji Gaige' [Efficiency Evaluation and Reform of China's SOEs (author's translation)] *Study Times, China* (Beijing, 26 December 2011) 11.

<sup>147</sup> **Table 2-8: Profits of Chinese SOEs and Non-SOEs in January and February of 2007 and 2012**

Months	The Profit of Chinese non-SOEs (RMB Billion Yuan)	The Profit of Chinese SOEs (RMB Billion Yuan)
January and February 2007	407 (approximately £27.13 Billion)	1,390 (approximately £92.67 Billion)
January and February 2012	2,002 (approximately £200.2 Billion)	1,791 (approximately £179.1 Billion)

Source: NBS; table devised by the author.

See Xu Peiyu, 'Siwanyi Hongli Haojin, Guoqi Touliangyue Lirun Xiajiang jin Liangcheng' [4-Trillion Dividend Exhausted, State-Owned Enterprises for the First Two-Month Profits Down almost 20%] *China's First Financial Daily* (Shanghai, 28 March 2012) <<http://finance.sina.com.cn/china/20120328/015311693537.shtml>> accessed 30 January 2017.

<sup>148</sup> **Table 2-9: Proportion of Urban Employment and Wages by Chinese SOEs 1995-2010**

Year	1995	2000	2005	2010
<b>Proportion of Urban Employment by Chinese SOEs (%)</b>	59	35	24	21
<b>Proportion of Total Wages Paid by Chinese SOEs to Urban Employees (%)</b>	75	71	60	54

Source: NBS and An Analysis of State-Owned Enterprises and State Capitalism in China; table devised by the author.

See Szamosszegi and Kyle (n 145).

<sup>149</sup> "SOEs play a negative role in income distribution": Sheng Hong and Zhao Nong, *China's State-Owned Enterprises: Nature, Performance and Reform* (World Scientific Publishing Company 2013) 123-24.

<sup>150</sup> At the end of 2010, the number of urban SOE workers occupied less than a quarter of total urban workers in China, while their wages accounted for more than 50 percent of total urban workers' wages. In the same period, non-SOE workers, who comprised 79 percent of all urban workers, shared less than one-half of all urban wages: Interview with Huiyong Shang, Researcher of Policy Planning Office, China Centre for Promotion of SME Development, Ministry of Industry and Information Technology of China (Beijing, China, 2012).

workers,<sup>151</sup> the average annual wages for SMEs workers are still at much lower.<sup>152</sup>

In short, China’s SOEs have benefitted only themselves. On the one hand, although SOEs have received preferred investments and occupied essential roles in the State’s economy for an extremely long period,<sup>153</sup> State intervention has not received a sufficient return. On the other hand, as the eldest sons of the State, while SOEs have taken their responsibilities to achieve common prosperity in China seriously, in contrast the prosperity of SOEs have not only hurt domestic privately-owned SMEs, but also brought a negative impact upon the State’s industrial structure.

### 2.2.2.2 “Messing up” the Industrial Structure

State intervention is a long-term feature of the Chinese government. To review the growth history of SOEs, although the State’s industrial policies have made positive contributions to them, the economy and market have their own inherent rules that the State should follow. However, as regards SOE growth, although the State has been attempting to strengthen market mechanisms, it has not reached the expected goal. Chinese government intervention goes beyond the market rules on some occasions and leaves some adverse impact on the domestic economy. Hence, this part of the chapter attempts to analyse the

<sup>151</sup> *Id.*

<sup>152</sup> **Table 2-10: Number and Average Annual Wage of Employees in Chinese SOEs and Private Sector 2010-2015**

Year	SOEs		Private Sector	
	Number of Employees (Thousand)	Average Annual Wage of Employees (RMB Yuan)	Number of Employees (Thousand)	Average Annual Wage of Employees (RMB Yuan)
2010	65,164	38,359 (approximately £3,835.9)	164,251	20,759 (approximately £2,075.9)
2011	67,042	43,483 (approximately £4,348.3)	182,989	24,556 (approximately £2,455.6)
2012	68,390	48,357 (approximately £4,835.7)	199,244	28,752 (approximately £2,875.2)
2013	63,651	52,657 (approximately £5,265.7)	218,573	32,706 (approximately £3,270.6)
2014	63,123	57,296 (approximately £5,649.8)	249,750	36,390 (approximately £3,588.3)
2015	62,083	65,296 (approximately £7,615.5)	280,771	39,589 (approximately £4,616.3)

Source: NBS; table devised by the author.

See NBS, ‘Employment and Wages’ (NBS, 2016) <<http://data.stats.gov.cn/english/easyquery.htm?cn=C01>> accessed 30 January 2017.

<sup>153</sup> See Knight and Ding (n 12) 168.

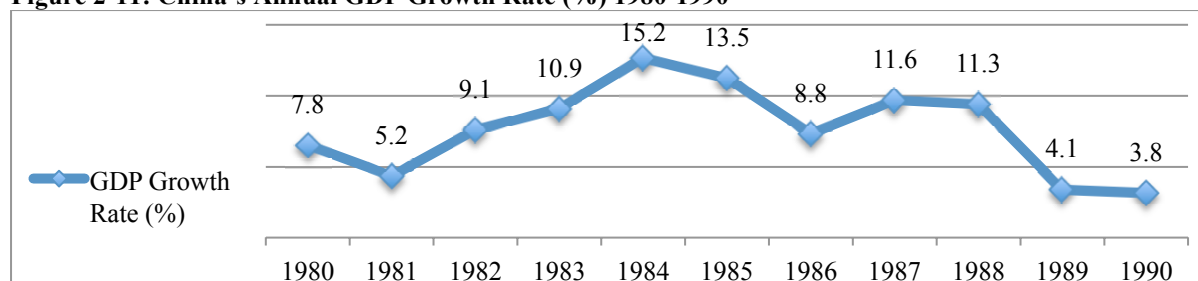
negative impacts on industrial structures engendered by administrative intervention and SOEs' development.

At the end of the 1980s and the beginning of the 1990s, the State's economic reform and the growth of SOEs encountered a number of difficulties, such as the overheated economy.<sup>154</sup> Although the Central Government planned to cool down such a trend, the decrease in economy came suddenly.<sup>155</sup> Even though privately-owned SMEs had flourished throughout the country and promoted economic growth in the 1980s, State intervention still caused large-scale SOEs to stall.<sup>156</sup> Thus, in 1992, Deng Xiaoping declared that the vitality of the State's economy required a "deep reform".<sup>157</sup> However, the 'Grasp the Big, Release the Small' policy (1995) paid increasing attention to the industrial structure and scale. In the last few years, this reform had brought a few successes,<sup>158</sup> but left obstacles for the industrial

<sup>154</sup> In the mid-1980s, because the Central Government of China "[o]fficially permitted the market track alongside with the planned track for industrial goods, but with a restriction of price ranges", the State faced an overheated economic growth: Qian (n 16) 5.

<sup>155</sup> In 1989, the number of Chinese privately-owned SMEs fell by more than 50 percent. In 1990, China's GDP growth rate reached its lowest point since 1980.

**Figure 2-11: China's Annual GDP Growth Rate (%) 1980-1990**



Source: 'GDP Growth (Annual %)' (*The World Bank*) (2015); Figure 2-11 devised by the author.

See Ma Licheng, *Jiaofeng 30 nian: Gaige Kaifang Sici Dazhenglun Qinli ji* [Three Decades of Confrontation: Four Controversies on the Issues of Reform and Opening Up (author's translation)] (Jiangsu People's Publishing, China 2008) 149; Coase and Wang (n 8) 105; and World Bank, 'GDP Growth (Annual %)' (*The World Bank*) <<http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG?page=4>> accessed 30 January 2017.

<sup>156</sup> See Dittmer and Liu (eds) (n 16) 2.

<sup>157</sup> See Deng Xiaoping, 'We Should Maintain Moderately Rapid Growth of Production', 7 June 1988, in Deng Xiaoping, *Selected Works of Deng Xiaoping Volume III: 1982-1992* (Foreign Languages Press, China 1994);

China is conducting a deep reform in order to create better conditions for future development... The choice before us is either to continue to make economic progress or to retreat. But to retreat will get us nowhere. Only by deepening reform in every field of endeavour can we ensure that the people will live a relatively comfortable life by the end of this century and that more progress will be made in the next.

and Diarmuid Rossa Phelan, 'Major Events in European and Chinese International Development 1947-2013' (2015) *Zeitschrift für Chinesisches Recht* 359, 376 (pointing out that "Deng Xiaoping accelerates market reforms to establish a 'socialist market economy'").

<sup>158</sup> Before 1993, most SOEs in China were in small and medium scale. Three years later, over 50 percent of SOEs in small scale had been privatised: see, e.g., Qian (n 16); and Dittmer and Liu (eds) (n 16) 242-43.

structure. Despite this framework showing more concern for the industrial structure among different industries and different kinds of enterprises, the industrial structure among different industries had revealed uneven development during the period of the ‘1990s National Industrial Policy Framework’ (1994). This ‘National Industrial Policy Framework’ placed undue emphasis on economic scale: for SOEs and industries it was “the bigger the better”.<sup>159</sup> This tendency became even worse after 1996, when the State Council published its ‘Notice of Statements on 1996’s SOE Reform Implementation’.

Owing to the framework and the State’s policy on SOE reform in 1996, by two years later Chinese heavy industry (mostly belonging to the government)<sup>160</sup> had showed a rapid growth momentum.<sup>161</sup> As regards SOEs’ development, this tendency seemed to be a good sign for a short period of time. However, it may have violated the original intention of Chinese “deep reform”, and harmed the long-term growth of the State’s economy. This occurred because the “successful” situation for SOEs partially relied on the privatisation process of small and medium-sized SOEs, which transferred the failure of some State-owned assets to private funds.

Therefore, when we examine the first Chinese national industrial policy framework and other industrial policies on SOE reform, it is clear that the grasping of large-scale SOEs, and the release of others, are continuous tasks in the implementation process. However, a reasonable industrial structure for SOEs and privately-owned SMEs has never been established.

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<sup>159</sup> See Alfred D Chandler, *Scale and Scope: The Dynamics of Industrial Capitalism* (Harvard University Press 1990) 36-39; and William Lazonick, *Business Organization and the Myth of the Market Economy* (CUP 1993) 132.

<sup>160</sup> See Lin Yifu, Cai Fang and Li Zhou, *Zhongguo Gouyou Qiye Gaige [The Reform of the State-Owned Enterprises]* (The Chinese University Press 1999) 1.

<sup>161</sup> By 2000, heavy industry accounted for over 60 percent of the gross industrial output value in China. From 2002, the industrial value-added output for heavy industry rose by 4.4 percent and reached 69 percent of total industrial value-added output by the end of 2005: Ma Xiaohu and Zhao Shufang, ‘Woguo Chanye Jiegou Yanbian 30 nian’ [The 30-Year Evolution of Industrial Structure in China (author’s translation)] in Zhou Dongtao and Ouyang Rihui, *Zhongguo Jingji Fazhan he Tizhi Gaige Baogao No.1: Zhongguo Gaige Kaifang 30 nian (1978-2008) [Report on China’s Economic Development and Institutional Reform No.1 – China: 30 Years of Reform and Opening-Up (1978-2008)]* (Social Sciences Academic Press, China 2008).

## 2.3 Eagerness of China's Economic Growth for Privately-Owned SMEs

Nowadays, the drawbacks of Chinese SOEs' unilateral development have become increasingly apparent. The State's long-term economic development cannot rely solely on the prosperity of SOEs. On the other hand, privately-owned SMEs, another kind of enterprise in the market, have been showing their energy in the State's economic development.<sup>162</sup> In 1999, the Central Government asserted that "SMEs are an important component of the non-State economy"<sup>163</sup>. It is commonly accepted that because of their small scale, SMEs have many advantages, but also disadvantages. Thus, while privately-owned SMEs are a crucial part of the Chinese economy,<sup>164</sup> they are the weak part looking for the State's support. Consequently, in order to form a balanced industrial structure, the Central Government should consider why the State's economy needs privately-owned SMEs and what supports are needed to provide for these SMEs' growth.

### 2.3.1 The Privileges of Being "Small"

Owing to certain advantages because of their small size, such as their flexibility, their large numbers, and their dynamism,<sup>165</sup> SMEs are useful complements to the market.<sup>166</sup> Based on the economist Marshall's statement, we may say that SMEs are analogous to small trees in the forest, because they have the elasticity and progressive force to fix loopholes for the forest's big trees (large-scale enterprises).<sup>167</sup> If this theory is applied to China, it can be argued that privately-owned SMEs, a crucial part of the State's economy, influence SOEs and contribute to industrial reconstruction.<sup>168</sup>

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<sup>162</sup> The development of private enterprises would strengthen activities of SOEs: Knight and Ding (n 12) 46.

<sup>163</sup> See Zhu Rongji, '1999 nian Guowuyuan Zhengfu Gongzuo Baogao' [Report on the Work of the Government (1999)] (The Second Session of the Ninth National People's Congress, Beijing, 5 March 1999) <[www.gov.cn/test/2006-02/16/content\\_201143.htm](http://www.gov.cn/test/2006-02/16/content_201143.htm)> accessed 30 January 2017.

<sup>164</sup> See Roy Rothwell and Walter Zegveld, *Innovation and the Small and Medium-Sized Firm* (Frances Pinter 1982) Preface.

<sup>165</sup> See Roy Rothwell, 'Industrial Innovation: Success, Strategy, Trends' in Mark Dodgson and Roy Rothwell (eds), *The Handbook of Industrial Innovation* (Edward Elgar 1994), cited in Barbara Scozzi, Claudio Garavelli and Kevin Crowston, 'Methods for Modeling and Supporting Innovation Processes in SMEs' (2005) 8 *European Journal of Innovation Management* 120, 124.

<sup>166</sup> See Rothwell and Zegveld (n 164).

<sup>167</sup> See Alfred Marshall, *Principles of Economics* (8th edn, The Macmillan Press Ltd 1982) 263-64.

<sup>168</sup> See David Smallbone and Friederike Welter, 'The Role of Government in SME Development in Transition



However, although small-scale enterprises are described as “beautiful”,<sup>169</sup> their scale can be a double-edged sword. SMEs often have weak competitiveness and a short life cycle.<sup>170</sup> Thus, when SMEs compete with large-scale enterprises in the market, they face a number of difficulties and plead for State assistance. This subsection illustrates both advantages and disadvantages of Chinese SMEs, and then explains why SMEs are important in the economy and why SME development needs State support.

### 2.3.1.1 Chinese SMEs – A Crucial Part in the State’s Economy

Generally, in a single country large-scale enterprises cannot monopolise all product markets. Instead, SMEs, with high flexibility and adaptability, are able to fill the gaps and match more market requirements.<sup>171</sup> In China, this theory applies to the relationship between SOEs and privately-owned SMEs. Although SOEs are extremely important, they cannot represent every enterprise. Therefore, besides meeting market requirements, privately-owned SMEs constitute a group that is of great importance in Chinese enterprises,<sup>172</sup> because of the fact that they cover a large number of enterprises, offer abundant career opportunities, increase productivity and profitability,<sup>173</sup> and so on.<sup>174</sup>

As regards the proportion of SMEs, China went through a process of increase from the end of the 1970s.<sup>175</sup> In the first decade of the 21st century, the percentage of SMEs out of the

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Economies’ (2001) 19 *International Small Business Journal* 63.

<sup>169</sup> See Ernst Friedrich Schumacher, *Small is Beautiful: Economics as if People Mattered* (2nd edn, Harper Perennial 1989) Preface; and in general, Joseph Pearce, *Small Is Still Beautiful: Economics as if Families Mattered* (Open Road Integrated Media, Inc. 2014) Ch VII.

<sup>170</sup> See Huang Mengfu, *Zhongguo Minying Qiye Fazhan Baogao (No.1) [The Development Report of Non-State-Owned Enterprises in China (No.1)]* (Social Sciences Academic Press, China 2005) 411.

<sup>171</sup> See Edward H Chamberlin, *The Theory of Monopolistic Competition: A Re-Oriented Theory of Value* (7th edn, Harvard University Press 1956) 100-05.

<sup>172</sup> See Saul Estrin and others, ‘Effects of Privatization and Ownership in Transition Economies’ (2009) 47 *Journal of Economic Literature* 699, 719.

<sup>173</sup> See Alexander Volokh, ‘Privatization and Competition Policy’ in Thomas K Cheng, Ioannis Lianos and D Daniel Sokol (eds), *Competition and the State* (Stanford University Press 2014) 15.

<sup>174</sup> In the UK, “[s]mall firms play a vital role in the economy. They are flexible and responsive to change. They stimulate competition and are the major source of job creation. They play a significant role in innovation. They contribute to flexible procurement from outsourcing and sub contracting”: see, e.g., James Curran, ‘What is Small Business Policy in the UK for? Evaluation and Assessing Small Business Policies’ (2000) 18 *International Small Business Journal* 36; and Board of Trade and others (eds), *Competitiveness: Helping Business to Win* (HMSO 1994) 12.

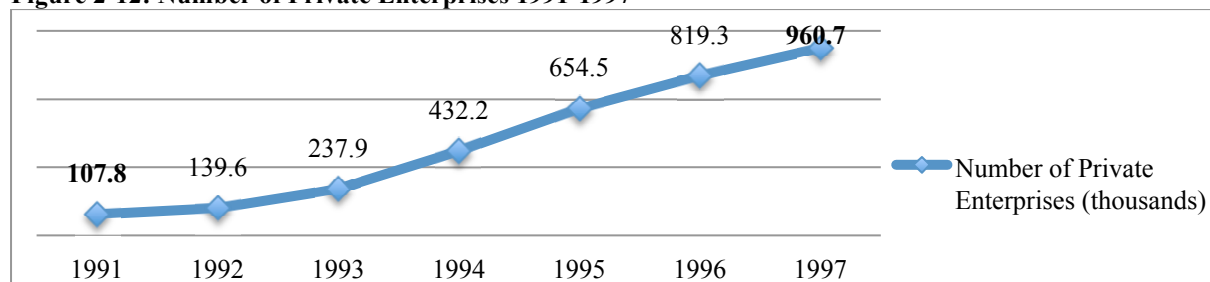
<sup>175</sup> In 1978, the individual economy was the only type of Chinese privately-owned SME, numbering 0.14 million and occupying a very small part of the market. In the 1980s, the Central Government allowed privately-owned small-scale enterprises to exist in urban China. Quite positively, in the following decades, the

total number of Chinese enterprises increased and reached the same level as most developed countries (i.e. 99 percent).<sup>176</sup> By the end of 2010, there were more than 45 million SMEs, accounting for 99.3 percent of all Chinese enterprises.<sup>177</sup>

In the case of career opportunities, SMEs also generate the majority of the employment in most developed countries.<sup>178</sup> Compared with the statistics in the US, the EU and Japan, China's SME proportion of employment was typically low at the turn of the century.<sup>179</sup>

number of private enterprises soared.

**Figure 2-12: Number of Private Enterprises 1991-1997**



Source: Yearbook of China Industrial and Commerce Administrative Management (1992-1998) and China Statistical Yearbook (1992-1998) cited in China's Emerging Private Enterprises: Prospects for the New Century; Figure 2-12 devised by the author.

See Zhang (n 118) 66; Richard Evans, *Deng Xiaoping and the Making of Modern China* (Penguin 1995) Chs13 & 14; H Stephen Harris and others (eds), *Anti-Monopoly Law and Practice in China* (OUP 2011) 9; and Gregory, Tenev and Wagle (n 115).

<sup>176</sup> For OECD members in 2005, the proportion of SMEs out of all enterprises exceeded 97 percent: SMEs accounted for 98-99 percent of all enterprises in Canada and America. SMEs get greater than 99 percent of all European enterprises. In Japan the situation with SMEs was almost the same. At the same time, SMEs in China also occupied over 99 percent of all enterprises: see, e.g., Eurostat Statistics Explained, 'Statistics on Small and Medium-Sized Enterprises' (*Eurostat Statistics Explained*, September 2015)

<[http://ec.europa.eu/eurostat/statistics-explained/index.php/Statistics\\_on\\_small\\_and\\_medium-sized\\_enterprises](http://ec.europa.eu/eurostat/statistics-explained/index.php/Statistics_on_small_and_medium-sized_enterprises)> accessed 30 January 2017; Edward I Altman and Gabriele Sabato, 'Modeling Credit Risk for SMEs: Evidence from the US Market' (2005) 43 *Abacus Journal* Issue 3 at 332; Zhiqiang Lu, 'Features and Financing Difficulties of Chinese SMEs' (Fourth-Annual China's SME Financing Forum, Shenzhen, China, 1 December 2005); and The Economist Intelligence Unit, 'SMEs in Japan: A New Growth Driver' (2010) *The Economist* <[https://www.eiuperspectives.economist.com/sites/default/files/EIU\\_Microsoft\\_JapanSMEs\\_FINAL-WEB.pdf](https://www.eiuperspectives.economist.com/sites/default/files/EIU_Microsoft_JapanSMEs_FINAL-WEB.pdf)> accessed 30 January 2017.

<sup>177</sup> See 'Shierwu Zhongxiao Qiye Chengzhang Guihua' [The 12th Five-Year Plan for SME Growth] (n 136).

<sup>178</sup> In the last decade, SMEs have provided approximately 75 percent of the net jobs in the US, which has added around 50 percent of the private workforce to the economy and employment, and represented more than 99 percent of all employers. In the EU private sector, about two out of three employment opportunities are provided by SMEs. SMEs have accounted for 60 to 70 percent of all jobs in most OECD countries: see, e.g., Sun Chuan, *Riben Zhongxiao Qiye yu Daqiye Guanxi Yanjiu* [*The Relationship between SMEs and Large-Scale Enterprises in Japan* (author's translation)] (People's Publishing House, China 2006) 74; Altman and Sabato (n 176); OECD, 'Small Businesses, Job Creation and Growth: Facts, Obstacles and Best Practices' (OECD, 1997) <[www.oecd.org/cfe/smes/2090740.pdf](http://www.oecd.org/cfe/smes/2090740.pdf)> accessed 30 January 2017; and European Commission Enterprise and Industry, 'Fact and Figures about the EU's Small and Medium Enterprise (SME)' (n 176).

<sup>179</sup> **Table 2-13: Employment Provided by Individual Economies and Private Enterprises 1997-2002**

Year		1997	1998	1999	2000	2001	2002
Proportion of Total Employment (%)	Individual Economy	7.82	8.69	8.80	7.10	6.51	6.40
	Private Enterprise	1.94	2.43	2.85	3.37	3.71	4.60
	Total	9.76	11.12	11.65	10.47	10.22	11.00

Source: Zhongguo Zhongxiaoqueye Fazhan Baogao (2008-2009) [China's SME Development Report

Fortunately, the proportion had increased year by year. By the end of 2008, Chinese SMEs were playing a vital role in employment, accounting for over 75 percent.<sup>180</sup>

Furthermore, even though the most important function of Chinese SMEs, namely the use of human resources, has been exploited in the last decade,<sup>181</sup> SMEs' functions are more than just that. For instance, SMEs can encourage market competition, improve the dynamic capabilities of enterprises, they can adjust the industrial organisation and structure, and so on. Although China's SMEs always exist in a situation where SOEs can use their market powers to influence or even control their growth, some high-growth SMEs grow quickly, and compete with a few SOEs. On the question of market dynamics, competition among SMEs cannot be overlooked. Since only a small percentage of SMEs are high-growth enterprises, in the competition most of China's SMEs, which do not have high-growth, are nervous about their situation and fear that they may be replaced at any time. Owing to this, SMEs are usually considered as an unstable, but dynamic, part of the market. They often have a beneficial role in increasing market activity and improving industrial organisation.

### 2.3.1.2 Chinese Privately-Owned SMEs' Wait for the State's Support

However, although SMEs present some really positive aspects for Chinese economic development, their own growth is a challenge. Following Itō's viewpoint, SMEs' difficulties generally arise from financial capital, the monopoly system and even the State.<sup>182</sup> Due to special circumstances in China, the monopoly of an enterprise often combines with the State's economic power: therefore, for privately-owned SMEs, financial capital and SOEs'

(2008-2009)]; table devised by the author.

See Li and others (eds) (n 96) 119 & 121.

<sup>180</sup> **Table 2-14: Chinese SMEs' Proportion of Total Non-Agricultural Employment 2008-2011**

Year	2008	2009	2010	2011
<b>SMEs' Proportion of Total Non-Agricultural Employment (%)</b>	78	75	80	Nearly 80

Source: *China Population & Employment Statistical Yearbook 2010* for 2008-2009 data, *Research on Response to Structural Problems in China's SME for 2010 datum*, *Research Report on China's SMEs 2011* for 2011 datum; table devised by the author.

See Huang Yufeng, *Woguo Zhongxiaoxing Qiye de Jiegouxing Kunjing ji Duice Yanjiu* [*Research on Response to Structural Problems in China's SME*] (Southwestern University of Finance & Economics Press, China 2010) 16; NBS, *China Population & Employment Statistical Yearbook 2010* (China Statistics Press 2010) 1-10; and All-China Federation of Industry & Commerce, *2011 nian Zhongguo Zhongxiao Qiye Diaoyan Baogao* [*Research Report on China's SMEs 2011* (author's translation)] (Joint Publishing House of China Industrial and Commercial 2012) 1.

<sup>181</sup> See Li and others (eds) (n 96) 29.

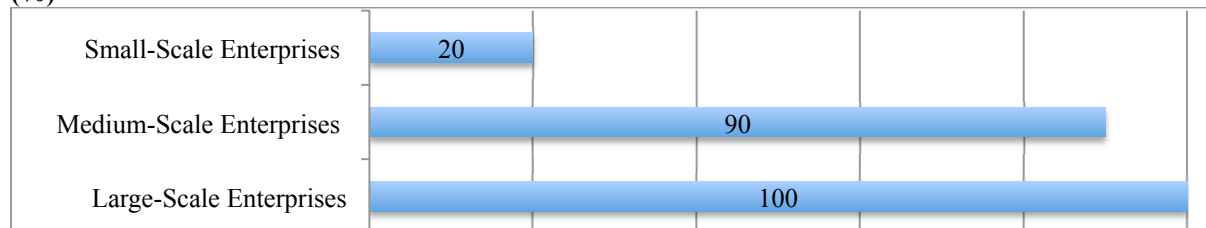
<sup>182</sup> See Itō Daikichi, *The Research on SMEs* (Nippon Hyoron Sha Co., Ltd. 1957) 28-29 & 42.

monopoly may have considerable negative impact on SMEs' growth. Since SMEs are unable to overcome such issues without assistance, they wait for the State's support.<sup>183</sup>

Capital shortfalls have been a fatal flaw in Chinese privately-owned SMEs' development.<sup>184</sup> Due to the instability of SMEs,<sup>185</sup> a credit system for privately-owned SMEs is difficult to establish.<sup>186</sup> Because of the absence of a credit system, privately-owned SMEs have trouble showing their credit; and without clean credit, hardly any banks or credit institutions are happy to loan capital to privately-owned SMEs.<sup>187</sup> This chain reaction leads to countless capital shortfalls for privately-owned SMEs in China. Because the financing bank<sup>188</sup> has not worked well for SME financing,<sup>189</sup> private lending (*minjian jiedai* in

<sup>183</sup> See Xu Baojian and Li Huilian (eds), *Zhongguo Xiaowei Qiye Shengcun Baogao 2012* [Report on the Survival Situation of China's Micro and Small Enterprises 2012 (author's translation)] (China Development Press 2012) 7.

<sup>184</sup> **Figure 2-15: Bank Loans Coverage Ratio for Large, Medium and Small-Scale Enterprises in China (%)**



Source: Research Report on China's SMEs 2011; figure devised by the author.

See All-China Federation of Industry & Commerce (n 180) 9; and Yuan Honglin, *Wanshan Zhongxiao Qiye Zhengce Zhichi Tixi Yanjiu* [Study on Improvement of Policy Support System in SME] (Dongbei University of Finance & Economic Press 2010) 181.

<sup>185</sup> The instability of SMEs can be shown in the lifespan of privately-owned SMEs. The life expectancy for Chinese SMEs at the beginning of the 2010s was 3.7 years, which is much lower than the average lifespan of SMEs in Europe, America and Japan: Development Research Center of the State Council, *Zhongxiao Qiye Fazhan* [The Development of Small and Medium Enterprises] (China Development Press 2011) 132.

<sup>186</sup> See Yuan (n 184).

<sup>187</sup> In 2012 only 31.4 percent of Chinese micro and small enterprises took bank loans as the main mode of financing: Xu and Li (eds) (n 183) 95.

<sup>188</sup> The author assumes that the financing bank in China means *commercial banks*. This research focuses on only four major and State-owned commercial banks: Bank of China, Industrial and Commercial Bank of China, Agricultural Bank of China, and China Construction Bank: China Banking Regulatory Commission, 'Guonei Yinhangye Jingrong Jigou' [Chinese Banks and Other Financial Institutions (author's translation)] (*China Banking Regulatory Commission*, 16 January 2015) <[www.cbrc.gov.cn/chinese/jrjg/index.html](http://www.cbrc.gov.cn/chinese/jrjg/index.html)> accessed 30 January 2017; and the Law of China on Commercial Banks 2003, Art 2.

Article 2: For the purposes of this Law, the term "commercial banks" means enterprise legal persons that are established in conformity with this Law and the Company Law of the People's Republic of China and that take in deposits from the general public, grant loans, handle settlements, etc.

<sup>189</sup> "Commercial banks are prohibited from charging fund management fees, financial consulting fees and other unreasonable fees for their services to small firms." At the very beginning of the 2010s, less than 7 percent of Chinese SMEs had accounts in four major and State-owned banks: see, e.g., Zhao Ying and Ni Yueju (eds), *Zhongguo Chanye Zhengce Biantong Qushi Shizheng Yanjiu 2000-2010* [The Empirical Analysis of Chinese Industry Policy Changing Tendency 2000-2010] (Economy & Management Publishing House, China 2012) 24; Xinhua News, 'China Lends Helping Hand to Cash-Strapped Small Firms' (*Xinhua, China*, 13 October 2011)

Chinese)<sup>190</sup> has become a practical method to resolve the financial capital issue of privately-owned SMEs. However, private lending disappoints the expectations of privately-owned SMEs once again,<sup>191</sup> because it exposes the defects of the State's financial system (the owners of private finance institutions may abscond with clients' money, and some private finance institutions may use bank loans to practice usury<sup>192</sup>). Therefore, it is vital to recognise that in China, privately-owned SMEs should rely mostly on the State's effective assistance to resolve their capital needs issues.<sup>193</sup> The Central Government started to set up a fund of RMB 60 billion Yuan (approximately £6.16 billion) to support SMEs.<sup>194</sup> Further, China will enhance regional equity markets and diversify its financial channels in order to serve SMEs.<sup>195</sup>

In addition, besides the practical finance system, the State should also favour maintaining a balance between the development of privately-owned SMEs and SOEs. In order to analyse SOEs' monopoly, it is necessary to use Galbraith's theory of "the planning system" and "the market system".<sup>196</sup> In China, this can be explained as follows: SOEs play

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<[www.gov.cn/english/2011-10/13/content\\_1967843.htm](http://www.gov.cn/english/2011-10/13/content_1967843.htm)> accessed 30 January 2017; Zheng (n 100) 7 & 75; and Gregory, Tenev and Wagle (n 115) 66-68.

<sup>190</sup> In this thesis, private lending in China means that privately-owned SMEs with capital shortfalls could choose to be financed by domestic individual creditors (see footnote 193 below): 'Wenzhoushi Minjian Rongzi Guanli Tiaoli' [Regulation of Wenzhou Municipality on the Administration of Private Finance] (2013) <[www.lawinfochina.com/display.aspx?id=15722&lib=law](http://www.lawinfochina.com/display.aspx?id=15722&lib=law)> accessed 30 January 2017.

<sup>191</sup> By 2012 only 10.5 percent of Chinese micro and small enterprises were using private lending as a mode of financing: Xu and Li (eds) (n 183) 95.

<sup>192</sup> See Nie Weizhu, Hong Nuoxin and Luo Yidan, 'Liu Kegou: Minjian Jiedai Luanxiang Genzai Jinrong Tixi Quexian' [Liu Kegou: Private Lending Exposes the Defects of the Chinese Financial System (author's translation)] *China's First Financial Daily* (Shanghai, 9 March 2012) A4.

<sup>193</sup> In 2011, the Central Government was "[c]onsidering establishing a monitoring system for private lending activities after a severe debt crisis of small firms in east China brought the informal lending market into spotlight". Because 45 percent of Chinese micro and small enterprises expected State's support for improving financing channels, in 2014, China did "[s]tart testing the waters of legalized private lending...": see, e.g., Xu and Li (eds) (n 183) 30; Xinhua News, 'China to Monitor Private Lending' (*Xinhua, China*, 11 November 2011) <[http://europe.chinadaily.com.cn/china/2011-11/11/content\\_14075216.htm](http://europe.chinadaily.com.cn/china/2011-11/11/content_14075216.htm)> accessed 30 January 2017; and Xinhua News, 'China Legalizes Private Lending in Wenzhou' (*Xinhua, China*, 28 February 2014) <[http://news.xinhuanet.com/english/china/2014-02/28/c\\_133150649.htm](http://news.xinhuanet.com/english/china/2014-02/28/c_133150649.htm)> accessed 30 January 2017.

<sup>194</sup> Xinhua News, 'US \$9.4 Billion Fund to Be Set up for SMEs' *Shanghai Daily, China* (Beijing, 2 September 2015) A3.

<sup>195</sup> See Xinhua News, 'China to Regulate Regional Equity Markets to Aid SMEs Financing' (*Xinhua, China*, 12 January 2017) <[www.chinadaily.com.cn/business/2017-01/12/content\\_27934927.htm](http://www.chinadaily.com.cn/business/2017-01/12/content_27934927.htm)> accessed 30 January 2017.

<sup>196</sup> "For Galbraith, a dual system composed of a planning system and a market system characterized the modern economy: large, well-organized firms are able to dominate market relations, while the millions of smaller enterprises cannot escape classic market restraints but are subject to both market and planning system control": see, e.g., Conrad P Waligorski, *John Kenneth Galbraith: The Economist as Political Theorist* (Rowman & Littlefield 2006) 59; and John K Galbraith, *Economics and the Public Purpose* (3rd edn, HarperCollins

the role of the planning system, while privately-owned SMEs are used to represent the market system. It is common for SOEs to have advanced technologies, and consume large quantities of resources and financial capital. The State also grants specific or exclusive rights to SOEs on some occasions. Therefore it is easy for SOEs to use their advantages to obstruct privately-owned SMEs. Owing to this tendency, the State should anticipate the crisis behind the interim success brought about by the partial intervention of SOEs, as well as limiting SOEs' over-development and forbidding SOEs from harming the interests of privately-owned SMEs and consumers.

All in all, besides the advantages, Chinese privately-owned SMEs also face several challenges in the development process. To achieve growth, they have always looked for State intervention. However, although China has never stopped its support in promoting SMEs since the end of the 1970s, exploring a suitable approach for State intervention in privately-owned SMEs remains a challenging task for the State. If this task could be suitably solved, privately-owned SMEs would finally have a chance to experience robust development.

### **2.3.2 State Intervention in China's Privately-Owned SMEs – Better than the Best**

With economic growth, Chinese economic circumstances have been constantly changing. In order to achieve the best results for SMEs' development, State intervention in privately-owned SMEs is normally coordinated with economic changes. However, although China has a commendable desire to promote SMEs, this is indeed a difficult task. Therefore, this subsection illustrates previous SME policies in order to discover the drawbacks of State intervention in the promotion process. In addition, it uses the experience from Japan on the issue of SMEs' support for reference, and then proposes a preferable support approach for the development of privately-owned SMEs.

#### *2.3.2.1 The State's Non-Stop Support for SME Development*

During the last quarter of the 20th century, China adopted a series of policies and laws

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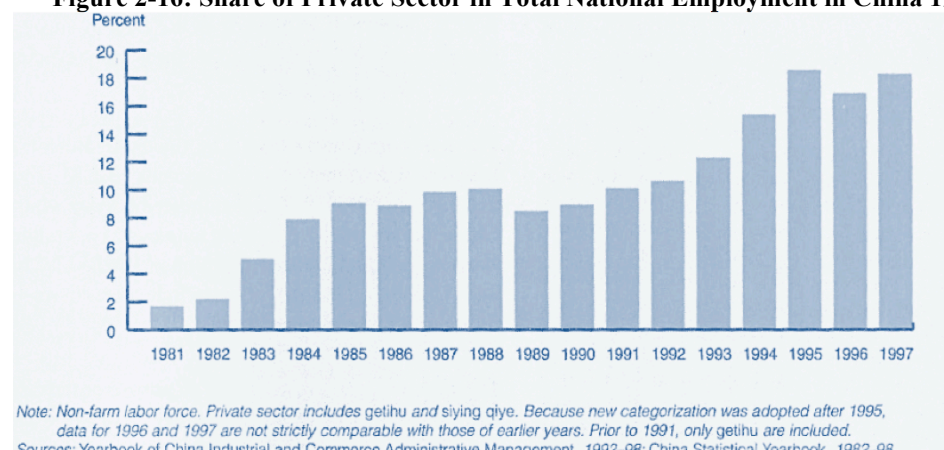
Distribution Services 1974) 232-53.

in recognition of the importance of individual economies and private enterprises, it legalised their existence, and supported their growth.<sup>197</sup> Hence, from the 1980s, individual economies and small-scale private enterprises sprang up around China.<sup>198</sup> Whilst they were extremely small and contributed less than 10 percent of GDP,<sup>199</sup> they enhanced market dynamics. However, although the ‘Grasp the Big, Release the Small’ policy (1995) for SOEs increased the quantity of privately-owned SMEs,<sup>200</sup> SMEs quality was not ideal. In addition, the Chinese ‘Report on the Work of the Government (1999)’ focused on SMEs’ development at the end of the last century.<sup>201</sup> SME promotion policies have steadily increased up to the present.

At the turn of the 21st century, with the implementation of ‘Several Statements of the State Council on Cultivating the Social Service System of SMEs’ (2000),<sup>202</sup> China endeavoured to establish multi-level, multi-channel, and multi-function social networks for SMEs (see further in footnote 13 in Chapter 3). Furthermore, the State Council stated that the State’s objectives were to protect the lawful interests of SMEs, to enhance the sustainability of privately-owned SMEs, and to support SME growth within economic rules.<sup>203</sup> Three

<sup>197</sup> The policies and laws include the *Constitution of China (1982 Revision)*, ‘CPC Central Committee and State Council (1987) Document No.1’, ‘Several Statements of the State Council on Supporting the Development of Individual and Private Economy’ (1993), and so on.

<sup>198</sup> **Figure 2-16: Share of Private Sector in Total National Employment in China 1981-1997**



Source: *China’s Emerging Private Enterprises: Prospects for the New Century*

See Gregory, Tenev and Wagle (n 115) 17.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> See Zhu (n 163).

<sup>202</sup> See ‘Guanyu Peiyu Zhongxiao Qiye Shehuihua Fuwu Tixi Ruogan Wenti de Yijian’ [Several Statements of the State Council on Cultivating the Social Service System of SMEs] (2000)

<[www.gov.cn/gongbao/content/2000/content\\_70316.htm](http://www.gov.cn/gongbao/content/2000/content_70316.htm)> accessed 30 January 2017.

<sup>203</sup> *Id.*

months later, a new policy, ‘Several Statements of the State Council on Encouraging and Promoting the Development of SMEs’ (2000), declared that the State should put forward policies on guiding and providing increasing support to privately-owned SMEs.<sup>204</sup> Thereafter, the private sector was ready to “[b]ecome a vital component part of the socialist market economy and an important propeller of social productive forces”<sup>205</sup>. Accordingly, in the first seven years of the 21st century, China’s privately-owned SMEs experienced a rapid and healthy development.<sup>206</sup>

However, such exciting progress for privately-owned SMEs did not lead to a situation where privately-owned SMEs immediately sprang up all over the place.<sup>207</sup> Therefore, China proposed ‘the 11th Five-Year Plan for SME Growth’ (2006-2010) (also known as ‘SME Growth Project’) in order to promote SMEs, cultivate an SME social service system, deepen SMEs’ reform, and so on.<sup>208</sup> The ‘SME Growth Project’ made support for privately-owned SMEs more explicit and comprehensive than before. However, this project was not able to produce the desired level of growth for privately-owned SMEs. Subsequently, another policy, ‘Several Opinions of the State Council on Further Promoting the Development of SMEs’ (2009), repeated that SMEs are a major force in national economic and social development.<sup>209</sup> This policy raised the role of SMEs to a new level: SMEs have functions to perform which are in the “public interest”.<sup>210</sup> However, although the desire is very strong,

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<sup>204</sup> See ‘Guanyu Guli he Cujin Zhongxiao Qiye Fazhan de Ruogan Zhengce Yijian’ [Several Statements of the State Council on Encouraging and Promoting the Development of SMEs] (2000) (n 136).

<sup>205</sup> See ‘Zhonggong Zhongyang Guanyu Wanshan Shehui Zhuyi Shichang Jingji Tizhi Ruogan Wenti de Jueding’ [CPC Central Committee’s Resolution on Several Issues on Improvement of Socialist Market Economic System] (2003) (n 94); and ‘Several Statements of the State Council on Encouraging, Supporting and Guiding the Development of Individual and Private Economy and Other Non-Public Sectors of the Economy’ (2005) <[www.lawinfochina.com/display.aspx?lib=law&id=3977](http://www.lawinfochina.com/display.aspx?lib=law&id=3977)> accessed 30 January 2017.

<sup>206</sup> See Li and others (eds) (n 96) 7.

<sup>207</sup> For example, the number of Chinese privately-owned gas stations has shrunk since the end of the 20th century (see Chapter 4.2 below). In the case of the steel industry, following administrative directives to shut down privately-owned SMEs has become a popular trend since 2005 (see Chapter 4.1 below).

<sup>208</sup> See ‘Fagaiwei: Shiyiwu Shishi Zhongxiao Qiye Chengzhang Gongcheng Jiuxiang Neirong’ [9 Issues in Implementing ‘the 11th Five-Year Plan for SME Growth’ (author’s translation)] (n 136).

<sup>209</sup> This policy aimed to solve growth difficulties of Chinese SMEs, e.g. discrimination when entering State-owned monopoly industries, financing difficulties, a lack of support policies, poor management, etc.; nevertheless, these tasks were hard to accomplish. Although support policies have been released to encourage private funds to enter the fixed-broadband market, privately-owned fixed-broadband operators have been facing a constant entry dilemma (see Chapter 4.3 below): ‘Guowuyuan Guanyu Jinyibu Cujin Zhongxiao Qiye Fazhan de Ruogan Yijian’ [Several Statements of the State Council on Further Promoting the Development of SMEs] (2009) (n 136).

<sup>210</sup> *Id*, the English version is available at ‘Bureau of China International SME Fair’



the reality is extremely cruel. This policy did not change the vulnerable situation of privately-owned SMEs: in reality, partially affected by the late-2000s global financial crisis and the tendency of “Guojin Mintui”, “the State advances while the private sector retreats” (see Chapter 2.1.2.2 above), the pace of growth of privately-owned SMEs slowed down during the Eleventh Five-Year Plan (2006-2010) period.<sup>211</sup>

Therefore, in order to ensure continuity of China’s SME policy, the ‘SME Growth Project’ was mentioned once again in the Twelfth Five-Year Plan (2011-2015).<sup>212</sup> It aimed to improve the development environment, as well as enhancing the viability, competitiveness and sustainability of privately-owned SMEs.<sup>213</sup> As the project is still in progress, whether or not it will be effective in promoting SMEs’ development remains uncertain. However, it is clear that because this project does not take “Guojin Mintui” seriously, ignoring obstacles created by the growth of SOEs remains an unchanging situation for privately-owned SMEs.<sup>214</sup>

### 2.3.2.2 Improvement of Chinese Privately-Owned SMEs through Coordination

To review the process of State intervention *vis-à-vis* Chinese privately-owned SMEs,

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[www.smefair.org.cn/en/html/NEWS/Documents/article/1270626462786.html](http://www.smefair.org.cn/en/html/NEWS/Documents/article/1270626462786.html)> accessed 30 January 2017.

SMEs play an important role in economic and social development. Promoting the development of SMEs is an important foundation to maintain stable and sustained economic growth and a major strategic task to safeguard people’s livelihood and social stability.

<sup>211</sup> The Central Government maintained that SMEs achieved rapid and sustainable development during the Eleventh Five-Year Plan period (2006-2010); SMEs’ contribution to China’s GDP was around 60 percent. However, the development of privately-owned SMEs was retarded after growing at their fastest pace between 2002 and 2007. Suffering from the global financial crisis of 2007 onwards, SMEs experienced increased failure rates: see, e.g., Li and others (eds) (n 96) 7-9 & 141; ‘Shierwu Zhongxiao Qiye Chengzhang Guihua’ [The 12th Five-Year Plan for SME Growth] (2011) (n 136); OECD, ‘SMEs’ Contribution to GDP, Employment and Exports in Asia, 2011 (or Latest Year Available)’ in OECD, *Economic Outlook for Southeast Asia, China and India 2014* (OECD Publishing 2013); Hasliza Abdul Halim, Noor Hazlina Ahmad and T Ramayah, ‘Maneuvering the Rough Commercial Landscape through Outsourcing: Repositioning Malaysian SMEs’ in Patricia Ordóñez de Pablos (ed), *International Business Strategy and Entrepreneurship: An Information Technology Perspective* (Business Science Reference, IGI Global 2014) 44; Chen (n 137) 237-38; and Lei Zhang and Wei Xia, ‘Integrating Small and Medium-Sized Enterprises into Global Trade Flows: The Case of China’ in Marion Jansen, Mustapha Sadni Jallab and Maarten Smeets (eds), *Connecting to Global Markets: Challenges and Opportunities: Case Studies Presented by WTO Chair-Holders* (WTO Publications 2014) 41.

<sup>212</sup> See ‘Shierwu Zhongxiao Qiye Chengzhang Guihua’ [The 12th Five-Year Plan for SME Growth] (2011) (n 136).

<sup>213</sup> See *id.*; and Cheng Jingye, ‘Ambassador Cheng Jingye’s Speech at China SME Global Development Forum’ (China SME Global Development Forum, Vienna, 25 June 2012)

[www.chinesemission-vienna.at/eng/hyyfy/t945446.htm](http://www.chinesemission-vienna.at/eng/hyyfy/t945446.htm)> accessed 30 January 2017.

<sup>214</sup> *Id.*

although the State has repeatedly published relevant industrial policies in the last three decades, the development of SMEs has faced constant challenges. In reality, in the world of State intervention there is no “best” approach – only one that is better for the State’s economic development at some specific time.<sup>215</sup> The same principle applies to State support for SME growth. It is important to find a suitable way to keep SOEs’ development and privately-owned SMEs’ growth in balance. However, since cooperation between SOEs and privately-owned SMEs is not always evident in China,<sup>216</sup> it is necessary to draw on the experience of other countries.

One country which does generate positive relationships between some well-developed SMEs and large-scale enterprises is Japan, where, in the manufacturing industries, SMEs and SOEs cooperate with each other.<sup>217</sup> Essentially, this positive situation relies on the “Supplier System” (most relevant SMEs work as subcontractors).<sup>218</sup> Under such a system, large-scale enterprises love to use their financial and technological advances to supervise the development of relevant SMEs. Because of these advances, it seems feasible for large-scale enterprises to assimilate relevant SMEs into the chain of production and operations, and then control the growth of those SMEs. For relevant SMEs, since large-scale enterprises cannot always meet all the requirements of the market, they are useful complements to the market. If SMEs can cooperate with relevant large-scale enterprises, it can be much easier for them to get a slice of the market for themselves. In Japanese manufacturing industries, “[m]akers, sharing risks with suppliers, attempt to cooperate with them to learn ways to upgrade their capabilities”<sup>219</sup>.

However, in China, the State’s industrial policy fails to provide a similar environment for rapid cooperation opportunities between privately-owned SMEs and SOEs. Instead, the State grants certain specific or exclusive rights to SOEs; and several SOEs use these rights to obstruct the development of privately-owned SMEs. For instance, in 1999, the State Council

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<sup>215</sup> Different development stages require different interventions: Vito Tanzi, *Government versus Markets: The Changing Economic Role of the State* (CUP 2011) Preface.

<sup>216</sup> See Development Research Center of the State Council (n 185) 152.

<sup>217</sup> See Sun (n 178) 3.

<sup>218</sup> See Cornelia Storz (ed), *Small Firms and Innovation Policy in Japan* (Routledge 2006) 137.

<sup>219</sup> See Christopher Howe, *China and Japan: History, Trends, and Prospects* (OUP 1996) 65.

announced that apart from two SOEs, namely PetroChina Company Limited (PetroChina) and Sinopec Group Company (Sinopec),<sup>220</sup> other wholesale sellers of refined oil were not allowed throughout over the country.<sup>221</sup> Additionally, the State granted specific or exclusive rights to retail sales to these two SOEs in 2001.<sup>222</sup> Since the petrol and chemical industry is monopolised by SOEs, privately-owned SMEs in this industry find it hard to survive.<sup>223</sup> There has been no genuine competition in this industry since the turn of the 21st century.

In the light of the Japanese experience, it is worth emphasising two points regarding China. *First*, cooperation between SOEs and privately-owned SMEs cannot interrupt SOE growth. Instead, it will lead to mutual benefit for both of them. *Second*, operating under the current SOE policy and SME policy, privately-owned SMEs find it hard to overcome discrimination and achieve success.

## 2.4 Conclusion

Due to a long history of economic intervention, the (semi-)government-oriented mode has played the pivotal role in China's economic development progress.<sup>224</sup> No matter how much the mode changes, SOEs are the constant beneficiary. From the First Five-Year Plan (1953-1957) to the current industrial policy, revitalising SOEs has been a matter of life and

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<sup>220</sup> Nowadays, the Chinese petrol and chemical industry is monopolised by three SOEs: China National Offshore Oil Corporate, PetroChina Company Limited and Sinopec Group Company. All of these three SOEs control oil drilling, refineries, sales, imports and exports all over China.

<sup>221</sup> See 'Guanyu Qingli Zhengdun Xiaolianyouchang he Guifan Yuanyou Chengpinyou Liutong Zhixu de Yijian' [On the Liquidating and Restructuring of the Small Oil Refining Factories and Standardizing the Circulation Order of Crude Oil and Petroleum Products' ('Order No.38 of 1999')] (1999) <<http://finance.sina.com.cn/chanjing/b/20050816/08301890025.shtml>> accessed 30 January 2017.

<sup>222</sup> See 'Guanyu Jinyibu Zhengdun he Guifan Chengpinyou Shichang Zhixu de Yijian' [The State Council Transmitted the State Economic and Trade Commission (SETC) and other Departments Published Further Notice on Regulating the Circulation of Crude Oil] (2001) <[www.gov.cn/gongbao/content/2001/content\\_61131.htm](http://www.gov.cn/gongbao/content/2001/content_61131.htm)> accessed 30 January 2017.

<sup>223</sup> Because of those two policies, the percentage of privately-owned gas stations dropped to 40 percent in 2003 from 87.6 percent in 1999: Xia Ying, 'Fanlongduanfa: Xianshi yu Qiwang' [Anti-Monopoly Law: Reality versus Expectations (author's translation)] *Southern Weekend* (Guangzhou, 29 July 2004) <<http://finance.sina.com.cn/g/20040729/1714911465.shtml>> accessed 30 January 2017.

<sup>224</sup> See Huang Jinxi, *Fanlongduanfa Shiyong Chuwai yu Huomian Zhidu Yanjiu – Yi Chanye Zhengce yu Jingzheng Zhengce de Chongtu yu Xietiao wei Shijiao* [Study on Anti-monopoly Exemptions and Exceptions – From A Perspective of Conflict and Coordination between Industrial Policy and Competition Policy (author's translation)] (Xiamen University Press, China 2014) 236; and Qingjiang Kong, 'The "State-Led-Economy" Issue in the BIT Negotiations and Its Policy Implications for China' (2016) 5 *China-EU Law Journal* 13, 15 (the latter points out that "[i]f we evaluate China's government-SOEs relationship... it seems reasonable to call Chinese economic system as a state-led economy. For a relatively long time, China's economy has featured as semi-market owing to the obvious governmental dominance").

death to the economy. In turn, SOEs have surface-positive effects on the State's economic development.<sup>225</sup> However, the prosperity of SOEs does not equate to national economic prosperity. The Chinese market, which has sought to be a competitive environment, with a harmonious mixture of various types and scales of enterprises, has been rather like a playground, existing simply for the benefit of SOEs. Based on the Five-Year Plan economic development system and the State's industrial policies, SOEs can stifle development of privately-owned SMEs and even partially drive the State's economy into rough territory.

To address this problem, several steps are required. First, 'the Five-Year Plan System' and State's industrial policy must take responsibility for slowing down the "selfish" development of SOEs. The myopic growth of SOEs (which blindly emphasises scales of enterprises and industries) cannot in itself create a long-term sound development, because SOEs have grown up in a comparatively short period of time without necessary and effective competition.

Second, because SOEs do not prevent themselves from harming other market participants, such as privately-owned SMEs, 'the Five-Year Plan System' and the State's industrial policy should be adjusted in certain ways. If we look back over recent decades, in order to ensure the national economic security, the "[g]overnment took too active a role in the economy..."<sup>226</sup> State intervention has focused on SOE growth in certain traditional State-owned sectors, which are considered as pillars in the Chinese economy (such as steel production). Simultaneously, the State's attention towards the growth of privately-owned SMEs has been correspondingly reduced. As a result, 'the Five-Year Plan System' and industrial policies have left increasing obstacles for privately-owned SMEs in their development approach.

Third, 'the Five-Year Plan System' and State's industrial policy should assist privately-owned SMEs in their efforts towards long-term development. Based on the advantages of being "small", privately-owned SMEs have become a dynamic factor in the

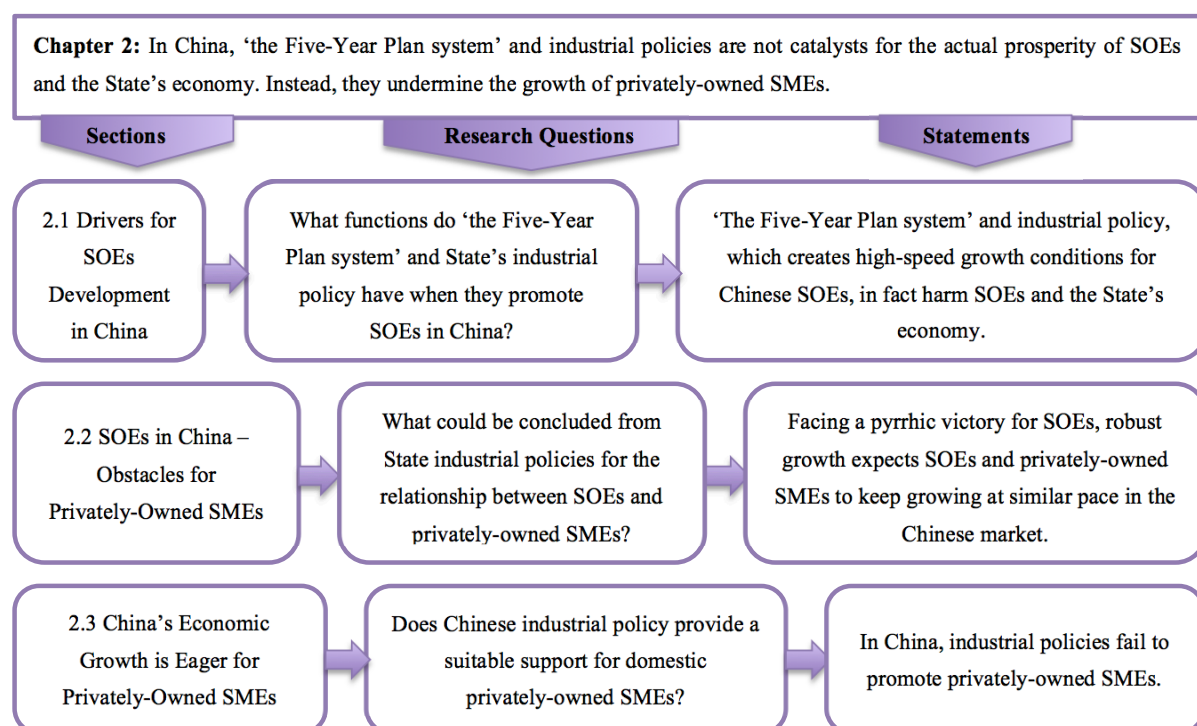
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<sup>225</sup> See Justin Yifu Lin, Fang Cai and Zhou Li, 'Competition, Policy Burdens, and State-Owned Enterprise Reform' (1998) 2 *The American Economic Review* 422, 423.

<sup>226</sup> See Stiglitz (n 13) 72.

Chinese market. However, the small-scale characteristic also contains some obstacles; therefore they expect the State to devote great effort to support their development. Because both ‘the Five-Year Plan System’ and the State’s industrial policy have failed to offer suitable support, privately-owned SMEs will require legal assistance, especially from *the Anti-Monopoly Law of China 2007*, to ensure that the State conforms to the application of its industrial policies.<sup>227</sup>

\* **Figure 2-17: Overview Figure of Chapter 2**



<sup>227</sup> See Yong Huang and others, ‘China’s 2007 Anti-Monopoly Law: Competition and the Chinese Petroleum Industry’ (2010) 31 Energy Law Review 337, 344.

# Chapter Three: The Reasons Why the Legal Framework for Supporting Market Participation by Privately-Owned SMEs Has Failed in China<sup>1</sup>

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[C]hina is switching gradually to the market economy while keeping the political structure intact. This path is long and rocky because the government has to walk a fine line between the creation of a dynamic private sector and the maintenance of a socialist country. The most challenging aspects include introducing of competition without compromising the dominance of State-owned enterprises

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<sup>1</sup> Certain ideas presented in the present Chapter was presented at the Socio-Legal Studies Association Annual Conference (SLSA 2016), entitled ‘When the Chinese Economic Law Facing Administrative Powers: Regarding Survival Conditions of Chinese Privately-Owned Small and Medium-Sized Enterprises’, held in Lancaster, UK on 5-7 April 2016; and some were also presented at the UK Annual Conference of the International Association of Legal and Social Philosophy (IVR) 2016, entitled ‘When Chinese Economic Law Faces Administrative Powers: How Fairness Between Economic Actors Can Be Promoted Through Law in China’, held in Leeds, UK on 29-30 October 2016; and some will be presented at the XXVIII World Congress of the International Association for the Philosophy of Law and Social Philosophy (IVR 2017), entitled ‘Supreme Administrative Power: Why Chinese Economic Law Fails with Regard to Privately-Owned SMEs’, held in Istanbul, Turkey on 16-21 July 2017. An early version of this Chapter will be published as Jing Wang, ‘A Maze of Contradictions: Chinese Law and Policy in the Development Process of Privately Owned Small and Medium-Sized Enterprises in China’ (2017) 25 Michigan State International Law Review (forthcoming).

(SOEs) in strategic sectors, restraining the dramatic changes in the economy from extending to the political arena, and keeping a good balance between efficiency and equality.

– Yong Huang<sup>2</sup>

This chapter aims to explore the Chinese establishment of a legal framework for encouraging privately-owned SMEs.<sup>3</sup> Essentially, the chapter focuses on two aspects: the legal flaws in *the Law of China on Promotion of Small and Medium-Sized Enterprises 2002 (the Chinese Law on Promotion of SMEs 2002)* and *the Anti-Monopoly Law of China 2007 (the Chinese Anti-Monopoly Law 2007)*. These two Laws are designed to enhance and promote the interests of privately-owned SMEs, but this objective is not achieved.

This chapter therefore analyses first, the legal flaws in *the Chinese Law on Promotion of SMEs 2002* and *the Chinese Anti-Monopoly Law 2007*; and second, the relationship between *the Chinese Anti-Monopoly Law 2007* and industrial policy from the perspective of the “public interest”, which involves consideration of how to reconcile the competing interests of the State’s interest, with the interests of the enterprises and consumer welfare (see further in Chapters 3.2 & 3.3 below), in the process of encouraging privately-owned SMEs’ growth. Because industrial policies have taken priority over the Anti-Monopoly Law in the Chinese market, how to balance their functions in the process of economic development has always been a hot potato in China. On one hand, positive economic growth should follow the competitive mechanism while, on the other hand, with regard to the economic situation of China and global economic competition, administrative powers should also be used to strengthen State’s economy. Otherwise, China’s sound and long-term economic growth is unachievable. This chapter will conclude that in China, industrial policies grant too many privileges and immunities to SOEs and administrative agencies, and thereby overrides the influence of the 2002 and 2007 Acts, as well as constraints the growth of privately-owned SMEs.

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<sup>2</sup> See Yong Huang, ‘Pursuing the Second Best: the History, Momentum, and Remaining Issues of *China’s Anti-Monopoly Law*’ (2008) 75 *Antitrust Law Journal* 117, 121.

<sup>3</sup> Sound economic policy must be restricted and underpinned by law: David Kennedy and Joseph E Stiglitz (eds), *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century* (OUP 2013) 149.

In China currently, the “public interest” seems to mean the State’s interest or consumer welfare from different perspectives, whereas I will contend, in this thesis, that the “public interest” actually should mean the reconciliation of competing interests between the State’s interest, interests of SOEs, interests of privately-owned SMEs and consumer welfare from the Anti-Monopoly Law perspective.

### **3.1 A Blip for China’s Privately-Owned SMEs: *The Chinese Law on Promotion of SMEs 2002***

Starting with the 2002 Act, between the beginning of 2002<sup>4</sup> to the end of 2007<sup>5</sup>, SMEs grew at their fastest pace,<sup>6</sup> reaching a new high in both quantity and quality.<sup>7</sup> Basically, during that 2002-2007 period, while a series of policies for the promotion of SMEs, and *the Chinese Law on Promotion of SMEs 2002*, had made a significant contribution to SME growth in China,<sup>8</sup> however, this momentum did not last long, because *the Chinese Law on Promotion of SMEs 2002* had some unavoidable legal flaws, which will now be analysed below.

#### **3.1.1 Welcome Changes to Privately-Owned SMEs Regime in China (2000-2007)**

In the spring of 2000, the State’s first individual policy on SME promotion, ‘Several

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<sup>4</sup> The year 2002 became a milestone for the Chinese establishment of the SMEs’ legal framework because the first SME promotion law, *the Chinese Law on Promotion of SMEs 2002*, was adopted.

<sup>5</sup> The reasons why the fastest pace ended in 2007 can be summarised as follows: (a) after the late-2000s global financial crisis, the tendency of ‘Guojin Mintui’, “the State advances while the private sector retreats”, emerged in China (see Chapter 2.1.2.2 above); (b) *the Chinese Law on Promotion of SMEs 2002* flaws in limiting administrative actions had become evident (see Chapter 3.1.2 below); (c) *the Chinese Anti-Monopoly Law* adopted in 2007 failed to remedy the legal flaws in *the Chinese Law on Promotion of SMEs 2002* (see Chapter 3.2.2 below).

<sup>6</sup> See Li Zibin and others (eds), *Zhongguo Zhongxiaoqiye Fazhan Baogao (2008-2009)* [*China’s SME Development Report (2008-2009)*] (China Economic Publishing House 2009) 7.

<sup>7</sup> As regards quantity, SMEs have accounted for 99 percent of all Chinese enterprises from 2003 onwards. As regards quality, SMEs provided approximately 60 percent of Chinese GDP in 2007, which had increased by nearly 10 percent since 2001: see, e.g., Research Group of China SME Index of Economic Development, *Zhongguo Zhongxiao Qiye Jingji Fazhan Zhishu Yanjiu Baogao, 2005* [*Research Report on China SME Index of Economic Development (SMEI, 2005)*] (Science Press, China 2008) Preface; Ai Fang, ‘Zhongxiaoqiye Rongzi Jiuqing Nanzai Nali’ [Financing Difficulties for SMEs in China (author’s translation)] *Economic Daily, China* (Beijing, 2 July 2002) 7; and Xiangfeng Liu, ‘SME Development in China: A Policy Perspective on SME Industrial Clustering’ in Hank Lim (ed), *ERIA Research Project Report, 2007, No.5 – Asian SMEs and Globalization* (Economic Research Institute for ASEAN and East Asia, March 2008) <[www.eria.org/SME%20Development%20in%20China\\_A%20Policy%20Perspective%20on%20SME%20Industrial%20Clustering.pdf](http://www.eria.org/SME%20Development%20in%20China_A%20Policy%20Perspective%20on%20SME%20Industrial%20Clustering.pdf)> accessed 30 January 2017.

<sup>8</sup> Chinese SME promotion policies include ‘Several Statements of the State Council on Cultivating the Social Service System of SMEs’ (2000), ‘Several Statements of the State Council on Encouraging and Promoting the Development of SMEs’ (2000), ‘The 11th Five-Year Plan for SME Growth’ (2006-2010), ‘The 12th Five-Year Plan for SME Growth’ (2011-2015), ‘Several Statements of the State Council on Further Promoting the Development of SMEs’ (2009), etc.: see further in Chapter 2.3.2.1.



Statements of the State Council on Cultivating the Social Service System of SMEs’ (2000),<sup>9</sup> was released and started a period of SMEs’ prosperity. This policy was designed to promote the interests of SMEs, and it enhanced their sustainability and established multi-level, multi-channel, and multi-function networks for SMEs.<sup>10</sup> Accordingly, Central Government and local governments at, or above, the county level<sup>11</sup> in China were urged to help SMEs to upgrade their existing products, develop new products and fill gaps in the market.<sup>12</sup> However, establishing a successful Social Service System of SMEs (“Social Service System” means Chinese regional governments and social and industrial players who work together to provide growth support services for SMEs)<sup>13</sup> was a long road from concept to practice. Chinese

<sup>9</sup> See ‘Guanyu Peiyu Zhongxiao Qiye Shehuihua Fuwu Tixi Ruogan Wenti de Yijian’ [Several Statements of the State Council on Cultivating the Social Service System of SMEs] (2000)

<[www.gov.cn/gongbao/content/2000/content\\_70316.htm](http://www.gov.cn/gongbao/content/2000/content_70316.htm)> accessed 30 January 2017.

<sup>10</sup> From then on, several supporting systems for SMEs, such as finance support, technical support, marketing support, administrative support, etc., have been steadily improved in China: see, e.g., *id*; and Jianzhong Xiao and David Smallbone, ‘Regional Variations in the Environment for Entrepreneurship Development: A Tale of Three Cities in China’ (56th Annual ICSB World Conference, Stockholm, Sweden, 15-18 June 2011).

<sup>11</sup> **Table 3-1: The Administrative Divisions of Mainland China (at and above the County Level)**

Country Level	Provincial Level	Prefectural Level	County Level
The Central Government of China	Provinces	Sub-Provincial Level Cities Prefectural Level Cities Autonomous Prefectures	Districts Counties County Level Cities Autonomous Counties Special Districts
	Autonomous Regions	Prefectural Level Cities Autonomous Prefectures	Banners Autonomous Banners
	Municipalities	Prefectural Level Cities Districts/Counties	

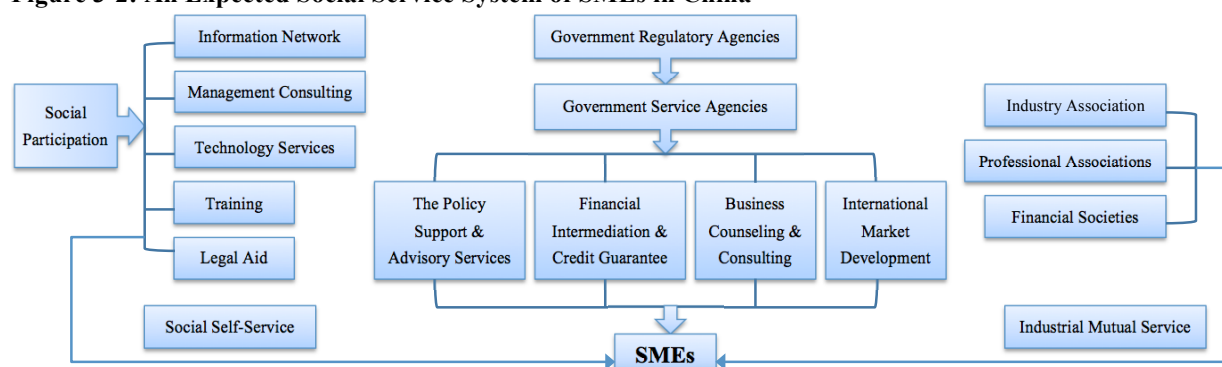
Source: ‘The Local Administrative System’; table devised by the author.

See the Central People’s Government of China, ‘The Local Administrative System’ (*Chinese Government’s Official Web Portal*) <[www.china.org.cn/english/Political/28842.htm](http://www.china.org.cn/english/Political/28842.htm)> accessed 30 January 2017.

<sup>12</sup> See Andrew Atherton and David Smallbone, ‘State Promotion of SME Development at the Local Level in China: An Examination of two Cases’ (2010) 2 *Journal of Chinese Entrepreneurship* 225.

<sup>13</sup> Establishing a Social Service System of SMEs means that governments and social/industrial organisations co-operate in order to offer multi-level, multi-channel, multi-function services to support the development of SMEs.

**Figure 3-2: An Expected Social Service System of SMEs in China**



Source: *Research on Improving Policies and Service Systems for SMEs’ Development in China*; figure translated by the author from Chinese.

See Ouyang Yao and others, *Zhongguo Zhichi Zhongxiao Qiye Fazhan de Zhengce he Fuwu Tixi Yanjiu*

SMEs still faced many challenges from SOEs.

In the summer of 2000, another State policy, ‘Several Statements of the State Council on Encouraging and Promoting the Development of SMEs’ (2000),<sup>14</sup> which put forward policies to guide and provide increasing support to SMEs, came into effect.<sup>15</sup> The State’s approach was to develop SOEs, and at the same time, also support privately-owned SMEs.<sup>16</sup> However, too much economic power and too many rights were granted to local governments,<sup>17</sup> so that any local government at, or above, the county level in China could guide the development approach of local SMEs within their administrative regions.<sup>18</sup> This led to a situation whereby SME growth would be influenced mainly by administrative interventions. However, despite the policy having a negative influence on the Chinese market,<sup>19</sup> the development of SMEs in the period between 2002 and 2007 was extremely significant (see footnote 7 above). These two SME policies (2000) were the forerunners in the process leading up to the Chinese SMEs’ legal framework establishment, via the 2002 and 2007 Acts.

In 2003 the first law on the promotion of SMEs, *the Chinese Law on Promotion of SMEs 2002*, came into force in China in order to improve the business environment for SMEs; to express a new standard for classification of small and medium enterprises<sup>20</sup>; and to determine

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[*Research on Improving Policies and Service System for Supporting SMEs’ Development in China* (author’s translation)] (China Social Sciences Press 2009) 188 & 195.

<sup>14</sup> See ‘Guanyu Guli he Cujin Zhongxiao Qiye Fazhan de Ruogan Zhengce Yijian’ [Several Statements of the State Council on Encouraging and Promoting the Development of SMEs] (2000) <[www.gov.cn/gongbao/content/2000/content\\_60460.htm](http://www.gov.cn/gongbao/content/2000/content_60460.htm)> accessed 30 January 2017.

<sup>15</sup> *Id.*

<sup>16</sup> The publication ‘Several Statements of the State Council on Encouraging and Promoting the Development of SMEs’ (2000) ought to be a good way to develop SOEs and privately-owned SMEs in a balanced way towards establishing collaboration and complementary industry groups in China. In 2002, SMEs consisted of over 95 percent of the total amount of enterprises in China, an increase of 0.2 percent compared with 2001. Concurrently, the total profit of SMEs rose more than 33 percent from the previous year: see, e.g., *id.*; and Joint Research Group on SMEs’ Development, ‘2003 nian Zhongguo Feigong Jingji Chengzhangxing Zhongxiao Qiye Fazhan Baogao’ [Report on Non-State-Owned SMEs’ Development in China (2003) (author’s translation)] *China Economic Times* (Beijing, 18 December 2003) A01.

<sup>17</sup> See Liu Qingfei, *Jingji Zhuaxing Beijingxia de Zhongxiao Qiye Cujinfa Yanjiu* [Study on the Chinese Law on Promotion of SMEs under Economic Transition (author’s translation)] (Peking University Press, China 2012) 173-83.

<sup>18</sup> See Xiao and Smallbone (n 10).

<sup>19</sup> For example, the negative influence of ‘Several Statements of the State Council on Encouraging and Promoting the Development of SMEs’ (2000), namely local governments guide the development approach of local SMEs, still can be seen in this decade: following government-led shutting-down policies, the Hebei provincial government aimed to merge and decrease local steel enterprises from over 200 in 2003 to 15 in 2015, without considering market rules (see footnote 137 below).

<sup>20</sup> This standard for classification of SMEs, which was further explained by ‘Interim Provisions on the

active and lawful support for SME growth.<sup>21</sup> Since then, support for developing SMEs has, at least at *the legal level*, occupied a higher priority in China. Accordingly, in 2004, SMEs experienced increasing profits.<sup>22</sup> However, at the same time, *the Chinese Law on Promotion of SMEs 2002* also encouraged local governments and agencies to establish and improve the social service system for SMEs.<sup>23</sup>

At the beginning of 2005, China released one additional industrial policy, which was related to SMEs' development, 'Several Statements of the State Council on Encouraging,

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Standards for Medium and Small Enterprises' in 2003, was used for nearly a decade in China. It was not upgraded until the measure 'Provisions on the Classification Standards for Small and Medium-Sized Enterprises' (2011) was adopted. The 2011 regulation not only claimed that SMEs included micro, small and medium-sized enterprises, but also offered more categories of Chinese SMEs classified by industry (see Table 1-1 in Chapter 1): 'Zhongxiao Qiye Huaxing Biaoqun Guiding' [Provisions on the Classification Standards for Small and Medium-Sized Enterprises] (2011) <[www.gov.cn/zwggk/2011-07/04/content\\_1898747.htm](http://www.gov.cn/zwggk/2011-07/04/content_1898747.htm)> accessed 30 January 2017.

<sup>21</sup> See the Law of China on Promotion of Small and Medium-Sized Enterprises 2002, Arts 1-3.

Article 1: This Law is enacted for the purpose of improving the business environment for small and medium-sized enterprises, promoting their sound development, creating more job opportunities in both urban and rural areas, and giving play to the important role of such enterprises in national economic and social development.

Article 2: For purposes of this Law, small and medium-sized enterprises refer to the different forms of enterprises under different ownerships that are established within the territory of the People's Republic of China according to law, that help to meet the social needs and create more job opportunities, that comply with the industrial policies of the State and that are small and medium-sized in production and business operation...

Article 3: With regard to small and medium-sized enterprises, the State applies the principles of active support, strong guidance, perfect service, lawful standardization and guaranteed rights and interests, in order to create a favorable environment for their establishment and development.

<sup>22</sup> The value of Chinese SMEs in 2004 was nearly 2.5 times that of 2001, a 34.4 percent average annual growth: Joint Research Group on SMEs' Development, '2005 nian Chengzhangxing Zhongxiao Qiye Fazhan Baogao' [Report on SMEs' Development in China (2005) (author's translation)] (Shenzhen Stock Exchange, China, 1 December 2005) <[www.szse.cn/main/aboutus/bsyw/zxqyszlt/200512017960.shtml](http://www.szse.cn/main/aboutus/bsyw/zxqyszlt/200512017960.shtml)> accessed 30 January 2017.

<sup>23</sup> See the Law of China on Promotion of Small and Medium-Sized Enterprises 2002, Arts 38-42.

Article 38: The State encourages all sectors of society to establish and improve the service system for small and medium-sized enterprises and to provide them with services.

Article 39: The government shall, in light of actual needs, support the institutions established in the service of small and medium-sized enterprises and see that they provide top-notch services to the enterprises...

Article 40: The State encourages the various kinds of public intermediary agencies to provide small and medium-sized enterprises with...services...

Article 41: The State encourages related institutions and institutions of higher education to train managerial, technical and other personnel for small and medium-sized enterprises...

Article 42: The self-regulating trade organizations shall actively serve small and medium-sized enterprises.

Supporting and Guiding the Development of Individual and Private Economy and Other Non-Public Sectors of the Economy' (2005).<sup>24</sup> This was a landmark decision, determining that privately-owned SMEs were a vital component part of the Chinese market economy, and an important propeller of the State's productive forces.<sup>25</sup> The positive trend for SMEs continued over the following two years. In 2006, the Central Government of China put forward the first Chinese 'SMEs Growth Project',<sup>26</sup> a clearer and more systematic SME policy than the previous policies, which would encourage SMEs to develop in the long-term.<sup>27</sup> In addition, one further measure beneficial to China's SMEs was adopted in 2007, namely *the Law of China on Enterprise Income Tax 2007*, which proposed to reduce taxes for SMEs.<sup>28</sup>

Consequently, due to the adoption of so many Chinese industrial policies and laws on the promotion of SMEs, China's SMEs increased at their fastest pace since the beginning of the 21st century.<sup>29</sup> However, the development of SMEs was not always smooth or straightforward because *the Chinese Law on Promotion of SMEs 2002* failed to establish the idea of *competition* and the *limitation for inappropriate intervention* in the marketplace. It soon became evident that, frequently, inappropriate administrative directives considered the State's short-term economic interests (partially represented by SOEs), for example during the

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<sup>24</sup> See 'Guowuyuan Guanyu Guli Zhichi he Yindao Siying Deng Feigongyouzhi Jingji Fazhan de Ruogan Yijian' [Several Statements of the State Council on Encouraging, Supporting and Guiding the Development of Individual and Private Economy and Other Non-Public Sectors of the Economy] (2005) <[www.gov.cn/zwgk/2005-08/12/content\\_21691.htm](http://www.gov.cn/zwgk/2005-08/12/content_21691.htm)> accessed 30 January 2017.

<sup>25</sup> See *id.*; and Hong Kong Trade Development Council (HKTDC), 'Eight Incentives to Promote SME Development' (2005) 12 Policy and Law <<http://info.hktdc.com/alert/cba-e0512a-2.htm>> accessed 30 January 2017 (the latter points out that by the end of 2005, China had partially established some support systems for SMEs, including fiscal support, financial support, support for start-ups, technical support, market expansion support, social service support, and legal support).

<sup>26</sup> See 'Fagaiwei: Shiyiwu Shishi Zhongxiao Qiye Chengzhang Gongcheng Jiuxiang Neirong' [9 Issues in Implementing 'the 11th Five-Year Plan for SME Growth' (author's translation)] *China Business Times* (Beijing, 30 December 2005) <[http://news.xinhuanet.com/fortune/2005-12/30/content\\_3987580.htm](http://news.xinhuanet.com/fortune/2005-12/30/content_3987580.htm)> accessed 30 January 2017.

<sup>27</sup> See 'The Eleventh Five-Year Plan 2006-2010' (2006) <[www.gov.cn/english/special/115y\\_index.htm](http://www.gov.cn/english/special/115y_index.htm)> accessed 30 January 2017.

<sup>28</sup> See the Law of China on Enterprise Income Tax 2007, Art 28.

Article 28: With respect to a qualified small enterprise earning low profits, the tax levied on its income shall be reduced at a rate of 20 percent.

<sup>29</sup> In 2007, the number of Chinese micro, small and medium-sized industrial enterprises experienced an increase of nearly 24 percent compared to 2005. During the same period, the gross value of industrial output of Chinese SMEs represented an increase of over 46 percent: Li and others (eds) (n 6) 39-40.

first global financial crisis of the 21st century: China's privately-owned SMEs were unable to avoid the fate of being marginalised by the State. Therefore, in analysing the legal support for privately-owned SMEs, it is essential to appreciate the legal flaws in *the Chinese Law on Promotion of SMEs 2002*.

### 3.1.2 The Legal Flaws in *the Chinese Law on Promotion of SMEs 2002*

#### 3.1.2.1 *Emphasising the State and Ignoring the Market*

The idea of the market mechanism is not completely, nor even deeply rooted, in the State's traditions and culture (see footnote 172 in Chapter 1).<sup>30</sup> Hence, for China, in the progress towards drafting *the Chinese Law on Promotion of SMEs 2002*, overlooking certain functions of the market mechanisms was inevitable. In effect, the phenomenon of emphasising the State's function, while ignoring market mechanisms, permeates the fabric of *the Chinese Law on Promotion of SMEs 2002*. This will now be considered:

First of all, *the Chinese Law on Promotion of SMEs 2002* lacks the notion of protecting competition. Following the adoption of this Law, the State committed to promoting the business cooperation of large-scale SOEs and privately-owned SMEs.<sup>31</sup> Using Japanese experience for guidance, this was assumed to be a successful "win-win" approach,<sup>32</sup> as it restricts the risks that often accompany vertical integration.<sup>33</sup> However, this was not in fact the case in China, because unrestrained cooperation under *the Chinese Law on Promotion of SMEs 2002* existed before 2008 (when *the Chinese Anti-Monopoly Law 2007* came into

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<sup>30</sup> See Lowell Dittmer and Guoli Liu (eds), *China's Deep Reform: Domestic Politics in Transition* (Rowman & Littlefield Publishers 2006) 239.

<sup>31</sup> See the Law of China on Promotion of Small and Medium-Sized Enterprises 2002, Art 32.

Article 32: The State encourages and supports large enterprises to establish, on the basis of resources allocation by the market, stable relations of cooperation with small and medium-sized enterprises in respect of the supply of raw and semi-processed materials, production, marketing, and technological development and updating, in order to help promote the development of small and medium-sized enterprises.

<sup>32</sup> Japan used the "Supplier System" to develop SMEs in the manufacturing industries. Under such a system, Japanese SMEs worked as subcontractors to large-scale enterprises, and in most cases, both of them achieved a win-win situation: Hiroshi Ueno, Takashi Murakoso and Takumi Hirai, 'Supplier System and Innovation Policy in Japan' in Cornelia Storz (ed), *Small Firms and Innovation Policy in Japan* (Routledge 2006) 137.

<sup>33</sup> The reason is that *the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No.54 of 14 April 1947)*, Japan came into force over a decade earlier than *the Small and Medium-Sized Enterprise Basic Act (No.154 of 1963)*, Japan; therefore cooperation between SMEs and large-scale enterprises cannot override competition policies.

force); in fact, during the period between 2003 and July 2008, hardly any domestic law or policy sought to limit this cooperation approach in China. Consequently, in the process of cooperation, China's SOEs, and their corresponding privately-owned SMEs *in the same industry*, could form a *vertical monopoly group*, and thereby create barriers to entry and obstacles to competition.<sup>34</sup> After 2008, although *the Chinese Anti-Monopoly Law 2007* was implemented, nothing was changed in *the Chinese Law on Promotion of SMEs 2002*.<sup>35</sup> "Administrative mergers" in the Chinese steel industry confirmed this. Since the first Chinese policy concerning the restructuring of domestic steel enterprises was released in 2005,<sup>36</sup> desires and demands of the State have always influenced its approach, without considering the need for competition or the survival situation of steel SMEs. Subsequently, such a trend continued after 2008, without any significant regard for *the Chinese Anti-Monopoly Law 2007*.<sup>37</sup>

A second reason why *the Chinese Law on Promotion of SMEs 2002* did not significantly change the existing approach towards the growth of SMEs, was the fact that SME growth still relied mainly on *decision-making by way of administrative directives*, especially support from *the State's industrial policy*. Because *the Chinese Law on Promotion of SMEs 2002* (Article 33) emphasises the powers and functions of the State,<sup>38</sup> *promoting SMEs' growth in the Chinese Law on Promotion of SMEs 2002* meant the prioritisation of initiatives which

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<sup>34</sup> See Yuan Honglin, *Wanshan Zhongxiao Qiye Zhengce Zhichi Tixi Yanjiu* [Study on Improvement of Policy Support System in SMEs] (Dongbei University of Finance & Economic Press, China 2010) 148.

<sup>35</sup> Before *the Chinese Anti-Monopoly Law 2007* was enacted, there was another effective law to maintain fair competition in China – *the Law of China against Unfair Competition 1993*. This was a significant point in the development of Chinese competition policy and law. However, although this law forbids behaviour that will exclude competitors from fair competition, it pays more attention to the principles of voluntariness, equality, impartiality, honesty, and even public commercial morality. To ensure competition in the Chinese market, it is not sufficient: considering the cooperation between large-scale SOEs and privately-owned SMEs, it is difficult to make any appropriate decisions. Therefore, *the Chinese Anti-Monopoly Law 2007* is considered as the first law to maintain competition in China: see, e.g., the Law of China against Unfair Competition 1993; and OECD, 'OECD Global Forum on Competition: the Objectives of Competition Law and Policy and the Optimal Design of A Competition Agency – China (Session I)' (9 January 2003) CCNM/GF/COMP/WD(2003)1.

<sup>36</sup> See 'Gangtie Chanye Fazhan Zhengce' [Policies for the Development of the Iron and Steel Industry] (2005) <[www.sdpc.gov.cn/zcfb/zcfbl/200507/t20050719\\_52618.html](http://www.sdpc.gov.cn/zcfb/zcfbl/200507/t20050719_52618.html)> accessed 30 January 2017.

<sup>37</sup> See Chapter 4.1 below.

<sup>38</sup> See the Law of China on Promotion of Small and Medium-Sized Enterprises 2002, Art 33.

Article 33: The State gives guidance to, promotes and regulates the restructuring of the assets of small and medium-sized enterprises through mergers, purchases, etc., in order to optimize the allocation of resources.

gave priority to industrial policy. Such a negative outcome was not difficult to foresee, based on a side-by-side comparison:

On the positive side, in order to solve a chronic trait of China's SMEs, namely their short lifespan, *the Chinese Law on Promotion of SMEs 2002* did emphasise the powers and functions of the State.<sup>39</sup> While realising short-term profit maximisation is the ultimate goal for most Chinese privately-owned SMEs<sup>40</sup>, however, in a brutally competitive market, making profits and maintaining longevity is a tricky issue for SMEs. In order to make a quick profit in a short time, a large number of them abandoned "the principle of good faith", such as honesty and other public commercial morality,<sup>41</sup> while instead devoting their time to selling counterfeit products. Predictably, giving up integrity is short-sighted behaviour in terms of SMEs' development. Accordingly, the average lifespan is approximately three years for China's privately-owned SMEs.<sup>42</sup> Facing such a grim reality, *the Chinese Law on Promotion of SMEs 2002* realised that although establishing the integrity of privately-owned SMEs was an extremely challenging task, it was time to commence the journey towards that goal.<sup>43</sup>

However, on the negative side, after *the Chinese Law on Promotion of SMEs 2002* came into force, the *government-oriented approach*, rather than the *legal-oriented approach* remained, and determined the fates of privately-owned SMEs.<sup>44</sup> Hence, a competitive market environment and a market-oriented model are not what have emerged. For example, in 1999 in the gas station sector, the State decided to *enhance* the market share of petrol SOEs in the refined oil retail market and *reduce* the number of privately-owned gas stations, through

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<sup>39</sup> See Zeng Wei, *Zhongxiao Qiye Shengcun Zhuangkuang Diaocha Baogao [An Investigation on the Status of Medium and Small Enterprises]* (China Economic Publishing House 2009) 18.

<sup>40</sup> *Ibid.*, 35.

<sup>41</sup> See the Law of China on Promotion of Small and Medium-Sized Enterprises 2002, Art 9.

Article 9: Small and medium-sized enterprises shall observe professional ethics, abide by the principle of good faith, work hard to raise their business level and increase the ability to develop themselves.

<sup>42</sup> See Huang Mengfu, *Zhongguo Minying Qiye Fazhan Baogao (No.1) [The Development Report of Non-State-Owned Enterprises in China (No.1)]* (Social Sciences Academic Press, China 2005) 411.

<sup>43</sup> See the Law of China on Promotion of Small and Medium-Sized Enterprises 2002, Art 9.

<sup>44</sup> *Ibid.*, Art 33.

administrative directive powers.<sup>45</sup> Moreover, after *the Chinese Law on Promotion of SMEs 2002* came into force, a further decline in gas station ownership occurred.<sup>46</sup>

Overall, therefore, *the Chinese Law on Promotion of SMEs 2002* failed to substantially improve the fate of privately-owned SMEs on a long-term basis. The State's industrial policy, with its focus on administrative intervention in favour of SOEs, continued to increase its influence. However, without developing sound market rules and pro-competition constraints on administrative interventions, Chinese privately-owned SMEs do not operate in a fair market, and find it difficult therefore to achieve a genuine competitive advantage. Thus, reliance merely on *the Chinese Law on Promotion of SMEs 2002* cannot reproduce the high levels of growth achieved by SMEs in the period 2000 to 2007.<sup>47</sup>

### *3.1.2.2 No Genuine Sanctions for Inappropriate Administrative Directives in China*

Emphasis on the function of the State, while ignoring the market mechanisms, was not the only flaw in *the Chinese Law on Promotion of SMEs 2002*: because there is no individual agency to manage administrative directives in China, these directives, created by many different agencies, often engender conflict for the growth of privately-owned SMEs. However, this Law lacks sanctions against those who issue inappropriate administrative directives, and also fails to offer legal remedies for privately-owned SME victims of such intervention.

In particular, Article 4 of *the Chinese Law on Promotion of SMEs 2002* states that not only the State Council of China, but also the local people's governments (at or above the county level), could guide and serve SMEs located within their respective administrative territories.<sup>48</sup> In other words, the regulations in *the Chinese Law on Promotion of SMEs 2002*

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<sup>45</sup> The publication 'Order No.38 of 1999' granted exclusive rights to petrol SOEs to control the oil source in China from 1999: 'Guanyu Qingli Zhengdun Xiaolianyouchang he Guifan Yuanyou Chengpinyou Liutong Zhixu de Yijian' [On the Liquidating and Restructuring of the Small Oil Refining Factories and Standardizing the Circulation Order of Crude Oil and Petroleum Products' ('Order No.38 of 1999')] (1999) <<http://finance.sina.com.cn/chanjing/b/20050816/08301890025.shtml>> accessed 30 January 2017.

<sup>46</sup> See Chapter 4.2 below.

<sup>47</sup> See Yuan (n 34) 149.

<sup>48</sup> See the Law of China on Promotion of Small and Medium-Sized Enterprises 2002, Art 4.

Article 4: [T]he related departments under the State Council shall, according to the policies and



provided an opportunity for all different levels of Chinese government to intervene in SMEs' development by way of administrative directives. However, because of regional differences in China, different local governments pursued different intervention models to promote local SMEs, and then protect local interests. Therefore, such a situation often results in conflict within different administrative areas.<sup>49</sup> Moreover, conflicts caused by administrative directives concerning privately-owned SMEs do not only exist within local-level agencies: *sometimes, local-level agencies' actions may challenge State-level agencies.*<sup>50</sup> Hence, the adoption of inappropriate administrative directives affecting privately-owned SMEs results in the market mechanisms being ignored, leading to an unhealthy development environment for SMEs in China.

However, for the protection of those adversely affected by inappropriate Chinese administrative directives, genuine sanctions are definitely absent in *the Chinese Law on Promotion of SMEs 2002*. Although it is common sense that there should be no real law without sanctions, this situation still occurs in China. Article 7 of *the Chinese Law on Promotion of SMEs 2002* stresses that administrative agencies shall not discriminate against

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overall planning of the State for small and medium-sized enterprises and within the scope of their respective functions and responsibilities, provide guidance and services to such enterprises.

Local people's governments at or above the county level, the administrative departments under them in charge of work in respect of enterprises and other departments concerned shall, within the scope of their respective functions and responsibilities, provide guidance and services to small and medium-sized enterprises...

<sup>49</sup> As a by-product of the Chinese planned economy, administrative monopoly exists in almost all aspects of the State's economy. However, this should be forbidden: Song Shengxia, 'Hebei Province under Antitrust Investigation' *Global Times Business, China* (Beijing, 15 September 2014) Biz02.

<sup>50</sup> For example, in order to improve SMEs' growth, 'the 12th Five-Year Plan for SME Growth' (2011) has allowed Chinese SMEs to use their home as a place of business since 2011. However, the *China Business Journal* stated that according to the requirements of the Beijing government, no family home could be used as a place of business before the end of 2011. Although this was changed according to 'Regulation on Further Support for Industrial Upgrading, Strengthening Industry Adjustment and Promoting the Transformation of Economic Development Mode in Beijing' (2011), approval procedures must be carried out: see, e.g., Zhang Yejun, 'Zhongxiao Qiye Shierwu Chengzhang Guihua Chutai: Gongxinbu Xinzhengce Chongtu Beijing Zhengce' ['The 12th Five-Year Plan for SME Growth' Released: The New MIIT's Policy is Challenged by the Beijing Government's Policies (author's translation)] *China Business Journal* (Guangzhou, 26 September 2011) A4; 'Shierwu Zhongxiao Qiye Chengzhang Guihua' [The 12th Five-Year Plan for SME Growth] (2011) <[www.gov.cn/gzdt/2011-09/23/content\\_1955213.htm](http://www.gov.cn/gzdt/2011-09/23/content_1955213.htm)> accessed 30 January 2017; and 'Beijingshi Renmin Zhengfu Bangongting Zhuanfa Shigongshangju Guanyu Jinyibu Zhichi Chanye Youhua Shengji Jiaqiang Yetai Tiaozheng Cujin Jingji Fazhan Fangshi Zhuanbian Gongzuo Yijian De Tongzhi' [Regulation on Further Support for Industrial Upgrading, Strengthening Industry Adjustment and Promoting the Transformation of Economic Development Mode in Beijing (author's translation)] (2011) <<http://govfile.beijing.gov.cn/Govfile/ShowNewPageServlet?id=5933>> accessed 30 January 2017.

SMEs or add unequal conditions to transactions of SMEs,<sup>51</sup> however, without including strong punitive measures in the law, this far-reaching Article remains an empty threat. Article 6 of this Law holds that when faced with inappropriate administrative directives, Chinese SMEs shall have the right to refuse, report and accuse, in cases of violations by administrative authorities who issue inappropriate administrative directives, to their higher administrative authorities.<sup>52</sup> However, nothing would happen after that, because it is the norm for officials to shield one another, so for administrative authorities that issue inappropriate administrative directives, admitting or even correcting mistakes is typically difficult to expect from their higher administrative authorities. Therefore, because both Articles 6 and 7 of *the Chinese Law on Promotion of SMEs 2002* are dysfunctional Articles for the protection of SMEs, there are no genuine sanctions against the infringers, and no legal remedies for SME “victims”.

Regrettably, the SMEs’ nightmare does not end there. In order to “whitewash” the above-mentioned flaws in *the Chinese Law on Promotion of SMEs 2002*, an official statement was issued in 2002 by the Development Research Center of the State Council of China<sup>53</sup>: this Law was a basic law in the area of support SMEs, which only established a framework, and many provisions in it were exhortatory nature in, without actual effects, and called for further improvements.<sup>54</sup>

Even worse, the flaw of having no genuine sanctions for breach of *the Chinese Law on*

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<sup>51</sup> See the Law of China on Promotion of Small and Medium-Sized Enterprises 2002, Art 7.

Article 7: Administrative departments shall safeguard the lawful rights and interests of small and medium-sized enterprises, protect their right to participate in fair competition and transaction according to law, and they may not discriminate against the enterprises or add unequal conditions to their transactions.

<sup>52</sup> *Ibid*, Art 6.

Article 6: [N]o unit may, in violation of laws and regulations, charge fees to or impose fines on small and medium-sized enterprises, nor collect money or things of value from them. The enterprises shall have the right to refuse to make the payment and the right to report and make accusations related to violations of the provisions mentioned above.

<sup>53</sup> The idea of “whitewashing” the flaws in *the Chinese Law on Promotion of SMEs 2002* was pointed out by Dr Lin Jiabin (a research fellow working in the Development Research Center of the State Council of China) in an interview in 2002. He took part in the legislative process of *the Chinese Law on Promotion of SMEs 2002*: Lei Dongjun, ‘Jiedu Zhongxiao Qiye Cujinfa’ [The Interpretation of *the Law of China on Promotion of SMEs* (author’s translation from Chinese)] *China Science Daily* (Beijing, 10 August 2002) 1.

<sup>54</sup> *Id.*

*Promotion of SMEs 2002* was exacerbated by a further expansion in the war between the State's industrial policy and this Law, because essentially, enacting *the Chinese Law on Promotion of SMEs 2002* did not mean that China would consistently 'Think Small First'<sup>55</sup>. Instead, the State's industrial policy is an unbeatable foe, and *the Chinese Law on Promotion of SMEs 2002* is always on the back foot. For instance, going through the full text of the Chinese 'Policies for the Development of the Iron and Steel Industry' (2005),<sup>56</sup> one sees that it focused on how to make large-scale enterprises bigger and stronger. Despite this policy being released three years after *the Chinese Law on Promotion of SMEs 2002*, the Law did not have any positive effect on it. This policy did not mention steel SMEs even once.<sup>57</sup> In comparison with the State's short-term interest, SMEs' future was completely ignored by inappropriate Chinese administrative directives in the steel industry.<sup>58</sup>

In summary, although around the time of the enactment of *the Chinese Law on Promotion of SMEs 2002*, China's SMEs saw a period of rapid development (2002-2007) on account of new State-sponsored SME promotion policies, this Law still had flaws, and failed to adequately protect and promote SMEs affected by either inappropriate administrative directives or SOE actions. Consequently, in order to foster market mechanisms and limit the impact of administrative directives, the State urgently needed to enact *the Chinese Anti-Monopoly Law* in the hope that it could bring a "second spring" for privately-owned SMEs.

### **3.2 The Return of SOEs: "Useless" Law for Chinese Privately-Owned SMEs**

Because more and more economic activities have been carried out in the Chinese market and have increasingly affected competition levels there since 1978, the Central Government of

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<sup>55</sup> The 'Think Small First' principle in Europe "[m]eans listening to SMEs before introducing new laws, examining the effect legislation will have on small businesses, and helping companies in need of support": Commission, 'Thinking Big for Small Businesses: What the EU does for SMEs' (*Enterprise and Industry of the European Commission*, 2011) <<http://ec.europa.eu/DocsRoom/documents/874/attachments/1/translations/en/renditions/pdf>> accessed 30 January 2017.

<sup>56</sup> See 'Gangtie Chanye Fazhan Zhengce' [Policies for the Development of the Iron and Steel Industry] (2005) <[www.sdpc.gov.cn/zcfb/zcfbl/200507/t20050719\\_52618.html](http://www.sdpc.gov.cn/zcfb/zcfbl/200507/t20050719_52618.html)> accessed 30 January 2017.

<sup>57</sup> *Id.*

<sup>58</sup> See further Chapter 4.1 as steel industry.

China felt that the domestic market required an anti-monopoly law. In response to the growing demand for legislation, the State Council began to draft a proposal for an Anti-Monopoly Law as early as 1994.<sup>59</sup> However, the formulation of the Chinese Anti-Monopoly Law was surrounded by controversy and was a prolonged process. Before *the Chinese Anti-Monopoly Law 2007* was first promulgated in 2007, several laws and policies concerned with improving competition were published in China.<sup>60</sup> However, these laws and policies did not provide unified guidance on the issue of competition in the Chinese market.<sup>61</sup> Such a situation was not resolved until 2007, when a comprehensive legal set of market rules, *the Chinese Anti-Monopoly Law 2007*, was finally adopted.<sup>62</sup>

Nevertheless, and significantly, when *the Chinese Anti-Monopoly Law 2007* came into force in 2008, it was obvious that the Law did not meet SME expectations.<sup>63</sup> The

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<sup>59</sup> See Xiaoye Wang, *The Evolution of China's Anti-Monopoly Law* (Edward Elgar Publishing 2014) 260.

<sup>60</sup> These were *the Law of China against Unfair Competition 1993* (see footnote 35 above), *the Law of China on the Protection of Consumer Rights and Interests 1993*, 'Provisions of the State Council on Prohibiting Regional Blockade in Market Economic Activities' (2001), 'Decisions of the State Council on Rectifying and Standardising the Order in the Market Economy' (2001), and so on: see, e.g., the Law of China on the Protection of Consumer Rights and Interests 1993, Art 5;

Article 5: The State shall protect the legitimate rights and interests of consumers from infringement. The State shall adopt measures to safeguard consumers' exercise of their rights in accordance with the law and to maintain the legitimate rights and interests of consumers.

'State Council Regulations Prohibiting the Implementation of Regional Barriers in the Course of Market Economy Activities' (2001) <[www.lawinfochina.com/display.aspx?lib=law&id=1820](http://www.lawinfochina.com/display.aspx?lib=law&id=1820)> accessed 30 January 2017;

Article 1: These Provisions are formulated with a view to establishing and perfecting the market system which is unified all over the country, provided with fair competition, and which is well-ordered, and to prohibiting the acts of regional blockade in the market economic activities, getting rid of regional blockades and maintaining the order of socialist market economy.

'Decisions of the State Council on Rectifying and Standardising the Order in the Market Economy' (2001) <[www.lawinfochina.com/display.aspx?lib=law&id=1822](http://www.lawinfochina.com/display.aspx?lib=law&id=1822)> accessed 30 January 2017.

In order to further deepen reform, expand openings to the outside world, and create a good environment for the national economic development vigorously and healthily, the State Council hereby decides, in light of China's present situation of the order in the market economy, to rectify and standardize the order in the market economy throughout the country.

<sup>61</sup> The situation of Chinese competition laws and policies has been described as "[a] patchwork of miscellaneous laws and regulations that seek to prevent the most damaging anti-competitive activities found in the transitional Chinese economy": Mark Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* (CUP 2009) 95.

<sup>62</sup> "A common issue that concerned consumers, private Chinese producers and foreign entrants to the domestic Chinese market was to ensure that SOEs were not exempted or afforded special treatment under the law": Mark Williams, *The Political Economy of Competition Law in Asia* (Edward Elgar Publishing 2013) 109.

<sup>63</sup> See World Bank and Development Research Center of the State Council, the People's Republic of China, *China 2030: Building a Modern, Harmonious, and Creative Society* (The World Bank 2013) 112.

thirteen-year incubation period (1994-2007) did not help matters, either.<sup>64</sup> On the contrary, the Law had several significant drawbacks and there remained much room for improvement. On the issue of SMEs' development, the apparent weak points of *the Chinese Anti-Monopoly Law 2007* were as follows. Firstly, there was not sufficient understanding of the exemption (Article 15 of the 2007 Act<sup>65</sup>) of pro-competitive agreements among SMEs: the importance of SMEs has not gotten enough attention. Secondly, there was a lack of effective sanctions in the Law against those who issued inappropriate administrative directives to impede the growth of privately-owned SMEs: this Law *has failed* to stop SOEs and administrative agencies from abusing their specific or exclusive rights.<sup>66</sup> The result is that, partially affected by the imperfect *Anti-Monopoly Law*, China's privately-owned SMEs' pace of development has slowed since 2008, after a period of rapid growth during the previous six years.

### **3.2.1 Privately-Owned SMEs – Impossible to be Ignored in *the Chinese Anti-Monopoly Law 2007***

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<sup>64</sup> See Huang Xiaowei, 'Fanlongduanfa Chutai shi Fanlongduan de Qidian' [*The Chinese Anti-Monopoly Law Promulgated: the Starting Point against Monopolistic Behaviour (author's translation)*] *Southern Weekend* (Guangzhou, 16 September 2007) C16.

<sup>65</sup> See the Anti-Monopoly Law of China 2007, Arts 13-15.

Article 13: Any of the following monopoly agreements among the competing business operators shall be prohibited:

- (1) fixing or changing prices of commodities;
- (2) limiting the output or sales of commodities;
- (3) dividing the sales market or the raw material procurement market;
- (4) restricting the purchase of new technology or new facilities or the development of new technology or new products;
- (5) making boycott transactions; or
- (6) other monopoly agreements as determined by the Anti-monopoly Authority under the State Council.

For the purposes of this Law, 'monopoly agreements' refer to agreements, decisions or other concerted actions that eliminate or restrict competition.

Article 14: Any of the following agreements among business operators and their trading parties are prohibited:

- (1) fixing the price of commodities for resale to a third party;
- (2) restricting the minimum price of commodities for resale to a third party; or
- (3) other monopoly agreements as determined by the Anti-monopoly Authority under the State Council.

Article 15: An agreement among business operators shall be exempted from application of Articles 13 and 14 if it can be proven to be in any of the following circumstances:

... (3) for the purpose of enhancing operational efficiency and reinforcing the competitiveness of small and medium-sized business operators...

<sup>66</sup> See Deborah Healey, 'A Comparative Look at the Competition Law Control of State-Owned Enterprises and Government in China' in Josef Drexler and others (eds), *More Common Ground for International Competition Law?* (Edward Elgar Publishing 2011) 147; and H Stephen Harris and others (eds), *Anti-Monopoly Law and Practice in China* (OUP 2011) 178.

Article 15(3) of *the Chinese Anti-Monopoly Law 2007* provides exemptions to agreements among SMEs;<sup>67</sup> specifically, any agreement or category of agreements among SMEs which satisfies the following two conditions shall be exempted from the scope of Articles 13 and 14<sup>68</sup> prohibitions found in *the Chinese Anti-Monopoly Law 2007*, namely where (a) any agreement or category of agreements among SMEs does not afford such SMEs the possibility of eliminating competition in respect of a substantial part of the products in question; and (b) any agreement or category of agreements among SMEs which allows consumers a fair share of the resulting benefit. According to the literal interpretation of the above-mentioned Articles, *the Anti-Monopoly Law* appears to protect China's SMEs. However, is that an accurate assessment? What is the actual objective of Article 15(3)?

In order to address this issue, the *objectives and purposes of the Chinese Anti-Monopoly Law 2007* need to be examined. In general, competition policy and law have multiple objectives: besides their economic objectives, they can reflect the wishes of society; the State's culture and history; the institutions in the State; and perceptions of the State: all are considerations which a State's competition policy and law can take into consideration.<sup>69</sup> Nonetheless, from the beginning of the 21st century, the objectives of competition policy and law have gradually concentrated on two specific areas: consumer welfare and efficient allocation of resources.<sup>70</sup> However, no matter where this issue goes, among all of the

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<sup>67</sup> See the Anti-Monopoly Law of China 2007, Arts 13-15.

<sup>68</sup> *Id.*

<sup>69</sup> See Christopher Townley, *Article 81 EC and Public Policy* (Hart Publishing 2009) 1.

<sup>70</sup> See Guidelines on the Application of Article 81(3) of the Treaty (now Article 101(3) TFEU) [2004] OJ C101/2;

13. The objective of Article 81 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers.

87. The decisive factor is the overall impact on consumers of the products within the relevant market and not the impact on individual members of this group of consumers. In some cases a certain period of time may be required before the efficiencies materialise. Until such time the agreement may have only negative effects. The fact that pass-on to the consumer occurs with a certain time lag does not in itself exclude the application of Article 81(3). However, the greater the time lag, the greater must be the efficiencies to compensate also for the loss to consumers during the period preceding the pass-on.

Case T-168/01 *GlaxoSmithKline Services Unlimited v Commission of the European Communities* [2006] ECR II-2969, paras 118 & 273.

objectives, the economic objective is, in practice, the most essential one.<sup>71</sup> Without it, other objectives may not be achieved.

Turning the focus then towards *the Chinese Anti-Monopoly Law 2007*, provoke debate on the economic objectives of this Law. The first point of discussion is the relationship *between consumer welfare and the “public interest”*<sup>72</sup> – the reconciliation of competing interests,<sup>73</sup> i.e., between the State’s interest, and those of the enterprises and consumer welfare. Although *the Chinese Anti-Monopoly Law 2007* identifies the attainment of the “public interest” as its final goal,<sup>74</sup> there still exists an obvious question: is the notion of the “public interest” in *the Chinese Anti-Monopoly Law 2007* somewhat broader than consumer welfare?<sup>75</sup> The second debate is that from the angle of Article 15(3): what was the core area

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<sup>71</sup> According to the OECD Global Forum on Competition and UNCTAD, economic efficiency, rather than other goals that may achieve the “public interest”, such as protecting SMEs or cultural goals, is becoming increasingly important in competition systems all over the world: see, e.g., Wang Xiaoye, *Fanlongduanfa [Anti-Monopoly Law]* (Law Press, China 2011) 26-27; and Townley (n 69) 13.

<sup>72</sup> For further information see the last paragraph of the introduction to this Chapter; and John B Kirkwood, ‘The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct’ (2013) 81 *Fordham Law Review* 2425, 2431-32.

<sup>73</sup> Interview with a Chinese scholar on *the Chinese Anti-Monopoly Law* (the scholar did not allow the researcher to use the interviewee’s name in any written work arising from the study, but did consent to being interviewed) (Beijing, China, 2012) (pointing out that balancing all interests in the Chinese market may be a modality to achieve the “public interest”); and Zhaojing Luo, ‘Development of Abuse of Administrative Power to Eliminate or Restrict Competition in *the Anti-Monopoly Law of the People’s Republic of China* and the Impact of Article 106 of EU Competition Law and Free Movement Rules’ (PhD thesis, University of Glasgow 2013) (pointing out that the “public interest” should have characteristics of commonality, reasonableness and legitimacy).

<sup>74</sup> See the Anti-Monopoly Law of China 2007, Art 1.

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

<sup>75</sup> *The Fair Trading Act 1973* (England and Wales) provided an explanation for the “public interest” in competition law: the Fair Trading Act 1973, England and Wales, Sec 84.

#### 84 Public interest.

(1) In determining for any purposes to which this section applies whether any particular matter operates, or may be expected to operate, against the public interest, the Commission shall take into account all matters which appear to them in the particular circumstances to be relevant and, among other things, shall have regard to the desirability—

- (a) of maintaining and promoting effective competition between persons supplying goods and services in the United Kingdom;
- (b) of promoting the interests of consumers, purchasers and other users of goods and services in the United Kingdom in respect of the prices charged for them and in respect of their quality and the variety of goods and services supplied;
- (c) of promoting, through competition, the reduction of costs and the development and use of new techniques and new products, and of facilitating the entry of new competitors into existing markets;
- (d) of maintaining and promoting the balanced distribution of industry and employment in the

of economic objectives that *the Chinese Anti-Monopoly Law* sought to promote and protect, when Chinese legislators adopted the Article 15(3) exemption to agreements among SMEs? Regarding the protection of competitors or effective competition, how could one *guarantee competition and economic efficiency simultaneously* in the Chinese market, for privately-owned SMEs and SOEs?<sup>76</sup>

In order to answer this question, it is essential to consider in detail SMEs' functions and the "public interest": *First*, as one of the main driving forces for increasing Chinese market activity,<sup>77</sup> the existence of privately-owned SMEs is conducive to improving consumer welfare. *Second*, privately-owned SMEs create job opportunities and improve living standards for their employees, which contribute to the realisation of increased social welfare in China (see Chapter 2.3 above). *Third*, because SOEs and privately-owned SMEs can be considered as two distinguishable types of enterprise in the Chinese market, an increase in privately-owned SMEs could be the equivalent of a decrease in SOEs. The same argument applies to their interests, which may balance the current unbalanced situation between these two groups of enterprise. Consequently, apart from consumer welfare, privately-owned SMEs can also promote other objectives of *the Chinese Anti-Monopoly Law 2007*, such as welfare of employees and interests of enterprises, as well as balancing these objectives to ultimately realise the "public interest".<sup>78</sup>

However, on the other hand, if *protecting SME operators* were one of the purposes of *the Chinese Anti-Monopoly Law 2007*, the State could therefore be accused of giving executive protection and strong support to SME operators. In this case, the interests and

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United Kingdom; and  
(e) of maintaining and promoting competitive activity in markets outside the United Kingdom on the part of producers of goods, and of suppliers of goods and services, in the United Kingdom.

(2) This section applies to the purposes of any functions of the Commission under this Act other than functions to which section 59(3) of this Act applies.

<sup>76</sup> See John Maurice Clark, 'Toward a Concept of Workable Competition' (1940) 30 *The American Economic Review* 241; and Morris A Adelman, 'Effective Competition and the Antitrust Laws' (1948) 61 *Harvard Law Review* 1289 (the latter points out that "[a]lthough the maintenance of effective, or 'workable', competition is generally considered as not the only, perhaps not even the most important, object of antitrust policy, exclusion of the wider social and political objects from this discussion...is more than a matter of mere convenience").

<sup>77</sup> See Michael E Porter, *The Competitive Advantage of Nations* (Free Press 1990) Chs 3 & 12.

<sup>78</sup> See Wang, *Fanlongduanfa [Anti-Monopoly Law]* (n 71) 5-9.



welfare of SME operators would be particularly important in China. However, although the phenomenon has not actually taken place, what if too many SMEs appeared in the market? Since SMEs are always associated with low efficiency, considering the interests and welfare of SME operators too much is not a very wise course of action in most instances. In reality, without the State's appropriate intervention, privately-owned SMEs frequently operate contrary to economic efficiency. Therefore, even though China's privately-owned SMEs are eager for State intervention to improve their conditions, excessive protection for SME operators could undermine effective competition in some sense.<sup>79</sup>

Conversely, if *promoting effective competition* were to be one of the State's major objectives for supporting the development of SMEs, giving specific support to SMEs could be considered as a method of promoting Chinese economic development. A review of the State's economic development in the last century indicates that although SOEs may get China onto the fast track to success, privately-owned SMEs are also one of the economic powers, a sector which cannot be ignored. Promoting effective competition under *the Chinese Anti-Monopoly Law 2007* will therefore offer an opportunity to achieve balanced economic growth: all kinds of Chinese enterprises will acquire a genuine opportunity to realise their realistic goals and enjoy competition in the market.

### **3.2.2 Disobedient SOEs and some Chinese Administrative Agencies**

If understanding of the exemptions to the agreements among SMEs (Article 15(3) of *the Chinese Anti-Monopoly Law 2007*) could be considered as an awareness issue, the inability of SMEs to stop SOEs and Chinese administrative agencies abusing their special or exclusive rights should be regarded as one of the legal mishaps of *the Chinese Anti-Monopoly Law 2007*. For SOEs and administrative agencies, although *the Chinese Anti-Monopoly Law 2007* does forbid the phenomenon of abusing dominant positions,<sup>80</sup> administrative powers ignore

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<sup>79</sup> See Wang Xianlin (ed), *Zhongguo Fanlongduanfa Shishi Redian Wenti Yanjiu [Research on Hot Issues of Enforcement of China's Anti-Monopoly Law]* (Law Press, China 2011) 10.

<sup>80</sup> Article 7 of *the Chinese Anti-Monopoly Law 2007* emphasises that the State protects SOEs and industries which are concerned with the lifeline of the national economy and national security. However, those SOEs and industries "[s]hall not damage the interests of consumers by virtue of their dominant or exclusive positions". Article 8 states, "no administrative organ or organisation empowered by a law or administrative regulation to administer public affairs may abuse its administrative powers to eliminate or restrict competition". Further on,

this requirement in order to create smooth-surface growth conditions and opportunities for SOEs.<sup>81</sup> Such a trend may enhance the interests of SOEs over a limited time, as well as the State's short-term interests. However, for the State's sustainable and sound development, striving for more success and interests in the short term is not an intelligent choice.<sup>82</sup> It is

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Articles 32-37 reiterate that administrative organs or organisations must not abuse their administrative power to eliminate competition in the Chinese market: see, e.g., Yong Huang and others, 'China's 2007 Anti-Monopoly Law: Competition and the Chinese Petroleum Industry' (2010) 31 *Energy Law Review* 337, 348; Rachel Evans, 'Transparency Creates Expectations' (2009) 28 *International Financial Law Review* 21; Thomas K Cheng, 'Competition and the State in China' in Thomas K Cheng, Ioannis Lianos and D Daniel Sokol (eds), *Competition and the State* (Stanford University Press 2014) 177; and the Anti-Monopoly Law of China, Arts 7, 8 & 32-37.

#### Chapter V Abuse of Administrative Power to Eliminate or Restrict Competition

Article 32: Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power, restrict or restrict in a disguised form entities and individuals to operate, purchase or use the commodities provided by business operators designated by it.

Article 33: Any administrative organ or organization empowered by a law or an administrative regulation to administer public affairs may not have any of the following conducts in an attempt to abuse its administrative power to block free circulation of commodities between regions:

- (1) imposing discriminative charge items, discriminative charge standards or discriminative prices upon commodities from outside the locality,
- (2) imposing such technical requirements and inspection standards upon commodities from outside the locality as different from those upon local commodities of the same classification, or taking such discriminative technical measures as repeated inspections or repeated certifications to commodities from outside the locality, so as to restrict them from entering the local market,
- (3) exerting administrative licensing, especially on commodities from outside the locality so as to restrict them from entering the local market,
- (4) setting barriers or taking other measures so as to hamper commodities from outside the locality from entering the local market or local commodities from moving outside the local region, or
- (5) other conducts for the purpose of hampering commodities from free circulation between regions.

Article 34: Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power to reject or restrict business operators from outside the locality from participating in local tendering and bidding activities by such means as imposing discriminative qualification requirements or assessment standards or releasing information in an unlawful manner.

Article 35: Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power to reject or restrict business operators from outside the locality from investing or setting up branches in the locality by imposing unequal treatment thereupon compared to that upon local business operators.

Article 36: Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power to force business operators to engage in the monopolistic conducts as prescribed in this Law.

Article 37: Any administrative organ may not abuse its administrative power to set down such provisions in respect of eliminating or restricting competition.

<sup>81</sup> See Angela Huyue Zhang, 'The Enforcement of the Anti-Monopoly Law in China: An Institutional Design Perspective' (2011) 56 *The Antitrust Bulletin* 630, 632.

<sup>82</sup> See Maurice E Stucke, 'Are People Self-Interested? – The Implications of Behavioral Economics on Competition Policy' in Josef Drexel and others (eds), *More Common Ground for International Competition Law?* (Edward Elgar Publishing 2011) 15-20.

therefore not surprising that EU competition law limits this phenomenon.<sup>83</sup>

However, insofar as *the Chinese Anti-Monopoly Law 2007* approaches this issue, there are no genuine sanctions against SOEs and Chinese administrative agencies: when they make excessive administrative intervention in specific economic development activities in the market involving domestic privately-owned SMEs, the “cost of violation” is extremely low. Consequently, the following two subsections aim to analyse the administrative powers within *the Chinese Anti-Monopoly Law 2007*, which is commonly abused in order to undermine the growth of privately-owned SMEs in the market.

### 3.2.2.1 Chinese Administrative Agencies – A Lack of Restraint on the Chinese Anti-Monopoly Law 2007

In order to protect domestic SOEs in traditional State-controlled industries that are concerned with the lifeline of the national economy and security, many administrative agencies in China have been granted rights to intervene in economic development.<sup>84</sup> The State-Owned Assets Supervision and Administration Commission of the State Council of China (SASAC), the supreme governing body of State assets, is one of those agencies.<sup>85</sup> In addition, local governments, which would be granted rights to supervise the local industrial

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<sup>83</sup> For example, Article 102 of the Treaty on the functioning of the European Union (TFEU) basically forbids enterprises abusing dominant positions. Article 106 of TFEU states that “[i]n the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties...” Case *RTT v GB-INNO-BM SA* gave a brilliant example of the abuse of dominant positions. In this case, although the State law allowed the undertaking to have control over the ancillary market, this ran contrary to EU competition law. As a result, the European Court of Justice (ECJ) forbade the abuse behaviour of the public undertaking: see, e.g., Treaty on the Functioning of the European Union [2008] OJ C115/49; Case C-18/88 *RTT v GB-INNO-BM SA* [1991] ECR I-5973, paras 17-20; Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH* [1991] ECR I-1979, paras 28-29; Case C-260/89 *Elliniki Radiophonia Tiléorassi v Dimotiki Etairia Pliroforissis* [1991] ECR I-2925, para 31; Case C-185/91 *Bundesanstalt für den Güterfernverkehr v Gebrüder Reiff GmbH & Co. KG* [1993] ECR I-5801, para 14; Dermot Cahill and others, *European Law* (5th edn, OUP 2011) 212-13; and Wentong Zheng, ‘State-Owned Enterprises versus the State: Lessons from Trade Law’ in Thomas K Cheng, Ioannis Lianos and D Daniel Sokol (eds), *Competition and the State* (Stanford University Press 2014) 76.

<sup>84</sup> See Wang, *Fanlongduanfa [Anti-Monopoly Law]* (n 71) 288.

<sup>85</sup> The main functions of the SASAC are supervising and managing a small group of SOEs, namely central SOEs (or State-controlled central enterprises); performing investor’s responsibilities for the State-owned assets; guiding and pushing forward the reform and restructuring of SOEs; improving corporate governance; propelling the strategic adjustment of the structure of the Chinese economy, and so on: SASAC, ‘Main Functions and Responsibilities of State-Owned Assets Supervision and Administration Commission of the State Council of China (SASAC)’ (*the SASAC, China*) <<http://en.sasac.gov.cn/n1408028/n1408521/index.html>> accessed 30 January 2017.

structure and the growth of SOEs within their administrative territory,<sup>86</sup> become additional administrative agencies with the ability to bring about economic intervention, often contrary to SMEs interests (see Chapter 4.1.2 below). However, their interventions, which focus on their own areas and interests, may disturb competition in the relevant market.<sup>87</sup> Therefore, *the Chinese Anti-Monopoly Law 2007* ought to provide adequate restrictions over these agencies. Disappointingly, hitherto those administrative agencies, which have *the right* to intervene in the market, have acted outside the reach or sanction of *the Anti-Monopoly Law*.

Because the SASAC and local governments can simply ignore *the Chinese Anti-Monopoly Law 2007* in the restructuring process of SOEs,<sup>88</sup> they easily undermine privately-owned SMEs. For example, one year before *the Chinese Anti-Monopoly Law 2007* was launched, the SASAC published an additional SOE policy, titled ‘Guiding Opinions of the State-Owned Assets Supervision and Administration Commission of the State Council about Promoting the Adjustment of State-Owned Capital and the Reorganisation of State-Owned Enterprises’ (2006), on the organisation of SOEs.<sup>89</sup> On the one hand, this policy was intended to enliven the State-owned SMEs and to establish a withdrawal mechanism for inferior enterprises. On the other hand, this policy was also committed to speeding up the restructuring of large-scale SOEs and improving the approval procedures for them.<sup>90</sup> Accordingly, the SASAC grants excessive administrative rights to local governments (at or above the prefectural level) and they use their excessive power and rights to intervene in the restructuring of local SOEs. However, at the same time there is hardly any Chinese law or legal authority that has a legitimate remit to constrain such excessive administrative intervention.

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<sup>86</sup> See Angela Huyue Zhang, ‘Taming the Chinese Leviathan: Is Antitrust Regulation A False Hope?’ (2015) 51 *Stanford Journal of International Law* 195-228 195, 204-05.

<sup>87</sup> See Song (n 49).

<sup>88</sup> See Sebastian Heilmann, ‘Experience First, Laws Later: Experimentation and Breakthroughs in the Restructuring of China’s State Sector’ in Jean Chun Oi (ed), *Going Private in China: The Politics of Corporate Restructuring and System Reform* (Walter H Shorenstein Asia-Pacific Research Center Books 2011) 98-103.

<sup>89</sup> See ‘Guanyu Tuijin Guoyou Ziben Tiaozheng he Guoyou Qiye Chongzu de Zhidao Yijian’ [Guiding Opinions of the State-Owned Assets Supervision and Administration Commission of the State Council about Promoting the Adjustment of State-Owned Capital and the Reorganization of State-Owned Enterprises] (2006) <[www.gov.cn/gongbao/content/2007/content\\_503385.htm](http://www.gov.cn/gongbao/content/2007/content_503385.htm)> accessed 30 January 2017, the English version is available at <<http://en.pkulaw.cn/display.aspx?cgid=82473&lib=law>> accessed 30 January 2017.

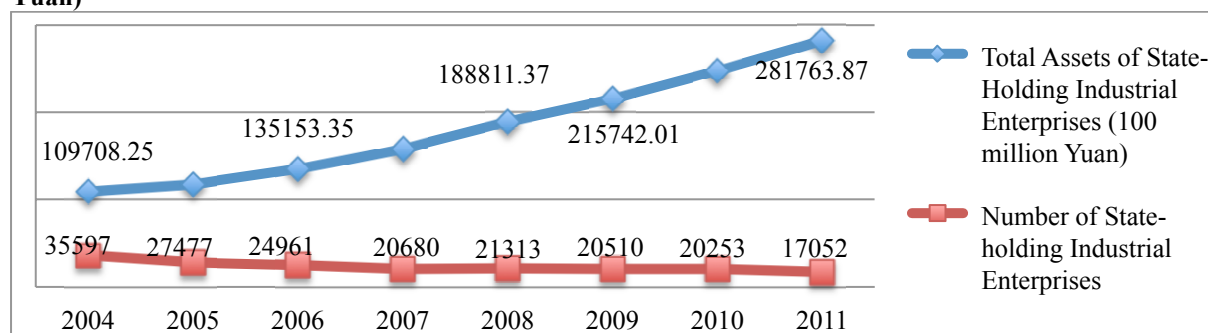
<sup>90</sup> *Id.*

Even worse, although there was hope that after *the Chinese Anti-Monopoly Law 2007* was enacted, this irrational situation would gradually disappear in China, the reality was to the contrary: SOEs have simply become larger and larger,<sup>91</sup> and are squeezing the economic space for privately-owned SMEs to operate in local markets.<sup>92</sup> Because the merger of local SOEs may reduce competition level in the relevant market, local privately-owned SMEs probably have to face the fact that their survival conditions will get progressively worse. The restructuring in the Chinese steel industry could easily demonstrate this unwelcome prospect.<sup>93</sup>

Second, the SASAC seeks a legal basis in *the Chinese Anti-Monopoly Law 2007* to cover illegal intervention in central SOEs. In 2003, the SASAC announced that the structural adjustment of central SOEs should be improved by reducing their total number.<sup>94</sup> However, at the present time (October 2016), the SASAC has not yet achieved its targets.<sup>95</sup> There are

<sup>91</sup> Because Chinese SOEs are selected winners created by State intervention, protected SOEs are unable to significantly grow. Although Figure 3-3 below shows how much progress was made in the assets of State-held industrial enterprises between 2004 and 2011, the return on equity (ROE) of SOEs was only close to one half of that of non-SOEs in the second half of the first decade of the 21st century (see Table 2-7 in Chapter 2).

**Figure 3-3: Assets of State-Holding Industrial Enterprises between 2004 and 2011 (RMB 100 million Yuan)**



Source: NBS; table Figure 3-3 composed by the author.

See NBS, 'Main Economic Indicators of State-Holding Industrial Enterprises by Industrial Sector (2003-2011)' (NBS, 2016) <<http://data.stats.gov.cn/english/easyquery.htm?cn=C01>> accessed 30 January 2017; United Nations Conference on Trade and Development, 'Rethinking Industrial Policy' (United Nations, April 2007) UNCTAD/OSG/DP/2007/2; and Wei Xiangyun, *Guoqi Gaige Xinsilu: Ruhe ba Zhengque de Shi Zuodui* [New Thinking on SOE Reform: How to Do the Right Thing Properly] (Publishing House of Electronics Industry, China 2013) 27.

<sup>92</sup> See Development Research Center of the State Council, *Zhongxiao Qiye Fazhan* [The Development of Small and Medium Enterprises] (China Development Press 2011) 6; and Zhou Liqun and Xie Siquan (eds), *Zhongguo Jingji Gaige 30 nian: Mingying Jingji juan (1978-2008)* [China's 30 Years of Reform: Volume of the Private Economy 1978-2008 (author's translation)] (Chongqing University Press, China 2008) 218-20.

<sup>93</sup> See Chapter 4.1 below.

<sup>94</sup> See Yong Zhen, *China's Capital Markets* (Chandos Publishing 2013) 210.

<sup>95</sup> According to the SASAC, the number of central SOEs ought to have shrunk by at least 34 percent and dropped to 80-100 by the end of 2010. Additionally, this figure would be further reduced in the period of the Twelfth Five-Year Plan (2011-2015). It was expected that the number of central SOEs should be within the range of 30 to 50: see, e.g., Xinhua News, 'Mergers Reduce China's Central SOEs to 123' (*Xinhua, China*, 5

still 102 central SOEs in China.<sup>96</sup>

After reviewing this State-oriented structural adjustment of central SOEs, we can assert that there were both positive and negative impacts arising from *the Chinese Anti-Monopoly Law 2007*. The positive aspect has been that in the process of the adjustment, the SASAC, with the aim of turning central SOEs into completely market-oriented enterprises in the following 10-15 years,<sup>97</sup> has not completely ignored market mechanisms: in this process, the SASAC intends firstly to ensure *the quality* of the adjustment, rather than *the quantity* of central SOEs. This could explain why the intended reduction in the number of central SOEs has not been achieved.

However, the negative aspect has been that, despite *the Chinese Anti-Monopoly Law 2007* coming into force, the SASAC removed nearly all legal restrictions to SOE mergers in China. In relation to the SASAC's approach, the SASAC and different levels of Chinese government control mergers between, or among, central SOEs and local SOEs. This is puzzling to officers working in the anti-monopoly agencies when considering *the Chinese Anti-Monopoly Law 2007*: on one hand, the officers consider that China's SOEs ought to comply with *the Chinese Anti-Monopoly Law 2007*,<sup>98</sup> while, on the other hand, the officers also hold that *the Constitution of China 2004*<sup>99</sup> and *the Chinese Anti-Monopoly Law 2007*<sup>99A</sup>

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August 2010) <[http://news.xinhuanet.com/english2010/china/2010-08/05/c\\_13431948.htm](http://news.xinhuanet.com/english2010/china/2010-08/05/c_13431948.htm)> accessed 30 January 2017; Li Baomin, 'Shierwu Qijian Zhongdian Gaige Longduan Hangye Guoyou Qiye' [Deepening SOE Reform in Monopoly Industries during the Twelfth Five-Year Period (author's translation)] (*China Economic Net*, 30 October 2010) <[www.ce.cn/xwzx/gnsz/zg/201010/30/t20101030\\_21930576.shtml](http://www.ce.cn/xwzx/gnsz/zg/201010/30/t20101030_21930576.shtml)> accessed 30 January 2017; and Li Rongrong, 'Guoziwei: 2007 Zhongguo Zhongyang Qiye jiang Jiasu Chongzu' [The SASAC will Accelerate the Restructuring of Central SOEs in 2007 (author's translation)] (*The Central People's Government of China*, 19 January 2007) <[www.china.com.cn/policy/txt/2007-01/19/content\\_7681508.htm](http://www.china.com.cn/policy/txt/2007-01/19/content_7681508.htm)> accessed 30 January 2017.

<sup>96</sup> In 2015, the SASAC accounted that the number of central SOEs will be reduced to 40 via mergers and acquisitions in the near future: see e.g., the SASAC, 'Zhongyang Qiye Minglu' [The List of Chinese Central SOEs] (*SASAC, China*) <[www.sasac.gov.cn/n86114/n86137/index.html](http://www.sasac.gov.cn/n86114/n86137/index.html)> accessed 30 January 2017; and Xinhua Finance, 'Number of China's Central SOEs to Be Reduced to 40 Via MA, Report' (*Xinhua Finance Agency, China*, 27 April 2015) <<http://en.xinfiance.com/html/Economies/Macro/2015/85057.shtml>> accessed 30 January 2017.

<sup>97</sup> See Xinhua News, 'China Focus: China Issues Guideline to Deepen SOE Reforms' (*Xinhua, China*, 13 September 2015) <[http://news.xinhuanet.com/english/2015-09/13/c\\_134620127.htm](http://news.xinhuanet.com/english/2015-09/13/c_134620127.htm)> accessed 30 January 2017; and Tian Zhiming, 'Guoziwei Mingque Yangqi Gaige Silu: Yangqi jiang Xishu Shangshi' [The SASAC Made the Idea of Central SOE Reform Clear: How to Become Listed Companies (author's translation)] *Southern Daily* (Guangzhou, 24 February 2011) A16.

<sup>98</sup> See Zhong Gang, *Fanlongduanfa Huomian Zhidu Yanjiu* [On the Exemption in Anti-Monopoly Laws] (Peking University Press, China 2010) 58.

<sup>99</sup> Article 7 of *the Constitution of China 2004* affirms that "[t]he State ensures the consolidation and growth of

confer special protection on SOEs. However, such an approach must be questioned, when pursuing the final objectives and purposes of *the Constitution of China 2004* and *the Chinese Anti-Monopoly Law 2007*: the SASAC should not indiscriminately use administrative powers and rights to intervene in the restructuring of Chinese SOEs.<sup>100</sup>

According to Chinese scholars and legislators, the SASAC's attitude to the mergers of SOEs should be subjected to legal restriction.<sup>101</sup> Both the Constitution and the Anti-Monopoly Law in China exist to advance the protection of the sound and rapid development of the national economy, not the safeguarding of the State's short-term interest. Though the core reason that the SASAC proposes to strengthen SOEs' development is to ensure national or economic security, SOEs' prosperity does not necessarily equate to the blooming of the national economy.<sup>102</sup> Pessimistically speaking, the actual competitiveness of SOEs, which have been developing fast under State intervention, could not be strong enough.<sup>103</sup> SOEs cannot be expected to lead all Chinese enterprises and the national

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the State economy": the Constitution of China 2004, Art 7.

<sup>99A</sup> Article 7 of *the Chinese Anti-Monopoly Law 2007* also mentions that for the sake of national or economic security, this Law protects the State economy: see, e.g. the Anti-Monopoly Law of China 2007, Art 7; Salil K Mehra and Meng Yanbei, 'Against Antitrust Functionalism: Reconsidering China's Antimonopoly Law' (2009) 49 *Virginia Journal of International Law* 379, 405; Li Rongrong, 'Guoqi Gaige Fabuhui' [SOE Reform Press Conference] (2008 Beijing International Media Center (BIMC) Press Conference, Beijing, 10 August 2008) <<http://news.cctv.com/china/20080810/105950.shtml>> accessed 30 January 2017; and Eleanor M Fox, 'An Anti-Monopoly Law for China – Scaling the Walls of Government Restraints' (2008) 75 *Antitrust Law Journal* 173, 178 (maintaining that "[w]hile 'undertaking' does not exclude SOEs, the dominant SOEs are in strategic sectors, and the strategic sectors are all but exempted from the prohibitions of the AML, while remaining under the control of the state, which is empowered to supervise them 'so as to protect the interests of the consumer and facilitate technological progress'").

<sup>100</sup> See Thomas R Howell and others, 'China's New Anti-Monopoly Law: A Perspective from the United States' (2009) 18 *Pacific Rim Law & Policy Journal* 53, 83; and Harris and others (eds), *Anti-Monopoly Law and Practice in China* (n 62) 24.

<sup>101</sup> Interview with a leading Chinese scholar on *the Chinese Anti-Monopoly Law* (the scholar did not allow the researcher to use the interviewee's name in any written work arising from the study, but did consent to being interviewed) (Beijing, China, 2012); Zhen Qinggui, 'Guoqi Gaizhi Gaige Bixu Yifa Jingxing' [China's SOE Reform Must be Conducted by Law (author's translation)] (2014) 37 *China Economic Weekly* 16; and Wang Xiaoye, 'Jingji Tizhi Gaige yu Woguo Fanlongduanfa' [Economic Reform and *the Chinese Anti-Monopoly Law* (author's translation)] (2009) 3 *Dongfang Faxue* [Oriental Law, China] 74, 80; Zhang Xiangdong, 'Fanlongduan, Yigeren de Zhanzheng' [Anti-Monopoly: A War of One's Own (author's translation)] (*Jingji Guancha* [The Economic Observer] (Beijing, 6 November 2009) <[www.eeo.com.cn/2009/1122/156314.shtml](http://www.eeo.com.cn/2009/1122/156314.shtml)> accessed 30 January 2017).

<sup>102</sup> Concerning the relationship between Chinese SOEs and privately-owned SMEs from 1978 onwards, SOEs unilateral development has blocked privately-owned SMEs and seriously damaged Chinese industrial structure: see Chapter 2.2.2 above.

<sup>103</sup> See Gao Xu, 'State-Owned Enterprises in China: How Big are They' (*The World Bank*, 19 January 2010) <<http://blogs.worldbank.org/eastasiapacific/state-owned-enterprises-in-china-how-big-are-they>> accessed 30 January 2017; and Gabriel Wildau and Tom Mitchell, 'Chinese Economy Slows Again as Beijing Seeks New Path to Growth' *Financial Times (Asia)* (Beijing & Shanghai, 16 April 2015) 1.

economy towards hope and prosperity. SOEs, as market participants,<sup>104</sup> ought to observe the market rules and laws<sup>105</sup> like other participants in the Chinese market. However, Chinese administrative agencies which have the power to intervene in the market often favour SOEs in the name of State interest.<sup>106</sup> Thus, with regard to competition between SOEs and privately-owned SMEs, if SOEs and administrative agencies ever step out of line (by intervention), *the Chinese Anti-Monopoly Law 2007* should be considered a counter-attacking force (but is not invoked as such): the core rules in the Chinese market should observe *the Chinese Anti-Monopoly Law 2007*, which ought not to sit idly by and allow such a situation to continue.<sup>107</sup>

However, things have not turned out that way: the semi-government-oriented economic growth model is hard to shake in China. The SASAC has drifted even further and further down that road, and put forward a development plan for mergers of SOEs at the end of 2011 and beginning of 2012 (the SASAC's Development Plan). For the purposes of economic expansion, the SASAC stresses complementary advantages and the powerful combination of central SOEs and local SOEs: i.e., the "joint power" of the State-owned economy.<sup>108</sup> It is not

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<sup>104</sup> See Wang, *The Evolution of China's Anti-Monopoly Law* (n 59) 388.

<sup>105</sup> See Sun Jin and Zhang Tian, 'Guanyu Fanlongduanfa dui Longduan Guoqi Shiyong Wenti de Sikao' [On the Application of Anti-Monopoly Law to State-Owned Monopoly] (2014) 8 *Fazhi Yanjiu* [Research on Rule of Law, China] 51; and Wang Hao, 'Guoqi Fanlongduan Qidai Qutequan' [Anti-Monopoly: Stripping Privileges of SOEs (author's translation)] *Zhongguo Jingji Daobao* [China Economic Herald] (Beijing, 5 September 2013) B01.

<sup>106</sup> See Wang, *Fanlongduanfa [Anti-Monopoly Law]* (n 71) 288.

<sup>107</sup> *The Chinese Anti-Monopoly Law* is "[k]nown as the Economic Charter...": Harris and others (eds), *Anti-Monopoly Law and Practice in China* (n 62) Forward.

<sup>108</sup> The "joint power" of the State-owned economy means to promote cooperation between central SOEs and local SOEs in order to strengthen SOEs as a whole and increase the value of State-owned assets. For example, until September 2013, approximately fifteen of Chinese provinces governments, such as Zhejiang, Guangxi, Henan, Jilin, Shaanxi, Qinghai, etc. had signed a "Cooperation Memorandum" with SASAC and several framework agreements with some central SOEs: see, e.g., Qu Lili, 'Guoziwei Antui Yangqi Zhenghe Difang Guozi Gouzhu Jianguan Dageju' [The SASAC Secretly Pushes the Integration of the State-Controlled Central Enterprises and Local SOEs (author's translation)] *China Business Journal* (Beijing, 16 January 2012) A2; 'Guoziwei yu Qinghai Shengzhengfu Juxing Qianshu Hezuo Beiwanglu' [The SASAC Signed a Cooperation Memorandum with the People's Government of Qinghai (author's translation)] *Qinghai Daily* (Xining, China, 12 June 2013) A01 & A03; SASAC, 'Guoziwei yu Zhejiang Shengzhengfu Qianshu Hezuo Beiwanglu' [The SASAC Signed a Cooperation Memorandum with the People's Government of Zhejiang (author's translation)] (*SASAC, China*, 27 December 2011) <[www.sasac.gov.cn/n1180/n1566/n259730/n264168/14179369.html](http://www.sasac.gov.cn/n1180/n1566/n259730/n264168/14179369.html)> accessed 30 January 2017; SASAC, 'Guoziwei yu Guangxi Zhuangzu Zizhiqu Renmin Zhengfu Juxing Hezuo Beiwanglu Qianzi Yishi ji Yangqi Guangxixing Huodong Qidong Yishi' [The SASAC Signed a Cooperation Memorandum with the People's Government of Guangxi (author's translation)] (*SASAC*, 29 March 2012) <[www.sasac.gov.cn/n1180/n1566/n259730/n264168/14379292.html](http://www.sasac.gov.cn/n1180/n1566/n259730/n264168/14379292.html)> accessed 30 January 2017; the People's Government of Henan Province, 'Guoziwei yu Henan Shengzhengfu Zaijing Qianshu Hezuo Beiwanglu' [The SASAC Signed a Cooperation Memorandum with the People's Government of Henan (author's translation)]



difficult to foresee that the integration of State-owned assets will be bound to bring about mergers and monopolies in several industries in the Chinese market (see for example, in the steel industry<sup>109</sup>). However, *the Chinese Anti-Monopoly Law 2007* (despite its name), seems to contain no genuine sanctions or remedies to prevent this phenomenon from occurring in China.

### 3.2.2.2 Impregnable Administrative Power – *The Chinese Anti-Monopoly Law 2007 has a Long Way to Go*

As already stated above, unrestrained administrative intervention over enterprise growth and the State's economic development is a major feature of China's economic model. Phenomenon, such as the 2011 SASAC's Development Plan for mergers of SOEs (see footnote 108 above) on cooperation among local governments, central SOEs and local SOEs, remains in force, and continues to have influence on the effectiveness of *the Chinese Anti-Monopoly Law 2007*. Since *the Anti-Monopoly Law 2007* has not imposed genuine

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(*The People's Government of Henan, China*, 15 March 2012)

<[www.henan.gov.cn/zwgk/system/2012/03/15/010296514.shtml](http://www.henan.gov.cn/zwgk/system/2012/03/15/010296514.shtml)> accessed 30 January 2017; SASAC, 'Guoziwei yu Jilin Shengzhengfu Juxing Hezuo Beiwanglu Qianzi ji Yangqi Zoujin Jilin Huodong Qidong Yishi' [The SASAC Signed a Cooperation Memorandum with the People's Government of Jilin (author's translation)] (*SASAC*, 20 April 2012) <[www.sasac.gov.cn/n1180/n1566/n259730/n264168/14429436.html](http://www.sasac.gov.cn/n1180/n1566/n259730/n264168/14429436.html)> accessed 30 January 2017; and SASAC, 'Guoziwei yu Shaanxi Shengzhengfu Juxing Qianshu Hezuo Beiwanglu ji Yangqi Jin Shan fazhan Huodong Yishi' [The SASAC Signed a Cooperation Memorandum with the People's Government of Shaanxi (author's translation)] (*SASAC*, 22 April 2012) <[www.sasac.gov.cn/n1180/n1566/n259730/n264168/14444256.html](http://www.sasac.gov.cn/n1180/n1566/n259730/n264168/14444256.html)> accessed 30 January 2017.

<sup>109</sup> For instance, since 2013, the cooperation between central SOEs (e.g. China Minmetals Corporation, China Railway Materials Company Limited, Sinosteel Corporation, etc.) and Hebei Iron and Steel Group Company Limited (a provincial SOE) has enhanced the upstream-downstream cooperation in the steel industry in Hebei market and squeezed the living space of other local competitors. Furthermore, in Hubei Province, Wuhan Iron and Steel (Group) Corporation (a central SOE in Hubei Province) has wholly owned Echeng Iron & Steel Co., Ltd. (a provincial SOE in Hubei Province) from 2013 onwards. By the end of 2015, a central SOE, namely the Metallurgical Corporation of China Ltd. (MCC Group) was orchestrated to merge with a provincial SOE, namely China Minmetals Corporation. In 2016, the Central Government announced that "[t]en central SOEs were in active discussions to create five groups": see, e.g., Wang Daojun, 'Duijie Yangqi de Quanguo Chongdong' [Being Engaged in the Cooperation with Central SOEs (author's translation)] (2010) 3 *Shanghai Guozi* [Capital Shanghai, China] 52; Lei Hanfa, Wei Qingyuan and Zhang Xiaowu, 'Hebei Gangtie Jituan yu Yangqi Zhanlve Hezuo Zaihuo Xinjinzhan' [The Cooperation between Hebei Iron and Steel Group Company Limited and Central SOEs Reaches a New Stage (author's translation)] (*China Economic Net*, 23 May 2013) <[http://district.ce.cn/zg/201305/23/t20130523\\_24413113.shtml](http://district.ce.cn/zg/201305/23/t20130523_24413113.shtml)> accessed 30 January 2017; Lu Yanan and Zhao Zhanhui, 'Guoqi Chongzu Buzuo Jiandan Jiajianfa' [SOE Restructuring: Refusing Basic Addition and Subtraction of the Adjustments (author's translation)] *China Daily* (Beijing, 28 December 2015) 18; Lucy Hornby, 'Beijing Orchestrates Mining Merger between Minmetals and MCC' (*Financial Times*, 8 December 2015) <[www.ft.com/cms/s/0/6df65a0a-9d99-11e5-8ce1-f6219b685d74.html#axzz3vL7cdf4](http://www.ft.com/cms/s/0/6df65a0a-9d99-11e5-8ce1-f6219b685d74.html#axzz3vL7cdf4)> accessed 30 January 2017; and Chen Hongxia, 'Hubeisheng Touzi Gongsi Tuichu, Wugang Jituan Quanpan Jieshou Egang' [State Development & Investment Corporation (SDIC) Hubei Branch Exit Investments and Wuhan Iron and Steel (Group) Corporation Wholly Owned Echeng Iron & Steel Co., Ltd. (author's translation)] *21st Century Media* (Wuhan, 22 May 2013) 18.

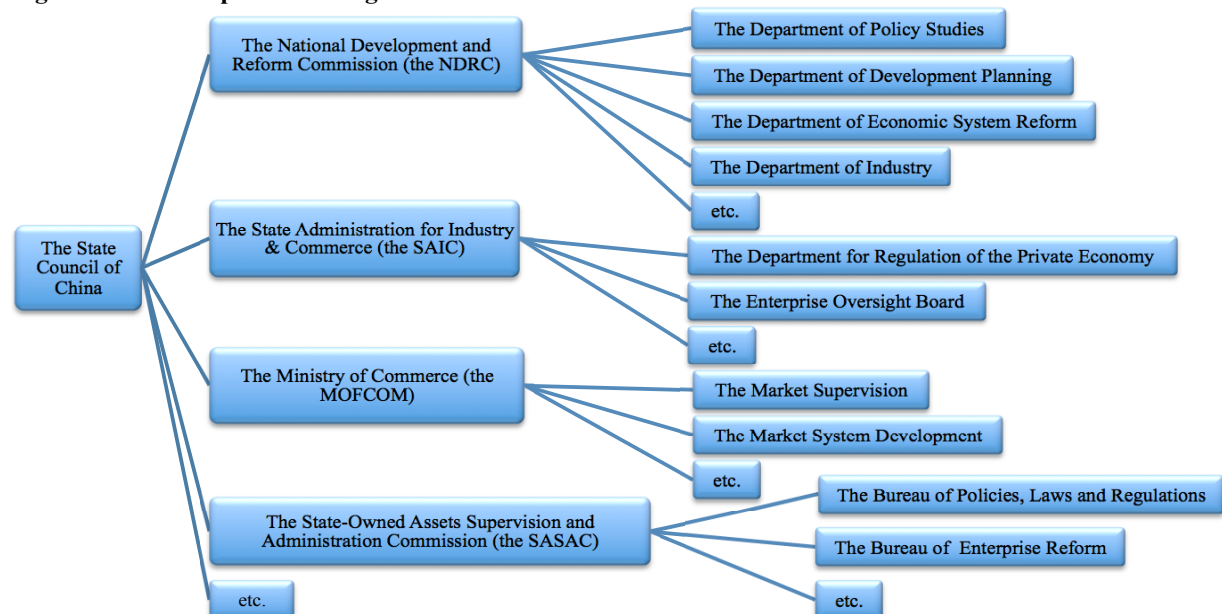
sanctions against administrative agencies if they engage in inappropriate intervention in the market.

According to Article 51(1) of the *Chinese Anti-Monopoly Law 2007*,<sup>110</sup> there are two “punishment” methods for administrative agencies and their officers where either plays a part in abusing administrative power to restrict competition in the Chinese market. The first is that the superior authority<sup>111</sup> shall order the lower-level authorities which issue excessive administrative directives to make correction of their illegal behaviour.<sup>112</sup> The second is that “[t]he superior authority shall impose punishments on the directly liable person(s)-in-charge and other directly liable persons...”<sup>113</sup> However, without specific penalties, these two methods cannot effectively crack down on either administrative agencies or the directly liable person. Therefore, this lack of sanctions under the two methods of punishment of administrative authorities and officers frustrates the smooth enforcement of the *Chinese*

<sup>110</sup> See the Anti-Monopoly Law of China 2007, Art 51.

<sup>111</sup> The superior authorities, which issue excessive administrative directives, are the heads of those lower-level authorities (see Figure 3-4 below):

**Figure 3-4: A Sample of the Organisational Structure of the State Council of China**



Source: ‘State Council Organization Chart’; table Figure 3-4 devised by the author.

See the State Council of China, ‘State Council Organization Chart’ (*The State Council of China*, 28 August 2014) <[http://english.gov.cn/state\\_council/2014/09/03/content\\_281474985533579.htm](http://english.gov.cn/state_council/2014/09/03/content_281474985533579.htm)> accessed 30 January 2017.

<sup>112</sup> See Stefan Weishaar, ‘Administrative Monopolies, State Aid, Barriers to Entry and Market Integration: Challenges for the Chinese Anti-Monopoly Law’ in Michael Faure and Xinzhu Zhang (eds), *Competition Policy and Regulation: Recent Developments in China, the US and Europe* (Edward Elgar Publishing 2011) 120.

<sup>113</sup> See the Anti-Monopoly Law of China 2007, Art 51.

*Anti-Monopoly Law 2007*.<sup>114</sup>

There is a further problem. Article 51(1) mentions that “[t]he anti-monopoly authority may put forward suggestions on handling of cases according to law to the relevant superior authority”<sup>115</sup>. Chinese administrative agencies have frequently used *appropriate*<sup>116</sup> or *inappropriate*<sup>117</sup> interventions in the market. However, it is rarely heard that any superior authority carries out supervision and inspection of lower-level authorities<sup>118</sup> when such violations have occurred.<sup>119</sup>

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<sup>114</sup> See Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2010* [Report on Competition Law and Policy of China 2010] (Law Press, China 2010) 173.

<sup>115</sup> See the Anti-Monopoly Law of China 2007, Art 51.

<sup>116</sup> The author assumes that *appropriate interventions* mean that Chinese administrative agencies use their powers effectively to enhance competition and ensure sound and sustainable economic development.

<sup>117</sup> The author assumes that *inappropriate interventions* in this research mean that Chinese administrative agencies abuse their powers to obstruct non-SOEs and interrupt competition in the market with a view to protecting SOEs and temporary State interest.

<sup>118</sup> In 2011 the SAIC carried out its first anti-monopoly enforcement actions against administrative monopoly in Jiangsu province and Guangdong province. In 2014 the Price Supervision and Anti-Monopoly Bureau investigated the Hebei provincial government on its local protection conduct for the first time. In 2015 the first successful case against administrative monopoly was decided by the Guangdong High People’s Court: the Guangdong Department of Education breached *the Chinese Anti-Monopoly Law of China 2007* (Article 32), because this organ established administrative monopoly by the way of requiring contestants of the Provincial Basic Skills of Construction Cost Competition to purchase required software from a particular brand, namely Glodon Co. Ltd: see, e.g., Wentong Zheng, ‘Competition Law in China’ in John Duns, Arlen Duke and Brendan Sweeney (eds), *Comparative Competition Law* (Edward Elgar Publishing 2015); Song (n 49); Donald Clarke, ‘First Successful Case against Administrative Monopoly’ (*The Law Professor Blogs Network*, 20 February 2015) <[http://lawprofessors.typepad.com/china\\_law\\_prof\\_blog/2015/02/first-successful-case-against-administrative-monopoly.html](http://lawprofessors.typepad.com/china_law_prof_blog/2015/02/first-successful-case-against-administrative-monopoly.html)> accessed 30 January 2017; Wan Jing, ‘Sifa Panjue Shouci dui Xingzheng Longduan Shuobu’ [The First Judicial Decisions against Administrative Monopoly (author’s translation)] *Legal Daily, China* (Beijing, 16 February 2015) 06; Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2014* [Report on Competition Law and Policy of China 2014] (Law Press, China 2014) 13; and the Anti-Monopoly Law of China 2007, Art 32:

Article 32: Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power, restrict or restrict in a disguised form entities and individuals to operate, purchase or use the commodities provided by operators designated by it.

<sup>119</sup> Article 30 of *the Law of China against Unfair Competition 1993* provides a similar right for superior authorities when their subordinate authorities abuse their administrative powers in the economy. However, although the SAIC investigated and prosecuted over 500 administrative monopoly cases under *the Law of China against Unfair Competition 1993* between 1995 and 2005, no inappropriate intervention has been corrected and no directly liable person has been punished: see, e.g., Wang Xiaoye, *Jingzhengfaxue* [Competition Law] (Social Sciences Academic Press, China 2007) 393; Zhou Dongxu, ‘Wang Xiaoye: Xingzheng Longduan Anjian Weihe Hanjian’ [Wang Xiaoye: Why Administrative Monopoly Cases are Uncommon (author’s translation)] (*Caixin Online, China*, 15 September 2014) <<http://m.opinion.caixin.com/pad/2014-09-15/100728745.html>> accessed 30 January 2017; Wang, *The Evolution of China’s Anti-Monopoly Law* (n 59) 356-57; Fair Trading Bureau of the SAIC and CASS Research Centre of International Law, *Fanlongduan Dianxing Anli ji Zhongguo Fanlongduan Zhifa Diaoचा* [Selected Anti-Monopoly Cases and Investigation and Analysis on the Chinese

In order to solve this problem, the first judicial interpretation of *the Chinese Anti-Monopoly Law 2007 (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)* was issued by the Supreme People's Court of China on 30 January 2012, and came into force on 1 June 2012. This judicial interpretation clearly expressed the view that, in China, *natural persons, legal persons, and other organisations* could bring a civil action against those who issue inappropriate administrative directives which adversely affect their growth.<sup>120</sup> According to Article 9 of this Judicial Interpretation [2012] No.5<sup>121</sup>, the People's Court may assume dominant positions of the defendants in the relevant markets based on the specific market structure and competitive circumstance, unless there is sufficient evidence to invalidate such a finding.<sup>122</sup> This Article grants much decision-making power to the People's

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*Administrative Anti-Monopoly Enforcement*] (Law Press China 2007) Introduction; and the Law of China against Unfair Competition 1993, Art 30.

Article 30: Where a government or its subordinate departments, in violation of the provisions of Article 7 of this Law, restrict people to purchasing commodities from a designated business operator or impose limits on other business operators' rightful operation activities or the normal circulation of commodities between different areas, the supervision and inspection department at higher levels shall order them to make corrections; and if the circumstances are serious, the persons held directly responsible shall be given administrative sanctions by the relevant department at the same or higher levels; if the designated business operator takes advantage of his status to sell goods of low quality at high prices or indiscriminately collects fees, the supervision and inspection department shall confiscate the illegal earnings and may impose a fine of not less than one time but not more than three times the illegal earnings in light of the circumstances.

<sup>120</sup> See 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; the Anti-Monopoly Law of China 2007, Art 50;

Article 50: Where any loss was caused by a business operator's monopolistic conducts to other entities and individuals, the business operator shall assume the civil liabilities.

Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2013 [Report on Competition Law and Policy of China 2013]* (Law Press, China 2013) 24 & 30.

<sup>121</sup> See 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, Art 9.

Article 9: Provided the alleged monopolistic conduct is the abuse of dominant market position attributed to a public enterprise or other undertaking legally possessing the dominant position, the People's Court may on the basis of market structure and competition conditions identify that the defendant possesses dominant position in the relevant market, unless proven otherwise by countervailing evidences.

<sup>122</sup> Under Article 9 of the *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*, a *public utility* with a *statutory monopoly* can be directly defined as having a dominant market position without evidence to the contrary. Based on the policy of 'the SAIC's Responding to How to Identify Other Operators Occupying Monopoly Status According to Law' (2000), *statutory monopoly* means that the operator is the only one or exists with insufficient competition in the relevant market. Therefore, examining the Chinese fixed-broadband

Courts in China in a highly specialised area.<sup>123</sup> However, the decision-making power has a double-sided nature. Without genuine use and necessary restriction, it may be challenging to uphold the principle of fairness. Because the People's Courts cannot be regarded as an independent law enforcement agency,<sup>124</sup> some anti-monopoly lawsuits involving large-scale SOEs, which involve the application of implement inappropriate administrative interventions, may turn into administrative disputes. Therefore, providing workable legal limitations for Chinese administrative agencies and SOEs, to curtail the abuse of their specific or exclusive rights, is difficult for *the Chinese Anti-Monopoly Law 2007 to achieve, when the People's Court can intervene*.<sup>125</sup> Therefore, it remains difficult for Chinese privately-owned SMEs to turn their situations from hopeless to hopeful, when facing administrative interventions.

The fact that there are no genuine sanctions against those who issue inappropriate administrative directives to the Chinese market is another major legal flaw in *the Chinese Anti-Monopoly Law 2007*.<sup>126</sup> The Chinese administrative laws and regulations that ought to remedy this legal flaw do not seek to effectively confine or prohibit administrative agencies

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industry, the SOEs' dominant position cannot be defined directly because China Telecom and China Unicom are, on the surface, "effective competitors" created by the State (see Chapter 4.3 below): see, e.g., *id*; 'Guojia Gongshang Xingzheng Guanliju Guanyu Ruhe Rending Qita Yifa Juyou Duzhan Diwei de Jingyingzhe Wenti de Dafu' [The SAIC's Responding to How to Identify Other Operators Occupying Monopoly Status According to Law (author's translation)] (2000) <[www.czgsj.gov.cn/baweb/show/shiju/bawebFile/243278.html](http://www.czgsj.gov.cn/baweb/show/shiju/bawebFile/243278.html)> accessed 30 January 2017; and Kong Xiangjun, Liu Zeyu and Wu Jianying (eds), *Fanbuzhengdang Jingzhengfa: Yuanli, Guize, Anli* [*The Chinese Anti-Unfair Competition Law: Principles, Rules & Cases* (author's translation)] (Tsinghua University 2006) 134.

<sup>123</sup> See Ma Guangyuan, 'Shekeyuan Zhuanjia: Minzhong Qisu Longduan Qiye Yiran Kunnan Chongchong' [The Anti-Monopoly Lawsuit Remains Many Difficulties in China (author's translation)] (*Anti-Monopoly Law Online, China*, 9 May 2012) <[www.antimonopolylaw.org/article/default.asp?id=3785](http://www.antimonopolylaw.org/article/default.asp?id=3785)> accessed 30 January 2017.

<sup>124</sup> In the area of competition law, such a situation not only exists in China, but also appears in the US. Grimes mentioned that "[t]he court has failed on its role to carefully examine economic policy arguments because of the unprincipled way in which it mixes arguments based on *state desire* or precedent with economic analysis": see, e.g., Donald Clarke, Peter Murrell and Susan Whiting, 'The Role of Law in China's Economic Development' in Loren Brandt and Thomas G Rawski, *China's Great Economic Transformation* (CUP 2012), cited in John Knight and Sai Ding, *China's Remarkable Economic Growth* (OUP 2012) 40; Williams, *The Political Economy of Competition Law in Asia* (n 62) 96; and Warren S Grimes, 'Fifteen Years of Supreme Court Antitrust Jurisprudence: The Defendant Always Wins' in Roger Zäch, Andreas Heinemann and Andreas Kellerhals (eds), *The Development of Competition Law: Global Perspectives* (Edward Elgar Publishing 2010) 30.

<sup>125</sup> "[T]he enforcement bureaucracy and the residual potency of the antitrust symbol remain strong enough to prevent the law's mistakes from being retracted": Robert H Bork, *Antitrust Paradox: A Policy at War With Itself* (Basic Books 1978) 4.

<sup>126</sup> All Articles of *the Chinese Anti-Monopoly Law 2007*, which relate to the abuse of administrative powers, are general principles of the prohibition without any specific sanctions (see footnote 80 above). The approach of "the superior authority punishment and correction" in this Law (Article 51 of *the Chinese Anti-Monopoly Law 2007*) is ineffective and requires a strong support from the administrative laws and regulations: see further in Chapter 5.2.1.

or their officers if they abuse their administrative power<sup>127</sup> and thereby restrict competition in the Chinese market.<sup>128</sup>

There are two ways to look for protection from the application of administrative laws and regulations in China: *administrative lawsuits* and *administrative reconsiderations*.<sup>129</sup> According to Article 13(1) of *The Interpretation of the Supreme People's Court on Several Issues of Administrative Procedure Law of China [2000] No.8*, “the specific administrative action” relating to competition can be challenged by administrative lawsuits.<sup>130</sup> However, *the Administrative Procedure Law of China 2015* and the Judicial Interpretation [2000] No.8 do not offer suitable protection<sup>131</sup> for the aggrieved party.<sup>132</sup> In the case of “SOE

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<sup>127</sup> See Guan Baoying, Huang Hui and Cao Jie, *Xingzheng Longduan zhi Xingzhengfa Guizhi [Regulating Administrative Monopoly towards the Chinese Administrative Law* (author's translation)] (China University of Political Science and Law Press 2008) 98.

<sup>128</sup> A similar situation related to the *Law of China against Unfair Competition 1993* is mentioned in footnote 119 above.

<sup>129</sup> In China, there are two types of administrative actions, “the specific administrative action” and “the abstract administrative action”. “The specific administrative action”, which can be challenged by administrative lawsuits, is a form of behaviour with the aim of regulating specific people when they do specific things. On the other hand, “the abstract administrative action”, which cannot be challenged by administrative lawsuits, is a form of behaviour with the aim of formulating binding rules for non-specific people and things. For instance, “[t]he People's Courts shall not accept suits brought by citizens, legal persons or other organizations against any of the following matters: ...administrative rules and regulations, or decisions and orders with general binding force formulated and announced by administrative organs...”: see, e.g., the Administrative Procedure Law of China 2015, Art 13; Zhang Zhengzhao, Hu Jinguang and Li Yuanqi (eds), *Xingzhengfa yu Xingzheng Susongfa [Administrative Law and Administrative Procedure Law]* (4th edn, Renmin University Press, China 2009) 106-84; and the Law of China on Administrative Reconsideration 1999, Art 7.

Article 7: If citizens, legal persons or other organizations consider illegal the following provisions, which the administrative organs take as the basis for their specific administrative acts, they may also apply for examination of these provisions when applying for administrative reconsideration of the said acts:

- (1) provisions formulated by departments under the State Council;
- (2) provisions formulated by local people's governments at or above the county level and the department under them; and
- (3) provisions formulated by township or town people's governments.

The provisions listed in the preceding paragraph do not include rules and regulations formulated by the ministries and commissions under the State Council or by local people's governments. The examination of rules and regulations shall be carried out in accordance with laws and administrative regulations.

<sup>130</sup> See *The Interpretation of the Supreme People's Court on Several Issues of Administrative Procedure Law of China [2000] No.8*, Art 13.

Article 13: Under any of the following circumstances, a citizen, a legal person or any other organisation could bring an administrative lawsuit according to law:

- (1) the sued specific administrative action is related to the neighboring rights or fair competition rights of the plaintiff...

<sup>131</sup> The author has pointed out that “suitable protection” means to restrict administrative intervention from the perspective of offering a fair playing-field between SOEs and privately-owned SMEs. Because only “the specific administrative action” can be challenged by the Chinese administrative lawsuits, certain

mixed-ownership reform” (which uses private funds to improve the development of SOEs) in the 2010s,<sup>133</sup> for privately-owned market participants who may hope to protect themselves from these plans, *the Chinese Anti-Monopoly Law 2007* cannot safeguard their interests, because the “mixed-ownership reform” seems to fall outside the scope of the 2007 Act.<sup>134</sup> Similarly, neither can Chinese administrative laws and regulations do anything useful because the cooperation between central SOEs and local governments or local SOEs, belonging to “the abstract administrative action”,<sup>135</sup> and so cannot be challenged by administrative lawsuits.<sup>136</sup> Thus, *administrative reconsideration* becomes the only protection

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privately-owned SMEs suffering from inappropriate administrative interventions cannot seek protection from *the Administrative Procedure Law of China 2015* and *the Interpretation of the Supreme People’s Court on Several Issues of Administrative Procedure Law of China [2000] No.8*.

<sup>132</sup> **Table 3-5: Data on Withdrawal of Administrative Cases in First Instance in China 2000-2010**

Year	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
<b>Withdrawal (%)</b>	37.8	33.3	30.7	31.6	30.6	30.2	33.8	37	35.9	38.4	44.5
<b>Withdrawal on Plaintiff’s Own (%)</b>	69.0	74.7	76.5	83.9	84.4	88.7	91.2	94.2	92.9	93.4	92.8

Source: ‘Litigations without A Ruling: The Predicament of Administrative Law in China’; table devised by the author.

See He Haibo, ‘Litigations without A Ruling: The Predicament of Administrative Law in China’ (2011) 3 *Tsinghua China Law Review* 257, 262-63; and Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed) (n 114) 174.

<sup>133</sup> The SASAC decided to reduce the number of SOEs from 2010 onwards, as well as enhancing their comprehensive strength. Since the end of 2013, SOE reform has been improved, and the introduction of private funds into SOEs is the basis of a new “mixed-ownership reform” in China: see, e.g., Curtis J Milhaupt and Wentong Zheng, ‘Beyond Ownership: State Capitalism and the Chinese Firm’ (2015) 103 *Georgetown Law Journal* 665, 673; Lan Hongguang, ‘China to Tackle Monopolies, Introduce Competition: CPC’ (*Xinhua, China*, 15 November 2013) <[http://news.xinhuanet.com/english/china/2013-11/15/c\\_132892076.htm](http://news.xinhuanet.com/english/china/2013-11/15/c_132892076.htm)> accessed 30 January 2017; Gabriel Wildau, ‘Beijing Identifies SOEs for Reform Pilot’ *Financial Times (Asia)* (Shanghai, 16 July 2014) 4; Yu Zheng, ‘China’s State-Owned Enterprise Mixed Ownership Reform’ (2014) 04 *East Asian Policy* 39; and Lv Hongqiao, ‘Guoqi Hebing Chongzu Lidu Jingren, Huo Jianshao Liuqicheng’ [A Shocking Process in SOE Merger and Acquisition, the Total Number of Chinese SOEs May Decline by 60-70 Percent (author’s translation)] (*Chinese Radio Network*, 6 January 2015)

<[http://finance.cnr.cn/txcj/20150106/t20150106\\_517319785.shtml](http://finance.cnr.cn/txcj/20150106/t20150106_517319785.shtml)> accessed 30 January 2017.

<sup>134</sup> The SASAC’s development plans to merge SOEs have been following administrative directives rather than *the Chinese Anti-Monopoly Law 2007*. The administrative enhancement of SOEs lowers the competitiveness of privately-owned market participants and thereby reduces their economic interests. For example, the SASAC’s recent action on mergers of SOEs, namely the 2010s “SOE mixed-ownership reform”, not only involves “[a] mix of different SOEs injecting capital into another SOE”, but also allows private funds to participate in certain SOEs. However, this reform would mainly result that the Central Government benefits from private funds, with regard to improving SOEs: see, e.g., Liu Liliang, ‘Jin Shixiang Guoqi Gaige Fangan Youwang Shuaxian Chutai’ [Nearly Ten SOE Reform Programmes are Expected to Come into Force (author’s translation)] *Zhongguo Zhengquan Bao [China Securities Journal]* (Beijing, 28 January 2015) A01 & 02; David Keohane, ‘SOE You Think You Can Reform? Mixed-Ownership Edition’ (*Financial Times*, 28 September 2015) <<https://ftalphaville.ft.com/2015/09/28/2140985/soe-you-think-you-can-reform-mixed-ownership-edition/>> accessed 30 January 2017; and Lang Xianping, *Zhongguoshi MBO: Guoqi Gaige Weishenme Mishi [Chinese-Style MBO: Why SOE Reform Lost* (author’s translation)] (3rd edn, The Eastern Publishing, China 2011) 6 & 11.

<sup>135</sup> See Guan (n 128) 9-10.

<sup>136</sup> See the Administrative Procedure Law of China 2015, Art 13; and the Law of China on Administrative Reconsideration 1999, Art 7.

method for privately-owned market participants. However, because bureaucrats traditionally tend to shield one another, administrative reconsideration is often considered to be a long and fruitless road for privately-owned SMEs.

As a result, since there is an absence of genuine sanctions to combat excessive administrative directives, *the Chinese Anti-Monopoly Law 2007* cannot prevent administrative agencies and SOEs from abusing their exclusive or special rights to interfere the market, such as interrupting the development process of privately-owned SMEs.<sup>137</sup> Even worse, a source of possible external assistance, namely Chinese administrative laws and regulations, is unable to assist in limiting the abuse of the administrative power.

In summary, China's privately-owned SMEs have been subjected to unfair treatment over a long period of time, in which nothing much has changed since *the Chinese Anti-Monopoly Law 2007* came into force. Why does inappropriate administrative intervention continue to be a very stubborn phenomenon in China? Analysis of the legal flaws in *the Chinese Law on Promotion of SMEs 2002* and *the Chinese Anti-Monopoly Law 2007* may offer a partial answer, but not a complete answer. Alternatively, the inherent tension between *the Chinese Anti-Monopoly Law 2007* and the State's industrial policy may provide a useful explanation for the weak survival conditions of privately-owned SMEs.

### **3.3 Inherent Tension between *the Chinese Anti-Monopoly Law 2007* and the State's Industrial Policy on the Development of SOEs and Privately-Owned SMEs**

Starting in 1978, China enacted a considerable number of policies for SMEs' development

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<sup>137</sup> In the case of the steel industry in Hebei province, the Hebei government aimed to merge and decrease both State-owned and privately-owned steel enterprises located in the province from over 200 in 2003 to 15 by the end of 2015, without considering market rules (see Chapter 4.1 below). In this process, all shutdown and merged steel enterprises can be described as victims suffering inappropriate administrative interventions. However, *the Chinese Anti-Monopoly Law 2007* has never paid attention to this government-led merger and shutting-down plan: see, e.g., Cao Kaihu, 'Hebei Gangtie jiang Zaici Piliang Chongzu Minying Gangqi' [Privately-Owned Steel Enterprises in Hebei Province will be Restructured Again (author's translation)] *First Financial Daily* (Shanghai, 13 December 2010) B01; Li Baoyuan, 'Hebei Gangtie Zhenghe Fangan Disandu Weitiao' [The Third Times Minor Adjustment on the Hebei Steel Enterprises' Merger Plan (author's translation)] *Yanzhao Dushibao [Yanzhao Metropolis Daily]* (Shijiazhuang, 13 September 2012) 17; and Fan Yali and Peng Yuqiang, 'Jinrong Weiji dui Hebei Gangtieye de Yingxiang' [The Impact of the Financial Crisis on the Steel Industry in Hebei Province (author's translation)] (2009) 11 *Economic Forum, China* 83.



(see Chapter 2.1.1 above<sup>138</sup>). However, a dedicated legal framework for SMEs has little more than ten years' history in China.<sup>139</sup> The growth of Chinese SMEs and even the State economy, and how to step up practical cooperation between the new legal framework for SMEs and the State's industrial policy, remains a tricky issue in China. Although *the Chinese Anti-Monopoly Law 2007* and the State's industrial policy have similar functions and final objective,<sup>140</sup> in other words the "public interest", conflict between them remains.<sup>141</sup> This tendency has not only undermined the authority of *the Chinese Anti-Monopoly Law 2007*, but has also granted privileges to China's SOEs and administrative agencies, threatening the growth of privately-owned SMEs. Consequently, based on such a phenomenon, the following section of this chapter devotes considerable attention to the competing priorities of the Chinese Anti-Monopoly Law and the Chinese industrial policy from two aspects: first, because the Anti-Monopoly Law and industrial policy rely on different approaches to realise the resources allocated and avoid market failure, conflicts between them exist,<sup>142</sup> and second,

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<sup>138</sup> Chinese policies for SMEs' development include 'the Reform and Opening Up' policy (1978), 'Preliminary Views on Economic Reform' (1980), 'the Interim Provisions on Carrying Out and Protecting Socialist Competition' (1980), 'the Decision of the CPC Central Committee on Economic Reform' (1984), the 'Grasp the Big, Release the Small' policy (1995), etc.

<sup>139</sup> The first Chinese law on promotion of the growth of SMEs (*the Chinese Law on Promotion of SMEs*) was enacted in 2003; and an extremely important law on market competition, *the Chinese Anti-Monopoly Law 2007*, is like an infant in the Chinese legal system on the issue of promoting privately-owned SMEs' growth.

<sup>140</sup> See Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2011 [Report on Competition Law and Policy of China 2011]* (Law Press, China 2011) 201; Joseph E Stiglitz, 'Government Failure vs. Market Failure: Principles of Regulation' in Edward J Balleisen and Davia A Moss (eds), *Government and Markets: Toward a New Theory of Regulation* (CUP 2012) 35 (maintaining "[t]hat in principle there are government interventions that would be welfare enhancing..."); and Shi Junhua, *Fanlongduan yu Zhongguo Jingji Fazhan: Zhanxingqi Zhongguo Fanlongduan Zhengce Yanjiu [Antitrust and Economic Development in China: Study on Chinese Antitrust Policies in the Reform Era]* (Economic Science Press, China 2013) 255-56.

<sup>141</sup> Two 2015 policies, namely 'Guidance on Essential Works of Deepening Economic System Reform' (2015) and 'Several Opinions of the CPC Central Committee and the State Council on Deepening Pricing Mechanism Reform' (2015), held that the government promoted effective coordination between *the Anti-Monopoly Law* and the State industrial policy: see, e.g., Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2015 [Report on Competition Law and Policy of China 2015]* (Law Press, China 2015) 24; 'Guanyu 2015 nian Shenhua Jingji Tizhi Gaige Zhongdian Gongzuo de Yijian' [Guidance on Essential Works of Deepening Economic System Reform (author's translation)] (2015) <[www.gov.cn/zhengce/content/2015-05/18/content\\_9779.htm](http://www.gov.cn/zhengce/content/2015-05/18/content_9779.htm)> accessed 30 January 2017; and 'Zhonggong Zhongyang Guowuyuan Guanyu Tuijin Jiage Jizhi Gaige de Ruogan Yijian' [Several Opinions of the CPC Central Committee and the State Council on Deepening Pricing Mechanism Reform (author's translation)] (2015) <[http://news.xinhuanet.com/fortune/2015-10/15/c\\_1116837695.htm](http://news.xinhuanet.com/fortune/2015-10/15/c_1116837695.htm)> accessed 30 January 2017.

<sup>142</sup> See Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2013 [Report on Competition Law and Policy of China 2013]* (Law Press, China 2013) 34.

the tension between the Anti-Monopoly Law and the State industrial policy<sup>143</sup> will be examined from the perspective of the definition and position of the “public interest” in both of them.<sup>144</sup>

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<sup>143</sup> See Frédéric Jenny, ‘Competition Law Remedies: In Search of a Theory’ in Ioannis Lianos and D Daniel Sokol (eds), *The Global Limits of Competition Law* (Stanford University Press 2012) 171; and Thomas K Cheng, Ioannis Lianos and D Daniel Sokol (eds), *Competition and the State* (Stanford University Press 2014) 2 (the latter points out “[c]ompetition authorities for the most part played only a minor role in the formulation of these policies”).

<sup>144</sup> In recent years, “public interest” has become a popular phrase in China. The book *On the Exemption in Anti-Monopoly Laws* maintained that the overall economic development could reflect the “public interest”. The “public interest” also appears in various laws and regulations, such as *General Principles of the Civil Law of China 1986*, *the Contract Law of China 1999*, *the Property Law of China 2007*, *the Administrative Permission Law of China 2003*, and so on. However, hitherto, “public interest” has not had a clear meaning. Although *the Trust Law of China 2001* and *the Law of China on Donations for Public Welfare 1999* have outlined the scope of the “public interest”, they are unable to provide a clear definition for this phrase that could apply in *the Chinese Anti-Monopoly Law 2007* context: see, e.g., Zhong (n 98) 77; *General Principles of the Civil Law of China 1986*, Arts 7 & 55;

Article 7: Civil activities shall have respect for social ethics and shall not harm the public interest, undermine state economic plans or disrupt social economic order...

Article 55: A civil juristic act shall meet the following requirements:  
... (3) the act does not violate the law or the public interest.

The Contract Law of China 1999, Art 52;

Article 52: Invalidating Circumstances  
A contract is invalid in any of the following circumstances:  
... (iv) The contract harms public interests...

The Property Law of China 2007, Art 7;

Article 7: The law shall be observed and social ethics shall be respected in acquiring or exercising the property rights and public interests and the lawful rights and interests of another person shall not be jeopardized.

The Administrative Permission Law of China 2003, Art 12;

Article 12: The procedure for administrative permission may be instituted for the following matters:  
... (2) matters relating to the development and utilization of limited natural resources, the allocation of public resources as well as access to the market of the special trades that have a direct bearing on public interests, etc....  
(3) matters relating to the professions and trades that provide services to the public and that have a direct bearing on public interests...

The Trust Law of China 2001, Art 60;

Article 60: A trust created for one of the following purposes in the interest of public welfare is a public welfare trust:  
(1) relief for the poor;  
(2) relief assistance to people suffering from disasters;  
(3) helping the disabled;  
(4) developing education, science, technology, culture, art and sports;  
(5) developing medical and public health undertakings;  
(6) developing undertakings for the protection of the environment and maintaining ecological environment; and  
(7) developing other public welfare undertakings.

### 3.3.1 Different Approaches to Realising Resource Allocation and the Avoidance of Market Failure

In China, it is generally considered that *the Chinese Anti-Monopoly Law 2007* and the State's industrial policy have the same functions in the area of the State's economic development: they are both devoted to ensuring an efficient allocation of resources and the avoidance of market failure.<sup>145</sup> However, this does not mean that *the Chinese Anti-Monopoly Law 2007* and the State's industrial policy are sufficiently similar, such that conflict is avoided.<sup>146</sup> In order to enhance economic efficiency<sup>147</sup> and avoid market failure, the Chinese Anti-Monopoly Law relies on *market mechanisms*, whereas industrial policy aims to achieve such functions by *administrative intervention*. Although different roads can lead to the same goals, in the process of achieving those goals, conflict is inevitable.

#### 3.3.1.1 Market Mechanisms – The Ideal Trump Card for the Chinese Anti-Monopoly Law 2007

Because China has not been a traditional market economy country since 1949, the State's demands have often determined, to a large extent, the impact of economic

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The Law of China on Donations for Public Welfare 1999, Art 3.

Article 3: For purposes of this Law, the term "public welfare" includes the following non-profit activities:

- (1) activities by community groups or individuals in disaster relief or poverty relief, or in giving assistance to the disabled;
- (2) educational, scientific, cultural, public health and sports services;
- (3) environmental protection and public utility construction; and
- (4) other public and welfare services to promote social development and progress.

<sup>145</sup> See Qi Hongli, 'Guojia Jingji Anquan yu Chanye Zhengce Lifa: Jiaru WTO gei Zhongguo Chanye Dailai de Chongji yu Riben Jingyan de Qishi' [The National Economic Safety and Industrial Legislation: Challenges after China's Accession to the WTO, with Special Reference to Japanese Experience (author's translation)] (2003) 19 Yunnan Caijing Daxue Xuebao Shehui Kexueban [Yunnan Finance & Economics University Journal of Economics & Management, China] 123; Meng Yanbei, 'Chanye Zhengce yu Fanlongduanfa de Chongtu yu Xietiao' [The Conflict and the Coordination between *the Chinese Anti-Monopoly Law* and the State's Industrial Policy (author's translation)] (2005) 2 Shehui Kexue Yanjiu [Social Sciences Research, China] 78; Liu Guiqing, *Fanlongduanfa zhong de Chanye Zhengce yu Jingzheng Zhengce* [The Relation between Competition Policy and Industrial Policy in Antitrust Law] (Peking University Press 2010) 2; and Chang Ha-Joon, 'The Economics and Politics of Regulation: A Critical Survey' (1997) 21 Cambridge Journal of Economics 703, 704.

<sup>146</sup> See Yong Huang and Shan Jiang, 'Thirty Years of PRC Anti-Monopoly Law under "State-Market" Yardstick: From Retrospective and Prospective Viewpoints' in Roger Zäch, Andreas Heinemann and Andreas Kellerhals (eds), *The Development of Competition Law: Global Perspectives* (Edward Elgar Publishing 2010) 177.

<sup>147</sup> Allocative efficiency and productive efficiency are two elements of *economic efficiency* in *the Chinese Anti-Monopoly Law 2007*. Consumer welfare, offering products or services with lower prices and better quality in the market can satisfy *economic efficiency*: Xiaoye Wang, 'Highlights of China's New Anti-Monopoly Law' (2008) 75 Antitrust Law Journal 133, 142.

development, one way or another.<sup>148</sup> Therefore, in China, a brief review of the history of the *Anti-Monopoly Law*'s development shows that it is synchronous with the gradual acceptance of the market mechanism by the State. Two years after 'the Reform and Opening Up' policy (1978), the State Council released the first competition policy ('the Interim Provisions on Carrying Out and Protecting Socialist Competition') in 1980. From then on, market mechanisms have started to be gradually introduced to China. Since the end of the 1980s and the start of the 1990s, in order to keep pace with Chinese "deep reform" (see footnote 157 in Chapter 2), the State has progressively acknowledged that market mechanisms, especially competitive mechanisms, should play an active role in the State's industrial and economic development.<sup>149</sup> In 1993, *the Law of China against Unfair Competition* (see footnote 35 above) and 'the Provisions on the Prohibition of the Restriction on Competition by Public Utility Enterprises' (1993),<sup>150</sup> which focused on competition and specific administrative rights in the market, came into effect. In the following years, the development of Chinese competition law and policy finally ushered in *the Chinese Anti-Monopoly Law* in 2007.

In the progression and development of the Chinese economy, State intervention has been widely used. Nowadays, in the context of State intervention, both the Chinese Anti-Monopoly Law and the State's industrial policy are the most useful and common tools for maintaining competition in the Chinese market. The most important distinction between them, is that *the Chinese Anti-Monopoly Law 2007* should be the core rule in the market,<sup>151</sup> while the State's industrial policies are regional or temporary policies for achieving specific purposes.

As the most basic rule for encouraging and protecting competition in the market, the

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<sup>148</sup> See Dittmer and Liu (eds) (n 30).

<sup>149</sup> See Li Peng, '1992 Zhengfu Gongzuo Baogao' [Report on the Work of the Government (1992)] (The Fifth Session of the Seventh National People's Congress, Beijing, 20 March 1992) <[www.hprc.org.cn/wxzl/wxysl/lczf/dishiyijie\\_4/200908/t20090818\\_27702.html](http://www.hprc.org.cn/wxzl/wxysl/lczf/dishiyijie_4/200908/t20090818_27702.html)> accessed 30 January 2017.

<sup>150</sup> The SAIC launched 'the Provisions on the Prohibition of the Restriction on Competition by Public Utility Enterprises' (1993) to prohibit public enterprises (e.g. enterprises providing postal services, telecommunication services, transportation services, water supply, electricity supply, etc.) from using their market power to interrupt competition and reduce consumer welfare: 'Guanyu Jinzhi Gongyong Qiye Xianzhi Jingzheng Xingwei de Ruogan Guiding' [The Provisions on the Prohibition of the Restriction on Competition by Public Utility Enterprises] (1993) <[http://gkml.saic.gov.cn/auto3743/auto3746/200807/t20080729\\_112475.htm](http://gkml.saic.gov.cn/auto3743/auto3746/200807/t20080729_112475.htm)> accessed 30 January 2017.

<sup>151</sup> See Harris and others (eds), *Anti-Monopoly Law and Practice in China* (n 66) Forward.

Chinese Anti-Monopoly Law not only needs to use market mechanisms, especially the competition mechanism, to ensure the vitality of the market, but also has to prevent the disadvantages of market competition.<sup>152</sup> Because competition within the market among competitors is an individual behaviour, nearly every competitor is concerned with its unique “self-interest”,<sup>153</sup> and proposes to maximise it without limitations.<sup>154</sup> Hence, without necessary restrictions, some market competitors probably gain strength at the expense of others. Even so, it is generally assumed that in the market, “the promotion and protection of competition is a rule of thumb for maximising welfare...”<sup>155</sup> Accordingly, as the source of market vitality, protecting the market mechanisms and fair competition also, should be the trump card for the Chinese Anti-Monopoly Law. Therefore, with regards to both advantages (ensuring market vitality) and disadvantages (promoting competitors’ self-interests) of market mechanisms, *the Chinese Anti-Monopoly Law 2007* attempts to adopt “a fair use” market mechanisms, in order to enhance economic efficiency on the one hand, and to avoid market failure on the other hand.

### 3.3.1.2 State-Oriented Industrial Policy in China

By contrast, as regards the lifeline of the national economy and national security, market mechanisms may not be sufficient to improve the global competitiveness of Chinese enterprises over a limited period of time. Instead, large-scale merger and reorganisation seems to be a rapid and effective method for SOEs<sup>156</sup> to develop rapidly in several traditional State-controlled industries.<sup>157</sup> Hence, for the growth of the Chinese economy, the

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<sup>152</sup> “There is general consensus that the basic objective of competition policy is to protect and preserve competition as the most appropriate means of ensuring the efficient allocation of resources – and thus efficient market outcomes – in free market economies”: OECD, ‘Competition Policy and Efficiency Claims in Horizontal Agreements’ (1996) <[www.oecd.org/competition/mergers/2379526.pdf](http://www.oecd.org/competition/mergers/2379526.pdf)> accessed 30 January 2017.

<sup>153</sup> Adam Smith presumed that “self-interest” drives individual competitors to persuade customers on grounds of quality and value to make a particular purchase, in *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776).

<sup>154</sup> “Competition is the principal regulator of commercial forces... Individual competitors’ motivating force derives from the pursuit of self-interest”: Sonya Margaret Willimsky, ‘The Concept of Competition’ (1997) 18 *European Competition Law Review* 54.

<sup>155</sup> See Timo Vålila, ‘No Policy is an Island – on the Interaction between Industrial and other Policies’ in Armin Riess (ed), *An Industrial Policy for Europe: From Concepts to Action* (Farrah Baut-Carlier EIB Graphic Shop 2006) 19.

<sup>156</sup> See Chien-Hsun Chen and Hui-Tzu Shih, *Mergers and Acquisitions in China: Impacts of WTO Accession* (Edward Elgar Publishing 2008) 38-42.

<sup>157</sup> For example, merger and reorganisation took place in the Chinese steel industry (see Chapter 4.1.1.2 below), the petroleum industry (see Chapter 4.2.1.1 below), etc.; and this is still an ongoing phenomenon: Russell Smyth

State-oriented industrial policy cannot be discarded.<sup>158</sup> However, the problem arises when, based on the State's industrial policy, the development approach adds too many of the State's desires to control the growth approach of SOEs and privately-owned SMEs (in other words, in the area of Chinese industrial policy, while the efficient allocation of resources, and the avoiding of the prospect of market failure, can both be achieved by the actions of the State), the State cannot always be correct in intervening in the market: smooth economic development requires therefore that State industrial policy should be limited, and become a much more moderate method of driving Chinese economic growth. Otherwise, optimising the allocation of resources may not be achieved, and *market failure may turn into government failure*.<sup>159</sup>

For instance, in order to transform China's steel industry into a large-scale industry by the end of 2012, the State Council enacted the 'Steel Industry Revitalisation Plan' in 2009, which considered that in the steel industry, economic efficiency is absolutely related to the industrial scale.<sup>160</sup> Therefore, with the intention of enhancing the global competitiveness of steel SOEs, "big is beautiful" has become a common dogma in China's steel industry. However, size does not always equate to strength. The rational input and output and reasonable scale of this industry must be thought out carefully; otherwise, the situation of having quantity without quality would soon appear. Unfortunately, this "prophecy" has come true. Before the 'Steel Industry Revitalisation Plan' (2009) was adopted, over-production of

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and Zhai Qingguo, 'Change and Restructuring in Chinese State-Owned Enterprises' (Asian Business and Economics Research Unit, Monash University, 2007) 7.

<sup>158</sup> See Heilmann (n 88) 96.

<sup>159</sup> State intervention is a commonly-used model for countries all over the world to avoid market failure. However, the fact is that, in the market, the shortcomings of governments are no less than those of markets: Charles Wolf, *Market or Governments: Choosing between Imperfect Alternatives* (2nd edn, MIT Press 1993) 12-33.

<sup>160</sup> The publication 'the Steel Industry Revitalisation Plan of China' (2009) set two objectives: (a) to form over three large-scale undertaking groups (with a production capacity of over 50 million tonnes) and about seven medium-scale undertaking groups (with a production capacity of 10 to 30 million tonnes) in the steel industry by 2011; (b) to raise the output of the top ten large steel undertakings to over 60 percent of total Chinese steel output by 2015, from 44 percent in 2009: see, e.g., 'Guowuyuan Bangongting Guanyu Jinyibu Jiada Jieneng Jianpai Jiakuai Gangtie Gongye Jiegou Tiaozheng de Ruogan Yijian' [Opinions on Further Increasing Energy Conservation Efforts and Speeding-up Restructuring in the Steel Industry (author's translation)] (2010) <[www.gov.cn/zwggk/2010-06/17/content\\_1629386.htm](http://www.gov.cn/zwggk/2010-06/17/content_1629386.htm)> accessed 30 January 2017; and 'Gangtie Chanye Tiaozheng he Zhenxing Guihua' [Steel Industry Revitalisation Plan of China] (2009) <[www.gov.cn/zwggk/2009-03/20/content\\_1264318.htm](http://www.gov.cn/zwggk/2009-03/20/content_1264318.htm)> accessed 30 January 2017, the English version is available at <[www.lawinfochina.com/display.aspx?lib=law&id=7529&CGid=>](http://www.lawinfochina.com/display.aspx?lib=law&id=7529&CGid=>)> accessed 30 January 2017.

basic and similar steel products already exceeded demand in China (see Figure 4-7 in Chapter 4) (the tendency towards excess of production over consumption appears in the area of high-end steel products<sup>161</sup>). As a result, the government-led plan went against the aims of achieving an efficient allocation of resources, and avoiding market failure, and engendered a worse situation of surplus production in the steel industry, the effects of which are still being felt at the time of writing (2016).

However, this is not the most unwelcome outcome that was brought about by the ‘Steel Industry Revitalisation Plan’ (2009): it also challenges the position of market mechanisms and the authority of *the Chinese Anti-Monopoly Law 2007*. Following the ‘Steel Industry Revitalisation Plan’ (2009), every provincial government had the right to make its own merger plan for local steel enterprises.<sup>162</sup> The only “controlling procedure” to examine those plans was to submit them to the relevant State agency before putting it into practice. However, because the relevant State agency simply needs to know what the plan is, rather than examine whether it is in conformity with *the Chinese Anti-Monopoly Law 2007*, this “controlling procedure” has no practical significance. To make matters even worse, there is no independent anti-monopoly enforcement agency in China that is dedicated to enforcing the *Anti-Monopoly Law 2007* (see Figure 5-1 in Chapter 5). Consequently, as regards the ‘Steel Industry Revitalisation Plan’ (2009), mergers in the steel industry are definitely government-oriented mergers. The voice of media criticism<sup>163</sup> called those mergers “administrative mergers”. In other words, different levels of government in China totally ignore *the Chinese Anti-Monopoly Law 2007* in the pursuit of the “enhancement” of the steel industry.<sup>164</sup>

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<sup>161</sup> See Dong Wei, ‘Li Rongrong: Guoqigaige Bunengzou Huitoulu’ [Li Rongrong: SOEs Reform Cannot Turn Back] *China Youth Daily* (Beijing, 8 April 2013) 10.

<sup>162</sup> See ‘Gangtie Chanye Tiaozheng he Zhenxing Guihua’ [Steel Industry Revitalisation Plan of China] (2009) (n 160).

<sup>163</sup> See Sun Weichen, ‘Gangtie Zhongguoshi Chongzu Zhiyou’ [Worries on Chinese-Style Mergers in the Steel Industry (author’s translation)] *Guoji Jingtongbao* [*Inferential Finance News*] (Beijing, 11 September 2009) 02; Pan Weijie, ‘Quyue Zhenghe: Zhongguo Gangtieye de Binggou Xindongli’ [Regional Integration – New Power for China’s Steel Industry Mergers (author’s translation)] (2009) 3 *Dongshihui* [Directors & Boards] 65; and He Rongliang, ‘Gangtie Dachongzu de Sige Yinyou’ [Four Worries on the Steel Mergers in China (author’s translation)] *Jingji Guancha* [*The Economic Observer*] (Beijing, 8 September 2012)

<[www.eeo.com.cn/observer/shelun/2009/09/08/150519.shtml](http://www.eeo.com.cn/observer/shelun/2009/09/08/150519.shtml)> accessed 30 January 2017.

<sup>164</sup> See Chapter 4.1 below.

Hence, apart from the same functions and a similar final objective, there are conflicts between *the Chinese Anti-Monopoly Law 2007* and industrial policy, which are caused by the State's particular stage of development. On the one hand, if the State treated *the Chinese Anti-Monopoly Law 2007* as a priority, this would be good for market mechanisms, especially the competitive mechanism.<sup>165</sup> However, if the State refuses to use industrial policy to support the development of certain vital industries, such as the steel industry, it will hamper the improvement of the comprehensive economic strength of the State, and China may suffer failure in terms of global economic competition. On the other hand, if the State treated the industrial policy as a priority, China's international competitiveness would be assured and enhanced in the short term, but market mechanisms and effective competition would remain only an illusion in China, and State intervention would (and does) lead to the existing situation of administrative monopolies going "from bad to worse".<sup>166</sup>

Thus, at present, the actual conflicts between *the Chinese Anti-Monopoly Law 2007* and the State's industrial policy generate the following two questions: (a) What is the most suitable mix of conditions needed to treat the conflicts between them, and to make them work together harmoniously? (b) What is the most suitable mix of conditions needed to create effective cooperation between the imperfect market and the growth-oriented government in the process of Chinese economic development? The "public interest", the reconciliation between the State's interest, the interests of enterprises, and of consumer welfare, might be the ultimate standard for the solution of these two questions.

### 3.3.2 The "Public Interest" in the Chinese Market: Exclusion or Compromise

Article 1 of *the Chinese Anti-Monopoly Law 2007* insists that safeguarding the "public

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<sup>165</sup> See Angela Huyue Zhang, 'Bureaucratic Politics and China's Anti-Monopoly Law' (2014) 47 *Cornell International Law Journal* 671, 697.

<sup>166</sup> Concerning steel merger plans in Hebei province, although the previous merger plans (from 2005 to 2013) concluded that some privately-owned steel SMEs disappeared illegally and merged steel enterprises operated independently, the Hebei provincial government could not allow the *administrative merger* to fail (see Chapter 4.1.1.2 below). Instead, the publication 'Hebei Structural Adjustment Programme on the Steel Industry' (2014) aims to further reduce the number of local privately-owned steel enterprises: see, e.g., Gao Pengfei, 'Hebeisheng Gangtie Qiye Lianhe Chongzu Moshi Fenxi' [Analysis on the Restructuring Mode of Steel Enterprises in Hebei Province (author's translation)] (2011) 10 *China Steel* 14, 17; and Yuan Zhiguang, 'Hebei Gangtie ChanYe Jiegou Tiaozheng Zaichu Zuhequan' [Further Restructuring in the Hebei Steel Industry (author's translation)] (*Xinhua, China*, 6 December 2014) <[http://news.xinhuanet.com/politics/2014-12/06/c\\_127282849.htm](http://news.xinhuanet.com/politics/2014-12/06/c_127282849.htm)> accessed 30 January 2017.



interest” in China, which should reconcile competing interests between the State, the market participants and consumers, is one of the major objectives of this Law.<sup>167</sup> Some scholars maintain that the State’s industrial policy has a similar final objective, the “public interest”.<sup>168</sup> However, there is no consensus on the meaning of “public interest” in China.<sup>169</sup> Whether the “public interest” should be defined by more precise elements, such as consumer welfare and the State’s interest, remains a problem.<sup>170</sup> Specifically, there is a common voice that, in the context of *the Chinese Anti-Monopoly Law 2007*, the “public interest” is equivalent to consumer welfare.<sup>171</sup> On the other hand, the State’s industrial policy always treats the State’s interest as a matter of priority, and insists it could represent the majority of the notion of the “public interest” in the Chinese market.<sup>172</sup>

Competition between “consumer welfare” and the State’s interest leads to a weird situation in China, whereby “public interest”, which loses its function of keeping a balance on interests in the market, is not the same in different areas. The difference between “consumer welfare”, “the State’s interest”, and “the public interest”, is a very necessary one. The “public interest”, which is wider than mere consumer welfare or the State’s interest, can

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<sup>167</sup> See the Anti-Monopoly Law of China 2007, Art 1.

<sup>168</sup> See Qi (n 145) 123; Wang Xiaoye, ‘Fanlongduanfa Zhongde Shehui Gonggong Liyi’ [The Public Interest in *the Chinese Anti-Monopoly Law* (author’s translation)] (2008) Chinese Academy of Social Sciences Review <<http://theory.people.com.cn/GB/49150/49153/7377262.htm>> accessed 30 January 2017; and Stiglitz (n 140).

<sup>169</sup> See Wang, *The Evolution of China’s Anti-Monopoly Law* (n 59) 161-67; Jiang Wuzhen, ‘Fanlongduanfa zhong de Gonggong Liyi Jiqi Shixian’ [The Public Interest in *the Chinese Anti-Monopoly Law* and its Implementation] (2010) 4 Peking University Law Journal 551, 553; and Diarmuid Rossa Phelan, ‘The Future of the Constitutional Welfare State in Europe from the Irish Perspective’ in Julia Iliopoulos-Strangas (ed), *The Future of the Constitutional Welfare State in Europe* (Nomos 2015) 126 (pointing out that “[e]ach person does not have the same social rights, which tend to correspond to need rather than nature”).

<sup>170</sup> See Xiaoye Wang, ‘Challenges In Enforcing Chinese Antimonopoly Law’ (*The Institute of Law, Chinese Academy of Social Sciences*) <[www.iolaw.org.cn/showarticle.asp?id=2242](http://www.iolaw.org.cn/showarticle.asp?id=2242)> accessed 30 January 2017.

<sup>171</sup> Interview with a Chinese scholar on *the Chinese Anti-Monopoly Law* (the scholar did not allow the researcher to use the interviewee’s name in any written work arising from the study, but did consent to being interviewed) (Shanghai, China, 2012); Interview with a leading academic expert on *the Chinese Anti-Monopoly Law* (the scholar did not allow the researcher to use the interviewee’s name in any written work arising from the study, but did consent to being interviewed) (Beijing, China, 2012) (the expert pointed out that the “public interest” is not the only goal in *the Chinese Anti-Monopoly Law 2007*. It is vital to emphasise the importance of “consumers welfare”); Jiang (n 169) 557 (pointing out because “consumer welfare” concerns all consumers involved in different anti-monopoly cases, comprehension of this term varies from case to case. Therefore, “consumer welfare” could be used to explain the “public interest” in *the Chinese Anti-Monopoly Law 2007*); and Zhao Chen, ‘Jingzhengfa yu Zhongguo de Xiaofeizhe Quanyi Baohu’ [Competition Law and Consumer Protection in China (author’s translation)] (2012) 17 People’s Tribune, China 102.

<sup>172</sup> See Zhang Shouwen, ‘Lun Jingjifa de Xiandaixing’ [Study on the Modernity of Economic Law (author’s translation)] in *Jingjifa Lunwen Xuancui* [Selected Papers on Economic Law (author’s translation)] (Law Press, China 2004); Xiao Shunbin, ‘Woguo Xueshujie Guanyu Gonggong Liyi de Zhuyao Guandian ji Pingjia’ [On the Main Points of Public Interest in Chinese Academic Circles] (2009) 6 Journal of Yunnan University (Law Edition), China 30.

be used to provide consumers with better-quality goods and services, and place enterprises in a better position to compete, both in the nation and worldwide. Where there is competition between consumer welfare and the national interest (which relates to the development of SOEs and non-SOEs), the State, with regard to the “public interest”, should adopt a neutral position,<sup>173</sup> rather than solely focus on the short-term national interest.

### 3.3.2.1 Consumer Welfare or the “Public Interest”

A significant point in competition law is that “[A]ntitrust 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?”<sup>174</sup> This statement also holds true when one is examining *the Chinese Anti-Monopoly Law 2007*. Whilst consumer welfare and the “public interest” both play important roles in the objectives of this Law, a question still arises: what is the genuine relationship between them? To this day, whether consumer welfare could be considered as synonymous with the “public interest” in the Anti-Monopoly Law is still a conundrum in China.<sup>175</sup>

On the one hand, hitherto, many global mainstream competition laws have been more inclined to protect consumer welfare as a matter of top priority.<sup>176</sup> It has been fashionable to

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<sup>173</sup> See Mark Furse, *Antitrust Law in China, Korea and Vietnam* (OUP 2009) 69.

<sup>174</sup> See Bork (n 125) 50.

<sup>175</sup> This also provokes a debate in EU competition law: Sonja E Keske, *Group Litigation in European Competition Law: A Law and Economic Perspective* (Intersentia 2010) 9-13.

<sup>176</sup> See World Bank and OECD, *A Framework for the Design and Implementation of Competition Law and Policy* (World Bank Publications 1999) 9 (pointing out that “the administration and enforcement of competition law and policy should assign the greatest importance to fostering economic efficiency and consumer welfare”); Eleanor M Fox, ‘Rapporteur of Session Two’ in Claus Dieter Ehlermann and Laraine L Laudati (eds), *European Competition Law Annual 1997: Objectives of Competition Policy* (Hart Publishing 1998) 157 (pointing out that “U.S. antitrust today is driven largely by the goal of maximising U.S. consumer welfare”); Bork (n 125) 22; Canada Competition Act 1985, Art 1.1;

The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to **provide consumers with competitive prices and product choices**.

Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No.54 of 14 April 1947), Japan, Art 1.

Article 1: The purpose of this Act is, by prohibiting private monopolization, unreasonable restraint of trade and unfair trade practices, by preventing excessive concentration of economic power and by

use consumer welfare to explain what constitutes “public interest”.<sup>177</sup> On the other hand, there exists a paradox<sup>178</sup>: competition law aims to maximise “the overall wealth of society”.<sup>179</sup> In the case of EU Competition Law, there are two ambivalent statements on the ultimate objective. One statement is that competition law protects consumer welfare rather than the whole “public interest”.<sup>180</sup> The other statement is the complete opposite, maintaining that its objective should be something much more important than consumer welfare.<sup>181</sup> Consumer welfare, which is advocated by EU Competition Law, may not fully represent the concept of “fair” completely in the market and society.<sup>182</sup> However, as a sort of

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eliminating unreasonable restraint of production, sale, price, technology, etc., and all other unjust restriction on business activities through combinations, agreements, etc., to promote fair and free competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities, to heighten the level of employment and actual national income, and thereby to promote the democratic and wholesome development of the national economy as well as to **assure the interests of general consumers.**

<sup>177</sup> See Jiang (n 169) 557; and Rudolph J R Peritz, *Competition Policy in America: History, Rhetoric, Law* (Revised edn, OUP 2000) 157.

<sup>178</sup> See Joseph F Brodley, ‘The Economic Goals of Antitrust Efficiency, Consumer Welfare, and Technological Progress’ (1987) 62 *New York University Law Review* 1020, 1032 (pointing out that “the term consumer welfare is the most abused term in modern antitrust analysis”); Claus Dieter Ehlermann and Laraine L Laudati (eds), *European Competition Law Annual 1997: Objectives of Competition Policy* (Hart Publishing 1998) 13 (pointing out that “[c]onsumer welfare should not be the central or even exclusive goal of antitrust, or that antitrust should be concerned about unemployment, inflation or other macroeconomic issues”); Rex Ahdar, ‘Consumers, Redistribution of Income and the Purpose of Competition Law’ (2002) 23 *European Competition Law Review* 341, 347-48 (pointing out that “let us return to the Chicagoan definition of consumer welfare as total welfare (or allocative efficiency). This is plainly wrong”); and Barry J Rodger, ‘Competition Policy, Liberalism and Globalization: A European Perspective’ (2000) 6 *Columbia Journal of European Law* 289, 303 (pointing out that “however, in practice there are a number of different economic, social and political objectives which may form part of any particular competition policy”).

<sup>179</sup> See Giorgio Monti, ‘EC Competition Law: The Dominance of Economic Analysis?’ in Roger Zäch, Andreas Heinemann and Andreas Kellerhals (eds), *The Development of Competition Law: Global Perspectives* (Edward Elgar Publishing 2010) 6; Paolo Buccirossi, ‘Introduction’ in Paolo Buccirossi (ed), *Handbook of Antitrust Economics* (MIT Press 2008); Willimsky (n 154) (pointing out that “the combined effect of allocative and productive efficiency is that society’s wealth is maximised”); Commission, ‘Report on Competition Policy 2006: Published in Conjunction with the General Report on the Activities of the European Union 2006’ COM (2007) 358 final; and Giuliano Amato, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (Hart Publishing 1997) 2.

<sup>180</sup> “Competition is not an end in itself, but an instrument designed to achieve a certain public interest objective, consumer welfare”: Philip Lowe, ‘Preserving and Promoting Competition: A European Response’ (2006) 2 *Competition Policy Newsletter* 1.

<sup>181</sup> See Kati J Cseres, ‘The Controversies of the Consumer Welfare Standard’ (2007) 3 *The Competition Law Review* 121, 172.

Competition law is primarily concerned with economic efficiency and with the overall welfare of society, without distinguishing between different groups of society. Competition policy also has other goals than improving final consumers’ welfare and therefore final consumers cannot and should not become the sole focus of competition laws.

<sup>182</sup> See Monti (n 179) 9; and Roger Zäch and Adrian Künzler, ‘Freedom to Compete or Consumer Welfare: The Goal of Competition Law according to Constitutional Law’ in Roger Zäch, Andreas Heinemann and Andreas Kellerhals (eds), *The Development of Competition Law: Global Perspectives* (Edward Elgar Publishing 2010) 71.

complex interest, the “public interest” is able to balance the interests of enterprises, industries, employees, consumers, governments, and so on. To put it another way, from the perspective of competition law in some countries and regions, there may be a need to reduce the consumer welfare on some occasions, in order to ensure the “public interest” at the jurisdictional stage (i.e., when implementing Competition Law).<sup>183</sup>

This paradox appears in *the Chinese Anti-Monopoly Law 2007* as well. Although the argument that the “public interest” is similar to consumer welfare is prevalent in China,<sup>184</sup> the State’s actions taken in pursuit of consumer welfare can often conflict with, and indeed negate, the “public interest”<sup>185</sup>: a good example can be seen in the reform process of the Chinese telecommunications industry, where the fundamental purpose is to serve consumers better than before. However, in reality, the State helped China Telecom and China Unicom (two SOEs) form a duopoly model in the domestic telecommunications market (see Table 4-16 in Chapter 4). Contrary to competition and consumer welfare, the telecommunications SOEs used their dominant position as an excuse for market segmentation. Because consumers do not have adequate rights to select suitable service providers and services, consumer welfare in the telecommunications industry is unable to be guaranteed. In addition, China’s telecommunications SOEs, which control the domestic broadband source, can refuse transactions with other potential competitors.<sup>186</sup> This not only poses a dilemma to potential private enterprises seeking to enter the market, but also creates negative effects for fair competition. Thus, with the disappearance of consumer welfare and competition, the “public interest” that attempts to balance different kinds of interests in the Chinese economic growth approach, is unable to be realised.<sup>187</sup>

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<sup>183</sup> See Townley (n 69) 90.

<sup>184</sup> See Interview with a Chinese scholar on *the Chinese Anti-Monopoly Law* (n 171); and Zhan Hao, *Zhongguo Fanlongduan Minshi Susong Redian Xiangjie [The Hot Issues of China Anti-Trust Private Litigation: The Juridical Interpretation Issued by China Supreme Court and the Analysis of Anti-Trust Cases]* (Law Press, China 2012) 63.

<sup>185</sup> Maximising consumer protection, a unilateral behaviour in the market, “[i]s directed against any form or seller conduct...”: Neil W Averitt, ‘Protecting Consumer Choice: Competition and Consumer Protection Law Together’ in Josef Drexl and others (eds), *More Common Ground for International Competition Law?* (Edward Elgar Publishing 2011) 37-39.

<sup>186</sup> See Chapter 4.3.2 below.

<sup>187</sup> In 2011, two large-scale telecommunication SOEs, namely China Telecom and China Unicom, faced an anti-monopoly probe: China Daily, ‘Anti-Monopoly Probe into Telecom Giants Confirmed’ *China Daily*

Therefore, in *the Chinese Anti-Monopoly Law 2007* context, using “consumer welfare” to replace the “public interest” may not be the wisest choice,<sup>188</sup> because China takes on increasing responsibilities and intervenes in the market in the name of consumer welfare, but with often negative outcomes (as seen immediately above). Accordingly, in this process, aside from the State’s short-term interest, other interests in the market are unable to be appropriately considered. Action taken by the State, *ostensibly* in the pursuit of consumer welfare, may place the “public interest” in jeopardy. Alternatively, if Chinese consumer welfare is maximised, the interests of competitors may be reduced. These competitors, the fountainhead of any market’s vitality, may then lose their motivation to compete. Such a situation would be a disaster for the Chinese market and *the Chinese Anti-Monopoly Law 2007*. Hence, in line with the EU approach, choosing the “public interest” as the final aim<sup>189</sup> of *the Chinese Anti-Monopoly Law 2007* is undoubtedly the most sensible way. Simultaneously, treating consumer welfare as an important aspect of realising the “public interest” may be a better choice for China (but the prospect of a good outcome cannot be guaranteed as the telecom’s example above demonstrated).

### 3.3.2.2 *The “State’s Interest” or “Public Interest”*

According to a European commentator, although there is a consensus that industrial policy in the market pursues the “public interest” in some way, as regards a definition of “public interest”, the industrial policy proposes that it could correspond to the State’s interest.<sup>190</sup> However, similar to the role of consumer welfare in the field of the Chinese Anti-Monopoly Law, the State’s interest, which is only one element in the wider goal of

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(Beijing, 9 November 2011) <[www.chinadaily.com.cn/business/2011-11/09/content\\_14066568.htm](http://www.chinadaily.com.cn/business/2011-11/09/content_14066568.htm)> accessed 30 January 2017.

<sup>188</sup> See Wang Xiaoye, ‘Woguo Fanlongduan Lifa de Zongzhi’ [The Purpose of Antitrust Legislation in China (author’s translation)] (2008) 2 *Journal of East China University of Political Science and Law* 98.

<sup>189</sup> See Pieter Kalbfleisch, ‘Aiming for Alliance: Competition Law and Consumer Welfare’ (2011) 2 *Journal of European Competition Law & Practice* 108, 113; and Peter A G van Bergeijk and Erik Kloosterhuis, ‘How to Merge with Law and Economics?’ in Peter A G van Bergeijk and Erik Kloosterhuis (eds), *Modelling European Mergers: Theory, Competition Policy and Case Studies* (Edward Elgar Publishing 2005) (pointing out that “in the practical application of competition law specific problems arise when we are asked to take into account special public interests”).

<sup>190</sup> See Johan den Hertog, ‘Economic Theories of Regulation’ in Roger J Van den Bergh and Alessio M Paccos (eds), *Regulations and Economics* (2nd edn, Edward Elgar 2012) 25.

realising the “public interest”, cannot achieve the “public interest”<sup>191</sup> if it is pursued to the exclusion of consumer welfare and competition between market participants.<sup>192</sup> On some occasions, for the sake of ensuring the State’s economic security and global competitiveness, the State’s interest may refuse to measure allocative efficiency and consumer welfare for a while.<sup>193</sup> Also, because redistribution of wealth might be a political issue, from the perspective of the State’s industrial policy,<sup>194</sup> the State may be primarily concerned to pursue national/international strategic economic development objectives, fully consistent with the State’s demands of national development, rather than competition for individual participants. Nonetheless, as regards the “public interest”, this is unacceptable: the narrow definition may impede the effectiveness of the legislator regarding the representation of protecting competition in the market.<sup>195</sup>

Consequently, if restriction can be imposed on State intervention, it may leave the State’s interest within a reasonable range from the perspective of the “public interest”: the State will not do whatever it wants in the market to obtain the maximum pursuit of its own narrow interest. However, in practice, limitations on the State’s interest in the Chinese market are often inadequate. In order to develop certain industries, especially those which are concerned with the lifeline of the national economy and economic security, the State’s industrial policy favours paying much more attention to some industries,<sup>196</sup> while, at the same time, the “public interest” has to unwillingly give way to the State’s interest.<sup>197</sup> For

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<sup>191</sup> See Ekaterina Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart Publishing 2010) 12; and David J Gerber, *Law and Competition in Twentieth Century Europe: Protecting Prometheus* (OUP 2001) 127 (the latter points out that exclusionary abuses, granted by regulations, can harm the “public interest”).

<sup>192</sup> “Administrative agencies are ad hoc responses to specific economic problems and political pressures, seldom capable of policy formulation for adequate delineation of public interest objectives”: Harry M Trebing, ‘Government Regulation and Modern Capitalism’ (1969) 3 *Journal of Economic Issues* 87, 92.

<sup>193</sup> See Philip Lowe, ‘The Design of Competition Policy Institutions for the 21st Century – The Experience of the European Commission and DG Competition’ (2008) 3 *Competition Policy Newsletter* 1, 6.

<sup>194</sup> See Kalbfleisch, ‘Aiming for Alliance: Competition Law and Consumer Welfare’ (n 189); and Pieter Kalbfleisch, ‘The Assessment of Interests in Competition Law: a Balancing Act’ in Mario Monti (ed), *Economic Law and Justice in Times of Globalisation: Festschrift for Carl Baudenbacher* (Nomos 2007) 473.

<sup>195</sup> See Mike Feintuck, *The Public Interest In Regulation* (OUP 2004) 225.

<sup>196</sup> In the 1990s, such a situation also existed in the European Union: see, e.g., Claus-Dieter Ehlermann, ‘State Aid Control in the European Union: Success or Failure?’ (1994) 18 *Fordham International Law Journal* 1212, 1213; Hans-Jorg Niemeyer, ‘State Aids and European Community Law’ (1993) 15 *Michigan Journal of International Law* 189, 190; and H Stephen Harris and others (eds), *Competition laws outside the United States*, vol 1 (American Bar Association 2001) 109.

<sup>197</sup> Examining the conflict between the State’s interest and the “public interest” towards the relationship between the State’s industrial policy and competition policy, “[t]he conflict is always present in strategic merger

example, Europe used State intervention to promote the development of their steel industry in the last quarter of the 20th century. Although nowadays the European steel industry is a world leader in its sector,<sup>198</sup> the “public interest” in that area also faced competition from European State Aid policies in the 1980s. A series of State Aid decisions<sup>199</sup> did play an active role in the steel sector’s restructuring at the time.<sup>200</sup> However, the primary focus on the *economic interests* of these territories or States did not achieve a correspondingly happy ending for *market competition* in the European steel industry in the 1980s (as the number of competition declined).<sup>201</sup> Accordingly, the “public interest” becomes senseless in such a context.

Applying this argument to China, it would not be difficult to conclude that the “prosperity” of SOEs, which represent an important part of the State’s interest at present, represents some sort of unscientific growth. With the purpose of ensuring the State’s short-term economic interest, the Central Government chooses to develop domestic SOEs in several traditional State-controlled industries as a matter of priority (see footnote 157 above). However, such a trend negates a most important aspect of the “public interest”, namely promotion of competition, without considering its functions of balancing different kinds of interests and contributing to long-term economic development. Therefore, the State’s industrial policy is unable to treat the State’s economic interest and other interests, such as consumer welfare and the interests of other competitors, in an equally or balanced fashion in the market. Another example can be seen in the Chinese gas station sector, State intervention has helped petrol SOEs to occupy a dominant position in the domestic refined oil retail market in the name of consumer welfare. However, after suffering through the “oil

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support in the absence of scale economies and in any industrial policy support that targets specific firms in a potentially competitive sector”: see, e.g., Vålila (n 155) 21; and Zhang (n 165) 672.

<sup>198</sup> See EUROFER, ‘Welcome to EUROFER, the European Steel Association’ (*The European Steel Association*) <[www.eurofer.org/](http://www.eurofer.org/)> accessed 30 January 2017.

<sup>199</sup> In order to eliminate a serious economic downturn in the European steel industry, many steel companies in Europe had to accept an intensive restructuring and hand their fates over to large publicly controlled steel companies: see, e.g., Martin Heidenhain (ed), *European State Aid Law: A Handbook* (Hart Publishing 2010) 388-95; and Conor Quigley, *European State Aid Law and Policy* (2nd edn, Hart Publishing 2009) 325-26.

<sup>200</sup> See Ehlermann (n 196) 1229.

<sup>201</sup> According to the Ecorys’s report, “[s]ince the late 1980s, State Aid has all but been phased out in the EU... As an integral part of the Internal Market, the Commission aims to create a level playing field for the sector within the EU...”: Ecorys, ‘Study on the Competitiveness of the European Steel Sector: Within the Framework Contract of Sectoral Competitiveness Studies’ (Ecorys, August 2008).

shortage”,<sup>202</sup> besides the interests of SOEs (that almost equates to the State’s economic interest in the gas station sector), privately-owned gas stations and consumers have been losing their interests and welfare.<sup>203</sup> In the long run, the “public interest” in having a strong competitive gas station sector, has been violated by the State’s short-term economic interest.

In sum, China’s economic development relies on both the Anti-Monopoly Law and the State’s industrial policy. However, in their cooperative relationship, both *the Chinese Anti-Monopoly Law 2007* and the industrial policy meet difficulties when trying to achieve the “public interest”. Without a uniform definition of “public interest” in the Chinese market, *the Chinese Anti-Monopoly Law 2007* and the industrial policies separately propose to use *consumer welfare* or *the State’s interest* to replace it. This is unacceptable. For one thing, “competition law cannot be rationally implemented until it has been decided whether public policy objectives should be considered there...”<sup>204</sup> For another, promoting the growth and competitiveness of specific industries could lead to a distortion of competition in the market.<sup>205</sup>

### 3.4 Conclusion

Looking back over the past few decades, a number of Chinese policies (see footnote 8 above) and laws (such as *the Chinese Law on Promotion of SMEs 2002* and *the Chinese Anti-Monopoly Law 2007*) related to domestic privately-owned SMEs have been enacted, and have led to SMEs experiencing ebbs and flows, in terms of both their growth prospects, and in terms of State legislative measures to support them. Both the rapid growth of Chinese privately-owned SMEs (2002-2007),<sup>206</sup> and also the subsequent slowdown in the 21st century (see footnote 5 above), deserve attention. From an examination of the root causes for the twists and turns in progress, it is easy to see that difficulties often arise from legal flaws in

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<sup>202</sup> “Oil shortages”, which occurred several times in China during the first decade of the 21st century, means that some refined oil products in the petroleum retail market are in short supply. This is caused by the anti-competitive behaviour of petrol SOEs.

<sup>203</sup> See Chapter 4.2.2.1 below.

<sup>204</sup> See Townley (n 69) 13.

<sup>205</sup> See Treaty on the Functioning of the European Union [2008] OJ C115/49, Art 173 (ex Art 157 TEC).

<sup>206</sup> See Li and others (eds) (n 6).



*the Chinese Law on Promotion of SMEs 2002* and *the Chinese Anti-Monopoly Law 2007*. When facing discrimination from the application of administrative powers operating in furtherance of the State's industrial policy, SMEs fail to receive adequate support from these two Laws.

The measures 'Several Statements of the State Council on Cultivating the Social Service System of SMEs' (2000),<sup>207</sup> and 'Several Statements of the State Council on Encouraging and Promoting the Development of SMEs' (2000),<sup>208</sup> which grant extra power to the local governments (at or above the county level) to guide SMEs,<sup>209</sup> sought to signal the start of a new era for SME protection in China. However, not only did the opposite happen, but furthermore *the Chinese Law on Promotion of SMEs 2002* inherited the *government-oriented approach* that favoured prioritising the development of SOEs in the name of promoting SMEs (see Chapter 3.1.2.1 above). So, although Articles 6 and 7 of this 2002 Law aimed to create competition circumstances for SMEs by limiting the abuse of administrative power, they had no practical improvement effects, because "officials shield one another" (see Chapter 3.1.2.2 above).

Corresponding to gradual shifts prompted by Government's desire to move the economy to market mechanisms, legislative work on the Chinese Anti-Monopoly Law started in the early 1990s,<sup>210</sup> and finally led to substantive change in 2007, when the first *Chinese Anti-Monopoly Law 2007* was signed.<sup>211</sup> However, although there is a view that "currently competition has the leading role" in China,<sup>212</sup> actions taken by the State pursuit of economic growth, have often cut across *the Chinese Anti-Monopoly Law 2007* being allowed to achieve its desired impact from the perspective of privately-owned SMEs.

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<sup>207</sup> See 'Guanyu Peiyu Zhongxiaoqiye Shehuihua Fuwu Tixi Ruogan Wenti de Yijian' [Several Statements of the State Council on Cultivating the Social Service System of SMEs] (2000) (n 9).

<sup>208</sup> See 'Guanyu Guli he Cujin Zhongxiao Qiye Fazhan de Ruogan Zhengce Yijian' [Several Statements of the State Council on Encouraging and Promoting the Development of SMEs] (2000) (n 14).

<sup>209</sup> See Liu (n 17).

<sup>210</sup> See Wang, *The Evolution of China's Anti-Monopoly Law* (n 59).

<sup>211</sup> See Williams, *The Political Economy of Competition Law in Asia* (n 62).

<sup>212</sup> See Maureen K Ohlhausen, 'Illuminating the Story of China's Anti-monopoly Law' (2013) The Antitrust Source

<[www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/oct13\\_ohlhausen\\_10\\_29f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct13_ohlhausen_10_29f.authcheckdam.pdf)> accessed 30 January 2017.

Privately-owned SMEs are impossible to ignore in *the Chinese Anti-Monopoly Law 2007* because they can achieve the ultimate objective of this Law, the “public interest”, by the way of reconciling competing interests in the market (such as consumer welfare and the interests of enterprises) (see Chapter 3.2.1 above). However, because *the Chinese Anti-Monopoly Law 2007* chooses the (ineffective) approach of the superior authority of punishment and correction to restrict inappropriate use of administrative powers,<sup>213</sup> industrial policy often acts outside this Law, and grants powers to SOEs and administrative agencies, which limits and hinders the normal development of privately-owned SMEs. Therefore, when struggling against administrative discrimination, privately-owned SMEs may seek assistance from the Chinese administrative laws and regulations: yet, to date, administrative laws and regulations have been an unhelpful corrective resource (see Chapter 3.2.2.2 above) for SMEs because many administrative actions cannot be challenged by administrative lawsuits. Furthermore, when resorting to the administrative review procedure (administrative reconsiderations), the situation that “officials shield one another” appears again. In addition, although private anti-monopoly enforcement brought new hope to Chinese privately-owned SMEs,<sup>214</sup> the current private enforcement regime fails to effectively compensate for the loss and cost to SMEs, thereby reducing the use of it.<sup>215</sup> Thus, in China, privately-owned SMEs continually face discrimination, without effective remedies.

Now that the situation has been highlighted, two important reasons provide an explanation. The first is that there is no effective sanction against inappropriate administrative interventions, which thus interferes with the effective implementation of *the Chinese Law on Promotion of SMEs 2002* or *the Chinese Anti-Monopoly Law 2007*. The second is that the Central Government of China has the right to influence the functions of Laws when it intervenes in the economy, and naturally often chooses to preserve the State’s economic interest as a matter of priority and urgency in the economic development process. However, maximising the State’s interest does not allow a balance to be achieved with other

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<sup>213</sup> See the Anti-Monopoly Law of China 2007, Art 51.

<sup>214</sup> See 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 (n 120).

<sup>215</sup> See Chapter 5.1.3.1 below.

“public” interests, such as consumer welfare, the interests of competitors, and the other kinds of interest in the Chinese market. Therefore, for the sake of ensuring the development of privately-owned SMEs and even the State’s long-term prosperity, both the State’s interest and the use of executive power in the market should be redefined, so that the current influence in favour of State/SOE interests is constrained.<sup>216</sup> The relationship between the State’s industrial policy and *the Chinese Anti-Monopoly Law 2007 must be taken seriously*.

“Is law so hopeless?”<sup>217</sup> Because of China’s pro-SOE industrial policies, administrative agencies (such as SASAC) and some SOEs have never had their administrative powers of intervention in the market limited. *The Chinese Law on Promotion of SMEs 2002* is therefore unable to be properly effective, and so, privately-owned SMEs have been “surviving between the cracks”. Similarly, *the Chinese Anti-Monopoly Law 2007*, a tiger without teeth, has been circumvented quite easily: it ought to provide sufficient protection and competition law exemptions for privately-owned SMEs, but it does not do so, as its application is circumvented and emasculated by administrative action.<sup>218</sup> Accordingly, the Chinese SME legal framework, which has been in place for over ten years, has suffered partial failure.

**\* Figure 3-6: Overview Figure of Chapter 3**

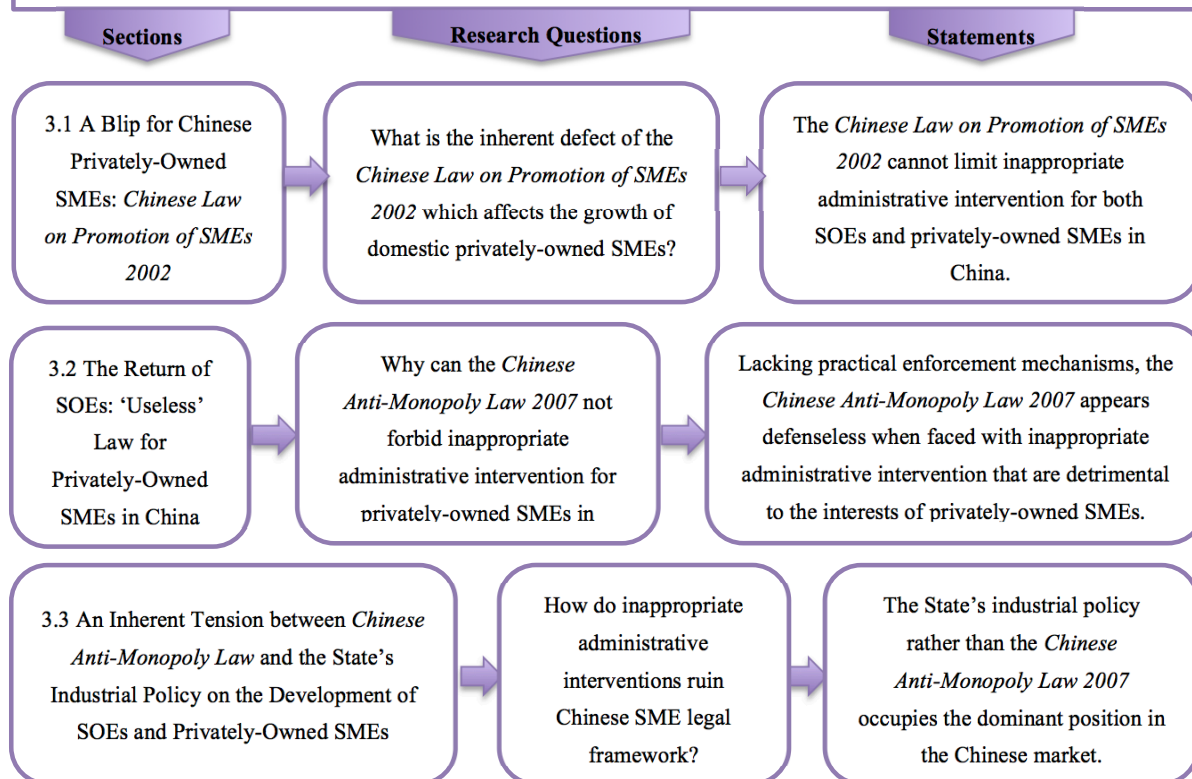
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<sup>216</sup> “Under the “*conflict of interest situation*” doctrine, the conferral by public authorities of exclusive or special rights amounts to an abuse of administrative power, if it establishes a market structure which favours or induces abusive conducts”: Alessandro Roberto Spano, ‘Competition Law and Policy in Contemporary China: Some Critical Issues’ (PhD thesis, King’s College London 2014) 156.

<sup>217</sup> To use Phelan’s sentence: Diarmuid Rossa Phelan, *It’s God We Ought to Crucify – Validity and Authority in Law* (Four Courts Press 2000) 75.

<sup>218</sup> See Zhengxin Huo, ‘A Tiger without Teeth: The Antitrust Law of The People’s Republic of China’ (2008) 10 Asian-Pacific Law & Policy Journal 32, 45.

**Chapter 3:** Privately-owned Chinese SMEs are unable to obtain chances for robust growth because of flaws in the *Chinese Law on Promotion of SMEs 2002* and the *Chinese Anti-Monopoly Law 2007* and the loopholes that left inconsistencies between the State's industrial policy and these two laws.



# Chapter Four: Realistic Risks of Privately-Owned SMEs in Chinese Traditional State-Controlled Industries - Putting the “Public Interest” in Peril

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[P]olicies intended to promote particular industries go against the basic tenets of the prevailing economic orthodoxy. Interventions are held to distort market signals, governments are seen as incapable of successfully “picking winners”, and the protected infants are believed never to grow up.

– Irfan ul Haque<sup>1</sup>

One has to bear in mind that the AML is not merely designed to restore competition but also to take affirmative actions to create competition. This unique feature distinguishes it from competition laws in most other jurisdictions.

– Yong Huang<sup>2</sup>

The State’s industrial policies, and competition law and policy that represent different interests, often counteract each other in the Chinese economic intervention approach.<sup>3</sup> Industrial policies prefer to emphasise the State’s economic interests, while competition law and policy pay more attention to consumer welfare.<sup>4</sup> In a semi-government-oriented country,<sup>5</sup> the government creates State-owned monopoly enterprises<sup>6</sup> in order to ensure promotion of self-interest,<sup>7</sup> including SOEs’ interests.<sup>8</sup> Thus, privately-owned SMEs are weakened in Chinese traditional State-controlled industries, and accordingly, the interests of

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<sup>1</sup> See United Nations Conference on Trade and Development, ‘Rethinking Industrial Policy’ (April 2007) UNCTAD/OSG/DP/2007/2.

<sup>2</sup> See Yong Huang, ‘Pursuing the Second Best: the History, Momentum, and Remaining Issues of China’s Anti-Monopoly Law’ (2008) 75 *Antitrust Law Journal* 117, 120.

<sup>3</sup> See Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2013* [Report on Competition Law and Policy of China 2013] (Law Press, China 2013) 34.

<sup>4</sup> See Chapter 3.3.2 above.

<sup>5</sup> Although the State claims that it protects the “public interest”, the reality is that it protects its own interest, in other words this is a case of permanent self-interest. This self-interest seems to be only one aspect of the “public interest”, rather than a balance between different types of interest groups: see, e.g., John Hart Ely, ‘Choice of Law and the State’s Interest in Protecting Its Own’ (1981) 23 *William and Mary Law Review* 173; Angela Huyue Zhang, ‘Bureaucratic Politics and China’s Anti-Monopoly Law’ (2014) 47 *Cornell International Law Journal* 671, 672; Diarmuid Rossa Phelan, ‘Can the State Sell the Nation?’ in Eddie Hobbs, Dominic Sherlock and Amanda Slevin (eds), *Own Our Oil - The Fight for Irish Economic Freedom* (Liberties Press 2014) 125 (pointing out that “[t]he State is not the People, nor the Nation, constitutionally or politically. Citizens...may assume that the State, and the State’s interest, is identical with that of the People. This is erroneous”); and Qingjiang Kong, ‘The “State-Led-Economy” Issue in the BIT Negotiations and Its Policy Implications for China’ (2016) 5 *China–EU Law Journal* 13, 15 (the latter points out that “China’s economy has featured as semi-market owing to the obvious governmental dominance”).

<sup>6</sup> “Monopoly enterprises are given exceptional advantages through the creation of barriers to entry or price regulations, which allow the enterprises to develop monopoly powers”: Sheng Hong, Zhao Nong and Yang Junfeng, *Administrative Monopoly in China: Cases, Behaviors, and Termination* (World Scientific Publishing Company 2015) 1.

<sup>7</sup> See Vito Tanzi, *Government versus Markets: The Changing Economic Role of the State* (CUP 2011) Preface; and Shi Junhua, *Fanlongduan yu Zhongguo Jingji Fazhan: Zhanxingqi Zhongguo Fanlongduan Zhengce Yanjiu* [Antitrust and Economic Development in China: Study on Chinese Antitrust Policies in the Reform Era] (Economic Science Press, China 2013) 154-58.

<sup>8</sup> As investors in SOEs, Chinese governments would not sacrifice the interests of SOEs.

SMEs and consumer welfare are diminished. As a result, as component elements of the “public interest”,<sup>9</sup> these elements place the ultimate objective of *the Chinese Anti-Monopoly Law 2007* in peril.

This Chapter examines the “interest-struggling” and the stifling of the growth of privately-owned SMEs in the Chinese steel industry, the gas station<sup>10</sup> industry and the fixed-broadband industry. The first section of this chapter explains how administrative intervention, which causes unfair competition and imbalance of interests in the steel industry, promotes SOEs but ignores privately-owned SMEs. From the end of the 1950s to the beginning of the 1970s, the State’s steel intervention created a sector without industrial concentration. Hence, reflecting to increasingly fierce international competition, steel intervention adopted a myopic emphasis on mergers, and this has resulted in the *artificial*<sup>11</sup> disappearance of privately-owned SMEs in the 21st century. As a result, the government-led process has ended up advancing the State’s short-term economic interest, to the detriment of increasing living standards, competition and the long-term growth of the steel industry. From the perspective of *the Chinese Anti-Monopoly Law 2007*, because competition in the steel industry has been abandoned by the State’s intervention, the interests of privately-owned steel SMEs have been lost. Therefore, government conduct has put the “public interest” in jeopardy.

The second section focuses on government intervention in the Chinese gas station sector. It shows how the unlimited rights given petrol SOEs overshadows competition<sup>12</sup> in the refined oil retail market and obstructs the activities of domestic privately-owned gas stations. The Central Government has advanced a series of policies to ensure the dominant position of

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<sup>9</sup> The author assumes that the “public interest” in *the Chinese Anti-Monopoly Law 2007* should be a commonality of interest to benefit everyone, i.e., reconciliation between the State’s interest, the interests of SOEs, the interests of privately-owned SMEs, and consumer welfare: see further in footnote 54 in Chapter 1; Zhaojing Luo, ‘Development of Abuse of Administrative Power to Eliminate or Restrict Competition in *the Anti-Monopoly Law of the People’s Republic of China* and the Impact of Article 106 of EU Competition Law and Free Movement Rules’ (PhD thesis, University of Glasgow 2013); and H Stephen Harris and others (eds), *Anti-Monopoly Law and Practice in China* (OUP 2011) 83.

<sup>10</sup> In this thesis, “gas station” means “petrol station” in British English.

<sup>11</sup> In this thesis, “artificial” means non-competition-related actions in certain industries, dictated by the State rather than by market mechanisms and market rules.

<sup>12</sup> “[D]ominant undertakings have a ‘special responsibility’ not to distort genuine competition”: Ekaterina Rousseva, *Rethinking Exclusionary Abuses in EU Competition Law* (Hart Publishing 2010) 1.

petrol SOEs since 1999,<sup>13</sup> and consequently, SOE-owned gas stations have experienced a flourishing growth with short-term interests strengthened. On the other hand, privately-owned gas stations have had to face the “development dilemma”, such as losing market share, transferring their ownership to SOEs, or shutting down. Furthermore, consumers, who have been involved in such State-sponsored reform, have to put up with welfare loss. Accordingly, not only has this unbalanced trend been against the “public interest” because both the interests of privately-owned gas stations and consumer welfare have been reduced, but also it causes a tough issue to arise for State intervention: could petrol SOEs accomplish the “public interest” by ignoring *the Chinese Anti-Monopoly Law 2007* in the refined oil retail market?

The third section demonstrates that Chinese privately-owned fixed-broadband SMEs operate in arduous conditions. Although the Central Government has insisted that it encourages private investment to promote entry into the telecommunications industry,<sup>14</sup> SOEs have obstructed this process and created a glass ceiling in order to protect their own self-interest.<sup>15</sup> In fact, the State boosts the interests of SOEs in the name of consumer welfare,

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<sup>13</sup> See Chapter 4.2.1.1 below.

<sup>14</sup> See ‘Several Opinions of the State Council on Encouraging and Guiding the Healthy Development of Private Investment’ (2010) <[www.lawinfochina.com/display.aspx?lib=law&id=8103&CGid=>](http://www.lawinfochina.com/display.aspx?lib=law&id=8103&CGid=>) accessed 30 January 2017;

Article 9: We shall encourage the participation of private capital in the telecommunications construction. We shall encourage the entry of private capital in the basic telecommunications operation market in the form of non-controlling shareholding. We shall support private capital in the value-added telecommunications business. We shall strengthen the supervision over monopoly and unfair competition in the telecommunications field to promote fair competition and boost sharing of resources.

Hou Yunlong, ‘Gongxinbu Yunniang xiang Minzi Kaifang Kuandai Jieru Yewu’ [Ministry of Industry and Information Technology (MIIT) of the Government of China Proposes to Open Broadband Access Services to Private Capital (author’s translation)] *Economic Information Daily* (Beijing, 9 April 2014) 3; and ‘Gongye he Xinxihuabu Guanyu Guli he Yindao Minjian Ziben Jinyibu Jingru Dianxinye de Shishi Yijian’ [Implementing Opinions to Encourage and Guide Further Investment of Private Capital in the Telecommunications Industry] (2012) <[www.gov.cn/zwqk/2012-06/28/content\\_2171772.htm](http://www.gov.cn/zwqk/2012-06/28/content_2171772.htm)> accessed 30 January 2017.

Article 1: We shall further encourage the participation of private capital in the telecommunications construction...

Article 2: ...

(2) To engage the participation of private capital in fixed-broadband businesses, for the sake of broadband development...

<sup>15</sup> In today’s China, a glass ceiling that keeps privately-owned enterprises away from the market in certain traditional State-owned sectors remains. For privately-owned SMEs in the petrol and chemical industry and the telecommunications industry, barriers to entry are extremely high: see, e.g., Ju Jinwen, *Feiguoyou Jingji Jinru*



as well as paying “lip-service” to *the Chinese Anti-Monopoly Law 2007*. However, a conflict arises between the State’s interests, the SOEs’ interests, the interests of privately-owned SMEs, and consumer welfare in the fixed-broadband market, and the result is that the “public interest”, a useful element to balance these individual interests, rarely achieves the desired result.

#### **4.1 Increasing Capacity and “Administrative Mergers” in China’s Steel Industry: No Way to Go for “Public Interest” and Privately-Owned SMEs**

Concerning national and economic security and the State’s interest, the steel industry has never escaped intervention from each successive government of China in the administration period of the People’s Republic of China.<sup>16</sup> Since the 1950s, the steel industry has made progress: China has been the largest steel-producing country worldwide for the past twenty years.<sup>17</sup> Government decision-making processes, not restricted by competition policy, have partially replaced market mechanisms with the intention of rapidly developing a “competitive” steel industry. However, the actual outcomes have often been contrary to the State’s expectations: such as inaccurate estimates of capacity; a wide range of construction in the steel industry without considering the wishes of both State-owned and privately-owned steel enterprises; and ignoring the general principle of *the Chinese Anti-Monopoly Law 2007*,<sup>18</sup>

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*Longduan Chanye Yanjiu* [Studies in Non-State-Owned Units Enter into the Monopoly Industries] (Economic & Management Publishing House, China 2009) 196; Quan Zhezhu (ed), *Xiaoxing Weixing Qiye Baoshengcun Moufazhan* (2012) [Micro and Small-Sized Enterprises Struggle to Survive and Develop (2012) (author’s translation)] (Joint Publishing House of China Industrial and Commercial 2013) 314; Chen Jianping, ‘Minzi Kaifang Jiyao Kaimen Yeyao Shezuo’ [Making Development Space for Privately-Owned Enterprises When Encouraging them to Enter the Market (author’s translation)] *The People’s Political Consultative Daily, China* (Beijing, 5 June 2012) 4; and Wang Wenjie, ‘Making Room for the Private Sector: Private Economy Needs More Support from the Government’ (2013) 14 *Beijing Review* 38.

<sup>16</sup> Indeed, as early as the first century BC, China established State monopolies of salt and iron and this led to a continuous debate on the function of State monopolies: promoting social and economic development, or not: see, e.g., Ming Wan, ‘Discourses on Salt and Iron: A First Century B.C. Chinese Debate over the Political Economy of Empire’ (2012) 17 *Journal of Chinese Political Science* 143; Zhu Zhongbo and Wang Ning, ‘Discourses on Salt and Iron and China’s Ancient Strategic Culture’ (2008) 2 *Chinese Journal of International Politics* 263; and Sang Hongyang, *Yantielun* [Discourses on Salt and Iron] (*Guoxue, China*) <[www.guoxue.com/zibu/zhajia/yantielun/yt1ml.htm](http://www.guoxue.com/zibu/zhajia/yantielun/yt1ml.htm)> accessed 30 January 2017.

<sup>17</sup> In 1996, China first became the largest steel-producing country worldwide, accounting for 13.5 percent of production in the world: see, e.g., Zhou Weifu, ‘Woguo Gangtie Gongye 60 nian Fazhan de Huigu yu Zhanwang’ [The Past, Present and Future of the Development of China’s Iron and Steel Industry in 60 Years: Retrospect and Prospect (author’s translation)] (2009) 6 *China Steel* 5; and Worldsteel Committee on Economic Studies, *Steel Statistical Yearbook 2014* (Worldsteel Committee on Economic Studies 2014) 2.

<sup>18</sup> Since 2014, Chinese anti-monopoly agencies have carried out systematic study on competitive situation in the steel industry: Competition Policy and Law Commission of China Society for World Trade Organisation

namely the “public interest”, by way of reducing the interests of privately-owned steel SMEs.

#### 4.1.1 Supreme Administrative Power and the State’s Interest in China’s Steel Intervention

From the 1950s, China decided to develop heavy-industry sectors as a matter of urgency.<sup>19</sup> Simultaneously, the steel industry began its journey to become a strong industry beyond all doubt. Steel production enjoyed rapid growth both before, and after, the 1960s, with strong fluctuations in the following decades. On the other hand, the ultra-fast growth of steel production has brought not only success, but also risks. New problems have appeared in the State’s steel intervention process: in parallel with increasing steel production, steel production overcapacities and steel mill scale have caused weaknesses for the steel sector from the State’s perspective. Hence, administrative intervention has been given a higher priority than steel output control, and the intensive restructuring in the steel industry, since the end of the 20th century, in order to make it into a competitive sector worldwide.

##### 4.1.1.1 Misuse of the State’s Power in Steel Capacity Estimates

With the aim of protecting national economic security, government assistance programmes led to an exciting evolution in the Chinese steel sector by the end of the First Five-Year Plan (1953-1957). By 1957, 26 State-owned steel mills, with different scales, located in different regions of China were completed and put into operation.<sup>20</sup> Steel

Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2015 [Report on Competition Law and Policy of China 2015]* (Law Press, China 2015) 7.

<sup>19</sup> See Mao Zedong, ‘On the Ten Major Relationships’ in *The Selected Works of Mao Tse-tung* (Foreign Languages Press, China 1977) 285-86.

<sup>20</sup> **Table 4-1: Table of Chinese Steel Mills in the First Five-Year Plan Period (1953-1957)**

Steel Mill Scale	Chinese Steel Mills in the 1950s			
	Position in China	Eastern	Middle	Western
Large-Scale	Northern	Anshan Steel Mill	Baotou Steel Mill	
	Southern	Wuhan Steel Mill		
Medium-Scale	Northern	Shijingshan Steel Mill (Beijing)	Taiyuan Steel Mill	
	Southern		Xiangtan Steel Mill Maanshan Steel Mill Hefei Steel Mill	Chongqing Steel Mill
Small-Scale	Northern	Handan Steel Mill	Linfen Steel Mill	Wulumuchi Steel Mill
		Jinan Steel Mill		
		Tonghua Steel Mill	Anyang Steel Mill	Lanzhou Steel Mill
	Southern	Nanjing Steel Mill	Xinyu Steel Mill	Jiangyou Steel Mill
		Hangzhou Steel Mill	Liuzhou Steel Mill	
		Guangzhou Steel Mill	Echeng Steel Mill	Guiyang Steel Mill
	Sanming Steel Mill	Lianyuan Steel Mill		

production over the period achieved an increase of more than 200 percent between 1953 and 1957.<sup>21</sup> However, even this tendency was not good enough for the rising enthusiasm for Chinese economic construction at that time. Following the belief that “human wisdom can prevail over nature” (*Ren Ding Sheng Tian* in Chinese),<sup>22</sup> priority was given to backyard steel furnace programmes in the fourth quarter of 1957.<sup>23</sup> Almost everyone was engaged in raw material collection and steel production<sup>24</sup>: when a shortage of raw materials occurred, iron utensils from daily life could be melted down. Therefore, the basic livelihoods of Chinese people were negatively and significantly affected during the period of this programme.<sup>25</sup> Additionally, another grandiose goal was proposed: that the growth of steel production would show a 10-fold increase over the next five years, 1958-1962.<sup>26</sup>

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Source: *Guidance on Steel Industry Development Policy*; table devised by the author.

See Liu Tienan, *Gangtie Chanye Fanzhan Zhengce Zhinan* [*Guidance on Steel Industry Development Policy*] (Economic Science Press, China 2005) 57.

<sup>21</sup> See James G Trench, ‘Role of the Chinese Steel Industry in the Economic Development of China and Australia’s Contribution to the Industry as a Supplier of Raw Materials’ (PhD thesis, Murdoch University 2004) 51.

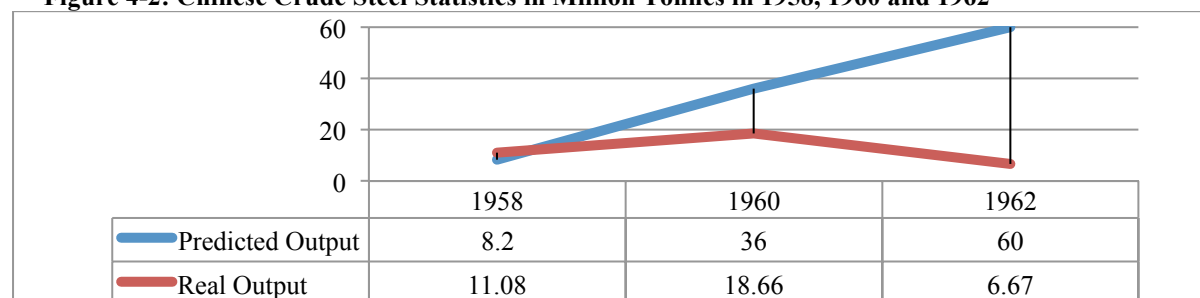
<sup>22</sup> There was a slogan in the Mao era: “If we work twenty-four hour a day and produce as much steel as possible, to surpass the production capacity of the UK and equal the production capacity of the US in the same period would be an exciting accomplishment”. However, this was only a pipe dream: see, e.g., June M Grasso, Jay P Corrin and Michael Kort, *Modernisation and Revolution in China: From the Opium Wars to the Olympics* (4th edn, M.E. Sharpe 2009) 168-69; and Alfred L Chan, *Mao’s Crusade: Politics and Policy Implementation in China’s Great Leap Forward* (OUP 2001) 31.

<sup>23</sup> In 1957, the Central Government of China declared its aim to create over 13,000 blast furnaces in the following year: see, e.g., M Gardner Clark, *Development of China’s Steel Industry and Soviet Technical Aid* (Cornell University Press 1973) 71; and Chan (n 22) 159.

<sup>24</sup> 600 million Chinese people dedicated themselves to China’s exhortations on the steel industry, which accounted for over 93 percent of the total population (see footnote 25 below) between 1958 and 1962: see, e.g., Grasso, Corrin and Kort (n 22); and ‘China Population Statistics and Related Information’ (*China Today*, 28 April 2011) <[www.chinatoday.com/data/china.population.htm](http://www.chinatoday.com/data/china.population.htm)> accessed 30 January 2017.

<sup>25</sup> Because of inadequate raw materials, the vast majority of Chinese people melted down almost all iron and steel household pots and pans, and schoolchildren had the task of “hunting for steel scraps on the street” in their out-of-school time. During the period of this programme collecting raw materials became one of the core tasks in ordinary Chinese people’s lives. In fact, even daily cooking became difficult for the Chinese; consequently they normally ate together in their commune. In this regard, their basic livelihoods were negatively affected: see, e.g., Grasso, Corrin and Kort (n 22); and Henny Sender, ‘China: Dug in too Deep’ (*Financial Times*, 24 June 2012) <[www.ft.com/cms/s/0/fa3d44de-bbb0-11e1-9aff-00144feabdc0.html#axzz3tOYpcUE2](http://www.ft.com/cms/s/0/fa3d44de-bbb0-11e1-9aff-00144feabdc0.html#axzz3tOYpcUE2)> accessed 30 January 2017.

<sup>26</sup> **Figure 4-2: Chinese Crude Steel Statistics in Million Tonnes in 1958, 1960 and 1962**



However, such interventions that ignored the reality of the steel sector’s commercial development, overlooked competition rules and led to very seriously unacceptable intervention in the Chinese steel industry from 2005 onwards<sup>27</sup> (administrative merging and a shutting down scheme for privately-owned steel SMEs<sup>28</sup>): first, numerous of small-scale and ineffective steel mills existed across the country and this has led to an intensive restructuring in the industry in the 21st century.<sup>29</sup> Second, soon after the policy decision was made to intervene, crude steel output developed ebbs and flows over the following decades.<sup>30</sup> Third, because many people were dedicated to crude steel production, they experienced a sharp decline in living standards (see footnote 25 above).

Even worse, although the steel intervention was a disaster, it was not the only mistake made by the government in estimating the capacity and purchasing power of steel production.

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\* For the real output of crude steel in 1958, more than 3 million tonnes was scrap steel.

Sources: ‘Erwu Jihua (1958-1962)’ [The Second Five-Year Plan (1958-1962) (author’s translation)] for predicted output of Chinese crude steel in 1958, 1960, 1962; ‘The Development of the Chinese Steel Industry – in a Changing Macroeconomic Environment’ for real output of Chinese crude steel in 1958, 1960 and 1962; Figure 4-2 devised by the author.

See Li Songtao, ‘Erwu Jihua (1958-1962)’ [The Second Five-Year Plan (1958-1962) (author’s translation)] *China Youth Daily* (Beijing, 20 March 2006) 1; Gangming Yuan, ‘Zhongguo Gangtie Gongye: Zai Hongguan Jingji Biandong zhong Fazhan’ [The Development of the Chinese Steel Industry – in a Changing Macroeconomic Environment (author’s translation)] (*Institute of Developing Economies, Japan External Trade Organisation*, 2007) <[www.ide.go.jp/English/Publish/Download/Jrp/pdf/143\\_2.pdf](http://www.ide.go.jp/English/Publish/Download/Jrp/pdf/143_2.pdf)> accessed 30 January 2017; and He Liangliang, ‘1958 nian Ganying Chaomei Kouhao Xiade Dayuejin Niandai’ [The Great Leap Forward under the 1958 Slogan of ‘Surpassing Britain and Catching up with the United States’] (*Phoenix, Hong Kong*, 30 September 2008) <[http://phtv.ifeng.com/program/sslld/200809/0930\\_2132\\_812582.shtml](http://phtv.ifeng.com/program/sslld/200809/0930_2132_812582.shtml)> accessed 30 January 2017.

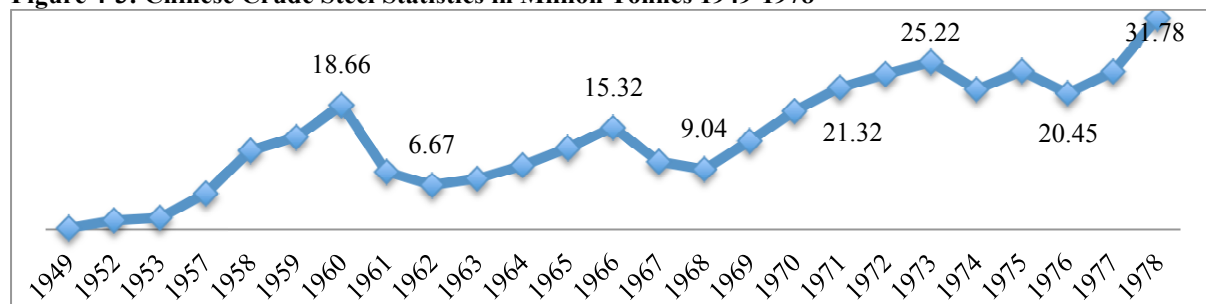
<sup>27</sup> See Grasso, Corrin and Kort (n 22) 164-75.

<sup>28</sup> See Chapter 4.1.2.2 below.

<sup>29</sup> See Chapter 4.1.1.2 below.

<sup>30</sup> Even though there was an annual average increase of more than 50 percent in Chinese crude steel production from 1958 to 1960, an irreversible downward trend followed. It was not until 1971, when the output of crude steel amounted to 21.32 million tonnes, that production reached and exceeded the level of output in 1960.

**Figure 4-3: Chinese Crude Steel Statistics in Million Tonnes 1949-1978**

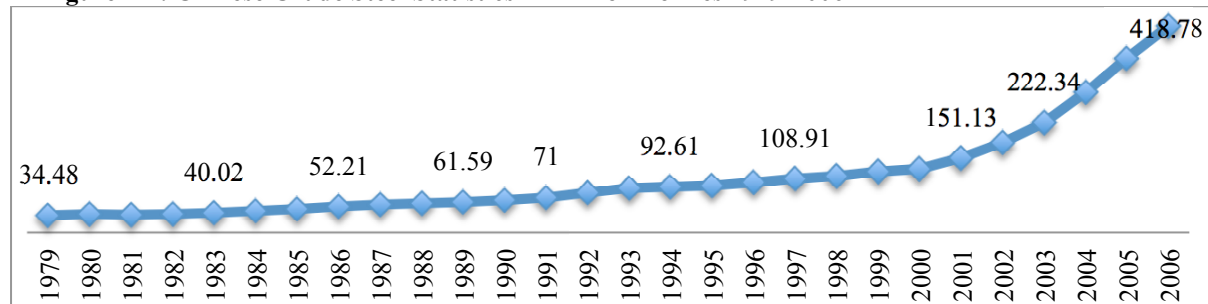


Source: ‘The Development of the Chinese Steel Industry – in a Changing Macroeconomic Environment’; figure devised by the author.

See Yuan (n 26) 4-5; and Ronald Hsia, ‘The Development of Mainland China’s Steel Industry Since 1958’ (1961) 7 *The China Quarterly* 112.

After a continual rise in steel output and sales volumes,<sup>31</sup> in the middle of the 1990s the State decided that China's steel production should stabilise around the level at that time, based on experience in the international steel industry.<sup>32</sup> However, the Chinese steel industry continued to grow<sup>33</sup> and reached its highest level of profits in 2006<sup>34</sup>: nevertheless, at the

<sup>31</sup> **Figure 4-4: Chinese Crude Steel Statistics in Million Tonnes 1979-2006**

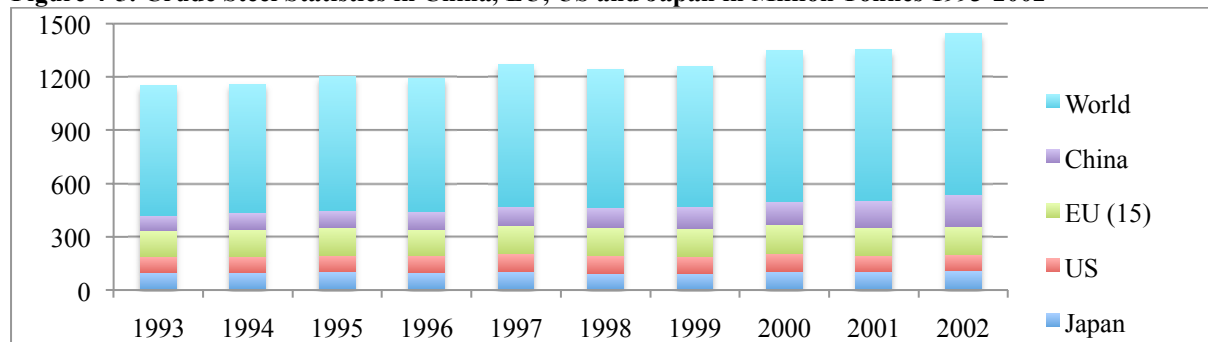


Source: 'The Development of the Chinese Steel Industry – in a Changing Macroeconomic Environment'; figure devised by the author.

See Yuan (n 26) 5-6.

<sup>32</sup> From the first half of the 1990s, the amount of steel production in several countries where the steel industry was well developed began to flatten.

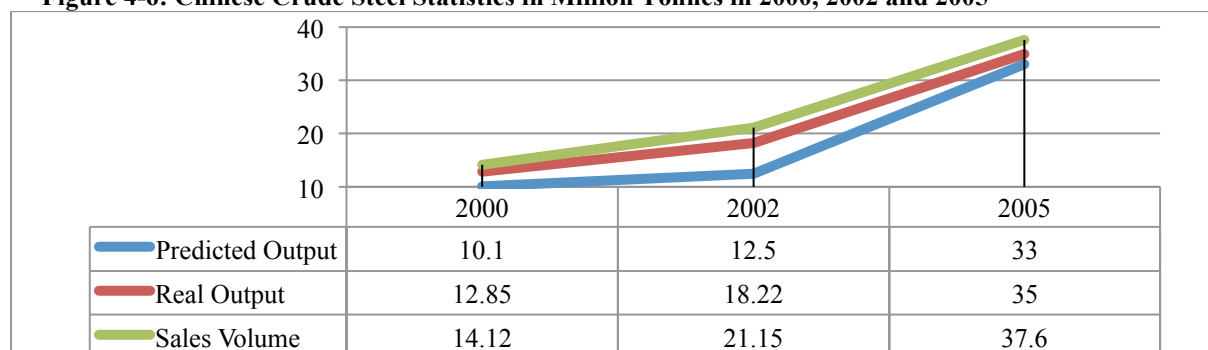
**Figure 4-5: Crude Steel Statistics in China, EU, US and Japan in Million Tonnes 1993-2002**



Source: *Steel Statistical Yearbook 2003*; Figure 4-5 devised by the author.

See Committee on Economic Studies of International Iron and Steel Institute, *Steel Statistical Yearbook 2003* (International Iron and Steel Institute (IISI) 2004) 7-8

<sup>33</sup> **Figure 4-6: Chinese Crude Steel Statistics in Million Tonnes in 2000, 2002 and 2005**



Source: 'Defects and Adverse Effects of the Chinese Investment and Regulatory Policy towards the Chinese Steel Industry'; Figure 4-6 devised by the author.

See Tarun Khanna, Aldo Musacchio and Ricardo Reisen de Pinho, 'Vale: Global Expansion in the Challenging World of Mining' (2010) Harvard Business School Case Study 10, cited in Elizabeth C Economy and Michael Levi, *By All Means Necessary: How China's Resource Quest is Changing the World* (OUP 2014) 37-38; and Jiang Feitao, 'Touzi Guizhi Zhengce de Quexian yu Buliang Xiaoying – Jiyu Gangtie Gongye de Kaocha' [Defects and Adverse Effects of the Chinese Investment and Regulatory Policy towards the Chinese Steel

same time, China failed to foresee global production overcapacity.<sup>35</sup>

However, in dealing with such a situation, the Central Government of China did not learn from the experience of European State aid for the EU steel industry<sup>36</sup>: in the process of eliminating steel overcapacity (which ideally should have been brought about by market behaviour), State aid was not efficient.<sup>37</sup> In China, overcapacity developed and led to further deterioration, with a sharp drop in profits and growth momentum between 2006 and 2011.<sup>38</sup>

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Industry (author's translation)] (2007) 6 China Industrial Economics 13.

<sup>34</sup> See Qi Zhongxi, 'Gangtie Hangye Lirun Chuang Lishi Zuihao Shuiping' [The Chinese Steel Industry Achieves Highest Profits in Its History (author's translation)] *China Daily* (Beijing, 24 February 2007) 01.

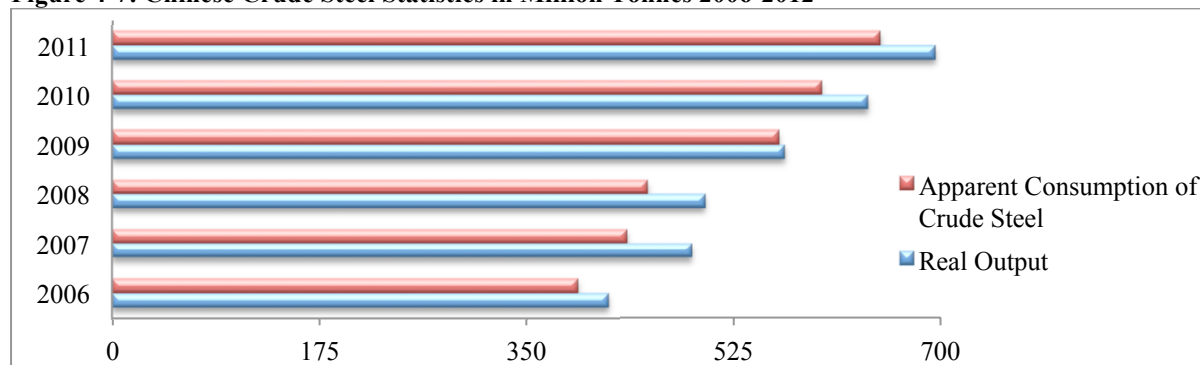
<sup>35</sup> See McKinsey & Company, 'Overcapacities in the Steel Industry' (OECD Steel Committee 74th Session, Paris, 2 July 2013); and McKinsey, 'Scarcity and Saturation: Steel and the Challenges of Volatile Raw Materials, Flat Margins, and Overcapacities' (McKinsey on Metals & Mining, Spring 2013).

<sup>36</sup> It is important to "[a]pply the past to the present": Diarmuid Rossa Phelan, 'The Future of the Constitutional Welfare State in Europe from the Irish Perspective' in Julia Iliopoulos-Strangas (ed), *The Future of the Constitutional Welfare State in Europe* (Nomos 2015) 123.

<sup>37</sup> See Commission, 'Towards Greater Competitiveness in the Steel Industry: The Need for Further Restructuring' SEC (1992) 2160 final; Lars-Hendrik Röller and Christian von Hirschhausen, 'State Aid, Industrial Restructuring and Privatization in the New German Länder: Competition Policy with Case Studies of the Shipbuilding and Synthetic Fibres Industries' (Discussion Paper FS IV 96 - 13, Wissenschaftszentrum Berlin, 1996) 18; and Frédéric Yves Jenny, 'Competition and State Aid Policy in the European Community' (1994) 18 *Fordham International Law Journal* 525, 546.

<sup>38</sup> Since 2005, China's apparent consumption of crude steel has been consistently lower than the output.

**Figure 4-7: Chinese Crude Steel Statistics in Million Tonnes 2006-2012**



Source: '2006 World Crude Steel Production Reached 1,200 Million Tonnes' for real output of Chinese crude steel in 2006; 'World Crude Steel Output Increases by 7.5% in 2007' for real output of Chinese crude steel in 2007; 'OECD Steel Committee Says Market Remains Strong, Despite Risks to Global Economy' for Chinese apparent consumption of crude steel in 2007; *Steel Industry Development Report 2011* for real output of Chinese crude steel in 2008 and Chinese apparent consumption of crude steel in 2008 and 2010; 'World Crude Steel Output Decreases by -8.0% in 2009' for real output of Chinese crude steel in 2009; 'World Crude Steel Output Increases by 6.8% in 2011' for real output of Chinese crude steel in 2010 and 2011; 'Crude Steel Apparent Consumption up by 6.4 percent in 2011' for Chinese apparent consumption of crude steel in 2011; Figure 4-7 devised by the author.

See Department of Raw Material Industry of Ministry of Industry and Information Technology, China Metallurgical Information and Standardization Institute and World Metals, China, *Gangtie Chanye Fazhan Baogao 2011* [*Steel Industry Development Report 2011*] (Chemical Industry Press, China 2011) 106 & 223; Hu Zhengwu, '2011 nian Cugang Biaoguan Xiaofeilian Tongbi Zengzhang 6.4%' [China's Apparent Consumption of Crude Steel Increases by 6.4 percent in 2011 (author's translation)] (*Custeel, China*, 17 January 2012) <[www.custeel.com/uc361/viewArticle.jsp?articleID=3045230](http://www.custeel.com/uc361/viewArticle.jsp?articleID=3045230)> accessed 30 January 2017; OECD, 'OECD Steel Committee Says Market Remains Strong, Despite Risks to Global Economy' (OECD, 23 May 2008) <[www.oecd.org/newsroom/oecdsteelcommitteesaysmarketremainsstrongdespiteriskstoglobaleconomy.htm](http://www.oecd.org/newsroom/oecdsteelcommitteesaysmarketremainsstrongdespiteriskstoglobaleconomy.htm)>

Finally, and belatedly, market mechanisms played their “regulatory” role in reducing steel production overcapacity.<sup>39</sup> Thus, crude steel production shrank for the first time in 31 years in 2012.<sup>40</sup> The automatic supply-demand adjustment brought about by market forces in the steel market is extremely useful and looks far more influential than government decrees and State-led initiatives in China.

#### 4.1.1.2 Primacy of the State’s Interest in “Administrative Mergers”

Despite the fact that the actual results of administrative intervention are often contrary to the State’s expectations, intervention remains, in China, an essential method for boosting the steel sector’s growth. The serious destabilising effects of the Great Leap Forward in the steel industry can be seen in the widespread establishment of blast furnaces.<sup>41</sup> A huge amount of inefficiency and incompetence in the operation of steel mills could be found in most Chinese cities. This affected industrial concentration, and so, with the State’s 2009 ‘Steel Industry Revitalisation Plan’. Countless small and medium-scale mills have closed down in recent years and a number of medium and large-scale enterprises have merged by interventions (see footnote 45 below). Since this government-led progress has rarely obeyed market rules, it is easy to criticise when examining it from the viewpoint of *the Chinese Anti-Monopoly Law 2007*.<sup>42</sup>

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accessed 30 January 2017; National Development and Reform Commission (NDRC) of China, ‘2006 nian Shijie Cugang Chanliang Dadao 12 yidun’ [2006 World Crude Steel Production Reaches 1,200 Million Tonnes (author’s translation)] (*National Development and Reform Commission, China*, 7 February 2007) <[www.ce.cn/cyssc/main/jtfzpspy/shwll/200702/07/t20070207\\_10351012.shtml](http://www.ce.cn/cyssc/main/jtfzpspy/shwll/200702/07/t20070207_10351012.shtml)> accessed 30 January 2017; IISI, ‘World Crude Steel Output Increases by 7.5% in 2007’ (*IISI*, 23 January 2008) <[www.worldsteel.org/media-centre/press-releases/2008/2007-world-steel-output.html](http://www.worldsteel.org/media-centre/press-releases/2008/2007-world-steel-output.html)> accessed 4 January 2017; IISI, ‘World Crude Steel Output Decreases by -8.0% in 2009’ (*IISI*, 22 January 2010) <[www.worldsteel.org/media-centre/press-releases/2010/2009-world-steel-output.html](http://www.worldsteel.org/media-centre/press-releases/2010/2009-world-steel-output.html)> accessed 4 January 2017; and IISI, ‘World Crude Steel Output Increases by 6.8% in 2011’ (*IISI*, 23 January 2012) <[www.worldsteel.org/media-centre/press-releases/2012/2011-world-crude-steel-production.html](http://www.worldsteel.org/media-centre/press-releases/2012/2011-world-crude-steel-production.html)> accessed 4 January 2017.

<sup>39</sup> See China Daily, ‘Zhongguo Gangchanliang Huoxian 31 nian lai Shouci Fuzengzhang’ [China’s Steel Production Shows Negative Growth for the First Time in 31 Years (author’s translation)] (*Ministry of Commerce of China*, 31 August 2012) <[www.chinadaily.com.cn/dfpd/jingji/2012-08/31/content\\_15722817.htm](http://www.chinadaily.com.cn/dfpd/jingji/2012-08/31/content_15722817.htm)> accessed 30 January 2017; and Frik Els, ‘Iron Ore Red Alert: China’s Steel Output Could Shrink for the First Time in 31 Years’ (*Mining.com*, 20 August 2012) <[www.mining.com/iron-ore-red-alert-chinas-steel-output-could-shrink-for-the-first-time-in-31-years-91545/](http://www.mining.com/iron-ore-red-alert-chinas-steel-output-could-shrink-for-the-first-time-in-31-years-91545/)> accessed 30 January 2017.

<sup>40</sup> *Id.*

<sup>41</sup> See Clark (n 23); and Chan (n 22) 159.

<sup>42</sup> See Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control

To give a little background, in order to rapidly increase steel production during the Second Five-Year Plan (1958-1962), steel intervention was practised, which resulted in many small and inefficient steel mills being established, one after another. Thereafter, an inefficient and often incompetent steel industry persisted for several decades. Although ‘Policies for the Development of the Iron and Steel Industry’ (2005) aimed to restructure steel enterprises,<sup>43</sup> the number of China’s steel enterprises reached 7198 (of which 199 were SOEs) by the end of 2006.<sup>44</sup> Since then, administrative intervention has been urgently working towards encouraging steel companies to either shut down or merge. Thus, the policy ‘the Steel Industry Revitalisation Plan of China’ (2009) came into effect.<sup>45</sup> By 2010, the number of

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of Concentrations between Undertakings [2008] OJ C265/6 (pointing out that “the fact that a merger affects competitors is not in itself a problem”); and the Anti-Monopoly Law of China 2007, Arts 20, 27-28.

Article 20: A concentration refers to the following circumstances:

- (1) the merger of business operators;
- (2) acquiring control over other business operators by virtue of acquiring their equities or assets; or
- (3) acquiring control over other business operators or the possibility of exercising decisive influence on other business operators by virtue of contract or any other means.

Article 27: In the case of the examination of the concentration of business operators, it shall consider the relevant elements as follows:

- (1) the market share of the business operators involved in the relevant market and the controlling power thereof over that market,
- (2) the degree of market concentration in the relevant market,
- (3) the influence of the concentration of business operators on the market access and technological progress,
- (4) the influence of the concentration of business operators on the consumers and other business operators,
- (5) the influence of the concentration of business operators on the national economic development, and
- (6) other elements that may have an effect on the market competition and shall be taken into account as determined by the Anti-monopoly Authority under the State Council.

Article 28: Where a concentration has or may have the effect of eliminating or restricting competition, the Anti-monopoly Authority under the State Council shall make a decision to prohibit the concentration. However, if the business operators concerned can prove that the concentration will bring more positive impact than negative impact on competition, or the concentration is pursuant to public interests, the Anti-monopoly Authority under the State Council may decide not to prohibit the concentration.

<sup>43</sup> See ‘Gangtie Chanye Fazhan Zhengce’ [Policies for the Development of the Iron and Steel Industry] (2005) <[www.sdpc.gov.cn/zcfb/zcfbl/200507/t20050719\\_52618.html](http://www.sdpc.gov.cn/zcfb/zcfbl/200507/t20050719_52618.html)> accessed 30 January 2017.

<sup>44</sup> See Dou Bin and Tang Guosheng (eds), *Gangtie Hangye Touzi Guodu Channeng Guosheng Yuanyin ji Duice* [Excessive Investment and Overcapacity in the Steel Industry: Causation and Countermeasures (author’s translation)] (Economic Science Press, China 2009) 131; and Yu Zheng and Regina Abrami, ‘The New Face of Chinese Industrial Policy: Making Sense of Anti-Dumping Cases in the Petrochemical and Steel Industries’ (2011) 11 *Journal of East Asian Studies* 373, 381.

<sup>45</sup> The publication ‘the Steel Industry Revitalisation Plan of China’ (2009) set two objectives: the first is to form more than three large-scale undertaking groups (with a production capacity of more than 50 million tonnes) and about seven medium-scale undertaking groups (with a production capacity of 10 to 30 million tonnes) in China’s steel industry by 2011. The second was to raise the output of the top ten large steel undertakings to over 60 percent of total Chinese steel output by 2015, from 44 percent in 2009. Additionally, the 2009 Plan



steel enterprises had been reduced to less than 900.<sup>46</sup> However, this is not the end: the objective of State's steel intervention is that in the future there will be only about 200 steel enterprises operating in China.<sup>47</sup> However, on the issue of intensive restructuring, there is no indisputable conclusion as to whether or not this government-led approach, which is only concerned about the notion of the short-term economic interest of the State, can meet the development needs and the "public interest" in the steel industry.

The *provincial merger* regime in Hebei province<sup>48</sup> is a useful example on which to focus: the local government intends to guide the whole merger process along the lines set out in the 'Steel Industry Revitalisation Plan of China' (2009) and the '12th Five-Year Plan (2011-2015) for China's Iron and Steel Industry'.<sup>49</sup> In a similar way to the European approach, the Chinese government selects companies it favours to achieve the purpose of rapidly establishing a competitive and strong steel sector.<sup>50</sup> However, because of the lack of necessary knowledge, the local provincial government often acts both as a guide and a

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underlined that all regional governments should support mergers between steel SOEs. However, although the starting point of the 2009 Plan was positive, criticism of administrative intervention has never stopped since it came into force. Several Chinese mainstream media even reported that mergers of steel companies under this Plan were "administrative mergers": see, e.g., Pan Weijie, 'Quyue Zhenghe: Zhongguo Gangtieye de Binggou Xindongli' [Regional Integration – New Power for China's Steel Industry Mergers (author's translation)] (2009) 3 Dongshihui [Directors & Boards] 65; Hao Rongliang, 'Gangtie Zhongguoshi Chongzu Zhiyou' [Chinese-style Restructuring Worries in the Steel Industry (author's translation)] *Guoji Jinrongbao* [International Finance News] (Beijing, 11 September 2009) 01; Hao Rongliang, 'Gangtie Dachongzu de Sige Yinyou' [Four Worries about the Steel Mergers in China (author's translation)] *Jingji Guancha* [The Economic Observer] (Beijing, 8 September 2012) <[www.eeo.com.cn/observer/shelun/2009/09/08/150519.shtml](http://www.eeo.com.cn/observer/shelun/2009/09/08/150519.shtml)> accessed 30 January 2017; and 'Gangtie Chanye Tiaozheng he Zhenxing Guihua' [Steel Industry Revitalisation Plan of China] (2009) <[www.gov.cn/zwgk/2009-03/20/content\\_1264318.htm](http://www.gov.cn/zwgk/2009-03/20/content_1264318.htm)> accessed 30 January 2017, the English version is available at <[www.lawinfochina.com/display.aspx?lib=law&id=7529&CGid=>](http://www.lawinfochina.com/display.aspx?lib=law&id=7529&CGid=>)> accessed 30 January 2017.

<sup>46</sup> See The State Council Information Office (SCIO), 'Guoxinban Juxing Shangbannian Gongye Tongxinye Jingji Yunxing deng Qingkuang Fabuhui' [Press Conference Held by the State Council Information Office on Economic Performance of China's Industry and Communication Industry in the First half of 2010 (author's translation)] (Press Conference of the State Council Information Office, Beijing, 19 January 2010) <[www.scio.gov.cn/xwfbh/xwfbh/wqfbh/2010/0720/](http://www.scio.gov.cn/xwfbh/xwfbh/wqfbh/2010/0720/)> accessed 30 January 2017.

<sup>47</sup> *Id.*

<sup>48</sup> Hebei Province, the biggest steel-producing region in China, covers a total area of 187,700 square kilometres: The People's Government of Hebei Province, 'About Hebei' (*The People's Government of Hebei Province, China*, 13 February 2014) <[www.hebei.gov.cn/english/10718809/index.html](http://www.hebei.gov.cn/english/10718809/index.html)> accessed 30 January 2017.

<sup>49</sup> China's Twelfth Five-Year Plan (2011-2015) stresses environmental issues in the process of the State's economic expansion. Incorporated into this, the '12th Five-Year Plan (2011-2015) for China's Iron and Steel Industry' also concerns environmental targets. It poses challenges to the steel sector regarding energy usage and pollution. As the State has claimed that small-scale blast furnaces often cause serious pollution, privately-owned steel SMEs face a dilemma: if they are unable to raise add-on funding for high-end equipment, they have to stop production and wait for demolition: KPMG China, 'China's 12th Five-Year Plan: Iron and Steel' (KPMG, May 2011).

<sup>50</sup> See Max Lienemeyer, 'State Aid for Restructuring the Steel Industry in the New Member States' (2005) 1 Competition Policy Newsletter 94, 98.

manipulator, making merger proposals subjectively without taking market conditions and regulations into account. Mill operators, whose views are ignored,<sup>51</sup> have to obey the government in the course of “administrative mergers”. For instance, in 2010 the Hebei provincial government proposed that 88 local steel enterprises should be restructured in the near future, and that the number of steel enterprises in Hebei be reduced accordingly to approximately 15 by the end of 2015.<sup>52</sup> In order to protect their own interests, privately-owned steel enterprises in the local market often undertake non-violent resistance in order to prevent the smooth programme of their government-led mergers.<sup>53</sup> However, the Chinese government would never allow “administrative mergers” to fail.<sup>54</sup> Hence, such an approach provides opportunities for provincial governments to carry out administrative intervention, in order to guarantee the smooth operation of mergers of steel enterprises: the real outcome of the 2010 Plan has been to make steel SOEs larger, but not necessarily stronger.<sup>55</sup>

Furthermore, turning the attention to the *interprovincial merger* between Wuhan Iron & Steel (Group) Corporation (a central SOE in Hubei Province) and Kun Steel Holding (a provincial SOE in Yunnan Province): although the merger between these two steel SOEs was

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<sup>51</sup> In accordance with their intended purposes, privately-owned steel enterprises prefer to reduce government intervention and operate independently in order to create a fair and competitive market: Gao Pengfei, ‘Hebeisheng Gangtie Qiye Lianhe Chongzu Moshi Fenxi’ [Analysis of the Restructuring Model of Steel Enterprises in Hebei Province (author’s translation)] (2011) 10 *China Steel* 14, 17.

<sup>52</sup> See Cao Kaihu, ‘Hebei Gangtie jiang Zaici Piliang Chongzu Minying Gangqi’ [Privately-Owned Steel Enterprises in Hebei Province to be Restructured Again (author’s translation)] *First Financial Daily* (Shanghai, 13 December 2010) B01; and Li Baoyuan, ‘Hebei Gangtie Zhenghe Fangan Disandu Weitiao’ [The Third Time for Minor Adjustment to the Hebei Steel Enterprises’ Merger Plan (author’s translation)] *Yanzhao Dushibao* [*Yanzhao Metropolis Daily*] (Shijiazhuang, 13 September 2012) 17.

<sup>53</sup> See Zhai Ruimin, ‘Hebei Gangtie Jituan Zhudong Tichu Jieyue’ [Hebei Steel Group Proposes to Terminate Previously-Announced Merger Agreements (author’s translation)] (*NetEase, China*, 20 January 2014) <<http://money.163.com/special/view454/>> accessed 30 January 2017.

<sup>54</sup> See Yuan Zhiguang, ‘Hebei Gangtie Chanye Jiegou Tiaozheng Zaichu Zuhequan’ [Further Restructuring in the Hebei Steel Industry (author’s translation)] (*Xinhua, China*, 6 December 2014) <[http://news.xinhuanet.com/politics/2014-12/06/c\\_127282849.htm](http://news.xinhuanet.com/politics/2014-12/06/c_127282849.htm)> accessed 30 January 2017.

<sup>55</sup> “Administrative mergers” were conducted by State intervention in the Chinese steel industry. Although certain of the merged steel enterprises continue to operate separately after mergers, they still have a responsibility to pretend that the mergers are bringing smooth development for them. For example, in 2016 China’s Baosteel Group and Wuhan Iron & Steel (Group) Corporation announced to restructure under State supervision: see, e.g., Yang Ying, ‘Tanjiu Gangtie Chanye Guojin Mintui’ [Exploring ‘Guojin Mintui’ in the Chinese Steel Industry (author’s translation)] (2011) 3 *Property Rights Guide* 8; Paul Carsten, Ruby Lian and Nicholas Heath, ‘China’s Baosteel, Wuhan Steel Announce Plan to Restructure’ (*Reuters*, 27 June 2016) <<http://uk.reuters.com/article/us-baoshan-steel-wuhan-steel-idUKKCN0ZC0EN>> accessed 30 January 2017; and Sheng Hong and Zhao Nong, *China’s State-Owned Enterprises: Nature, Performance and Reform* (World Scientific Publishing Company 2013) xv.

described as a positive change in the interprovincial merger regime, which could accelerate consolidation of the steel industry,<sup>56</sup> discordant voices remain. In 2005, Kun Steel Holding faced a development dilemma, and therefore the provincial government proposed to accept RMB ten billion Yuan (approximately £0.67 billion) investment from a foreign company, ArcelorMittal.<sup>57</sup> However, this proposal touched a sensitive nerve. In accordance with State security and national interests, the proposal was quickly abandoned. Subsequently, a plan to bring about mergers of Chinese steel enterprises was implemented in haste,<sup>58</sup> with the relevant policy being to treat the development of “central SOEs” (i.e., those steel SOEs that are directly supervised by the State-Owned Assets Supervision and Administration Commission of China (SASAC)) as a priority.<sup>59</sup> That meant that, in the government-led merger process, Wuhan Iron & Steel (Group) Corporation occupied the superior position, and Kun Steel Holding, which did not seek cooperation with a central SOE, acted as a passive recipient without any enthusiasm for the merger. As a consequence, not only Kun Steel Holding but also Wuhan Iron & Steel (Group) Corporation had to accept that the strategic restructuring between them was only a combination in certain aspects – the combination only involved the accounting of their finance: both of them continued to run separately, and did not form a “good fit” following the “administrative merger”.<sup>60</sup> In other words, they have not combined into a *de facto* large-scale steel enterprise group.

Even though “administrative mergers” are the method favoured to achieve the essential requirements of relevant policies,<sup>61</sup> this method does not treat different types of interest in a

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<sup>56</sup> See Xiong Jinchao and Liu Juan, ‘Wugang yu Kungang Chongzu: Zhongguo Gangtie Hangye Zhenghe jiang Tisu’ [Interprovincial Merger between Wuhan Iron and Steel (Group) Corporation and Kun Steel Holding: Speeding Up the Chinese Steel Industry Consolidation (author’s translation)] *Jingji Guancha* [*The Economic Observer*] (Beijing, 1 August 2007) <[http://news.xinhuanet.com/newscenter/2007-08/01/content\\_6462590.htm](http://news.xinhuanet.com/newscenter/2007-08/01/content_6462590.htm)> accessed 30 January 2017.

<sup>57</sup> Telephone Interview with a staff member of Kun Steel Holding, Yunnan Province, China (the interviewee did not agree to the researcher using the interviewee’s name in any written work arising from the study, but did consent to being interviewed) (Cangzhou, China, 2012).

<sup>58</sup> See ‘Gangtie Chanye Fazhan Zhengce’ [Policies for the Development of the Iron and Steel Industry] (2005) (n 36).

<sup>59</sup> See Jiang Feitao and Li Xiaoping, ‘Zhijie Ganyu Shichang yu Xianzhi Jingzheng: Zhongguo Chanye Zhengce de Quxiang yu Genben Quexian’ [Government Intervention in Markets and Competition Restriction: Fundamental Flaws in the Chinese Industrial Policy’s Direction (author’s translation)] (2010) 9 *China Industrial Economics* 26.

<sup>60</sup> See Telephone Interview (n 57).

<sup>61</sup> The policies include ‘Policies for the Development of the Iron and Steel Industry’ (2005), ‘Steel Industry Revitalisation Plan of China’ (2009) and the Twelfth Five-Year Plan (2011-2015).

fair-minded manner or take the practical demands of the Chinese steel industry into account. As the above two examples demonstrate, an examination of *provincial mergers*, which realise the wishes of local governments, has caused increasing difficulties for local privately-owned steel enterprises.<sup>62</sup> Accordingly, their interests decrease with a corresponding increase in the SOEs' interests. An examination of *interprovincial mergers*, which emphasise State security and national interests, demonstrates that they fail to effectively balance interests between central SOEs and provincial SOEs. In short, China's steel intervention in the first decade of the 21st century created unbalanced interests between central SOEs and provincial SOEs, as well as with privately-owned steel enterprises; and in this regard, interventions obstructed the realisation of the "public interest" in the steel market.

Following all the above-mentioned interventions in the steel industry, the State's policy seems to be the sole basis for the administrative mergers in this industry. By contrast, competition law and policy, which ought to maintain competition in the steel market, protect the "public interest", and restrict anti-competitive steel mergers, do not play any role of significance. The restructuring of steel enterprises has arisen from administrative intervention, not market focus. In particular, each provincial government makes proposals on steel mergers within its own province and then submits each proposal individually to the Ministry of Industry and Information Technology of the Government of China (MIIT). If the local government receives a positive reply, the merger will occur shortly thereafter.<sup>63</sup> Can this illegal merging process help the steel industry with regard to increasing industrial concentration? After 10 years of intensive restructuring from 2005, criticism of industrial concentration, the outcome of "administrative mergers", continues. Both *the output of the top ten largest steel enterprises* and *the output of the top four largest steel enterprises* failed to

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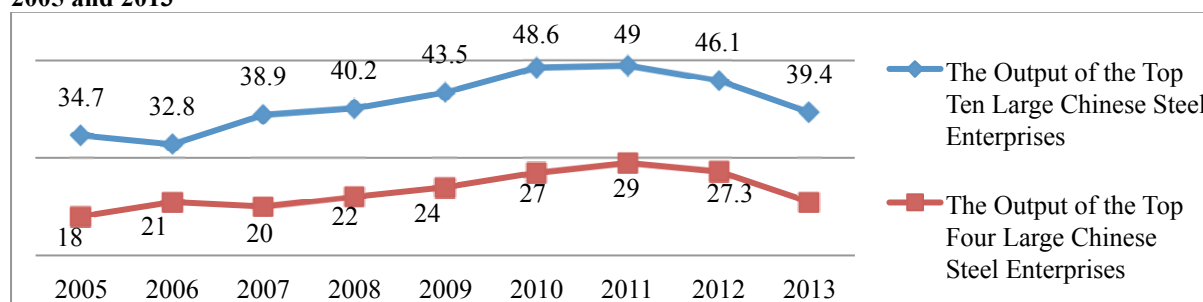
<sup>62</sup> The Hebei provincial government proposed to reduce the number of local steel enterprises from 88 to approximately 15 by the end of 2015. Apart from two steel SOEs, namely Hebei Iron & Steel Group Company Limited (HBIS) and Shougang Group, other privately-owned steel enterprises have to compete for the remaining 13 places. Otherwise, they must exit from the steel market: Zhai Ruimin, 'Hebei Gangtieye Zhenghe Fang'an Baopi: Minying Gangqi Zhengduo 13 ge Ming'e' [Approval for the Integration Programme in the Hebei Steel Industry: Privately-Owned Steel Enterprises Compete for 13 Places (author's translation)] (*NetEase, China*, 1 February 2013) <<http://money.163.com/special/view316/>> accessed 30 January 2017.

<sup>63</sup> See 'Gangtie Chanye Fazhan Zhengce' [Policies for the Development of the Iron and Steel Industry] (2005) (n 36); and 'Gangtie Chanye Tiaozheng he Zhenxing Guihua' [Steel Industry Revitalisation Plan of China] (2009) (n 45).

show improvement during the restructuring period.<sup>64</sup> Such a trend illustrates that administrative conduct is unable to promote industrial concentration regarding the task of the ‘Steel Industry Revitalisation Plan of China’ (2009), namely for the output of the top ten largest steel enterprises to reach 60 percent in 2015 (see footnote 45 above). However, the stubborn State’s steel intervention programme requires pressing ahead with intensive restructuring in this sector.

According to the rules of competition law and policy in China, when the scale of undertakings exceeds a certain level,<sup>65</sup> enterprises should notify the anti-monopoly authority

<sup>64</sup> **Figure 4-8: The Output of the Top Ten and the Top Four Largest Chinese Steel Enterprises between 2005 and 2013**



\* The output of the top four largest Chinese steel enterprises in 2013 is an estimate.

Sources: *The Empirical Analysis of Chinese Industry Policy Changing Tendency 2000-2010* for the output of the top ten and the top four largest Chinese steel enterprises in 2005-2008; ‘China Iron and Steel Industry Statistics, 2005-2009’ for the output of the top ten and the top four largest Chinese steel enterprises in 2009; ‘The 12th Five-Year Plan (2011-15) for China’s Iron and Steel Industry’ for the output of the top ten and the top four largest Chinese steel enterprises in 2010; ‘Analysis of Concentration Ratio of the Chinese Steel Industry in 2011’ for the output of the top ten and the top four largest Chinese steel enterprises in 2011; ‘Good Time for Mergers and Acquisitions in the Chinese Steel Industry’ for the output of the top four largest Chinese steel enterprises in 2012 from January to November; ‘Concentration Drops, Mergers and Acquisitions in the Steel Industry to Grow Faster’ for the output of the top ten largest Chinese steel enterprises in 2012 and 2013; Figure 4-8 devised by the author.

See Zhao Ying and Ni Yueju (eds), *Zhongguo Chanye Zhengce Biandong Qushi Shizheng Yanjiu 2000-2010* [*The Empirical Analysis of Chinese Industry Policy Changing Tendency 2000-2010*] (Economy & Management Publishing House, China 2012) 176; Li Yongjun, ‘2011 nian Woguo Gangtie Jizhongdu Zhuangkuang Fenxi Zongjie’ [Analysis of Concentration Ratio of the Chinese Steel Industry in 2011 (author’s translation)] (2012) 5 *Zhongguo Gangtie Gongye Tongji Yuebao* [Monthly Statistics of the Chinese Steel Industry (author’s translation)] 27; ‘Gangtie Gongye Shierwu Fazhan Guihua’ [The 12th Five-Year Plan (2011-2015) for China’s Iron and Steel Industry] (2011) <[www.gov.cn/zw/gk/2011-11/07/content\\_1987459.htm](http://www.gov.cn/zw/gk/2011-11/07/content_1987459.htm)> accessed 30 January 2017; Song Binbin, ‘Jizhongdu Busheng Fanjiang, Gangtieye Jianbing Chongzu jiang Tisu’ [Concentration Drops, Mergers and Acquisitions in the Steel Industry to Grow Faster] *China Industry News* (Beijing, 15 April 2014) A3; Zheng and Abrami (n 44); ‘China’s 12th Five-Year Plan: Iron and Steel’ (n 49); Xia Qing, ‘Gangtie Hangye Yinglai Jianbing Chongzu Haoshiji’ [Good Time for Mergers and Acquisitions in the Chinese Steel Industry (author’s translation)] *Securities Daily, China* (Beijing, 25 January 2013) A3; and Jun Wang, ‘Steel Planning: China Releases a New Plan for the Iron and Steel Industry Centered on Industrial Upgrades’ (2011) 47 *Beijing Review* 28-29.

<sup>65</sup> See ‘Provisions of the State Council on Thresholds for Prior Notification of Concentrations of Undertakings’ (2008) <<http://fldj.mofcom.gov.cn/article/c/200903/20090306071501.shtml>> accessed 30 January 2017.

Article 3: Where a concentration of undertakings reaches any of the following thresholds, the undertaking(s) concerned shall file a prior notification with the competent commerce department of

of mergers.<sup>66</sup> However, this requirement is not being respected,<sup>67</sup> especially with regard to administrative intervention in the steel sector: few if any steel SOEs notify the anti-monopoly authority of their mergers. For example, in 2008, the annual sales of Wuhan Iron & Steel (Group) Corporation were over RMB 120 billion Yuan (approximately £12.03 billion).<sup>68</sup> The turnover of Hebei Iron & Steel Group Company Limited reached RMB 167 billion Yuan (approximately £16.74 billion) in 2008,<sup>69</sup> USD 25.92 billion dollars (approximately £16.03 billion) in 2009,<sup>70</sup> USD 33.55 billion dollars (approximately £21.49 billion) in 2010,<sup>71</sup> USD 38.72 billion dollars (approximately £24.94 billion) in 2011.<sup>72</sup> Both enterprises meet the

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the State Council, and no such concentration may be implemented without the clearance of prior notification:

(1) the combined worldwide turnover of all the undertakings concerned in the preceding financial year is more than RMB 10 billion Yuan, and the nationwide turnover within China of each of at least two of the undertakings concerned in the preceding financial year is more than RMB 400 million yuan; or

(2) the combined nationwide turnover within China of all the undertakings concerned in the preceding financial year is more than RMB 2 billion Yuan, and the nationwide turnover within China of each of at least two of the undertakings concerned in the preceding financial year is more than RMB 400 million Yuan.

In the calculation of turnover, the unique circumstances of such special industries or sectors as banking, insurance, securities and futures shall be taken into account, and the specific measures therefor shall be formulated by the competent commerce department of the State Council in conjunction with other relevant departments of the State Council.

Article 4: Where a concentration of undertakings does not reach any of the thresholds specified in Article 3 of these Provisions, but facts and evidence collected in accordance with the prescribed procedures establish that such concentration effects, or is likely to effect, the elimination or restriction of competition, the competent commerce department of the State Council shall initiate an investigation in accordance with law.

<sup>66</sup> See the Anti-Monopoly Law of China 2007, Art 21.

Article 21: Where a concentration reaches the threshold of declaration stipulated by the State Council, a declaration must be lodged in advance with the Anti-monopoly Authority under the State Council, or otherwise the concentration shall not be implemented.

<sup>67</sup> See Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2011 [Report on Competition Law and Policy of China 2011]* (Law Press, China 2011) 35; and Yin Zhenmao, 'Yangqi Hengxiang Hebing Shifou Weifan Fanlongduanfa' [Horizontal Merger of Central SOEs against the Anti-Monopoly Law? (author's translation)] *Securities Daily, China* (Beijing, 27 February 2015) A001 (pointing out that the implementation of the *Chinese Anti-Monopoly Law 2007* should be consistent with the State's economic growth with regard to SOEs).

<sup>68</sup> See Yang Libing and Bai Fang, 'Wuhan Shouge Qianyi Qiye: Wugang 2008 niang Xiaoshou da 1,200 Yiyuan' [The First Hundred-Billion Enterprise in Hubei Province: The Annual Sales of Wuhan Iron & Steel (Group) Corporation Reached RMB 120 billion Yuan in 2008 (author's translation)] *Hubei Daily, China* (Wuhan, 3 January 2009) 1.

<sup>69</sup> See HBIS, 'Hebei Gangtie Jituan 2009 nian Dashiji' [2009 Annual Report of HBIS (author's translation)] (HBIS, 2009).

<sup>70</sup> See HBIS, 'Hebei Gangtie Jituan 2010 nian Dashiji' [2010 Annual Report of HBIS (author's translation)] (HBIS, 2010).

<sup>71</sup> See HBIS, 'Hebei Gangtie Jituan 2011 nian Dashiji' [2011 Annual Report of HBIS (author's translation)] (HBIS, 2011).

requirement which obliges them to notify the anti-monopoly authority of their mergers. However, this has never happened. Market competition is unable to compete with administrative intervention in the intensive restructuring of the Chinese steel industry. Simultaneously, the State's interest occupies the supreme position when it does battle with other types of interest in the market, because as a market participant without any necessary legal constraints, the government cannot be a fair arbiter of the "public interest". All in all, the result of "administrative mergers" is a government-oriented structural adjustment which cannot be compatible with the requirements of *the Chinese Anti-Monopoly Law 2007*.

#### **4.1.2 Lack of Genuine Competition and the "Public Interest": The Disappearance of Privately-Owned Steel SMEs**

Inconsistently with the ultimate goal of *the Chinese Anti-Monopoly Law 2007*, maximising the State's interest by administrative intervention in the steel industry seems an urgent priority in China: the State has imposed a specific target on industrial concentration in order to achieve this objective. Nearly all steel SOEs have participated in the restructuring programme. Nevertheless, simply rationalising mergers of steel *SOEs* does not seem enough to achieve the restructuring goal as quickly as possible. Consequently, privately-owned steel enterprises also have to participate in the restructuring programme, and have been required to do so by successive Chinese governments, which paints a bleak picture for privately-owned steel SMEs: on the one hand, in order to compensate for the lack of sufficient State investment, the State invited private capital to participate in the restructuring of steel SOEs<sup>72</sup>, while on the other hand, in accordance with the State intervention policy, some privately-owned steel SMEs began to disappear from the market, not because of market competition but because they were forced to either shut down or merge with SOEs. The interests of privately-owned steel SMEs, which should be protected by *the Chinese Anti-Monopoly Law 2007*, have not been protected. Accordingly, the ultimate goal of this Law, namely the "public interest", which ought to benefit the interests of both owners and

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<sup>72</sup> See HBIS, 'Hebei Gangtie Jituan 2012 nian Dashiji' [2012 Annual Report of HBIS (author's translation)] (HBIS, 2012).

<sup>73</sup> Interview with Huiyong Shang, Researcher of Policy Planning Office, China Centre for Promotion of SME Development, Ministry of Industry and Information Technology of China (Beijing, China, 2012).

employees of privately-owned steel SMEs, has been sidelined!

#### 4.1.2.1 SMEs in China's Steel Sector – To Be, or Not to Be

Currently, a high degree of concentration is one of the most significant characteristics of the steel industry worldwide.<sup>74</sup> However, China's steel industry was in a relevantly low state of concentration for a long period of time, compared with neighbouring countries with well-developed steel industries, such as Japan.<sup>75</sup> Therefore, in the process of improving industrial steel concentration, a large number of privately-owned SMEs become a thorn in the side of the Chinese steel sector from the State's steel intervention perspective. Although the State emphasises that there are no restrictive measures for any privately-owned SMEs in the steel industrial policy,<sup>76</sup> the reality is otherwise. In the case of Hebei province, the principle of 'Hebei General Guidance on Developing Steel Industry' (2004)<sup>77</sup> is "promoting large-scale enterprises while pressuring small ones"<sup>78</sup>.

Several years later, despite this Guidance being out of date, the guiding ideology had not changed. The local government even mentioned cutting off small-scale steel enterprises as being one of its responsibilities, based on the intervention policy 'Product Specification

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<sup>74</sup> See Jean-Marie Beguin, 'Industrial Relations in the Steel Industry' 'Industrial Relations in the Steel Industry' (*EurWORK*, 3 May 2005) <[www.eurofound.europa.eu/eiro/2004/12/study/tn0412101s.htm](http://www.eurofound.europa.eu/eiro/2004/12/study/tn0412101s.htm)> accessed 30 January 2017.

<sup>75</sup> To highlight a vital criterion for evaluating industrial concentration, the output of the top four largest Chinese steel enterprises in 2007 was less than 20 percent of the total national output, while the output of the top four largest Japanese steel enterprises was nearly 75 percent: see, e.g., KPMG, 'China's Iron and Steel Industry amid the Financial Crisis' (2009) China Metallurgical News <[www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Documents/China-iron-steel-200906.pdf](http://www.kpmg.com/CN/en/IssuesAndInsights/ArticlesPublications/Documents/China-iron-steel-200906.pdf)> accessed 30 January 2017; and He Weida and Dong Huimin, 'Study on the Competitiveness and Efficiency of China's Iron and Steel Industry Based on a Three-Double-Model' (3rd International Symposium on Information Engineering and Electronic Commerce (IEEC 2011), Huangshi, China, 22-24 July 2011).

<sup>76</sup> See Liu (n 20) 31.

<sup>77</sup> See 'Hebeisheng Gongtie Gongye Fazhan Zhidao Yijian' [Development Guidance on the Hebei Steel Industry (author's translation)] (2004) <[http://govinfo.nlc.gov.cn/hebsfz/xxgk/hbs1/201207/t20120731\\_2295094.shtml?classid=388](http://govinfo.nlc.gov.cn/hebsfz/xxgk/hbs1/201207/t20120731_2295094.shtml?classid=388)> accessed 30 January 2017.

<sup>78</sup> For example, in Wu'an City, Hebei province, in order to survive in the market, 26 local privately-owned steel enterprises merged into one in 2006: Zhai, 'Hebei Gangtieye Zhenghe Fang'an Baopi: Minying Gangqi Zhengduo 13 ge Ming'e' [Approval for the Integration Programme in the Hebei Steel Industry: Privately-Owned Steel Enterprises Compete for 13 Places (author's translation)] (n 62).

\* Wu'an City, a county-level underdeveloped city in the north-eastern parts of China, Hebei Province, is famous for iron ores: the People's Government of Wu'an City, 'Wu'an Ziyuan Huanjing' [Natural Resources and the Environment in Wu'an (author's translation)] (*The People's Government of Wu'an City, China*, 28 January 2008) <[www.wuan.gov.cn/zjwa/info/58615.html](http://www.wuan.gov.cn/zjwa/info/58615.html)> accessed 30 January 2017.



Conditions in the Chinese Steel Industry' (2010).<sup>79</sup> The 2010 policy requires certain privately-owned small-scale steel enterprises to exit from the steel market on the grounds of environment protection. Therefore, the Hebei provincial government has been conducting an ongoing merger plan for local privately-owned steel enterprises (see footnote 62 above).

Is the aforementioned administrative intervention suitable for the development of steel SMEs and even the industry itself, if it is examined from the perspective of competition? The answer is that an absolute reasonable standard has never been proved for returns to scale in China's steel industry.<sup>80</sup> In fact, based on the actual conditions in different countries and regions, steel enterprises of any size would have a fair chance of success at different growth stages. For instance, in the early 1960s, rapid casting development was well suited to small-scale steel mills.<sup>81</sup> Hence, steel SMEs achieved success during the next ten years in Western countries.<sup>82</sup> Thereafter, a high degree of concentration created another successful era for the steel industry in the same areas from the 1990s.

A similar approach partially appears in China. For some years (1953-1957) (see Table 4-1 above) after the People's Republic of China was founded, a very popular notion was that to develop the steel industry, China should simultaneously maintain large-scale, medium-scale and small-scale steel companies.<sup>83</sup> This brought about the first step in the development of China's steel industry. However, from 1961 to 1965, and again since the 1980s a paradox has appeared: despite previous developments in the industry, the government declared that all steel SMEs, both State-owned and privately-owned, should be eliminated. In 1981, and 1989, the State Council twice published industrial policies and

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<sup>79</sup> See 'Gangtie Hangye Shengchan Jingying Guifan Tiaojian' [Product Specification Conditions in the Chinese Steel Industry (author's translation)] (2010) <<http://zfs.mep.gov.cn/gz/bmhb/gwygf/201209/W020120904527382344872.pdf>> accessed 30 January 2017.

<sup>80</sup> See Jiang Feitao and others, 'Touzi Guizhi Zhengce de Quexian yu Buliang Xiaoying: Jiyu Zhongguo Gangtie Gongye de Kaocha' [Defects and Adverse Effects of Investment Regulations towards the Chinese Steel Industry (author's translation)] (2007) 9 China Industrial Economics 66.

<sup>81</sup> See William Thomas Hogan, *Steel in the 21st Century: Competition Forges a New World Order* (Lexington Books 1994) 76-78.

<sup>82</sup> *Id.*

<sup>83</sup> See Political Department of Xiamen Revolutionary Committee, *Gaoju Angang Xianfa Guanghui Qizhi Fenyong Qianjin* [Revere the 'Angang Constitution' Glorious Banner to Forge Ahead (author's translation)] (Unpublished 1977); and People's Daily Commentator, 'Ba Zhongxiao Gangtie Gongye Gaoshangqu' [Developing Chinese Steel SMEs (author's translation)] (1977) 1 Jiangsu Yejin, China [Modern Metallurgy] 1.

requested a reduction in the proportion of small-scale steel mills (most of which were privately-owned).<sup>84</sup> Moreover, in 2010, the MIIT declared that some one hundred million tonnes of steel production capacity, produced by privately-owned steel SMEs, would need to be eliminated within the next two years in order to reduce air pollution.<sup>85</sup> Hence, because of the State's steel intervention, the production line that Chinese privately-owned steel SMEs relied on to survive were in danger of being destroyed very quickly and these SMEs had to place their fate into the State's hands.

Although the State would like to get rid of privately-owned steel SMEs, there is still an ongoing debate about whether these SMEs should or should not be eliminated: as iron ore reserves are spread over the entire country, the development of China's steel industry is hard to concentrate into a few locations.<sup>86</sup> Instead, China has conditions which are suitable for non-State-owned steel SMEs' survival and development in many provinces.<sup>87</sup> In Hebei province, for example, there were more than 200 steel enterprises by the end of 2003; and more than half of those enterprises were not large-scale, they were owned by private operators and they were scattered throughout the province.<sup>88</sup> Hebei steel SME industrial clusters had a rapid growth in this way, and became to an important growth point for provincial economic development.<sup>89</sup>

However, this positive trend did not continue elsewhere in China. During the global financial crisis of 2007 onwards, Hebei steel SMEs experienced a cold snap from the market

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<sup>84</sup> See Lv Tie, Li Xiaohua and He Jun, 'Fada Guojia Taotai Luohou Channeng de Zuofa yu Qishi' [Experience and Learning about Eliminating Backward Productions in Developed Countries (author's translation)] *China Economic Times* (Beijing, 20 January 2010) 5.

<sup>85</sup> See Wang Qunjun, 'Gongxinbu: Jinming Liangnian jiang Taotai Luohou Liantie Nengli Yiyidun' [The MIIT of China: One Hundred Million Tonnes of Backward Steel Production Capacity will be Eliminated in the Next Two Years (author's translation)] (*China National Radio*, 24 March 2010) <[http://china.cnr.cn/yaowen/201003/t20100324\\_506195339.html](http://china.cnr.cn/yaowen/201003/t20100324_506195339.html)> accessed 30 January 2017.

<sup>86</sup> See Gao Qingju, 'Guanyu Woguo Gangtie Gongye Shengcun Fazhan de Jidian Kanfa' [Some Opinions on the Survival and Development of China's Steel Industry (author's translation)] (2006) 9 *Yejin Guanli* [China Steel Focus] 16.

<sup>87</sup> *Id.*

<sup>88</sup> See 'Hebeisheng Gongtie Gongye Fazhan Zhidao Yijian' [Development Guidance on the Hebei Steel Industry (author's translation)] (2004) (n 77).

<sup>89</sup> See Ding Chao and Zhao Lei, 'Hebeisheng Gangtie Chanye Jiqun yu Hexin Jingzhengli Yanjiu' [Research on the Hebei Steel Industry Clusters and Core Competitiveness (author's translation)] (2008) 16 *Shangchang Xiandaihua*, China [Market Modernisation] 323.

conditions, with nearly forty percent of small steel enterprises shutting down,<sup>90</sup> however, this forty percent reduction in competition seemed bearable for the industry, compared with the worse experience potentially suffered by the remaining steel SMEs in Hebei, which was caused by government-led shutting-down policies.<sup>91</sup> The State insisted that these small-scale enterprises were showing low efficiency and were creating high levels of pollution, and that therefore most of them must shut down without complaint.

Contrary to the intentions of *the Chinese Anti-Monopoly Law 2007*, administrative intervention has left a huge question mark for nearly 1,000 small blast furnaces in China.<sup>92</sup> All of these are facing a shutting down dilemma. Resulting from State-sponsored steel intervention, two kinds of destabilising effect might appear. On the one hand, administrative intervention, which treats steel production scale as the first criterion, leads to a convergence of scale of steel enterprises. It requires local steel small-scale enterprises to shut down and medium or large-scale privately-owned steel enterprises to merge with SOEs. In such a process, steel enterprise-scale and strengths become similar, and substitutability among these enterprises is enhanced. Accordingly, their competitiveness is reduced because of a clear unilateral emphasis on enlarging steel enterprises.<sup>93</sup> On the other hand, certain privately-owned steel SMEs have to cope with the following situations: small blast furnaces, the equipment that privately-owned steel SMEs survive with, must be removed as soon as possible, as required by administrative intervention. Because these SMEs do not have enough funds to establish large blast furnaces, they may have to exit from the steel market, leaving their employees to face unemployment.

The existence of small-scale steel enterprises reflects a market demand<sup>94</sup> which is suited

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<sup>90</sup> See Fan Yali and Peng Yuqiang, 'Jinrong Weiji dui Hebei Gangtieye de Yingxiang' [The Impact of the Financial Crisis on the Steel Industry in Hebei Province (author's translation)] (2009) 11 *Economic Forum*, China 83.

<sup>91</sup> For small-scale steel enterprises in Hebei province which collapse due to competition, the reasons probably include weak demand and product surplus, unmarketable products, funding strand breaks, and so on. However, when they have to close after administrative intervention, the reasons given by the government for intervention are questionable.

<sup>92</sup> See Yang Jiang, 'Qianzuo Xiaogaolu Guanting Xuannian' [1,000 Small Blast Furnaces to Shut Down in China (author's translation)] (2010) 10 *Zhongguo Jingji he Xinxihua* [China Economy & Informatisation] 48.

<sup>93</sup> See Jiang and others (n 80) 56.

<sup>94</sup> See Clayton M Christensen and Michael E Raynor, *The Innovator's Solution: Creating and Sustaining Successful Growth* (Harvard Business School Press 2003) 35-59.

to the conditions of the steel sector's growth stage and the distribution of iron ore across China.<sup>95</sup> Government-led shutting-down policies deal a huge blow, not only for privately-owned steel SMEs, but also for the whole industry because the reduction in numbers of privately-owned steel SMEs and the concentration of steel SOEs, which are not brought about by market mechanisms, fail to establish a competitive industry. To date, the trend towards the two extremes of steel SMEs' development caused by administrative intervention has become increasingly apparent. On the one hand, a small number of steel SMEs which have sufficient capacity to survive in the steel market are looking for opportunities to participate in mergers with other privately-owned steel enterprises, or with steel SOEs, with the purpose of circumventing the risk of being the victim of the State's industrial policy. On the other hand, for the majority of steel SMEs, which cannot attract additional investment, withdrawing from the market is their fate.<sup>96</sup> Examination of such outcomes from the perspective of *the Chinese Anti-Monopoly Law 2007* shows that they are not in line with the market requirements of the steel sector development: balancing the relationship between enterprises of different scales, as well as between State-owned and privately-owned enterprises. In this regard, the ultimate goal of *the Chinese Anti-Monopoly Law 2007*, namely the "public interest", has been sidelined, by way of increasing the interests of SOEs but reducing the interests of privately-owned steel SMEs.<sup>97</sup>

#### 4.1.2.2 *Reorganisation Predicament of Privately-Owned Steel SMEs – The Attractiveness of Steel SOEs*

In view of conditions in the Chinese steel industry during the global financial crisis of 2007 onwards, the State has promulgated a series of intensive intervention policies, such as the promotion of mergers; and the restriction and elimination of backward production capacity: this steel intervention has endangered the fate of large numbers of privately-owned steel SMEs. In order to meet the requirements of the State's steel intervention, most

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<sup>95</sup> See Gao (n 86) 21.

<sup>96</sup> See Li Zhongmin, 'Tuijin Jianbing Chongzu Ruhe Jiangu Minying Qiye de Liyi' [How to Protect the Interests of Private-Owned Enterprises in the Process of Promoting Merger and Reorganisation in China (author's translation)] (2010) 21 World Knowledge 16.

<sup>97</sup> See Wu Jianlian and Ma Guochuan, *Chongqi Gaige Yicheng: Zhongguo Jingji Gaige Ershijiang* [Restart Reform Agenda: China's Economic Reform 20 Points] (Shenghuo-Dushu-Xinzhi Joint Publishing Company, China 2013) 236-37.

privately-owned steel enterprises have realised that remaining independent is not a permanent solution for their growth because they rarely have the ability to compete with steel SOEs. Hence, in Hebei province 39 privately-owned steel enterprises, selected a way of cooperation and joint development<sup>98</sup> in 2008, by forming themselves into two new privately-owned steel groups, namely Tangshan Great Wall Iron & Steel Group and Tangshan Bohai Steel Group in Tangshan City, Hebei province,<sup>99</sup> accounting for 51.7 percent of local steel production.<sup>100</sup>

However, for Tangshan Great Wall Iron & Steel Group, their development did not follow the expected route. After more than one year of non-substantive consolidation,<sup>101</sup> the stability of the Group suffered when the State Council released its ‘Opinions on Further Increasing Energy Conservation Efforts and Speeding-up Restructuring in the Steel Industry’ (2010), which was designed to increase the electricity costs for most steel SMEs.<sup>102</sup> This policy increased not only the operating costs of privately-owned steel SMEs, but also their sense of urgency. As a result, it stimulated some privately-owned steel enterprises to find a new survival path for themselves. For instance, five competitive and large enterprises that previously belonged to Tangshan Great Wall Iron & Steel Group, succumbed to the embrace of steel SOEs by the end of 2010.<sup>103</sup> Other privately-owned steel SMEs which believed that *unity is strength* in belonging to the same privately-owned group, had to face being

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<sup>98</sup> See ‘Tangshan Minying Gangtie Baotuan Qunuan’ [Tangshan Privately-Owned Steel Enterprises Huddle Together for Warmth (author’s translation)] *Hebei Daily* (Shijiazhuang, China, 22 December 2008) 5.

<sup>99</sup> See Alan H Price and others, ‘The Reform Myth: How China is Using State Power to Create the World’s Dominant Steel Industry’ (The American Iron & Steel Institute and The Steel Manufacturers Association, October 2010) 13.

\* Tangshan is an industrial prefecture-level city, in the north-eastern part of China, Hebei Province. Tangshan City had a population of more than 7.5 million in 2014 and covers an area of about 17,040 square kilometres: the People’s Government of Tangshan City, ‘Tangshan Gailan’ [Tangshan Overview (author’s translation)] (*The People’s Government of Tangshan City, China*, 21 April 2015) <[www.tangshan.gov.cn/zhuzhan/tsgl/](http://www.tangshan.gov.cn/zhuzhan/tsgl/)> accessed 30 January 2017.

<sup>100</sup> See Tang Runqing, ‘Tangshan liang Minying Gangtie Jituan Chengli’ [Two Privately-Owned Steel Groups Established in Tangshan City (author’s translation)] *Hebei Daily, China* (Shijiazhuang, 20 December 2008) 1.

<sup>101</sup> Because it did not form equity ties with each associate in Tangshan Great Wall Iron & Steel Group, associates had the freedom to come and go: Yang (n 55).

<sup>102</sup> In order to increase energy conservation efforts in the Chinese steel industry and decrease air pollution caused by steel production, the policy, namely ‘Opinions on Further Increasing Energy Conservation Efforts and Speeding-up Restructuring in the Steel Industry’ (2010), increased the operating costs of steel SMEs with the aim of limiting their development: ‘Guowuyuan Bangongting Guanyu Jinyibu Jiada Jieneng Jianpai Jiakuai Gangtie Gongye Jiegou Tiaozheng de Ruogan Yijian’ [Opinions on Further Increasing Energy Conservation Efforts and Speeding up Restructuring in the Steel Industry (author’s translation)] (2010) <[www.gov.cn/zwqk/2010-06/17/content\\_1629386.htm](http://www.gov.cn/zwqk/2010-06/17/content_1629386.htm)> accessed 30 January 2017.

<sup>103</sup> See Liu Wenbing and Zhang Qiusheng, *Zhongyang Qiye Binggou Chongzu Baogao (2011)* [Report on Mergers and Acquisitions of Central State-Owned Enterprises] (China Economic Publishing House 2011) 45-46.

abandoned again. Even worse, industry insiders predicted that if these trends continued, very few privately-owned steel enterprises would be able to stay in business, and that none of them would be SMEs.<sup>104</sup>

In brief, “nationalisation by merger” or shutting down seem to be the inevitable choices for Chinese privately-owned steel SMEs. For those which engage in a merger with steel SOEs, using their private funds to develop a State-owned economic actor may be an irresistible (and inevitable) outcome. On the other hand, for those private concerns which now have to close, this question arises: who will bear the cost of their *artificial* exit from the market?

#### *4.1.2.3 Who Bears the Cost of Chinese Privately-Owned Steel SMEs’ Artificial Exits? – State Expectations versus the “Public Interest”*

At the present time, government-oriented policies to shut down small blast furnaces without market competition and selection may herald the demise of certain Chinese privately-owned steel SMEs which cannot attract additional investment or a sustainable transformation. However, since the ubiquity of the steel sector means that it is an industry with high barriers to exit, such shutting-down policies for steel SMEs, without an effective exit mechanism, activate a series of follow-up questions for such SMEs, as well as for future economic growth. Because local people’s living standards and local economic growth have to take second place to the State’s expectations (mergers) in the steel industry: the effect of barring local privately-owned SMEs in order to improve industrial concentration means that often local people will not obtain any benefits from such interventions.<sup>105</sup> Comparing the Chinese experience with the Tata experience in UK in 2015<sup>106</sup>, although large numbers of

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<sup>104</sup> See Zhang Boling, ‘Baotianshi Chongzu Shibai Minying Gangtie Qiu Guoyouhua’ [Hebei Private-Owned Steel Enterprises Cannot Escape Nationalisation Fate (author’s translation)] (2011) 3 Century Weekly, China 43.

<sup>105</sup> See Chapter 4.1.2.3.1 below.

<sup>106</sup> See Chris Rhodes, ‘UK Steel Industry: Statistics and Policy’ (House of Commons, UK, 5 May 2016) <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7317#fullreport>> accessed 30 January 2017; Tim Bowler, ‘Britain’s Steel Industry: What’s Going Wrong?’ (*BBC*, 30 March 2016) <[www.bbc.co.uk/news/business-34581945](http://www.bbc.co.uk/news/business-34581945)> accessed 30 January 2017; and Hazel Sheffield, ‘Tata Steel: 4 Charts That Show Why the UK Steel Industry is in Crisis’ *Independent* (30 March 2016) <[www.independent.co.uk/news/business/news/steel-redcar-tata-four-chart-that-shows-why-the-uk-steel-industry-is-in-crisis-and-why-the-a6701111.html](http://www.independent.co.uk/news/business/news/steel-redcar-tata-four-chart-that-shows-why-the-uk-steel-industry-is-in-crisis-and-why-the-a6701111.html)> accessed 30 January 2017.

steel enterprises' employees in both these countries have faced job losses and strongly expressed their expectations of urgent unemployment compensation in difficult times, UK employees are much more fortunate, as indicated by the UK government announcement: "The government and Tata Steel have announced an initial support package of up to £9 million to support the local economy and employees..."<sup>107</sup>

Owing to the Chinese steel intervention policy, the interests of privately-owned steel SMEs have sharply declined in two ways. On the one hand, with regard to competition reduction (see footnote 62 above), owners of privately-owned steel SMEs hardly benefit at all when facing increasing challenges from steel SOEs. On the other hand, regarding the layoffs of privately-owned steel SMEs' employees, their loss of interests also leads to a decline in the interests of privately-owned steel SMEs. In this regard, a commonality interest to benefit the public, namely the "public interest", arises to pose a challenge: Who should have the obligation to bear the costs of steel SMEs exiting the market, such as unemployment costs and local development issues? This remains a major problem in China's steel intervention.

#### 4.1.2.3.1 Unemployed Landless Peasants under Government-Led Shutting-Down Policies

Taking the largest steel province, Hebei province, as an example,<sup>108</sup> this is a place where private capital plays an important role in the steel industry. Because of a limited ability to attract investment, most privately-owned steel SMEs in this province were built in less-developed regions, especially on agricultural land. Due to low farm incomes and relatively high land-use fees, many peasants were happy to lease their agricultural land to local privately-owned steel SMEs, and thus have become landless peasants. For those who do not want to leave their home, working in local steel SMEs seems to be the only way to

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<sup>107</sup> See Department for Business, Innovation & Skills, 'Government and Tata Steel to Provide Support to Scunthorpe Steel Workers and Local Economy' (*Department for Business, Innovation & Skills, UK*, 23 October 2015)

<[www.gov.uk/government/news/government-and-tata-steel-to-provide-support-to-scunthorpe-steel-workers-and-local-economy](http://www.gov.uk/government/news/government-and-tata-steel-to-provide-support-to-scunthorpe-steel-workers-and-local-economy)> accessed 30 January 2017.

<sup>108</sup> See Li Rong, 'Gangshi Jixi Xundi Gangtie Diyi Dasheng Hebei Fachu Dimi Baogao' [Steel Demand in China Hit New Lows and the Largest Steel Province, Hebei, Appears Sluggish (author's translation)] (*Xinhua, China*, 2 September 2012) <<http://finance.people.com.cn/n/2012/0902/c70846-18896977.html>> accessed 30 January 2017.

economic survival. Receiving income from both land-use fees and employment in privately-owned steel SMEs can improve the lives of landless peasants in the short term. However, these peasants cannot foresee the survival crisis which might occur in the future.

In order to establish a more competitive and highly-concentrated steel sector in China, administrative intervention pays close attention to shutting down a large number of small-scale steel enterprises. Simultaneously, local landless peasants who used to work in those SMEs have to face the following dilemma: on the one hand, local steel SMEs close and landless peasants are unemployed, while on the other hand, due to pollution from steel SMEs, arable land is difficult to rehabilitate and it will be difficult for these landless peasants to return to traditional agriculture. As a result, in a relatively short period, the unemployment rates could hit new record highs in Hebei's steel industry.<sup>109</sup>

In this instance, unemployment compensation has become another hot potato for steel enterprises and even the local government. Since local landless peasants lose their jobs because privately-owned steel SMEs go bankrupt, theoretically they should receive some unemployment benefits. However, in practice the majority of them have difficulty in obtaining any unemployment compensation. The first reason is the gap between law and reality. Although unemployment insurance is a legal right for all employees working in enterprises and institutions in all Chinese cities and towns,<sup>110</sup> generally this legal right is not

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<sup>109</sup> In Hebei province, some one million employees are potential victims of the State's steel intervention. Most local privately-owned steel enterprises announced layoffs of between 10 and 30 percent of their employees: see, e.g., Jin Yanli and Li Zhengsheng, 'Ruhe rang Baiwan Zhigong Bushiye' [Helping One Million Unemployed Workers (author's translation)] *China Labour and Social Security News* (Beijing, 15 June 2015) 3; Ruby Lian and Manolo Serapio Jr, 'China May Close More Steel Mills in 2014 to Tackle Pollution – Industry' (*Reuters*, 17 December 2013) <[www.reuters.com/article/2013/12/17/china-steel-output-idUSL3N0JV1NU20131217](http://www.reuters.com/article/2013/12/17/china-steel-output-idUSL3N0JV1NU20131217)> accessed 30 January 2017; Xiong Shaochong, 'Caiyuanchao Xiji Hebei Gangtieye' [Layoffs Attacking the Hebei Iron and Steel Industry (author's translation)] (*Jiemian*, China, 1 December 2015) <[www.jiemian.com/article/457826.htm](http://www.jiemian.com/article/457826.htm)> accessed 30 January 2017; and Lingling Wei and Bob Davis, 'In China, Beijing Fights Losing Battle to Rein In Factory Production: Some Chinese Localities Stymie Efforts to Curb Industrial Overcapacity and Pollution' *The Wall Street Journal* (Xingtai, China, 16 July 2014) <[www.wsj.com/articles/in-china-beijing-fights-losing-battle-to-rein-in-factory-production-1405477804](http://www.wsj.com/articles/in-china-beijing-fights-losing-battle-to-rein-in-factory-production-1405477804)> accessed 30 January 2017.

<sup>110</sup> See the Regulations of China on Unemployment Insurance 1999, Art 2.

Article 2: Enterprises and institutions in cities and towns as well as their staff and workers shall pay unemployment insurance premium in accordance with these Regulations.

The unemployed of enterprises and institutions in cities and towns may enjoy the benefits of unemployment insurance in accordance with these Regulations.

Enterprises and institutions in cities and towns mentioned in this Article refer to State-owned



observed by most private-sector steel companies.<sup>111</sup>

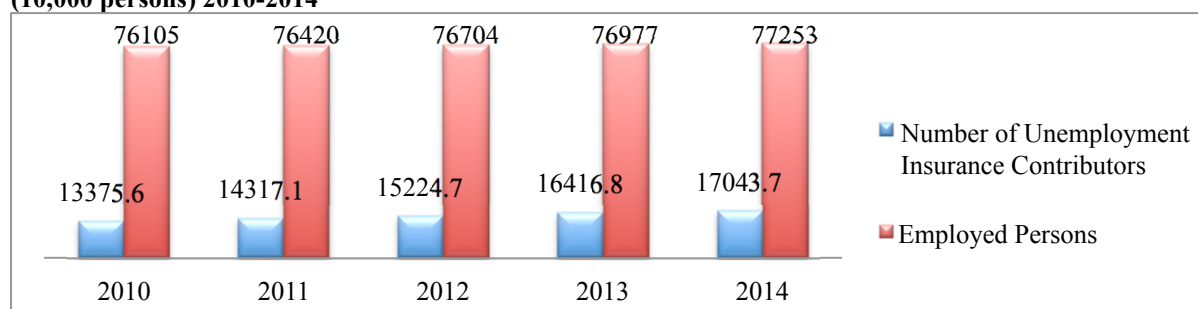
Additionally, the lack of policy on protection of unemployed landless peasants is consistent with government-led shutting-down policies. In short, the government will not offer unemployment payment to unemployed employees who used to work in privately-owned steel SMEs.<sup>112</sup> Therefore, in such dire straits, unemployed landless peasants have to leave their homes and pour into cities to earn a living. However, life there is not easy for them. Without sufficient knowledge and experience, most of these unemployed workers become engaged in manual labour, receiving low-level incomes.<sup>113</sup> In this situation, who can protect their interests and be engaged as an advocate on their behalf?

Therefore, a number of questions have to be raised. Is it always right to focus on the State's interest, while sacrificing the interests of low level workers? Should China seek to develop several important industries, such as the steel industry, solely on the basis of industrial policy, with complete disregard for the purposes and stipulations of *the Chinese Anti-Monopoly Law 2007*? The answer is clear. In theory, the “public interest”, the ultimate

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enterprises, collectively-owned enterprises in cities and towns, enterprises with foreign investment, privately-owned enterprises in cities and towns, and other enterprises in cities and towns.

<sup>111</sup> **Figure 4-9: Number of Unemployment Insurance Contributors and Employed Persons in China (10,000 persons) 2010-2014**



Source: NBS; Figure 4-9 devised by the author.

See National Bureau of Statistics of China (NBS), ‘Annual Data’ (NBS, 2016) <<http://data.stats.gov.cn/english/easyquery.htm?cn=C01>> accessed 30 January 2017.

<sup>112</sup> The Hebei provincial government contributes to training steel employees, as well as protecting their jobs during the product reduction process which has been taking place since 2014. However, for those previous steel employees, who had already stopped working or lost their jobs, the government does not provide any training or unemployment payment: see, e.g., Jin and Li (n 109); and Xiong (n 109).

<sup>113</sup> See Liyan Qi, ‘Growth in Wages Slows for Migrants in China’ *The Wall Street Journal* (Beijing, 27 May 2013) <[www.wsj.com/articles/SB10001424127887323855804578508320442894196](http://www.wsj.com/articles/SB10001424127887323855804578508320442894196)> accessed 30 January 2017; NBS, ‘China’s Economy Showed Steady Growth In the First Quarter of 2015’ (*National Bureau of Statistics of China*, 15 April 2015) <[www.stats.gov.cn/english/PressRelease/201504/t20150415\\_712435.html](http://www.stats.gov.cn/english/PressRelease/201504/t20150415_712435.html)> accessed 30 January 2017 (pointing out that the average monthly income for migrants in China was only 3000 Yuan RMB (approximately £300) by January 2015); and Gabriel Wildau, ‘China Migration: At the Turning Point?’ *Financial Times (Asia)* (5 May 2015) 5.

goal of the 2007 Act, should be the final constraint on State's steel intervention and provide reasonable protection for enterprises. However, one expert on the Chinese Anti-Monopoly Law has observed that when the interests of different parties collide, the "public interest" is difficult to achieve:

*First*, the State is unwilling to ensure that people can obtain their legitimate interests equitably. *Second*, even when some legitimate interests are obtained, not everyone can be legally entitled to their benefits.<sup>114</sup> As an illustration, in Hebei province, when a number of peasants decided to rent their land to local privately-owned steel enterprises, they had a dream that they would probably no longer need to rely on the agricultural industry. However, in order to maximise the State's economic interest in the steel industry, the government makes frequent changes in industrial policies and ignores the interests of local privately-owned steel enterprises and their employees, namely landless peasants. Therefore, the lives of these landless peasants face difficulties. Accordingly, the unbalanced situation between the State's interest and the interests of local privately-owned steel enterprises in the local area shows up. This indicates that a commonality interest, the "public interest", is unachievable. In short, in the battle between the State's unreasonable expectation and the "public interest" in steel intervention, the former, which always has an advantage over the latter, spikes certain interests in the steel industry.

#### 4.1.2.3.2 Local Growth versus Artificial Exits of Privately-Owned Steel SMEs

Negative outcomes of government-led shutting-down policies for privately-owned steel SMEs go beyond creating unemployment. The shutting-down policies also lead to slow economic growth, and even retrogression in some areas where privately-owned steel enterprises are dominant in leading the economic development.<sup>115</sup> First of all, because the development situation of enterprises is related to local employment rates and local fiscal revenues, steel enterprises may guarantee the basic living standards of many local people (see

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<sup>114</sup> Interview with a leading academic expert in competition law in China (the interviewee did not agree to the researcher using the interviewee's name in any written work arising from the study, but did consent to being interviewed) (Beijing, China, 2012).

<sup>115</sup> See Zhu Yushen and Yang Shixin, 'Juejiang de Gaolu: Hebei Luohou Channeng Taotai Diaocha' [Stubborn Blast Furnace: Surveys on Eliminating Backward Production Capacity in Hebei Steel Industry (author's translation)] *Shanghai Securities News* (Shanghai, 19 August 2010) 11.

footnote 119 below). Furthermore, because of the Chinese revenue-sharing system,<sup>116</sup> greater local tax revenues result in a richer province or city and a more active economic environment.<sup>117</sup> Therefore, since shutting-down steel SMEs equates to reducing local tax revenues, which benefit the development of the local economy, it is necessary to consider the effect of government-led shutting-down policies in a wider sense. These wider consequences arising from intervention raise issues beyond that of unemployment, and affect the interests of local governments in many different ways, which seem to reach far beyond the shutting-down policies themselves.<sup>118</sup>

Consequently, when considered alongside the predictable improvement in local economic development, government-led shutting-down policies for steel SMEs are often not fully implemented by each local government. Taking Wu'an City in Hebei province as an example, this city's prosperity is dependent on the steel industry, especially the growth of privately-owned steel SMEs. In recent years, for the sake of protecting the local economy, contrary to State administration intervention in the steel industry, the growth of the steel industry in Wu'an City has not changed a great deal.<sup>119</sup> Why has the local government chosen to take political risks by largely ignoring the State intervention policy? High-speed economic development and the amount of local fiscal revenue generated seem sufficient explanations for the local government's choice. Based on one of the Wu'an government's statistical reports, the GDP of Wu'an City reached RMB 528.3 billion Yuan (approximately £51 billion) in 2011, up from RMB 80.1 billion Yuan (approximately £6.13 billion) in

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<sup>116</sup> The Chinese revenue-sharing system commonly requires each provincial government to submit the central tax revenues at the same rate. In general, the Central Government accounts for approximately 70 percent of the total quota throughout the year, while the provincial and local governments share the rest. Therefore, the pace of local economic development in practice depends on the local tax revenues: Xiao Wang and Richard Herd, 'The System of Revenue Sharing and Fiscal Transfers in China' (2013) OECD Economics Department Working Papers No. 1030

<[www.oecd-ilibrary.org/economics/the-system-of-revenue-sharing-and-fiscal-transfers-in-china\\_5k4bwnwtmx0r-en](http://www.oecd-ilibrary.org/economics/the-system-of-revenue-sharing-and-fiscal-transfers-in-china_5k4bwnwtmx0r-en)> accessed 30 January 2017.

<sup>117</sup> See Wang Feimin, *Fanlongduanfa Shiye Zhongde Zhongguo Chanye Zhengcefa* [*Industrial Policy Law in China: From the Perspective of Antimonopoly Law*] (Law Press, China 2013) 116-17.

<sup>118</sup> See Zhao and Ni (n 64) 35.

<sup>119</sup> The number of privately-owned steel enterprises in Wu'an city declined from 18 in 2011 to 16 in 2014, and these 16 enterprises accounted for 41.5 percent of GDP in Wu'an: see, e.g., Liu Yi, 'Yige Zhong Huagongye Shi de Fenli Zhuangshen' [A Turnaround Approach for A Heavy Industrial City (author's translation)] *China Daily* (Beijing, 8 November 2014) 09; and the People's Government of Wu'an City, 'Gangtie Hangye Gaishu' [Overview of Steel Industry (author's translation)] (*The People's Government of Wu'an City, China*, 29 December 2011) <[www.wuan.gov.cn/tzwa/info/77694.html](http://www.wuan.gov.cn/tzwa/info/77694.html)> accessed 30 January 2017.

2002.<sup>120</sup> Concurrently, the local fiscal revenue reached RMB 61.4 billion Yuan (approximately £5.93 billion), which was 7.9 times the amount collected in 2002.<sup>121</sup> Moreover, about two-thirds of local GDP comprises the contribution made by the privately-owned steel enterprises.<sup>122</sup> Additionally, the total amount of privately-owned steel enterprises' tax accounted for more than 70 percent of the local fiscal revenue in those years.<sup>123</sup> Hence, looking at those data, it is not difficult to infer that if the majority of privately-owned steel SMEs in Wu'an City were to close, this city's economy would rapidly find itself in serious trouble.<sup>124</sup>

Therefore, since the restructuring programme for China's steel industry does not meet the interests of some local governments,<sup>125</sup> those local governments which partially rely on privately-owned steel SMEs to survive and develop are unwilling to implement this intervention programme as enthusiastically as the State desires. As a result, those governments become obstacles to the implementation of State-sponsored shutting-down policies and steel industry restructuring programmes. Moreover, because each government prefers to first consider its own interests in the process of the establishment of a more competitive and highly-concentrated steel sector, the State interest and the interests of local governments are sometimes hard to reconcile. Even worse, since there is no effective legal

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<sup>120</sup> See the People's Government of Wu'an City, 'Cong Shuzi Kan Bianhua' [Changes in Numbers (author's translation)] (*The People's Government of Wu'an City, China*, 4 September 2012) <[www.wuan.gov.cn/first/info/80673.html](http://www.wuan.gov.cn/first/info/80673.html)> accessed 30 January 2017.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> See Deng Yao, 'Gangtie Tingchan Fengbao Laixi: Gangjia Yingsheng Fengzhang' [Storm of Stopping Production: Steel Production Prices Rise Rapidly (author's translation)] *21st Century Media* (Beijing, 7 September 2010) 18.

<sup>124</sup> Affected by State-sponsored shutting down policies and restructuring programmes, Hebei province's GDP growth rate in the first half of 2014 was only 5.8 percent: Wang Xinyuan, 'Local GDP Short of Targets' *Global Times, China* (Beijing, 25 July 2014) <[www.globaltimes.cn/content/872524.shtml](http://www.globaltimes.cn/content/872524.shtml)> accessed 30 January 2017.

<sup>125</sup> Tangshan City in Hebei province is another example of anti-State intervention in the steel industry. Before the end of 2012, the city announced that in order to decrease air pollution, certain small blast furnaces (belonging to local privately-owned steel SMEs) would be demolished. However, fog and haze that blanketed the North China plain, especially in Tangshan City from the end of 2012 showed that steel industry's air pollution was still serious. China Iron and Steel Association pointed out that privately-owned steel SMEs should take responsibility for this. Whether one judges this accusation correct or not, it at least partly reflected the fact that the local government had not closed so many small blast furnaces as they mentioned: see, e.g., Wang Zhaohua, 'Gangtie: Guanting Xiaogaolu Rengjiang Jixu' [The Steel Industry: Continuing to Shut down Small Blast Furnaces (author's translation)] *Hangzhou City Express, China* (Hangzhou, 8 January 2011) B04; Xinhua News, 'Environmental Costs Weigh on Struggling Steelmakers' (*Xinhua, China*, 26 September 2013) <[www.china.org.cn/environment/2013-09/26/content\\_30144094.htm](http://www.china.org.cn/environment/2013-09/26/content_30144094.htm)> accessed 30 January 2017; and Zhao Qian, 'Hebei to Cut Steel Production' *Global Times, China* (Beijing, 20 August 2013) <[www.globaltimes.cn/content/805282.shtml](http://www.globaltimes.cn/content/805282.shtml)> accessed 30 January 2017.

restriction on administrative intervention, in order to achieve or avoid privately-owned steel SMEs' artificial exits, confrontation at all levels of government will continue to occur. However, since a new trend in State-sponsored shutting-down policies and steel industry restructuring programmes had come into force in China by the end of 2014,<sup>126</sup> local governments have had to adapt to these harsh realities, which only consider the State's expectations, while ignoring local economic growth and the interests of privately-owned SMEs. Thus, the "public interest", which ought to consider almost everyone's interest much better than it does: is hard to realise in the intervention process.

When all is considered, after the incredible expansion of China's steel industry which started at the end of the 1950s, nationalisation and shutting-down programmes are probably inevitable fates for privately-owned steel SMEs under the present administrative intervention approach. For those that have to shut down from time to time, they have no choice other than to bear the artificial market exit costs, such as the welfare loss of employees working in privately-owned steel enterprises. For those that engage in mergers with steel SOEs, using their private funds to develop certain steel SOEs may be an inevitable trend. Both of these outcomes bring great difficulties in balancing the State's economic interest, the interests of local governments, the interests of privately-owned SMEs, and the welfare of ordinary people involved in the Chinese steel intervention approach. In short, regarding the non-equilibrium growth between the 1950s and the present time in the steel industry, State-sponsored programmes that abandon the market rules and act on behalf of the State's wishes destroy the balance between SOEs and privately-owned steel SMEs and ruin the commonality of interest, the "public interest".

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<sup>126</sup> See Peng Fei, 'Hebei 3 Gangqi Ticheng Banqian, Yelian Qiye Jiang Xiaojian Liucheng' [3 Steel Enterprises in Hebei Province Move Outside Cities and 60 Percent of Local Smelting Enterprises' Steel to Be Cut (author's translation)] *Daily News, China* (Shandong, 9 December 2014) 06.

## 4.2 Unfair State Intervention in Chinese Privately-Owned Gas Stations: Destroying the “Public Interest”<sup>127</sup>

China’s administrative intervention’s requirements (nationalisation and withdrawal of privately-owned SMEs) have affected not only the steel industry, but also the gas station sector. In 1998, the State Council gave notice that it would restructure two State-owned oil groups, PetroChina Company Limited (PetroChina) and China Petrochemical Corporation (Sinopec), as well as allowing them to monopolise the Chinese north and south oil and gas markets, respectively.<sup>128</sup> This indicates that privately-owned gas stations have suffered a similar fate to that suffered by China’s privately-owned steel SMEs. After this rapid “non-competition-related” decline in the number of privately-owned gas stations at the turn of the 21st century, the surviving privately-owned gas stations had to face a series of further challenges, such as being squeezed out of specific areas by SOE-owned gas stations, “oil shortages”,<sup>129</sup> unfair State oil subsidies,<sup>130</sup> and petrol SOEs’ high-priced acquisitions of privately-owned retail gas stations.<sup>131</sup> As a consequence, increasing challenges to privately-owned gas stations arose, while providing an opportunity for petrol SOEs to act in a pivotal role in the petroleum retail market. In brief, State intervention in the gas station industry has permitted the unequal treatment of those which have different attributes to SOEs.

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<sup>127</sup> An early version of this section was presented at the University of Liverpool International Postgraduate Legal Conference 2016: Emerging Issues in Law, entitled ‘Factors Affecting the Functions of the *Anti-Monopoly Law of China 2007* in the Chinese Refined Oil Retail Market’, held in Liverpool, UK on 11 January 2016.

<sup>128</sup> See ‘Guanyu Qingli Zhengdun Xiaolianyouchang he Guifan Yuanyou Chengpinyou Liutong Zhixu de Yijian’ [On the Liquidating and Restructuring of the Small Oil Refining Factories and Standardizing the Circulation Order of Crude Oil and Petroleum Products’ (‘Order No.38 of 1999’)] (1999) <<http://finance.sina.com.cn/chanjing/b/20050816/08301890025.shtml>> accessed 30 January 2017.

<sup>129</sup> “Oil shortages”, which occurred several times in China during the first decade of the 21st century, refers to some refined oil products in the Chinese petroleum retail market being in short supply. This is caused by the anti-competitive behaviour of petrol SOEs. On the one hand, certain gas stations refuse to sell refined oil products when retail prices are lower than wholesale prices. On the other hand, certain gas stations, which prefer to sell refined oil products in the oil shortage situation, cannot obtain sufficient refined oil products from petrol SOEs’ suppliers: Lin Boqiang, *Zhongguo Nengyuan Zhengce Sikao* [Reflection on the Chinese Energy Policy (author’s translation)] (China Financial & Economic Publishing House 2009) 137 & 180.

<sup>130</sup> In order to reduce the price of fuel and improve basic living standards for Chinese people, China implies oil subsidies policies. In this thesis, State oil subsidies comprise two aspects: one is the subsidy for domestic petroleum enterprises in the production area. The other is the subsidy for domestic petroleum retail enterprises and consumers in the consumption area: see, e.g., *ibid*, 201; and Usha CV Haley and George T Haley, *Subsidies to Chinese Industry: State Capitalism, Business Strategy, and Trade Policy* (OUP 2013) 43-44.

<sup>131</sup> In the Chinese administrative intervention approach, petrol SOEs are willing to pay above market value for privately-owned gas stations in order to expand their market share in the refined oil retail market: Interview with a staff member of China Sinopec Hebei Branch (the interviewee did not agree to the researcher using the interviewee’s name in any written work arising from the study, but did consent to being interviewed) (Shijiazhuang, China, 2012).

Subsequently, as competition-takers in the petroleum retail market, Chinese consumers have had to suffer negative results from petrol SOEs' unfair competition, such as "oil shortages" and high-priced acquisitions.<sup>132</sup>

An examination of the unfair intervention for privately-owned gas stations from the perspective of *the Chinese Anti-Monopoly Law 2007* reveals a one-sided emphasis on protecting SOEs while squeezing privately-owned gas stations and consumer welfare, and thus destroying the balance between different interest groups in the relevant market. Therefore, the "public interest", the ultimate aim of *the Chinese Anti-Monopoly Law 2007*, has been sidelined.

#### **4.2.1 Awaiting Effective Protection from *the Chinese Anti-Monopoly Law 2007*: Unshaken Dominant Position of SOE-Owned Gas Stations**

Reviewing the development path of Chinese gas stations, from the stage of comprehensive national control to the opening up to private funds, and then to the industry concentration by petrol SOEs, SOE-owned gas stations have always occupied a dominant position in this industry, apart from the period between 1992 and 1998.<sup>133</sup> Since the end of the 20th century, the nationalisation and concentration of China's gas station industry,<sup>134</sup> which depends on the State's industrial policy, has become a "non-competition-related" programme.<sup>135</sup>

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<sup>132</sup> Regarding the high-priced acquisitions, petrol SOEs are able to enlarge their market share because privately-owned gas stations cannot compete against them in the acquisition process. Therefore, competition between SOE-owned and privately-owned gas stations has been reduced. With regard to consumers in such a process, although high-priced acquisitions cannot lead to price increases because Chinese refined oil prices have been fixed within a range determined by the State (see Chapter 4.2.2.1 below), this programme still adversely affects consumer welfare because local consumers have limited choices when more and more gas stations become SOE-owned.

<sup>133</sup> After about 14 years of economic reform (beginning from the 'Reform and Opening Up' Policy in 1978), the Central Government of China decided to deepen and consolidate economic reform in 1992. Therefore, deregulation of refined oil prices took place and the refined oil retail market was opened up to private funds. After that, privately-owned gas stations began to occupy an increasing market share: see, e.g., Industrial Economics Institute of China Social Sciences Academy, *Zhongguo Gongye Fazhan Baogao [China's Industrial Development Report]* (Economic Management Press, China 2000) 1-34; Jiang Shan and Huang Yong, 'Lun Zhongguo Shiyou Hangye de Fanlongduanfa Shiyong' [Application of Anti-Monopoly Law in China's Petroleum Sector] (2011) 4 *Modern Law Science*, China 79; and Wang Yejun, 'Chengpinyou Dingjiaquan Xiafang Haiyou Duoyuan' [How Long It Takes to Decentralise Refined Oil Pricing Control (author's translation)] *Beijing Business* (Beijing, 21 June 2013) 05.

<sup>134</sup> Such a trend may change recently because the Thirteenth Five-Year Plan (2016-2020) encourages the opening up of the petrol and chemical industry to private funds: Liang Wenyuan, 'Dapo Longduan, Shihua Xiayou xiang Minqi Kaifang' [Breaking the Monopoly, the Downstream Oil and Gas Industry Opening up to Private Funding (author's translation)] *China Industrial Economy News* (Beijing, 12 November 2013) A03.

<sup>135</sup> See 'Guanyu Qingli Zhengdun Xiaolianyouchang he Guifan Yuanyou Chengpinyou Liutong Zhixu de

Although this programme provides advantages to consumers, such as ensuring the quality of refined oil products,<sup>136</sup> it also has several disadvantages due to the accompanying characteristics of government intervention.

As regards competition mechanisms, industry concentration in general is the result of the natural evolution of the market, which may improve resource allocation. However, the government-led concentration programme runs in the opposite direction. Administrative intervention, a distortion of efficient resource allocation, may grant too many rights to petrol SOEs and interfere with the development of privately-owned gas stations.<sup>137</sup> Consequently, fair competition disappears from the market.<sup>138</sup> In addition, because “oil shortages” emerged with the increasing intervention in refined oil retail transactions, consumers have been unable to obtain sufficient refined oil for their daily lives on some occasions. Therefore, “oil shortages” have reduced consumer welfare in the petroleum retail market. This SOE-led situation, which destroys competition in the petroleum retail market by virtue of reducing supplies to privately-owned gas stations, as well as ignoring consumer welfare by introducing below-demand supply, conflicts with *the Chinese Anti-Monopoly Law 2007*.<sup>139</sup> In this regard, anti-competitive behaviour and loss of consumer welfare cause “public interest” to be lost completely in the gas station industry. Therefore, in the process of reforming the gas station industry, an examination of the discrimination against privately-owned gas stations, which leads to the loss of consumer welfare and the “public interest” is required, and it is also necessary to obey market mechanisms and *the Chinese Anti-Monopoly Law 2007* in order to restrict government powers.

#### *4.2.1.1 Building Up State Monopolies in the Petroleum Retail Market: Speedy Disappearance of Certain Privately-Owned Gas Stations*

After Deng Xiaoping’s Southern Tour in 1992, in order to avoid the drawbacks of a

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Yijian’ [On the Liquidating and Restructuring of the Small Oil Refining Factories and Standardizing the Circulation Order of Crude Oil and Petroleum Products (‘Order No.38 of 1999’)] (1999) (n 128).

<sup>136</sup> Interview with a staff member of China Sinopec Hebei Branch (n 131).

<sup>137</sup> See Wang Dan, *Zhongguo Shiyou Chanye Fazhan Lujing: Guazhan Jingzheng yu Guizhi* [*Chinese Oil Industry Development Path: Oligopoly Competition and Regulation* (author’s translation)] (China Social Sciences Press 2007) 164.

<sup>138</sup> *Id.*

<sup>139</sup> See Chapter 4.2.2.2 below



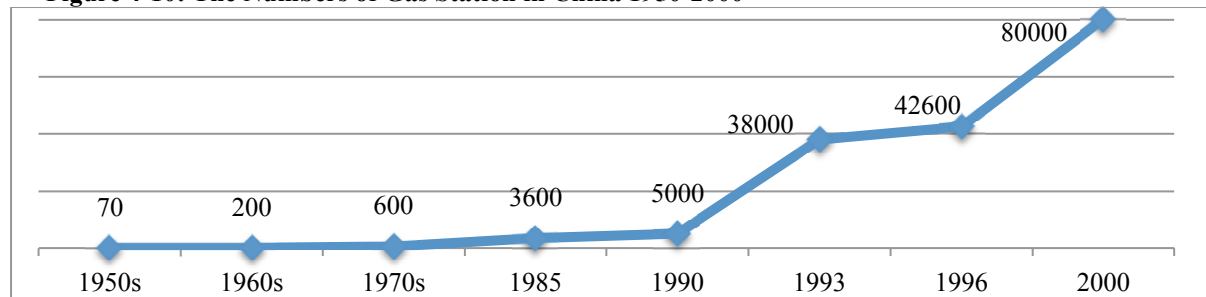
centrally planned economy,<sup>140</sup> the Chinese petroleum retail market began to open to private investment.<sup>141</sup> Thereafter, the number of gas stations, especially privately-owned gas stations, grew at an unprecedented rate in competitive circumstances.<sup>142</sup> By the end of 1998, there were approximately 56,300 privately-owned gas stations in operation,<sup>143</sup> occupying more than 60 percent of the market share.<sup>144</sup>

However, the good times did not last long<sup>145</sup>: in 1999 a policy called ‘On the Liquidating and Restructuring of the Small Oil Refining Factories and Standardizing the Circulation Order of Crude Oil and Petroleum Products’ (‘Order No.38 of 1999’) was released.<sup>146</sup> Accordingly, petrol SOEs were to monopolise the source of refined oil,<sup>147</sup> and

<sup>140</sup> See Roderick MacFarquhar (ed), *The Politics of China: Sixty Years of the People’s Republic of China* (3rd edn, CUP 2011) 492-94; and John Chan, ‘Twenty Years Since Deng Xiaoping’s ‘Southern Tour’ – Part 1’ (*World Socialist Website*, 26 November 2012) <[www.wsws.org/en/articles/2012/11/deng-n26.html](http://www.wsws.org/en/articles/2012/11/deng-n26.html)> accessed 30 January 2017.

<sup>141</sup> See Jiang and Huang (n 133).

<sup>142</sup> **Figure 4-10: The Numbers of Gas Station in China 1950-2000**



\* All data in the figure are approximate amount.

Source: Data Comparison and Analysis of Domestic and Foreign Gas Stations; figure devised by the author. See Yin Qiang and Dong Liming, ‘Guoneiwai Jiayouzhan Xiangguan Shuju Duibi yu Fenxi’ [Data Comparison and Analysis of Domestic and Foreign Gas Stations (author’s translation)] (2002) 12 *International Petroleum Economics* 43.

<sup>143</sup> See Li Zhichuan, ‘Zhongguo Mingying Shiyou Qiye Fazhan Zhuangkuang he Qianjing Zhanwang’ [Development and Prospects for Chinese Private-Owned Oil Enterprises (author’s translation)] (2012) 4 *International Petroleum Economics* 54.

<sup>144</sup> See Liu Changjie and Zhang Xiangdong, ‘Zhongshiyou Zhongshihua Jie Youjia Kuozhang, Niansui Banshu Mingying Jiayouzhan’ [Oil Prices Provide Opportunities for PetroChina and Sinopec to Expand, thereby Crushing Half of the Privately-Owned Gas Stations (author’s translation)] *Jingji Guancha* [*The Economic Observer*] (Changchun, Shanyang and Beijing, 10 April 2006) <<http://finance.sina.com.cn/chanjing/b/20060408/11192485151.shtml>> accessed 30 January 2017.

<sup>145</sup> An examination of the Chinese inflation occurred in the mid-1990s, “[a] formidable list of problems constitute the political agenda for a system whose capacity to resolve them is growing ever more limited... The likelihood that it will be able to weather unscathed the instability that is very likely to attend the passing of Deng Xiaoping is quite slim”. Thus, the Chinese Government strengthened macro-control in the Ninth Five-Year Plan (1996-2000): see, e.g., John Bryan Starr, ‘China in 1995: Mounting Problems, Waning Capacity’ (1996) 36 *Asian Survey* 13; and Tang Yonglin, ‘Jiuwu Jihua (1996-2000)’ [The Ninth Five-Year Plan (1996-2000) (author’s translation)] *China Youth Daily* (Beijing, 20 March 2006) 4.

<sup>146</sup> Two petrol SOEs, namely PetroChina and Sinopec, formulated monopolies and proposed their new growth plan at the turn of the 21st century. They proposed to occupy 30 percent and 60 percent market shares, respectively, in the petroleum retail market by 2005: see, e.g., ‘Guanyu Qingli Zhengdun Xiaolianyouchang he Guifan Yuanyou Chengpinyou Liutong Zhixu de Yijian’ [On the Liquidating and Restructuring of the Small Oil

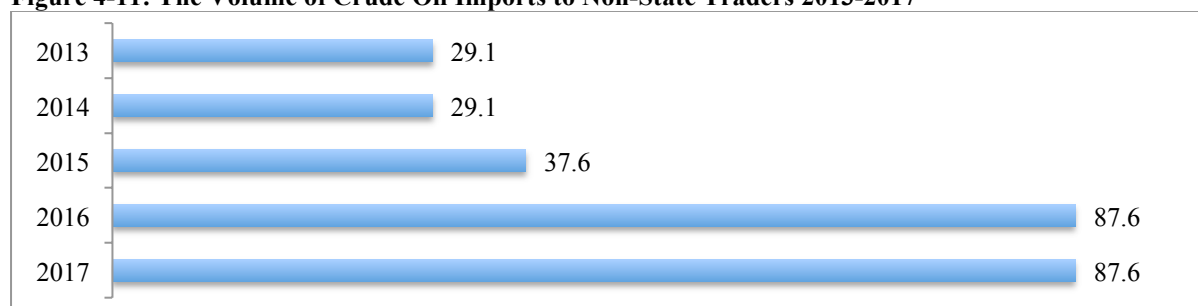
started to squeeze the operating spaces of privately-owned gas stations.<sup>148</sup> Moreover, in order to further strengthen the results of nationalisation, the State Council published an order of ‘Further Rectifying and Regulating the Circulation Order of Refined Oil’ in 2001.<sup>149</sup> At this

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Refining Factories and Standardizing the Circulation Order of Crude Oil and Petroleum Products’ (‘Order No.38 of 1999’) (1999) (n 128); Ju (n 42) 166; Wang, *Zhongguo Shiyou Chanye Fazhan Lujing: Guazhan Jingzheng yu Guizhi* [*Chinese Oil Industry Development Path: Oligopoly Competition and Regulation* (author’s translation)] (n 137) 68; and Waichung Lo, ‘Recent Development of Petroleum Industry in China’ in Hung Gay Fung, Changhong Pei and Kevin H Zhang (eds), *China and the Challenge of Economic Globalization: The Impact of WTO Membership* (M.E. Sharpe 2006) 293.

<sup>147</sup> In the 2010s, the Ministry of Commerce of China has opened a certain volume of crude oil imports to non-State traders. Although this volume has increased year-on-year (see Figure 4-11 below), it is still limited and is not enough to enable them to challenge petrol SOEs. For example, non-State traders were only allowed to import 29.10 million tonnes in 2013, which accounted for a mere 10.33 percent of the total import volume.

**Figure 4-11: The Volume of Crude Oil Imports to Non-State Traders 2013-2017**



Source: ‘2013 Non-State Trading of Crude Oil Imports to Allow the Total Amount, Eligibility Criteria and Application Procedures’ for datum in 2013, ‘2014 Non-State Trading of Crude Oil Imports to Allow the Total Amount, Eligibility Criteria and Application Procedures’ for datum in 2014, ‘2015 Non-State Trading of Crude Oil Imports to Allow the Total Amount, Eligibility Criteria and Application Procedures’ for datum in 2015, ‘2016 Non-State Trading of Crude Oil Imports to Allow the Total Amount, Eligibility Criteria and Application Procedures’ for datum in 2016; ‘2017 Non-State Trading of Crude Oil Imports to Allow the Total Amount, Eligibility Criteria and Application Procedures’ for datum in 2017; figure devised by the author.

See ‘2013 nian Yuanyou Feiguoying Maoyi Jinkou Yunxuliang Zongliang, Shenqing Tiaojian he Shenqing Chengxu’ [2013 Non-State Trading of Crude Oil Imports to Allow the Total Amount, Eligibility Criteria and Application Procedures] (2012) <[www.mofcom.gov.cn/article/b/c/201210/20121008384083.shtml](http://www.mofcom.gov.cn/article/b/c/201210/20121008384083.shtml)> accessed 30 January 2017; ‘2014 nian Yuanyou Feiguoying Maoyi Jinkou Yunxuliang Zongliang, Shenqing Tiaojian he Shenqing Chengxu’ [2014 Non-State Trading of Crude Oil Imports to Allow the Total Amount, Eligibility Criteria and Application Procedures] (2013) <[www.mofcom.gov.cn/article/b/e/201310/20131000341735.shtml](http://www.mofcom.gov.cn/article/b/e/201310/20131000341735.shtml)> accessed 30 January 2017; NBS, ‘Annual Data’ (n 111); ‘2015 nian Yuanyou Feiguoying Maoyi Jinkou Yunxuliang Zongliang, Shenqing Tiaojian he Shenqing Chengxu’ [2015 Non-State Trading of Crude Oil Imports to Allow the Total Amount, Eligibility Criteria and Application Procedures] (2014) <[www.mofcom.gov.cn/article/b/e/201411/20141100787333.shtml](http://www.mofcom.gov.cn/article/b/e/201411/20141100787333.shtml)> accessed 30 January 2017; ‘2016 nian Yuanyou Feiguoying Maoyi Jinkou Yunxuliang Zongliang, Shenqing Tiaojian he Shenqing Chengxu’ [2016 Non-State Trading of Crude Oil Imports to Allow the Total Amount, Eligibility Criteria and Application Procedures] (2015) <[www.mofcom.gov.cn/article/b/e/201510/20151001151573.shtml](http://www.mofcom.gov.cn/article/b/e/201510/20151001151573.shtml)> accessed 30 January 2017; and ‘2017 nian Yuanyou Feiguoying Maoyi Jinkou Yunxuliang Zongliang, Shenqing Tiaojian he Shenqing Chengxu’ [2017 Non-State Trading of Crude Oil Imports to Allow the Total Amount, Eligibility Criteria and Application Procedures] (2016) <[www.mofcom.gov.cn/article/b/e/201612/20161202001147.shtml](http://www.mofcom.gov.cn/article/b/e/201612/20161202001147.shtml)> accessed 30 January 2017.

<sup>148</sup> By the end of 2000, the total number of Sinopec’s gas stations in China reached 25,493. Of those, Sinopec directly operated 20,259 gas stations, having an increase of 78.1 percent since 1999: see, e.g., Jiang and Huang (n 133); and Zhong Jingjing, ‘Liangtongyou Binggou Gongxia Jiayouzhan Banbi Jiangshan’ [PetroChina and Sinopec Took over Half of Domestic Petroleum Retail Market (author’s translation)] *Xinjingbao* [*The Beijing News*] (Beijing, 19 July 2012) B09.

<sup>149</sup> See ‘Guanyu Jinyibu Zhengdun he Guifan Chengpinyou Shichang Zhixu Yijian de Tongzhi’ [Further Rectifying and Regulating the Circulation Order of Refined Oil (author’s translation)] (2001) <[www.china.com.cn/chinese/PI-c/70619.htm](http://www.china.com.cn/chinese/PI-c/70619.htm)> accessed 30 January 2017.

point, PetroChina and Sinopec controlled the approval of all new gas stations, refined oil suppliers and wholesalers enterprises in China.<sup>150</sup>

Counter to the 2001 Orders mentioned above, with the publication of ‘Several Opinions of the State Council on Encouraging, Supporting and Guiding the Development of Individual and Private Economy and Other Non-Public Sectors of the Economy’ (2005) coming into effect, the nationalisation trend of privately-owned gas stations seemed to be compelled to stop.<sup>151</sup> However, in the same year, the State retightened its control of wholesale enterprises of refined oil products and proposed a requirement that wholesale enterprises of refined oil products must have more than 30 gas stations.<sup>152</sup> This proposal was revised before being finally published: the number of gas stations was reduced from 30 to 10. However, from the point of view of privately-owned gas stations, this policy still assisted PetroChina and Sinopec to control the oil purchase channels of gas stations. As a result, by the end of 2006, SOE-owned gas stations dominated the refined oil retail market,<sup>153</sup> and accounted for more than 50 percent of the total number in China.<sup>154</sup>

However, there also existed a possibility of exciting change in such a difficult circumstance. In order to fulfill WTO commitments, not only petrol SOEs but also privately-owned and foreign-funded enterprises should have opportunities to access the wholesaling of refined oil after the first day of December 2006. However, only one private-owned enterprise obtained the qualification this time.<sup>155</sup> This means the basis for

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<sup>150</sup> *Id.*

<sup>151</sup> See ‘Guowuyuan Guanyu Guli Zhichi he Yindao Siying Deng Feigongyouzhi Jingji Fazhan de Ruogan Yijian’ [Several Statements of the State Council on Encouraging, Supporting and Guiding the Development of Individual and Private Economy and Other Non-Public Sectors of the Economy] (2005) <[www.gov.cn/zwggk/2005-08/12/content\\_21691.htm](http://www.gov.cn/zwggk/2005-08/12/content_21691.htm)> accessed 30 January 2017.

<sup>152</sup> See ‘Technical Specifications of Managing Operation of Wholesale Enterprises of Refined Oil Products (Draft of Soliciting Opinions)’ (2005) <<http://english.mofcom.gov.cn/aarticle/policyrelease/domesticpolicy/200506/20050600110229.html>> accessed 30 January 2017.

<sup>153</sup> See Yong Huang and others, ‘China’s 2007 Anti-Monopoly Law: Competition and the Chinese Petroleum Industry’ (2010) 31 *Energy Law Review* 337, 351.

<sup>154</sup> See Ju (n 42) 167; and Department of Circulation Industry Development, ‘2006 nian Guonei Jiayouzhan Shuliang Jiegou Fenxi’ Quantitative Structural Analysis of Domestic Gas Stations in 2006 (author’s translation) (Department of Circulation Industry Development, Ministry of Commerce of China, 28 April 2007) <<http://ltfzs.mofcom.gov.cn/aarticle/af/200704/20070404623746.html>> accessed 30 January 2017.

<sup>155</sup> See Pang Tieli, ‘Woguo Shiyou Hangye Longduan de Falv Guizhi’ [Legal Regulation on the Monopoly in the Chinese Petroleum and Chemical Industry (author’s translation)] (*International Economic Law, China*, 2010) <[http://article.chinalawinfo.com/ArticleHtml/Article\\_59344.shtml](http://article.chinalawinfo.com/ArticleHtml/Article_59344.shtml)> accessed 30 January 2017; and Li Zi,

privately-owned gas stations' survival, refined oil supply, was still governed by SOEs.

Two years later, another seemingly positive change appeared: *the Chinese Anti-Monopoly Law 2007* came into force. However, this Law did not help matters.<sup>156</sup> SOEs abuse of their dominant position to limit the growth of privately-funded gas stations continued. By the end of 2008, some 15,000 Chinese privately-owned gas stations had closed down, and about 10,000 surviving gas stations were operating at a deficit.<sup>157</sup>

Accordingly, a publication titled 'Several Opinions of the State Council on Encouraging and Guiding the Healthy Development of Private Investment' (2010), encouraging private investors to enter the oil industry, was released.<sup>158</sup> However, the fairer opportunities to compete which privately-owned gas stations were looking forward to did not happen, and PetroChina and Sinopec's market share continued to rise.<sup>159</sup> Conversely, by the end of 2011 the number of privately-owned gas stations was 44,005 and their proportion had dropped to 47.82 percent.<sup>160</sup> Moreover, most of these were surviving in a discriminating market environment.<sup>161</sup>

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'Hedging Oil Risks: Trade in Oil Futures will Come, in Time, with Deregulation' (2004) Beijing Review <[www.bjreview.cn/EN/200438/Business-200438%28A%29.htm](http://www.bjreview.cn/EN/200438/Business-200438%28A%29.htm)> accessed 30 January 2017.

<sup>156</sup> See Huang and others (n 153) 337.

<sup>157</sup> See Lin (n 129) 161.

<sup>158</sup> See 'Several Opinions of the State Council on Encouraging and Guiding the Healthy Development of Private Investment' (2010) (n 14).

Article 8: We shall encourage the participation of private capital in the construction of oil... We shall support the participation of private capital in the construction of facilities and networks for the storage, transportation and pipeline transport of crude oil...and petroleum products in the form of non-controlling shareholding.

<sup>159</sup> PetroChina had an increase of nearly 600, and their total number of gas stations nationwide reached 17,996 at the end of 2010. By 2011 PetroChina had established more than 1,300 new service gas stations, and had brought their total number of gas stations to 19,362, accounting for 20.26 percent of total gas stations in China. Simultaneously, Sinopec also had plans to increase the number of their gas stations: an annual growth rate of 8 percent for newly built gas stations nationwide (29,000 gas stations) in 2010, and an increase of over one thousand in 2011, accounting for 31.92 percent of total gas stations in China. By end of 2011, PetroChina and Sinopec together accounted for some 52 percent of total gas stations in China: see, e.g., Juan Du, 'Oil Companies to Open More Stations' *China Daily* (Beijing, 10 June 2011) <[www.chinadaily.com.cn/bizchina/2011-06/10/content\\_12673187.htm](http://www.chinadaily.com.cn/bizchina/2011-06/10/content_12673187.htm)> accessed 30 January 2017; and PetroChina, 'Domestic Businesses Developed in All-round Manner while Overseas Strategies Achieved Remarkable Results: PetroChina's Production and Operations Advanced Steadily in 2011' (PetroChina, 29 March 2012) <[www.petrochina.com.cn/ptr/xwxx/201404/6836919d4ed44c9e9c29d1607b7923af.shtml](http://www.petrochina.com.cn/ptr/xwxx/201404/6836919d4ed44c9e9c29d1607b7923af.shtml)> accessed 30 January 2017.

<sup>160</sup> *Id.*

<sup>161</sup> See Harris and others (eds) (n 9) 337.

Because petrol SOEs were not satisfied with their market share, PetroChina began to outsource some gas stations to staff and other people from the fourth quarter of 2012.<sup>162</sup> Soon after that, the Sinopec adopted the same development strategy for its own gas stations.<sup>163</sup> After petrol SOEs had captured more than half of the petroleum retail market in the first decade of the 21st century, this message has seemed to be a positive signal for private investors. However, the petrol SOEs refused to transfer the rights of independent pricing to contractors, so none of these outsourced gas stations are completely independent market competitors.<sup>164</sup> As a result, this strengthens and improves the competitiveness of SOE-owned gas stations even though there was an increase in the number of operators. On the other hand, privately-owned gas stations began to face more and more challenges, which increased pressure on retailers to sell their gas stations to SOEs. Consequently, acquiring further market share in the Chinese petroleum retail market would become much easier for PetroChina and Sinopec.<sup>165</sup>

In 2014, responding to the Chinese mix-owned reform, Sinopec took the lead to sign “capital injection agreements” with 25 privately-owned investors.<sup>166</sup> This conduct injected some new blood into upstream refining business in the oil industry and would also encourage other traditional State-controlled industries to devote to the mixed-ownership reform<sup>167</sup> (using private funds to improve the development of SOEs, see further in footnote 133 below in Chapter 3). However, “mixed-ownership reform is not a panacea”<sup>168</sup>. Because private

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<sup>162</sup> The internal contracts of outsourced gas stations are not entirely self-financing contracts: apart from the right to choose suitable employees, arrange salary distribution, sales strategy and control operating costs, contractors do not have any other operating rights on supplier selection, sales quantity, etc.: see, e.g., Zhong Jingjing, ‘Zhongshiyou Wanzuo Xiaojiayouzhan jiang Zhuanxing Chengbao Jingying’ [PetroChina Intends to Subcontract 10,000 Small-Scale Gas Stations (author’s translation)] *Xinjingbao* [*The Beijing News*] (Beijing, 26 November 2012) B03; and Wu Jianhua, ‘Zhongshiyou Banshu Xiaojiayouzhan Neibu Chengbao Chongji Mingying Jiayouzhan’ [PetroChina Pushes Internal Subcontracting Reform for Half of Its Small-Scale Gas Stations, Challenging Private Gas Stations (author’s translation)] (2012) 49 *Investor Journal*, China 23.

<sup>163</sup> See Li Chunlian, ‘Zhongshihua huo Jiejian Zhongshiyou Shishui Jiayouzhan Chengbao Jingying’ [Sinopec May Follow PetroChina’s Way to Outsource Some of their Gas Stations (author’s translation)] *Securities Daily* (Beijing, 27 November 2012) D1.

<sup>164</sup> See Huang Jie, ‘Zhongshiyou Neibu Fenshi Wanzuo Jiayouzhan’ [Ostensible Privatisation of Gas Stations in PetroChina (author’s translation)] *Zhongguo Jingying bao* [*China Business Journal*] (Beijing, 3 December 2012) A15.

<sup>165</sup> *Id.*

<sup>166</sup> See Xinhua News, ‘Sinopec Corp. Leads China’s Mix-Owned Economy Drive’ (*China Finance Corporation*, 17 September 2014) <<http://en.xinhua08.com/a/20140918/1387396.shtml>> accessed 30 January 2017.

<sup>167</sup> *Id.*

<sup>168</sup> See Song Shengxia, ‘Mixed-Ownership no Cure for all Ills, Say SOE Officials’ *Global Times*, *China*

investors have a 30 percent share limit,<sup>169</sup> the effects of this big progress remain uncertain.<sup>170</sup> Furthermore, as soon as the Ministry of Commerce of China (MOFCOM) launched rules for non-SOEs to import crude oil,<sup>171</sup> State monopolies begin to be challenged and privately-owned gas stations may expect a better market circumstance in the future. Although it is a good start, fair competition in the market still has a long way to go.

Therefore, to date, the tendency of nationalisation and concentration in the gas station sector has not been effectively reduced, and such a situation obstructs the establishment of healthy living space for privately-owned gas stations. On the one hand, SOEs' interests and the State's short-term economic interests have expanded day after day because of the unshakable and abusive dominant position of petrol SOEs. On the other hand, since SOEs control a majority of refined oil supplies in China, privately-owned gas stations have to put their fate into the hands of petrol SOEs.

#### *4.2.1.2 Access and Exit Mechanisms for Privately-Owned Gas Stations – Nothing with Market Competition*

Observing the process of nationalisation and concentration in the Chinese gas station industry, it is not hard to see this development is filled with the State's notion of self-interests and SOEs' interference. Access to market and exit from market mechanisms for privately-owned gas stations are not related to competition. In other words, *the Chinese Anti-Monopoly Law 2007* failed to limit the abuse of dominant position of petrol SOEs. This

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(Tianjin, 10 September 2014) <[www.globaltimes.cn/content/880847.shtml](http://www.globaltimes.cn/content/880847.shtml)> accessed 30 January 2017.

<sup>169</sup> See Du Juan, 'Sinopec Given Approval for Private Capital Injection' *China Daily (USA)* (7 January 2015) 15; Wayne Ma, 'Sinopec to Allow Some Outside Ownership of Distribution Activities: China's Largest Oil Refiner Open to Third-Party Participation of Up to 30% Share' *The Wall Street Journal* (Beijing, 19 February 2014) <[www.wsj.com/articles/SB10001424052702304914204579392654098777642](http://www.wsj.com/articles/SB10001424052702304914204579392654098777642)> accessed 30 January 2017; and Wayne Ma, 'Sinopec to Sell Nearly 30% of Sales-and-Marketing Unit: Chinese Oil Refiner Values Deal With 25 Investors at \$17.5 Billion' *The Wall Street Journal* (Beijing, 15 September 2014) <[www.wsj.com/articles/sinopec-to-sell-almost-30-of-sales-and-marketing-unit-1410703848](http://www.wsj.com/articles/sinopec-to-sell-almost-30-of-sales-and-marketing-unit-1410703848)> accessed 30 January 2017.

<sup>170</sup> See Du Juan, 'Sinopec is Allowing in Private Investors' *China Daily* (Beijing, 20 February 2014) <[www.chinadaily.com.cn/business/2014-02/20/content\\_17293185.htm](http://www.chinadaily.com.cn/business/2014-02/20/content_17293185.htm)> accessed 30 January 2017.

<sup>171</sup> See Xinhua Finance, 'China Issues Rules for Refineries to Import Crude Oil via Non-State Trade' (*Xinhua Finance Agency, China*, 23 July 2015) <<http://en.xinhuanet.com/html/Industries/Energy/2015/121232.shtml>> accessed 30 January 2017; and 'Shangwubu Guanyu Yuanyou Jiagong Qiye Shenqing Feiguoying Maoyi Jinkou Zige Youguan Gongzuo de Tongzhi' [Ministry of Commerce Circular on Crude Oil Processing Enterprises to Apply for Non-State Trading Import Eligibility to Work] (2015) <[www.mofcom.gov.cn/article/b/e/201507/20150701056066.shtml](http://www.mofcom.gov.cn/article/b/e/201507/20150701056066.shtml)> accessed 30 January 2017.

will now be illustrated.

An administrative licence is required for setting up a gas station in China.<sup>172</sup> In principle, if gas station applicants meet the State's admission requirements and are able to source refined oil, the State encourages private capital to enter the petroleum retail market. However, there is no guarantee that each applicant who meets all the requirements would be granted a licence.<sup>173</sup> Written requirements are not aligned with the reality because the personal relationship is typically important in China.<sup>174</sup>

Taking the required interval of distance between gas stations for instance: although a

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<sup>172</sup> See the Administrative Permission Law of China 2003, Arts 12, 14 & 22;

Article 12: The procedure for administrative permission may be instituted for the following matters: ... (3) matters relating to the professions and trades that provide services to the public and that have a direct bearing on public interests...

Article 14: With respect to the matters specified in Article 12 of this Law, the procedure for administrative permission may be instituted by law. Where such a law is not enacted, it may be instituted by administrative regulations.

Article 22: Administrative permission shall be granted by an administrative department with the power of granting such permission within the limits of its statutory functions and powers.

'Measures for the Administration of the Refined Oil Market' (2006)  
<[www.asianlii.org/cn/legis/cen/laws/mftaotrom509/](http://www.asianlii.org/cn/legis/cen/laws/mftaotrom509/)> accessed 30 January 2017;

Article 3: A licensing system is applied to the refined oil business activities. The Ministry of Commerce shall take responsibility to draft the laws and regulations for the administration of the refined oil market, draw up ministerial regulations and organize the implementation thereof, and supervise and manage the refined oil market nationwide under law. The administrative departments of commerce of the people's governments in each province, autonomous region, municipality directly under the Central Government and city specifically designated in the state plan (hereinafter referred to as the administrative departments of commerce of the provincial people's governments) shall take responsibility to formulate the development planning of the fueling stations and storage industry under their respective jurisdictions, and organise and coordinate the supervision and administration of the refined oil business activities under their respective jurisdictions.

Article 6: To apply for the qualification for engaging in the retail business of refined oil, an enterprise shall submit an application to the administrative department of commerce of the municipal people's government (or the level of districted city, same below) of the place where it is located, which shall examine the application and report the preliminary examination opinion along with the application materials to the administrative department of commerce of the provincial people's government, which shall determine whether to grant a refined oil retailing license or not.

'Guowuyuan dui Quexu Baoliu de Xingzheng Shenpi Xiangmu Sheding Xingzheng Xuke de Jueding' [Decision of the State Council on Establishing Administrative Licence for Administrative Review and Approval Issues that are Truly Needed to be Retained (author's translation)] (2004)  
<[www.gov.cn/zwggk/2005-06/20/content\\_7908.htm](http://www.gov.cn/zwggk/2005-06/20/content_7908.htm)> accessed 30 January 2017.

<sup>173</sup> See Interview with a staff member of China Sinopec Hebei Branch (n 131).

<sup>174</sup> See Deborah Healey, 'A Comparative Look at the Competition Law Control of State-Owned Enterprises and Government in China' in Josef Drexler and others (eds), *More Common Ground for International Competition Law?* (Edward Elgar Publishing 2011) 126.

service radius of gas stations in cities is not to be less than 0.9 miles,<sup>175</sup> there are no less than 11 gas stations on a 4.4 kilometer stretch of road on Road G111 in Beijing.<sup>176</sup> Why are there so many gas stations on this road section? Demand and interests are the most primitive spiritual force. In the past, lack of alternative roads in this area, the 4.4-kilometer section of a traditional national road was extremely busy with traffic. Without that 11 gas stations in the 1990s, refined oil supply in that road section was unable to meet the consumer demand. Hence, the market demand defeated the State's regulation in this local petroleum retail market. However, in recent years, a high-speed road network and public transport facilities reduce the traffic flow in this road section; and consequently 11 gas stations may exceed demand. However, in order to seize this tiny market quickly, petrol SOEs launched high-priced acquisition programmes match the "market-price" of the gas station did not merit market mechanisms.<sup>177</sup> By the end of 2012, 10 of these 11 gas stations on Road G111 in Beijing belonged to petrol SOEs.<sup>178</sup> In brief, since petrol SOEs expanded market share and obtained interests via varieties of breaking the regulation of 'the Standard of Urban Road and Traffic Planning and Design (GB 50220-95)' (1995) (see footnote 175 above), the interests of petrol SOEs provide a new explanation for the dense layout of gas stations in this road section.

Furthermore, in order to win as much of the market share as possible in a short time, nationalisation of privately-owned gas stations has been a method generally exploited by

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<sup>175</sup> "Section 8.2.1 The radius of city gas station space should between 0.9-1.2 kilometers": 'Chengshi Daolu Jiaotong Guihua Sheji Guifan GB 50220-95' [The Standard of Urban Road and Traffic Planning and Design (GB 50220-95) (author's translation)] (1995) <[www.zzguifan.com/webarbs/book/252/54247.shtml](http://www.zzguifan.com/webarbs/book/252/54247.shtml)> accessed 30 January 2017.

<sup>176</sup> This road section is from 'China International Exhibition Center Station' to 'Hualikan Station' in Jingshun Road (G111), Tianzhu Town, Shunyi District, Beijing, China.

<sup>177</sup> Petrol SOEs are paying more than the gas stations' general market value because this is the only way for them to enter this tiny market that was previously occupied by privately-owned gas stations. In order to obtain more gas stations in this local market, competition between Sinopec, PetroChina and China National Offshore Oil Corporation was held by high-priced acquisitions. However, from the point of view of petrol SOEs, the prices that they paid to previous privately-owned gas stations obey the short supply rule: see, e.g., Interview with one staff member of China Sinopec Changqing Gas Station in Tianzhu Town, Beijing (the interviewee did not agree to the researcher using the interviewee's name in any written work arising from the study, but did consent to being interviewed) (Beijing, China, 2012); and Interview with a staff member of China Sinopec Hebei Branch (n 131).

<sup>178</sup> Apart from 'Tianrui Gas Station', the other ten former privately-owned gas stations were all acquired by one of the three petrol SOEs, Sinopec, PetroChina and China National Offshore Oil Corporation, in the last two years (probably between November 2010 and October 2012). Sinopec acquired five of them; PetroChina purchased four, and China National Offshore Oil Corporation bought one in 2011.



Chinese petrol SOEs over the last decade. Due to strong financial reserves and competing pressures from other petrol SOEs, a high-priced acquisition programme was commenced (from the mid-2000s onwards), and this has led to serious interference in the normal direction of privately-owned gas stations. Petrol SOEs take a gamble on the acquisition of gas stations. Although the value of most Chinese privately-owned gas stations should not exceed RMB 10 million (approximately £1 million), the traded price of three privately-owned gas stations reached a total of RMB 150 million (approximately £15 million).<sup>179</sup> Another two privately-owned gas stations have merited a total acquisition price of RMB 60 million (approximately £6 million).<sup>180</sup> However, petrol SOEs still maintain that this is in compliance with market mechanisms<sup>181</sup> because, to date, demand exceeds supply and competitors are willing to pay higher prices in order to expand their market share.<sup>182</sup> As a result, petrol SOEs unscrupulously intervene in the development of privately-owned gas stations under the guise of competition, and a sharp decline in the market share of privately-owned gas stations has resulted. For instance, up to 2012 privately-owned gas stations only occupied about 25 percent of all gas stations in Beijing,<sup>183</sup> approximately 10 percent of all gas stations in Guangzhou,<sup>184</sup> and only a little over 24 percent of all gas stations in downtown Cangzhou.<sup>185</sup>

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<sup>179</sup> See You Xingyu, 'Minying Jiayouzhān Esī Peisi Haishi Maishen' [The Fate of Chinese Privately-Owned Gas Stations (author's translation)] (*Xinhua, China*, 30 October 2007) <[www.gd.xinhuanet.com/newscenter/2007-10/30/content\\_11535594.htm](http://www.gd.xinhuanet.com/newscenter/2007-10/30/content_11535594.htm)> accessed 30 January 2017.

<sup>180</sup> See Zhong Ang and Chen Yong, 'Jiayouzhān Kuozhāng Yīnyou: Zhongshiyōu Xiāngjiē Ānhuī Gāojiāmēn Shōugōu' [Gas Stations' Expansion Worries: PetroChina Explains the High Price for Privately-Owned Gas Station Acquisitions in Anhui Province (author's translation)] *Jingji Guanchā* [*The Economic Observer*] (Beijing, 5 February 2010) <[www.eeo.com.cn/2010/0205/162553.shtml](http://www.eeo.com.cn/2010/0205/162553.shtml)> accessed 30 January 2017.

<sup>181</sup> See Interview with a staff member of China Sinopec Hebei Branch (n 131).

<sup>182</sup> *Id.*

<sup>183</sup> See Lao Jiadi, 'Minying Jiayouzhān Bānshū Běishōubian' [Half of the Private Gas Stations have been Acquired by Petrol SOEs in China (author's translation)] *Shānghāi Evening News* (Shanghai, 17 October 2012) A2 & 12.

<sup>184</sup> Email from BP-PetroChina Petroleum Company to author (11 January 2013).

\* Guangzhou, a well-developed city, is the capital of Guangdong Province. It is the largest city in the south-eastern part of China, with a population of some 13 million people, and covers a total area of 7434.40 square kilometres. Up to February 2014 it governed ten districts (Yuexiu, Haizhu, Liwan, Tianhe, Baiyun, Huangpu, Huadu, Panyu, Nansha and Luogang) and two county-level cities (Conghua and Zengcheng): see, e.g., The People's Government of Guangzhou City, 'Renkou Minzu' [Population and Ethnic Groups] (*The People's Government of Guangzhou City, China*, 2015) <[www.gz.gov.cn/gzgov/s2771/zjgzlistcon.shtml](http://www.gz.gov.cn/gzgov/s2771/zjgzlistcon.shtml)> accessed 30 January 2017; and The People's Government of Guangzhou City, 'Xingzheng Quyu' [Administrative Regions] (*The People's Government of Guangzhou City, China*, 2015) <[www.gz.gov.cn/gzgov/s2294/zjgzcon.shtml](http://www.gz.gov.cn/gzgov/s2294/zjgzcon.shtml)> accessed 30 January 2017.

<sup>185</sup> Interview with a staff member of China Sinopec Cangzhou Branch (the interviewee did not agree to the researcher using the interviewee's name in any written work arising from the study, but did consent to being interviewed) (Cangzhou, China, 2012).

Despite the high-priced acquisition programme, which has helped petrol SOEs to seize more of the market and obtain high profits, the resulting situation presents a paradox. Some privately-owned gas stations take great exception to the unfair competition behaviour of petrol SOEs, and call for proper protection from *the Chinese Anti-Monopoly Law 2007*. For instance, according to 18 questionnaires completed by privately-owned gas stations in Guangzhou City, which comprised about 30 percent of all local privately-owned gas stations in 2012, only one of these gas stations expressed an intention to withdraw from the local market and sell out to petrol SOEs.<sup>186</sup> Additionally, in Cangzhou City nobody expressed an intention to exit from the petroleum retail market, based on 6 questionnaires received from privately-owned gas stations there, which comprised 40 percent of all local privately-owned gas stations.<sup>187</sup> As a silent protest, those participants would prefer to lose money rather than compromise,<sup>188</sup> because they are fighting for private investment.

In brief, in the nationalisation and concentration process of the Chinese gas station industry, rare privately-owned gas stations denied the fact that they face increasing challenges in the development of competition with the SOE-owned gas stations since 1999. Although unfair competition is unable to avoid, these privately-owned gas stations have to devote into a war that they have a rare chance to win. At the same time, they consistently believe, if they can persist and stick to the local petroleum retail market as long as possible, they would obtain the legal salvation from *the Chinese Anti-Monopoly Law 2007*. However, this Law disappoints them once again in the updating process of refined oil pricing control mechanisms.

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\* Cangzhou is an underdeveloped prefecture-level city, in the north-eastern part of China, Hebei Province. Cangzhou City comprises two districts (Xinhua and Yunhe), four county-level cities (Huanghua, Renqiu, Botou and Hejian), ten counties (Cangxian, Qingxian, Dongguang, Haixing, Yanshan, Suning, Nanpi, Wuqiao, Xianxian and Mengcun), and three development areas (Cangzhou Bohai New Area, Cangzhou Economic Development Area and Cangzhou High-tech Industrial Development Area). This city had a population of more than 7.2 million people in 2012 and covers an area of about 14,000 square kilometres. Only Xinhua District and Yunhe District make up the downtown area of Cangzhou: The People's Government of Cangzhou City, 'About Cangzhou' (*The People's Government of Cangzhou City, China*, 18 April 2012) <[www.cangzhou.gov.cn/english/aboutcity/index.shtml](http://www.cangzhou.gov.cn/english/aboutcity/index.shtml)> accessed 30 January 2017.

<sup>186</sup> See Appendix 5 (ii) below.

<sup>187</sup> See Appendix 5 (iii) below.

<sup>188</sup> See You (n 179).

#### 4.2.2 Malicious Use of Refined Oil Pricing Control Mechanisms and Oil Subsidies in China – Further Squeezing for Privately-Owned Gas Stations and the “Public Interest”

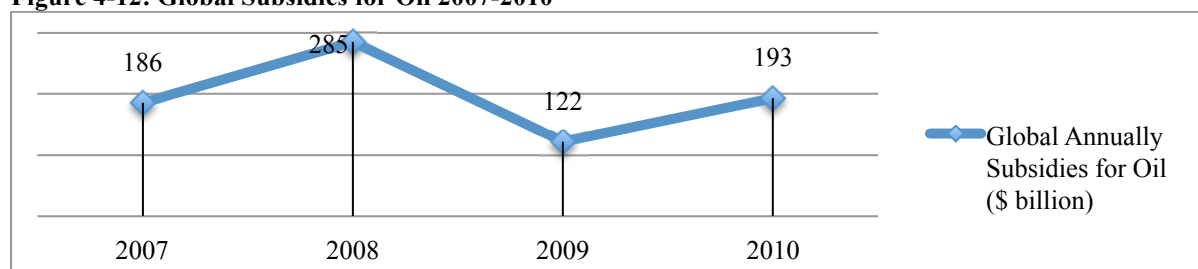
State oil subsidies, a sensible idea which are intended to lower oil production costs and the price that consumers have to pay, are a method for the government to use in order to promote oil consumption.<sup>189</sup> However, this idea often contrasts strongly with reality. Along with the increasingly serious environmental problems caused by oil consumption, the voice of opposition to State oil subsidies is now growing louder.<sup>190</sup>

When oil subsidies in China are examined from the point of view of *the Chinese Anti-Monopoly Law 2007*, the subsidies become a sad reminder of how ineffective the 2007 Act is as a means for protecting the interests of privately-owned gas stations and consumers. Although the State’s subsidies’ policy should synchronise with competition policy and be limited by relevant laws, “subsidies...may be either beneficial or harmful, either promoting welfare or distorting competition, depending on the circumstances”<sup>191</sup>. As intervention

<sup>189</sup> See Oil Change International, ‘Fossil Fuel Subsidies: Overview’ (*Oil Change International*) <[www.priceofoil.org/fossil-fuel-subsidies/](http://www.priceofoil.org/fossil-fuel-subsidies/)> accessed 30 January 2017.

<sup>190</sup> It is now becoming a worldwide belief that governments should phase out fossil fuel subsidies in the future. Hopefully, by 2020 these will be completely phased-out globally. In contrast, concerning the vital role of refined oil in everyday life, oil subsidies are still commonly found worldwide (see Figure 4-12 below) (e.g., 47 percent of the total fossil fuel subsidies in 2010): see, e.g., Natural Resources Defense Council, ‘Governments Should Phase Out Fossil Fuel Subsidies or Risk Lower Economic Growth, Delayed Investment in Clean Energy and Unnecessary Climate Change Pollution’ (*Natural Resources Defense Council*, June 2012) <[www.endfossilfuelsubsidies.org/files/2012/05/fossilfuelsubsidies\\_report-nrdc.pdf](http://www.endfossilfuelsubsidies.org/files/2012/05/fossilfuelsubsidies_report-nrdc.pdf)> accessed 30 January 2017; and International Energy Agency (IEA), OECD and World Bank, ‘The Scope of Fossil-Fuel Subsidies in 2009 and a Roadmap for Phasing out Fossil-Fuel Subsidies’ (G20 Summit, Seoul, 2010).

**Figure 4-12: Global Subsidies for Oil 2007-2010**



Source: ‘Fossil Fuel Subsidies: a Tour of the Data’; Figure 4-12 devised by the author.

See Duncan Clark, ‘Fossil Fuel Subsidies: a Tour of the Data’ *The Guardian* (London, 19 January 2012) <[www.guardian.co.uk/environment/datablog/2012/jan/18/fossil-fuel-subsidy](http://www.guardian.co.uk/environment/datablog/2012/jan/18/fossil-fuel-subsidy)> accessed 30 January 2017; IEA, ‘World Energy Outlook 2011: IEA Analysis of Fossil-Fuel Subsidies’ (OECD/IEA, 4 October 2011) <[www.iea.org/publications/freepublications/publication/WEO2011\\_WEB.pdf](http://www.iea.org/publications/freepublications/publication/WEO2011_WEB.pdf)> accessed 30 January 2017; and IEA, OPEC, OECD and World Bank, ‘Fossil-Fuel and other Energy Subsidies: An Update of the G20 Pittsburgh and Toronto Commitments’ (G20 Meeting of Finance Ministers and Central Bank Governors, Paris, 2011 and G20 Summit, Cannes, 2011).

<sup>191</sup> See OECD, ‘Competition Policy in Subsidies and State Aid’ (12 November 2001) DAF/CLP(2001)24;

behaviour, the genuine objective of oil subsidies should be based on the use of government power to avoid unfair situations developing in the market, e.g., to restore the long-term viability of oil enterprises; or to ensure consumer welfare; or to achieve the “public interest”.<sup>192</sup> However, Chinese oil subsidies are inconsistent with competition policies because they are directed towards ensuring the development of SOEs and the State’s short-term economic interest instead. Therefore, this subsection of the chapter examines the fate of privately-owned gas stations, and how the “public interest” is damaged by the application of unfair Chinese oil subsidies. Due to the State oil control system, the subsidies’ functions are not only confined to this area, but also involve the wider petroleum retail market. In other words, the worst effect of the State oil subsidies within the sphere of oil production, appears in the downstream sector to unfairly result in the “development dilemma” of privately-owned gas stations, and makes the “public interest” unachievable. What causes such a situation? Petrol SOEs’ unrestrained behaviour, along with the price control of refined oil and “oil shortages”, must share a significant part of the blame. This will now be considered in more detail next.

#### *4.2.2.1 Chinese Refined Oil Pricing Mechanisms and State Oil Subsidies – Creating Oil Shortages and Reducing the “Public Interest”*

In the period of rapid growth of privately-owned gas stations (between 1992 and 1998), an oil market without full price controls existed in China.<sup>193</sup> However, even though oil prices ought to be set by the market,<sup>194</sup> a new round of oil price adjustments began with the ‘Order No.38 of 1999’.<sup>195</sup> In June 2000, for the first time the Central Government allowed refined oil prices to float to some extent in accordance with international oil prices: and since 2001,

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and Li Hong, *Gongping Xiaolv yu Kechixu Fazhan – Zhongguo Nengyuan Butie Gaige Lilun yu Zhengce Shijian* [Fair Efficiency and Sustainable Development – China’s Energy Subsidy Reform in Theory and Practice (author’s translation)] (China Economic Publishing House 2011) 104-05.

<sup>192</sup> See Wang, *Zhongguo Shiyou Chanye Fazhan Lujing: Guazhan Jingzheng yu Guizhi* [Chinese Oil Industry Development Path: Oligopoly Competition and Regulation (author’s translation)] (n 137) 183-84.

<sup>193</sup> Between 1992 and 1998, fair competition almost emerged in the Chinese refined oil retail market because many privately-owned refineries and gas stations existed, and refined oil prices partially relied on market mechanisms: see, e.g., Jiang and Huang (n 133); and Wang, ‘Chengpinyou Dingjiaquan Xiafang Haiyou Duoyuan’ [How Long It Takes to Decentralise Refined Oil Pricing Control (author’s translation)] (n 133).

<sup>194</sup> See Huang and others (n 1) 352.

<sup>195</sup> See ‘Guanyu Qingli Zhengdun Xiaolianyouchang he Guifan Yuanyou Chengpinyou Liutong Zhixu de Yijian’ [On the Liquidating and Restructuring of the Small Oil Refining Factories and Standardizing the Circulation Order of Crude Oil and Petroleum Products’ (‘Order No.38 of 1999’)] (1999) (n 128).

Chinese refined oil prices could be adjusted when the weighted average of the global oil market was greater than 8 percent.<sup>196</sup> A new oil pricing mechanism came into effect in 2009. However, this weakness, namely unreal-time price adjustment,<sup>197</sup> still remained. Although the market called for a new pricing adjustment mechanism with immediate reaction, the newer one, which was first proposed in 2011 with high expectations, did not completely solve the problem when it came into force at the end of March 2013.<sup>198</sup> It was still unable to adjust Chinese refined oil prices swiftly in accordance with global oil price movements.<sup>199</sup>

In addition, when the refined oil pricing mechanisms interact with oil subsidies, they create a distorted view of the “public interest” in the Chinese refined oil retail market. *First of all*, the interaction between the refined oil pricing mechanisms and oil subsidies promotes the interests of SOEs, but reduces those of privately-owned gas stations. For example: import prices of crude oil could float with international oil prices, while retail prices of refined oil in China would remain at the previous level for at least 10 days. Thus, very few domestic gas stations are able to cope with the loss from within their own resources.

As enterprises which are integral to the entire oil industry chain, petrol SOEs can ensure their own safety and enhance their position to the detriment of privately-owned petrol retailers. The reasons are as follows: (a) since the Chinese oil wholesale prices float at the

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<sup>196</sup> See Chen Shaofeng, ‘State-Regulated Marketisation: China’s Oil Pricing Regime’ (2006) 7 *Perspectives* 151, 168; and Lin Boqiang and Jiang Zhujun, *Zhongguo Nengyuan Butie Gaige he Sheji* [China’s Energy Subsidy Reform and Design (author’s translation)] (Science Press, China 2012) 26.

<sup>197</sup> *Unreal-time price adjustment* means that Chinese refined oil prices do not float directly in accordance with international oil prices; the refined oil prices only change when necessary requirements were satisfied. For example, the 2009 Chinese refined oil pricing mechanism stated that if international crude oil prices changed by over 4 percent in a period of 22 working days, the NDRC must adjust domestic oil prices: ‘Circular of the National Development and Reform Commission on Issuing the Administrative Measures for Oil Prices (For Trial Implementation)’ (Expired) <[www.lawinfochina.com/display.aspx?lib=law&id=7600&CGid=](http://www.lawinfochina.com/display.aspx?lib=law&id=7600&CGid=)> accessed 30 January 2017.

<sup>198</sup> The new Chinese oil pricing mechanism proposed to shorten the price adjustment period from 22 working days to 10 and **remove** the threshold for price adjustment at 4 percent: Lan Lan, ‘Oil Pricing System Gets Adjustment’ *China Daily* (Beijing, 27 March 2013) <[http://europe.chinadaily.com.cn/business/2013-03/27/content\\_16347526.htm](http://europe.chinadaily.com.cn/business/2013-03/27/content_16347526.htm)> accessed 30 January 2017.

<sup>199</sup> Although the State insists that the new pricing mechanism has made a great improvement, it is still not a complete market-based system: see, e.g., Ping Zhang, ‘China to Reform Gasoline Pricing Mechanism’ (Press Conference of the First Session of the 12th National People’s Congress (NPC), Beijing, 6 March 2013) <<http://english.cntv.cn/20130306/104683.shtml>> accessed 30 January 2017; and Kazunori Takada, ‘China Could Target Oil Firms, Telecoms, Banks in Price Probes’ (*Reuters*, 15 August 2013) <<http://uk.reuters.com/article/2013/08/15/uk-china-%20antitrust-ndrc-idUKBRE97E04W20130815>> accessed 30 January 2017.

same pace as international crude oil prices, petrol SOEs do not suffer any loss of interest in the production area. (b) Because petrol SOEs can obtain oil subsidies in the petroleum refining process (see footnote 130 above), they do not suffer negative effects from the State's unreal-time price adjustment mechanisms (see footnote 197 above). Although the subsidies are not paid directly to SOE-owned gas stations, petrol SOEs, enterprises with an effect throughout the entire industry chain, could easily balance their foreseeable losses.<sup>200</sup> However, if, due to pricing mechanisms, the Chinese wholesale price of refined oil rises higher than the retail price in a few days, privately-owned gas stations which only do business in the retail market have to face money-losing sales. Without subsidies, these privately-owned gas stations probably feel that one minute is like a lifetime.<sup>201</sup> Accordingly, petrol SOEs become bigger and stronger,<sup>202</sup> while certain privately-owned gas stations become uncompetitive, and may even close down. Because market competition between SOE-owned gas stations and privately-owned gas stations disappears, interests between them cannot be maintained at a balanced level. Thus, the "public interest", which relies for its realisation on competition and the reconciliation of competing interests between different groups in the market, has never had the chance to be achieved.

*Second*, the cooperation between the refined oil pricing mechanisms and oil subsidies creates virtual "oil shortages" and profoundly influences the "public interest" in the Chinese refined oil retail market, by way of the adverse impact on the interests of privately-owned gas stations and consumer welfare. In general, "oil shortages", which affect people's basic needs for refined oil (for example, private cars could not be refuelled as required), and which reduce the interests of privately-owned gas stations, occur when oil wholesale prices are *higher* than refined oil prices in the local market. Because of the oil pricing mechanisms, owners of gas stations may have a clear expectation that fluctuations of refined oil prices will occur. Therefore, if transactions will result in loss of money, theoretically they will cease

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<sup>200</sup> See Feng Hui, 'Youjia Wenti de Falv Guizhi – yi Chanyefa yu Jingzhengfa de Gongneng Zuhe wei Hexin' [Legal Regulations for China's Oil Prices – Based on Cooperative Functions between Industrial Policy and Competition Law (author's translation)] (2012) 3 Science of Law, China 122.

<sup>201</sup> See Lin (n 129) 161.

<sup>202</sup> See Jiang Lei, 'Gaoyoujia de Chong'er, Zhongshiyou huo Duda' [The Party Benefitting from High Oil Prices, Possible Dominance of Sinopec (author's translation)] *Jingji Guancha* [The Economic Observer] (Beijing, 9 April 2011) 04.

retail sales and store petrol product for a suitable time, while they wait for retail prices to rise before they start selling again. Petrol SOEs point out that their gas stations create an upward pressure on price, and insist on uninterrupted oil sales without concern for losses, because they need to safeguard the demand and welfare of consumers and maintain a normal routine/life for them.<sup>203</sup> Arguing in this way, petrol SOEs claim that privately-owned gas stations are the real culprits behind “oil shortages”, because of their timely storing in order to increase their own self interest.<sup>204</sup>

However, does this assertion correspond to reality? *On the one hand*, regarding refined oil supplies in China, privately-owned gas stations cannot compete in a fair situation because petrol SOEs may sometimes refuse to supply them,<sup>205</sup> even though there are supply agreements between them. As *both market participants and rule setters*, petrol SOEs can impose unilateral trade measures. They make a transactional queue when refined oil demand is higher than supply. First, as regards their own interests, petrol SOEs prefer to give first priority to their own gas stations’ requirements. Second, they have obligations to satisfy the oil demand of the government’s key projects. Last of all, they may give consideration to supplies for privately-owned gas stations depending on the volume remaining.<sup>206</sup> However, no matter how little they supply, privately-owned gas stations have to accept the situation,<sup>207</sup> in order to somehow offset oil shortages in supply.

*On the other hand*, due to the limited capacity of storage tanks, it is impossible for privately-owned gas stations to store adequate amounts of refined oil and wait for better prices.<sup>208</sup> Even if they stored certain products in a timely manner, they still would not be able

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<sup>203</sup> Interview with a staff member of China Sinopec Hebei Branch (n 131).

<sup>204</sup> *Id.*

<sup>205</sup> “Oil shortages” in the Chinese refined oil retail market were *artificial* because privately-owned gas stations cannot obtain enough supplements from monopolised petrol SOEs: Wang Ying and Zhou Yan, ‘Private Fuel Stations Scramble as Diesel Supplies Tank’ *China Daily* (Beijing, 21 October 2011) 13.

<sup>206</sup> By the end of 2010, over 2,000 privately-owned gas stations in the southern part of China failed to obtain enough diesel from petrol SOEs: Xinhua News, ‘China’s Private Refineries Blame Oil Shortage on Monopoly’ *China Daily* (Beijing, 2 December 2010) <[www.chinadaily.com.cn/business/2010-12/02/content\\_11643367.htm](http://www.chinadaily.com.cn/business/2010-12/02/content_11643367.htm)> accessed 30 January 2017.

<sup>207</sup> See Wang Shichuan, ‘Yijiangjia Jiuyouhuang Heyi Chengguanli’ [Why Oil Shortages always Keep Pace with Price Reduction of Refined Oil in China (author’s translation)] (*EastDay China*, 19 October 2011) <[www.china.com.cn/economic/txt/2011-10/19/content\\_23662310.htm](http://www.china.com.cn/economic/txt/2011-10/19/content_23662310.htm)> accessed 30 January 2017.

<sup>208</sup> See Cui Muyang, ‘Beijing Jiayouzhan Founren Tunji Chengpinyou’ [Chinese Privately-Owned Gas Stations in Beijing Denied to Hoard Refined Oil (author’s translation)] *Xinjingbao* [*The Beijing News*] (Beijing, 3

to earn sufficient profits to compensate for the loss caused by the suspension of the oil supply.<sup>209</sup> Thus, contrary to the assertion of the petrol SOEs, because these SOEs illegally refuse<sup>210</sup> to supply suitable amounts of refined oil to privately-owned gas stations,<sup>211</sup> private gas stations have to suffer through “oil shortages” and a failure to supply sufficient refined oil to their consumers.

In fact, the present refined oil pricing mechanism, which leaves a time gap between the ebbs and flows between fluctuations between crude oil and refined oil prices in China, is a useful tool to enable petrol SOEs to expand their own interests, as well as reducing the profits of privately-owned gas stations and consumers. In one respect, when international crude oil price rise, petrol SOEs can use the profits created upstream, and oil subsidies within the sphere of production, to compensate for losses suffered in the downstream. In addition, petrol SOEs control refined oil transactions, so, as well as blaming privately-owned gas stations for oil shortages, they also generate “higher profits”<sup>212</sup> and enhance their reputation.

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November 2007) <<http://news.eastday.com/c/20071103/u1a3204744.html>> accessed 30 January 2017.

<sup>209</sup> *Id.*

<sup>210</sup> See Wentong Zheng, ‘Transplanting Antitrust in China: Economic Transition, Market Structure, and State Control’ (2010) 32 *University of Pennsylvania Journal of International Law* 643, 698-99; and the Anti-Monopoly Law of China 2007, Arts 6 & 17.

Article 6: Any business with a dominant position may not abuse that dominant position to eliminate, or restrict competition.

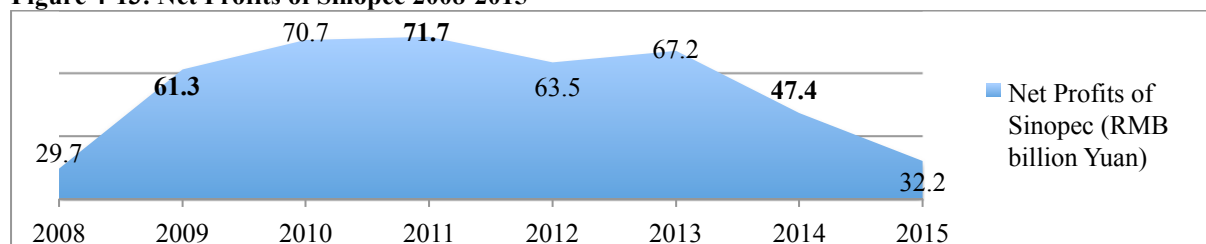
Article 17: A business operator with a dominant market position shall not abuse its dominant market position to conduct the following acts:

... (3) refusing to trade with a trading party without any justifiable cause...

<sup>211</sup> See Meng Yanbei, ‘Research on Issues about the Applicable Scope of China’s Anti-Monopoly Law in Monopolistic Industries’ in Jichun Shi (ed), *Renmin Chinese Law Review: Selected Papers of The Jurist (法学家)*, vol 2 (Edward Elgar Publishing 2014) 166.

<sup>212</sup> From 2008 to 2011, net profits of Sinopec continued to increase. However, the artificial interests could not last. In 2012, the net profits of Sinopec showed an 11.4 percent decrease over 2011. Although the net profits in 2013 increased again, they were still lower than those in 2011. In 2014, the net profits of Sinopec decreased again. Moreover, the administrative intervention seems to lose its function because the net profits of PetroChina has declined nearly 70 percent in 2015, affected by the 2015 oil and gas industry trends: global oil prices have fallen sharply.

**Figure 4-13: Net Profits of Sinopec 2008-2015**





Because privately-owned gas stations have to face the rising purchase prices and supplement shortages with hardly any oil subsidies,<sup>213</sup> at the same time, oil shortages affect consumer welfare in the refined oil retail market because consumers cannot obtain sufficient fuel for their daily use. Therefore, with regard to the lack of competition, the adverse impact on privately-owned gas stations' interests, and the reduction in consumer welfare in the petroleum retail market, it can be said that SOEs' behaviour totally ignores the relevant requirements of *the Chinese Anti-Monopoly Law 2007* and destroys its final objective, the promotion of the "public interest".

#### 4.2.2.2 State Oil Monopolies and "Oil Shortages" – Where is the Chinese Anti-Monopoly Law 2007?

Why can petrol SOEs reap high profits and even improve their reputations, although these SOEs abuse their specific or exclusive rights to cause "oil shortages" without considering legal requirements.<sup>214</sup> Because of a misunderstanding of the assertion that *the Chinese Anti-Monopoly Law 2007* is a tool to establish and protect State monopolies in

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Source: Sinopec Annual Reports; Figure 4-13 devised by the author.

See Sinopec, '2008 Annual Report and Accounts' (Sinopec, 27 March 2009)

<[http://english.sinopec.com/download\\_center/reports/2008/20090330/download/AnnualReport2008.pdf](http://english.sinopec.com/download_center/reports/2008/20090330/download/AnnualReport2008.pdf)>

accessed 30 January 2017; Sinopec, '2009 Annual Report and Accounts' (Sinopec, 26 March 2010)

<[www.sinopecgroup.com/group/en/Resource/pdf/AnnualReport2009.pdf](http://www.sinopecgroup.com/group/en/Resource/pdf/AnnualReport2009.pdf)> accessed 30 January 2017; Sinopec,

'2010 Annual Report and Accounts' (Sinopec, 25 March 2011)

<[www.sinopecgroup.com/group/en/Resource/pdf/2010AnnualReport.pdf](http://www.sinopecgroup.com/group/en/Resource/pdf/2010AnnualReport.pdf)> accessed 30 January 2017; Sinopec,

'2011 Annual Report and Accounts' (Sinopec, 23 March 2012)

<[http://english.sinopec.com/download\\_center/reports/2011/20130110/download/2011AnnualReport.pdf](http://english.sinopec.com/download_center/reports/2011/20130110/download/2011AnnualReport.pdf)>

accessed 30 January 2017; Sinopec, '2012 Annual Report and Accounts' (Sinopec, 22 March 2013)

<[http://english.sinopec.com/download\\_center/reports/2012/20130324/download/2012AnnualReport.pdf](http://english.sinopec.com/download_center/reports/2012/20130324/download/2012AnnualReport.pdf)>

accessed 30 January 2017; Sinopec, '2013 Annual Report and Accounts' (Sinopec, 21 March 2014)

<[http://english.sinopec.com/download\\_center/reports/2011/20130110/download/2011AnnualReport.pdf](http://english.sinopec.com/download_center/reports/2011/20130110/download/2011AnnualReport.pdf)>

accessed 30 January 2017; Sinopec, '2014 Annual Report and Accounts' (Sinopec, 20 March 2015)

<[http://english.sinopec.com/download\\_center/reports/2014/20150322/download/20150322e.pdf](http://english.sinopec.com/download_center/reports/2014/20150322/download/20150322e.pdf)> accessed 30

January 2017; Sinopec, '2015 Annual Report and Accounts' (Sinopec, 29 March 2016)

<[http://english.sinopec.com/download\\_center/reports/2015/20160329/download/2016032918C.pdf](http://english.sinopec.com/download_center/reports/2015/20160329/download/2016032918C.pdf)> accessed

30 January 2017; and Brian Spegele, 'PetroChina Says 2015 Profit Plunged 60%-70%: China's Largest Oil and

Gas Producer by Volume Says it Expects Little Rebound in Oil This Year' *The Wall Street Journal* (29

January 2016) <[www.wsj.com/articles/petrochina-says-2015-profit-plunged-60-70-1454067278](http://www.wsj.com/articles/petrochina-says-2015-profit-plunged-60-70-1454067278)> accessed 30

January 2017.

<sup>213</sup> According to the information gathered from 18 questionnaires concerning 'Obstacles to the Development of Chinese Privately-Owned Gas Stations' that were completed in Guangzhou City, only two of the gas stations received State subsidies. According to the information gathered from 6 questionnaires concerning 'Obstacles to the Development of Chinese Privately-Owned Gas Stations' that were completed in downtown Cangzhou, none of the gas stations obtained State subsidies: see Appendix 5 below.

<sup>214</sup> See Zhou Rui, 'Zhengzhou Zhongshihua Beizhi Tunyou Daizhang, Fagaiwei Fanlongduanju yi Jieru Diaocha' [Zhengzhou Sinopec was Accused of Hoarding and Driving Prices Up and the Anti-Monopoly Bureau Under the NDRC of China Launches Antitrust Probe (author's translation)] (*China News*, 9 February 2015) <<http://finance.chinanews.com/ny/2015/02-09/7048763.shtml>> accessed 30 January 2017.

certain vital sectors,<sup>215</sup> this Law fails to restrict administrative interventions in the gas station sector.<sup>216</sup> Thus, discriminatory transactions, offered by petrol SOEs to privately-owned gas stations, take place “legally” within the country,<sup>217</sup> even though they cause “oil shortages”<sup>218</sup> and then bring notoriety to the privately-owned gas stations’ sector. Instead, the true situation is a rather different one: most privately-owned gas stations, without enough refined oil storage, have to insist on surviving alone and thus they suffer losses. Subsequently, certain privately-owned gas stations that cannot bear these huge losses have to exit the market.<sup>219</sup> Accordingly, the competitive landscape is bound to negatively change in today’s Chinese gas station sector,<sup>220</sup> and at the same time competition, an important metric for consumer welfare, is disappearing from the petroleum retail market.

However, for refined oil consumers, this is not the end of the story. A decrease in living standards is a painful nightmare. With regard to administrative intervention and unilateral trade measures imposed by petrol SOEs, the immediate task for this industry is probably to improve international competitiveness, to ensure national energy security and to maximise

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<sup>215</sup> See the Anti-Monopoly Law of China 2007, Arts 7, 17 & 37.

Article 7: With respect to the industries controlled by the State-owned economy and concerning the lifeline of national economy and national security or industries implementing exclusive operation and sales according to law, the state protects the lawful business operations conducted by the business operators therein...

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.

Article 17: A business operator with a dominant market position shall not abuse its dominant market position to conduct the following acts:

... (3) refusing to trade with a trading party without any justifiable cause;

... For the purposes of this Law, ‘dominant market position’ refers to a market position held by a business operator having the capacity to control the price, quantity or other trading conditions of commodities in the relevant market, or to hinder or affect any other business operator wishing to enter the relevant market.

Article 37: Any administrative organ may not abuse its administrative power to set down such provisions in respect of eliminating or restricting competition.

<sup>216</sup> See Huang and others (n 1) 354-58.

<sup>217</sup> See Jiang and Huang (n 133).

<sup>218</sup> See Wang, *Zhongguo Shiyou ChanYe Fazhan Lujing: Guazhan Jingzheng yu Guizhi* [Chinese Oil Industry Development Path: Oligopoly Competition and Regulation (author’s translation)] (n 137) 180; and Li Zhe, ‘Nijiang Youjia Wojiu Duangong: Quanguo Duodi Jiayouzhan Chuxian Youhuang’ [Oil SOEs Refuse to Supply Whenever Refined Oil Price Drops: Oil Shortages Occurred Nationwide (author’s translation)] (*EastDay China*, 19 October 2011) <[www.china.com.cn/economic/txt/2011-10/19/content\\_23662354.htm](http://www.china.com.cn/economic/txt/2011-10/19/content_23662354.htm)> accessed 30 January 2017.

<sup>219</sup> See Lin (n 129) 161.

<sup>220</sup> See Pang (n 155).

petrol SOEs' interests or the State's short-term economic interest, rather than to guarantee the daily living standards of average people. When refined oil demand is higher than supply, SOEs choose immediately to abandon supplying the requirements of privately-owned gas stations,<sup>221</sup> whose consumers are mostly average Chinese people. Therefore, the practice of abandoning privately-owned gas stations creates everyday travel inconvenience for large numbers of Chinese. However, who will fight against this illegal conduct of petrol SOEs in the interests of consumers? In a country strictly governed by the rule of law, Competition Laws will soon find their appropriate place. However, in a semi-government-oriented country, *the Chinese Anti-Monopoly Law 2007* is an extremely ineffective law, watching over the decline in consumer welfare. Accordingly, the final objective of the 2007 Act, the "public interest", which partially relies on competition and the realisation of consumer welfare, cannot be achieved.

In summary, owing to the specific or exclusive rights of petrol SOEs deriving from the application of Chinese unilateral oil pricing mechanisms and State oil subsidies, high-priced acquisition programmes and "oil shortage" can occur at any time based on the decisions of SOEs. If such a trend continues, many privately-owned gas stations will be on the brink of insolvency and become helpless victims. Because the State monopoly system is the crux of the problem regarding unfair competition in the Chinese refined oil retail market, *the Chinese Anti-Monopoly Law 2007* has little or no effect over it,<sup>222</sup> and so, changing this vulnerable position seems to be a pipe dream at present for the privately-owned gas stations. Thus, when we are confronted with a trail of impacts from State oil subsidies, pricing control mechanisms and "oil shortages", it is essential to break the State monopoly and offer the opportunity for fair competition to all gas stations in China.<sup>223</sup> In brief, the surviving privately-owned gas stations expect effective practical application of *the Chinese Anti-Monopoly Law 2007*, and hope that one day this Law will be able to fairly regulate relevant industrial policies.<sup>224</sup>

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<sup>221</sup> See Xinhua News, 'China's Private Refineries Blame Oil Shortage on Monopoly' (n 206).

<sup>222</sup> See Jiang and Huang (n 133).

<sup>223</sup> *Id.*

<sup>224</sup> See Huang and others (n 1) 363-67.

### 4.3 Fostering or Suppression? Reluctance of Chinese Privately-Owned Fixed-Broadband SMEs to Enter the Market without “Network Interoperability”<sup>225</sup>

Apart from the steel industry and the gas station industry, the Chinese telecommunications industry, especially the fixed-broadband sector, is another area that has implemented administrative reconstruction without full consideration for competition, the interests of privately-owned SMEs, or consumer welfare. The wishes and demands of the State play a pivotal role in establishing “network interoperability”.<sup>226</sup> To date, in order to protect the interests of SOEs, the administrative intervention concerning “network interoperability” *has fostered private funds from the outside, whereas it has discouraged them from the inside.*<sup>227</sup> This trend puzzles existing or prospective privately-owned fixed-broadband operators, and creates a brick wall for them. Moreover, because of the lack of “network interoperability”, many lines are constructed, yet these are high-priced, but low-speed, fixed-broadband

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<sup>225</sup> The main idea of this section was presented as a poster at the Queen Mary University of London (QMUL) Postgraduate Legal Research Conference 2016, entitled ‘Fostering or Suppression? The Reluctance of Chinese Privately-Owned Fixed-Broadband Operators to Enter the Market from the perspective of *the Anti-Monopoly Law of China 2007*’, held in London, UK on 3 June 2016; and this section will be presented at the 6th Annual International Conference on Law, Regulations and Public Policy (LRPP 2017), held in Singapore on 5-6 June 2017, as well as being published in the form of conference proceedings, entitled ‘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*’.

<sup>226</sup> See the Institute of Electrical and Electronics Engineers (IEEE) Technical Committee on Communications Quality and Reliability, ‘Gives a Working Definition for the Interoperability Study Group’, cited in Paulo Teixeira de Sousa and Peter Stuckmann, ‘Telecommunication Network Interoperability’ in Paolo Bellavista (ed), *Telecommunication Systems and Technologies* (EOLSS Publishers 2009) 267.

Network Interoperability is the continuous ability to send and receive data between interconnected networks providing the level of quality expected by the end user customer without any negative impact to the sending and or receiving networks. Specifically: Network Interoperability is the functional inter working of a service across or between multi-vendor, multi-carrier inter-connections (i.e., node-to-node, or network-to-network) working under normal and stress conditions, and per the applicable standers [sic], requirements, and specifications.

<sup>227</sup> In 2013, China decided to promote and encourage private funds to take part in the fixed-broadband market, in order to boost market competition. However, without “network interoperability”, privately-owned operators are unable to enter the market smoothly: see, e.g., Xiaohui Yu, ‘Introduction to “Broadband China” Strategy’ (*China Academy of Telecommunication Research of the MIIT*, 5 September 2013) <[http://file.eu-chinapdsf.org/Internet/PUB/Activity4/Results%203/Broadband%20China%20introduction\\_Yu%20Xiaohui.pdf](http://file.eu-chinapdsf.org/Internet/PUB/Activity4/Results%203/Broadband%20China%20introduction_Yu%20Xiaohui.pdf)> accessed 30 January 2017; ‘Zhonggong Zhongyang Guanyu Quanmian Shenhua Gaige Ruogan Zhongda Wenti de Jueding’ [CPC Central Committee’s Decision on Major Issues Concerning Comprehensively Deepening Reforms (author’s translation)] (2013) <[www.gov.cn/jrzq/2013-11/15/content\\_2528179.htm](http://www.gov.cn/jrzq/2013-11/15/content_2528179.htm)> accessed 30 January 2017; ‘Kuandai Zhongguo’ Zhanlv ji Shishi Fangan’ [‘Broadband China’ Strategy and Implementation Plan (author’s translation)] (2013) <[www.gov.cn/zwggk/2013-08/17/content\\_2468348.htm](http://www.gov.cn/zwggk/2013-08/17/content_2468348.htm)> accessed 30 January 2017; and the Central Government of China, ‘Broadband China’ Strategy: Network and Application’ (*China Communications*) <<http://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=6623497>> accessed 30 January 2017.

services<sup>228</sup> and so, consequently, consumer welfare cannot be advanced. In theory, *the Chinese Anti-Monopoly Law 2007* should prohibit these anti-competitive practices; however, in reality, this Law has lost its function of achieving effective competition,<sup>229</sup> as well as that of protecting the interests of privately-owned fixed-broadband operators and consumer welfare. In this regard, the ultimate objective of *the Chinese Anti-Monopoly Law 2007*, namely the “public interest”, is sidelined. Therefore, this section of the chapter examines the survival conditions of privately-owned fixed-broadband operators caused by the lack of “network interoperability” in China; it analyses the anti-monopoly probe into Chinese telecommunications SOEs (2011); and it evaluates genuine functions of new telecommunications intervention policies for private funds.

### 4.3.1 Cooperation and Competition Reform for “Network Interoperability” – Struggling in China’s Fixed-Broadband Sector

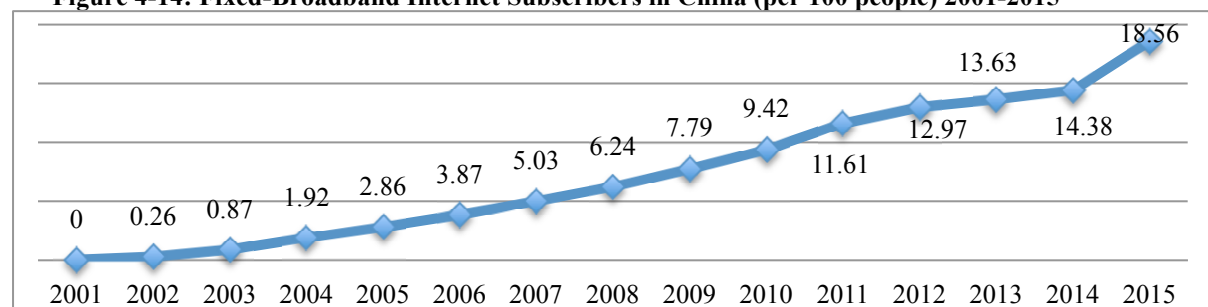
Ten years after the World Wide Web was born in August 1991, China began to build its own network in 2001,<sup>230</sup> and from that time fixed-broadband subscriptions have continued to grow.<sup>231</sup> However, in comparison with some EU Member States, the Chinese rate is still at a low penetration level.<sup>232</sup> Due to the important role of network construction in national

<sup>228</sup> See Xinhua News, ‘China Pledges Faster and Cheaper Internet’ *China Daily (USA)* (Beijing, 16 May 2015) <[http://usa.chinadaily.com.cn/business/2015-05/16/content\\_20735353.htm](http://usa.chinadaily.com.cn/business/2015-05/16/content_20735353.htm)> accessed 30 January 2017.

<sup>229</sup> See Qian Yu and Qu Zhongfang, ‘Tongxun: Dianxin Shichang Longduan Jidai Pobing’ [Communications: Telecommunications Monopolies Waiting to Break the Ice (author’s translation)] *Beijing Business* (Beijing, 23 June 2012) T04.

<sup>230</sup> However, Diarmuid pointed out that “China connects to NSFNET (National Science Foundation Network), the early backbone network of internet” in 1994: Diarmuid Rossa Phelan, ‘Major Events in European and Chinese International Development 1947-2013’ (2015) *Zeitschrift für Chinesisches Recht* 359, 378.

<sup>231</sup> **Figure 4-14: Fixed-Broadband Internet Subscribers in China (per 100 people) 2001-2015**



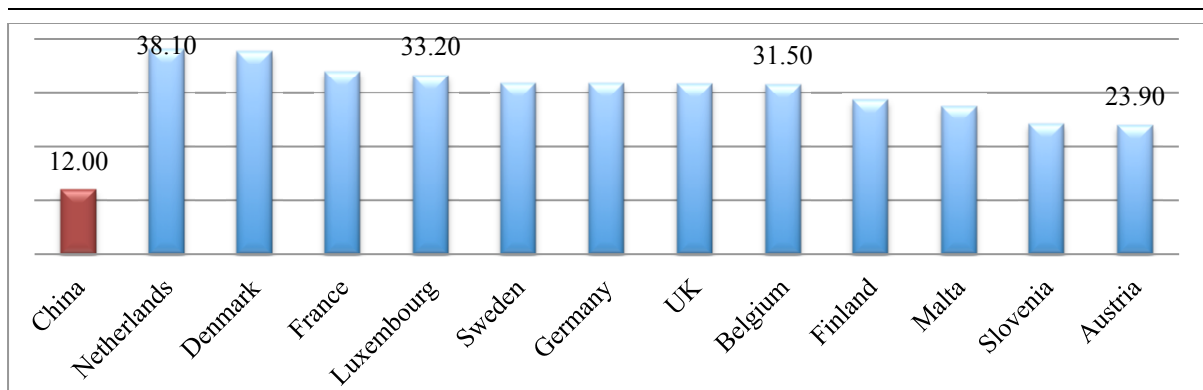
Source: ‘Fixed-Broadband Internet Subscribers (per 100 people)’; figure devised by the author.

See World Bank, ‘Fixed-Broadband Internet Subscribers (per 100 people)’ (*The World Bank*, 2016) <<http://data.worldbank.org/indicator/IT.NET.BBND.P2>> accessed 30 January 2017.

<sup>232</sup> **Figure 4-15: Fixed-Broadband Internet Subscribers of Some EU Member States and China, Early 2011 (per 100 people)**

economic development,<sup>233</sup> increasing the network penetration has been a vital task for the Chinese government in recent years.<sup>234</sup>

However, under the semi-government-guiding mode, the State, which cannot avoid advancing its own interests, often obstructs the reform process. Thus, the broadband revolution has become complicated, though indispensable, in China.<sup>235</sup> Accordingly, “network interoperability”, which would create low-priced, but also high-speed, fixed-broadband services, has not yet been realised. Concurrently, a duopoly/oligopoly model, established by two/three telecommunications SOEs, has existed in the Chinese fixed-broadband sector for a long period.<sup>236</sup>



Source: ‘The World in 2011 – ICT Facts and Figures’; figure devised by the author.

See International Telecommunication Union (ITU), ‘The World in 2011 – ICT Facts and Figures’ (ITU, 2011) <[www.itu.int/ITU-D/ict/facts/2011/material/ICTFactsFigures2011.pdf](http://www.itu.int/ITU-D/ict/facts/2011/material/ICTFactsFigures2011.pdf)> accessed 30 January 2017.

<sup>233</sup> Recent research shows that broadband construction will help advance the economic and social development of China. For every 10 percent increase in broadband penetration, the State will achieve a 1.3 percent increase in GDP: see, e.g., Chinese Institute of Engineering Development Strategies, *Zhongguo Zhanlvxing Xinxing Chanye Fazhan Baogao (2013)* [2013 Report on the Development of China’s Strategic Emerging Industries] (Science Press, China 2013) 211; and Wu Hequan, ‘Xiandai Xinxing Keji de Fazhan yu Chanye Biange’ [The Development of Modern Information Technologies and Revolution of the Telecommunications Industry (author’s translation)] (*The National People’s Congress*, 12 November 2013) <[www.npc.gov.cn/npc/xinwen/2013-11/12/content\\_1813242.htm](http://www.npc.gov.cn/npc/xinwen/2013-11/12/content_1813242.htm)> accessed 30 January 2017.

<sup>234</sup> See Eric Harwit, ‘China’s Telecommunications Industry: Development Patterns and Policies’ (1998) 71 *Pacific Affairs* 175, 193.

<sup>235</sup> See World Bank and Development Research Center of the State Council, the People’s Republic of China, *China 2030: Building a Modern, Harmonious, and Creative Society* (The World Bank 2013) 162; and Chapter 4.3.2.1 below.

<sup>236</sup> **Table 4-16: A Chronology of Chinese Telecommunications SOEs in the Fixed-Broadband Market**

Time	Chinese Telecommunications SOEs	Did/Do SOEs operate a duopoly model in the Chinese fixed-broadband market?
Before 1994	Ministry of Posts and Telecommunications of China	Monopoly
1994-1997	Directorate General of Telecommunications, P&T, China (China Telecom)	Formulated a duopoly model
	China United Network Communications Group Co., Ltd (China Unicom)	

	Jitong Network Communications Company Limited (China Jitong)	N/A
1998-2001	<b>China Telecom</b>	Formulated a duopoly model in <i>the Chinese telecommunications market</i>
	<b>China Unicom</b>	
	China Jitong	Non-fixed-broadband network operators
	China Satellite Communications Co. Ltd. (China Satcom)	
	China Mobile Ltd. (China Mobile)	
	China Tietong	
China Netcom		
2002-2007	<b>China Telecom</b>	<b>Yes</b>
	<b>China Netcom</b>	No
	China Tietong	Non-fixed-broadband network operators
	China Unicom	
	China Mobile	
	China Satcom	
2008-2011	<b>China Telecom</b>	<b>Yes</b>
	<b>China Unicom</b>	Merged without regard for the requirement of <i>the Chinese Anti-Monopoly Law 2007</i> , occupied more than 90 percent of the market share
	China Mobile	Non-fixed-broadband network operator

Source: *Dianxin Hangye: Jingzheng Fenxi Fangfa yu Shijian* [Telecommunications Industry: Competitive Analysis Methods and Practice] for information before 2008, *Anti-Monopoly Law and Practice in China* for information in 2008-2011; table devised by the author.

January 2012- November 2015	<b>China Telecom</b>	<b>Yes</b>
	<b>China Unicom</b>	Occupied over 85 percent of the market share by the end of 2012, and occupied approximately 65 percent of the market share by the end of November 2015
	China Mobile	Became a fixed-broadband network operator in December 2013, but until November 2015 the new arrangement had not changed <b>the duopoly model</b> in the fixed-broadband market.
	China Broadcasting Network (CBN)	Became a fixed-broadband network operator in 2014, but the new arrangement did not change <b>the duopoly model</b> in the fixed-broadband market.

Source: 'Fagaiwei Kuandai Fanlongduan Diaocha Shangwei Jian' [NDRC Broadband Antitrust Investigation is not yet Concluded (author's translation)], 'Disida Dianxin Yunyingshang Dansheng, Guangdian Guowang Nengxian Duodalang?' [China's Fourth-Largest Operator Launched; Can China Broadcasting Network Lift Heavy Waves? (author's translation)]; table devised by the author.

Time	Chinese Telecommunications SOEs	Market Share of SOEs in the Chinese fixed-broadband market (Thousand)	Did/Do SOEs operate a duopoly model in the Chinese fixed-broadband market?
December 2015-the present time	<b>China Telecom</b>	Over 120,000 households users	From <b>the duopoly model</b> to <b>the oligopoly model</b>
	<b>China Unicom</b>	Over 72,000 households users	
	<i>China Mobile</i>	Over 60,000 households users	
	CBN	Over 20,000 households users	No

Source: 'Disida Dianxin Yunyingshang Dansheng, Guangdian Guowang Nengxian Duodalang?' [China's Fourth-Largest Operator Launched; Can China Broadcasting Network Lift Heavy Waves? (author's translation)]; table devised by the author.

See Mark Williams, *Competition Policy and Law in China, Hong Kong and Taiwan* (CUP 2005) 191; H Stephen Harris and others (eds), *Anti-Monopoly Law and Practice in China* (OUP 2011) 198; Song Jie and others (eds), *Dianxin Hangye: Jingzheng Fenxi Fangfa yu Shijian* [Telecommunications Industry: Competitive Analysis Methods and Practice (author's translation)] (Posts & Telecom Press, China 2009) 84; Lang Lang, 'Fagaiwei Kuandai Fanlongduan Diaocha Shangwei Jian' [NDRC Broadband Antitrust Investigation is not yet Concluded (author's translation)] *21st Century Media* (Beijing, 12 December 2012) 20; Ding Yougang (ed),

As far back as the mid-1980s, apart from the US, most telecommunications enterprises throughout the world were controlled by the State by a natural monopoly.<sup>237</sup> However, an attitude that effective competition could kick-start a bright future for the telecommunications industry appeared in the EU in the mid-1970s,<sup>238</sup> because with technological development, State monopoly in the telecommunications industry became less conspicuous.<sup>239</sup> In 1983, the ‘Littlechild Report’ (also known as the ‘Regulation of British Telecommunications’ Profitability’)<sup>240</sup> maintained that “competition is indisputably the most effective – perhaps the only effective means – of protecting consumers against monopoly power. Regulation is essentially the means of preventing the worst excesses of monopoly; it is not a substitute for competition...”<sup>241</sup> Subsequently, cooperation and competition received unprecedented attention in the industry and piloted the industry’s reform globally, especially in developed countries.<sup>242</sup>

Basically, this cooperation and competition reform includes two elements: (a) launching

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*Zhongguo Qiye Chongzu Anli [Cases of Companies Reorganisation in China]* (Dongbei University of Finance & Economic Press, China 2009) 116; Shi (n 7) 240; Li Hongxia, ‘Yidong Huode Guwang Paizhao Yingxiang de Bujinshi Kuandai’ [China Mobile Received Fixed-Line Licence in 2013, Its Effect is larger than Broadband (author’s translation)] (*China Academy of Telecommunication Research of MIIT*, 19 March 2014) <[http://finance.ifeng.com/a/20140325/11973667\\_0.shtml](http://finance.ifeng.com/a/20140325/11973667_0.shtml)> accessed 30 January 2017; Guo Xiaofeng, ‘Disida Dianxin Yunyingshang Dansheng, Guangdian Guowang Nengxian Duodalang?’ [China’s Fourth-Largest Operator Launched; Can China Broadcasting Network Lift Heavy Waves? (author’s translation)] (*Tencent, China*, 6 May 2016) <<http://tech.qq.com/a/20160506/011443.htm>> accessed 30 January 2017; and Fan Feifei, ‘CBN Seeks Telecommunication Operating Business License’ *China Daily* (Beijing, 22 April 2016) <[http://europe.chinadaily.com.cn/business/2016-04/22/content\\_24742911.htm](http://europe.chinadaily.com.cn/business/2016-04/22/content_24742911.htm)> accessed 30 January 2017; Reuters, ‘China Awards 4th Telecom License to State-Owned Broadcaster’ (*Reuters*, 5 May 2016) <[www.reuters.com/article/china-telecoms-idUSL3N18227E](http://www.reuters.com/article/china-telecoms-idUSL3N18227E)> accessed 30 January 2017.

<sup>237</sup> See Robert W Crandall, *Competition and Chaos: U.S. Telecommunications Since the 1996 Telecom Act* (Brookings Institution Press 2005) 1 & 7; Neil Fligstein, ‘Lessons from Europe: Some Reflections on the European Union and the Regulation of Business’ in Edward J Balleisen and Davia A Moss (eds), *Government and Markets: Toward a New Theory of Regulation* (CUP 2012) 151; Xu Junqi and Bernd Holznagel, *Ronghe Beijing Xiade Zhongou Dianxin Guanzhi Bijiao [Comparative Study on the EU-China Telecommunication Regulation in a Convergent Era]* (Beijing University of Posts and Telecommunications Press 2009) 22-23; and Andrea Renda, ‘Telecommunications Regulation’ in Roger J Van Den Bergh and Alessio M Paces (eds), *Regulation and Economics* (2nd edn, Edward Elgar 2012) 341.

<sup>238</sup> See Commission, ‘Council Resolution of 15 July 1974 on a Community Policy on Data Processing’ [1974] OJ C 86; and Volker Schneider, ‘Institutional Reform in Telecommunications: The European Union in Transnational Policy Diffusion’ in Maria Green Cowles, James Caporaso and Thomas Risse (eds), *Transforming Europe: Europeanization and Domestic Change* (Cornell University Press 2001) 76.

<sup>239</sup> See Tuna Baskoy, *The Political Economy of European Union Competition Policy: A Case Study of the Telecommunications Industry* (Routledge 2008) 2 & 86.

<sup>240</sup> In general, see Stephen C Littlechild, *Regulation of British Telecommunications’ Profitability* (Department of Industry 1983).

<sup>241</sup> *Ibid*, para 4.11.

<sup>242</sup> See Jon Stern, ‘What the Littlechild Report Actually Said’ (Proceedings of a joint LBS Regulation Initiative, CRI and City University Business School Conference, London, 2003); Fligstein (n 237) 152; and Baskoy (n 239) 96.



telecommunications law to encourage the provision of network access and service interoperability among all network operators within the country<sup>243</sup>; and, (b) privatisation and breaking-up State monopolies,<sup>244</sup> in order to enhance competition within the industry.<sup>245</sup>

With a similar approach to the EU and the US, China is also apparently dedicating itself to cooperation and competition reform. However, with regard to cooperation, although China first launched its “network interoperability” reform in 2003, the goal has not yet been achieved in the fixed-broadband market.<sup>246</sup> With regard to competition, although competition

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<sup>243</sup> For example, in the UK, telecommunications enterprises should ensure the provision of network access and service interoperability. In the EU, the importance of broadband networks interoperability is emphasised. In the US, each telecommunications enterprise in the country has a duty to interconnect with the facilities and equipment of others: see, e.g., Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on Guidelines for Trans European Telecommunications Networks and Repealing Decision’ (2011) No 1364/2006/EC; the Telecommunications Act 1984 (England and Wales), Sec 8;

8 Special provisions applicable to certain licences

(1) This section applies to any licence granted under Section 7 above to a particular person which includes conditions requiring that person —

... (b) to connect to any telecommunication system to which the licence relates, or permit the connection to any such system of, such other telecommunication systems and such apparatus as are specified in the licence or are of a description so specified;

(c) to permit the provision by means of any telecommunication system to which the licence relates of such services as are specified in the licence or are of a description so specified...

The Communications Act 2003 (England and Wales), Sec 4;

4 Duties for the purpose of fulfilling Community obligations

... (7) The fifth Community requirement is a requirement to encourage, to such extent as OFCOM consider appropriate for the purpose mentioned in subsection (8), the provision of network access and service interoperability...

and the Telecommunications Act of 1996 (US), Sec 251;

SEC. 251. Interconnection

(a) General Duty of Telecommunications Carriers — Each telecommunications carrier has the duty —

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256...

<sup>244</sup> See Treaty on the Functioning of the European Union [2008] OJ C115/49.

Article 345 (ex Article 295 TEC): The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.

<sup>245</sup> See Ian Walden (ed), *Telecommunications Law and Regulation* (4th edn, OUP 2012) Ch 2.8; James B Speta, ‘Antitrust and Local Competition under the Telecommunications Act’ (2003) 71 *Antitrust Law Journal* 99, 122; Crandall (n 237) 72-73; and Baskoy (n 239) 113-15

<sup>246</sup> See ‘Circular of the General Office of the State Council on Distributing the Opinions of the Ministry of Information Industry and Other Departments on Further Strengthening the Supervision Over the Telecommunications Market’ (2003) <[www.lawinfochina.com/display.aspx?lib=law&id=3161&CGid=>](http://www.lawinfochina.com/display.aspx?lib=law&id=3161&CGid=>) accessed 30 January 2017.

was permitted in this industry since 1992,<sup>247</sup> and opening the telecommunications market to private investment has been mentioned at certain times, this sector has been continuously controlled and intervened in, by the State. Chinese telecommunications SOEs, who treat self-interest as a matter of priority,<sup>248</sup> have operated a duopoly model in the telecommunications market since 1994,<sup>249</sup> as well as in the fixed-broadband market between 2002 and 2015 (see Table 4-16 above).

The development of the Internet created a reform opportunity for the Chinese telecommunications industry: for example, *the Telecommunications Regulations of China 2000* came into force in order to spread networks based on “network interoperability”.<sup>250</sup> However, the fixed-broadband market was artificially divided by the State Council for China Netcom and Telecom.<sup>251</sup> Although this might be beneficial for developing a network

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<sup>247</sup> See Yukyung Yeo, ‘Regulating China’s Industrial Economy: A Comparative Case Study of Auto and Telecom Service Sectors’ (PhD thesis, University of Maryland 2007) 134.

<sup>248</sup> See OECD, ‘Review of the Development and Reform of the Telecommunications Sector in China’ (13 March 2003) DSTI/ICCP(2002)6/FINAL.

<sup>249</sup> In the second half of 1992, in order to establish China Unicom (a telecommunications SOE), the former Ministry of Electronics Industry, the Ministry of Electric Power Industry and the Ministry of Railways unveiled their joint proposal to the State Council. This proposal highlighted the importance of introducing competition into the domestic telecommunications markets, as well as mentioning the fact that this market had serious contradictions: China Telecom (another telecommunications SOE) monopolised the market, and the market supply was unable to meet the demand. Subsequently, China Unicom was established in 1994. However, contrary to the original intentions of the proposal, China Telecom and Unicom created a duopoly model in the telecommunications market: see, e.g., Yuan Chunhui, *Guanzhi Zhili: Zhongguo Dianxin Changye Gaige Shizheng Yanjiu [Regulatory Governance: Empirical Study on the Reform of the Chinese Telecommunications Industry]* (author’s translation) (Posts & Telecom Press, China 2009) 132-33; Ju (n 42) 154; Doug Pitt, Naill Levine and Yan Xu, ‘Unity of Objective, Diversity of Approach: Deregulatory Telecom Developments in Hong Kong and China’ (1999) 37 IEEE Communications Magazine 100, 102; and Scott Yunxiang Guan, *China’s Telecommunications Reforms: From Monopoly Towards Competition* (Nova Biomedical 2002) 19-20.

<sup>250</sup> See the Telecommunications Regulations of China 2000, Art 17.

Article 17: Interconnection among telecommunications networks shall be carried out based on the principles of technical feasibility, economic reasonableness, fairness, impartiality and mutual cooperation.

Major telecommunications operators shall not reject interconnection requests from other telecommunications operators and private network operators.

“Major telecommunications operators” as referred to in the preceding paragraph shall mean operators that control essential telecommunications infrastructure and have a large share of the telecommunications market, and that therefore may have a material effect on the entry of other telecommunications operators into the telecommunications market.

Such major telecommunications operators shall be determined by the supervisory department for the information industry under the State Council.

<sup>251</sup> In the Chinese fixed-broadband market, the new China Netcom controls 10 northern and coastal provinces and cities. These are Heilongjiang, Liaoning, Jilin, Hebei, Henan, Inner Mongolia, Shandong, Shanxi, Beijing and Tianjin. The new China Telecom controls 21 provinces and cities, most of which are in the south of China. These are Anhui, Chongqing, Gansu, Guangxi, Hainan, Hunan, Jiangsu, Ningxia, Sichuan, Xinjiang, Zhejiang, Fujian, Guangdong, Guizhou, Hebei, Jiangxi, Qinghai, Shaanxi, Shanghai, Tibet and Yunnan: OECD (n 248).

infrastructure and temporarily maximising the interests of SOEs, this administrative conduct has made the attainment of “network interoperability” impossible.

Whilst a new Chinese policy (that was supposed to oppose the divide-and-conquer strategy and emphasise a balance of interests between SOEs, privately-owned enterprises and consumers) was announced in 2008,<sup>252</sup> this turned out to be an empty promise. The duopoly/oligopoly model remained (see Table 4-16 above), and China Telecom and Unicom, which rarely made efforts to develop “network interoperability”, refuse to contemplate market competition.<sup>253</sup> Since 2012, although telecommunications SOEs have encouraged the “network interoperability” of the *broadband mainline*<sup>254</sup>, they have shown no concern for the interoperability of the residential broadband network.<sup>255</sup> Hence, low-priced but high-speed service for Chinese fixed-broadband consumers has not been realised.

The Central Government of China turned towards encouraging private funds to enter the *basic broadband operation*<sup>256</sup> market since 2010, with the aim of breaking up monopolies and increasing competition.<sup>257</sup> However, without “network interoperability”, this policy is hardly exciting news.<sup>258</sup> Since telecommunications SOEs control the national telecom

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<sup>252</sup> In 2008, the NDRC, the MIIT and the Ministry of Finance of the Government of China launched a policy titled ‘Notices on Deepening the Reform of the Telecommunications System’ (2008), to identify the importance of competition and “network interoperability” in the telecommunications industry: ‘Guanyu Shenhua Dianxin Tizhi Gaige de Tonggao’ [Notice on Deepening the Reform of the Telecommunications System (author’s translation)] (2008) <[www.gov.cn/gzdt/2008-05/24/content\\_991345.htm](http://www.gov.cn/gzdt/2008-05/24/content_991345.htm)> accessed 30 January 2017.

<sup>253</sup> See Zhang Weiyang and Sheng Hong, ‘Cong Dianxinye Kan Zhongguo de Fanlongduan Wenti’ [Examining the Chinese Anti-Monopoly Issues in the Telecommunications Industry (author’s translation)] (1998) 2 *Revolution* 66; and Donald Wittman, ‘The End of Special Interests Theory and the Beginning of a More Positive View of Democratic Politics’ in Edward J Balleisen and Davia A Moss (eds), *Government and Markets: Toward a New Theory of Regulation* (CUP 2012) 207.

<sup>254</sup> *Broadband mainline/backbone* in this thesis is public network infrastructure in China which provides network access to retailers rather than individual customers. The mainline is normally divided into certain smaller lines to enter residential areas.

<sup>255</sup> Interview with a staff member of China Unicom Cangzhou Branch (the interviewee did not agree to the researcher using the interviewee’s name in any written work arising from the study, but did consent to being interviewed) (Cangzhou, China, 2012); and Interview with a staff member of China Telecom Cangzhou Branch (the interviewee did not agree to the researcher using the interviewee’s name in any written work arising from the study, but did consent to being interviewed) (Cangzhou, China, 2012).

<sup>256</sup> *Basic broadband operation* includes providing public network infrastructure; public data transfer services; basic voice communication services.

<sup>257</sup> See ‘Several Opinions of the State Council on Encouraging and Guiding the Healthy Development of Private Investment’ (2010) (n 14); and ‘Gongye he Xinxihuabu Guanyu Guli he Yindao Minjian Ziben Jinyibu Jinru Dianxinye de Shishi Yijian’ [MIIT’s Views on Encouraging and Guiding Further Investment of Private Capital in the Telecommunications Industry (author’s translation)] (2012) <[www.gov.cn/zwgk/2012-06/28/content\\_2171772.htm](http://www.gov.cn/zwgk/2012-06/28/content_2171772.htm)> accessed 30 January 2017.

<sup>258</sup> See Hou Yulong, ‘Minzi Jinru Dianxinye Shidian Fangan Chengxing’ [Pilot Program of Private Capital into

backbone network and the metropolitan area network, they can choose whether to take the initiative of opening up the broadband market or not. If SOEs refuse to implement the State's 2010 intervention policy, privately-owned fixed-broadband operators are unable to do anything about the duopoly/oligopoly model.

In 2011, the NDRC carried out a probe into the anti-competitive conduct of China Unicom and Telecom, because they were creating different transaction terms for different buyers, and were refusing to achieve “network interoperability”.<sup>259</sup> However, the results were mixed.<sup>260</sup> This government-initiated anti-monopoly probe failed to make significant progress on “network interoperability” on behalf of privately-owned fixed-broadband operators.<sup>261</sup> Therefore, in 2013, the State announced again that it was encouraging private funds to invest in the fixed-broadband sector (see footnote 227 above).<sup>262</sup> Furthermore, the MIIT launched a document ‘Broadband Access Network Business Open Pilot Programme’ (2014) to allow privately-owned fixed-broadband operators to apply for broadband operator licences.<sup>263</sup> Subsequently, the first three privately-owned broadband operators, namely Suning Commerce Group, Great Wall Broadband Network, and Wangsu Science & Technology, which were approved in June 2015, took the first steps towards attempting to

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the Telecommunications Industry (author's translation)] *Economic Information Daily* (Beijing, 13 November 2012) A01 & A02.

<sup>259</sup> See Zhong Jingjing and Zhao Jin, ‘Dianxin Liantong Shenqing Zhongzhi Fanlongduan Diaocha’ [China Telecom and Unicom Apply for Suspension of Anti-Monopoly Investigation (author's translation)] *Xinjingbao* [*The Beijing News*] (Beijing, 3 December 2011) A01 & A04; Xiaoye Wang, *The Evolution of China's Anti-Monopoly Law* (Edward Elgar Publishing 2014) 376; and Harris and others (eds) (n 236) 116-17.

<sup>260</sup> The NDRC implemented commitment in this investigation. However, the result of the commitment only enhanced “network interoperability” between China Telecom and Unicom, rather than the interoperability between telecommunications SOEs and privately-owned fixed-broadband operators: see, e.g., Chapter 4.3.2.1 below; and Wang Xiaoye, ‘Zhongguo Dianxin Zhongguo Liantong Shexian Longduanan de Zaisikao’ [Rethinking the Anti-Monopoly Probe of China Unicom and China Telecom (author's translation)] (2013) 2 *Shanghai Jiaotong University Law Review*, China 5.

<sup>261</sup> See Chapter 4.3.2.1 below; Xinhua News, ‘NDRC to Rule on Broadband Monopoly’ (*Xinhua, China*, 20 February 2014) <[www.chinadaily.com.cn/bizchina/2014-02/20/content\\_17293756.htm](http://www.chinadaily.com.cn/bizchina/2014-02/20/content_17293756.htm)> accessed 30 January 2017; and Sun Zhenghua, ‘Liantong Dianxin Fanlongduanan Yuanhe Sannian Wuguo’ [Why the Anti-Monopoly Probe of China Unicom and China Telecom has been of No Avail in 3 Years (author's translation)] *Legal Weekly* (Beijing, 25 February 2014) <[www.legalweekly.cn/index.php/Index/article/id/4613](http://www.legalweekly.cn/index.php/Index/article/id/4613)> accessed 30 January 2017.

<sup>262</sup> See Xue Song, ‘Kuandai Jieru Yewu Nixiang Minzi Kaifang’ [The Imminent Opening up of the Chinese Broadband Internet Access Market to Private Funds (author's translation)] *Guangzhou Daily* (Guangzhou, 11 April 2014) AIII4; and Xie Lirong, ‘China Restarts Telecom Industry Reform’ (*Caijing Magazine, China*, 3 June 2014) <<http://english.caijing.com.cn/2014-06-03/114232047.html>> accessed 30 January 2017.

<sup>263</sup> See ‘Kuandai Jieruwang Yewu Kaifang Shidian Fang'an’ [Broadband Access Network Business Open Pilot Programme] (2014) <[www.techweb.com.cn/tele/2014-12-25/2111097.shtml](http://www.techweb.com.cn/tele/2014-12-25/2111097.shtml)> accessed 30 January 2017.

break the State monopoly.<sup>264</sup> However, without complete “network interoperability” being achieved, others have observed that the government was just paying lip service to privately-owned fixed-broadband operators.<sup>265</sup>

Furthermore, with regard to international competitiveness, the Central Government of China (in January 2016) has proposed to consolidate reform of the telecommunications industry<sup>266</sup>, by cooperation between China Unicom and Telecom.<sup>267</sup> Although “network interoperability” will be improved for these two SOEs, privately-owned broadband operators will derive hardly any benefit from the SOEs’ cooperation.

Consequently, reviewing the Chinese telecommunications reform approach over the past two decades, although this sector has repeatedly experienced reforms to introduce competition and cooperation, the continuation of the preservation of the duopoly/oligopoly model of SOEs has been a constant theme, because telecommunications SOEs often ignore their duties to support other network operators, especially privately-owned operators. Without proper competition, sharing benefits from the existing network of SOEs becomes particularly difficult for privately-owned fixed-broadband operators. Accordingly, low-priced high-speed fixed-broadband services are, at the current time, unachievable dreams for

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<sup>264</sup> See Zhou Tao, ‘Shoupi Mingying Kuandai Yunyingshang Dansheng, Kuandai Shichang Longduan huo Dapo’ [Privately-Owned Broadband Operators First Approved, Monopoly Might Be Broken Up (author’s translation)] (*Huanqiu, China*, 24 June 2015) <<http://tech.huanqiu.com/original/2015-06/6757336.html>> accessed 30 January 2017.

<sup>265</sup> See Xinhua News, ‘Analysis that is Difficult to Break the Monopoly of Private Broadband’ (*Netease Technology*, 6 July 2015) <[www.hihuadu.com/2015/07/06/analysis-that-is-difficult-to-break-the-monopoly-of-private-broadband-28068.html](http://www.hihuadu.com/2015/07/06/analysis-that-is-difficult-to-break-the-monopoly-of-private-broadband-28068.html)> accessed 30 January 2017.

<sup>266</sup> See Securities Times, ‘Gongxinbu: Zhengzai Kaolv Dianxinye Shenhua Gaige Fangxiang’ [MIIT: Telecom Deepening the Reform Process and the Direction Being Considered] (*Zhengquan Shibao* [*Securities Times*], *China*, 5 November 2015) <<http://kuaixun.stcn.com/2015/1105/12469483.shtml>> accessed 30 January 2017.

<sup>267</sup> Although in 2015 there were reports in the international media that China Unicom and Telecom would be merged in early 2016, the Executive Director, Chairman and CEO of China Unicom stated that a merger between China Unicom and Telecom would be impossible. In January 2016, China Unicom and Telecom signed a strategic cooperation agreement in order to quash the merger rumour: see, e.g., Xie Lirong, ‘Liantong Dongshizhang Wang Xiaochu: Dianxin Liantong jiang Hebing Chunshu Yaoyan’ [CEO of China Unicom Wang Xiaochu: A Rumor of a Merger between China Unicom and Telecom (author’s translation)] (*Caijing Magazine, China*, 29 December 2015) <<http://yuanchuang.caijing.com.cn/2015/1229/4043499.shtml>> accessed 30 January 2017; Mou Yinzhi, ‘Dianxinye dao Gaidian, Hebing neng Jiuchang?’ [Whether a Merger Can Help When the Telecommunications Industry has Reached Crisis Point (author’s translation)] *Legal Evening News* (Beijing, 24 August 2015) A28; and Yang Bo, ‘Zhongguo Dianxin yu Zhongguo Liantong Qianshu Zhanlve Hezuo Xieyi, Fourein Hebing Chuanyan’ [The Signing of a Strategic Cooperation Agreement between China Unicom and China Telecom, and Denial of the Merger Rumour (author’s translation)] (*people.cn, China*, 13 January 2016) <<http://it.people.com.cn/n1/2016/0113/c1009-28048098.html>> accessed 30 January 2017.

Chinese consumers. Therefore, certain laudable goals of *the Chinese Anti-Monopoly Law 2007*, such as fair and effective competition, consumer welfare, and promoting the interests of privately-owned SMEs, have no chance of being attained. With the absence of consumer welfare and the interests of privately-owned fixed-broadband operators, the “public interest” (reconciliation between the State’s interest, interests of SOEs, interests of privately-owned SMEs, and consumer welfare) is impossible to realise.

#### **4.3.2 The “Public Interest” Requiring Privately-Owned Operators to Participate in the Fixed-Broadband Market**

Because competition reform does not work as expected in the fixed-broadband market, responsibility for protecting privately-owned operators falls on *the Chinese Anti-Monopoly Law 2007*. However, from an examination of *the anti-monopoly probe of China Unicom and Telecom* (2011), it is not difficult to conclude that the results<sup>268</sup> of this probe failed to advance the ability of privately-owned fixed-broadband operators to compete against the SOEs.<sup>269</sup> Furthermore, outcomes of semi-structured interviews carried out by the author in two Chinese cities, show that privately-owned fixed-broadband operators still suffer discrimination in the telecommunications industry, without deriving any protection from *the Chinese Anti-Monopoly Law 2007*. Therefore, it is necessary to investigate whether or not the current (from 2013 onwards) administrative intervention concerned with boosting the emergence of privately-owned fixed-broadband operators could promote competition and a balance of interests between SOEs, privately-owned operators and consumers towards the “public interest” in the fixed-broadband market.

##### *4.3.2.1 The Anti-Monopoly Probe of China Unicom and Telecom (2011) – Opportunity or Crisis for Privately-Owned Fixed-Broadband Operators*

The NDRC believed that China Unicom and Telecom were abusing their dominant position to create differential pricing and were refusing “network interoperability” in the Chinese fixed-broadband market,<sup>270</sup> as well as maintaining high-level access costs with a

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<sup>268</sup> See below Chapter 4.3.2.1.

<sup>269</sup> See Wang, ‘Zhongguo Dianxin Zhongguo Liantong Shexian Longduanan de Zaisikao’ [Rethinking the Anti-Monopoly Probe of China Unicom and China Telecom (author’s translation)] (n 260).

<sup>270</sup> See Wang, *The Evolution of China’s Anti-Monopoly Law* (n 259) 381-82; China Economic Review, ‘China

low level internet speed.<sup>271</sup> It investigated the anti-competitive conduct of these two SOEs in 2011.<sup>272</sup> However, as an evaluation of the practical applications of *the Chinese Anti-Monopoly Law 2007* in this probe, it can be asserted that the situation is not optimistic.<sup>273</sup>

First, regarding the original purpose of the NDRC when it proposed the investigation of China Unicom and Telecom, there was a “commonly known but secret” agenda: in addition to enhancing “network interoperability” of the mainline or backbone broadband, this probe also took responsibility for creating an oligopoly of SOEs in the Chinese broadband market.<sup>274</sup> With technological development, the NDRC chose to give a slice of the fixed-broadband market to another SOE, namely China Broadcasting Network (CBN) (established in 2014),<sup>275</sup> in order to achieve “triple-play interoperability” (telecommunications networks, radio networks and Internet convergence).<sup>276</sup> However,

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Telecom, Unicom Targeted in Monopoly Probe’ (*China Economic Review*, 10 November 2011) <[www.chinaeconomicreview.com/content/china-telecom-unicom-targeted-monopoly-probe](http://www.chinaeconomicreview.com/content/china-telecom-unicom-targeted-monopoly-probe)> accessed 30 January 2017; the Telecommunications Regulations of China 2000, Art 22;

Article 22: Fee settlement and apportionment in connection with interconnection shall comply with the relevant provisions of the State, and no additional fees shall be charged other than those stipulated.

Technical standards, measures for fee settlement and specific administrative provisions for interconnection shall be formulated by the supervisory department for the information industry under the State Council.

and the Anti-Monopoly Law of China 2007, Arts 6 & 47.

Article 6: Any business with a dominant position may not abuse that dominant position to eliminate, or restrict competition.

Article 47: Where any business operator abuses its dominant market status in violation of this Law, it shall be ordered to cease doing so. The anti-monopoly authority shall confiscate its illegal gains and impose thereupon a fine of 1% up to 10% of the sales revenue in the previous year.

<sup>271</sup> See Xinhua News, ‘China Telecom, China Unicom Pledge to Mend Errors after Anti-Monopoly Probe’ (*Xinhua, China*, 2 December 2011) <[www.china.org.cn/business/2011-12/02/content\\_24063134.htm](http://www.china.org.cn/business/2011-12/02/content_24063134.htm)> accessed 30 January 2017.

<sup>272</sup> See Thomas K Cheng, ‘Competition and the State in China’ in Thomas K Cheng, Ioannis Lianos and Daniel Sokol (eds), *Competition and the State* (Stanford University Press 2014) 170; Zhong and Zhao (n 259); and Wang, *The Evolution of China’s Anti-Monopoly Law* (n 259).

<sup>273</sup> See Wang, ‘Zhongguo Dianxin Zhongguo Liantong Shexian Longduanan de Zaisikao’ [Rethinking the Anti-Monopoly Probe of China Unicom and China Telecom (author’s translation)] (n 260).

<sup>274</sup> The commonly known but secret agenda of the NDRC broadband anti-monopoly investigation means that the agenda is known by the majority of staff members who work in the NDRC and telecommunications SOEs. However, it is a secret for other people in China: Interview with a staff member of China Telecom Cangzhou Branch (n 255).

<sup>275</sup> See Shen Jingting, ‘China Broadcasting Network Launched’ *China Daily* (28 May 2014) <[http://europe.chinadaily.com.cn/business/2014-05/28/content\\_17548046.htm](http://europe.chinadaily.com.cn/business/2014-05/28/content_17548046.htm)> accessed 30 January 2017.

<sup>276</sup> See Jianqiu Zeng, ‘Triple Play: Development Trends and Business Strategy in China’ (Management and

because China Telecom and Unicom have maintained a dominant position in the domestic fixed-broadband market for many years, they can create serious difficulties for any new entrant, even if the new entrant is a central SOE. Therefore, the broadband anti-monopoly investigation should have been a direct and effective method of redistributing market share, but in reality it has not boosted competition. If this “commonly known but secret” agenda were reasonable, this government-initiated probe would merely enhance State monopolies and extend “network interoperability” for SOEs, but without protecting the interests of privately-owned fixed-broadband operators.<sup>277</sup>

Second, the criticism of the implementation commitment in the broadband anti-monopoly investigation (2011), namely that the commitment failed to enhance “network interoperability”, has never disappeared.<sup>278</sup> Although *the Chinese Anti-Monopoly Law 2007* has adopted the commitment system for monopoly infringements, in order to improve efficiency, as well as reducing investigation costs,<sup>279</sup> the implementation has inevitably created negative effects, such as decreasing the authority of *the Chinese Anti-Monopoly Law 2007*, encouraging monopoly infringements, and so on.<sup>280</sup> Faced with the investigation,

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Service Science (MASS) 2010 International Conference, Wuhan, China, 2010).

<sup>277</sup> See Cheng (n 272) 171; and Lang (n 236).

<sup>278</sup> See Wang, ‘Zhongguo Dianxin Zhongguo Liantong Shexian Longduanan de Zaisikao’ [Rethinking the Anti-Monopoly Probe of China Unicom and China Telecom (author’s translation)] (n 260); and Wang, *The Evolution of China’s Anti-Monopoly Law* (n 259) 399-400.

<sup>279</sup> See Wang, *The Evolution of China’s Anti-Monopoly Law* (n 259) 40 & 403; and the Anti-Monopoly Law of China 2007, Art 45;

Article 45: As regards suspected monopolistic conduct that the anti-monopoly authority is investigating, if the business operators under investigation promise to eliminate the impact of the conduct by taking specific measures within the time limit prescribed by the anti-monopoly authority, the anti-monopoly authority may decide to suspend the investigation. The decision on suspending the investigation shall specify the specific measures as promised by the business operators under investigation.

Where the anti-monopoly authority decides to suspend the investigation, it shall supervise the implementation of the promise by the relevant business operators. If the business operators keep their promise, the anti-monopoly authority may decide to terminate the investigation.

However, the anti-monopoly authority shall resume the investigation, where

- (1) the business operators fail to implement the promise,
- (2) significant changes have taken place to the facts based on which the decision to suspend the investigation was made; or
- (3) the decision to suspend the investigation was made based on incomplete or inaccurate information provided by the business operators.

<sup>280</sup> See Wang, ‘Zhongguo Dianxin Zhongguo Liantong Shexian Longduanan de Zaisikao’ [Rethinking the Anti-Monopoly Probe of China Unicom and China Telecom (author’s translation)] (n 260); and Sun Jin and Feng Yannan, ‘Fanlongduanfa Chengnuo Zhidu Yunxing Jizhi Yanjiu’ [The Operating Mechanism of the Commitment under Antimonopoly Law] in Wang Xiaoye (ed), *Jingzheng Zhifa Nengli Jianshe* [Capacity



China Telecom and Unicom adopted a commitment in order to reduce violation fines: at the end of 2011, these two SOEs promised to enhance “network interoperability” and made a commitment of a 35 percent reduction in the terminal access price for fixed-broadband within 5 years.<sup>281</sup> In February 2014, China Telecom and Unicom submitted their improvement reports, which stated that (a) they had signed a settlement-free peering agreement, and implemented it since the first day of 2013, and (b) they had nearly tripled the interconnection capacity for fixed-broadband all over the country.<sup>282</sup>

Although the NDRC was satisfied with the above-mentioned outcomes,<sup>283</sup> voices of doubt were also heard<sup>284</sup>. Firstly, although between 2011 and 2014 the reduction in the terminal access price for fixed-broadband reached 30 percent, it has still not been as salutary as expected<sup>285</sup>: high-priced but low-speed fixed-broadband services remain. Secondly, the settlement-free peering agreement cannot guarantee full “network interoperability” in the fixed-broadband sector, because it only mentioned that it would benefit telecommunications SOEs rather than other fixed-broadband market participants, in particular privately-owned operators. Thirdly, commitment made under *the Chinese Anti-Monopoly Law 2007* is unable to compensate for the damage caused by the anti-competitive behaviour of China Telecom and Unicom.<sup>286</sup> Thus, it is hard for competitors and consumers to share benefits from these development, which concentrated mainly on the cooperation between these two SOEs.

Furthermore, the present level of “network interoperability” is unable to protect

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*Building for the Enforcement of Competition Law*] (Social Sciences Academic Press, China 2012).

<sup>281</sup> See Feng Ya, ‘Fagaiwei Zhengshi yi Shoudao Dianxin Liantong Zhenggai Fangan yu Zhongzhi Diaocha Shenqing’ [Acceptance by the NDRC of the Report on Implementation of the Reform Programme from China Unicom and China Telecom following the Application for Suspension of the Investigation (author’s translation)] (*Chinese Radio Network*, 2 December 2011) <[http://finance.cnr.cn/dujia/201112/t20111202\\_508869822.shtml](http://finance.cnr.cn/dujia/201112/t20111202_508869822.shtml)> accessed 30 January 2017.

<sup>282</sup> See China News, ‘Fagaiwei: Dianxin Liantong Longduanan jiang Genju Pinggu Zuochu Chuli Jueding’ [The NDRC will Make a Decision Based on the Rectification Report of China Telecom and China Unicom (author’s translation)] (*China News*, 19 February 2014) <[www.chinanews.com/gn/2014/02-19/5855627.shtml](http://www.chinanews.com/gn/2014/02-19/5855627.shtml)> accessed 30 January 2017.

<sup>283</sup> *Id.*

<sup>284</sup> See Wang, ‘Zhongguo Dianxin Zhongguo Liantong Shexian Longduanan de Zaisikao’ [Rethinking the Anti-Monopoly Probe of China Unicom and China Telecom (author’s translation)] (n 260).

<sup>285</sup> See Wu Tao, ‘Gongxinbu Tui Wucuooshi Jiangzifei Tiwangsuo’ [The MIIT Carrying out Five Measures to Improve Network Speeds and Reduce Internet Charges (author’s translation)] (*China News*, 29 April 2014) <<http://top.sina.cn/tech/2015-04-29/tnews-iavxeafs6505055.d.html?vt=4&pos=108>> accessed 30 January 2017.

<sup>286</sup> See Sun (n 261).

consumer welfare in the fixed-broadband market. Firstly, in order to win a market share in this unfair competition, most privately-owned operators have to select a low-price scheme. However, because they purchase resources from telecommunications SOEs, they rarely have any cost advantage when competing with these SOEs; and consequently boosting customer numbers is probably the only way to increase profitability. Because these privately-owned operators use a fixed bandwidth to serve as many customers as possible, their consumers obtain low speeds with low prices. Secondly, because privately-owned fixed-broadband operators may suffer from SOEs refusing to deal with them, it is hard for their consumers to obtain the continuity and stability of services.<sup>287</sup>

Consequently, with regard to both the original purpose and the outcomes of the broadband anti-monopoly investigation (2011), the aims of *the Chinese Anti-Monopoly Law 2007*, such as fair competition, interests of competitors, and consumer welfare, continue to be obstructed in the fixed-broadband market. Most importantly, the failure of these goals to be achieved means that the vital and ultimate objective of this Law, the “public interest”, suffers the same fate. Based on the real situation of privately-owned fixed-broadband operators in two Chinese cities, where the researcher carried out semi-structured interviews, unachievable fair competition makes it necessary for privately-owned SMEs and consumers to pick themselves up after disappointments over and over again.

#### 4.3.2.2 *Inability to Compete Successfully for the “Public Interest” – China’s Privately-Owned Fixed-Broadband Operators Suffering Discrimination*

With technological demand and development, services in the fixed-broadband market have become an integral part of daily life. However, after more than a decade of cooperation and competition reform in the Chinese telecommunications sector in the 21st century, the level of prices, even for the slow speed fixed-broadband services, remains high when compared with most Western countries.<sup>288</sup> Because Chinese telecommunications SOEs

<sup>287</sup> See below Chapter 4.3.2.2.

<sup>288</sup> **Table 4-17: ICT Price Sub-Baskets in Some EU Member States and China 2010-2013**

Countries	Fixed-Broadband Sub-Basket as a Percent of GNI per capita			
	2013	2012	2011	2010
Luxembourg	0.64	0.6	0.6	0.6

continue to control the vast majority of basic broadband networks for long periods of time (see Table 4-16 above), their functions must be examined carefully in order to demonstrate this scenario.

The transaction of purchasing network bandwidth between telecommunications SOEs and privately-owned fixed-broadband SMEs is not established on a fair and voluntary basis. To preserve their traditional dominant positions, SOEs do not like to sell their own survival resources to competitors, such as to privately-owned fixed-broadband SMEs.<sup>289</sup> Thus, without “network interoperability”, privately-owned SMEs which provide similar fixed-broadband services to consumers, in the same market, are unable to become effective competitors to SOEs.

Taking Cangzhou City, Hebei province, as an example, by the end of October 2012 there were two State-owned fixed-broadband operators, together with **two** privately-owned operators which occupied a total of **less than 10 percent** of the local market share.<sup>290</sup>

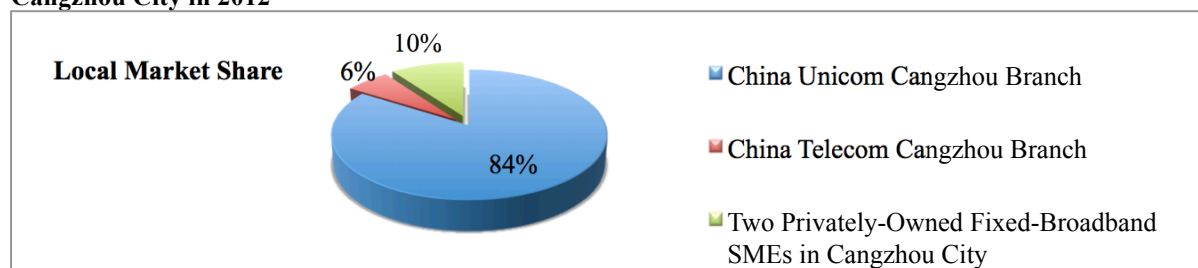
Some EU Member States	UK	0.48	0.7	0.7	0.6
	Belgium	0.88	0.9	0.7	0.6
	Netherlands	0.89	0.9	0.8	0.8
	Denmark	0.92	0.9	0.9	0.9
	France	0.79	0.8	0.8	0.9
	Finland	0.77	0.9	0.9	0.9
	Germany	1.04	1.1	1.1	1.1
	Slovenia	1.31	1.8	1.8	1.7
<b>China</b>	<b>3.54</b>	<b>5.6</b>	<b>4.5</b>	<b>5.0</b>	

Source: *Measuring the Information Society Report 2014* for data in 2013, *Measuring the Information Society Report 2013* for data in 2012 and 2011, *Measuring the Information Society 2012* for data in 2010; table devised by the author.

See ITU, *Measuring the Information Society Report 2014* (ITU 2014) 124; ITU, *Measuring the Information Society Report 2013* (ITU 2013) 116; and ITU, *Measuring the Information Society 2012* (ITU 2012) 76.

<sup>289</sup> See Wang Xiangjun, *Dianxinye Zhengfu Jianguan Yanjiu: Xingzhengfa Shijiao* [Study on Government Regulatory Practices on the Telecommunications Industry: From the Perspective of the Administrative Law (author’s translation)] (Intellectual Property Publishing House, China 2009) 127.

<sup>290</sup> **Figure 4-18: Local Fixed-Broadband Market Share of SOEs and Privately-Owned Operators in Cangzhou City in 2012**



Source: From interviews; Figure 4-18 devised by the author.

However, the market share of local privately-owned fixed-broadband SMEs suffered yet another squeeze: one, serving 0.06 million household users, faced restrictions on its leasing of broadband equipment.<sup>291</sup> On the one hand, this privately-owned SME mentioned that due to the unrealised “network interoperability”, it was unable to pay the excessively high operating costs of the fixed-broadband to China Telecom Cangzhou Branch, which offered it fixed-broadband network usage. On the other hand, without a mutually beneficial basis or win-win cooperation, Telecom Cangzhou Branch was unwilling to assist with this transfer transaction.<sup>292</sup> In other words, Telecom Cangzhou Branch became an irresponsible market participant and ignored its legal obligations as regards establishing “network interoperability” for other operators (see footnote 270 above). If this trend continues, privately-owned fixed-broadband SMEs and competition in this local market will have a bleak future.<sup>293</sup> Accordingly, for local residential broadband consumers, because obtaining a low-price and fast-speed service is currently an impossible dream, their welfare is rarely protected. From the perspective of *the Chinese Anti-Monopoly Law 2007*, with the loss of both interests of privately-owned operators and consumer welfare, the ultimate goal of this Law, the “public interest”, cannot be achieved in the local fixed-broadband market.

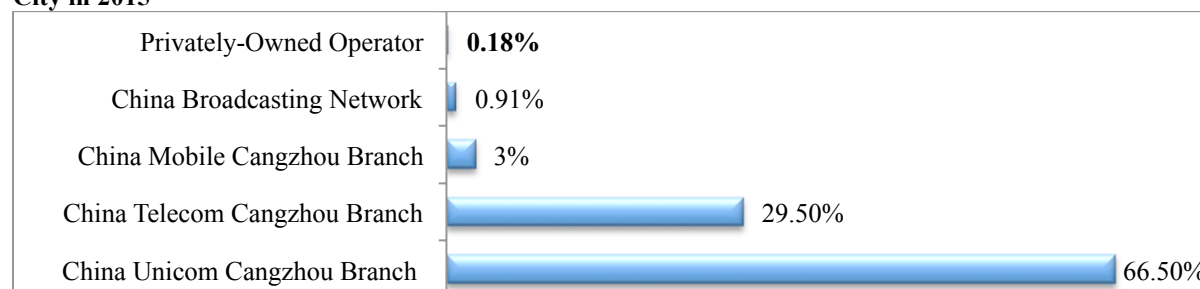
\* There were approximately 2 million households users in Cangzhou City by the end of October 2012. China Unicom Cangzhou Branch served more than 1.7 million household users. China Telecom Cangzhou Branch had nearly 0.12 million household users. One local privately-owned fixed-broadband operator that intended to sell its market share to Telecom Cangzhou Branch had approximately 0.06 million household users. The other local privately-owned fixed-broadband operator, providing fixed-broadband services for Universities and Colleges in the city, served the remaining households users: Interview with a staff member of China Unicom Cangzhou Branch (n 255); and Interview with a staff member of China Telecom Cangzhou Branch (n 255).

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> The above-mentioned scenario can be demonstrated by data collected in Cangzhou City at the end of July 2015. Only **one** privately-owned operator exists in the local market, having 1,940 household users in a market of more than 106,720 household users. Because of the State’s decision in 2013, the local market share has changed but only slightly: China Mobile Cangzhou Branch began to offer fixed-broadband services in 2014.

**Figure 4-19: Local Fixed-Broadband Market Share of SOEs and Privately-Owned Operator in Cangzhou City in 2015**



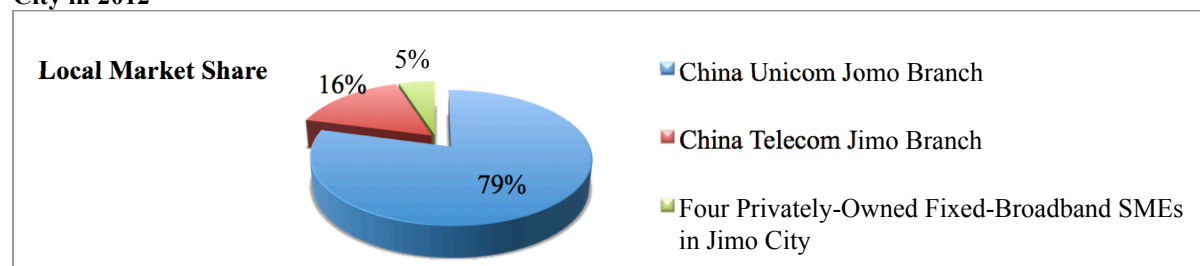
Source: From an Email; Figure 4-19 devised by the author.  
Email from China Telecom Cangzhou Branch to author (20 August 2015).

Another example can be found in Jimo City, Shandong province, China,<sup>294</sup> where local privately-owned fixed-broadband SMEs also operate in unfair competitive situations. That city is an extremely noteworthy area because the local residential broadband network had not achieved any level of interoperability by the end of 2012: China Telecom and Unicom Jimo branches had established the basis of their networks separately, and forbade interoperability use because of technology reasons.<sup>295</sup> The only way for local privately-owned SMEs to participate in the residential broadband market was to obtain network usage rights from SOEs, but transactions between local privately-owned SMEs and SOEs were not easy to accomplish, because SOEs wish to protect their own self interest. By the end of 2012, even though **four** local fixed-broadband SMEs operated in Jimo City, all of them having bought the network usage rights from China Telecom Jimo branch, the biggest one occupied merely **2 percent** of the local fixed-broadband market share.<sup>296</sup> To aggravate their plight, both China Telecom and Unicom Jimo branches stated that there was no proposal on residential broadband “network interoperability”.<sup>297</sup> Consequently, in the Jimo fixed-broadband market, it would

<sup>294</sup> Jimo City is a county-level underdeveloped city in the north-eastern part of China, Shandong province. This city had nearly 1.2 million people at the end of 2012, and has a total area of about 1,780 square kilometres: The People’s Government of Jimo City, ‘Jimo Gaikuang’ [About Jimo (author’s translation)] (*The People’s Government of Jimo City, China*, 28 January 2013) <[www.jimo.gov.cn/zoujijimo/Columns/1521.asp?typeid=2862&parentid=2759&videos=&jms=277](http://www.jimo.gov.cn/zoujijimo/Columns/1521.asp?typeid=2862&parentid=2759&videos=&jms=277)> accessed 30 January 2017.

<sup>295</sup> Since the beginning of 2014, China Mobile Jimo Branch has offered fixed-broadband services in the local market. Although the market share has changed slightly, the issue of unrealised “network interoperability” still persists.

<sup>296</sup> **Figure 4-20: Local Fixed-Broadband Market Share of SOEs and Privately-Owned Operators in Jimo City in 2012**



Source: From Interviews; figure devised by the author.

\* By the end of 2012, there were over 0.1 million household users in the Jimo fixed-broadband market, and two SOEs (China Unicom and Telecom Jimo Branches) occupied more than 95 percent of the local market share. Four local fixed-broadband SMEs occupied less than 5 percent of the market share: Online interview with a staff member of China Telecom Jimo Branch (the interviewee did not agree to the researcher using the interviewee’s name in any written work arising from the study, but did consent to being interviewed) (Bangor, Wales, UK, 2013); and online interview with a staff member of China Unicom Jimo Branch (the interviewee did not agree to the researcher using the interviewee’s name in any written work arising from the study, but did consent to being interviewed) (Bangor, Wales, UK, 2013).

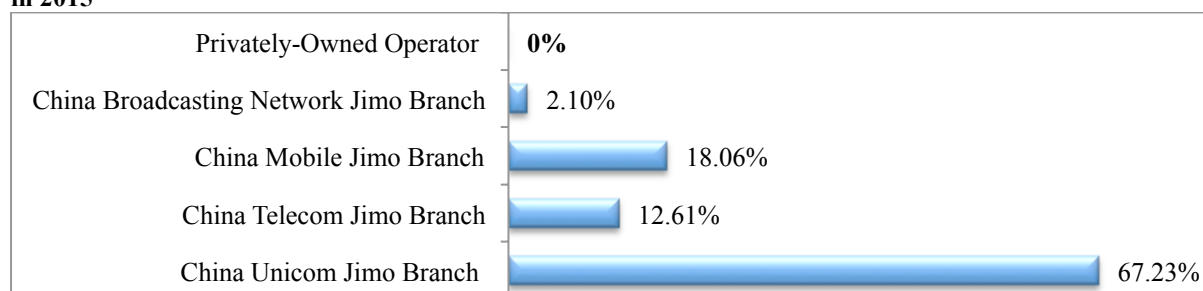
<sup>297</sup> *Id.*

not be difficult to reach a similar conclusion to that in Cangzhou City: without “network interoperability”, local privately-owned operators find it very difficult to share the advantages of SOEs,<sup>298</sup> and it is difficult for local consumers<sup>298</sup> to obtain low-price and fast-speed services. Because both local private competitors and also consumers have been denied their interests, the ultimate goal of *the Chinese Anti-Monopoly Law 2007*, namely the “public interest” that aims to balance interests between different types of competitors and consumer welfare, is unattainable.

As China is State with more than 600 cities,<sup>299</sup> taking just two cities as examples may not guarantee authoritative data. However, what occurred in both Cangzhou and Jimo Cities seems to be a common phenomenon in the Chinese fixed-broadband market. Although the State has proposed a last-mile programme (2012)<sup>300</sup> for privately-owned fixed-broadband SMEs and encouraged them to take part in residential broadband operations, the outlook does not look favourable.<sup>301</sup> Taking the attitude of one owner of a privately-owned fixed-broadband SME in Beijing for reference, the State’s broadband policy as regards the

<sup>298</sup> The above-mentioned scenario can be demonstrated by data collected in Jimo City at the beginning of September 2015. No privately-owned operator exists in the local market.

**Figure 4-21: Local Fixed-Broadband Market Share of SOEs and Privately-Owned Operator in Jimo City in 2015**



*Source:* From an Email; figure devised by the author.

Email from China United Network Communications Group Co., Ltd (China Unicom) Jimo Branch to author (4 September 2015).

<sup>299</sup> See The Worldwatch Institute, *State of the World 2000* (The Worldwatch Institute 2000) 45.

<sup>300</sup> The last-mile programme is a government requirement for the fixed-broadband network in China, which was launched in 2012. It aims to offer network access ports for all new homes and a proportion of old homes. China established a target to connect 40 million households to fixed-broadband network by the end of 2015: Shen Jingting, ‘New Residences Required to Provide Fiber Network Connections’ *China Daily* (9 January 2013) <[http://usa.chinadaily.com.cn/business/2013-01/09/content\\_16099801.htm](http://usa.chinadaily.com.cn/business/2013-01/09/content_16099801.htm)> accessed 30 January 2017.

<sup>301</sup> The last-mile programme (2012) seems to offer opportunities for privately-owned fixed-broadband operators. However, the reality is very different: see, e.g., Stuart Corner, ‘The Politics of Speed: An Examination of National Governments’ Policies for FTTX Networks’ (2013) 63 *Telecommunications Journal of Australia* 6.1-6.14; and Southern Daily, ‘Kuandai Tisu Jixu Datong “Zuihou Yigongli”’ [The Necessary Boosting of “the Last-Mile Programme” (author’s translation)] *Southern Daily* (Guangzhou, 19 August 2015) <<http://it.chinanews.com/it/2015/08-19/7475602.shtml>> accessed 30 January 2017.

last-mile programme has been admirable, but its implementation has been typically problematic.<sup>302</sup> Firstly, without “network interoperability”, privately-owned fixed-broadband operators find it difficult to obtain network resources from telecommunications SOEs. Secondly, *the Chinese Anti-Monopoly Law 2007* and *the Telecommunications Regulations of China 2000* seem like an empty shell, almost conniving at the selfish behaviour of telecommunications SOEs. Therefore, although China has for many years realised the importance of broadband “network interoperability”, its implementation is still a long way from reality.

#### 4.3.2.3 *Unachievable Aim for Private Funds – Entering the Chinese Fixed-Broadband Market without “Network Interoperability”?*

Because network construction is closely related to China’s economic development (see footnote 233 above), in 2013 the Central Government decided to allow more privately-owned operators to operate fixed-broadband services in order to establish competition and provide low-price high-speed services to consumers.<sup>303</sup> A boom in the appearance of privately-owned operators might have been foreseen.<sup>304</sup> However, this trend does not emerge because of the unachieved “network interoperability”, a sore point concerning network construction. In addition, in May 2015 the State Council of China issued an industrial policy<sup>305</sup> to “[s]peed up high-speed broadband network construction and reduce costs for broadband network services...”<sup>306</sup> Although at the end of 2015 the MIIT declared that the

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<sup>302</sup> See Wang Xiaotao, ‘Minqi neng Chixia Liugei Ziji de Kuandai Dangao ma?’ [Could Privately-Owned Fixed-Broadband SMEs Take Part in the Last-Mile Programme? (author’s translation)] *Zhongguo Jingji Daobao* [*China Economic Herald*] (Beijing, 27 September 2012) B03.

<sup>303</sup> See ‘Kuandai Zhongguo’ Zhanlv ji Shishi Fang’an’ [‘Broadband China’ Strategy and Implementation Plan (author’s translation)] (n 227); ‘Zhonggong Zhongyang Guanyu Quanmian Shenhua Gaige Ruogan Zhongda Wenti de Jueding’ [The Decision on Major Issues Concerning Comprehensively Deepening Reforms (author’s translation)] (n 227); Corner (n 301); and Eileen Yu, ‘China Broadband Market to Open Up to Private Capital’ (*ZDNet*, 13 April 2014) <[www.zdnet.com/article/china-broadband-market-to-open-up-to-private-capital/](http://www.zdnet.com/article/china-broadband-market-to-open-up-to-private-capital/)> accessed 30 January 2017.

<sup>304</sup> See Xu Lan, ‘Minzi Kuandai Shangxingzhi ‘Zuihou Yigongli’’ [Privately-Owned Fixed-Broadband Operators Have the ‘Last Mile’ to Enter the Market (author’s translation)] *Xinxi Shibao* [*Information Times, China*] (Guangzhou, China, 25 April 2014) A16.

<sup>305</sup> See ‘Guowuyuan Bangongting Guanyu Jiakuai Gaosu Kuandai Wangluo Jianshe Tuijin Wangluo Tisu Jiangfei de Zhidao Yiyian’ [Several Statements of the State Council on Speeding Up High-Speed Broadband Network Construction and Reducing Costs for Broadband Network Services (author’s translation)] (2015) <[www.gov.cn/zhengce/content/2015-05/20/content\\_9789.htm](http://www.gov.cn/zhengce/content/2015-05/20/content_9789.htm)> accessed 30 January 2017.

<sup>306</sup> See The State Council of China, ‘Full Transcript of the State Council Policy Briefing on Oct 16, 2015’ (*The State Council of China*, 16 October 2015) <[http://english.gov.cn/news/policy\\_briefings/2015/10/16/content\\_281475213105407.htm](http://english.gov.cn/news/policy_briefings/2015/10/16/content_281475213105407.htm)> accessed 30 January

annual target of speeding up broadband speeds and reducing service costs had been met,<sup>307</sup> approximately 96 percent of consumers did not agree.<sup>308</sup> An examination of *the Chinese Anti-Monopoly Law 2007* would explain the reasons for these unsuccessful interventions.

On the one hand, if a huge growth in the appearance of privately-owned operators corresponds to reality, this situation needs to be examined with respect to effective competition. In reality, it may be caused by privately-owned operators blindly entering the market, because they expect that it will be an easy way to make a good profit. However, such a trend would show negative effects on market competition because it is hard for new operators to be strong competitors of telecommunications SOEs.<sup>309</sup> In general, new entrants without technical and financial advantages would all offer similar services to consumers. Accordingly, fierce competition would arise in the fixed-broadband market and the majority of operators would find it difficult to stand out from the crowd without a unique competitive advantage. In addition, since privately-owned operators do not have their own network backbones, they have to purchase the network usage rights from SOEs. Thus, they would fail to offer any price advantages over these SOEs. In brief, using private funds to improve the competition level in the Chinese fixed-broadband market would be an extremely tough task.

Furthermore, without “network interoperability”, Chinese privately-owned fixed-broadband operators will have difficulties in finishing the last-mile programme.<sup>310</sup> Because these operators do not have permission to establish their own network backbones in the local market, making transfer transactions to achieve fixed-broadband network usage with SOEs remains the only way for privately-owned operators to enter the market.<sup>311</sup> If *the Chinese*

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2017.

<sup>307</sup> See Zhao Yibo, ‘Gongxinbu: Kuandai Tisu Jiangfei Quannian Mubiao Yiwancheng’ [MIIT: The Annual Target of Speeding Up Broadband Speeds and Reducing Service Costs Completed (author’s translation)] *Xinjingbao* [*The Beijing News*] (Beijing, 25 December 2015) B05.

<sup>308</sup> See Southern Daily, ‘Jinnian Tisu Jiangfei Mubiao Wancheng, Bufen Wangmin Weihe “Meiganjue”’ [Why the Annual Target of Speeding Up Broadband Speeds and Reducing Service Costs Completed Makes No Sense to Certain Consumers (author’s translation)] *Southern Daily* (Guangzhou, 25 December 2015) <[www.chinanews.com/it/2015/12-25/7687545.shtml](http://www.chinanews.com/it/2015/12-25/7687545.shtml)> accessed 30 January 2017.

<sup>309</sup> See Chu Xia, ‘Jingtí Xiaoyunyingshang Zhadui Jingzheng Kuandai Shichang’ [Privately-Owned Fixed-Broadband Operators May Create the Appearance of a Boom in the Chinese Market (author’s translation)] (18 April 2014) <[www.cnii.com.cn/broadband/2014-04/18/content\\_1345748.htm](http://www.cnii.com.cn/broadband/2014-04/18/content_1345748.htm)> accessed 30 January 2017.

<sup>310</sup> See Southern Daily, ‘Kuandai Tisu Jixu Datong “Zuihou Yigongli”’ [The Necessary Boosting of “the Last-Mile Programme” (author’s translation)] (n 301).

<sup>311</sup> See Xu (n 304).



*Anti-Monopoly Law 2007* fails to limit the SOEs' abuse of their specific or exclusive rights, it is a continuous scenario that SOEs refuse transfer transactions for new private entrants. In other words, without "network interoperability", telecommunications intervention of this decade that allows more privately-owned operators to operate fixed-broadband services only pays lip service to opening up the market to private funds in China.<sup>312</sup>

Regarding the foreseeable outcomes of telecommunications interventions, both effective competition and the last-mile programme are stuck in fierce competition without "network interoperability". Although government intervention presents a beautiful thumbnail sketch of the establishment of competition in the fixed-broadband market, with the aim of providing low-price and high-speed services to consumers, the results are not as positive as the Central Government expected: *firstly*, competition between SOEs and private entrants cannot be guaranteed, thereby enhancing the interests of telecommunications SOEs but reducing the interests of private entrants. *Secondly*, because private entrants fail to bring effective competition to the existing fixed-broadband services, Chinese consumers continue to suffer high-priced but low-speed services as before.<sup>313</sup> In other words, consumer welfare is not protected, either. Accordingly, with regard to the loss of both the interests of private entrants and consumer welfare, the ultimate aim of *the Chinese Anti-Monopoly Law 2007*, the "public interest" with characteristics of commonality and reasonableness, has become nothing but a dream once more.

As a result, after more than a decade of apparent cooperation and competition reform in the Chinese telecommunications industry in the 21st century, competition is still beyond the reach of privately-owned SMEs in the fixed-broadband market. Accordingly, consumer welfare remains nothing but empty words. Although the State has constantly expressed concern regarding "network interoperability" and consumer welfare, as well as carrying out the anti-monopoly probe of China Unicom and Telecom (2011) and introducing the last-mile

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<sup>312</sup> See Chen Wei, 'Po Dianxin Longduan: Kaifang bi Fakuan Gengzhongyao' [Breaking the Telecommunications Monopoly: Opening is more Important than the Fines (author's translation)] *Economic Information Daily* (Beijing, 5 June 2015) 2.

<sup>313</sup> See Southern Daily, 'Jinnian Tisu Jiangfei Mubiao Wancheng, Bufen Wangmin Weihe "Meiganjue"' [Why the Annual Target of Speeding Up Broadband Speeds and Reducing Service Costs Makes No Sense to Certain Consumers (author's translation)] (n 308).

programme (2012), nothing has touched the soul of this anti-competitive situation, namely the self-interests of SOEs. Therefore, with the “non-disappearance” of the requirements of *the Chinese Anti-Monopoly Law 2007*, such as competition and consumer welfare, the notion of telecommunications SOEs completely controlling the domestic fixed-broadband market and destroying the “public interest” in this area is still prevalent.

#### **4.4 Conclusion: The “Public Interest” in Jeopardy**

With regard to the Chinese level of economic development, there is an obvious gap between China and the developed countries. Therefore, the Central Government of China relies on administrative powers to formulate and promulgate a series of strategies and policies in order to promote the State’s economic growth.<sup>314</sup> However, because the State makes mistakes during the strategy and policy execution period, the way towards achieving positive developments in the Chinese economy is like a minefield.<sup>315</sup>

In the Chinese steel industry, the mills’ development has always been controlled by the State: when the Central Government realised the importance of the number of steel mills and products, there was a sharp increase in their number within the country, without any consideration for market rules. When the State took industrial concentration seriously, the formation of “strong” and large-scale steel SOEs became a new task for State intervention. Thus, to date, “administrative mergers” and closing-down programmes are pivotal parts of administrative intervention designed to supervise and reduce the number of privately-owned SMEs. However, such anti-competitive interventions not only override market mechanisms and the tenets of *the Chinese Anti-Monopoly Law 2007*, but also place unfair emphasis on the interests of SOEs and ignore the interests of privately-owned steel SMEs. Therefore, because both the interests of privately-owned SMEs and their employees’ welfare are reduced, these interventionist policies ultimately provide no future for a commonality of interest to benefit everyone, namely the “public interest” in the steel sector.

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<sup>314</sup> See Harris and others (eds) (n 236) 178.

<sup>315</sup> See Yu Li and Wu Xuliang, *Chanye Zuzhi yu Fanlongduanfa [Industrial Organization and Antimonopoly Law]* (Dongbei University of Finance & Economics Press 2008) 8.

A similar situation also exists in the Chinese petroleum retail market: administrative intervention shows no mercy towards privately-owned gas stations. Petrol SOEs abuse their exclusive rights to cause “oil shortages”, as well as using oil pricing mechanisms to work with State oil subsidies in order to seize the market share of privately-owned gas stations and obtain extra market share. In the first decade of the 21st century, SOEs began a programme of high-priced acquisitions of privately-owned gas stations that were often 3 to 5 times more than their real value, with a view to enlarging their own market share quickly. Accordingly, the growth of the privately-owned gas station sector has been impossible to achieve, and competition between SOE-owned gas stations and privately-owned gas stations has never existed in the Chinese petroleum retail market since 1999. Even worse, because of “oil shortages”, the living standards of many Chinese people who require refined oil in their daily life have never been guaranteed. Thus, with the lack of regard for the interests of privately-owned gas stations and consumer welfare, the “public interest” that relies for its realisation on competition remains uncertain.

Unlike the intervention in the steel industry and the gas station industry, the State has chosen an appropriate entry point at which to intervene in the Chinese fixed-broadband market, namely “network interoperability”. However, privately-owned fixed-broadband SMEs do not experience an easier life than do privately-owned SMEs in the steel industry and the gas station industry. Since telecommunications SOEs do not actively cooperate with this intervention, “network interoperability” has never been realised. Existing or prospective privately-owned fixed-broadband SMEs often face barriers inside the market, or when entering the market. Although the NDRC identified the fact that two telecommunications SOEs, namely China Unicom and Telecom, were abusing their exclusive rights to refuse “network interoperability”, and conducted a probe into their anti-competitive behaviour in 2011, the outcomes did not help privately-owned fixed-broadband SMEs. Furthermore, even though a new series of interventions has been launched since 2013, in order to enhance competition in the fixed-broadband market through the method of increasing private funds, the objective is not easy to achieve without “network interoperability”. Thus, because proper competition is unforeseeable for privately-owned fixed-broadband SMEs, the interests

between telecommunications SOEs and privately-owned fixed-broadband SMEs cannot be balanced. Even worse, because of the absence of “network interoperability”, China’s fixed-broadband consumers have never obtained high-speed/low-price services. Because two important aims of *the Chinese Anti-Monopoly Law 2007*, namely fair competition and consumer welfare, have failed to materialise, so the ultimate aim of this Law, the “public interest”, has never had an opportunity to emerge.

To review intervention approaches in Chinese traditional State-controlled industries, why is the “public interest” sidelined? The following two reasons must be noted: *first*, SOEs and administrative agencies deny that the State’s interest constitutes another type of individual interests, which pays more attention to itself, rather than balances different types of competing interests in the Chinese marketplace, in order to achieve realisation of the “public interest”.<sup>316</sup> Although SOEs which represent State interest in the market ought to take responsibility for promoting the growth of other domestic market participants,<sup>317</sup> they are unable to support and promote consumer welfare and interests of privately-owned SMEs in the industrial growth approach. *Second*, China is not a country with a pure market economy in the traditional sense, and rarely establishes competition in the market. Chinese SOEs are not only market participants, but also leaders which have specific or exclusive rights to ensure that the State’s economic growth develops according to the State’s principles. Because *the Chinese Anti-Monopoly Law 2007* fails to offer effective limitations to SOEs in the market,<sup>318</sup> privately-owned SMEs in traditional State-controlled industries survive in conditions of weakness. In order to get rid of this development dilemma, this should be the proper time for China to finish the hibernation period of *the Chinese Anti-Monopoly Law 2007*.

\* **Figure 4-22: Overview Figure of Chapter 4**

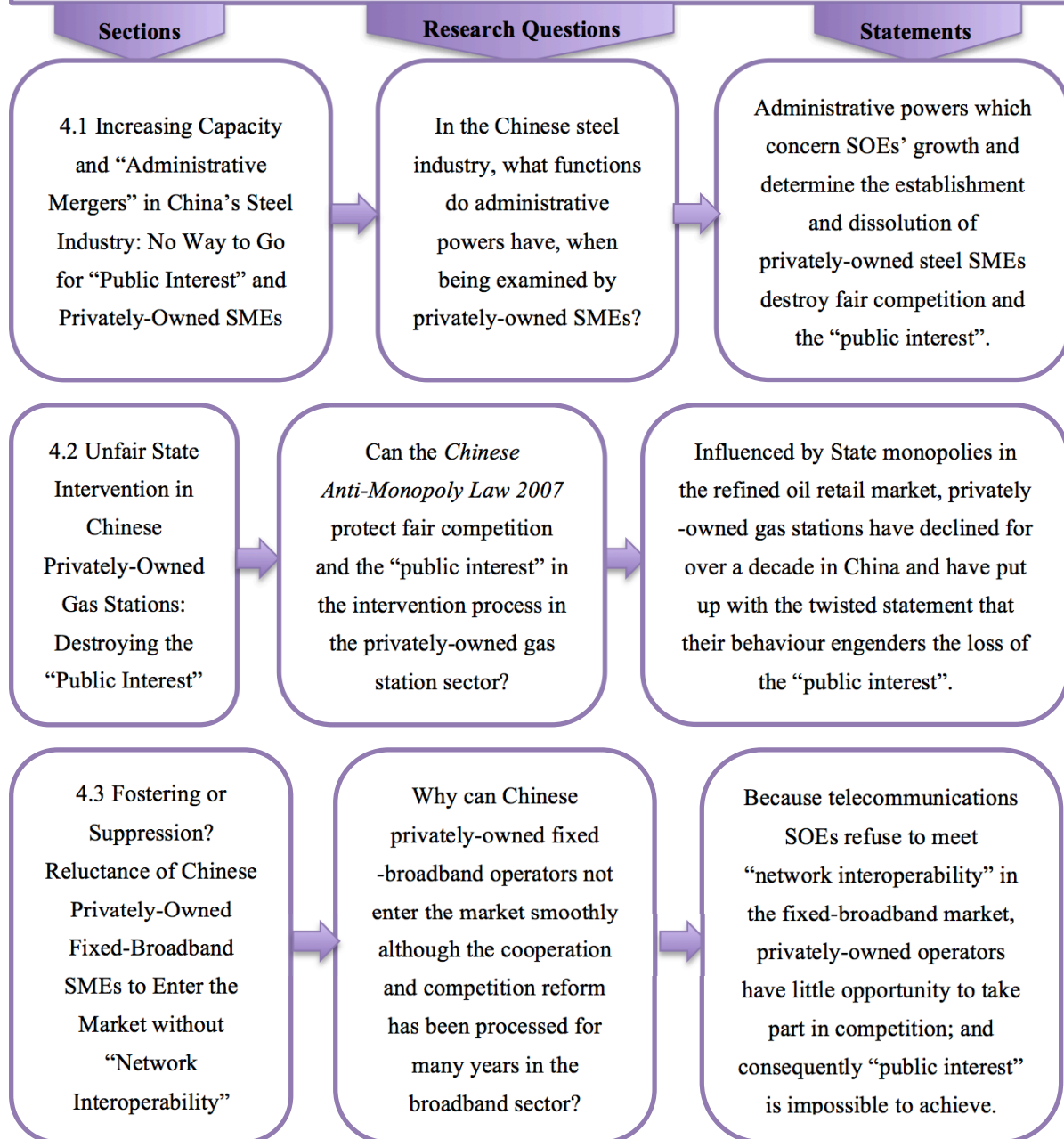
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<sup>316</sup> See Ely (n 5).

<sup>317</sup> See Chapter 2.2.2 above.

<sup>318</sup> See Xiaoye Wang and Adrian Emch, ‘Five Years of Implementation of China’s Anti-Monopoly Law – Achievements and Challenges’ (2013) 1 *Journal of Antitrust Enforcement* 247, 267.

**Statement of Chapter 4:** In order to maximise the State’s short-term interests and promote SOE growth, the State’s industrial policies replace the dominant position of the *Chinese Anti-Monopoly Law 2007* in the Chinese market to determine the fate of privately-owned SMEs in the steel industry, the gas stations industry and the fixed-broadband industry, as well as destroying the “public interest” in the market.



# Chapter Five: Struggling against Administrative Powers

## - Practical Applications of *the Chinese Anti-Monopoly Law 2007* towards Privately-Owned SMEs<sup>1</sup>

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China needs competition law for a host of reasons: for its undertakings of all types to compete with state owned enterprises, to deal with “administrative monopolies” formed by the state, to enter into agreements with other market actors that are pro-competition, to support mergers that themselves foster competition, and to participate in standards setting bodies and patent pools on a fair basis, among others.

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<sup>1</sup> An early version of this Chapter was presented at the King’s College London the 10th Annual International Graduate Legal Research Conference (IGLRC 2016), entitled ‘Struggling against Administrative Powers: Practical Applications of *the Chinese Anti-Monopoly Law 2007* towards Privately-Owned Small and Medium-Sized Enterprises’, held in London, UK on 4-5 April 2016; and this Chapter has been selected as a paper for presentation by the 2016 Conference of the Law and Society Association of Australia & New Zealand (LSAANZ Conference 2016), entitled ‘Creating an Effective Challenge to Administrative Monopoly Powers in China: Practical Applications of *the Anti-Monopoly Law of China 2007* from a Privately-Owned SMEs Perspective’, held in Brisbane, Australia on 30 November-3 December, 2016.

对中国这个处于转轨中的国家来说，最为严重的反竞争行为似乎不是来自企业本身，而是来自政府部门的政策，或政府与国有企业之间的合谋。[In China's transition era, the most serious anti-competitive conduct is engendered by the State's industrial policies or collusion between Chinese administrative agencies and SOEs, rather than by enterprises (author's translation)].

– Zhang Weiyong and Sheng Hong<sup>3</sup>

An examination of State intervention with regard to privately-owned SMEs' survival situations in Chinese traditional State-controlled industries<sup>4</sup> reveals that legal restrictions on administrative powers are ineffective.<sup>5</sup> Whereas the Economic Charter,<sup>6</sup> namely the *Chinese Anti-Monopoly Law 2007*, has now been in force for over eight years (from 2008 onwards), administrative powers which are granted by the State's industrial policies to treat SOEs and privately-owned SMEs unfairly have never been effectively limited.<sup>7</sup> Accordingly, the interests of privately-owned SMEs and consumer welfare have not been realised, despite them being listed among the goals of the Chinese competition law (for example, see how the steel industry, the gas station industry and the fixed-broadband industry have fared in Chapter 4). As a result, a balance of the competing interests of the State, different types of enterprises and consumers in the market, namely the “public interest” (the ultimate objective of *the Chinese Anti-Monopoly Law 2007*)<sup>8</sup> has failed to be achieved.

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<sup>2</sup> See H Stephen Harris and others (eds), *Anti-Monopoly Law and Practice in China* (OUP 2011) Preface.

<sup>3</sup> See Zhang Weiyong and Sheng Hong, ‘Cong Dianxinye Kan Zhongguo de Fanlongduan Wenti’ [Examining the Chinese Anti-Monopoly Issues in the Telecommunications Industry (author's translation)] (1998) 2 *Revolution* 66.

<sup>4</sup> For example, mergers and reorganisations which took place in the Chinese steel industry and the petroleum industry have squeezed the living space of relevant privately-owned market participants: see, e.g., Russell Smyth and Zhai Qingguo, ‘Change and Restructuring in Chinese State-Owned Enterprises’ (Asian Business and Economics Research Unit, Monash University, 2007) 7; and see further in Chapters 4.1 & 4.2.

<sup>5</sup> Although *the Chinese Law on Promotion of SMEs 2002* and *the Chinese Anti-Monopoly Law 2007* purport to restrict administrative powers in order to promote the development of privately-owned SMEs, they fail to avoid the government-oriented economy model. In other words, administrative intervention could easily go beyond the requirements of these two Laws: see Chapter 3 above.

<sup>6</sup> See Harris and others (eds) (n 2) Forward.

<sup>7</sup> See Xiaoye Wang and Adrian Emch, ‘Five Years of Implementation of China's Anti-Monopoly Law – Achievements and Challenges’ (2013) 1 *Journal of Antitrust Enforcement* 247; R Richard Geddes, ‘Case Studies of Anticompetitive SOE Behavior’ in R Richard Geddes (ed), *Competing with the Government: Anticompetitive Behavior and Public Enterprises* (Hoover Institution Press 2004) 35; and Angela Huyue Zhang, ‘The Enforcement of the Anti-Monopoly Law in China: An Institutional Design Perspective’ (2011) 56 *The Antitrust Bulletin* 630.

<sup>8</sup> See the *Anti-Monopoly Law of China 2007*, Art 1.

Article 1: This Law is enacted for the purpose of preventing and restraining monopolistic conduct,

In an attempt to reverse this plight of privately-owned SMEs, this chapter puts forward two suggestions in order to make *the Chinese Anti-Monopoly Law 2007* a top priority for State intervention. The first suggestion concerns the *internal considerations* of *the Chinese Anti-Monopoly Law 2007*: namely, to curb the administrative powers of some agencies and SOEs<sup>9</sup> on behalf of privately-owned SMEs. This comprises three parts: establishing an independent anti-monopoly regulatory agency in China;<sup>10</sup> the formulation of several State-specific regulations in order to restrict administrative agencies and SOEs; and, improving private anti-monopoly litigation<sup>11</sup> in order to protect privately-owned SMEs. The second suggestion relates to *external considerations*, highlighting the need for cooperation between certain legal elements<sup>12</sup> in administrative law; as well as company law, and *the Chinese Anti-Monopoly Law 2007*, in order to curtail the *ultra vires* exercise of discretionary powers of anti-monopoly agencies in order to achieve a fair playing-field between SOEs and privately-owned SMEs.

## 5.1 Upgrading China's Anti-Monopoly Enforcement towards Better Treatment for Privately-Owned SMEs

During China's economic transition era, because the State's industrial policies and SOEs often cross the boundaries established by competition policies and *the Chinese Anti-Monopoly Law 2007*,<sup>13</sup> privately-owned SMEs and the State's sustainable long-term

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protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, [and] promoting the healthy development of the socialist market economy.

<sup>9</sup> See Harris and others (n 2) 180.

<sup>10</sup> See Xiaoye Wang, *The Evolution of China's Anti-Monopoly Law* (Edward Elgar Publishing 2014) 324-25.

<sup>11</sup> "Antitrust model should combine both public and private elements": Assimakis P Komninos, *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Hart Publishing 2008) 8-11.

<sup>12</sup> The linkage between Administrative Law and *the Chinese Anti-Monopoly Law 2007* focuses on restricting the use of discretionary powers of anti-monopoly agencies (see Chapter 5.2.1 below). Corporate Social Responsibility is a linkage between the Company Law and *the Chinese Anti-Monopoly Law 2007* which is held in this thesis to balance the interests of SOEs, the interests of privately-owned SMEs, and consumer welfare (see Chapter 5.2.2 below).

<sup>13</sup> See David EM Sappington and J Gregory Sidak, 'Anticompetitive Behavior by State-Owned Enterprises: Incentives and Capabilities' in R Richard Geddes (ed), *Competing with the Government: Anticompetitive Behavior and Public Enterprises* (Hoover Institution Press 2004) 14.

Because an SOE has greater incentive to engage in anticompetitive practices and circumvent antitrust laws than its private counterpart, particular vigilance in monitoring the market activities of SOEs is warranted. It may also be appropriate to subject an SOE to more stringent competition laws



economic development have been threatened.<sup>14</sup> Accordingly, unbalanced situations between different interest groups frequently surface and cause a decrease in the “public interest” in the market. An examination of the anti-monopoly law’s implementation shows that having a “good idea” (but “poor implementation”<sup>15</sup>) is a persistent characteristic of *the Chinese Anti-Monopoly Law 2007*.<sup>16</sup> Hence, this section recommends improving *the enforcement of the Chinese Anti-Monopoly Law 2007* in order to restrict administrative powers, in the interests of privately-owned SMEs.<sup>17</sup>

### 5.1.1 Establishing a Single Anti-Monopoly Regulatory Agency in China – An Expectation of Privately-Owned SMEs

Echoing the requirements of *the Chinese Anti-Monopoly Law 2007*,<sup>18</sup> the National Anti-Monopoly Commission (directly led by the State Council) and three

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and harsher penalties for violating them.

<sup>14</sup> See Zhang Weiyang, *Qiye Lilun yu Zhongguo Qiye Gaige* [*The Theory of Enterprises and the Reform of Chinese Enterprises*] (Shanghai People’s Press 2015) Forward; and see also further details in Chapter 4 above.

<sup>15</sup> See Christopher Townley, *Article 81 EC and Public Policy* (Hart Publishing 2009) 13 (pointing out that “[c]ompetition law cannot be rationally implemented until it has been decided whether public policy objectives should be considered there, and if so when”); and Frank H Stephen, ‘The Institutional Environment Required to Support China’s New Normal Economy’ (2016) November *China–EU Law Journal* 1, 2 (the latter points out that “the success of the new market economy policy will depend not only on the reform of the law on the books but also on how it is implemented through the courts and how it fits with both Chinese legal tradition and culture”).

<sup>16</sup> See Chapter 4.3.2.1 above.

<sup>17</sup> “Competition could “address market failure”; “advance the ‘public interest’”; “advance special interests”; and “assist in the transition to a competitive market””: Paul Crampton, ‘Striking the Right Balance between Competition and Regulation: The Key is Learning from Our Mistakes’ (APEC-OECD Co-Operative Initiative on Regulatory Reform: Third Workshop, Jeju Island, Korea, 16-17 October 2002).

<sup>18</sup> See the Anti-Monopoly Law of China 2007, Arts 9 & 10.

Article 9: The State Council shall establish the Anti-monopoly Commission, which is in charge of organizing, coordinating, and guiding anti-monopoly work, and performs the following functions:

- (1) studying and drafting related competition policies;
- (2) organizing the investigation and assessment of overall competition situations in the market, and issuing assessment reports;
- (3) constituting and issuing anti-monopoly guidelines;
- (4) coordinating anti-monopoly administrative law enforcement; and
- (5) other functions as assigned by the State Council.

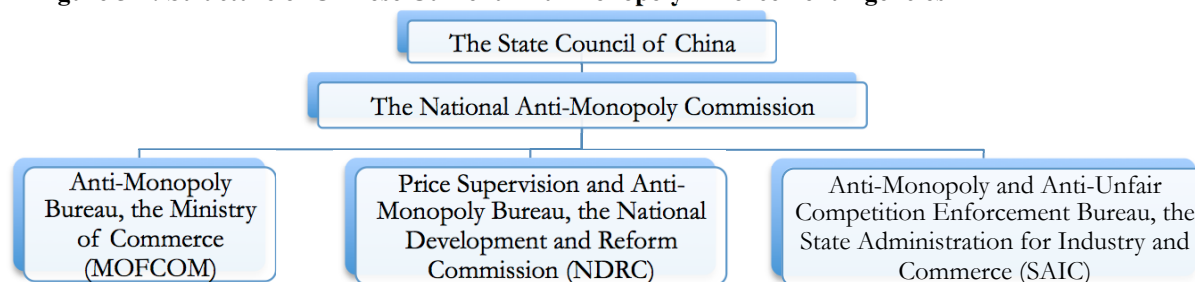
The State Council shall stipulate the composition and working rules of the Anti-monopoly Commission.

Article 10: The anti-monopoly authority designated by the State Council (hereinafter referred to as the Anti-monopoly Authority under the State Council) shall be in charge of anti-monopoly law enforcement in accordance with this Law.

The Anti-monopoly Authority under the State Council may, when needed, authorize the corresponding authorities in the people’s governments of the provinces, autonomous regions and municipalities directly under the Central Government to take charge of anti-monopoly law enforcement in accordance with this Law.

sub-ministerial-level anti-monopoly enforcement agencies (led by different subsidiary organs of the State Council) were created in 2008.<sup>19</sup> However, the multi-agency operation is not as salutary as had been expected<sup>20</sup> for several reasons. *First*, although *the Chinese Anti-Monopoly Law 2007* grants investigative and enforcement powers to anti-monopoly enforcement agencies,<sup>21</sup> their powers are inadequate<sup>22</sup>: for example, China’s anti-monopoly

<sup>19</sup> **Figure 5-1: Structure of Chinese Current Anti-Monopoly Enforcement Agencies**



Source: *Research on Anti-Monopoly Law Enforcement System*; figure devised by the author.

\* This figure will be published as Jing Wang, ‘A Maze of Contradictions: Chinese Law and Policy in the Development Process of Privately Owned Small and Medium-Sized Enterprises in China’ (2017) 25 *Michigan State International Law Review* (forthcoming).

See Wen Xueguo, Meng Yanbei and Gao Chongying, *Fanlongduanfa Zhixing Zhidu Yanjiu* [*Research on Anti-Monopoly Law Enforcement System* (author’s translation)] (China Social Sciences Press 2011) 67; and Harris and others (n 2) 263.

<sup>20</sup> See Zhang Qiong, ‘Zhongguo Fanlongduan Gongzuo de Xingshi he Renwu’ [The Work Situation and Tasks of *the Chinese Anti-Monopoly Law* (author’s translation)] (2014) 11 *Xingzheng Guanli Gaige* [Administration Reform, China] 37; and Ren Xue and Zhao Chenxi, ‘Fanlongduan Zhize Huafen Buqing Huozhi Zhifa Chongtu’ [Multi-Agency Working May Cause Conflicts for Anti-Monopoly Investigation (author’s translation)] *Legal Daily* (Beijing, 7 March 2011) 4.

<sup>21</sup> See the Anti-Monopoly Law of China 2007, Arts 38-41.

#### Chapter VI: Investigation into Suspicious Monopolistic Conduct

Article 38: The anti-monopoly authority shall make investigations into suspicious monopolistic conduct in accordance with the law.

Any entity or individual may report suspicious monopolistic conduct to the anti-monopoly authority. The anti-monopoly authority shall keep the identity of the informer confidential.

Where an informer makes a report in written form and provides relevant facts and evidence, the anti-monopoly authority shall carry out the necessary investigation.

Article 39: The anti-monopoly authority may take any of the following measures in investigating suspicious monopolistic conduct:

- (1) conducting an inspection by entering the business premises of business operators under investigation or by entering any other relevant place,
- (2) inquiring of the business operators under investigation, interested parties, or other relevant entities or individuals, and requiring them to explain the relevant conditions,
- (3) consulting and duplicating the relevant documents, agreements, account books, business correspondence and electronic data, etc., of the business operators under investigation, interested parties and other relevant entities or individuals,
- (4) seizing and detaining relevant evidence, and
- (5) inquiring about the bank accounts of the business operators under investigation.

Before the measures as prescribed in the preceding paragraph are approved, a written report shall be submitted to the chief person(s)-in-charge of the anti-monopoly authority.

Article 40: When inspecting suspicious monopolistic conduct, there shall be at least two law enforcers, and they shall show their law enforcement certificates.

When inquiring about and investigating suspicious monopolistic conduct, law enforcers shall make

enforcement agencies do not have the right to investigate all suspicious conduct.<sup>23</sup> *Second*, these anti-monopoly enforcement agencies do not have a sufficient number of qualified professionals<sup>24</sup>; consequently enforcement officers come up against considerable enforcement confusion in their work.<sup>25</sup> *Third*, cooperation among the three sub-ministerial-level agencies is complicated.<sup>26</sup> The specific implementation of *the Chinese Anti-Monopoly Law 2007* relies on the three anti-monopoly enforcement agencies realising the following: in general, the ‘Anti-Monopoly Bureau, the Ministry of Commerce of China (MOFCOM)’ mainly focuses on merger control; the ‘Price Supervision and Anti-Monopoly Bureau, the National Development and Reform Commission of China (NDRC)’ specialises in price-related anticompetitive conduct,<sup>27</sup> and the ‘Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau, the State Administration for Industry & Commerce of

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notes thereon, which shall bear the signatures of the persons under inquiry or investigation.

Article 41: The anti-monopoly authority and functionaries thereof shall be obliged to keep confidential the trade secrets they have access to during the course of the law enforcement.

<sup>22</sup> See Wen, Meng and Gao (n 19) 62-64.

<sup>23</sup> For example, Article 38 of *the Chinese Anti-Monopoly Law 2007* only states that “[t]he anti-monopoly authority shall make investigations into suspicious monopolistic conduct in accordance with the law”. When “administrative mergers” occurred in the steel industry, the 2007 Act became a gag law (as in the situation of steel enterprises considered above in Chapter 4.1.1.2): see, e.g., the Anti-Monopoly Law of China 2007, Art 38; and Mark Furse, *Antitrust Law in China, Korea and Vietnam* (OUP 2009) 111-12.

<sup>24</sup> See Wen, Meng and Gao (n 19) 62-64.

<sup>25</sup> With regard to the definition of the relevant market, the reasons are as follows: (a) defining the relevant market relies on data from government organs, industry associations, research institutes, relevant companies, etc. The data may vary from one to another because different organisations may choose different starting points. (b) According to Articles 8 and 9 of ‘Guide of the Anti-Monopoly Committee of the State Council for the Definition of the Relevant Market’ (2009), defining the relevant market should consider many factors, such as demanders’ shift, price differences among commodities, distribution channels of commodities, physical form, features, quality, technical characteristics and other general characteristics and uses of commodities, and so on; consequently anti-monopoly enforcers have the right to consider other important factors in different cases. Due to individual differences in cognition, such a situation can lead to confusion in defining the relevant market: see, e.g., Ding Maozhong, ‘Lun Xiangguan Shichang Jieding de Buquedingxing Jiqi Yingdui’ [On the Uncertainty in Defining the Relevant Market and the Countermeasures] in Wang Xiaoye (ed), *Jingzheng Zhifa Nengli Jianshe [Capacity Building for the Enforcement of Competition Law]* (Social Sciences Academic Press, China 2012) 245-54; Wan Jing, Han Shunhua and Xie Ronghua, ‘Jiceng Fanlongduan Zhifa de Kunhuo’ [The Confusion of Anti-Monopoly Enforcement for the Local Administrative Organs (author’s translation)] *Legal Daily, China* (Beijing, 5 January 2015) 06; and ‘Guide of the Anti-Monopoly Committee of the State Council for the Definition of the Relevant Market’ (2009) <<http://en.pkulaw.cn/display.aspx?cgid=118975&lib=law>> accessed 30 January 2017.

<sup>26</sup> See Wang and Emch (n 7).

<sup>27</sup> Before July 2011, the ‘Price Supervision and Anti-Monopoly Bureau’ was named as the ‘Price Supervision Department of NDRC’ concerning unfair pricing in the Chinese market: Antitrust Source, ‘Interview with Xu Kunlin, Director General of the Department of Price Supervision Under the National Development and Reform Commission of People’s Republic of China’ (2011) February The Antitrust Source <[www.americanbar.org/content/dam/aba/migrated/2011\\_build/antitrust\\_law/feb11\\_xuintrvw2\\_23f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/antitrust_law/feb11_xuintrvw2_23f.authcheckdam.pdf)> accessed 30 January 2017.

China (SAIC)' aims to break up administrative monopoly.<sup>28</sup> On the surface, these three agencies have duties which appear to be positioned in different areas. However, they suffer from overlapping powers, and conflicts in the actual enforcement process.<sup>29</sup> Therefore, an upgrade of the current Chinese anti-monopoly enforcement system is recommended.

#### *5.1.1.1 Chinese Anti-Monopoly Enforcement Agencies – Disappointing Protectors of Privately-Owned SMEs*

Although Chinese anti-monopoly enforcement agencies have made some progress since 2008,<sup>30</sup> it is still vital to highlight certain issues that adversely affect privately-owned SMEs in the anti-monopoly enforcement process. *Firstly*, because it is a new task in China to regulate monopolies, there is a lack of anti-monopoly professionals.<sup>31</sup> Thus, the current anti-monopoly enforcement agencies cannot overcome administrative interventions or State-led monopolies on behalf of privately-owned SMEs.<sup>32</sup> For example, although Article

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<sup>28</sup> However, facing administrative monopolies, Chinese anti-monopoly agencies rarely have a right to punishment: see, e.g., Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2015* [Report on Competition Law and Policy of China 2015] (Law Press, China 2015) 99; and Harris and others (n 2) 268.

<sup>29</sup> Interview with a leading academic expert on the *Chinese Anti-Monopoly Law* (the interviewee did not allow the researcher using the interviewee's name in the written work arising from the study, but did consent to being interviewed) (Beijing, China, 2012); and Zhang, 'The Enforcement of the Anti-Monopoly Law in China: An Institutional Design Perspective' (n 7) 641-44.

<sup>30</sup> Taking the 'Anti-Monopoly Bureau, the MOFCOM' for instance, between August 2008 and June 2012, the number of "concentration declarations" in China reached 518, of which 464 cases were concluded. Of those 464 cases, the 'Anti-Monopoly Bureau' unconditionally approved 449 cases, conditionally approved 14 cases, and only prohibited one case. In addition, the number of "concentration declarations" in 2012 was 207, of which 164 cases were concluded. In 2013, the number of "concentration declarations" was 224, of which 207 cases were concluded. In 2014, the number of "concentration declarations" was 262, of which 245 cases were concluded. Of those 245 cases, the 'Anti-Monopoly Bureau' unconditionally approved 240 cases, conditionally approved 4 cases, and solely prohibited one case: see, e.g., Zhang Qiong (n 20); the MOFCOM, 'The Ministry of Commerce Holds a Special Press Conference on Anti-Monopoly Work' (The Ministry of Commerce, Beijing, 8 April 2014) <<http://english.mofcom.gov.cn/article/newsrelease/press/201404/20140400554324.shtml>> accessed 30 January 2017; Ming Shang, 'New Development in China Merger Control' (Asia Competition Association Beijing Conference, Beijing, 21 October 2012); Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2013* [Report on Competition Law and Policy of China 2013] (Law Press, China 2013) 2; Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2014* [Report on Competition Law and Policy of China 2014] (Law Press, China 2014) 4; and Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2015* [Report on Competition Law and Policy of China 2015] (n 28) 2.

<sup>31</sup> See Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2011* [Report on Competition Law and Policy of China 2011] (Law Press, China 2011) 37; and Qing Li, 'New Developments in Antimonopoly Law Enforcement by NDRC' (Asia Competition Association Beijing Conference, Beijing, 21 October 2012).

<sup>32</sup> See Development Research Center of the State Council, *Zhongxiao Qiye Fazhan* [The Development of Small and Medium Enterprises] (China Development Press 2011) 15.

14(3) of the *Chinese Anti-Monopoly Law 2007* grants rights to anti-monopoly agencies to decide what agreements in the market shall be defined as monopoly agreements,<sup>33</sup> anti-monopoly enforcers themselves still have problems defining them.<sup>34</sup> On the one hand, anti-monopoly enforcers may be concerned with administrative powers as a primary issue when implementing the *Chinese Anti-Monopoly Law 2007*. For example, in the steel industry, the execution of “administrative mergers”<sup>35</sup> does not encounter any legal obstacles from the 2007 Act, and recklessly determines the fate of privately-owned steel enterprises from small to medium sizes.<sup>36</sup> On the other hand, if the *Chinese Anti-Monopoly Law 2007* has a chance to supervise the merger process in the steel industry, the government anti-monopoly enforcers will meet implementation difficulties. One of the reasons for this is that whilst there is a clear definition of the relevant market in China,<sup>37</sup> how to use it effectively and suitably has so far

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<sup>33</sup> See the Anti-Monopoly Law of China 2007, Art 14.

Article 14: Any of the following agreements among business operators and their trading parties are prohibited:  
... (3) other monopoly agreements as determined by the Anti-monopoly Authority under the State Council.

<sup>34</sup> See Qing Li (n 31).

<sup>35</sup> The document ‘Steel Industry Revitalisation Plan of China’ (2009) proposed a government-oriented merger regime in the steel industry. Chinese mainstream media reported that mergers under this Plan were “administrative mergers” (see footnote 163 in Chapter 3): ‘Gangtie Chanye Tiaozheng he Zhenxing Guihua’ [Steel Industry Revitalisation Plan of China] (2009) <[www.gov.cn/zwggk/2009-03/20/content\\_1264318.htm](http://www.gov.cn/zwggk/2009-03/20/content_1264318.htm)> accessed 30 January 2017.

<sup>36</sup> See Chapter 4.1.1.2 above.

<sup>37</sup> See the Anti-Monopoly Law of China 2007, Art 12;

Article 12: For the purposes of this Law,  
... ‘relevant market’ refers to the commodity scope or territorial scope within which the business operators compete against each other during a certain period of time for specific commodities or services (hereinafter generally referred to as ‘commodities’).

‘Guide of the Anti-Monopoly Committee of the State Council for the Definition of the Relevant Market’ (2009) (n 25).

Article 2: Functions of Defining the Relevant Market

... Defining the relevant market scientifically and reasonably is very important to such key issues as identifying competitors and potential competitors, determining the market share of business operators and the degree of market concentration, deciding the market position of business operators, analyzing the impact of business operators’ behaviors on market competition, judging whether business operators’ behaviors are illegal and what legal liabilities they need to assume if their behaviors are illegal. Therefore, the definition of the relevant market is usually the starting point for analyzing competitive behaviors and an important step of the anti-monopoly law enforcement work.

Article 3: Meaning of the Relevant Market

Relevant market refers to a commodity scope and geographic scope within which business operators compete with each other in a certain period of time regarding particular commodities or services (hereinafter collectively referred to as ‘commodities’). In the practice of anti-monopoly law enforcement, it is usually required to define the relevant commodity market and the relevant geographic market.

been a controversial issue in the implementation of *the Chinese Anti-Monopoly Law 2007*.<sup>38</sup> Without adequate economists to judge and explain the relevant market in each special case, solving the issue of monopoly agreements is a difficult task<sup>39</sup> for anti-monopoly enforcement agencies (see footnote 25 above).

*Secondly*, the current multi-agency environment leads to repetition and conflict in anti-monopoly investigations,<sup>40</sup> while simultaneously failing to effectively protect market participants.<sup>41</sup> Chinese anti-monopoly cases may involve abuse of a dominant position, price monopoly and administrative monopoly at the same time; thus in theory, they can be investigated by more than one enforcement agency.<sup>42</sup> If communication and cooperation have not actually taken place among the three anti-monopoly agencies (see Figure 5-1 above),

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The term ‘relevant commodity market’ refers to a market comprised of a group or a category of commodities that are considered by consumers to have a relatively strong substitution relationship based on the characteristics, uses and prices of the commodities. These commodities have a relatively intense competitive relationship, and it may be considered as the commodity scope within which business operators compete with each other in the anti-monopoly law enforcement.

The term ‘relevant geographic market’ refers to the scope of geographic areas within which consumers can acquire commodities that have a relatively strong substitution relationship. Such areas have a relatively intense competitive relationship with each other, and the geographic scope may be considered as the area within which business operators compete with each other in the anti-monopoly law enforcement.

Where such factors as production cycle, life time, seasonal features, fashion style or protection period of intellectual property rights have become commodity characteristics that cannot be ignored, the factor of time shall be considered in the definition of the relevant market...

<sup>38</sup> See Qing Li (n 31); and, in general, Wang Xiaoye (ed), *Fanlongduanfa zhong de Xiangguan Shichang Jieding* [Market Definition in the Antitrust Law] (Social Sciences Academic Press, China 2014).

<sup>39</sup> See Li Hong, *Xiangguan Shichang Lilun yu Shijian – Fanlongduan zhong Xiangguan Shichang Jieding de Jingjixue Fenxi* [Relevant Market Theory and Practice: Antitrust Economic Analysis as Defined in the Relevant Market] (The Commercial Press, China 2011) 67.

<sup>40</sup> See Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2012* [Report on Competition Law and Policy of China 2012] (Law Press, China 2012) 74-75; Interview with a leading academic expert on *the Chinese Anti-Monopoly Law* (n 29); and Zhang, ‘The Enforcement of the Anti-Monopoly Law in China: An Institutional Design Perspective’ (n 7) 642-44.

<sup>41</sup> See Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2011* [Report on Competition Law and Policy of China 2011] (n 31) 105.

<sup>42</sup> For example, in June 2007, the ‘Loudi [a city in Hunan province, China] Insurance Industry Association’ signed “cooperation agreements” with 11 insurance companies to monopolise car insurance business for new vehicles in the Loudi market. Both the Hunan Price Bureau (supervised by the NDRC) and the Hunan Province Administration for Industry and Commerce (supervised by the SAIC) separately investigated this monopoly conduct, and imposed different financial penalties at the end of 2012 and the beginning of 2013, respectively: see, e.g., ‘Loudi Xinchexian Shichang Longduan bei Chachu’ [Loudi New Vehicles’ Insurance Monopoly has been Investigated and Punished (author’s translation)] *Jinghua Shibao* [Jinghua Times, China] (Beijing, 29 December 2012) 014; and Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2014* [Report on Competition Law and Policy of China 2014] (n 30) 37.

different agencies find it hard to avoid duplication or remain unnoticed in their work process.<sup>43</sup> In the case of duplication, if administrative agencies refuse to give up their powers, different anti-monopoly agencies may come to different conclusions on the same case, and consequently a final decision is hard to reach (see footnote 42 above).<sup>44</sup> Thus, the multi-agency operating system could bring challenges arising from conflicting decisions for market participants involved in anti-monopoly cases in China.

*Thirdly*, failing to stop *administrative monopolies*<sup>45</sup> may well be the most significant defect of Chinese anti-monopoly enforcement agencies, especially regarding the survival situations of privately-owned SMEs.<sup>46</sup> Although *the Chinese Anti-Monopoly Law 2007*

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<sup>43</sup> See Ren and Zhao (n 20).

<sup>44</sup> See Liu Wei and Xie Peng, 'Zhongguoshi Fanlongduan 5 nian' [A Five-Year Review of Chinese-Style Anti-Monopoly (author's translation)] *Southern Weekend* (Guangzhou, China, 27 September 2013) <[www.infzm.com/content/94649](http://www.infzm.com/content/94649)> accessed 30 January 2017.

<sup>45</sup> In China, *administrative monopoly* includes two types: local protection and State-led monopoly. Articles 33-35 of *the Chinese Anti-Monopoly Law 2007* (see footnote 47 below) regulate local protections. State-led monopoly, in general, means abusing the State's administrative powers to intervene economic development by forming monopolies in some unnatural monopoly industries, which is somehow regulated by Article 7 of *the Chinese Anti-Monopoly Law 2007* (see footnote 80 below): see, e.g., Xu Guangyao, 'Fanlongduanfa shangde Xingzheng Longduan Fenxi' [An Analysis of Administrative Monopoly in *the Chinese Anti-Monopoly Law* (author's translation)] (2014) 11 *Xingzheng Guanli Gaige* [Administration Reform, China] 42; Wang Shang, 'Xingzhengxing Longduan ji Fanlongduan Falv Guizhi Shuping' [A Review of Administrative Monopoly and Anti-Monopoly Law Regulation] (2014) 20 *Xuelilun* [Theory Research, China] 102; Ou Changmei, 'Fagaiwei Mingnian Zhugong Xingzheng Longduan' [The NDRC of China Focuses on Administrative Monopoly in 2015 (author's translation)] *Dongfang Zaobao* [*Dongfang Daily*] (Shanghai, 4 December 2014) A18; Yang Junfeng, 'Fanlongduanfa ye Shiyongyu Xingzheng Longduan' [*The Chinese Anti-Monopoly Law* also Applies to Administrative Monopoly (author's translation)] *Southern Weekend* (Guangzhou, China, 31 October 2014) <[www.infzm.com/content/105208](http://www.infzm.com/content/105208)> accessed 30 January 2017; and Chen Jing, 'Guojia Fagaiwei Fanlongduanju Juzhang: 2015 nian jiang Zhugong Xingzheng Longduan' [Director General of the Department of Price Supervision Under the NDRC of China: Administrative Monopoly is the Main Task in 2015 (author's translation)] (*China News*, 1 December 2014) <<http://finance.chinanews.com/cj/2014/12-01/6833517.shtml>> accessed 30 January 2017.

<sup>46</sup> In December 2014, the Supreme People's Court of China held a press conference to explain 'Comments of the Supreme People's Court on the Equal Protection of the Law of Non-Public Economy Promoting the Healthy Development of the Non-Public Economy' [2014]: this mentioned that the State relaxes legal environment for the privately-owned economy, as well as providing fair protection for the State-owned economy and privately-owned economy: see, e.g., 'Zuigao Renmin Fayuan Guanyu Yifa Pingdeng Baohu Feigongyouzhi Jingji Cujin Feigongyouzhi Jingji Jiankang Fazhan de Yijian' [Comments of the Supreme People's Court on the Equal Protection of the Law of Non-Public Economy Promoting the Healthy Development of the Non-Public Economy] [2014] <<http://ltfzs.mofcom.gov.cn/article/ckts/ckqita/201501/20150100873720.shtml>> accessed 30 January 2017; Shen Qing, 'China Relaxes Legal Environment for Private Economy' (*Xinhua, China*, 29 December 2014) <[http://news.xinhuanet.com/english/china/2014-12/29/c\\_133885643.htm](http://news.xinhuanet.com/english/china/2014-12/29/c_133885643.htm)> accessed 30 January 2017; and Sun Jungong and Zhang Yongjian, 'Fabu "Guanyu Yifa Pingdeng Baohu Feigongyouzhi Jingji, Cujin Feigongyouzhi Jingji Jiankang Fazhan de Yijian"' [Issuing 'Comments on the Equal Protection of the Law of Non-Public Economy Promoting the Healthy Development of Non-Public Economy' (author's translation)] (Press Conference of the Supreme People's Court of China, Beijing, 29 December 2014) <<http://legal.people.com.cn/GB/51654/363283/391857/>> accessed 30 January 2017.

purports to tackle administrative monopoly,<sup>47</sup> administrative powers remain the biggest obstacle for anti-monopoly enforcement.<sup>48</sup> The approach of ‘the superior authority punishment and correction’ (Article 51 of *the Chinese Anti-Monopoly Law 2007*, see footnote

<sup>47</sup> See the Anti-Monopoly Law of China 2007, Arts 32-37 & 51.

#### Chapter V: Abuse of Administrative Power to Eliminate or Restrict Competition

Article 32: Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power, restrict or restrict in a disguised form entities and individuals to operate, purchase or use the commodities provided by business operators designated by it.

Article 33: Any administrative organ or organization empowered by a law or an administrative regulation to administer public affairs may not have any of the following conducts by abusing its administrative power to block free circulation of commodities between regions:

- (1) imposing discriminative charge items, discriminative charge standards or discriminative prices upon commodities from outside the locality,
- (2) imposing such technical requirements and inspection standards upon commodities from outside the locality as different from those upon local commodities of the same classification, or taking such discriminative technical measures as repeated inspections or repeated certifications to commodities from outside the locality, so as to restrict them to enter local market,
- (3) exerting administrative licensing specially on commodities from outside the locality so as to restrict them to enter local market,
- (4) setting barriers or taking other measures so as to hamper commodities from outside the locality from entering the local market or local commodities from moving outside the local region, or
- (5) other conducts for the purpose of hampering commodities from free circulation between regions.

Article 34: Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power to reject or restrict business operators from outside the locality to participate in local tendering and bidding activities by such means as imposing discriminative qualification requirements or assessment standards or releasing information in an unlawful manner.

Article 35: Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power to reject or restrict business operators from outside the locality to invest or set up branches in the locality by imposing unequal treatment thereupon compared to that upon local business operators.

Article 36: Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power to force business operators to engage in the monopolistic conducts as prescribed in this Law.

Article 37: Any administrative organ may not abuse its administrative power to set down such provisions in respect of eliminating or restricting competition.

#### Chapter VII: Legal Liabilities

Article 51: Where any administrative organ or an organization empowered by a law or administrative regulation to administer public affairs abuses its administrative power to eliminate or restrict competition, the superior authority thereof shall order it to make correction and impose punishments on the directly liable person(s)-in-charge and other directly liable persons. The anti-monopoly authority may put forward suggestions on handling according to law to the relevant superior authority.

Where it is otherwise provided in a law or administrative regulation for handling the organization empowered by a law or administrative regulation to administer public affairs which abuses its administrative power to eliminate or restrict competition, such provisions shall prevail.

<sup>48</sup> See Hu Xuecui, ‘Wuwei Xuezhe Yanzhong de Zhongguo Fanlongduan Diaocha’ [Opinions of Five Chinese Scholars on Chinese Anti-Monopoly Investigation (author’s translation)] (*Phoenix, Beijing*, 20 November 2014) <[http://finance.ifeng.com/a/20141120/13293532\\_4.shtml](http://finance.ifeng.com/a/20141120/13293532_4.shtml)> accessed 30 January 2017.



47) is inherent in abusing administrative powers,<sup>49</sup> because this requirement is like “putting foxes in charge of the hen house”.<sup>50</sup> In other words, because bureaucrats traditionally tend to shield one another, rare punishment and correction are held towards administrative interventions.<sup>51</sup> Therefore, examination of China’s economic development approach shows that administrative agencies favour SOEs rather than privately-owned SMEs.<sup>52</sup> Local governments favour local branches of SOEs rather than developing both SOEs and privately-owned SMEs in parallel.<sup>53</sup> In brief, due to the present punishment and correction approach established in *the Chinese Anti-Monopoly Law 2007*, administrative monopoly continues and non-SOEs are unable to compete with SOEs which have privileged identities.

Faced with the above-mentioned loopholes in China’s anti-monopoly enforcement system, such as a lack of relevant judicial interpretations and professionals, the multi-agency operating system, and the failure to break administrative monopoly, effective competition in the Chinese market rarely has the opportunity to emerge. As a way of preventing such a trend, the following subsection suggests establishing an independent anti-monopoly enforcement agency,<sup>54</sup> under the direct supervision of the State Council of China.

#### *5.1.1.2 Upgrading Chinese Anti-Monopoly Agencies in order to Achieve Better Competition between SOEs and Privately-Owned SMEs*

In order to upgrade the Chinese anti-monopoly enforcement system, two elements need to be explained in the following pages. The *first* element concentrates on how to understand and form an independent anti-monopoly enforcement agency to replace the present

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<sup>49</sup> See Wang Xiaoye (ed), *Fanlongduan Lifa Redian Wenti [Hot Spots of Chinese Anti-Monopoly Legislation]* (Social Sciences Academic Press, China 2007) 125; Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2010 [Report on Competition Law and Policy of China 2010]* (Law Press, China 2010) 173; and Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2011 [Report on Competition Law and Policy of China 2011]* (n 31) 95.

<sup>50</sup> See Chapter 3.2.2.2 above.

<sup>51</sup> Regarding how the steel, gas station, and telecommunications sector have fared in Chapter 4, relevant SOEs and administrative agencies escape punishment although they have anti-competitive behaviour.

<sup>52</sup> See Chapter 2.2.1 above.

<sup>53</sup> See Chapter 4.3.2.2 above.

<sup>54</sup> See Huang Yong, ‘Zhengfu Zhineng zai Zhongguo Fanlongduanfa Shishi zhong de Dingwei’ [The Government Functions Relating to Enforcement of *Chinese Anti-Monopoly Law*] in Wang Xiaoye (ed), *Jingji Quanjihua xia Jingzhengfa de Xinfazhan [New Development of Competition Law under Globalization]* (Social Sciences Academic Press, China 2005) 137.

multi-agency system. The *second* element analyses what powers and functions the future anti-monopoly enforcement agency should have in order to effectively tackle administrative monopoly and support privately-owned SMEs in China.

#### 5.1.1.2.1 Uniqueness and Independence of the Future Chinese Anti-Monopoly Enforcement Agency

At the turn of the 21st century, many countries realised that an independent competition authority would be more powerful in balancing and preventing narrow interest goals between different interest groups when enforcing competition law (antitrust/anti-monopoly law).<sup>55</sup> By 2002, approximately 63 percent of developed countries and 59 percent of developing countries all over the world had independent competition authorities, which were not attached to any ministry in their countries.<sup>56</sup> In the EU, independent competition authorities have had positive achievements in recent years.<sup>57</sup> In the UK, the new competition enforcement agency, the Competition and Markets Authority (CMA), which was legally formed in 2013 and began operating in 2014, is “an independent non-ministerial department”<sup>58</sup>.

With a similar development approach, an independent anti-monopoly agency ought to be an achievable goal for China.<sup>59</sup> However, unlike the US multi-agency system,<sup>60</sup> an

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<sup>55</sup> See Commission on Investment, Technology and Related Financial Issues Intergovernmental Group of Experts on Competition Law and Policy, *Independence and Accountability of Competition Authorities* (OUP 2001) Executive Summary.

<sup>56</sup> See Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2011* [*Report on Competition Law and Policy of China 2011*] (n 31) 38; and World Bank, ‘World Development Report 2002: Building Institutions for Markets’ (Geneva 15-18 July 2008) 142.

<sup>57</sup> See Abel M Mateus, ‘Why Should National Competition Authorities be Independent and How Should They be Accountable?’ (2007) 3 *European Competition Journal* 17; and Johan W Van de Gronden and Sybe A de Vries, ‘Independent Competition Authorities in the EU’ (2006) 2 *Utrecht Law Review* 32.

<sup>58</sup> The CMA replaced the Office of Fair Trading (OFT) and the Competition Commission (CC) in the UK: see, e.g., Competition and Markets Authority, ‘About Us’ (*Competition and Markets Authority, UK*, 2014) <[www.gov.uk/government/organisations/competition-and-markets-authority/about](http://www.gov.uk/government/organisations/competition-and-markets-authority/about)> accessed 30 January 2017; and Becket McGrath and Jo Love, ‘United Kingdom Overview’ in *The Handbook of Competition Enforcement Agencies 2014* (Global Competition Review 2014).

<sup>59</sup> See Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2014* [*Report on Competition Law and Policy of China 2014*] (n 30) 37.

<sup>60</sup> The US Antitrust enforcement agencies include the Federal Trade Commission’s Bureau of Competition and the US Department of Justice’s Antitrust Division. Although the US antitrust law is probably a paragon in the world that has more than one antitrust enforcement agency, there is a paradox concerning the dual authority model: a single antitrust enforcement agency with higher efficiency would save many more investigation resources: see, e.g., *id*; Richard A Posner, ‘A Statistical Study of Antitrust Enforcement’ (1970) 13 *Journal of Law and Economics* 365; Philip Elman, ‘Retrospect and Prospect’ in Boston Bar Association, Antitrust

uneven understanding remains of how things should work in China.<sup>61</sup> Since the Chinese anti-monopoly enforcement system was set up, drawbacks of the multi-agency operating system, such as low efficiency, lack of authority, and incoherence (see the above-mentioned case in footnote 42), have been evident in anti-monopoly enforcement.<sup>62</sup> Because the multi-agency operating system remains, reform is required.

The first element of this reform consists of *uniqueness*: establishing a single Chinese anti-monopoly enforcement agency.<sup>63</sup> The author recommends merging the current agencies, namely the National Anti-Monopoly Commission and three enforcement agencies, into a new ‘Chinese Anti-Monopoly Authority’ (see Figure 5-3 below). This would not only combine human, material and financial resources for anti-monopoly investigations, but would also reduce disputes in the investigation process.<sup>64</sup>

The second element of the reform is *independence*: the new ‘Chinese Anti-Monopoly Authority’, directly supervised by the State Council, should implement *the Chinese Anti-Monopoly Law 2007* with greater autonomy. In other words, other administrative agencies should no longer be unable to interfere with anti-monopoly enforcement concerning SOEs.<sup>65</sup> In today’s China, the three anti-monopoly enforcement agencies remain subordinate

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Committee and Greater Boston Chamber of Commerce, *A Primer on Unlawful Restraints in Marketing and Distribution* (Warren, Gorham & Lamont 1967) 58; William E Kovacic, ‘Downsizing Antitrust: Is It Time to End Dual Federal Enforcement?’ (1996) 41 *The Antitrust Bulletin* 505; Spencer Weber Waller, ‘Prosecution by Regulation: The Changing Nature of Antitrust Enforcement’ (1998) 77 *Oregon Law Review* 1383; Harry First, Eleanor M Fox and Daniel E Hemli, ‘The United States: The Competition Law System and the Country’s Norms’ in Eleanor M Fox and Michael J Trebilcock (eds), *The Design of Competition Law Institutions: Global Norms, Local Choices* (OUP 2013) 344-83; and Robert N Cook and Robert A Skitol, ‘Fresh Thinking About the FTC/DOJ Interface: Return to the Wilson-Brandeis-Elman Vision’ (2002) July *The Antitrust Source* <[www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/cookskitol.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/cookskitol.authcheckdam.pdf)> accessed 30 January 2017.

<sup>61</sup> The positive side of a multi-agency operating system includes stimulating motivation of different agencies and improving their working efficiency: see, e.g, Interview with a leading academic expert on *the Chinese Anti-Monopoly Law* (n 29); and Harris and others (n 2) 265.

<sup>62</sup> See Furse (n 23) 72; and Interview with a leading academic expert on *the Chinese Anti-Monopoly Law* (n 29).

<sup>63</sup> See Interview with a leading academic expert on *the Chinese Anti-Monopoly Law* (n 29); Interview with a leading Chinese scholar on *the Chinese Anti-Monopoly Law* (the interviewee did not allow the researcher using the interviewee’s name in any written work arising from the study, but did consent to being interviewed) (Beijing, China, 2012); and Zhong Gang, *Fanlongduanfa Huomian Zhidu Yanjiu [On the Exemption in Anti-Monopoly Laws]* (Peking University Press, China 2010) 139.

<sup>64</sup> See Wang Xiaoye, ‘Guanyu Woguo Fanlongduan Zhifa Jigou de Jige Wenti’ [Several Issues On China’s Anti-Monopoly Law Enforcement Agencies (author’s translation)] (2007) 28 *Dong Yue Tribune* 30, 39.

<sup>65</sup> *Ibid.*, 37.

authorities (MOFCOM, the NDRC and the SAIC). When anti-monopoly investigations involve central SOEs (which are at the same administrative level as these anti-monopoly enforcement agencies<sup>66</sup>), *the Chinese Anti-Monopoly Law 2007* often ineffectively blocks administrative monopoly<sup>67</sup> because anti-monopoly enforcement agencies often fear to challenge the same level SOEs.<sup>68</sup> With regard to the survival of privately-owned SMEs examined above in Chapter 4, it is easy to speculate that despite relevant administrative agencies and SOEs abuse their administrative powers to challenge *the Chinese Anti-Monopoly Law 2007* by the way of formulating mergers, discriminating privately-owned SMEs and reducing consumer welfare, no actual investigations are carried out to limit the conduct of relevant administrative agencies and SOEs. Faced with such a situation, if the future ‘Chinese Anti-Monopoly Authority’ does not have independent and authoritative powers, it will fail to carry out effective investigations involving administrative powers.

Accordingly, in order to overcome the current system’s weaknesses, the upgrade approach to the Chinese anti-monopoly enforcement system should include two steps to

<sup>66</sup> **Figure 5-2: Administrative Levels of the Chinese Anti-Monopoly Enforcement Agencies and Central SOEs**

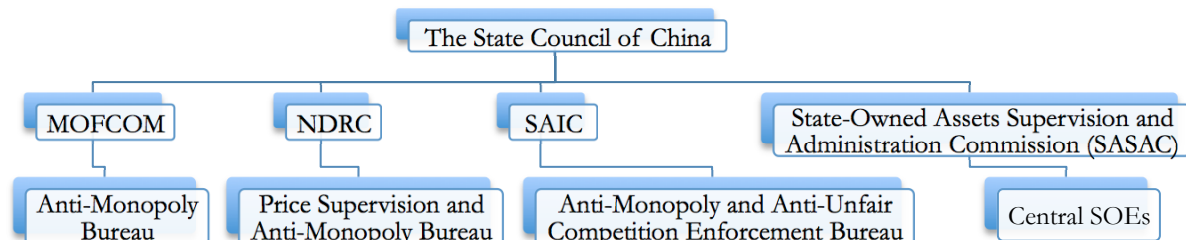


Figure devised by the author.

<sup>67</sup> Since *the Chinese Anti-Monopoly Law 2007* came into force, only six administrative monopoly cases have been investigated. Further, “Chinese officials’ statements since enactment of the AML confirm that industrial policy and discriminatory intent continue to guide its application and enforcement”: see, e.g., Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2015 [Report on Competition Law and Policy of China 2015]* (n 28) 90; and U.S. Chamber of Commerce, ‘Competition Interests in China’s Competition Law Enforcement: China’s Anti-Monopoly Law Application and the Role of Industrial Policy’ (U.S. Chamber of Commerce, 2014) <[www.uschamber.com/sites/default/files/aml\\_final\\_090814\\_final\\_locked.pdf](http://www.uschamber.com/sites/default/files/aml_final_090814_final_locked.pdf)> accessed 30 January 2017.

<sup>68</sup> In 2011 the Chinese anti-monopoly enforcement impose large fines on *SOEs* for the first time. Between 2008 and 2013, the anti-monopoly probe of China Unicom and Telecom (2011) is the only anti-monopoly case involving *central SOEs* which was officially published. Furthermore, in 2014 the American Chamber of Commerce and the European Union Chamber of Commerce in China stated that Chinese anti-monopoly enforcement targeted foreign companies rather than administrative monopoly (this statement is explained further in footnote 172): see, e.g., Liu Jie, ‘Drug Firms Face Monopoly Fines’ *China Daily* (Beijing, 15 November 2011) <[http://usa.chinadaily.com.cn/epaper/2011-11/15/content\\_14098188.htm](http://usa.chinadaily.com.cn/epaper/2011-11/15/content_14098188.htm)> accessed 30 January 2017; Ying Xue, ‘The Private Enforcement of Anti-Monopoly Law in a Transitional China: An Analysis from Economic and Comparative Perspectives’ (SJD dissertation, University of Illinois 2012) 5; and Liu and Xie (n 44).

satisfy *uniqueness* and *independence*. First, the administrative level of anti-monopoly agency operation must be upgraded, so that it is directly under the State Council of China.<sup>69</sup> This would make the new proposed ‘Chinese Anti-Monopoly Authority’ much more powerful. Second, concerning administrative powers, the new ‘Chinese Anti-Monopoly Authority’ should have a number of branches at the provincial level, directly answerable to their superior’s orders to support privately-owned SMEs on a wide range of issues.<sup>70</sup> However, in order to rein in the privileged positions of Chinese SOEs and ensure the professional level of anti-monopoly enforcers, there would be no need to establish branches lower than the provincial level.<sup>71</sup>

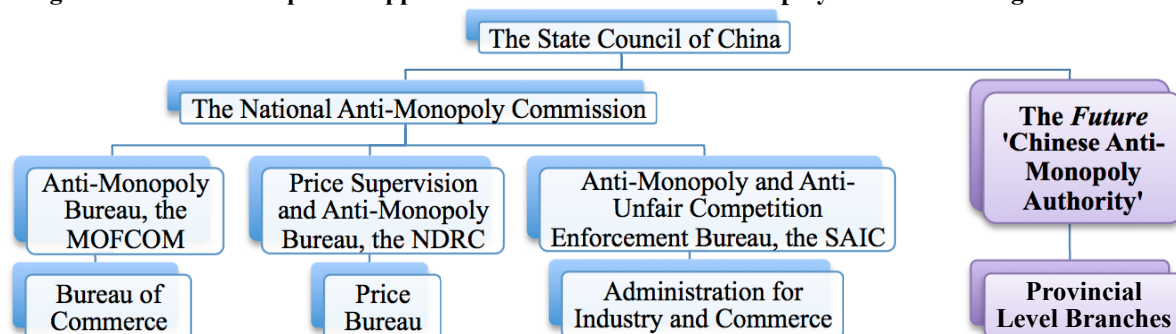
#### 5.1.1.2.2 Powers and Functions of the Future Chinese Anti-Monopoly Authority

If the anti-monopoly enforcement system can be upgraded successfully, acquisition of more powers to achieve authority and independence would be the expectation of the ‘Chinese Anti-Monopoly Authority’, especially regarding privately-owned SMEs.

Concerning the professional characteristics of competition,<sup>72</sup> the first power and function of the ‘Chinese Anti-Monopoly Authority’ would include explanation of some essential elements of *the Chinese Anti-Monopoly Law 2007*; launching competition policies;

<sup>69</sup> See Mark Williams, *The Political Economy of Competition Law in Asia* (Edward Elgar Publishing 2013) 111-12.

<sup>70</sup> **Figure 5-3: The Development Approach of the Chinese Anti-Monopoly Enforcement Agencies**



\* The left boxes in blue show the current multi-agency system in China, while the right boxes in purple indicate the updated anti-monopoly enforcement in the future.

Figure devised by the author.

<sup>71</sup> Anti-monopoly enforcement below the provincial level would cause confusion: Wan, Han and Xie (n 25).

<sup>72</sup> See Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2011 [Report on Competition Law and Policy of China 2011]* (n 31); Clifford Winston, *Government Failure versus Market Failure: Microeconomics Policy Research and Government Performance* (AEI-Brookings Joint Center for Regulatory Studies 2006) 94; and Qing Li (n 31).

and providing guidance on particular competition issues.

To elaborate: *first*, for the sake of enhancing the legal usability and impartiality of judgments, the relevant market concept in *the Chinese Anti-Monopoly Law 2007* requires further explanation. When the relevant market can be suitably defined in specific cases, the dominant position will be examined both theoretically and rationally;<sup>73</sup> as a result, victims will receive appropriate protection (for example, as in the situation of privately-owned gas stations and their consumers considered above in Chapter 4.2).

*Second*, an examination of the outcomes of State intervention in China (until now) reveals that uneven growth between SOEs and privately-owned SMEs appears when the State's industrial policies challenge competition policies. In order to prevent such a situation arising in the future, *industrial policies* must align with *competition policies*,<sup>74</sup> which would be articulated arising by the proposed 'Chinese Anti-Monopoly Authority'.<sup>75</sup> This change would increase the effectiveness and coherence of all Chinese market-intervention policies and help privately-owned SMEs to avoid *inappropriate*<sup>76</sup> intervention. If this change is achievable, privately-owned SMEs in the Chinese steel industry could receive better treatment (by *the Chinese Anti-Monopoly Law 2007*) in the government-led merger and

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<sup>73</sup> For example, *Li Fangping v China Netcom (Group) Co. Ltd. Beijing Branch*, "on appeal, the Beijing High People's Court upheld the judgment by the lower court, including on the market definition point": see, e.g., *Li Fangping v China Netcom (Group) Co. Ltd. Beijing Branch* [2008] Beijing No. 2 Intermediate People's Court No. 17385; *Li Fangping v China Netcom (Group) Co. Ltd. Beijing Branch* [2010] Beijing High People's Court No. 481; Zhaojing Luo, 'Development of Abuse of Administrative Power to Eliminate or Restrict Competition in *the Anti-Monopoly Law of the People's Republic of China* and the Impact of Article 106 of EU Competition Law and Free Movement Rules' (PhD thesis, University of Glasgow 2013) 28; Harris and others (n 2) 97-99; and Adrian Emch and Jonathan Liang, 'Private Antitrust Litigation in China – The Burden of Proof and Its Challenges' (April 2013) 1 Competition Policy International (CPI) Antitrust Chronicle <[www.competitionpolicyinternational.com/private-antitrust-litigation-in-china-the-burden-of-proof-and-its-challenges/](http://www.competitionpolicyinternational.com/private-antitrust-litigation-in-china-the-burden-of-proof-and-its-challenges/)> accessed 30 January 2017.

<sup>74</sup> "China will introduce fair competition reviews into its industrial policy as the country prioritizes a fair, competitive economy...": Cheng Yunjie, 'China to Build Fair Competition Review Mechanism' (*Xinhua, China*, 25 July 2015) <[http://news.xinhuanet.com/english/2015-07/25/c\\_134446376.htm](http://news.xinhuanet.com/english/2015-07/25/c_134446376.htm)> accessed 30 January 2017.

<sup>75</sup> See Zhu Hongwen and Wang Jian, 'Erquan Heyi Zouxiang Sanquan Heyi: Woguo Fanlongduan Zhifa Jiguan Daoru Zhunsifaquan de Lilun, Lujing he Neirong' [From Two Gathering Powers to Three Gathering Powers: The Theory, Path and Content on Introducing Quasi-Judicial Powers to Chinese Anti-Monopoly Enforcement Agencies (author's translation)] (International Symposium on Controversial Issues regarding Chinese AML Enforcement, Hangzhou, China, 13-14 August 2012).

<sup>76</sup> The author assumes that *inappropriate interventions* in this research mean that Chinese administrative agencies abuse their powers to obstruct non-SOEs and interrupt competition in the market with a view to protecting SOEs and temporary State interest.

shutting-down process.<sup>77</sup>

*Third*, it would be an obligation for the ‘Chinese Anti-Monopoly Authority’ to work on anti-monopoly knowledge diffusion all over the country in order to promote competition in the market, especially educating other administrative agencies, SOEs and privately-owned SMEs.<sup>78</sup> Administrative agencies and SOEs should realise the dangers for competition arising from administrative monopoly, while privately-owned SMEs should have a good knowledge of anti-competitive conduct in order to protect themselves.

The second power and function of the ‘Chinese Anti-Monopoly Authority’ would be upgraded investigative powers with regard to the application of the State’s industrial policies and any anti-competitive conduct of administrative agencies and SOEs. When administrative agencies that have the right to launch industrial policies are at the *same administrative level* as the ‘Chinese Anti-Monopoly Authority’, such as the MOFCOM, the NDRC and the SAIC, the Authority should have the right to request arbitration from particular authorities<sup>79</sup> (i.e. the Supreme People’s Court of China). When lower-level administrative agencies release industrial policies contrary competition policies or *the Chinese Anti-Monopoly Law 2007*, the Authority should have the right to suspend the implementation of these industrial policies and require modifications directly. Furthermore, the ‘Chinese Anti-Monopoly Authority’ should have the genuine right to investigate and penalise all anti-competitive conduct within the country, with no exemption for SOEs<sup>80</sup>. Therefore, all merger plans in the steel industry<sup>81</sup>

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<sup>77</sup> See Chapters 4.1.1.2 & 4.1.2.2 above.

<sup>78</sup> “Competition policy...must develop a competition culture in the society in which it operates. This is in itself one of the principal elements which can guarantee the competitiveness if an economy in the longer term”: Philip Lowe, ‘The Design of Competition Policy Institutions for the 21st Century – The Experience of the European Commission and DG Competition’ (2008) 3 Competition Policy Newsletter 1, 6.

<sup>79</sup> See Harris and others (n 2) 188-89.

<sup>80</sup> See Wang Xiaoye (ed), *Zhonghua Renmin Gongheguo Fanlongduanfa Xiangjie* [Explanation on the Chinese Anti-Monopoly Law] (Intellectual Property Publishing House, China 2008) 80; Luo (n 73) 78; Ping Lin and Jingjing Zhao, ‘Merger Control Policy Under China’s Anti-Monopoly Law’ (2012) 41 *Review of Industrial Organization* 109, 117; and the Anti-Monopoly Law of China 2007, Art 7.

Article 7: With respect to the industries controlled by the State-owned economy and concerning the lifeline of national economy and national security or industries implementing exclusive operation and sales according to law, the state protects the lawful business operations conducted by the business operators therein...

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.

could be examined and decided upon by the ‘Chinese Anti-Monopoly Authority’, applying *the Chinese Anti-Monopoly Law 2007*, without interference by other administrative agencies.<sup>82</sup>

To sum up, forming a single and independent anti-monopoly enforcement agency, namely the ‘Chinese Anti-Monopoly Authority’, would be a better approach in order to restrict the application of conflicting administrative powers and prevent administrative monopoly in China. However, because the current anti-monopoly multi-agency operating system has been prevalent for more than eight years notwithstanding constant criticism, this upgrade will certainly take time. In order to make an immediate improvement, a number of other methods should be explored and developed, such as launching a small number of specific regulations concerning Chinese SOEs and administrative agencies, in order to prevent specific or exclusive rights’ abuse in the marketplace.

### **5.1.2 Specific Regulations for Preventing the Abuse of Administrative Powers**

In theory, *the Chinese Anti-Monopoly Law 2007* prohibits SOEs and administrative agencies from abusing their specific or exclusive rights or dominant position to interrupt competition in the market.<sup>83</sup> If their behaviour, within the scopes of Articles 7, 32-37 and 50 of *the Chinese Anti-Monopoly Law 2007*, causes any losses, these SOEs or administrative agencies

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<sup>81</sup> See Chapter 4.1.1.2 above.

<sup>82</sup> See the Anti-Monopoly Law of China 2007, Art 27.

Article 27: In the case of the examination of the concentration of business operators, it shall consider the relevant elements as follows:

- (1) the market share of the business operators involved in the relevant market and the controlling power thereof over that market,
- (2) the degree of market concentration in the relevant market,
- (3) the influence of the concentration of business operators on the market access and technological progress,
- (4) the influence of the concentration of business operators on the consumers and other business operators,
- (5) the influence of the concentration of business operators on the national economic development, and
- (6) other elements that may have an effect on the market competition and shall be taken into account as determined by the Anti-monopoly Authority under the State Council.

<sup>83</sup> See Yong Huang and others, ‘China’s 2007 Anti-Monopoly Law: Competition and the Chinese Petroleum Industry’ (2010) 31 *Energy Law Review* 337, 348; and Rachel Evans, ‘Transparency Creates Expectations’ (2009) 28 *International Financial Law Review* 21.



should compensate the losses.<sup>84</sup> However, without implementation and effective punitive measures, these Articles remain an empty threat.<sup>85</sup> Therefore, launching a number of specific regulations to restrict administrative powers and improve anti-monopoly implementation may be acceptable for today's China in order to cure the weakness of *the Chinese Anti-Monopoly Law 2007*, as well as benefiting privately-owned SMEs which have contended for equal development opportunities with SOEs.<sup>86</sup>

These specific regulations should be directed towards at least three targets. The *first* one is regulation of the supremacy of *the Chinese Anti-Monopoly Law 2007* in order to prohibit the abuse of specific or exclusive rights or dominant positions by SOEs. With regard to administrative levels of these administrative agencies, there would be two requirements to accomplish this target: (a) Higher-level agencies, which have the right to launch industrial policies, must be aware that no industrial policy in China can triumph over *the Chinese Anti-Monopoly Law 2007*; (b) Lower-level administrative agencies, which do not have the right to launch industrial policies, should refuse to implement industrial policies which violate *the Chinese Anti-Monopoly Law 2007*. Simultaneously, in order to avoid risks caused by refusals against implementation, lower-level administrative agencies should be granted powers to report their opinions to anti-monopoly enforcement agencies with evidence. Subsequently, anti-monopoly enforcement agencies should investigate and make a decision on these industrial policies: whether to change or leave them alone. In addition, the same rights and protection for lower-level administrative agencies should also be the entitlement of SOEs, with the aim of avoiding most of the current administrative intervention, from taking place.

The *second* target of specific regulations would cope with the right of market participants, such as privately-owned SMEs, to report and refuse administrative intervention

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<sup>84</sup> See the Anti-Monopoly Law of China 2007, Arts 7, 32-37 & 50 (see footnotes 47 & 80 above).

Article 50: Where any loss was caused by a business operator's monopolistic conducts to other entities and individuals, the business operator shall assume the civil liabilities.

<sup>85</sup> See Shi Jianzhong, 'Woguo Fanlongduanfa de Tese Zhidu, Liangdian Zhidu ji Zhongda Buzu' [Specific and Significant Features and Critical Deficiencies of *the Chinese Anti-Monopoly Law* (author's translation)] (2008) 1 Faxuejia [The Jurist, China] 14, 18; and Wang, *The Evolution of China's Anti-Monopoly Law* (n 10) 205.

<sup>86</sup> See Lowe (n 78).

instigated by SOEs, or industrial policies launched by both higher-level and lower-level administrative agencies. Because the majority of privately-owned SMEs are local enterprises, it will be difficult for them to report unfair situations directly to anti-monopoly enforcement agencies. Thus, making contact with local anti-monopoly enforcement officers working in the Bureaus of Commerce, the Price Bureaus and the Administration for Industry and Commerce will be a possible solution. Taking the Price Bureaus, for instance, over 150 new anti-price monopoly enforcers have been added in local administrative agencies since 2011,<sup>87</sup> in order to take on responsibilities for reactions to anti-monopoly enforcement, as well as saving privately-owned SMEs from inappropriate administrative intervention. However, although the Price Supervision and Anti-Monopoly Bureau treated the administrative monopoly as their main work task for the first time in 2015, the current situation shows no difference.<sup>88</sup>

The *third* target of specific regulations would be the reduction of administrative monopolies in China, by introducing a handful of anti-monopoly enforcement and punitive measures. Firstly, when SOEs and administrative agencies abuse their specific or exclusive rights to intervene in privately-owned SMEs in traditional State-controlled industries, anti-monopoly enforcement agencies would have the right to stop the infringement. Accordingly, “administrative mergers” in the steel industry would disappear;<sup>89</sup> the amount of privately-owned gas stations would increase;<sup>90</sup> and private funds would enter the fixed-broadband market more easily.<sup>91</sup>

Secondly, anti-monopoly enforcement agencies would have the right to determine who will gain benefits from the compensation<sup>92</sup> caused by administrative monopoly, with the aim

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<sup>87</sup> See Qing Li (n 31).

<sup>88</sup> See Qu (n 45).

<sup>89</sup> See Chapter 4.1.1.2 above.

<sup>90</sup> See Chapter 4.1.2.2 above.

<sup>91</sup> See Chapter 4.3.2 above.

<sup>92</sup> See the Anti-Monopoly Law of China 2007, Arts 46-48.

Article 46: Where business operators reach a monopoly agreement and institute it in violation of this Law, the anti-monopoly authority shall order them to cease doing so, and shall confiscate the illegal gains and impose a fine of 1% up to 10% of the sales revenue in the previous year. Where the reached monopoly agreement has not been instituted, a fine of not more than 500,000 Yuan (approximately £54,400) shall be imposed...

Article 47: Where any business operator abuses its dominant market status in violation of this Law,

of compensating relevant privately-owned SMEs suffered the inappropriate administrative intervention. In order to ensure smooth implementation, specific regulations would also be required to provide detailed explanations for calculating compensation.

In brief, all of these measures described above would provide immediate remedies to offset the current shortcomings of China's anti-monopoly regime, as well as enhancing competition and promoting sound development between SOEs and privately-owned SMEs.

### **5.1.3 Strengthening Private Enforcement of *the Chinese Anti-Monopoly Law 2007* on Behalf of Privately-Owned SMEs**

As the adoption of specific regulations regarding administrative powers of Chinese SOEs and administrative agencies cannot fully protect privately-owned SMEs that suffer administrative discrimination, private enforcement of *the Chinese Anti-Monopoly Law 2007*<sup>93</sup> will provide additional protection.<sup>94</sup> Based on the experiences of the US antitrust law and EU competition law,<sup>95</sup> cooperation between public<sup>96</sup> and private anti-monopoly enforcement<sup>97</sup> offers more

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it shall be ordered to cease doing so. The anti-monopoly authority shall confiscate its illegal gains and impose thereupon a fine of 1% up to 10% of the sales revenue in the previous year.

Article 48: Where any business operator implements concentration in violation of this Law, the anti-monopoly authority shall order it to cease doing so, to dispose of shares or assets, transfer the business or take other necessary measures to restore the market situation before the concentration within a time limit, and may impose a fine of not more than 500,000 Yuan (approximately £54,400).

<sup>93</sup> See the Anti-Monopoly Law of China 2007, Art 50 (see footnote 84 above); and 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, Art 1.

Article 1: The civil cases caused by monopolistic conducts mentioned in the Provisions (hereinafter referred to as civil dispute cases on monopoly), refer to civil cases filed before the People's Court by any natural person, legal entities or other organizations that suffer losses because of monopolistic conducts or have disputes because the contents of contracts and articles of trade associations, etc., allegedly violate Anti-Monopoly Law.

<sup>94</sup> See Komninos (n 11) 6 (pointing out that "the common features of administrative-public enforcement are the verticality of the dispute, which remains one between the state and private individuals, and the administrative nature of the sanctions imposed"; and Rainer Kulms, 'Competition Law Enforcement under Informational Asymmetry' (2016) December China-EU Law Journal 1, 5 (points to "[b]ut *amicus* interventions by public competition authorities might help private plaintiffs to overcome their difficulties").

<sup>95</sup> "If public enforcers cannot be relied upon to enforce laws honestly and vigorously, then it is necessary to replace or at least supplement their efforts with private enforcement": Xue (n 68) 39; OECD, 'Working Party No. 3 on Co-operation and Enforcement: Relationship between Public and Private Antitrust Enforcement' (9 June 2015) DAF/COMP/WP3/WD(2015)11; in general, Alison Jones, 'Private Enforcement of EU Competition Law: A Comparison with, and Lessons from, the US' in Maria Bergström, Marios Iacovides, Magnus Strand (eds), *Harmonising EU Competition Litigation: The New Directive and Beyond* (Hart Publishing 2016); Robert H Lande and Joshua P Davis, 'Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases' (2008) 42 University of San Francisco Law Review 879, 905-06; and Emil Paulis, 'Policy Issues in the Private Enforcement of EC Competition Law' in Jürgen Basedow (ed), *Private Enforcement of EC Competition Law*

protection for victims under *the Chinese Anti-Monopoly Law 2007*.<sup>98</sup>

(Kluwer Law International 2007) 8-9.

<sup>96</sup> Although certain Chinese scholars and enforcers have applauded anti-monopoly enforcement in the past eight years, the reality has been otherwise in China. By the end of 2012, there had been *no judgment* in favour of the plaintiff among all Chinese public anti-monopoly enforcement cases.

**Table 5-4: The Number of Public Anti-Monopoly Enforcement Cases in China between August 2008 and December 2012**

Types of Decisions of Public Anti-Monopoly Enforcement Cases	Time Period	August 2008 – December 2009	2010	2011	2012	Total
District Court Accepted Civil Anti-Monopoly Cases		10	33	18	55	<b>116</b>
Concluded Cases		6	23	24	49	<b>102</b>
The Number of Judgments in Favour of the Plaintiff		0	0	0	N/A	<b>N/A</b>

Source: ‘Results of Antimonopoly Civil Procedure of China’ for data from August 2008 to 2011, *Report on Competition Law and Policy of China 2013* for 2012 and total; table devised by the author.

See Deng Zhisong and Dai Jianmin, ‘Fengyu Liudu Chunqiu: Zhongguo Fanlongduanfa Zhounian Jinian’ [The Ebb and Flow: The Sixth Anniversary of *Chinese Anti-Monopoly Law* (author’s translation)] (2014) 24 Biweekly of Administration for Industry and Commerce, China 13; Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2013* [*Report on Competition Law and Policy of China 2013*] (n 30) 23-25; ‘Fagaiwei: Zhongguo Fanlongduan Juedui Meiyou Neimu, Yinqing Zhenbushao’ [NDRC: Chinese Anti-Monopoly has No Hidden Secrets, but Lots of Dilemmas (author’s translation)] *China Daily* (Beijing, 18 September 2014) <<http://finance.people.com.cn/n/2014/0918/c1004-25683036.html>> accessed 30 January 2017; and Kesheng Jin, ‘Results of Antimonopoly Civil Procedure of China’ (International Seminar on Assessing Economic and Legal Arguments in Antitrust Cases, Shanghai, 09 November 2012).

<sup>97</sup> An examination of anti-monopoly enforcement in China, between 2008 and 2013, reveals that there were only slightly over 200 civil anti-monopoly cases. There was only *one judgment* in favour of the plaintiff, in the case of *Beijing Rui Bang Yong He Science and Trade Co., Ltd. v Johnson & Johnson (Shanghai) Medical Equipment Co., Ltd.* In 2014, an anti-monopoly civil action was first taken in the Chinese petroleum industry to challenge a central SOE. However, the judgement on this case is **not** in favour of the plaintiff: see, e.g., Wang Congcong and Song Ya, ‘Fanlongduanfa Shishi Wunian, Heyi Minshi Susong cai 200 Duoqi – Fang Guowuyuan Fanlongduan Weiyuanhui Zhuania Zixunzu Zhuanjia, Zhongguo Zhengfa Daxue Jiaoshou Shi Jianzhong’ [Why did Five-Year Implementation of *the Chinese Anti-Monopoly Law* Only Bring Slightly Over 200 Civil Anti-Monopoly Cases – Interviewing Professor Shi Jianzhong, a Member of the Anti-Monopoly Committee Expert Advisory Group, working in China University of Political Science (author’s translation)] *China Youth Daily* (Beijing, 29 August 2013) 07; Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2014* [*Report on Competition Law and Policy of China 2014*] (n 30) 26-27; Ding Wenlian, ‘Xianzhi Zuidi Zhuanshou Jiage de Fanlongduan Fenxi – Beijing Ruibang Yonghe Kemao Youxian Gongsi su Qiangsheng (Shanghai) Yiliao Qicai Youxian Gongsi, Qiangsheng (Zhongguo) Yiliao Qicai Youxian Gongsi Zongxiang Longduan Xieyi Jiufenan’ [Analysis of Minimum Resale Price Restrictions – *Beijing Rui Bang Yong He Science and Trade Co., Ltd. v Johnson & Johnson (Shanghai) Medical Equipment Co., Ltd.* (author’s translation)] (*Shanghai Court*, 27 January 2014) <<http://shfy.chinacourt.org/article/detail/2014/01/id/1209557.shtml>> accessed 30 January 2017; *Beijing Rui Bang Yong He Science and Trade Co., Ltd. v Johnson & Johnson (Shanghai) Medical Equipment Co., Ltd.* [2012] Shanghai High People’s Court No. 6; Wan Jing, ‘Fanlongduan Susong Shangxu Pochu Zhuduo Pingjing’ [Anti-Monopoly Lawsuit Still Needs to Eliminate Several Bottlenecks (author’s translation)] *Legal Daily, China* (Beijing, 5 January 2015) 06; Li Chunlian, ‘Shiyou Hangye Daxiang Fanlongduan Diyi’ an zhong Shengsu’ [AnJie Represented Sinopec Won the First Anti-Monopoly Case in the Chinese Petroleum Industry: Reform should Go Ahead to Break Monopolies (author’s translation)] *Securities Daily* (Beijing, 21 August 2014) C3; and Anjie Law Firm, ‘Anjie Daili Zhongshihua zai Shiyou Hangye Fanlongduan Diyi’ an zhong Shengsu’ [AnJie Represented Sinopec Won the First Anti-Monopoly Case in the Chinese Petroleum Industry (author’s translation)] (*Anjie Law Firm*, 1 November 2016) <[www.anjielaw.com/news\\_detail/newsId=470.html](http://www.anjielaw.com/news_detail/newsId=470.html)> accessed 30 January 2017.

<sup>98</sup> Because private anti-monopoly enforcement has advantages, e.g. compensatory functions, deterrent functions, relief functions, etc., it may fix enforcement gaps of the Chinese public anti-monopoly enforcement in order to

In the US, private antitrust enforcement has been the genuine driving force behind the enforcement of antitrust law for several decades.<sup>99</sup> The EU case *Van Gend & Loos* held that individuals were entitled to assert their EU Law rights in national courts.<sup>100</sup> Although private antitrust enforcement in the EU used to be “a subject of strong interest in theory, but minor importance in practice” in the 20th century,<sup>101</sup> this situation has gradually improved in the 21st century.<sup>102</sup> However, China is lagging far behind<sup>103</sup> and private anti-monopoly

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protect privately-owned SMEs and provide better protection for the interests of victims: see, e.g., Wang Xiaoye, *Fanlongduanfa [Anti-Monopoly Law]* (Law Press, China 2011) 350; Wang Jian, ‘Fanlongduanfa Siren Zhixing de Youyuexing Jiqi Shixian: Jianlun Zhongguo Fanlongduanfa Yinru Siren Zhixing Zhidu de Biyaoxing he Lifa Jianyi’ [Advantages of Private Enforcement of the Chinese Anti-Monopoly Law and its Exertion: Necessity for Chinese Private Anti-Monopoly Enforcement and Relevant Legislative Suggestions (author’s translation)] (2007) 4 *Journal of Northwest University of Political Science and Law*, China 104; and Wang Xianlin, ‘Fanlongduan Minshi Susong yu Xingzheng Zhifa de Xianjie yu Xietiao’ [Convergence and Coordination Between the Chinese Anti-Monopoly Enforcement and Administrative Enforcement (author’s translation)] (2013) 3 *Journal of Jiangxi University of Finance and Economics* 87.

<sup>99</sup> See Everette MacIntyre, ‘The Role of the Private Litigant in Antitrust Enforcement’ (1962) 7 *The Antitrust Bulletin* 113; *Reiter v Sonotone Corp* (1979) 442 US 340, para 344; Gregor Erbach, ‘EU and US Competition Policies Similar Objectives, Different Approaches’ (EPRS, 27 March 2014) <[www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140779/LDM\\_BRI\(2014\)140779\\_REV1\\_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/140779/LDM_BRI(2014)140779_REV1_EN.pdf)> accessed 30 January 2017; and ‘The US Plaintiffs’ Bar’ (2012) 15 *Global Competition Review* 10.

Over the past 20 years or so, the US Department of Justice’s antitrust division has won settlements or criminal fines of just over US\$4 billion against cartelists and others. While no comprehensive research is available on private damages, a recent study of the 40 largest private antitrust cases from 1990 until 2007 documented close to US\$19 billion in damages paid by defendants.

<sup>100</sup> “The European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the member states but also their nationals”: see, e.g., Case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1, 2; Diarmuid Rossa Phelan, *Revolt or Revolution – The Constitutional Boundaries of the European Community* (Sweet & Maxwell 1997) 69-70; Bernard Rudden and Diarmuid Rossa Phelan (eds), *Basic Community Cases* (OUP 1997) 11-31; Donnadh Woods, Ailsa Sinclair and David Ashton, ‘Private Enforcement of Community Competition Law: Modernisation and the Road Ahead’ (Directorate-General for Competition (DG Competition), Summer 2004) <[http://ec.europa.eu/competition/speeches/text/2004\\_2\\_31\\_en.pdf](http://ec.europa.eu/competition/speeches/text/2004_2_31_en.pdf)> accessed 30 January 2017; and C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6316, paras 19 & 26.

<sup>101</sup> See Andreas Heinemann, ‘Private Enforcement in Europe’ in Roger Zäch, Andreas Heinemann and Andreas Kellerhals (eds), *The Development of Competition Law: Global Perspectives* (Edward Elgar Publishing 2010) 300; Komninos (n 11) 26; and Clifford Jones and Eleanor Sharpston, ‘Beyond Delimitis: Pluralism, Illusions, and Narrow Constructionism in Community Antitrust Litigation’ (1997) 3 *Columbia Journal of European Law* 85, 92.

<sup>102</sup> See Commission, ‘Proposal for a Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union’ COM (2013) 0404 final; Commission, ‘Green Paper on Damages Actions for Breach of the EC Antitrust Rules’ COM (2005) 672 final; Commission, ‘Commission Staff Working Paper – Annex to the Green Paper on Damages Actions for Breach of the EC Antitrust Rules’ SEC (2005) 1732; Komninos (n 11) xiii; and Eric McCarthy and others, ‘Litigation Culture Versus Enforcement Culture: A Comparison of US and EU Plaintiff Recovery Actions in Antitrust Cases’ (2007) *The Antitrust Review of the Americas* 38.

<sup>103</sup> See Angela Huyue Zhang, ‘Bureaucratic Politics and China’s Anti-Monopoly Law’ (2014) 47 *Cornell International Law Journal* 671, 677 (pointing out that “Chinese antitrust enforcement relies primarily on administrative enforcement rather than private litigation”); Wang and Emch (n 7) 264 (pointing out that there

enforcement faces tough obstacles<sup>104</sup>: private enforcement of *the Chinese Anti-Monopoly Law 2007* brings far greater expectations than actual positive outcomes.<sup>105</sup>

#### 5.1.3.1 Persistent Problems of Private Anti-Monopoly Enforcement Examined from the Perspective of Chinese Privately-Owned SMEs

As mentioned in the ‘Asia Competition Association Beijing Conference’ (21 October 2012, Beijing), for private anti-monopoly enforcement in China, the problems which have been solved have been fewer than those left with unresolved;<sup>106</sup> therefore there remains much room for improvement.<sup>107</sup>

Because the current private anti-monopoly enforcement in China *prohibits indirect purchasers* from suing, plaintiffs (direct purchasers) remain in a small range,<sup>108</sup> which is similar to the “Illinois Brick rule”<sup>109</sup>. However, this rule was completely overturned by another US antitrust case in 1990, namely *Kansas v Utilicorp United*, in which the judge clearly held that indirect purchasers should have the same rights as direct purchasers in

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are solely two judgments in favor of plaintiffs in private enforcement).

<sup>104</sup> See Wang and Song (n 97); Wan (n 97); Zhao Dong, *Fanlongduan Minshi Susong Zhengju Zhidu Yanjiu* [Research on Civil Anti-Monopoly Evidence System] (China University of Political Science and Law Press 2014) 1 & 4; and Zhang, ‘The Enforcement of the Anti-Monopoly Law in China: An Institutional Design Perspective’ (n 7) 658-62.

<sup>105</sup> See Li Zhu, ‘Persistent Problems in the System of Anti-Monopoly Civil Procedure of China’ (Asia Competition Association Beijing Conference, Beijing, 21 October 2012).

<sup>106</sup> *Id.*

<sup>107</sup> See Wang Xiaoye, *Fanlongduanfa* [Anti-Monopoly Law] (n 98) 350-52.

<sup>108</sup> See Fang Xiaomin, ‘Fanlongduan Minshi Susong de Jige Wenti’ [Some Issues Surrounding the Antitrust Civil Litigation] in Wang Xiaoye (ed), *Jingzheng Zhifa Nengli Jianshe* [Capacity Building for the Enforcement of Competition Law] (Social Sciences Academic Press, China 2012) 269; Shen Yunyu and Qin Qi, ‘Lun Woguo Fanlongduan Minshi Susong Yuangao Zige de Rendeng Biaozhun’ [Plaintiff Qualification Criteria in Chinese Private Anti-Monopoly Lawsuits (author’s translation)] (2014) 7 Price Supervision and Anti-Monopoly in China 11; and the Civil Procedure Law of China 2012, Art 119.

Article 119: The following conditions must be met when a lawsuit is brought:

- (1) the plaintiff must be a citizen, legal person or any other organization that has a direct interest in the case;
- (2) there must be a definite defendant;
- (3) there must be specific claim or claims, facts, and cause or causes for the suit; and
- (4) the suit must be within the scope of acceptance for civil actions by the People’s Courts and under the jurisdiction of the People’s Court where the suit is entertained.

<sup>109</sup> In 1977, an important rule of private antitrust enforcement was established by the *Illinois Brick Co. v Illinois* case in the US: only direct purchasers had rights to appeal: see, e.g., *Illinois Brick Co. v Illinois* (1977) 431 US 720, para 97; William M Landes and Richard A Posner, ‘The Economics of Passing on: A Reply to Harris and Sullivan’ (1980) 128 University of Pennsylvania Law Review 1274; and Herbert Hovenkamp, *Federal Antitrust Policy: the Law of Competition and its Practices* (3rd edn, West Group 2005) 617.

private antitrust enforcement.<sup>110</sup> Although granting the same rights to indirect purchasers may lead to a situation where plaintiffs pass on their damages to direct purchasers but obtain compensation from defendants,<sup>111</sup> advanced progress had been demonstrated in the US.<sup>112</sup> By 2001, 70 percent of the US states granted private antitrust litigation rights to indirect purchasers.<sup>113</sup> Moreover, EU competition law not only allocates private antitrust litigation rights to both direct purchasers and indirect purchasers, but it also allows defendants to invoke the “passing-on” defence.<sup>114</sup> However, China has not followed this trend: hitherto, it has completely closed the door on private anti-monopoly enforcement by indirect purchasers,<sup>115</sup> which include the vast majority of consumers.<sup>116</sup> Therefore, because the major section of consumer welfare is unable to seek protection from the current private anti-monopoly enforcement regime, the “public interest” in *the Chinese Anti-Monopoly Law*

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<sup>110</sup> See Hovenkamp (n 109) 627; and *Kansas v Utilicorp United* (1990) 497 US 199, paras 110 & 218.

The petitioners, in their final argument, contend that § 4C of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1394, as amended, 15 U.S.C. § 15c, authorizes them to sue on behalf of consumers even though the consumers, as indirect purchasers, have no cause of action of their own.

<sup>111</sup> See William M Landes and Richard A Posner, ‘Should Indirect Purchasers Have Standing to Sue under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick’ (1979) 46 *The University of Chicago Law Review* 602; Robert G Harris and Lawrence A Sullivan, ‘Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis’ (1979) 128 *University of Pennsylvania Law Review* 269; Landes and Posner (n 109); Robert G Harris and Lawrence A Sullivan, ‘Passing on the Monopoly Overcharge: A Response to Landes and Posner’ (1980) 128 *University of Pennsylvania Law Review* 1280; and Robert Cooter, ‘Passing on the Monopoly Overcharge: A Further Comment on Economic Theory’ (1981) 129 *University of Pennsylvania Law Review* 1523.

<sup>112</sup> See Robert M Langer, ‘The Role of State Attorneys General in the Private Enforcement of State Antitrust and Consumer Protection Statutes’ (1988) 18 *Journal of Reprints for Antitrust Law and Economics* 85, 87.

<sup>113</sup> See Kevin O’Connor, ‘Is the Illinois Brick Wall Crumbling?’ (2001) 15 *Antitrust* 34, 35.

<sup>114</sup> See Commission, ‘Study on the Passing-on of Overcharges’ (Competition) (2016) final; the European Parliament and of the Council Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and of the European Union text with EEA relevance (antitrust damages actions) [2014] OJ L 349/1; Commission, ‘White Paper on Damages Actions for Breach of the EC Antitrust Rules’ COM (2008) 165 final; Magnus Strand, ‘The Defence of Passing On Loss, Gain and the Award of Damages in Private Enforcement of Competition Law’ (2010) Uppsala Faculty of Law Working Paper 5/2010 <<https://uu.diva-portal.org/smash/get/diva2:306085/FULLTEXT01.pdf>> accessed 30 January 2017; and Firat Cengiz, ‘Passing-On Defense and Indirect Purchaser Standing in Actions for Damages against the Violations of Competition Law: What Can the EC Learn from the US?’ (2007) Centre for Competition Policy Working Paper 07-21 <<http://competitionpolicy.ac.uk/documents/107435/107587/ccp07-21.pdf>> accessed 30 January 2017.

<sup>115</sup> See Fang (n 108); and Zhan Hao, *Zhongguo Fanlongduan Minshi Susong Redian Xiangjie [The Hot Issues of China Anti-Trust Private Litigation: The Juridical Interpretation Issued by China Supreme Court and the Analysis of Anti-Trust Cases]* (Law Press, China 2012) 159.

<sup>116</sup> See Wang Jian, ‘Guanyu Tuijin Woguo Fanlongduan Siren Susong de Sikao’ [A Reflection on Some Private Anti-Monopoly Enforcement Issues in China (author’s translation)] (2010) 3 *Fashang Yanjiu [Studies in Law and Business]* 23.

2007 has become unachievable.<sup>117</sup>

Furthermore, as has happened in the US and the EU,<sup>118</sup> *the high cost but low compensation arising from litigation* may make potential plaintiffs in China reconsider initiating private anti-monopoly litigation.<sup>119</sup> On the one hand, Chinese privately-owned SMEs have to be concerned with the high cost of litigation.<sup>120</sup> Taking the burden of proof<sup>121</sup>, for example, if any privately-owned SMEs which have suffered from SOEs abusing their

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<sup>117</sup> In this research, the author argues that the “public interest” in *the Chinese Anti-Monopoly Law 2007* is the reconciliation of competing interests, between the State’s interest and those of the enterprises and consumer welfare (for further information see the last paragraph of the introduction to Chapter 3): see, e.g., Interview with a Chinese scholar on *the Chinese Anti-Monopoly Law* (the interviewee did not agree to the researcher using the interviewee’s name in any written work arising from the study, but did consent to being interviewed) (Beijing, China, 2012) (pointing out that balancing all interests in the Chinese market may be a modality to achieve the “public interest”); and Luo (n 73) (pointing out that the “public interest” should have characteristics of commonality, reasonableness and legitimacy).

<sup>118</sup> See Jürgen Basedow (ed), *Private Enforcement of EC Competition Law* (Kluwer Law International 2007) 1; Philip F Zeidman, ‘The Small Business Administration and Private Antitrust Litigation’ (1967) 36 *Antitrust Law Journal* 188, 194; and Lande and Davis (n 98) 882-83.

<sup>119</sup> See Wang and Song (n 97); Wang and Emch (n 7) 264; Zhao (n 104) 1 & 15; and Wouter PJ Wils, ‘Should Private Antitrust Enforcement Be Encouraged in Europe?’ (2003) 26 *World Competition: Law and Economics Review* 473, 482 (pointing out that “[P]rivate enforcement appears more costly than public enforcement...”).

<sup>120</sup> See Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2014 [Report on Competition Law and Policy of China 2014]* (n 30) 31; Wan (n 97); and Robert H Lande, ‘Are Antitrust ‘Treble’ Damages Really Single Damages?’ (1993) 54 *Ohio State Law Journal* 115, 129-54.

<sup>121</sup> See 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, Art 8;

Article 8: If the alleged monopolistic conduct relates to the abuse of market dominant position specified by Article 17, Paragraph 1 of the Anti-Monopoly Law, the plaintiff shall bear the burden of proof on the dominant position of the defendant in the relevant market, and their abuse of dominant market position.

The defendant shall bear the burden of proof if it offers the defence that the conduct is justifiable.

and the Anti-Monopoly Law of China 2007, Art 17.

Article 17: A business operator with a dominant market position shall not abuse its dominant market position to conduct the following acts:

- (1) selling commodities at unfairly high prices or buying commodities at unfairly low prices;
- (2) selling products at prices below cost without any justifiable cause;
- (3) refusing to trade with a trading party without any justifiable cause;
- (4) requiring a trading party to trade exclusively with itself or trade exclusively with a designated business operator(s) without any justifiable cause;
- (5) tying products or imposing unreasonable trading conditions at the time of trading without any justifiable cause;
- (6) applying dissimilar prices or other transaction terms to counterparties with equal standing;
- (7) other conduct determined as abuse of a dominant position by the Anti-monopoly Authority under the State Council.

For the purposes of this Law, ‘dominant market position’ refers to a market position held by a business operator having the capacity to control the price, quantity or other trading conditions of commodities in the relevant market, or to hinder or affect any other business operator wishing to enter the relevant market.



dominant position intend to seek adjudication, they must consider the costs arising from the investigation process and the collection of evidence.<sup>122</sup> If they cannot afford it, they have to withdraw from private litigation.<sup>123</sup> In the petroleum retail market, although privately-owned SMEs have suffered from SOEs' discrimination for years,<sup>124</sup> the first anti-monopoly civil action only took place in 2014.<sup>125</sup>

On the other hand, the low level of compensation,<sup>126</sup> namely for *actual losses*,<sup>127</sup> also is a concern of China's privately-owned SMEs before they participate in private anti-monopoly enforcement. In the US, *the Clayton Antitrust Act of 1914* held that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor...and shall recover **threefold** the damages by him sustained, and the cost of suit, including a reasonable attorney's fee"<sup>128</sup>. This is a practical programme to compensate the actual loss due to monopolies and balance the cost of antitrust investigations. The high monopoly fines also act as a deterrent to all enterprises in the market which might adopt anti-competitive behaviour in the future. In the EU, the publication 'Directive on Antitrust Damages Actions' was adopted and signed into law in 2014 to enhance private anti-monopoly enforcement.<sup>129</sup> However, in China, the judicial interpretation, namely *Provisions of the Supreme People's Court on Several Issues Concerning the Application of*

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<sup>122</sup> See Zhang, 'The Enforcement of the Anti-Monopoly Law in China: An Institutional Design Perspective' (n 7) 660; Zhan (n 115) 126-38; and Diarmuid Rossa Phelan, 'The Effect of Complexity of Law on Litigation Strategy' in Antoine Masson and Mary J Shariff (eds), *Legal Strategies: How Corporations Use Law to Improve Performance* (Springer 2010) 347 (pointing out that "[l]itigation is expensive and time consuming").

<sup>123</sup> See Sonja E Keske, *Group Litigation in European Competition Law: A Law and Economic Perspective* (Intersentia 2010) 71-73.

<sup>124</sup> See Chapter 4.2 above.

<sup>125</sup> See Li Chunlian (n 97).

<sup>126</sup> See Shi (n 85).

<sup>127</sup> See 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, Art 14.

Article 14: Based on the claims of the plaintiff and the proven facts, the People's Court shall order the defendant to cease the infringing action, to pay damages, or to undertake other civil responsibilities, provided that the monopolistic conduct of the defendant existed and has caused losses to the plaintiff.

Upon the request of the plaintiff, the People's Court may include reasonable expenses paid by the plaintiff for investigation and prohibition of monopolistic conduct, in the compensation for damages.

<sup>128</sup> See the Clayton Antitrust Act of 1914, Sec 15(a).

<sup>129</sup> See Commission, 'Antitrust: Commission Welcomes Council Adoption of Directive on Antitrust Damages Actions' (*European Commission*, 10 November 2014) <[http://europa.eu/rapid/press-release\\_IP-14-1580\\_en.htm](http://europa.eu/rapid/press-release_IP-14-1580_en.htm)> accessed 30 January 2017; and the EU Dir 2014/104/EU on antitrust damages actions.

*Law in Hearing Civil Cases Caused by Monopolistic Conducts [2012] No.5*, merely agrees to compensate for *actual losses*.<sup>130</sup> This not only increases the costs of anti-monopoly enforcement, but also ignores the high costs of investigations paid for by plaintiffs. Therefore, when assessing the relative positions of privately-owned SMEs and SOEs in China, privately-owned SMEs fail to be compensated for their losses and litigation costs,<sup>131</sup> while SOEs are still attracted by high profits arising from monopoly conduct.<sup>132</sup>

To sum up, China's private anti-monopoly enforcement regime, is unable to protect the majority of consumers, and has the characteristics of high cost but low compensation. Thus, unfair competition remains to obstruct privately-owned SMEs. However, regarding "a formidable deterrent"<sup>133</sup> of private anti-monopoly enforcement on balancing SOEs and privately-owned SMEs, such a negative situation ought to be changed, and this could be done by: (a) granting rights of private anti-monopoly lawsuits to indirect purchasers and keeping an eye on passing-on; and (b) increasing compensation to cover actual losses, costs for investigations and interests of plaintiffs.

#### *5.1.3.2 A Tradeoff of Chinese Private Anti-Monopoly Enforcement in the Future for Privately-Owned SMEs and the "Public Interest"*

In order to fix the shortcomings of the current private anti-monopoly enforcement system, two other aspects need to be considered in the future: (a) Group litigation,<sup>134</sup>

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<sup>130</sup> See 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 (n 127).

<sup>131</sup> "[T]he cost of bringing a case against an SOE will be higher than bringing one against a non-state firm...": Angela Huyue Zhang, 'Taming the Chinese Leviathan: Is Antitrust Regulation A False Hope?' (2015) 51 *Stanford Journal of International Law* 195, 213.

<sup>132</sup> See Hou Liyang, 'Fanlongduan Rengran Renzhong Daoyuan' [The Chinese Private Anti-Monopoly Enforcement still has a Long Way to Go (author's translation)] *Dongfang Daily* (Shanghai, 9 May 2012) A22; and Kees Jan Kuilwijk and Diarmuid Rossa Phelan, 'On the Tax-Deductibility of Fines for EC Competition Law Infringements' (2010) 3 *European Competition Law Review* 131, 132 (the latter points out that "large companies need large fines to deter them from wrongdoing").

<sup>133</sup> See Keske (n 123) ix.

<sup>134</sup> In general, group litigation includes three types: joinder procedures, representative actions and collective actions: see, e.g., Stephen C Yeazell, 'Group Litigation and Social Context: Toward a History of the Class Action' (1977) 77 *Columbia Law Review* 866; Keske (n 123) 39-43; Woods, Sinclair and Ashton (n 100); and Andrea Renda and others, 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios (Final Report)' (Done in Brussels, Rome and Rotterdam, 21 December 2007) <[http://ec.europa.eu/competition/antitrust/actionsdamages/files\\_white\\_paper/impact\\_study.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf)> accessed 30 January 2017.

including public interest litigation,<sup>135</sup> needs to be established, with the aim of reducing anti-monopoly litigation costs for privately-owned SMEs, protecting more victims and achieving the “public interest” in the Chinese market;<sup>136</sup> and (b) If the upgrade of the private anti-monopoly enforcement is achievable, then preventing privately-owned SMEs from abusing the private enforcement system is another element which will be required in the future.<sup>137</sup>

To elaborate: because the monopolistic conduct of enterprises, especially SOEs, may affect the Chinese industry as a whole (such as the growth and interests of other market participants, consumer welfare and also the “public interest”), group litigation can protect more victims.<sup>138</sup> For instance, although “administrative mergers” in the steel industry block the growth path of most privately-owned steel SMEs,<sup>139</sup> it is prohibitively expensive for these privately-owned SMEs to have adequate time and money to hire legal experts to engage in long-term proceedings associated with private anti-monopoly lawsuits.<sup>140</sup> On the other hand, if *the Chinese Anti-Monopoly Law 2007* were to accept group litigation as certain EU member states have done,<sup>141</sup> such as Germany,<sup>142</sup> victims could play an effective role to

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<sup>135</sup> The author assumes that *public interest litigation* is a particular kind of *representative action* in the group litigation process which protects the “public interest” in the market, even though there is also a point of view that *public interest litigation* belongs to *collective action*: see, e.g., Arthur B LaFrance, ‘Federal Rule 11 and Public Interest Litigation’ (1988) 22 Valparaiso University Law Review 331; Renda and others (n 134); Woods, Sinclair and Ashton (n 100) 4; and Zhang Ruiping, *Fanlongduan Suquan Baozhang Jizhi Yanjiu [Research on the Safeguard of Anti-Monopoly Litigant’s Right of Action]* (author’s translation) (Lixin Accounting Publishing House, China 2013) 73 & 112-17.

<sup>136</sup> See Steven C Salop and Lawrence J White, ‘Economic Analysis of Private Antitrust Litigation’ (1986) 74 Georgetown Law Journal 1001, 1005-09; and Keske (n 123) 69.

<sup>137</sup> See Zhu (n 105).

<sup>138</sup> See Fang (n 108) 271.

<sup>139</sup> See Chapter 4.1.1.2 above.

<sup>140</sup> The discovery process of private anti-monopoly lawsuits is often a time and money consuming approach for plaintiffs: see, e.g., Donncadh Woods, ‘Private Enforcement of Antitrust Rules – Modernization of the EU Rules and the Road Ahead’ (2004) 16 Loyola Consumer Law Review 431, 444; and Zeidman (n 119).

<sup>141</sup> See Renda and others (n 134).

Group litigation has the potential to significantly alleviate the financial burden for both plaintiffs and defendants in damages actions, thanks to economies of scale. The European legal landscape has shifted in the last few years so that forms of group litigation are increasingly available.

<sup>142</sup> See Act against Restraints on Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB) (2013), Sec 33(1).

§33 Claims for Injunctions, Liability for Damages

(1) Whoever violates a provision of this Act, Articles 101 or 102 of the *Treaty on the Functioning of the European Union* or a decision taken by the competition authority shall be obliged to the person affected to rectify the infringement and, where there is a risk of recurrence, to desist from further

counter monopolistic circumstances.<sup>143</sup> Furthermore, in comparison with privately-owned SMEs, consumers may comprise a more dispersed group in the market,<sup>144</sup> which makes it more difficult to protect their welfare. For example, in the gas station industry, although consumers have to endure the “oil shortages”, caused by administrative monopolies, their welfare rarely obtains legal protection.<sup>145</sup> However, if the same situation occurred in the UK, the result would be different because Section 81 of *the Consumer Rights Act 2015*<sup>146</sup> provide

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infringements. A claim for injunction already exists if an infringement is likely. Affected persons are competitors or other market participants impaired by the infringement.

<sup>143</sup> See Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2014 [Report on Competition Law and Policy of China 2014]* (n 30) 209.

<sup>144</sup> See Keske (n 123) 69-70.

<sup>145</sup> See Chapter 4.2.2.2 above.

<sup>146</sup> In this thesis, when examples are taken from UK legal data, UK comprises only England and Wales: see, e.g., the Consumer Rights Act 2015, Sec 81 (which replaces the old Section 47B of *the Competition Act of 1998*).

### **81 Private actions in competition law**

Schedule 8 (private actions in competition law) has effect.

5 (1) For section 47B substitute—

“47B Collective proceedings before the Tribunal

- (1) Subject to the provisions of this Act and Tribunal rules, proceedings may be brought before the Tribunal combining two or more claims to which section 47A applies (“collective proceedings”).
- (2) Collective proceedings must be commenced by a person who proposes to be the representative in those proceedings.
- (3) The following points apply in relation to claims in collective proceedings—
  - (a) it is not a requirement that all of the claims should be against all of the defendants to the proceedings,
  - (b) the proceedings may combine claims which have been made in proceedings under section 47A and claims which have not, and
  - (c) a claim which has been made in proceedings under section 47A may be continued in collective proceedings only with the consent of the person who made that claim.
- (4) Collective proceedings may be continued only if the Tribunal makes a collective proceedings order.
- (5) The Tribunal may make a collective proceedings order only—
  - (a) if it considers that the person who brought the proceedings is a person who, if the order were made, the Tribunal could authorise to act as the representative in those proceedings in accordance with subsection (8), and
  - (b) in respect of claims which are eligible for inclusion in collective proceedings.
- (6) Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable to be brought in collective proceedings.
- (7) A collective proceedings order must include the following matters—
  - (a) authorisation of the person who brought the proceedings to act as the representative in those proceedings,
  - (b) description of a class of persons whose claims are eligible for inclusion in the proceedings, and
  - (c) specification of the proceedings as opt-in collective proceedings or opt-out collective proceedings (see subsections (10) and (11)).

that consumer acting on behalf of at least two individuals have the right to propose group litigation.<sup>147</sup> Therefore, in order to effectively protect Chinese consumers, group litigation ought to be a strong feature of private anti-monopoly enforcement.

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(8) The Tribunal may authorise a person to act as the representative in collective proceedings—

- (a) whether or not that person is a person falling within the class of persons described in the collective proceedings order for those proceedings (a “class member”), but
- (b) only if the Tribunal considers that it is just and reasonable for that person to act as a representative in those proceedings.

(9) The Tribunal may vary or revoke a collective proceedings order at any time.

(10) “Opt-in collective proceedings” are collective proceedings which are brought on behalf of each class member who opts in by notifying the representative, in a manner and by a time specified, that the claim should be included in the collective proceedings.

(11) “Opt-out collective proceedings” are collective proceedings which are brought on behalf of each class member except—

- (a) any class member who opts out by notifying the representative, in a manner and by a time specified, that the claim should not be included in the collective proceedings, and
- (b) any class member who—
  - (i) is not domiciled in the United Kingdom at a time specified, and
  - (ii) does not, in a manner and by a time specified, opt in by notifying the representative that the claim should be included in the collective proceedings.

(12) Where the Tribunal gives a judgment or makes an order in collective proceedings, the judgment or order is binding on all represented persons, except as otherwise specified.

(13) The right to make a claim in collective proceedings does not affect the right to bring any other proceedings in respect of the claim.

(14) In this section and in section 47C, “specified” means specified in a direction made by the Tribunal.”

(2) Section 47B of the Competition Act 1998 (as substituted by sub-paragraph (1)) applies to claims arising before the commencement of this paragraph as it applies to claims arising after that time.

<sup>147</sup> Although group litigation has certain weaknesses (e.g., brought by the high cost of litigation, plaintiff’s “self-interested behaviour”, Court’s “maximum flexibility”, etc.) which result in that group litigation is rare to achieve common interest and ineffectively protect small businesses and consumers from a competition law perspective before *the Consumer Rights Act 2015* came into force, it still opens the door to consumers. *The Consumer Rights Act 2015* purports to provide “effective enforcement of private damages claims”, as well as offering a fast-track procedure for claims brought by SMEs in order to resolve their cases “more quickly and at a lower cost”. However, regarding the 2015 Act, “it is simply like a new diesel car with a ‘defeat device’ embedded in it”. For example, plaintiffs would abuse anti-monopoly group litigation: with regard to the follow-on damages, because “[t]he out of court resolution of a follow on dispute would always be a “success” for the plaintiffs”, the anti-monopoly group litigation may be abused to protect too many consumers who “[i]n the majority had not perceived the direct impact of the harm to competition on their own interests”: see, e.g., Matthew O’Regan, ‘United Kingdom: Consumer Rights Act 2015 Introduces New Procedures for Competition Litigation, Including Collective Follow-on Damages Actions’ (*Kluwer Competition Law Blog*, 5 October 2015) <<http://kluwercompetitionlawblog.com/2015/10/05/united-kingdom-consumer-rights-act-2015-introduces-new-procedures-for-competition-litigation-including-collective-follow-on-damages-actions/>> 30 January 2017; in general, Arianna Andreangeli, *Private Enforcement of Antitrust: Regulating Corporate Behaviour through Collective Claims in the EU and US* (Edward Elgar Publishing 2014) Ch 5; Competition Policy Blog, ‘Collective Actions after the Consumer Rights Act 2015’ (*Competition Policy Blog*, 5 May 2015) <<https://competitionpolicy.wordpress.com/2015/05/05/collective-actions-after-the-consumer-rights-act-2015/>> accessed 30 January 2017; Explanatory Notes to Consumer Rights Act 2015, paras 418-50; Commission, ‘Commission Staff Working Paper – accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules’ COM (2008) 165 final; OFT, ‘Quick Guide to Private Litigation in Competition Cases’ (2010) <[www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284447/private-litigation.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284447/private-litigation.pdf)> accessed 30 January 2017; and Thomas de la Mare, ‘Private Actions: The CRA 2015 Giveth; and the 2015 CAT Rules Taketh Away’ (*Competition Bulletin*, 1 October 2015) <<https://competitionbulletin.com/2015/10/01/private-actions-the-cra-2015-giveth-and-the-2015-cat-rules-taketh-away/>> 30 January 2017.

In addition, public interest litigation would be a further improvement in the role that group litigation could play in Chinese private anti-monopoly enforcement.<sup>148</sup> If this were accepted, non-specific persons or institutions would be able to bring private anti-monopoly lawsuits without their direct interests being affected,<sup>149</sup> on behalf of effective competition and the “public interest” in the Chinese market.<sup>150</sup> Regarding the deterrence of private anti-monopoly enforcement,<sup>151</sup> in theory, all enterprises and consumers in the market should have the chance to obtain a reasonable benefit from public oversight. Conversely, administrative monopolies would no longer be able to hide.

However, like a two-edged sword,<sup>152</sup> the usage of Chinese private anti-monopoly enforcement for privately-owned SMEs also requires limitations.<sup>153</sup> Otherwise, the positive possibilities might turn into negative ones<sup>154</sup>: for example, privately-owned SMEs and the Chinese public may use it as a malicious tool to disturb the market order and disrupt the development of SOEs in market.<sup>155</sup> Since almost every market participant aims to maximise its own interests in various ways, abusing the enhanced rights that the private anti-monopoly lawsuit might confer could be regarded as a new tool for (in bad faith) disrupting competitors.<sup>156</sup> Hence, in order to protect the development of balanced growth between

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<sup>148</sup> See Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2014 [Report on Competition Law and Policy of China 2014]* (n 30) 209.

<sup>149</sup> See Woods, Sinclair and Ashton (n 100) 4.

<sup>150</sup> See Xu Shiyang, ‘Fanlongduan Minshi Susong Shijianxing Zengqiang’ [Practical Enhancement in the Field of Chinese Anti-Monopoly Civil Procedure (author’s translation)] *Shanghai Legal Newspaper* (Shanghai, 20 June 2012) B07; and Fang (n 108) 271-72.

<sup>151</sup> See Keske (n 123) 75-85.

<sup>152</sup> “[P]rivate rights of action U.S.-style are poison. They over-reached dramatically. And we have to use substantive liability standards to push back on what we think are hard-wired elements of the private rights of action mechanism”: see, e.g., William E Kovacic, ‘A Speech at an ABA Panel on Exemptions and Immunities’ (Washington D.C., 19 November 2007) cited in Robert H Lande and Joshua P Davis, ‘Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases’ (2008) 42 *University of San Francisco Law Review* 879, 887; Joshua P Davis and Robert H Lande, ‘Defying Conventional Wisdom: The Case For Private Antitrust Enforcement’ (2013) 48 *Georgia Law Review* 1, 38-78; and Komninos (n 11) 12 (maintaining that private enforcement which favours private interests abandons the “public interest” in some ways).

<sup>153</sup> See Zhu (n 105).

<sup>154</sup> See Andreangeli (n 147).

<sup>155</sup> See Zhu (n 105).

<sup>156</sup> In recent years, abuse of civil actions by plaintiffs often appear in China and attract judicial attention because this tendency has at least three negative effects: (a) harmed interests of defendants; (b) a waste of judicial resources; and (c) damaging the efficacy and credibility of the judiciary. Therefore, in order to increase the severity of the punishment tends to the action for malicious prosecution and frivolous lawsuits, the 4th Plenary Session of the 18th CPC (the Communist Party of China) launched a new decision entitled ‘Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law’ (2014).

privately-owned SMEs and SOEs, the private anti-monopoly enforcement tools must be improved, but limited as to when they can be deployed.<sup>157</sup>

To sum up this review of the existing functions of *the Chinese Anti-Monopoly Law 2007* in the State's economic growth process, this Law not only fails to establish an effective individual regulatory anti-monopoly agency, but it also cannot limit the abuse of administrative powers in the market on behalf of privately-owned SMEs. Hence, this section provides three pieces of advice: improving the current multi-agency implementation of *the Chinese Anti-Monopoly Law 2007*; launching specific regulations to restrict SOEs; and strengthening private anti-monopoly enforcement. However, these improvements, while upgrading the functions of *the Chinese Anti-Monopoly Law 2007* from the inside, may not be adequate for curbing excessive use of administrative powers, because administrative interventions have become ingrained in China, and SOEs lack sufficient cognitive capacity to cooperate collaboratively with privately-owned SMEs.

## **5.2 A New Alliance between *the Chinese Anti-Monopoly Law 2007* and Other Legal Elements with Regard to Privately-Owned SMEs**

Apart from the *internal improvement approach* of anti-monopoly enforcement in China, the *external approach* also should be mentioned as a way of restricting misuse of administrative powers,<sup>158</sup> as well as promoting privately-owned SMEs and realising the “public interest” in the Chinese market. Drawing a thumbnail sketch to describe the discretionary powers of anti-monopoly enforcement agencies under *the Chinese Anti-Monopoly Law 2007*,<sup>159</sup> it is not

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Wang and Ren pointed out that “[a]busing right of civil action should be punished and prevented by imposing civil liability, administrative liability and criminal liability...”: see, e.g., Zou Gang, ‘Minshi Suquan Lanyong de Weihai’ [The Harmful Effects of Abuse of Civil Actions (author’s translation)] *Legal Daily* (Beijing, 4 May 2016) 09; CPC Central Committee, ‘Zhonggong Zhongyang Guanyu Quanmian Tuijin Yifa Zhiguo Guogan Zhongda Wenti de Jueding’ [Decision of the CPC Central Committee on Major Issues Pertaining to Comprehensively Promoting the Rule of Law (2014)] *China Daily* (Beijing, 29 October 2014) 01; Wang Xiao and Ren Wensong, ‘Minshi Suquan Lanyong de Falv Guizhi’ [The Statutory Regulation on the Right of Action Abuse] (2015) 05 *Modern Law Science*, China 183; Xue (n 68) 41; Wils, ‘Should Private Antitrust Enforcement Be Encouraged in Europe?’ (n 119) 485; and Andreangeli (n 147) 194 (pointing out that “...this litigation model would engender the risk of “self-interested behaviour” on the part of counsel...”).

<sup>157</sup> *Id.*

<sup>158</sup> Curbing the abuse of administrative power is a vital task for the Chinese competition law system: Williams (n 69) 215-16.

<sup>159</sup> See the Anti-Monopoly Law of China 2007, Arts 13-15, 17-18 & 27 (see footnotes 33, 82 & 121 above).

Article 13: Any of the following monopoly agreements among the competing business operators

difficult to show that how to use these powers suitably presents a thorny problem.<sup>160</sup> Therefore, the first part of this section discusses limitations and remedies for discretionary powers of Chinese anti-monopoly enforcement agencies. Subsequently, as regards the pivotal role of SOEs<sup>161</sup> and collusion between SOEs and administrative agencies in the Chinese market,<sup>162</sup> the second part of this section will highlight Corporate Social Responsibility (CSR)<sup>163</sup> in Company Law, which aims to balance the relationship between SOEs and privately-owned SMEs, as well as achieving the “public interest”. Since CSR prefers to support the idea that SOEs (which use large amounts of public resources to develop themselves<sup>164</sup>) should pass on certain rights and benefits to consumers and privately-owned SMEs, as well as providing better market conditions for competitors (see footnote 219 below), it (i.e. CSR) may serve as a possible basis for controlling SOEs’ conduct. In addition, if consumer welfare and the interests of privately-owned SMEs are protected by CSR, other objectives of *the Chinese Anti-Monopoly Law 2007*, such as improving competition and the “public interest”, may move forward towards realisation.

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shall be prohibited:

... (6) **other monopoly agreements** as determined by the Anti-monopoly Authority under the State Council...

Article 15: An agreement among business operators shall be exempted from application of articles 13 and 14 if it can be proven to be in any of the following circumstances:

... (7) **other circumstances** as stipulated by laws and the State Council...

Article 18: The dominant market status shall be determined according to the following factors:

... (6) **other factors** related to determining a dominant market position of the said business operator.

<sup>160</sup> See You Yu, ‘Lun Fanlongduan Zhifa zhi Guifan yu Bili Yuanze’ [Norms in Anti-Monopoly Enforcement and the Legal Principle of Proportionality (author’s translation)] (2010) 03 Journal of Gansu Political Science and Law Institute, China 105; and Feng Lei and Zhong Chao, ‘60 Yiyuan Fadan: Zhiwei Gongping’ [RMB 6-Billion (Approximately £631 Millions) Fines Imposed in the Interests of Fair Competition (author’s translation)] *Guangming Daily, China* (Beijing, 11 February 2015) 05.

<sup>161</sup> See Chapters 2.1 & 2.2 above.

<sup>162</sup> See Chapters 4.1 & 4.2 above.

<sup>163</sup> “[C]orporate social responsibility is a commitment to improve community well-being through discretionary business practices and contributions of corporate resources”: Philip Kotler and Nancy Lee, *Corporate Social Responsibility: Doing the Most Good for Your Company and Your Cause* (John Wiley & Sons, Inc. 2005) 31; and Commission, ‘Corporate Social Responsibility’ (*Enterprise and Industry of the European Commission*) <<http://ec.europa.eu/growth/industry/corporate-social-responsibility/>> accessed 30 January 2017.

Corporate social responsibility (CSR) refers to companies taking responsibility for their impact on society. As evidence suggests, CSR is increasingly important to the competitiveness of enterprises. It can bring benefits in terms of risk management, cost savings, access to capital, customer relationships, human resource management, and innovation capacity.

<sup>164</sup> See Gao Xu, ‘State-Owned Enterprises in China: How Big are They’ (*The World Bank*, 19 January 2010) <<http://blogs.worldbank.org/eastasiapacific/state-owned-enterprises-in-china-how-big-are-they>> accessed 30 January 2017.



### 5.2.1 Curbing the Misuse of Discretionary Powers in Anti-Monopoly Enforcement – Coordination between *the Chinese Anti-Monopoly Law 2007* and the Administrative Law

Apart from the listed exemptions, *the Chinese Anti-Monopoly Law 2007* grants wide discretionary powers to anti-monopoly enforcement agencies (see footnote 159 above), to help this Law adjust to the changing circumstances in different anti-monopoly cases.<sup>165</sup> However, an examination of the functions of *the Chinese Anti-Monopoly Law 2007* towards privately-owned SMEs<sup>166</sup> reveals that discretionary powers may fail to stop administrative monopolies, and may engender unfair competition.<sup>167</sup>

On one hand, Chinese anti-monopoly enforcers are probably unable to use discretionary powers suitably.<sup>168</sup> They may be confused about how to correctly apply the criteria describing anti-competitive conduct, such as the standard of the relevant market (see footnote 37 above),<sup>169</sup> and defining a dominant position of SOEs (using the single entity theory<sup>170</sup>). If these concepts can be suitably defined based on each anti-competitive case, it will be easy to recognise monopoly conduct or identify the dominant position of SOEs in the specific market<sup>171</sup> (concerning the situations in the steel, gas station and fixed-broadband sectors, see Chapter 4), thereby offering victims, namely privately-owned SMEs and consumers, better protection than before. On the other hand, the administrative level of Chinese anti-monopoly enforcement agencies, such as the subordinate agencies (MOFCOM, the NDRC and the SAIC) means that discretionary powers may not be regularly used<sup>172</sup> when monopoly cases

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<sup>165</sup> See You (n 160); and Feng and Zhong (n 160).

<sup>166</sup> See Development Research Center of the State Council (n 32) 153.

<sup>167</sup> See You (n 160).

<sup>168</sup> The “[r]isk of excessive use of commitment decisions relates to the possible temptation for competition authorities, or their staff, to try to obtain desired results beyond the scope of their legal powers”: see, e.g., Wouter PJ Wils, *Efficiency and Justice in European Antitrust Enforcement* (Hart Publishing 2008) 32; and Zhan (n 115) 173-94.

<sup>169</sup> See Qing Li (n 31).

<sup>170</sup> See Angela Huyue Zhang, ‘The Single Entity Theory: An Antitrust Time-Bomb for Chinese State-Owned Enterprises?’ (2012) 4 *The Antitrust Bulletin* 805, 810.

<sup>171</sup> See Zhang Baisha, ‘Xiangguan Shichang Jieding Ruogan Wenti Yanjiu’ [Some Issues Surrounding the Definition of the Relevant Product Market] in Wang Xiaoye (ed), *Jingzheng Zhifa Nengli Jianshe* [*Capacity Building for the Enforcement of Competition Law*] (Social Sciences Academic Press, China 2012) 418.

<sup>172</sup> Taking the NDRC pricing investigations for instance, on the one hand

[a]n August 2014 American Chamber of Commerce survey reveals that 49% of its members feel that Chinese regulators target foreign companies selectively and subjectively applying ‘legal and extra-legal approaches’. Also in August 2014, the European Union Chamber of Commerce in China

involve *higher-level agencies or central SOEs*.<sup>173</sup> It should be kept in mind that *the Chinese Anti-Monopoly Law 2007*, which in theory ought to balance the relationship between SOEs and privately-owned SMEs and maintain competition in the market, is similar to the role that a referee plays in a game, does not play its due role: instead it is the player (market participants) rather than the referee who determines the level of excitement of the game.<sup>174</sup> Hence, with regard to the lack of theoretical basis and implementation guidelines for anti-monopoly discretionary powers,<sup>175</sup> as well as the inertia of administrative powers in the market, Chinese anti-monopoly discretionary powers do not play their due role in protecting market participants.

In order to prevent the above-mentioned situation from continuing, three actions are

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released its stance, stating that some sectors had faced heavy-handed ‘administrative intimidation tactics’, such as urging foreign firms to admit guilt and accept punishments and remedies without full hearings, and not to bring lawyers to hearings or challenge investigations... A recent US Chamber of Commerce report asserts that NDRC investigations were directed disproportionately against foreign corporations, with a view to pursuing industrial policy goals. It claims that the NDRC’s failure to publish reasoned decisions falls well short of basic standards of transparency. A September 2014 US-China Business Council survey shows that 86% of members are concerned (61%) or very concerned (25%) about the competition environment, with the primary concerns being enforcement (56%), and the legal and regulatory framework (36%).

On the other hand, the official statement of the Price Supervision and Anti-Monopoly Bureau of the NDRC is that they treated domestic and foreign companies equally. The Price Supervision and Anti-Monopoly Bureau emphasised that administrative monopoly is their main work task in 2015. However, “the main battle these agencies (anti-monopoly enforcement agencies) face in tackling SOE cases is fought within the bureaucratic hierarchy...” For example, although the merger between China Unicom and Netcom (2008) which have qualified as “concentration” under *the Chinese Anti-Monopoly Law 2007* ought to be reported to MOFCOM, the MOFCOM somehow ignored this merger. Furthermore, concerning situations occurring in the steel industry (see Chapter 4.1 above), *selective enforcement* exists: see, e.g., Zhang, ‘Taming the Chinese Leviathan: Is Antitrust Regulation A False Hope?’ (n 131) 196; Ou (n 45); Chen (n 45); European Parliament, ‘China: Anti-Trust Probes Targeting Foreign Firms’ (European Parliamentary Research Service (EPRS), October 2014) <[www.europarl.europa.eu/RegData/etudes/ATAG/2014/538965/EPRS\\_ATA%282014%29538965\\_REV1\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/ATAG/2014/538965/EPRS_ATA%282014%29538965_REV1_EN.pdf)> accessed 30 January 2017; Yang Yichen and others, ‘Fanlongduan Xiatui Waiqi’ [Anti-Monopoly Scars Foreign Enterprises out of China (author’s translation)] *Economic Information Daily* (Beijing, 21 October 2014) <[www.jjckb.cn/2014-10/21/content\\_524392.htm](http://www.jjckb.cn/2014-10/21/content_524392.htm)> accessed 30 January 2017; Wang Biqiang, ‘Liantong Wangtong Hebing Shexian Weifan Fanlongduanfa, Shangwubu Zhengshi’ [MOFCOM Confirmed that Unicom/Netcom Merger Is Suspected of Violating the Anti-Monopoly Law] *Jingji Guancha* [*The Economic Observer*] (Beijing, 1 May 2009) <[www.eeo.com.cn/eeo/jjgcb/2009/05/04/136558.shtml](http://www.eeo.com.cn/eeo/jjgcb/2009/05/04/136558.shtml)> accessed 30 January 2017; and Zhang, ‘The Enforcement of the Anti-Monopoly Law in China: An Institutional Design Perspective’ (n 7) 651.

<sup>173</sup> See Liu and Xie (n 44).

<sup>174</sup> See Ding Li, ‘Fanlongduanfa Buneng Zhifan Tanguan Bufan Huangdi’ [*Chinese Anti-Monopoly Law Should Be against Monopoly Enterprises as well as the Political System* (author’s translation)] *Southern Weekend* (Guangzhou, 31 July 2008) E31.

<sup>175</sup> See China News, ‘Fagaiwei Huiying Ziyou Cailiangquan Guoda: Jiang Zhiding Guifan’ [NDRC Response to the Too-Large Discretionary Powers of Anti-Monopoly: Will Formulate Norms (author’s translation)] (*China News*, 19 February 2014) <[www.chinanews.com/gn/2014/02-19/5855622.shtml?\\_fin](http://www.chinanews.com/gn/2014/02-19/5855622.shtml?_fin)> accessed 30 January 2017.

proposed, as follows (from the perspective of ensuring real (rather than apparent) coordination between *the Chinese Anti-Monopoly Law 2007* and the Administrative Law<sup>176</sup>). *First*, it is necessary to restrict administrative monopolies in unfairly inhibiting the interests of privately-owned SMEs. In 2010, a number of administrative regulations were adopted, such as the ‘Provisions for the Industry and Commerce Administrations on the Prohibition of Abuse of Dominant Market Position’ (2010)<sup>177</sup>; the ‘Provisions Concerning Prevention of Abusing Administrative Power to Eliminate or Restrict Competition by the Administration for Industry and Commerce’ (2010)<sup>178</sup>; and the ‘Rules of the SAIC on Prohibition of Monopoly Agreements’ (2010), in order to support anti-monopoly enforcement in China.<sup>179</sup> In theory, this coordination appeared to have positive effects: preventing administrative agencies from abusing their powers through self-interest<sup>180</sup>; restricting administrative staff behaviours; and limiting the collusion between administrative agencies and SOEs in the

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<sup>176</sup> See Yu Li and Wu Xuliang, ‘Fanlongduanfa Bushi Jiejue Xingzheng Longduan he Hangye Longduan de Liangce’ [The Anti-Monopoly Law is not the Best Way to Resolve Administrative Monopoly and Industry Monopoly] in Yu Liangchun (ed), *Fan Xingzhengxing Longduan yu Cujin Jingzheng Zhengce Qianyan Wenti Yanjiu* [Study on New Research Frontiers in Anti-Administrative Monopoly and Competition Policies (author’s translation)] (Economic Science Press, China 2008) 129-31; Salil K Mehra and Meng Yanbei, ‘Against Antitrust Functionalism: Reconsidering China’s Antimonopoly Law’ (2009) 49 *Virginia Journal of International Law* 379, 405; William Wade and Christopher Forsyth, *Administrative Law* (11th edn, OUP 2014) 4 (pointing out that “[a] first approximation to a definition of administrative law is to say that it is the law relating to the control of governmental power”); and Diarmuid Rossa Phelan, ‘The Crystallisation of Judicial Review as a Distinct Legal Subject’ (2009) 4 *Judicial Review* 432 (pointing out “[a]dministrative law can be broadly or narrowly defined. Wade gives a broad definition as ‘the law relating to the control of governmental power’. Narrowly, administrative law is the set of principles, evolved by court decisions in judicial review cases, which control administrative actions”).

<sup>177</sup> The publication ‘Provisions for the Industry and Commerce Administrations on the Prohibition of Abuse of Dominant Market Position’ (2010) (Article 16) prohibits the abuse of dominant position in China and stresses that staff members in Chinese commercial administrative organs should not take part in such practices: ‘Gongshang Xingzheng Guanli Jiguan Jinzhi Lanyong Shichang Zhipei Diwei Xingwei de Guiding’ [Provisions for the Industry and Commerce Administrations on the Prohibition of Abuse of Dominant Market Position] (2010) <[www.saic.gov.cn/zwgk/zyfb/zjl/fld/201101/t20110104\\_103267.html](http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201101/t20110104_103267.html)> accessed 30 January 2017.

<sup>178</sup> The publication ‘Provisions Concerning Prevention of Abusing Administrative Power to Eliminate or Restrict Competition by Administration for Industry and Commerce’ (2010) lists different forms or types of administrative agencies which abuse their powers to eliminate or restrict competition. Therefore, it partially limits discretionary powers of China’s anti-monopoly enforcement agencies on the issue of using administrative agencies to interrupt competition: ‘Gongshang Xingzheng Guanli Jiguan Zhizhi Lanyong Xingzheng Quanli Paichu Xianzhi Jingzheng Xingwei de Guiding’ [Provisions Concerning Prevention of Abusing Administrative Power to Eliminate or Restrict Competition by the Administration for Industry and Commerce] (2010) <[www.saic.gov.cn/zwgk/zyfb/zjl/fld/201101/t20110104\\_103268.html](http://www.saic.gov.cn/zwgk/zyfb/zjl/fld/201101/t20110104_103268.html)> accessed 30 January 2017.

<sup>179</sup> The publication ‘Rules of the SAIC on Prohibition of Monopoly Agreements’ (2010) prohibits monopoly agreements and stresses that staff members in commercial administrative agencies should not take part in any anti-monopoly conduct: ‘Gongshang Xingzheng Guanli Jiguan Jinzhi Longduan Xieyi Xingwei de Guiding’ [Rules of the SAIC on Prohibition of Monopoly Agreements] (2010) <[www.gov.cn/flfg/2011-01/07/content\\_1779945.htm](http://www.gov.cn/flfg/2011-01/07/content_1779945.htm)> accessed 30 January 2017.

<sup>180</sup> See ‘Gongshang Xingzheng Guanli Jiguan Zhizhi Lanyong Xingzheng Quanli Paichu Xianzhi Jingzheng Xingwei de Guiding’ [Provisions Concerning Prevention of Abusing Administrative Power to Eliminate or Restrict Competition by Administration for Industry and Commerce] (2010) (n 178).

market.<sup>181</sup> However, *none* of these three administrative regulations *takes an interest in the discretionary powers of Chinese anti-monopoly enforcement agencies*. This is a *lacuna* in the scope of these sets of regulations because selective enforcement in favour of SOEs (see footnote 172 above) means that Chinese anti-monopoly enforcement agencies may protect SOEs and other administrative agencies in anti-monopoly investigation,<sup>182</sup> or may wholly ignore the anti-competitive conduct of SOEs and other administrative agencies altogether.<sup>183</sup> Thus, privately-owned SMEs in traditional State-controlled industries, such as the steel industry, the gas station industry and the fixed-broadband industry, are unable to benefit from the *purported* coordination between *the Chinese Anti-Monopoly Law 2007* and the Administrative Law. Therefore, great efforts should be devoted to further combined action towards discretionary powers, such as emphasising administrative penalties when anti-monopoly enforcement agencies or their staff abuse their discretionary powers in order to forbid anti-competitive conduct of SOEs and administrative agencies. To this end, the above-mentioned ‘Rules of the SAIC on Prohibition of Monopoly Agreements’ (2010) should be revised to avoid the abuse of discretionary powers of anti-monopoly law’s implementation.

*Second*, linkage between *the Chinese Anti-Monopoly Law 2007* and *Administrative Law* and practice, should inject some new blood into anti-monopoly enforcement agencies, by training or hiring professionals for anti-monopoly investigations in order to reduce unfair practices by administrative monopolies.<sup>184</sup> For example, the proportion of anti-monopoly

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<sup>181</sup> See ‘Gongshang Xingzheng Guanli Jiguan Jinzhi Lanyong Shichang Zhipei Diwei Xingwei de Guiding’ [Provisions for the Industry and Commerce Administrations on the Prohibition of Abuse of Dominant Market Position] (2010) (n 177).

<sup>182</sup> See Chapter 4.3.2.1 above.

<sup>183</sup> For instance, at the end of 2015 a central SOE, namely the Metallurgical Corporation of China Ltd. (MCC), was orchestrated to merge into a provincial SOE, namely China Minmetals Corporation, by the State. Although this merger should be regulated by *the Chinese Anti-Monopoly Law 2007* (Article 21), it is totally ignored by the current anti-monopoly *selective enforcement* in favour of SOEs: see, e.g., Lucy Hornby, ‘Beijing Orchestrates Mining Merger between Minmetals and MCC’ (*Financial Times*, 8 December 2015) <[www.ft.com/cms/s/0/6df65a0a-9d99-11e5-8ce1-f6219b685d74.html#axzz3vL7cdf4](http://www.ft.com/cms/s/0/6df65a0a-9d99-11e5-8ce1-f6219b685d74.html#axzz3vL7cdf4)> accessed 30 January 2017; and the Anti-Monopoly Law of China 2007, Art 21.

<sup>184</sup> For example, with regard to the first successful case against administrative monopoly, which was decided by the Guangdong High People’s Court in 2015, economics professionals participated in the Court proceeding (see further in footnote 118 in Chapter 3): see, e.g., Wan Jing, ‘Fanlongduan Zhifa Liangge “Shouli” Zhangxian Fazhi Jingshen’ [The First Two Specific Conduct of Anti-Monopoly Enforcement Highlighting the Spirit of Nomocracy (author’s translation)] *Legal Daily, China* (Beijing, 24 December 2015) 06; Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu*

enforcement professionals in both economics and law that an anti-monopoly agency should have can be guided by the staffing levels in administrative agencies. Adding economists into anti-monopoly agencies or cooperating with economists in the investigation process would be a better method of understanding fair (and unfair) competition in the market.<sup>185</sup> The judicial interpretation *Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in Hearing Civil Cases Caused by Monopolistic Conducts [2012] No.5* held that “[p]arties shall apply to the People’s Court to have one or two specialists with relevant knowledge appear in Court to make explanations on specialty issues about the case”<sup>186</sup>. In addition, keeping administrative regulations in line, it would be useful to allow more anti-monopoly scholars to participate in anti-monopoly investigations because scholars are much more familiar with *the Chinese Anti-Monopoly Law 2007* than current anti-monopoly enforcers in China.<sup>187</sup> Hence, training professionals,<sup>188</sup> as well as introducing more economists<sup>189</sup> and legal scholars to participate in the work of Chinese anti-monopoly enforcement agencies, would lead to a sensible usage for anti-monopoly discretionary powers

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*Zhengce Yanjiu Baogao 2012 [Report on Competition Law and Policy of China 2012]* (n 40); and Phelan, ‘The Effect of Complexity of Law on Litigation Strategy’ (n 122) 341 (pointing out that “[t]he legal system is one which can only be run by professionals”).

<sup>185</sup> See Giorgio Monti, ‘EC Competition Law: The Dominance of Economic Analysis?’ in Roger Zäch, Andreas Heinemann and Andreas Kellerhals (eds), *The Development of Competition Law: Global Perspectives* (Edward Elgar Publishing 2010) 4; Neelie Kroes, ‘European Competition Policy – Delivering Better Markets and Better Choices’ (London, 15 September 2005); and Guidelines on the Application of Article 81(3) of the Treaty (now Article 101(3) TFEU) [2004] OJ C101/2.

21. Restrictions of competition by object are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the Community competition rules. Restrictions by object such as price fixing and market sharing reduce output and raise prices, leading to a misallocation of resources, because goods and services demanded by customers are not produced. They also lead to a reduction in consumer welfare, because consumers have to pay higher prices for the goods and services in question.

<sup>186</sup> See 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, Art 12.

<sup>187</sup> To date, anti-monopoly enforcers and Anti-Monopoly Law scholars in China have had many opportunities to exchange views, such as academic conferences. However, these scholars rarely take part in anti-monopoly investigations: Interview with a Chinese scholar on *the Chinese Anti-Monopoly Law* (n 117).

<sup>188</sup> See Competition Policy and Law Commission of China Society for World Trade Organisation Studies (ed), *Zhongguo Jingzheng Falv yu Zhengce Yanjiu Baogao 2014 [Report on Competition Law and Policy of China 2014]* (n 30) 69-71.

<sup>189</sup> See Zhao (n 104) 4, 16-18 & 58-62.

from a professional perspective when facing administrative monopolies.<sup>190</sup>

*Third*, because to err is human, anti-monopoly enforcement agencies might make unreasonable judgments, which need to be changed afterwards. Therefore, the Chinese justice system should provide judicial review for aggrieved parties. In terms of specifics, in order to limit improper or erroneous use of anti-monopoly discretionary powers, it is necessary to grant administrative lawsuit rights to market participants to take action against unreasonable anti-monopoly judgments.<sup>191</sup> To date, although *the Chinese Anti-Monopoly Law 2007* does grant the administrative lawsuit right *to enterprises*, it has also set conditions: e.g., parties in concentration or merger cases must apply for an administrative reconsideration before the administrative lawsuit.<sup>192</sup> For example, because the ‘Anti-Monopoly Bureau, the MOFCOM’ is in charge of concentration or merger cases, the MOFCOM should be the administrative reconsideration organ for parties in such cases.<sup>193</sup> Because of the administrative level of

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<sup>190</sup> The reason is that cooperation would close the loopholes in China’s anti-monopoly enforcement approach. As Monti mentioned in the area of EU Competition Law “[n]o economist would ever have written Article 81 and 82 in the way that they have been...”: Monti (n 185) 13 & 21-23.

<sup>191</sup> See Dacheng Law Offices, ‘Xingzheng Susongfa Xiugai Youliyu Tuidong Xingzheng Longduan Susong’ [Administrative Monopoly Lawsuits by Modifying Could Promote the Chinese Administrative Procedure Law (author’s translation)] (*Dacheng Law Offices*, 2 November 2014) <[http://blog.sina.com.cn/s/blog\\_5a81db850102v65k.html](http://blog.sina.com.cn/s/blog_5a81db850102v65k.html)> accessed 30 January 2017.

<sup>192</sup> See the Anti-Monopoly Law of China 2007, Arts 28-29 & 53.

Article 28: Where a concentration has or may have the effect of eliminating or restricting competition, the Anti-monopoly Authority under the State Council shall make a decision to prohibit the concentration. However, if the business operators concerned can prove that the concentration will bring more positive impact than negative impact on competition, or the concentration is pursuant to public interests, the Anti-monopoly Authority under the State Council may decide not to prohibit the concentration.

Article 29: Where the concentration is not prohibited, the Anti-monopoly Authority under the State Council may decide to attach restrictive conditions for reducing the negative impact of such concentration on competition.

Article 53: Where any party concerned objects to the decision made by the anti-monopoly authority in accordance with Articles 28 and 29 of this Law, it may first apply for an administrative reconsideration; if it objects to the reconsideration decision, it may lodge an administrative lawsuit in accordance with law.

Where any party concerned is dissatisfied with any decision made by the anti-monopoly authority other than the decisions prescribed in the preceding paragraph, it may lodge an application for administrative reconsideration or initiate an administrative lawsuit in accordance with law.

<sup>193</sup> See the Law of China on Administrative Reconsideration 1999, Art 12.

Article 12: When refusing to accept a specific administrative act taken by the department of a people’s government at or above the county level, the applicant may choose to apply to the people’s government at the same level or to the competent department at a higher level for administrative reconsideration.

MOFCOM and the location of MOFCOM (Beijing), administrative reconsideration would be a time and money-consuming issue for most applicants (both applicants and some third parties<sup>194</sup>). Therefore, applicants may abandon this legal protection, which will mean that their grievances are hard to bring to appeal. For third parties, such as certain market participants and consumers, who are affected by the concentration or merger cases but who are *unable* to apply for administrative lawsuits, administrative reconsiderations are the *only method* of administrative remedy. However, in a bureaucratic State, when Chinese anti-monopoly enforcement agencies are concerned with self-interest which is consistent with that of other authorities (but not consistent with that of third parties), the third parties find it hard to achieve the results they expect. Therefore, in order to offer effective remedies for applicants in the future, an upgrade in the area of China's administrative law is required in order to regulate anti-monopoly discretionary powers via efficacious administrative lawsuits and administrative reconsiderations.

Overall, although the positive side of curtailing the discretionary powers of Chinese anti-monopoly enforcement agencies must be commended, also the negative side (the weaknesses and gaps) cannot be ignored. Therefore, three elements to improve this problem are suggested in this section, namely: (a) revising administrative regulations to limit the abuse of anti-monopoly discretionary powers; (b) adding economics and legal professionals into the anti-monopoly investigation process; and (c) increasing the feasibility of permitting easier access (and wider access) to administrative proceedings challenging unreasonable anti-monopoly judgments. Existing methods that purport to focus on anti-monopoly discretionary powers do not in fact give sufficient consideration to the survival situations of privately-owned SMEs, suffering from SOEs' discrimination. Thus, these SMEs require better protection from another legal source.

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<sup>194</sup> *Ibid*, Art 10.

Article 10: Citizens, legal persons and other organizations that apply for administrative reconsideration in accordance with this Law are the applicants.

... Other citizens, legal persons or other organizations that have interests in the specific administrative acts on which administrative reconsideration has been applied may take part in administrative reconsideration as a third party.

## 5.2.2 Functions of Corporate Social Responsibility for Chinese Privately-Owned SMEs – Restricting SOEs and Realising the “Public Interest”

With the aims of curbing administrative monopolies in the interests of privately-owned SMEs and achieving the final aim of *the Chinese Anti-Monopoly Law 2007*, namely the “public interest”, which can balance the interests of SOEs and privately-owned SMEs, as well as those of consumer welfare the Chinese market requires efforts to be made by Company Law.<sup>195</sup> CSR, a key concept in the relationship between business ethics and law,<sup>196</sup> would be an element working with *the Chinese Anti-Monopoly Law 2007* to envisage a better future for Chinese enterprises of different scales and different types of ownerships towards competition.<sup>197</sup> However, contrary to this theory, in certain traditional State-controlled industries, such as the steel industry, the gas station industry and the fixed-broadband industry,<sup>198</sup> SOEs always consume more social resources but contribute less to the community (i.e., they are loss-making<sup>199</sup>). According to the current status quo, Chinese

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<sup>195</sup> See Zhen Qinggui, ‘Guoqi Gaizhi Gaige Bixu Yifa Jinxing’ [China SOE Reform Must be Carried out According to Law (author’s translation)] (2014) 37 China Economic Weekly 16.

<sup>196</sup> In 2005 *the Companies Law of China* first proposed CSR as a legal concept in China. However, it is only a proposal in principle without specific provisions. In recent years, although surface situations of CSR may receive welcome changes in China, understanding of enterprises and the public about it is still one-sided: they pay more attention to environmental protection: see, e.g., the Companies Law of China 2013, Art 5;

Article 5: A company shall, with all its legal person assets, operate independently and be responsible for its own profits and losses according to law. A company shall, under the macro-adjustment and control of the State, organize its production and operation independently in accordance with market demands for the purpose of raising economic benefits and labour productivity and maintaining and increasing the value of its assets.

The legitimate rights and interests of companies shall be protected by law, and shall be inviolable.

Liu Junhai, *Xiandai Gongsifa [Modern Corporation Law]* (2nd edn, Law Press, China 2011) 640-44; Shen Sibao and Cheng Huaer, ‘Qiantan Zhongguo Qiye Shehui Zeren’ [Issues on CSR in China] in Lou Jianbo and Gan Peizhong (eds), *Qiye Shehui Zeren Zhuanlun [Studies on Corporate Social Responsibility]* (Peking University Press, China 2009); ‘Guidelines to the State-Owned Enterprises Directly Under the Central Government on Fulfilling Corporate Social Responsibilities’ (2007) in Nathalie Bernasconi-Osterwalder, Lise Johnson and Jianping Zhang (eds), *Chinese Outward Investment: An Emerging Policy Framework* (The International Institute for Sustainable Development 2013) 172-74; and Elizabeth C Economy and Michael Levi, *By All Means Necessary: How China’s Resource Quest is Changing the World* (OUP 2014) 103.

<sup>197</sup> “CSR is an essential component of risk and reputation management for many companies, and becomes increasingly important as enterprises are exposed to greater public scrutiny”: Commission, ‘European Competitiveness Report 2008’ COM (2008) 774 final.

<sup>198</sup> See Chapter 4 above.

<sup>199</sup> By the end of 2015, over half of central SOEs lost money: see, e.g., Rao Shouchun, ‘67 jia Kuisun Yangqi Nianzhong Dakao, Shuikao Chushou Zichan ji Zhengfu Butie Zhanying’ [End of Year Examinations for 67 Money-Losing Central SOEs, Who will Turn Surplus by Selling Assets and Government Subsidies (author’s translation)] *21st Century Business Herald* (Beijing, 1 December 2015) 16; Gao (n 164); Nicholas Lardy, ‘China’s Rise is a Credit to Private Enterprise not State Control’ *Financial Times (Asia)* (Beijing, 16 September 2014) 9; Yukon Huang, ‘Rethinking China’s State-Owned Enterprises’ (*Financial Times*, 21 November 2014) <<http://blogs.ft.com/the-a-list/2014/11/21/rethinking-chinas-state-owned-enterprises/>> accessed 30 January



administrative agencies and SOEs may consider that the current development approach is sensible and legal.<sup>200</sup> However, such biased administrative behaviour only engenders an unpleasant result ultimate because it destroys the balance between SOEs and other market participants.<sup>201</sup> Consequently, because it is only SOEs which are benefiting from administrative interventions, the balanced interests of multiple groups in the Chinese economic development marketplace (namely the “public interest”) face huge challenges ahead. In order to escape from this dilemma, adoption of CSR ideas could assist *the Chinese Anti-Monopoly Law 2007* to better promote and protect strong competition.

#### 5.2.2.1 Advantages of Using CSR in the Chinese Market – Balancing Interests

As far back as the 1960s, the relationship between competition and CSR went against the old-fashioned attitude that businesses are often opposed to society’s interests.<sup>202</sup> In general, in open and free competition, without deception or fraud, the social responsibility of business goes beyond individual interests and considers social interest as a whole, thereby avoiding destructive development and increasing self-profits in the long run.<sup>203</sup> In 2005, the EU’s Lisbon Strategy highlighted the fact that CSR, which has promotion functions on sustainable development, could upgrade competition levels in the market.<sup>204</sup> The OECD holds that competition law or policy should be effective in promoting social welfare and overall economic growth.<sup>205</sup> Similarly, *the Chinese Anti-Monopoly Law 2007* declares that maintaining competition is a mission to achieve the maximum level of the “public interest” in the market.<sup>206</sup> Thus, according to the present theory, the relationship between CSR and

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2017; and Sheng Hong and Zhao Nong, *China’s State-Owned Enterprises: Nature, Performance and Reform* (World Scientific Publishing Company 2013) xxi (pointing out that SOEs’ profits “[a]re mainly accounted for by a small number of monopoly enterprises”).

<sup>200</sup> See the Constitution of China 2004, Art 7 (holding that “[t]he State ensures the consolidation and growth of the State economy”); the Anti-Monopoly Law of China 2007, Art 7 (holding that this Law protects the State economy for the sake of national or economic security); and Li Rongrong, ‘Guoqi Gaige Fabuhui’ [SOE Reform Press Conference] (2008 Beijing International Media Center (BIMC) Press Conference, Beijing, 10 August 2008) <<http://news.cctv.com/china/20080810/105950.shtml>> accessed 30 January 2017.

<sup>201</sup> See Chapter 2.2.2 above.

<sup>202</sup> See Michael E Porter and Mark R Kramer, ‘Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility’ (2006) 84 Harvard Business Review 78.

<sup>203</sup> See *id.*; and Milton Friedman, *Capitalism and Freedom* (University of Chicago Press 1962) Ch 8.

<sup>204</sup> See Commission, ‘Working Together for Growth and Jobs: A New Start for the Lisbon Strategy’ COM (2005) 24 final.

<sup>205</sup> See OECD, ‘Guidelines for Multinational Enterprises’ (OECD, 2008) <[www.oecd.org/investment/mne/1922428.pdf](http://www.oecd.org/investment/mne/1922428.pdf)> accessed 30 January 2017.

<sup>206</sup> See the Anti-Monopoly Law of China, Art 1.

competition policies and laws could be expressed as follows: CSR promotes competition in the market, as well as increasing the interests of enterprises and consumers. In return, (in the Chinese context) competition policies and laws endeavour to achieve total social welfare or the “public interest” in the market.

As regards customers and reputation management, in general customers are more willing to make transactions with companies which have a better *social reputation* and which may refuse destructive development, as well as offering better quality of products and services and thereby survive over the long term.<sup>207</sup> Accordingly, if market participants intend to compete for market share and consumers, CSR should be an incentive for them to increase effective competition.<sup>208</sup> Subsequently, the improved competition would result in better market conditions and benefit more consumers than before. Foreseeably, the “public interest” in the market, benefiting consumers, would keep up with the pace of CSR. However, this theory cannot be fully applied to the Chinese market at present<sup>209</sup> because consumers do not have sufficient knowledge of CSR.<sup>210</sup> Therefore, as regards establishing a win-win relationship between CSR and competition, in theory, enhancing awareness of Chinese consumers about CSR ought to be a vital task for both Company Law and *the Chinese*

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<sup>207</sup> In the US and EU, enterprises which are devoted to the practice of CSR find it easier to win loyal consumers than others. Before 2005, over two-thirds of customers in the US admitted that they preferred to choose products or services from enterprises with good CSR. Comparably, 70 percent of consumers in the EU had the same attitude. According to data presented in the book, entitled *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility*, after 2005 nearly 90 percent of the US and EU consumers would like to consider CSR of enterprises when purchasing products or services. However, in China, “though consumers may say that they are willing to pay more for goods and services produced by CSR active firms, whether they will behave in such a manner is still doubtful”: see, e.g., Shirley Quo and Rodney Con Foo, ‘Competition Law, CSR and Small Business’ (2005) 31 *Company Lawyer* 402, 404; CSR Europe, ‘European Consumers Want Socially Responsible Products’ (2001) *The Corporate Social Responsibility Magazine in Europe* 10; Lois A Mohr and Deborah J Webb, ‘The Effects of Corporate Social Responsibility and Price on Consumer Responses’ (2005) 39 *Journal of Consumer Affairs* 121; Lois A Mohr, Deborah J Webb and Katherine E Harris, ‘Do Consumers Expect Companies to Be Socially Responsible? The Impact of Corporate Social Responsibility on Buying Behavior’ (2005) 35 *Journal of Consumer Affairs* 45; David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Brookings Institution Press 2006), cited in Andreas Ruhmkorf, *Corporate Social Responsibility, Private Law and Global Supply Chains* (Edward Elgar Publishing 2015) 126; and Bala Ramasamy and Mathew Yeung, ‘Chinese Consumers’ Perception of Corporate Social Responsibility (CSR)’ (2009) 88 *Journal of Business Ethics* 119, 130.

<sup>208</sup> See John Peloza and Jingzhi Shang, ‘Investing in Corporate Social Responsibility to Enhance Customer Value’ (*The Conference Board Governance Center*, February 2011) <<http://blogs.law.harvard.edu/corpgov/2011/02/28/investing-in-corporate-social-responsibility-to-enhance-customer-value/>> accessed 30 January 2017.

<sup>209</sup> See Ramasamy and Yeung (n 207).

<sup>210</sup> See Zhilong Tian, Rui Wang and Wen Yang, ‘Consumer Responses to Corporate Social Responsibility (CSR) in China’ (2011) 101 *Journal of Business Ethics* 197, 198-99.

*Anti-Monopoly Law 2007.*

Furthermore, CSR often has the function of balancing enterprises' input and output.<sup>211</sup> Basically, if enterprises add inputs on CSR issues, the enterprises will attract more consumers than before.<sup>212</sup> If the number of consumers increases, sales and interests of these enterprises will rise proportionately; in this way the overflow interest will make up for the CSR inputs.<sup>213</sup> Actually, in the circle from CSR to interests, enterprises should be the biggest beneficiaries.<sup>214</sup> Therefore, in theory, in order to strive for the best interest, those enterprises without CSR labels have to adjust to the times.

Nevertheless, an examination of a number of Chinese State-owned sectors reveals that their development does not completely follow the theoretical approach advocated by CSR. They strengthen their short-term economic interests, while simultaneously weakening the interests of privately-owned SMEs, while considering consumer welfare only at a later stage.<sup>215</sup> As a result, they abandon their social responsibilities and destroy the "public interest" in the Chinese market. For example, SOEs' monopoly conduct in the fixed-broadband industry, which causes high prices but low-speed fixed-broadband services, is a flagrant violation of consumer welfare.<sup>216</sup> However, unlike consumers in the US,<sup>217</sup> most Chinese consumers are unable to refuse products from SOEs because, for example, Chinese telecommunications SOEs control the national backbone network; they occupy a dominant position in the domestic fixed-broadband market; and control the entry of

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<sup>211</sup> See Catherine JM Paul and Donald S Siegel, 'Corporate Social Responsibility and Economic Performance' (2006) 26 *Journal of Productivity Analysis* 207, 210.

<sup>212</sup> See CB Bhattacharya and Sankar Sen, 'Doing Better at Doing Good: When, Why, and How Consumers Respond to Corporate Social Initiatives' (2004) 47 *California Management Review* 9, 12.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> See Chapter 4 above.

<sup>216</sup> Although there is an assert statement that China Unicom and Telecom (two SOEs) were ahead in the practice of CSR, harsh reality refuted this assertion: see, e.g., Chen Jiagui and others, *Qiyehui Zeren Lanpishu: Zhongguo Qiyehui Zeren Yanjiu Baogao (2011)* [*Bluebook of Corporate Social Responsibility: Research Report on Corporate Social Responsibility of China (2011)*] (Social Sciences Academic Press, China 2011) 12-17; and also Chapter 4.3.2.1 above.

<sup>217</sup> 73 percent of consumers in the US chose to boycott products or services from those enterprises without CSR: CONE, '2004 CONE Corporate Citizenship Study: Building Brand Trust' (CONE, 2004) <[http://twopercentclub.org/repository/documents/2004\\_cone\\_corporate\\_citizenship\\_exec\\_summary.pdf](http://twopercentclub.org/repository/documents/2004_cone_corporate_citizenship_exec_summary.pdf)> accessed 30 January 2017.

competitors.<sup>218</sup> Consequently, enhancing CSR should be an urgent task for Chinese SOEs, in order to ensure consumer welfare, as well as upgrading levels of competition and balancing interests among different interest groups on behalf of advancing the “public interest” in the market.

#### 5.2.2.2 Alienation Rights in CSR – SOEs’ Duties to the Broader Community

In the 1930s, a new idea emerged in “the West” that privately-owned large-scale enterprises have extra responsibilities to society.<sup>219</sup> Besides business owners and creditors, CSR requires these enterprises to consider the interests of employees, consumers and other elements in their development approaches.<sup>220</sup> However, in the case of China, even today SOEs, which are supported by the State and control a large number of resources with inherent advantages, still ought to take more social responsibilities that they in fact do.<sup>221</sup>

Before 1978, the State gave nearly all industrial growth powers to SOEs, while even since 1978, SOEs continue to occupy the core position in national development strategies.<sup>222</sup> Contrary to the CSR theory, the State prefers to treat the economic demands of itself as a priority, relying on SOEs to achieve them, while it reduces the interests of privately-owned SMEs and consumer welfare: for example, when the Central Government of China decided to restructure the steel industry in the interests of SOEs, privately-owned steel enterprises had to

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<sup>218</sup> Before 2012, China Unicom and Telecom virtually refused to make any effort to achieve the fixed-broadband network interoperability for privately-owned fixed-broadband operators. Although the Central Government promised to promote private funds entering the fixed-broadband market, glass ceiling remains: see, e.g., Chapter 4.3 above; Eileen Yu, ‘China Broadband Market to Open Up to Private Capital’ (*ZDNet*, 13 April 2014) <[www.zdnet.com/article/china-broadband-market-to-open-up-to-private-capital/](http://www.zdnet.com/article/china-broadband-market-to-open-up-to-private-capital/)> accessed 30 January 2017; Quan Zhezhu (ed), *Xiaoxing Weixing Qiye Baoshengcun Moufazhan (2012)* [*Micro and Small-Sized Enterprises Struggle to Survive and Develop (2012)* (author’s translation)] (Joint Publishing House of China Industrial and Commercial 2013) 314; Wang Wenjie, ‘Making Room for the Private Sector: Private Economy Needs More Support from the Government’ (2013) 14 *Beijing Review* 38; and Stuart Corner, ‘The Politics of Speed: An Examination of National Governments’ Policies for FTTX Networks’ (2013) 63 *Telecommunications Journal of Australia* 6.1-6.14.

<sup>219</sup> See Edwin Merrick Dodd Jr, ‘For Whom are Corporate Managers Trustees?’ (1932) 45 *Harvard Law Review* 1145, 1162.

<sup>220</sup> *Id.*

<sup>221</sup> See Liu Junhai, *Gongsi de Shehui Zeren* [*Corporate Social Responsibility* (author’s translation)] (Law Press, China 1999) 6-7; Lou Jianbo and Guo Xiuhua, ‘Xiandai Qiye Shehui Zeren Hexin Linian he Zhongguo Shijian Zhilu’ [The Core Idea of CSR and its Practice in China] in Lou Jianbo and Gan Peizhong (eds), *Qiye Shehui Zeren Zhuanlun* [*Studies on Corporate Social Responsibility*] (Peking University Press, China 2009); in general, Chen and others (n 216) Ch1 (maintaining that Chinese SOEs perform well in CSR); and Liwen Lin, ‘Corporate Social Responsibility in China: Window Dressing or Structural Change?’ (2010) 28 *Berkeley Journal of International Law* 64, 87-88.

<sup>222</sup> See Chapter 2.1 above.

agree to follow the strategy.<sup>223</sup> After Chinese State-owned oil enterprises decided to propel nationalisation of the gas station into action, nationalisation strategies had negative impacts on the interests of privately-owned gas stations and hence consumer welfare.<sup>224</sup> In the fixed-broadband industry, because SOEs refuse to implement “network interoperability”, privately-owned fixed-broadband operators rarely have opportunities to enter the market. Without effective competition, fixed-broadband consumers have to pay higher prices for slow speed services.<sup>225</sup> With regard to these situations, Chinese industrial policy makers and staff members of SOEs ought to recognise that SOEs have responsibilities for sharing value with the whole of society and creating a win-win situation among themselves, privately-owned SMEs and consumers in the economic growth approach.<sup>226</sup>

This thesis puts forward two suggestions to improve this situation: firstly, the Chinese Company Law should provide a clear definition of CSR (as the European Commission has done<sup>227</sup>). Although Article 5 of *the Companies Law of China 2013 (the Chinese Companies Law 2013)* has given legal status to CSR for over a decade (see footnote 196 above), it does not exactly explain what CSR is and how it should function. One of the most important

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<sup>223</sup> See Chapter 4.1.1 above.

<sup>224</sup> See Chapter 4.2.2 above.

<sup>225</sup> See Chapter 4.3 above.

<sup>226</sup> See Shu Juan, Ju Yang and Yu Yang, ‘Yangqi: Gongheguo Zhangzi Yaodang Juxing’ [Central SOEs: China’s Eldest Son Want to Be a Superstar (author’s translation)] *Guangzhou Daily, China* (Guangzhou, 5 August 2009) A1 & A7; and Porter and Kramer (n 202) 84.

<sup>227</sup> In 2011, the European Commission defined CSR as “a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis”. Furthermore, the Commission also introduced the further development scope of CSR: Commission, ‘A Renewed EU Strategy 2011-14 for Corporate Social Responsibility’ COM (2011) 0681 final.

The Commission has identified a number of factors that will help to further increase the impact of its CSR policy, including:

- The need for a balanced multistakeholder approach that takes account of the views of enterprises, non-business stakeholders and Member States.
- The need to better clarify what is expected of enterprises, and to make the EU definition of CSR consistent with new and updated international principles and guidelines.
- The need to promote market reward for responsible business conduct, including through investment policy and public procurement.
- The need to consider self- and co-regulation schemes, which are an important means by which enterprises seek to meet their social responsibility.
- The need to address company transparency on social and environmental issues from the point of view of all stakeholders, including enterprises themselves.
- The need to give greater attention to human rights, which have become a significantly more prominent aspect of CSR.
- The need to acknowledge the role that complementary regulation plays in creating an environment more conducive to enterprises voluntarily meeting their social responsibility.

participants in CSR, namely the stakeholder,<sup>228</sup> is partially ignored in China's company law relating to CSR. For instance, although, according to Liu, enterprises should be concerned with consumer welfare when drafting corporate social responsibility clauses,<sup>229</sup> examination of the behaviour of petrol SOEs and telecommunications SOEs shows that consumers have to abdicate their welfare responsibilities.<sup>230</sup> Concerning the relationship between SOEs and privately-owned SMEs, paying back to society in terms of competition is a myth for Chinese SOEs. Consequently, without a clear legal definition, the function of CSR is more symbolic than real.

Secondly, following the idea of treating the cause rather than merely the symptoms, disseminating and understanding CSR is the second improvement method proposed to assist align *Chinese Anti-Monopoly Law 2007* and Company Law. Nowadays, most Chinese SOEs believe that their successes stem from strong policy decisions, as well as their own efforts and favourable market environment,<sup>231</sup> rather than support from the whole of society or the relinquishing of rights of other society members, such as privately-owned SMEs and consumers. Therefore, in order to create a relatively fair market environment for privately-owned SMEs, and offer better welfare for consumers, *the Chinese Companies Law*

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<sup>228</sup> See Max BE Clarkson, 'A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance' (1995) 20 *The Academy of Management Review* 92, 106-07;

Stakeholders are persons or groups that have, or claim, ownership, rights, or interests in a corporation and its activities, past, present, or future...

A primary stakeholder group is one without whose continuing participation the corporation cannot survive as a going concern. Primary stakeholder groups typically are comprised of shareholders and investors, employees, customers, and suppliers, together with what is defined as the public stakeholder group: the governments and communities that provide infrastructures and markets, whose laws and regulations must be obeyed, and to whom taxes and other obligations may be due...

Secondary stakeholder groups are defined as those who influence or affect, or are influenced or affected by, the corporation, but they are not engaged in transactions with the corporation and are not essential for its survival...

Jichun Shi, 'How Chinese Enterprises to Live in Freedom and Competition: Further Integration of the Corporate Law and Competition Law of China with Global Standards' (New York University Global Fellows Forum, New York, 25 October 2006) <[www.law.nyu.edu/sites/default/files/upload\\_documents/gffjshipaper.pdf](http://www.law.nyu.edu/sites/default/files/upload_documents/gffjshipaper.pdf)> accessed 30 January 2017 (pointing out "[o]perators must give top priority to the shareholders, in addition, take into consideration of the interests of employees, creditors, governments and the society, operating others capital cautiously and conscientiously as a 'factotum'"); and Lin (n 221) 64.

<sup>229</sup> See Liu (n 196) 643.

<sup>230</sup> See Chapters 4.2.2.1 & 4.3.2.1 above.

<sup>231</sup> See Wang Ping, 'Guoqi Gaige: Zouxiang Hefang' [SOEs Reform: Which Direction to Go (author's translation)] (2012) 21 *The People's Congress of China* 11, 12; and Bai Tianliang, 'Zhengxi "Laizhi Buyi"', *Wenbu Tuijin Gaige* [Treasure Hard-Won and Steadily Pushing forward Reform (author's translation)] *China Daily* (Beijing, 12 April 2012) 05.

2013 should be amended so that the interests of SOEs, privately-owned SMEs and consumers would be balanced to achieve the final objective of *the Chinese Anti-Monopoly Law 2007*, namely the “public interest”.

To sum up, after consideration of anti-monopoly discretionary powers and SOEs’ conduct in the Chinese market, protecting privately-owned SMEs (via cooperation between *the Chinese Anti-Monopoly Law 2007* and China’s Administrative Law or Company Law) is advocated in this research. *First*, concerning discretionary powers of anti-monopoly enforcement agencies, this research not only suggests improving legal coordination in order to restrict administrative monopolies, but it also advocates adding or training professionals who will participate in anti-monopoly enforcement. Furthermore, in order to remedy inappropriate administrative behaviour of Chinese anti-monopoly enforcement agencies, administrative law needs revision in order to improve the feasibility of tating administrative proceedings against unreasonable anti-monopoly judgments. *Second*, concerning the requirement of alienation rights for SOEs, cooperation between *the Chinese Anti-Monopoly Law 2007* and company law should concentrate on the mutually reinforcing relationship between CSR and market competition, and assertion why CSR is in a vulnerable condition in China. Accordingly, this section recommends defining CSR and improving the understanding of CSR among SOEs, privately-owned SMEs and the public.

### **5.3 Conclusion**

Chinese administrative agencies and SOEs in traditional State-controlled sectors often abuse their specific or exclusive rights to impede the growth of privately-owned SMEs, and thus cause the loss of the interests of privately-owned SMEs and consumer welfare. Hitherto, facing the situation of “the fox guarding the hen house”, there has been no guarantee of competition and long-term economic development in China. Furthermore, because uneven growth causes unequal conditions for public and private participants in the market, the “public interest”, defined as the reconciliation of interests between the State’s interest, the interests of enterprises and consumer welfare, is unable to be realised. Because *the Chinese*

*Anti-Monopoly Law 2007* is weak, this chapter has recommended improvements to be made to both the *internal* and *external aspects*.

The *internal reform* to enhance the enforcement capabilities of *the Chinese Anti-Monopoly Law 2007*, includes three components. The first deals with improvements to the current multi-agency operating system. Although the National Anti-Monopoly Commission (directly led by the State Council) and three anti-monopoly enforcement agencies (subordinate organs of the State's ministerial-level agencies) aim to operate hand in hand to cope with monopoly conduct, they suffer duplications in their working practice and fail to counteract with certain industrial policies. Hence, the establishment of an independent anti-monopoly enforcement agency in China, the 'Chinese Anti-Monopoly Authority', directly under the State Council to avoid the current drawbacks, as well as regulating administrative powers in the market.

The second component is a remedy for the lack of an independent anti-monopoly enforcement agency at the present time: the launching (or revising) of a number of specific regulations to regulate administrative agencies and SOEs, in order to adequately protect privately-owned SMEs and market competition. As regards the conflict between the State's industrial policy and *the Chinese Anti-Monopoly Law 2007*,<sup>232</sup> the supremacy of this Law *must be emphasised*, in order to curb administrative monopolies. If any industrial policies are in confrontation with *the Chinese Anti-Monopoly Law 2007*, these policies should be reported to the anti-monopoly enforcement agencies. Furthermore, specific regulations would introduce a handful of anti-monopoly implementation details and punitive measures to reduce the discrimination against privately-owned SMEs caused by administrative monopolies.

The third component would promote private anti-monopoly enforcement, which could close gaps in public anti-monopoly enforcement, as well as providing better protection for victims, such as privately-owned SMEs and consumers. Because indirect purchasers in China

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<sup>232</sup> See Huang Jinxi, *Fanlongduanfa Shiyong Chuwai yu Huomian Zhidu Yanjiu – Yi Chanye Zhengce yu Jingzheng Zhengce de Chongtu yu Xietiao wei Shijiao* [Study on Anti-monopoly Exemptions and Exceptions – From A Perspective of Conflict and Coordination between Industrial Policy and Competition Policy (author's translation)] (Xiamen University Press, China 2014) 90 & 237-49; and Chapter 3.3 above.



do not have the right to take private anti-monopoly lawsuits, and compensation only covers actual losses of plaintiffs, private anti-monopoly enforcement is unable to challenge the imbalanced growth between SOEs and privately-owned SMEs. Thus, the author would advise fixing these loopholes and introducing group litigation (including public interest litigation) to reduce anti-monopoly litigation costs for privately-owned SMEs, in order to protect more victims and achieve another route to protecting the “public interest”. Concurrently, echoing these improvements, preventing privately-owned SMEs from abusing the private enforcement system should be put in place, because maximising self-interest is an unavoidable characteristic of market participants. If all these targets can be achieved, private anti-monopoly enforcement will not only protect privately-owned SMEs and consumers, but also support the development of competition and the “public interest” in the Chinese market.

Furthermore, *the Chinese Anti-Monopoly Law 2007* also requires *external reform* related to other legal areas. The first assistance should come from Administrative Law, which can curb improper use (or lack of use) of discretionary powers of anti-monopoly enforcement agencies granted by *the Chinese Anti-Monopoly Law 2007*. Because Chinese anti-monopoly enforcers have less satisfactory professional standards, anti-monopoly enforcement agencies have difficulty in remaining neutral in investigations, and are accustomed to protecting other administrative agencies. The improper use (or abuse, or lack of use) of discretionary powers offer opportunities for Chinese administrative agencies and SOEs to leave obstacles for privately-owned SMEs’ market entry and impedes the development of the competition in the market. Thus, the body of Administrative Law that regulates the behaviour of administrative agencies and their staff will save privately-owned SMEs from untold miseries (and *the Chinese Anti-Monopoly Law 2007* from having its reputation tarnished).

The second assistance should come from CSR in Company Law. This is not only a measure to promote the upgrading of the market competition in China, but also a wise choice to make SOEs more aware of their responsibility to “pay something back” to society, in order to cultivate competitive culture.<sup>233</sup> To date, China’s SOEs have undermined the interests of

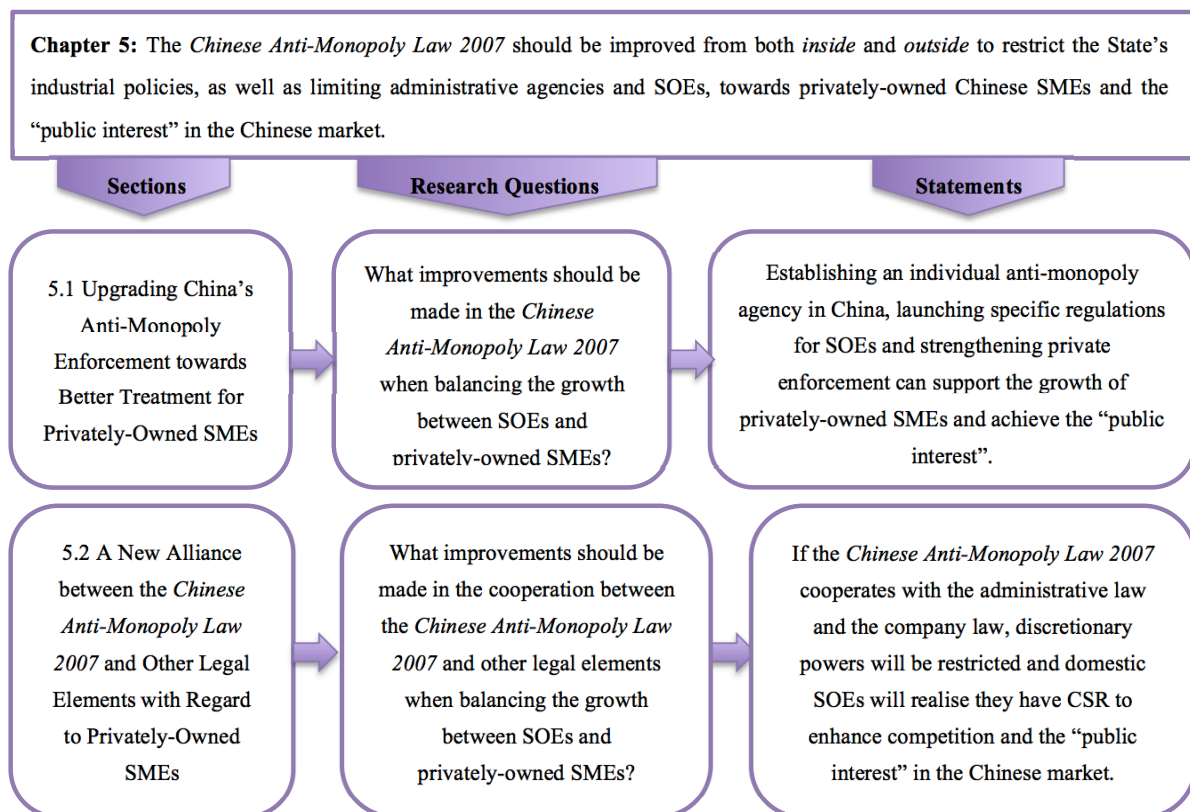
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<sup>233</sup> See Ding Maozhong, *Fanlongduanfa yu Jingji Xianxiang de Dianmian Toushi Yanjiu [In-depth Research on the Relationship between Anti-Monopoly Law and Economic Phenomena* (author’s translation)] (Law Press

privately-owned SMEs, consumer welfare and also the “public interest”. Hence, this research proposes using CSR to enhance the SME legal framework via making it a legal imperative for SOEs in China’s Companies Law.

Nevertheless, although this research assumes a bold vision to restrict the administrative powers of Chinese administrative agencies and SOEs arising from *the Chinese Anti-Monopoly Law 2007*, in the interests of privately-owned SMEs and the “public interest”, these proposals may not by themselves suffice. Further research should continue in the next few years.

\* **Figure 5-5: Overview Figure of Chapter 5**



## Chapter Six: Conclusion

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It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way...

– Charles Dickens<sup>1</sup>

When State intervention occurs, Chinese industrial policies, which are heavily biased in favour of SOEs,<sup>2</sup> often override the proper application of *the Chinese Law on Promotion of SMEs 2002* and *the Chinese Anti-Monopoly Law 2007*.<sup>3</sup> Because it is hard to avoid the influence of China’s administrative agencies and SOEs when formulating and implementing industrial policies, SOEs, acting in a polar role on behalf of the State’s economic interest, create a growth dilemma for privately-owned SMEs, especially those which struggle to survive in traditional State-controlled sectors, such as the steel industry, the gas station industry and the fixed-broadband industry.<sup>4</sup> Consequently, this research concentrated study on the application of administrative powers in the Chinese market, in order to discover the

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<sup>1</sup> See Charles Dickens, *A Tale of Two Cities* (OUP 1973) 1.

<sup>2</sup> See Neil Gregory, Stoyan Tenen and Dileep Wagle, *China’s Emerging Private Enterprises: Prospects for the New Century* (International Finance Corporation 2000) Executive Summary; and also Chapter 2 above.

<sup>3</sup> See Chapter 3 above.

<sup>4</sup> See Chapter 4 above.

reasons why privately-owned SMEs are given weak protection, as well as seeking legal solutions from the perspective of the reforms brought about by *the Chinese Anti-Monopoly Law 2007*.<sup>5</sup>

This thesis has demonstrated why SOEs are important in China's economy;<sup>6</sup> but also why the current Chinese market requires the participation of privately-owned SMEs;<sup>7</sup> and why State industrial policy or administrative intervention results in the lack of a fair playing-field between SOEs and privately-owned SMEs in three traditional State-controlled industries. Because *the Chinese Anti-Monopoly Law 2007* "loses its way" when pitted against the application of State agencies' administrative powers, it is not hard to conclude that fair competition is unable to exist in the Chinese economy at present, because privately-owned SMEs have been continuously discriminated against by the State's industrial policies and collusion between administrative agencies and SOEs. Accordingly, the ultimate objective of *the Chinese Anti-Monopoly Law 2007*, namely the promotion of the "public interest",<sup>8</sup> which is assumed to be *the reconciliation between the State's interest, interests of SOEs, interests of privately-owned SMEs and consumer welfare*,<sup>9</sup> is not successfully achieved! In order to deal with this situation, both internal and external improvements to *the Chinese Anti-Monopoly Law 2007* have been proposed<sup>10</sup> in this thesis, in order to properly advance privately-owned SMEs' interests. Effective restriction of administrative intervention will also be required as part of this reform of *the Chinese Anti-Monopoly Law 2007*.<sup>11</sup>

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<sup>5</sup> See Chapter 5 above.

<sup>6</sup> See Chapters 2.1 & 2.2 above.

<sup>7</sup> See Chapter 2.3 above.

<sup>8</sup> Interview with a Chinese scholar on *the Chinese Anti-Monopoly Law* (the interviewee did not agree to the researcher using the interviewee's name in any written work arising from the study, but did consent to being interviewed) (Beijing, China, 2012) (pointing out that balancing all interests in the Chinese market may be a modality to achieve the "public interest"); and the Anti-Monopoly Law of China 2007, Art 1.

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

<sup>9</sup> See Chapter 3.3 above.

<sup>10</sup> See Chapters 5.1 & 5.2 above.

<sup>11</sup> See Chapters 5.1.3 & 5.2.1 above.

## 6.1 The Significance of the Study

From the perspective of *the Chinese Anti-Monopoly Law 2007*, the overarching research question in this thesis is how an effective legal framework for the protection of Chinese privately-owned SMEs might come into being, in order to overcome the *ultra vires* exercise of administrative powers by domestic agencies and SOEs.

Whilst there has been other research conducted from the perspective of administrative intervention and *the Chinese Anti-Monopoly Law 2007*, the research does not frequently concentrate on *tradeoffs*<sup>12</sup> occurring between SOEs and privately-owned SMEs in the traditional State-controlled industries.<sup>13</sup> This point, together with the following four elements, constitute the original contribution of this thesis:

(a) When analysing the conflict between SOEs and privately-owned SMEs, the author explains some Western economic theories and applies them to the Chinese situation, such as the “partnership dance” principle, “the planning system” and “market system” theory, and so on.<sup>14</sup> Because China is a country with a unique history and specific growth conditions, and has experienced a transition era in a changing globalised economy,<sup>15</sup> this thesis does not recommend adopting the “borrow-for-use” approach from experiences found in other countries or regions.<sup>16</sup>

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<sup>12</sup> See further in Chapter 4: case studies in the Chinese steel (Chapter 4.1), gas station (Chapter 4.2), and fixed-broadband (Chapter 4.3) sectors have been taken place, in order to demonstrate how the tradeoff between SOEs and privately-owned SMEs has been damaged by abuse of administrative powers in the marketplace.

<sup>13</sup> See Development Research Center of the State Council, *Zhongxiao Qiye Fazhan [The Development of Small and Medium Enterprises]* (China Development Press 2011) 15; and R Richard Geddes, *Competing with the Government: Anticompetitive Behavior and Public Enterprises* (Hoover Institution Press 2004) xiii.

<sup>14</sup> See Chapter 2 above.

<sup>15</sup> See Joseph E Stiglitz, ‘Creating the Institutional Foundations for a Market Economy’ in David Kennedy and Joseph E Stiglitz (eds), *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century* (OUP 2013) 72.

<sup>16</sup> For example, in Chapters 2.3.2.2 & 3.1.2.1 the author mentioned that although the cooperation between SMEs and large-scale enterprises has succeeded in Japan, it is difficult for China to copy this successful model because the State fails to overcome inertia on granting unnecessary specific or exclusive rights to SOEs which squeeze SMEs’ living space. In Chapter 5.1 when introducing *a uniqueness and independence ‘Anti-Monopoly Authority’* and *private enforcement* to the Chinese anti-monopoly enforcement system based on both positive and negative experiences of US and EU, the author solely focuses on their potential functions on *limiting administrative interventions*. The reason is that the Chinese “[c]ompetition law has to adapt to the political, economic, geographic and socio-cultural conditions...”: see, e.g., Roger Zäch, Andreas Heinemann and Andreas Kellerhals (eds), *The Development of Competition Law: Global Perspectives* (Edward Elgar Publishing 2010)

(b) The author has defined the “public interest” in the Chinese Anti-Monopoly Law context, as the reconciliation between *the State’s interest, the interests of SOEs, the interests of privately-owned SMEs, and consumer welfare* in the Chinese market, since there is no generally accepted definition of it, and how to define the term has been debated for years in China.

(c) In order to highlight key findings of this research, such as collusion between SOEs and administrative agencies, which obstructs privately-owned SMEs and the “public interest” from being vindicated in the market, the author carried out fieldwork in the Chinese steel industry, the gas station industry and the fixed-broadband industry, all areas which have not been previously considered from the perspective of assessing whether there is such continuing collusion taking place.

(d) With regard to effective limitations for the application of administrative powers over transactions that are normally falling within the jurisdiction of *the Chinese Anti-Monopoly Law 2007*, “internal” and “external” proposals for the Anti-Monopoly Law’s reform were discussed and advanced in Chapter 5.<sup>17</sup>

## **6.2 Key Findings and Contributions<sup>18</sup>**

This thesis suggests what features *the Chinese Anti-Monopoly Law 2007 should have* in order to establish an appropriate tradeoff between SOEs and privately-owned SMEs, and thereby achieve the “public interest”, and achieve a sense of balance in the competition between different interest groups in China.

### **6.2.1 The Growth of Privately-Owned SMEs – A Salutary Move towards a Better Economy and Promoting the “Public Interest” in China**

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Preface; and David Kennedy and Joseph E Stiglitz, ‘Introduction’ in David Kennedy and Joseph E Stiglitz (eds), *Law and Economics with Chinese Characteristics: Institutions for Promoting Development in the Twenty-First Century* (OUP 2013) 2.

<sup>17</sup> See further in Chapter 6.2.3 below.

<sup>18</sup> Some of the ideas presented in the present section will be published as Jing Wang, ‘A Maze of Contradictions: Chinese Law and Policy in the Development Process of Privately Owned Small and Medium-Sized Enterprises in China’ (2017) 25 Michigan State International Law Review (forthcoming).

An examination of China's economic development approach, especially from 1978 onwards, indicates that privately-owned SMEs have their commercial activities hampered by the meddling of State agencies' or SOEs' administrative interventions in order to achieve the State's short-term economic interest.<sup>19</sup> Chapters 2 and 3 demonstrated this scenario from the perspective of policy and law, respectively. Chapter 2 concluded that 'the Five-Year Plans' and the State's industrial policies are catalysts for the "prosperity" of SOEs,<sup>20</sup> but instead undermine the growth of privately-owned SMEs.<sup>21</sup> Chapter 3 considered how flaws in *the Chinese Law on Promotion of SMEs 2002* and *the Chinese Anti-Monopoly Law 2007*<sup>22</sup> created inconsistencies between State industrial policy and *the Chinese Anti-Monopoly Law 2007*,<sup>23</sup> such that privately-owned SMEs are unable to deploy the law satisfactorily, i.e., to overcome administrative discrimination.

Furthermore, with regard to the importance of privately-owned SMEs in the market,<sup>24</sup> Chapters 2 and 3 also analyse how the current situation in China has sidelined the "public interest" via discriminating against privately-owned SMEs. Chapter 4 further demonstrated this scenario with examples taken from three different State-controlled sectors (i.e., the steel industry, the gas station industry and the fixed-broadband industry). From this study, three most important points emerge: (a) Privately-owned SMEs could influence competition in the

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<sup>19</sup> See Chapters 2.3 & 3.1 above.

<sup>20</sup> SOEs' profits "[a]re mainly accounted for by a small number of monopoly enterprises": Sheng Hong and Zhao Nong, *China's State-Owned Enterprises: Nature, Performance and Reform* (World Scientific Publishing Company 2013) xxi.

<sup>21</sup> The author demonstrated that (a) the blossoming of Chinese privately-owned SMEs and "relevant industrial policies" have little to do with each other; (b) SOEs remain the weathervane for SME development; and (c) yet, many SOEs are losing substantial amounts of money: see Chapter 2 above.

<sup>22</sup> The author identified two core flaws of *the Chinese Law on Promotion of SMEs 2002* and *the Chinese Anti-Monopoly Law 2007* in Chapters 3.1 & 3.2: (a) emphasising the State and ignoring the market; and (b) no genuine sanctions for inappropriate administrative directives.

<sup>23</sup> The author pointed out two tensions between the State's industrial policy and *the Chinese Anti-Monopoly Law 2007* in Chapter 3.3: (a) they take different approaches to realise the resources allocated and avoid market failure; and (b) they use different ways to explain the "public interest" in the market.

<sup>24</sup> Privately-owned SMEs have become an important component part of the Chinese economy since 1992 and accounted for over 99 percent of all enterprises in China from 2003 onwards: see, e.g., Jiang Zemin, 'Report at 14th Party Congress (1992)' (The 14th National Congress of the Communist Party of China, Beijing, 12 October 1992) <[www.bjreview.com.cn/document/txt/2011-03/29/content\\_363504.htm](http://www.bjreview.com.cn/document/txt/2011-03/29/content_363504.htm)> accessed 30 January 2017; Research Group of China SME Index of Economic Development, *Zhongguo Zhongxiao Qiyе Jingji Fazhan Zhishi Yanjiu Baogao 2005* [*Research Report on China SME Index of Economic Development (SMEI 2005)*] (Science Press, China 2008) Preface; and Xiangfeng Liu, 'SME Development in China: A Policy Perspective on SME Industrial Clustering' in Hank Lim (ed), *ERIA Research Project Report, 2007, No.5 – Asian SMEs and Globalization* (Economic Research Institute for ASEAN and East Asia, March 2008) <[www.eria.org/SME%20Development%20in%20China\\_A%20Policy%20Perspective%20on%20SME%20Industrial%20Clustering.pdf](http://www.eria.org/SME%20Development%20in%20China_A%20Policy%20Perspective%20on%20SME%20Industrial%20Clustering.pdf)> accessed 30 January 2017.

market; therefore, SOEs' influence could be reduced.<sup>25</sup> (b) Privately-owned SMEs could enhance consumer welfare.<sup>26</sup> (c) Attaching more significance to the promotion of the interests of privately-owned SMEs via the way of creating job opportunities (see Table 2-9 in Chapter 2 above) and improving living standards for their employees, could benefit the promotion of the “public interest” from the point of view of *the Chinese Anti-Monopoly Law 2007*.<sup>27</sup>

In brief, all of these beneficial elements would work together to balance the competing needs of different interest groups and realise the “public interest” in the Chinese transition era. However, these positive possibilities for Chinese privately-owned SMEs at present only exist in theory, as the reality is that privately-owned SMEs in the steel industry, the gas station industry and the fixed-broadband industry, examined above in Chapter 4, face very difficult survival conditions.

### **6.2.2 Collusion between Administrative Agencies and SOEs in China and its impediment for Privately-Owned SMEs**

Administrative interventions provide collusion opportunities between administrative agencies and SOEs (via the application of State industrial policies), and this often hinders the growth and prosperity of privately-owned SMEs.<sup>28</sup> Although in principle the State should maintain social justice in the intervention process,<sup>29</sup> the State cannot avoid protecting the interests of

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<sup>25</sup> Analogous to different types of trees in the forest, SOEs and privately-owned SMEs should be mutually supportive of Chinese economic development, in order to create a competitive environment. Encouraging private capital to participate in the market can break administrative monopolies, as well as pushing SOEs towards more innovation and development in the long term: see, e.g., Alfred Marshall, *Principles of Economics* (8th edn, The Macmillan Press Ltd 1982) 263-64; David Smallbone and Friederike Welter, ‘The Role of Government in SME Development in Transition Economies’ (2001) 19 *International Small Business Journal* 63; and also Chapter 2.3.1 above.

<sup>26</sup> For example, fixed-broadband consumers are looking forward to reduced high-speed broadband costs via the way of introducing more privately-owned fixed-broadband operators to participate in the Chinese market: see Chapter 4.3 above.

<sup>27</sup> For example, although both the Central Government and provincial governments wanted to shut down certain privately-owned steel SMEs across China, those SMEs' contribution towards local economic development, (by way of tax contribution; creating job opportunities; and improving living standards for their employees) led some local governments to refuse to do so. On the other hand, for the governments which obeyed this steel intervention, unemployment compensation has become another hot potato for the local governments affected: see Chapter 4.1.2.3 above.

<sup>28</sup> See Zhang Weiyong and Sheng Hong, ‘Cong Dianxinye Kan Zhongguo de Fanlongduan Wenti’ [Chinese Anti-Monopoly Issues in the Telecommunications Industry (author's translation)] (1998) 2 *Revolution* 66.

<sup>29</sup> See Vito Tanzi, *Government versus Markets: The Changing Economic Role of the State* (CUP 2011) 52.



SOEs and sidelining the application of, and the enforcement of competition rules to level the playing field for SMEs.<sup>30</sup> Accordingly, privately-owned SMEs pay a heavy price for the administrative collusion that suppresses their commercial development. This study looked at three industries in Chapter 4 to demonstrate this key finding.

– Steel:

In order to succeed against global competition, the government-oriented approach has been a feature of the Chinese steel sector from the beginning.<sup>31</sup> Because of the State’s aspiration to overtake Britain’s steel output within fifteen years,<sup>32</sup> countless small-scale steel mills were established between the 1950s and the 1970s.<sup>33</sup> Therefore, reflecting increasingly fierce international competition, collusion between Chinese administrative agencies and steel SOEs has been continuing since the 1980s in order to reduce the number of steel enterprises countrywide (both public and privately-owned), which has led to “blind” mill closures and administrative mergers.<sup>34</sup> Although ostensibly one of the main purposes of *the Chinese Anti-Monopoly Law 2007* is to act as a lever for keeping an eye on State-led monopolies,<sup>35</sup>

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<sup>30</sup> See John Hart Ely, ‘Choice of Law and the State’s Interest in Protecting Its Own’ (1981) 23 William and Mary Law Review 173.

<sup>31</sup> See Chapter 4.1 above.

<sup>32</sup> In recent years the UK steel industry has been somewhat hit by China, the current world’s largest steel producing country: Chris Rhodes, ‘UK Steel Industry: Statistics and Policy’ (House of Commons, UK, 5 May 2016) <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7317#fullreport>> accessed 30 January 2017; and June M Grasso, Jay P Corrin and Michael Kort, *Modernisation and Revolution in China: From the Opium Wars to the Olympics* (4th edn, M.E. Sharpe 2009) 168-69.

<sup>33</sup> See Chapter 4.1.1.1 above.

<sup>34</sup> The number of China’s steel enterprises, which reached 7198 (of which 199 were SOEs) by the end of 2006, will *be forced to reduce* to 200 in the very near future. On one hand, certain small-scale privately-owned steel enterprises close down; while on the other hand, medium or large-scale privately-owned steel enterprises are forced to merge with steel SOEs: see Chapters 4.1.1.2, 4.1.2.1 & 4.1.2.2 above.

<sup>35</sup> See the Anti-Monopoly Law of China 2007, Arts 7-8 & 36-37.

Article 7: With respect to the industries controlled by the State-owned economy and concerning the lifeline of national economy and national security or 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.

Article 8: No administrative organ or organization empowered by a law or administrative regulation to administer public affairs may abuse its administrative powers to eliminate or restrict competition.

Article 36: Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power to force business

the steel intervention has destroyed the hoped-for supremacy of this Law being realised, and left painful memories for privately-owned steel SMEs: with myopic expansion of steel SOEs, the SMEs have continuously disappeared and the market has been steadily losing competition.

– Refined oil retailing:

Since 1999, collusion between administrative agencies and SOEs has occurred in the Chinese refined oil retail market, in order to guarantee petrol SOEs' dominant position.<sup>36</sup> Since the State restricted the importation of crude oil<sup>37</sup> and ensured that petrol SOEs control the majority of refined oil resources (see Figure 4-11 in Chapter 4), the Chinese refined oil retail market has failed to preserve a level playing-field between public and privately-owned gas stations. In periods of short supplies of refined oil, petrol SOEs prioritise their own interests at the expense of non-SOEs, so privately-owned gas stations have to bear losses alone and suffer false accusations of oil hoarding.<sup>38</sup> Even worse, simultaneously, petrol SOEs carry out high-priced acquisitions<sup>39</sup> without any effective limitation by *the Chinese Anti-Monopoly Law 2007*.<sup>40</sup> Thus, because *the Chinese Anti-Monopoly Law 2007* has failed in its functions of restricting petrol SOEs, privately-owned gas stations find it hard to survive in the face of collusion between the application of State industrial policies and the behaviour of petrol SOEs.

– Broadband:

In the Chinese fixed-broadband sector, collusion also occurs between administrative

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operators to engage in the monopolistic conducts as prescribed in this Law.

Article 37: Any administrative organ may not abuse its administrative power to set down such provisions in respect of eliminating or restricting competition.

<sup>36</sup> See Chapter 4.2 above.

<sup>37</sup> 'Guanyu Qingli Zhengdun Xiaolianyouchang he Guifan Yuanyou Chengpinyou Liutong Zhixu de Yijian' [On the Liquidating and Restructuring of the Small Oil Refining Factories and Standardizing the Circulation Order of Crude Oil and Petroleum Products' ('Order No.38 of 1999')] (1999) <<http://finance.sina.com.cn/chanjing/b/20050816/08301890025.shtml>> accessed 30 January 2017.

<sup>38</sup> Chinese petrol SOEs argue that because of the lengthy time before price adjustment in oil price mechanisms (see Chapter 4.2.2.1 above), domestic privately-owned gas stations opportunistically store refined oil in their own self-interests. This then causes "oil shortages" in the refined oil retail market. SOEs insist that privately-owned gas stations are culprits, although the facts point to the opposite.

<sup>39</sup> See Chapter 4.2.1.2 above.

<sup>40</sup> Accordingly, the proportion of Chinese privately-owned gas stations declined by over 10 percent between 1998 and 2011: see Chapter 4.2.1.1 above.

agencies and SOEs in order to prevent fixed-broadband operators from achieving “network interoperability”.<sup>41</sup> Also a “glass ceiling” inhibits privately-owned fixed-broadband operators.<sup>42</sup> Although the Central Government has proposed “cooperation and competition” reform in the telecommunications industry from 2003 onwards, the duopoly/oligopoly model of SOEs has virtually prevented this reform from taking place in the fixed-broadband area (see Table 4-16 in Chapter 4 above). Privately-owned operators find it difficult to secure access to SOEs’ fixed-broadband lines.<sup>43</sup> Thus, the National Development and Reform Commission (NDRC) carried out a probe into the anti-competitive conduct of China Telecom and Unicom (two SOEs) in 2011.<sup>44</sup> However, the real outcome of this probe has been to show that the NDRC prefers to give a slice of the fixed-broadband market to another SOE, namely China Broadcasting Network (CBN), in order to achieve triple-play SOE interoperability (radio networks, telecommunications network and Internet convergence), rather than promote fair access competition conditions for privately-owned SMEs.<sup>45</sup> Thus, Chinese privately-owned fixed-broadband operators still struggle to survive in the face of collusion between administrative agencies and telecommunications SOEs.<sup>46</sup>

Further, because of the absence of “network interoperability”, China’s fixed-broadband consumers have never obtained high-speed/low-price services. Because two important aims of *the Chinese Anti-Monopoly Law 2007*, namely fair competition and consumer welfare, have failed to materialise, so the ultimate aim of this Law, the “public interest”, has never had an opportunity to emerge.

### **6.2.3 Restricting Administrative Powers as a Crucial Condition for More Effective Anti-Monopoly Law Application/Implementation for the Benefit of Privately-Owned SMEs**

Under the semi-government-oriented economic growth model, the exercise of administrative powers often blocks the Chinese market from developing market competition conditions and

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<sup>41</sup> See Chapter 4.3.1 above.

<sup>42</sup> See Chapter 4.3 above.

<sup>43</sup> See Chapter 4.3.2.2 above.

<sup>44</sup> See ‘China Telecom, China Unicom Pledge to Mend Errors after Anti-Monopoly Probe’ (*Xinhua, China*, 2 December 2011) <[www.china.org.cn/business/2011-12/02/content\\_24063134.htm](http://www.china.org.cn/business/2011-12/02/content_24063134.htm)> accessed 30 January 2017.

<sup>45</sup> See Chapter 4.3.2.1 above.

<sup>46</sup> See Chapter 4.3.2.3 above.

creates obstacles for privately-owned SMEs. Whilst some SME policies<sup>47</sup> and *the Chinese Law on Promotion of SMEs 2002* brought about welcome changes for SMEs between 2000 and 2007, they have been unable to overcome certain administrative directives.<sup>48</sup> Thus, in order to achieve an actual market economy and a level playing-field between SOEs and privately-owned SMEs in China, these SMEs had pinned their high hopes on *the Chinese Anti-Monopoly Law 2007*, which ought to be the supreme law in the market.<sup>49</sup> However, after eight years of implementation (from 2008 onwards), *the Chinese Anti-Monopoly Law 2007* fails, for a number of reasons, to prevent inappropriate administrative interventions when it comes face to face with the implementation of the State's industrial policies.<sup>50</sup> The reasons identified for this failure, and the solutions that this thesis has proposed are as follows:

First, because genuine sanctions are conspicuously absent to combat the *ultra vires* exercise of administrative interventions,<sup>51</sup> *the Chinese Anti-Monopoly Law 2007* fails to control the behaviour of SOEs and administrative agencies in the market: e.g., with typically low fines for violations, SOEs and administrative agencies turn a blind eye to this Law.<sup>52</sup> To escape from such a negative situation and provide effective protection for privately-owned SMEs, “self-improvement” measures for the anti-monopoly law's implementation and enforcement should be encouraged as follows:

(a) an anti-monopoly enforcement agency should be established (at ministerial-level), under the direct supervision of the State Council: this would solve the current implementation dilemma,<sup>53</sup> namely conflict within the intervention attitudes of the higher administrative authorities. This reform of the anti-monopoly enforcement system would consist of two

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<sup>47</sup> Chinese SME promotion policies in the 21st century include ‘Several Opinions of the State Council on Cultivating the Social Service System of SMEs’ (2000), ‘Several Opinions of the State Council on Encouraging and Promoting the Development of SMEs’ (2000), ‘The 11th Five-Year Plan for SME Growth’ (2006-2010), ‘The 12th Five-Year Plan for SME Growth’ (2011-2015), ‘Several Opinions of the State Council on Further Promoting the Development of SMEs’ (2009), etc.: see Chapter 2.3.2.1 above.

<sup>48</sup> See Chapters 2.3 & 3.1 above.

<sup>49</sup> See H Stephen Harris and others (eds), *Anti-Monopoly Law and Practice in China* (OUP 2011) Forward.

<sup>50</sup> See Chapter 3.2.2 above.

<sup>51</sup> All Articles of *the Chinese Anti-Monopoly Law 2007*, which relate to the abuse of administrative power, are general principles of the prohibition without any specific sanctions (see footnote 35 above).

<sup>52</sup> See Chapter 3.2 above.

<sup>53</sup> See Chapter 5.1.1 above.

characteristics: *uniqueness* and *independence*. The *first* element of this reform is *uniqueness*: establishing a single ‘Chinese Anti-Monopoly Authority’ by merging the current agencies (at sub-ministerial-level), in order to combine human, material and financial resources and reduce disputes in the investigation process.<sup>54</sup> The *second* element of the reform is *independence*: the new ministerial-level ‘Chinese Anti-Monopoly Authority’ should implement *the Chinese Anti-Monopoly Law 2007* with greater autonomy in order to carry out effective investigations involving administrative powers.<sup>55</sup>

(b) enacting specific regulations that limit the intervention of administrative powers would reduce the probability of abuse of administrative powers occurring in the Chinese market, and would thereby expand the “growth” space for privately-owned SMEs.<sup>56</sup> These specific regulations should be directed towards three targets: (i) the supremacy of *the Chinese Anti-Monopoly Law 2007*;<sup>57</sup> (ii) the granting of more powers to allow privately-owned SMEs to challenge administrative directives;<sup>58</sup> and (iii) the reduction of administrative monopolies influence.<sup>59</sup>

(c) private anti-monopoly enforcement capabilities should be enhanced: this would increase the “opposition force” against the current distortive influence of administrative interventions in China, and help achieve a more level playing-field for privately-owned SMEs and consumers. In order to remedy the situation, *the “high cost but low compensation” outcome arising from private anti-monopoly litigation*, needs to be addressed. Chapter 5.1.3 pointed out what new features the private anti-monopoly enforcement regime *should have* in order to establish a balanced tradeoff between SOEs and privately-owned SMEs (indirect

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<sup>54</sup> See Chapter 5.1.1.2.1 above.

<sup>55</sup> *Id.*

<sup>56</sup> See Chapter 5.1.2 above.

<sup>57</sup> The specific regulations should regulate that industrial policy-making agencies must be aware that no industrial policy can triumph over *the Chinese Anti-Monopoly Law 2007*: this would ensure that industrial policy implementation agencies could refuse to implement industrial policies which violate *the Chinese Anti-Monopoly Law 2007*: see Chapter 5.1.2 above.

<sup>58</sup> The specific regulations could provide that privately-owned SMEs have rights to report and challenge administrative intervention instigated by SOEs, or industrial policies launched by administrative agencies: see Chapter 5.1.2 above.

<sup>59</sup> The specific regulations should also introduce a handful of anti-monopoly enforcement and punitive measures to regulate law enforcers: see Chapter 5.1.2 above.

purchasers and group litigation facilitation),<sup>60</sup> and thereby achieve the “public interest” (promote public interest litigation).<sup>61</sup>

Because these three recommendations require the imposition of substantial sanctions against the abuse of administrative powers, a balanced growth between SOEs and privately-owned SMEs could emerge in the Chinese market; and consequently their interests would also be balanced.

Second, the People’s Court cannot be regarded as an independent anti-monopoly enforcement agency when dealing with anti-monopoly lawsuits, because anti-monopoly lawsuits involving SOEs may turn into a battle for supremacy between administrative intervention and Chinese Competition Law. Therefore, market participants that suffer inappropriate administrative directives are obliged to find “close allies” in the Chinese legal system, i.e., in Administrative Law. However, with regard to the current situation, *administrative lawsuits* and *administrative reconsiderations* often fail to support victims suffering from inappropriate use of administrative powers and anti-competitive conduct.<sup>62</sup> Accordingly, in order to adequately protect privately-owned SMEs, a new approach to the application of Administrative Law and *the Chinese Anti-Monopoly Law 2007* is required. If this is realisable, it will define a suitable scope of discretionary powers for anti-monopoly enforcement agencies, as well as offering a fair playing-field between SOEs and privately-owned SMEs. Besides decreasing the frequency of the abuse of administrative powers in the market, cooperation will also reduce the situation whereby bureaucrats shield one another. Three actions are proposed to enhance the compatibility between *the Chinese Anti-Monopoly Law 2007* and Administrative Law:

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<sup>60</sup> (a) Regarding plaintiffs (direct purchasers) in Chinese private anti-monopoly litigation, it is necessary to open the door also to *indirect purchasers* with the aim of protecting the vast majority of consumers. (b) Regarding the high cost but low compensation private anti-monopoly litigation, *group litigation* needs to be established, in order to reduce litigation costs for privately-owned SMEs: see Chapter 5.1.3 above.

<sup>61</sup> On the one hand, public interest litigation needs to be established in order to provide effective protection for competition and the “public interest” in the market. On the other hand, the usage of private anti-monopoly enforcement also requires limitations, because it might become a new tool as a (bad faith) strategy for disrupting competitors: see Chapter 5.1.3.2 above.

<sup>62</sup> (a) With regard to administrative lawsuits, only a small amount of administrative actions, namely “the specific administrative action”, relating to competition, can currently be the subject of challenge in administrative lawsuits; (b) with regard to “administrative reconsiderations”, the higher-level corrective measure roots in the reality that bureaucrats traditionally tend to shield one another: see Chapter 3.2.2.2 above.

(a) The introduction of measures to reduce *selective enforcement* in favour of SOEs; (b) the injecting of new blood into anti-monopoly enforcement agencies, by training or hiring *economics and legal professionals*; and (c) the provision of *appropriate remedies for victims of unreasonable anti-monopoly decisions* made by enforcers.<sup>63</sup>

Because the reality is that the Administrative Law is ineffective, at the present time, to bring about improved anti-monopoly implementation, Company Law may be looked to instead in order to bring about a positive change for *the Chinese Anti-Monopoly Law 2007*'s role and status, in limiting inappropriate use of administrative powers in the market.<sup>64</sup> If this is achievable, it will not only elevate Chinese SOEs' awareness of their Corporate Social Responsibilities (CSR), but also would enhance their awareness of the need to better protect privately-owned SMEs from discriminatory practices or policies.<sup>65</sup> This would be a positive move away from simply forbidding misuse of administrative powers in the market, and would help reduce social acceptance of such trends. Accordingly, SOEs would no longer be the only thriving component in the Chinese market, and both SOEs and privately-owned SMEs could participate in the market without discrimination in the future. Subsequently, the "commonality interest" for the State, market participants and consumers, namely the "public interest", would have an opportunity to emerge.

### **6.3 Limitations of the Study and Areas for Further Study**

The present work in the field of upgrading legal protections for Chinese privately-owned SMEs and limiting the abuse of administrative powers in the Chinese market from the perspective of *the Chinese Anti-Monopoly Law 2007*, cannot avoid having limitations because the research scope was, of necessity, not defined too widely, and the time available to carrying out fieldwork in several cities across China was limited. The black-letter law

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<sup>63</sup> See Chapter 5.2.1 above.

<sup>64</sup> Chapter 5.2.2.2 suggests that Chinese Company Law should (a) provide a clear definition of CSR, including the need to balance stakeholders interest, as well as promoting market reward and the "public interest"; and (b) contribute to improving the understanding of CSR among SOEs, privately-owned SMEs, and the public.

<sup>65</sup> See Ding Maozhong, *Fanlongduanfa yu Jingji Xianxiang de Dianmian Toushi Yanjiu [In-depth Research on the Relationship between Anti-Monopoly Law and Economic Phenomena]* (author's translation) (Law Press China 2013) 136.

approach and existing literature survey were sufficient to allow the research question to be answered. Field research was attempted, but levels of interviewee co-operation varied. Apart from this, there are several issues pending with regard to *the Chinese Anti-Monopoly Law 2007*, such as a clear definition of the “public interest” adopted by this Law, and the clarification and quantification of anti-monopoly enforcement and legal liabilities: these two elements may constitute new research problems for examination in the researcher’s future research work.

### **6.3.1 The Lack of a Clear Definition of the “Public Interest” in *the Chinese Anti-Monopoly Law 2007***

In any research which concentrates on privately-owned SMEs from the perspective of *the Chinese Anti-Monopoly Law 2007*, paying attention to the final aim of this Law, namely the “public interest”, is an inescapable task.<sup>66</sup> However, without a clear definition in this Law, the understanding of the “public interest” causes a grave problem for the harmonious pursuit of the State’s industrial policies and *the Chinese Anti-Monopoly Law 2007*. It is a false proposition to use either the State’s interest or consumer welfare to replace the “public interest” in the Chinese market.<sup>67</sup> An examination of the survival situations of privately-owned SMEs in the steel industry, the gas station industry, and the fixed-broadband industry, reveals that the State’s short-term economic interest takes a predominant position and reduces the interests of privately-owned SMEs and consumer welfare.<sup>68</sup> Conversely, as an individual interest, consumer welfare, if given too much prominence, is also unable to strike a balance between the State’s interest and the interests of market participants in the Chinese market.<sup>69</sup> As a result, no matter what is used to replace the “public interest” in the current Chinese market, the “public interest” has never gained the opportunity to be realised. Although the author maintains that *the “public interest” is not a type of individual interest, and instead should be an amalgam of the reconciling between competing interests, such as*

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<sup>66</sup> See Chapter 3.2.1 above.

<sup>67</sup> See Chapter 3.3 above.

<sup>68</sup> See Chapter 4 above.

<sup>69</sup> Overemphasising the importance of consumer welfare, while overlooking interests of market participants, may cause negative effects to businesses, and then reduce effective competition in the market: see Chapter 3.3.2 above.



*the State interests, the interests of enterprises, and consumer welfare*, it has become clear that, without sufficient explanation in *the Chinese Anti-Monopoly Law 2007*, the notion of the “public interest” is hard to realise and merits further study.

### **6.3.2 Further Development of *the Chinese Anti-Monopoly Law 2007* in Enforcement and Establishing Legal Liabilities – Clarification and Quantification**

The weak enforcement of *the Chinese Anti-Monopoly Law 2007* is a crucial reason for the generation of the vulnerable situation of privately-owned SMEs in traditional State-controlled sectors. Therefore, it is essential to deliberate in future research work, on the further development of implementing rules to advance the influence of *the Chinese Anti-Monopoly Law 2007*, from the perspectives of clarification and quantification.

In detail, there are at least three elements that should be considered: the first is the *relevant market*,<sup>70</sup> and determine whether monopolies do, or do not, exist.<sup>71</sup> In fact, the regulations on the “relevant market” in *the Chinese Anti-Monopoly Law 2007* leave much room for improvement.<sup>72</sup>

The second element is the need for proper regulation of the *discretionary powers of Chinese anti-monopoly enforcement agencies*, because *the Chinese Anti-Monopoly Law 2007* grants a wide range of discretionary powers to these agencies<sup>73</sup>: without this reform, China’s anti-monopoly enforcement agencies may fail to prevent the *ultra vires* exercise of administrative interventions within the country.

The third element is the need for regulations on the *legal liabilities of administrative agencies and SOEs* whose action violate *the Chinese Anti-Monopoly Law 2007*, because

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<sup>70</sup> See Ding Maozhong, ‘Lun Xiangguan Shichang Jieding de Buquedingxing Jiqi Yingdui’ [On the Uncertainty in Defining the Relevant Market and the Countermeasures] in Wang Xiaoye (ed), *Jingzheng Zhifa Nengli Jianshe* [Capacity Building for the Enforcement of Competition Law] (Social Sciences Academic Press, China 2012) 254-64.

<sup>71</sup> See Zhang Baisha, ‘Xiangguan Shichang Jieding Ruogan Wenti Yanjiu’ [Some Issues Surrounding the Definition of the Relevant Product Market] in Wang Xiaoye (ed), *Jingzheng Zhifa Nengli Jianshe* [Capacity Building for the Enforcement of Competition Law] (Social Sciences Academic Press, China 2012) 418; and Yu Li and Wu Xuliang, *Chanye Zuzhi yu Fanlongduanfa* [Industrial Organization and Antimonopoly Law] (Dongbei University of Finance & Economics Press 2008) 48.

<sup>72</sup> In general, see Wang Xiaoye (ed), *Fanlongduanfa zhong de Xiangguan Shichang Jieding* [Market Definition in the Antitrust Law] (Social Sciences Academic Press, China 2014); and see further in Chapter 5.1.1.

<sup>73</sup> See Chapter 5.2.1 above.

hitherto no genuine sanctions have been instigated against those who implement or encourage State-led monopolies in China: administrative agencies and SOEs can violate *the Chinese Anti-Monopoly Law 2007* without suffering adverse consequences, while privately-owned SMEs have to suffer lifelong discrimination arising from their actions. Thus, the implementing rules in *the Chinese Anti-Monopoly Law 2007* require clarification and quantification, in order to enhance anti-monopoly enforcement, and increase the legal exposure of administrative agencies and SOEs who violate the 2007 Act.

#### **6.4 Areas for Further Study and Use of this Study's Research Model**

The research model used in this thesis could also be used in further studies. For example:

(a) With regard to other laws that also retard the development of SMEs in China, such as *the Chinese Law of Promotion of SMEs 2002*, Administrative Law and Company Law, the research model used in this thesis would be appropriate to use in order to assess what reforms would be needed in order to establish a stronger and more supportive legal framework for SMEs in China from the perspective of the above-mentioned Laws.

(b) With regard to other traditional State-controlled industries, such as the electricity industry, the postal industry and the tobacco industry, Chinese privately-owned SMEs may suffer similar administrative interventions: thus, this study's research model could also be used to conduct future studies in these other industries.

(c) With regard to the definition of the "public interest" adopted by the author in this research, the author merely touched upon it from the perspective of *the economic objective of the Chinese Anti-Monopoly Law 2007*. Hence, this research model could also be used to expand the definition of the "public interest" into *the non-economic area*, with regard to solving the ongoing conflict between privately-owned SMEs and SOEs.

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## Interviews

- Interview with a Chinese scholar on *Chinese Anti-Monopoly Law* (the interviewee did not agree to the researcher using the interviewee's name in any written work arising from the study, but did consent to being interviewed) (Shanghai, China, 2012)

Interview with a staff member of China Sinopec Hebei Branch (the interviewee did not agree to the researcher using the interviewee's name in any written work arising from the study, but did consent to being interviewed) (Shijiazhuang, China, 2012)

Interview with a staff member of China Telecommunications Corporation (China Telecom) Cangzhou Branch (the interviewee did not agree to the researcher using the interviewee's name in any written work arising from the study, but did consent to being interviewed) (Cangzhou, China, 2012)

Interview with a staff member of China United Network Communications Group Co., Ltd (China Unicom) Cangzhou Branch (the interviewee did not agree to the researcher using the interviewee's name in any written work arising from the study, but did consent to being interviewed) (Cangzhou, China, 2012)

Interview with a staff member of China Sinopec Cangzhou Branch (the interviewee did not agree to the researcher using the interviewee's name in any written work arising from the study, but did consent to being interviewed) (Cangzhou, China, 2012)

Interview with five leading academic experts in competition law in China (the interviewee did not agree to the researcher using the interviewee's name in any written work arising from the study, but did consent to being interviewed) (Beijing, China, 2012)

Interview with Huiyong Shang, Researcher of Policy Planning Office, China Centre for Promotion of SME Development, Ministry of Industry and Information Technology of the People's Republic of China (Beijing, China, 2012)

Interview with one staff member of China Sinopec Changqing Gas Station in Tianzhu Town, Beijing (the interviewee did not agree to the researcher using the interviewee's name in any written work arising from the study, but did consent to being interviewed) (Beijing, China, 2012)

Online interview with a staff member of China Telecom Jimo Branch (the interviewee did not agree to the researcher using the interviewee's name in any written work arising from the study, but did consent to being interviewed) (Bangor, Wales, UK, 2013)

Online interview with a staff member of China Unicom Jimo Branch (the interviewee did not agree to the researcher using the interviewee's name in any written work arising from the study, but did consent to being interviewed) (Bangor, Wales, UK, 2013)

Telephone Interview with a staff member of Kun Steel Holding, Kunming, Yunnan Province, China (the interviewee did not agree to the researcher using the interviewee's name in any written work arising from the study, but did consent to being interviewed) (Cangzhou, China, 2012)

## **Personal Communications**

Email from BP-PetroChina Petroleum Company to author (2013)

Email from China Telecommunications Corporation (China Telecom) Cangzhou Branch to author (2015)

Email from China United Network Communications Group Co., Ltd (China Unicom) Jimo Branch to author (2015)

Email from the SME Performance Review of European Commission Enterprise and Industry to author (2015)

## **Appendices**

## **Appendix 1**

### **Relevant Articles of China's Laws and Policies in Chinese and English**

## The Interim Provisions on Carrying Out and Protecting Socialist Competition (1980)\*

### 国务院关于开展和保护社会主义竞争的暂行规定（1980）

(Adopted at the Fourth Session of the Sixth National People's Congress of China on October 17, 1980 and  
Repealed on October 6, 2001)

（1980年10月17日国务院发布，2001年10月6日废止）

<p>党的十一届三中全会以来……竞争逐步开展起来，在我国经济生活中显示出它的活力，推动着经济的发展……我们应当逐步改革现行的经济管理体制，积极地开展竞争，保护竞争的顺利进行。为此，特作以下暂行规定：</p>	<p>Since the Third Plenary Session of the Eleventh Central Committee of the Communist Party of China, competition has been developing gradually and showing its strong economic vitality to promote economic growth... These interim provisions are formulated to improve the current economic management system, encourage rational competition, and ensure the smooth running of the competition.</p>
<p>一 在开展竞争中，所有的生产和经营单位，都应当保证完成国家的产销计划……</p>	<p><b>Article 1</b> In the competition process, all business operators in China should ensure completion of the national marketing plan...</p>
<p>二 开展竞争必须扩大企业的自主权，尊重企业相对独立的商品生产者的地位……对一切侵犯企业自主权的作法，企业有权抵制和上诉。</p>	<p><b>Article 2</b> In order to promote market competition, the autonomy of enterprises must be expanded and the relatively independent status of enterprises must be respected... In response to those behaviours that violate the autonomy of enterprises, relevant enterprises shall have the right to refuse and appeal.</p>
<p>三 在社会主义公有制经济占优势的情况下，允许和提倡各种经济成分之间、各个企业之间，发挥所长，开展竞争。在经济活动中，除国家指定由有关部门和单位专门经营的产品以外，其余的不得进行垄断、搞独家经营……对于有利于国计民生的集体经济和个体经济……他们的正当权益，应受到国家法律的保护……</p>	<p><b>Article 3</b> In the case where the socialist market economy occupies the leading force in the national economy, competition among various economic groups and different enterprises should be permitted and encouraged. With the exception of some specific agencies and enterprises which get State permits for monopoly or exclusive operating, this behaviour shall be forbidden in China... Legitimate rights and interests of the collective economy and the individual economy must be protected according to relevant laws and policies in China...</p>

\* The Chinese version is available at 'The Official Website of the Chinese Government'  
<[www.gov.cn/gongbao/shuju/1980/gwyb198016.pdf](http://www.gov.cn/gongbao/shuju/1980/gwyb198016.pdf)> accessed 30 January 2017. The author translated the Articles from Chinese.

<p>四</p> <p>广开商品流通渠道，为竞争开辟场所.....</p>	<p><b>Article 4</b></p> <p>Commodity distribution channels shall be widened in China to improve competition...</p>
<p>五</p> <p>开展竞争必须对不合理的价格逐步进行必要的调整.....</p>	<p><b>Article 5</b></p> <p>Unreasonable prices must be adjusted gradually in line with competition in the Chinese market...</p>
<p>六</p> <p>开展竞争必须打破地区封锁和部门分割.....工业、交通、财贸等有关部门对现行规章制度中妨碍竞争的部分，必须进行修改，以利于开展竞争。采取行政手段保护落后，抑制先进，妨碍商品正常流通的作法，是不合法的，应当予以废止。</p>	<p><b>Article 6</b></p> <p>Regional blockades must be broken and the separation of the departments must be promoted in line with competition... Some existing anti-competitive rules and regulations, released by administrative departments, such as Industry Department, Transportation Department, Trade Finance Department, etc., must be modified to satisfy competition. Any administrative behaviour which stagnates the flagging economy, inhibiting advance and impeding the normal circulation of commodities, is illegal and should be abolished.</p>
<p>八</p> <p>竞争要严格遵守国家的政策法令，采取合法的手段进行.....</p>	<p><b>Article 8</b></p> <p>Competition must strictly abide by policies and laws in China and be carried out through legal means...</p>
<p>九</p> <p>各级政府和主管部门要.....加强对竞争的领导.....要学会掌握经济规律.....制订必要的经济法规，指导竞争的健康发展.....</p>	<p><b>Article 9</b></p> <p>Governments and authorities at various levels must...strengthen their leadership over competition; ...follow economic rules, ...and launch necessary economic laws and regulations to direct the positive development of competition in the market...</p>
<p>十</p> <p>以上暂行规定，希结合实际情况认真试行。各地区、各部门可根据本规定的精神，制订实施办法，保护竞争的开展。</p>	<p><b>Article 10</b></p> <p>The interim provisions shall be put into practice on a trial basis and combined with the actual situation. Every province and department may formulate its own implementation measures to protect the competitive conduct in accordance with the spirit of the interim provisions.</p>

# Constitution of the People's Republic of China 1982 & 2004 Revisions\*

## 中华人民共和国宪法 1982 & 2004

(Adopted at the Fifth Session of the Fifth National People's Congress of China and promulgated for implementation by the Announcement of the National People's Congress on December 4, 1982

Amended in accordance with the Amendments to the Constitution of China adopted respectively at the First Session of the Seventh National People's Congress on April 12, 1988, the First Session of the Eighth National People's Congress on March 29, 1993, the Second Session of the Ninth National People's Congress on March 15, 1999 and the Second Session of the Tenth National People's Congress on March 14, 2004)

(1982年12月4日第五届全国人民代表大会第五次会议通过

根据1988年4月12日第七届全国人民代表大会第一次会议通过的《中华人民共和国宪法修正案》、1993年3月29日第八届全国人民代表大会第一次会议通过的《中华人民共和国宪法修正案》、1999年3月15日第九届全国人民代表大会第二次会议通过的《中华人民共和国宪法修正案》和2004年3月14日第十届全国人民代表大会第二次会议通过的《中华人民共和国宪法修正案》修正。)

<i>1982 Revision</i>	
<b>第一章 总则</b>	<b>Chapter I General Principles</b>
<b>第十一条</b> 在法律规定范围内的个体经济、私营经济等非公有制经济，是社会主义市场经济的重要组成部分。	<b>Article 11</b> The non-public sectors of the economy such as the individual and private sectors of the economy, operating within the limits prescribed by law, constitute an important component of the socialist market economy.

<i>2004 Revision</i>	
<b>第一章 总则</b>	<b>Chapter I General Principles</b>
<b>第七条</b> 国有经济，即社会主义全民所有制经济，是国民经济中的主导力量。国家保障国有经济的巩固和发展。	<b>Article 7</b> The State-owned economy, namely, the socialist economy under ownership by the whole people, is the leading force in the national economy. The State ensures the consolidation and growth of the State-owned economy.

\* The English version is available at 'Database of Laws and Regulations, China'  
<[www.npc.gov.cn/englishnpc/Law/2007-12/05/content\\_1381903.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/05/content_1381903.htm)> accessed 30 January 2017.

# General Principles of the Civil Law of the People's Republic of China 1986\*

## 中华人民共和国民法通则 1986

(Adopted at the Fourth Session of the Sixth National People's Congress of China on April 12, 1986)

(1986年4月12日第六届全国人民代表大会第四次会议通过)

<b>第一章 基本原则</b>	<b>Chapter I Basic Principles</b>
<b>第七条</b> 民事活动应当尊重社会公德，不得损害社会公共利益，破坏国家经济计划，扰乱社会经济秩序。	<b>Article 7</b> Civil activities shall have respect for social ethics and shall not harm the public interest, undermine state economic plans or disrupt social economic order.
<b>第二章 公民（自然人）</b>	<b>Chapter II Citizen (Natural Person)</b>
<b>第四节 个体工商户、农村承包经营户</b>	<b>Section 4 Individual Businesses and Leaseholding Farm Households</b>
<b>第二十六条</b> 公民在法律允许的范围内，依法经核准登记，从事工商业经营的，为个体工商户。个体工商户可以起字号。	<b>Article 26</b> “Individual businesses” refers to businesses run by individual citizens who have been lawfully registered and approved to engage in industrial or commercial operations within the sphere permitted by law. An individual business may adopt a shop name.
<b>第四章 民事法律行为和代理</b>	<b>Chapter IV Civil Juristic Acts and Agency</b>
<b>第一节 民事法律行为</b>	<b>Section 1 Civil Juristic Acts</b>
<b>第五十五条</b> 民事法律行为应当具备下列条件： （一）行为人具有相应的民事行为能力； （二）意思表示真实； （三）不违反法律或者社会公共利益。	<b>Article 55</b> A civil juristic act shall meet the following requirements: (1) the actor has relevant capacity for civil conduct; (2) the intention expressed is genuine; and (3) the act does not violate the law or the public interest.

\* The English version is available at 'Database of Laws and Regulations, China'  
<[www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383941.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm)> accessed 30 January 2017.



## Amendment to the Constitution of the People's Republic of China 1988\*

### 中华人民共和国宪法修正案 1988

(Adopted at the First Session of the Seventh National People's Congress of China and promulgated for implementation by the Announcement of the National People's Congress on April 12, 1988)

(1988年4月12日第七届全国人民代表大会第一次会议通过)

<p>第一条</p> <p>宪法第十一条增加规定：“国家允许私营经济在法律规定的范围内存在和发展。私营经济是社会主义公有制经济的补充。国家保护私营经济的合法的权利和利益，对私营经济实行引导、监督和管理。”</p>	<p><b>Article 1</b></p> <p>Adding a new paragraph in Article 11, of <i>Constitution of the People's Republic of China (1982 Revision)</i>: “The State protects the lawful rights and interests of the non-public sectors of the economy such as the individual and private sectors of the economy. The State encourages, supports and guides the development of the non-public sectors of the economy and, in accordance with law, exercises supervision and control over the non-public sectors of the economy.”</p>
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\* The Chinese version is available at ‘The National People's Congress of China’ <[www.npc.gov.cn/wxzl/wxzl/2000-12/05/content\\_4498.htm](http://www.npc.gov.cn/wxzl/wxzl/2000-12/05/content_4498.htm)> accessed 30 January 2017; the English translation is available at ‘Database of Laws and Regulations, China’ <[www.npc.gov.cn/englishnpc/Law/2007-12/05/content\\_1381903.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/05/content_1381903.htm)> accessed 30 January 2017.

# Provisional Regulations of the People's Republic of China on Private Enterprises 1988\*

## 中华人民共和国私营企业暂行条例 1988

(Promulgated June 25, 1988 by the State Council of China)

(1988年6月25日国务院令 第4号发布)

<b>第一章 总则</b>	<b>Chapter I General Principles</b>
<b>第二条</b> 本条例所称私营企业是指企业资产属于私人所有、雇工八人以上的营利性的经济组织。	<b>Article 2</b> For the purpose of these Regulations, the term “private enterprise” shall refer to a privately funded economic entity which employs at least eight persons.
<b>第三条</b> 私营经济是社会主义公有制经济的补充。国家保护私营企业的合法权益。 私营企业必须在国家法律、法规和政策规定的范围内从事经营活动。	<b>Article 3</b> The private economy shall be seen as a complement to the socialist publicly owned economy. The State shall protect the legal rights and interests of private enterprises. A private enterprise shall operate within the scope stipulated by State laws, statutory regulations and policies.
<b>第四条</b> 私营企业职工依法组织工会。职工的合法权益受国家法律保护。	<b>Article 4</b> The employees of a private enterprise may organize a trade union in accordance with the law. The legal rights and interests of employees shall receive the protection of State laws.

\* The English version is available at ‘The Ministry of Commerce of China’  
<<http://english.mofcom.gov.cn/aarticle/lawsdata/chineselaw/200211/20021100053520.html>> accessed 30 January 2017.

# Law of the People's Republic of China Against Unfair Competition 1993\*

## 中华人民共和国反不正当竞争法 1993

(Adopted at the Third Meeting of the Standing Committee of the Eighth National People's Congress of China on September 2, 1993)

(1993年9月2日第八届全国人民代表大会常务委员会第三次会议通过)

<b>第一章 总则</b>	<b>Chapter I General Provisions</b>
<b>第一条</b> 为保障社会主义市场经济健康发展，鼓励和保护公平竞争，制止不正当竞争行为，保护经营者和消费者的合法权益，制定本法。	<b>Article 1</b> This Law is formulated with a view to safeguarding the healthy development of a socialist market economy, encouraging and protecting fair competition, repressing unfair competition acts, and protecting the lawful rights and interests of business operators and consumers.
<b>第二条</b> .....本法所称的不正当竞争，是指经营者违反本法规定，损害其他经营者的合法权益，扰乱社会经济秩序的行为.....	<b>Article 2</b> ... "Unfair competition" mentioned in this Law refers to a business operator's acts violating the provisions of this Law, infringing upon the lawful rights and interests of another business operator and disturbing the socio-economic order...
<b>第三条</b> 各级人民政府应当采取措施，制止不正当竞争行为，为公平竞争创造良好的环境和条件.....	<b>Article 3</b> People's governments at various levels shall take measures to repress unfair competition acts and create favourable environment and conditions for fair competition...
<b>第二章 不正当竞争行为</b>	<b>Chapter II Acts of Unfair Competition</b>
<b>第六条</b> 公用企业或者其他依法具有独占地位的经营者，不得限定他人购买其指定的经营者的商品，以排挤其他经营者的公平竞争。	<b>Article 6</b> A public utility enterprise or any other business operator occupying monopoly status according to law shall not restrict people to purchasing commodities from the business operators designated by him, thereby precluding other business operators from fair competition.
<b>第十四条</b> 经营者不得捏造、散布虚伪事实，损	<b>Article 14</b> A business operator shall not fabricate or spread false information to

\* The English version is available at 'Database of Laws and Regulations, China'  
<[www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383803.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383803.htm)> accessed 30 January 2017.

害竞争对手的商业信誉、商品声誉。	injure his competitors' commercial credit or the reputation of his competitors' commodities.
<b>第三章 监督检查</b>	<b>Chapter III Supervision and Inspection</b>
<p>第十六条</p> <p>县级以上监督检查部门对不正当竞争行为，可以进行监督检查。</p>	<p><b>Article 16</b></p> <p>Supervision and inspection departments at or above the county level may carry out supervision over and inspection of unfair competition acts.</p>
<b>第四章 法律责任</b>	<b>Chapter IV Legal Responsibility</b>
<p>第二十条</p> <p>经营者违反本法规定，给被侵害的经营者造成损害的，应当承担损害赔偿责任……</p> <p>被侵害的经营者的合法权益受到不正当竞争行为损害的，可以向人民法院提起诉讼。</p>	<p><b>Article 20</b></p> <p>A business operator who violates the provisions of this Law and thus causes damage to the infringed business operators, shall bear the liability of compensation for the damage…</p> <p>A business operator whose lawful rights and interests are infringed upon by unfair competition acts may bring a suit in a People's Court.</p>
<p>第二十三条</p> <p>公用企业或者其他依法具有独占地位的经营者，限定他人购买其指定的经营者的商品，以排挤其他经营者的公平竞争的，省级或者设区的市的监督检查部门应当责令停止违法行为，可以根据情节处以五万元以上二十万元以下的罚款……</p>	<p><b>Article 23</b></p> <p>In cases where a public utility enterprise or any other business operator occupying monopoly status according to law restricts people to purchasing commodities from a designated business operator in order to deprive other business operators from fair competition, the supervision and inspection departments at the provincial level or of cities divided into districts shall order the ceasing of the illegal acts and may impose a fine of not less than 50,000 Yuan but not more than 200,000 Yuan depending on the circumstances…</p>

<p>第三十条</p> <p>政府及其所属部门违反本法第七条规定，限定他人购买其指定的经营者的商品、限制其他经营者正当的经营活动，或者限制商品在地区之间正常流通的，由上级机关责令其改正；情节严重的，由同级或者上级机关对直接责任人员给予行政处分。被指定的经营者借此销售质次价高商品或者滥收费用的，监督检查部门应当没收违法所得，可以根据情节处以违法所得一倍以上三倍以下的罚款。</p>	<p><b>Article 30</b></p> <p>Where a government or its subordinate departments, in violation of the provisions of Article 7 of this Law, restrict people to purchasing commodities from a designated business operator or impose limits on other business operators' rightful operation activities or the normal circulation of commodities between different areas, the supervision and inspection department at higher levels shall order them to make corrections; and if the circumstances are serious, the persons held directly responsible shall be given administrative sanctions by the relevant department at the same or higher levels; if the designated business operator takes advantage of his status to sell goods of low quality at high prices or indiscriminately collects fees, the supervision and inspection department shall confiscate the illegal earnings and may impose a fine of not less than one time but not more than three times the illegal earnings in light of the circumstances.</p>
<p>第三十一条</p> <p>监督检查不正当竞争行为的国家机关工作人员滥用职权、玩忽职守，构成犯罪的，依法追究刑事责任；不构成犯罪的，给予行政处分。</p>	<p><b>Article 31</b></p> <p>Where a State functionary engaged in supervision over and inspection of unfair competition acts abuses his power or neglects his duty, and if the case constitutes a crime, he shall be investigated for criminal responsibility according to law; if the case does not constitute a crime, he shall be given an administrative sanction.</p>

**Law of the People's Republic of China on the Protection of Consumer Rights and  
Interests 1993\***

**中华人民共和国消费者权益保护法 1993**

(Adopted at the Fourth Meeting of the Standing Committee of the Eighth National People's Congress of China  
on October 31, 1993)

(1993年10月31日第八届全国人民代表大会常务委员会第四次会议通过)

<p>第五条</p> <p>国家保护消费者的合法权益不受侵害。</p> <p>国家采取措施，保障消费者依法行使权利，维护消费者的合法权益。</p>	<p><b>Article 5</b></p> <p>The State shall protect the legitimate rights and interests of consumers from infringement.</p> <p>The State shall adopt measures to safeguard consumers' exercise of their rights in accordance with the law and to maintain the legitimate rights and interests of consumers.</p>
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\* The English version is available at 'Database of Laws and Regulations, China'  
<[www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383812.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383812.htm)> accessed 30 January 2017.

# Contract Law of the People's Republic of China 1999\*

## 中华人民共和国合同法 1999

(Adopted at the Second Session of the Ninth National People's Congress of China on March 15, 1999)

(1999年3月15日第九届全国人民代表大会第二次会议通过)

<p>第五十二条</p> <p>有下列情形之一的，合同无效：</p> <p>……（四）损害社会公共利益……</p>	<p><b>Article 52 Invalidating Circumstances</b></p> <p>A contract is invalid in any of the following circumstances:</p> <p>... (iv) The contract harms public interests...</p>
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\* The English version is available at 'Database of Laws and Regulations, China'  
<[www.npc.gov.cn/englishnpc/Law/2007-12/11/content\\_1383564.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383564.htm)> accessed 30 January 2017.

# Law of the People's Republic of China on Administrative Reconsideration 1999\*

## 中华人民共和国行政复议法 1999

(Adopted at the Ninth Meeting of the Standing Committee of the Ninth National People's Congress of China on April 29, 1999)

(1999年4月29日第九届全国人民代表大会常务委员会第九次会议通过)

<b>第一章 总则</b>	<b>Chapter I General Provisions</b>
<b>第二条</b> 公民、法人或者其他组织认为具体行政行为侵犯其合法权益，向行政机关提出行政复议申请.....	<b>Article 2</b> This Law shall be applicable to cases where citizens, legal persons or other organizations apply to administrative organs for administrative reconsideration when they consider that certain specific administrative acts infringe upon their lawful rights or interests...
<b>第五条</b> 公民、法人或者其他组织对行政复议决定不服的，可以依照行政诉讼法的规定向人民法院提起行政诉讼，但是法律规定行政复议决定为最终裁决的除外。	<b>Article 5</b> A citizen, legal person or other organization that refuses to accept the decision made after administrative reconsideration may, in accordance with the provisions of the Administrative Procedure Law, bring an administrative lawsuit before a People's Court, with the exception of those decisions that are final as prescribed by law.
<b>第二章 行政复议范围</b>	<b>Chapter II The Limits of Administrative Reconsideration</b>
<b>第六条</b> 有下列情形之一的，公民、法人或者其他组织可以依照本法申请行政复议： .....（五）认为行政机关侵犯合法的经营自主权的..... （十一）认为行政机关的其他具体行政行为侵犯其合法权益的。	<b>Article 6</b> Citizens, legal persons and other organizations may apply for administrative reconsideration according to this Law, if they: ... 5. consider that administrative organs infringe upon their lawful decision-making power for operation... 11. consider that other specific administrative acts taken by administrative organs infringe upon their lawful rights or interests.
<b>第七条</b> 公民、法人或者其他组织认为行政机关的具体行政行为所依据的下列规定不合法，在对具体行政行为申请行政复议时，可以一并向行政复议机关	<b>Article 7</b> If citizens, legal persons or other organizations consider illegal the following provisions, which the administrative organs take as the basis for their specific administrative acts, they may also apply for examination of these provisions when applying for administrative

\* The English version is available at 'Database of Laws and Regulations, China'  
<[www.npc.gov.cn/englishnpc/Law/2007-12/11/content\\_1383562.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383562.htm)> accessed 30 January 2017.



<p>提出对该规定的审查申请：</p> <p>（一）国务院部门的规定；</p> <p>（二）县级以上地方各级人民政府及其工作部门的规定；</p> <p>（三）乡、镇人民政府的规定。</p> <p>前款所列规定不含国务院部、委员会规章和地方人民政府规章。规章的审查依照法律、行政法规办理。</p>	<p>reconsideration of the said acts:</p> <p>(1) provisions formulated by departments under the State Council;</p> <p>(2) provisions formulated by local people's governments at or above the county level and the department under them; and</p> <p>(3) provisions formulated by township or town people's governments.</p> <p>The provisions listed in the preceding paragraph do not include rules and regulations formulated by the ministries and commissions under the State Council or by local people's governments. The examination of rules and regulations shall be carried out in accordance with laws and administrative regulations.</p>
<p><b>第三章 行政复议申请</b></p>	<p><b>Chapter III Application for Administrative Reconsideration</b></p>
<p><b>第十条</b></p> <p>依照本法申请行政复议的公民、法人或者其他组织是申请人.....</p> <p>同申请行政复议的具体行政行为有利害关系的其他公民、法人或者其他组织，可以作为第三人参加行政复议.....</p>	<p><b>Article 10</b></p> <p>Citizens, legal persons and other organizations that apply for administrative reconsideration in accordance with this Law are the applicants...</p> <p>Other citizens, legal persons or other organizations that have interests in the specific administrative acts on which administrative reconsideration has been applied may take part in administrative reconsideration as a third party...</p>
<p><b>第十二条</b></p> <p>对县级以上地方各级人民政府工作部门的具体行政行为不服的，由申请人选择，可以向该部门的本级人民政府申请行政复议，也可以向上一级主管部门申请行政复议.....</p>	<p><b>Article 12</b></p> <p>When refusing to accept a specific administrative act taken by the department of a people's government at or above the county level, the applicant may choose to apply to the people's government at the same level or to the competent department at a higher level for administrative reconsideration...</p>

# Law of the People's Republic of China on Donations for Public Welfare 1999\*

## 中华人民共和国公益事业捐赠法 1999

(Adopted at the Tenth Meeting of the Standing Committee of the Ninth National People's Congress of China on June 28, 1999)

(1999年6月28日第九届全国人民代表大会常务委员会第十次会议通过)

<p>第三条</p> <p>本法所称公益事业是指非营利的下列事项：</p> <p>（一）救助灾害、救济贫困、扶助残疾人等困难的社会群体和个人的活动；</p> <p>（二）教育、科学、文化、卫生、体育事业；</p> <p>（三）环境保护、社会公共设施建设；</p> <p>（四）促进社会发展和进步的其他社会公共和福利事业。</p>	<p><b>Article 3</b></p> <p>For purposes of this Law, the term “public welfare” includes the following non-profit activities:</p> <p>(1) activities by community groups or individuals in disaster relief or poverty relief, or in giving assistance to the disabled;</p> <p>(2) educational, scientific, cultural, public health and sports services;</p> <p>(3) environmental protection and public utility construction; and</p> <p>(4) other public and welfare services to promote social development and progress.</p>
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\* The English version is available at 'Database of Laws and Regulations, China' <[www.npc.gov.cn/englishnpc/Law/2007-12/11/content\\_1383559.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/11/content_1383559.htm)> accessed 30 January 2017.

# Regulations of China on Unemployment Insurance 1999\*

## 失业保险条例 1999

(Adopted at the Eleventh Executive Meeting of the State Council of China on December 26, 1999)

(1999年12月26日中华人民共和国国务院第十一次常务会议通过)

<b>第一章 总则</b>	<b>Chapter I General Provisions</b>
<b>第二条</b> 城镇企业事业单位、城镇企业事业单位职工依照本条例的规定，缴纳失业保险费。 城镇企业事业单位失业人员依照本条例的规定，享受失业保险待遇。 本条所称城镇企业，是指国有企业、城镇集体企业、外商投资企业、城镇私营企业以及其他城镇企业。	<b>Article 2</b> Enterprises and institutions in cities and towns as well as their staff and workers shall pay unemployment insurance premium in accordance with these Regulations. The unemployed of enterprises and institutions in cities and towns may enjoy the benefits of unemployment insurance in accordance with these Regulations. Enterprises and institutions in cities and towns mentioned in this Article refer to State-owned enterprises, collectively-owned enterprises in cities and towns, enterprises with foreign investment, privately-owned enterprises in cities and towns, and other enterprises in cities and towns.
<b>第二章 失业保险基金</b>	<b>Chapter II Unemployment Insurance Funds</b>
<b>第十条</b> 失业保险基金用于下列支出： (一) 失业保险金.....	<b>Article 10</b> Unemployment insurance funds shall be used for the following expenditure: a. unemployment insurance compensation...
<b>第三章 失业保险待遇</b>	<b>Chapter III Unemployment Insurance Benefits</b>
<b>第十四条</b> 具备下列条件的失业人员，可以领取失业保险金： (一) 按照规定参加失业保险，所在单位和本人已按照规定履行缴费义务满1年的； (二) 非因本人意愿中断就业的；	<b>Article 14</b> Qualifications for the unemployed who may receive unemployment insurance compensation are as follows: a. have participated in unemployment insurance: the unit to which they belong, and they themselves have performed the obligation of paying premium not less than one year; b. have suspended employment not due to their own willingness;

\* The English version is available at 'Asian Legal Information Institute' <[www.asianlii.org/cn/legis/cen/laws/roui413/](http://www.asianlii.org/cn/legis/cen/laws/roui413/)> accessed 30 January 2017.

<p>(三) 已办理失业登记, 并有求职要求的.....</p>	<p>c. have undergone unemployment registration and have requested new jobs...</p>
<p>第二十一条</p> <p>单位招用的农民合同制工人连续工作满1年, 本单位并已缴纳失业保险费, 劳动合同期满未续订或者提前解除劳动合同的, 由社会保险经办机构根据其工作时间长短, 对其支付一次性生活补助。补助的办法和标准由省、自治区、直辖市人民政府规定。</p>	<p><b>Article 21</b></p> <p>If a contract-system farmer worker engaged by a unit has been working continuously for not less than one year, and the unit has paid unemployment insurance premium, where no contract is renewed when the employment contract has expired or the contract is terminated in advance, the social insurance agency shall pay a one-off living subsidy to the farmer worker according to the length of his working period. Measures and standards for such subsidies are to be stipulated by people's governments of provinces, autonomous regions and municipalities directly under the Central Government.</p>

**The Interpretation of the Supreme People's Court on Several Issues of Administrative  
Procedure Law of China [2000] No.8\***

**最高人民法院关于执行《中华人民共和国行政诉讼法》若干问题的解释[2000]**

(Promulgated by the Judicial Committee of the Supreme People's Court of China on November 24, 1999,  
Judicial Interpretation [2000] No.8)

(1999年11月24日最高人民法院审判委员会第1088次会议通过，法释〔2000〕8号)

<p>第十三条</p> <p>有下列情形之一的，公民、法人或者其他组织可以依法提起行政诉讼：</p> <p>(一)被诉的具体行政行为涉及其相邻权或者公平竞争权的；</p> <p>(二)与被诉的行政复议决定有法律上利害关系或者在复议程序中被追加为第三人的；</p> <p>(三)要求主管行政机关依法追究加害人法律责任的；</p> <p>(四)与撤销或者变更具体行政行为有法律上利害关系的。</p>	<p><b>Article 13</b></p> <p>Under any of the following circumstances, a citizen, a legal person or any other organisation could bring an administrative lawsuit according to law:</p> <p>(1) the sued specific administrative action is related to the neighboring rights or fair competition rights of the plaintiff;</p> <p>(2) if the plaintiff has interests in a specific administrative action under litigation or has been added as a third person in the administrative review process, administrative reconsideration decision could be sued;</p> <p>(3) the plaintiff requires that the competent administrative authorities shall be held liable for the offender;</p> <p>(4) if the plaintiff has interests in a revoking or changing administrative action under litigation.</p>
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\* The Chinese version is available at 'The Official Website of the National People's Congress of China' <[www.npc.gov.cn/npc/lfzt/2014/2013-12/20/content\\_1817962.htm](http://www.npc.gov.cn/npc/lfzt/2014/2013-12/20/content_1817962.htm)> accessed 30 January 2017. The author translated the Article from Chinese.

# Telecommunications Regulations of China 2000\*

## 中华人民共和国电信条例 2000

(Adopted at the Thirty-First Regular Meeting of the State Council held on September 20, 2000)

(2000年9月25日中华人民共和国国务院第三十一次常务会议通过)

<b>第一章 总则</b>	<b>Chapter I General Principles</b>
<b>第四条</b> 电信监督管理遵循政企分开、破除垄断、鼓励竞争、促进发展和公开、公平、公正的原则.....	<b>Article 4</b> The supervision and regulation of the telecommunications industry shall be based on the principles of separation of government administration from enterprise management, elimination of monopoly, encouragement of competition and promotion of development, as well as the principles of openness, fairness and impartiality...
<b>第二章 电信市场</b>	<b>Chapter II The Telecommunications Market</b>
<b>第一节 电信业务许可</b>	<b>Section 1 Telecommunications Permits</b>
<b>第七条</b> 国家对电信业务经营按照电信业务分类，实行许可制度..... 未取得电信业务经营许可证，任何组织或者个人不得从事电信业务经营活动。	<b>Article 7</b> The State shall implement a licensing system for the operation of telecommunications businesses, pursuant to which telecommunications businesses shall be divided into categories... No organizations or individuals may undertake telecommunications business operation activities without an operating permit.
<b>第二节 电信网间互联</b>	<b>Section 2 Telecommunications Network Interconnection</b>
<b>第十七条</b> 电信网之间应当按照技术可行、经济合理、公平公正、相互配合的原则，实现互联互通。 主导的电信业务经营者不得拒绝其他电信业务经营者和专用网运营单位提出的互联互通要求。 前款所称主导的电信业务经营者，是指控制必要的基础电信设施并且在	<b>Article 17</b> Interconnection among telecommunications networks shall be carried out based on the principles of technical feasibility, economic reasonableness, fairness, impartiality and mutual cooperation. Major telecommunications operators shall not reject interconnection requests from other telecommunications operators and private network operators. “Major telecommunications operators” as referred to in the preceding paragraph shall mean operators that control essential

\* The English version is available at ‘The Official Website of the Chinese Government’  
<[www.china.org.cn/business/laws\\_regulations/2010-01/20/content\\_19273945.htm](http://www.china.org.cn/business/laws_regulations/2010-01/20/content_19273945.htm)> accessed 30 January 2017.

<p>电信业务市场中占有较大份额,能够对其他电信业务经营者进入电信业务市场构成实质性影响的经营者。</p> <p>主导的电信业务经营者由国务院信息产业主管部门确定。</p>	<p>telecommunications infrastructure and have a large share of the telecommunications market, and that therefore may have a material effect on the entry of other telecommunications operators into the telecommunications market.</p> <p>Such major telecommunications operators shall be determined by the supervisory department for the information industry under the State Council.</p>
<p><b>第十九条</b></p> <p>公用电信网之间、公用电信网与专用电信网之间的网间互联,由网间互联双方按照国务院信息产业主管部门的网间互联管理规定进行互联协商,并订立网间互联协议。</p> <p>网间互联协议应当向国务院信息产业主管部门备案。</p>	<p><b>Article 19</b></p> <p>With respect to interconnection between two public telecommunications networks or interconnection between a public telecommunications network and a private telecommunications network, the two interconnecting parties shall negotiate with respect to the interconnection and enter into an interconnection agreement in accordance with the provisions on the administration of network interconnection stipulated by the supervisory department for the information industry under the State Council.</p> <p>Such interconnection agreement shall be filed with the supervisory department for the information industry under the State Council for the record.</p>
<p><b>第二十条</b></p> <p>网间互联双方经协商未能达成网间互联协议的,自一方提出互联要求之日起 60 日内,任何一方均可以按照网间互联覆盖范围向国务院信息产业主管部门或者省、自治区、直辖市电信管理机构申请协调;收到申请的机关应当依照本条例第十七条第一款规定的原则进行协调,促使网间互联双方达成协议;自网间互联一方或者双方申请协调之日起 45 日内经协调仍不能达成协议的,由协调机关随机邀请电信技术专家和其他有关方面专家进行公开论证并提出网间互联方案。协调机关应当根据专家论证结论和提出的网间互联方案作出决定,强制实现互联互通。</p>	<p><b>Article 20</b></p> <p>If the two interconnecting parties fail to reach an interconnection agreement through negotiation within 60 days from the date on which a party requests interconnection, either party may, based on the scope of coverage of the interconnection, apply for coordination of the matter by either the supervisory department for the information industry under the State Council or the telecommunications administration authority of the province, autonomous region or municipality directly under the central government. The authority that receives such application shall conduct such coordination in accordance with the principles set forth in Article 17(1) in order to encourage agreement by the interconnecting parties. If an agreement still cannot be reached within 45 days from the date on which a party or both parties apply for such coordination, the coordinating authority shall have the discretion to invite telecommunications technology experts and experts in other related fields to present publicly their arguments and propose an interconnection plan. The coordinating authority shall make a decision based on the arguments and the interconnection plan of the experts and impose mandatory interconnection.</p>

第二十二條

網間互聯的費用結算與分攤應當執行國家有關規定，不得在規定標準之外加收費用。

網間互聯的技術標準、費用結算辦法和具體管理規定，由國務院信息產業主管部門制定。

**Article 22**

Fee settlement and apportionment in connection with interconnection shall comply with the relevant provisions of the State, and no additional fees shall be charged other than those stipulated.

Technical standards, measures for fee settlement and specific administrative provisions for interconnection shall be formulated by the supervisory department for the information industry under the State Council.



# Trust Law of the People's Republic of China 2001\*

## 中华人民共和国信托法 2001

(Adopted at the Twenty-First Meeting of the Standing Committee of the Ninth National People's Congress of China on 28 April, 2001)

(2001年4月28日第九届全国人民代表大会常务委员会第二十一次会议通过)

<p>第六十条</p> <p>为了下列公共利益目的之一而设立的信托，属于公益信托：</p> <p>(一) 救济贫困；</p> <p>(二) 救助灾民；</p> <p>(三) 扶助残疾人；</p> <p>(四) 发展教育、科技、文化、艺术、体育事业；</p> <p>(五) 发展医疗卫生事业；</p> <p>(六) 发展环境保护事业，维护生态环境；</p> <p>(七) 发展其他社会公益事业。</p>	<p><b>Article 60</b></p> <p>A trust created for one of the following purposes in the interest of public welfare is a public welfare trust:</p> <p>(1) relief for the poor;</p> <p>(2) relief assistance to people suffering from disasters;</p> <p>(3) helping the disabled;</p> <p>(4) developing education, science, technology, culture, art and sports;</p> <p>(5) developing medical and public health undertakings;</p> <p>(6) developing undertakings for the protection of the environment and maintaining ecological environment; and</p> <p>(7) developing other public welfare undertakings.</p>
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\* The English version is available at 'The Official Website of the Chinese Government'  
<[www.china.org.cn/china/LegislationsForm2001-2010/2011-02/12/content\\_21907980.htm](http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/12/content_21907980.htm)> accessed 30 January 2017.

**Law of the People's Republic of China on Promotion of Small and Medium-Sized Enterprises 2002\***

**中华人民共和国中小企业促进法 2002**

(Adopted at the Twenty-Eighth Meeting of the Standing Committee of the Ninth National People's Congress of China on June 29, 2002)

(2002年6月29日第九届全国人民代表大会常务委员会第二十八次会议通过)

<b>第一章 总则</b>	<b>Chapter I General Provisions</b>
<p><b>第一条</b></p> <p>为了改善中小企业经营环境,促进中小企业健康发展,扩大城乡就业,发挥中小企业在国民经济和社会发展中的重要作用,制定本法。</p>	<p><b>Article 1</b></p> <p>This Law is enacted for the purpose of improving the business environment for small and medium-sized enterprises, promoting their sound development, creating more job opportunities in both urban and rural areas, and giving play to the important role of such enterprises in national economic and social development.</p>
<p><b>第二条</b></p> <p>本法所称中小企业,是指在中华人民共和国境内依法设立的有利于满足社会需要,增加就业,符合国家产业政策,生产经营规模属于中小型的各种所有制和各种形式的企业。</p> <p>中小企业的划分标准由国务院负责企业工作的部门根据企业职工人数、销售额、资产总额等指标,结合行业特点制定,报国务院批准。</p>	<p><b>Article 2</b></p> <p>For purposes of this Law, small and medium-sized enterprises refer to the different forms of enterprises under different ownerships that are established within the territory of the People's Republic of China according to law, that help to meet the social needs and create more job opportunities, that comply with the industrial policies of the State and that are small and medium-sized in production and business operation.</p> <p>The criteria for determining small and medium-sized enterprises shall be laid down by the department under the State Council in charge of work in respect of enterprises, on the basis of the number of employees, volume of sale, total assets, etc., of an enterprise and in light of the characteristics of different trades, and shall be submitted to the State Council for approval.</p>
<p><b>第三条</b></p> <p>国家对中小企业实行积极扶持、加强引导、完善服务、依法规范、保障权益的方针,为中小企业创立和发展创造有利的环境。</p>	<p><b>Article 3</b></p> <p>With regard to small and medium-sized enterprises, the State applies the principles of active support, strong guidance, perfect service, lawful standardization and guaranteed rights and interests, in order to create a favorable environment for their establishment and</p>

\* The English version is available at 'The Official Website of the Chinese Government'  
[www.china.org.cn/china/LegislationsForm2001-2010/2011-02/14/content\\_21917037.htm](http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/14/content_21917037.htm) accessed 30 January 2017.

	development.
<p>第四条</p> <p>国务院负责制定中小企业政策,对全国中小企业的发展进行统筹规划。</p> <p>国务院负责企业工作的部门组织实施国家中小企业政策和规划,对全国中小企业工作进行综合协调、指导和服务。</p> <p>国务院有关部门根据国家中小企业政策和统筹规划,在各自职责范围内对中小企业工作进行指导和服务。</p> <p>县级以上地方各级人民政府及其所属的负责企业工作的部门和其他有关部门在各自职责范围内对本行政区域内的中小企业进行指导和服务。</p>	<p><b>Article 4</b></p> <p>The State Council shall be responsible for formulating policies regarding small and medium-sized enterprises and make overall planning for their development.</p> <p>The department under the State Council in charge of work in respect of enterprises shall arrange for the implementation of the State policies and plans concerning small and medium-sized enterprises, making all-round coordination and providing guidance and services in the work regarding such enterprises throughout the country.</p> <p>The related departments under the State Council shall, according to the policies and overall planning of the State for small and medium-sized enterprises and within the scope of their respective functions and responsibilities, provide guidance and services to such enterprises.</p> <p>Local people's governments at or above the county level, the administrative departments under them in charge of work in respect of enterprises and other departments concerned shall, within the scope of their respective functions and responsibilities, provide guidance and services to small and medium-sized enterprises located within their respective administrative areas.</p>
<p>第五条</p> <p>国务院负责企业工作的部门根据国家产业政策,结合中小企业特点和发展状况,以制定中小企业发展产业指导目录等方式,确定扶持重点,引导鼓励中小企业发展。</p>	<p><b>Article 5</b></p> <p>The department under the State Council in charge of work in respect of enterprises shall, according to the industrial policies of the State and in light of the characteristics of the small and medium-sized enterprises and the conditions of their development, determine the key ones for support by formulating a catalogue of small and medium-sized enterprises to be provided with guidance for their industrial development or by other means, in order to encourage the development of all such enterprises.</p>
<p>第六条</p> <p>国家保护中小企业及其出资人的合法投资,及因投资取得的合法收益。任何单位和个人不得侵犯中小企业财产及其合法收益。</p> <p>任何单位不得违反法律、法规向中小企业收费和罚款,不得向中小企业摊派财物。中小企业对违反上述规定的</p>	<p><b>Article 6</b></p> <p>The State protects the lawful investments made by small and medium-sized enterprises and their investors, as well as the legitimate profits earned from the investments. No unit or individual may infringe upon the property and lawful rights and interests of such enterprises.</p> <p>No unit may, in violation of laws and regulations, charge fees to or impose fines on small and medium-sized enterprises, nor collect money or things of value from them. The enterprises shall have the</p>

行为有权拒绝和有权举报、控告。	right to refuse to make the payment and the right to report and make accusations related to violations of the provisions mentioned above.
<p>第七条</p> <p>行政管理部门应当维护中小企业的合法权益, 保护其依法参与公平竞争与公平交易的权利, 不得歧视, 不得附加不平等的交易条件。</p>	<p><b>Article 7</b></p> <p>Administrative departments shall safeguard the lawful rights and interests of small and medium-sized enterprises, protect their right to participate in fair competition and transaction according to law, and they may not discriminate against the enterprises or add unequal conditions to their transactions.</p>
<p>第八条</p> <p>中小企业必须.....依法经营管理, 不得侵害职工合法权益, 不得损害社会公共利益。</p>	<p><b>Article 8</b></p> <p>Small and medium-sized enterprises shall...manage business according to law, and they may not infringe upon the lawful rights and interests of their employees or impair public interests.</p>
<p>第九条</p> <p>中小企业应当遵守职业道德, 恪守诚实信用原则, 努力提高业务水平, 增强自我发展能力。</p>	<p><b>Article 9</b></p> <p>Small and medium-sized enterprises shall observe professional ethics, abide by the principle of good faith, work hard to raise their business level and increase the ability to develop themselves.</p>
<b>第二章 资金支持</b>	<b>Chapter II Funding</b>
<p>第十条</p> <p>中央财政预算应当设立中小企业科目, 安排扶持中小企业发展专项资金。</p> <p>地方人民政府应当根据实际情况为中小企业提供财政支持。</p>	<p><b>Article 10</b></p> <p>In the budget of the Central Government there shall be a heading for small and medium-sized enterprises, under which to arrange special funds for supporting the development of such enterprises.</p> <p>Local people's governments shall, in accordance with actual conditions, provide financial support to small and medium-sized enterprises.</p>
<p>第十八条</p> <p>国家推进中小企业信用制度建设, 建立信用信息征集与评价体系.....</p>	<p><b>Article 18</b></p> <p>The State promotes the development of the credit system for small and medium-sized enterprises by establishing a collection and assessment system of credit information...</p>
<p>第十九条</p> <p>县级以上人民政府和有关部门应当推进和组织建立中小企业信用担保体系.....</p>	<p><b>Article 19</b></p> <p>People's governments at or above the county level and related departments shall promote and arrange for the establishment of a credit guaranty system for small and medium-sized enterprises...</p>

<p>第二十条</p> <p>国家鼓励各种担保机构为中小企业提供信用担保。</p>	<p><b>Article 20</b></p> <p>The State encourages all kinds of guaranty institutions to provide credit guaranty to small and medium-sized enterprises.</p>
<p><b>第三章 创业扶持</b></p>	<p><b>Chapter III Support for Establishment of Enterprises</b></p>
<p>第二十三条</p> <p>国家在有关税收政策上支持和鼓励中小企业的创立和发展。</p>	<p><b>Article 23</b></p> <p>The State supports and encourages, through relevant taxation policies, the establishment and development of small and medium-sized enterprises.</p>
<p><b>第五章 市场开拓</b></p>	<p><b>Chapter V Market Development</b></p>
<p>第三十二条</p> <p>国家鼓励和支持大企业与中小企业建立以市场配置资源为基础的、稳定的原材料供应、生产、销售、技术开发和技术改造等方面的协作关系,带动和促进中小企业发展。</p>	<p><b>Article 32</b></p> <p>The State encourages and supports large enterprises to establish, on the basis of resources allocation by the market, stable relations of cooperation with small and medium-sized enterprises in respect of the supply of raw and semi-processed materials, production, marketing, and technological development and updating, in order to help promote the development of small and medium-sized enterprises.</p>
<p>第三十三条</p> <p>国家引导、推动并规范中小企业通过合并、收购等方式,进行资产重组,优化资源配置。</p>	<p><b>Article 33</b></p> <p>The State gives guidance to, promotes and regulates the restructuring of the assets of small and medium-sized enterprises through merges, purchases, etc., in order to optimize the allocation of resources.</p>
<p><b>第六章 社会服务</b></p>	<p><b>Chapter VI Public Services</b></p>
<p>第三十八条</p> <p>国家鼓励社会各方面力量,建立健全中小企业服务体系,为中小企业提供服务。</p>	<p><b>Article 38</b></p> <p>The State encourages all sectors of society to establish and improve the service system for small and medium-sized enterprises and to provide them with services.</p>
<p>第三十九条</p> <p>政府根据实际需要扶持建立的中小企业服务机构,应当为中小企业提供优质服务……</p>	<p><b>Article 39</b></p> <p>The government shall, in light of actual needs, support the institutions established in the service of small and medium-sized enterprises and see that they provide top-notch services to the enterprises...</p>
<p>第四十条</p> <p>国家鼓励各类社会中介机构为中小</p>	<p><b>Article 40</b></p> <p>The State encourages the various kinds of public intermediary</p>

<p>企业提供创业辅导、企业诊断、信息咨询、市场营销、投资融资、贷款担保、产权交易、技术支持、人才引进、人员培训、对外合作、展览展销和法律咨询等服务。</p>	<p>agencies to provide small and medium-sized enterprises with such services as instructions on establishment of enterprises, business consulting, information consultancy, marketing, investment, financing, credit guaranty, property right transaction, technological support, bringing in of talents, personnel training, cooperation with other countries, exhibitions, fairs and legal advice.</p>
<p>第四十一条</p> <p>国家鼓励有关机构、大专院校培训中小企业经营管理及生产技术等方面的人员，提高中小企业营销、管理和技术水平。</p>	<p><b>Article 41</b></p> <p>The State encourages related institutions and institutions of higher education to train managerial, technical and other personnel for small and medium-sized enterprises, in order to help raise the enterprises' level of marketing, management and technology.</p>
<p>第四十二条</p> <p>行业的自律性组织应当积极为中小企业服务。</p>	<p><b>Article 42</b></p> <p>The self-regulating trade organizations shall actively serve small and medium-sized enterprises.</p>
<p><b>第七章 附则</b></p>	<p><b>Chapter VII Supplementary Provisions</b></p>
<p>第四十四条</p> <p>省、自治区、直辖市可以根据本地区中小企业的情况，制定有关的实施办法。</p>	<p><b>Article 44</b></p> <p>The provinces, autonomous regions and municipalities directly under the Central Government may, in the light of the conditions of the local small and medium-sized enterprises, formulate measures for implementation of this Law.</p>

# Administrative Permission Law of the People's Republic of China 2003\*

## 中华人民共和国行政许可法 2003

(Adopted at the Fourth Meeting of the Standing Committee of the Tenth National People's Congress of China on August 27, 2003)

(2003年8月27日第十届全国人民代表大会常务委员会第四次会议通过)

<b>第一章 总则</b>	<b>Chapter I General Provisions</b>
<b>第五条</b> 设定和实施行政许可，应当遵循公开、公平、公正的原则... 符合法定条件、标准的，申请人有依法取得行政许可的平等权利，行政机关不得歧视。	<b>Article 5</b> The procedure for administrative permission shall be instituted and administrative permission shall be granted in adherence to the principles of openness, fairness and impartiality... Applicants who meet the statutory requirements and standards shall have equal rights to obtain administrative permission according to law, and administrative departments shall not discriminate against any of them.
<b>第二章 行政许可的设定</b>	<b>Chapter II Institution of the Procedure for Administrative Permission</b>
<b>第十一条</b> 设定行政许可，应当遵循经济和社会发展规划，有利于发挥公民、法人或者其他组织的积极性、主动性，维护公共利益和社会秩序，促进经济、社会和生态环境协调发展。	<b>Article 11</b> The procedure for administrative permission shall be instituted in adherence to the laws governing economic and social development and for the benefit of bringing into full play the enthusiasm and initiative of citizens, legal persons and other organizations, safeguarding public interests, maintaining public order and promoting the harmonious development of the economy, society and the ecological environment.
<b>第十二条</b> 下列事项可以设定行政许可： (一) 直接涉及国家安全... (二) 有限自然资源开发利用、公共资源配置以及直接关系公共利益的特定行业的市场准入等... (三) 提供公众服务并且直接关系公	<b>Article 12</b> The procedure for administrative permission may be instituted for the following matters: (1) matters relating to the special activities that directly involve State security... (2) matters relating to the development and utilization of limited natural resources, the allocation of public resources as well as access to the market of the special trades that have a direct bearing on public

\* The English version is available at 'Chinese Government's Official Web Portal'  
<[http://english1.english.gov.cn/laws/2005-09/07/content\\_29926.htm](http://english1.english.gov.cn/laws/2005-09/07/content_29926.htm)> accessed 30 January 2017.

<p>共利益的职业、行业……</p>	<p>interests, etc.... (3) matters relating to the professions and trades that provide services to the public and that have a direct bearing on public interests...</p>
<p><b>第十四条</b></p> <p>本法第十二条所列事项，法律可以设定行政许可。尚未制定法律的，行政法规可以设定行政许可。</p> <p>必要时，国务院可以采用发布决定的方式设定行政许可。实施后，除临时性行政许可事项外，国务院应当及时提请全国人民代表大会及其常务委员会制定法律，或者自行制定行政法规。</p>	<p><b>Article 14</b></p> <p>With respect to the matters specified in Article 12 of this Law, the procedure for administrative permission may be instituted by law. Where such a law is not enacted, it may be instituted by administrative regulations.</p> <p>When necessary, the State Council may institute the procedure for administrative permission by means of promulgating decisions. After implementation of such decisions, the State Council shall, except for matters to which provisional administrative permission is granted, without delay request the National People's Congress or its Standing Committee to enact laws, or formulate administrative regulations itself.</p>
<p><b>第三章 行政许可的实施机关</b></p>	<p><b>Chapter III Department Granting Administrative Permission</b></p>
<p><b>第二十二条</b></p> <p>行政许可由具有行政许可权的行政机关在其法定职权范围内实施。</p>	<p><b>Article 22</b></p> <p>Administrative permission shall be granted by an administrative department with the power of granting such permission within the limits of its statutory functions and powers.</p>



# Law of the People's Republic of China on Commercial Banks 2003\*

## 中华人民共和国商业银行法 2003

(Adopted at the Thirteenth Meeting of the Standing Committee of the Eighth National People's Congress on May 10, 1995, promulgated by Order No. 47 of the President of China on May 10, 1995, and amended in accordance with the Decision of the Standing Committee of the National People's Congress on Amending the Law of China on Commercial Banks adopted at the Sixth Meeting of the Standing Committee of the Tenth National People's Congress on December 27, 2003)

(1995年5月10日第八届全国人民代表大会常务委员会第十三次会议通过, 根据2003年12月27日第十届全国人民代表大会常务委员会第六次会议《关于修改〈中华人民共和国商业银行法〉的决定》修正)

<b>第一章 总则</b>	<b>Chapter I General Provisions</b>
<b>第二条</b> 本法所称的商业银行是指依照本法和《中华人民共和国公司法》设立的吸收公众存款、发放贷款、办理结算等业务的企业法人。	<b>Article 2</b> For the purposes of this Law, the term "commercial banks" means enterprise legal persons that are established in conformity with this Law and the Company Law of the People's Republic of China and that take in deposits from the general public, grant loans, handle settlements, etc.

\* The English version is available at 'Database of Laws and Regulations, China' <[www.npc.gov.cn/englishnpc/Law/2007-12/12/content\\_1383716.htm](http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383716.htm)> accessed 30 January 2017.

# Law of the People's Republic of China on Enterprise Income Tax 2007\*

## 中华人民共和国企业所得税法 2007

(Adopted at the Fifth Session of the Tenth National People's Congress on March 16, 2007)

(2007年3月16日第十届全国人民代表大会第五次会议通过)

<b>第一章 总则</b>	<b>Chapter I General Provisions</b>
第四条 企业所得税的税率为 25%.....	<b>Article 4</b> The rate of enterprise income tax shall be 25 percent...
<b>第四章 税收优惠</b>	<b>Chapter IV Preferential Tax Policies</b>
第二十八条 符合条件的小型微利企业,减按 20% 的税率征收企业所得税.....	<b>Article 28</b> With respect to a qualified small enterprise earning low profits, the tax levied on its income shall be reduced at a rate of 20 percent...

\* The English version is available at 'Database of Laws and Regulations, China'  
<[www.npc.gov.cn/englishnpc/Law/2009-02/20/content\\_1471133.htm](http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471133.htm)> accessed 30 January 2017.

# Property Law of the People's Republic of China 2007<sup>1\*</sup>

## 中华人民共和国物权法 2007

(Adopted at the Fifth Session of the Tenth National People's Congress of China on March 16, 2007)

(2007年3月16日第十届全国人民代表大会第五次会议通过)

<p>第七条</p> <p>物权的取得和行使，应当遵守法律，尊重社会公德，不得损害公共利益和他人合法权益。</p>	<p><b>Article 7</b></p> <p>The law shall be observed and social ethics shall be respected in acquiring or exercising the property rights and public interests and the lawful rights and interests of another person shall not be jeopardized.</p>
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\* The English version is available at 'The Official Website of the Chinese Government'  
<[www.china.org.cn/china/LegislationsForm2001-2010/2011-02/11/content\\_21897791.htm](http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/11/content_21897791.htm)> accessed 30 January 2017.

# Anti-Monopoly Law of the People's Republic of China 2007\*

## 中华人民共和国反垄断法 2007

(Adopted at the Twenty-Ninth Meeting of the Standing Committee of the Tenth National People's Congress of China on August 30, 2007)

(2007年8月30日第十届全国人民代表大会常务委员会第二十九次会议通过)

<b>第一章 总则</b>	<b>Chapter I General Provisions</b>
<p>第一条</p> <p>为了预防和制止垄断行为,保护市场公平竞争,提高经济运行效率,维护消费者利益和社会公共利益,促进社会主义市场经济健康发展,制定本法。</p>	<p><b>Article 1</b></p> <p>This Law is enacted for the purpose of preventing and restraining monopolistic conduct, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, [and] promoting the healthy development of the socialist market economy.</p>
<p>第二条</p> <p>中华人民共和国境内经济活动中的垄断行为,适用本法;</p> <p>中华人民共和国境外的垄断行为,对境内市场竞争产生排除、限制影响的,适用本法。</p>	<p><b>Article 2</b></p> <p>This Law shall be applicable to monopolistic conduct in economic activities within the People's Republic of China.</p> <p>This Law shall apply to conduct outside the territory of the People's Republic of China if it eliminates or has restrictive effects on competition in the domestic market of the PRC.</p>
<p>第三条</p> <p>本法规定的垄断行为包括:</p> <p>(一) 经营者达成垄断协议;</p> <p>(二) 经营者滥用市场支配地位;</p> <p>(三) 具有或者可能具有排除、限制竞争效果的经营者集中。</p>	<p><b>Article 3</b></p> <p>For the purposes of this Law, 'monopolistic conduct' is defined as the following:</p> <p>(1) monopolistic agreements among business operators;</p> <p>(2) abuse of dominant market positions by business operators; and</p> <p>(3) concentration of business operators that eliminates or restricts competition or might be eliminating or restricting competition.</p>
<p>第四条</p> <p>国家制定和实施与社会主义市场经济相适应的竞争规则,完善宏观调控,健全统一、开放、竞争、有序的市场体系。</p>	<p><b>Article 4</b></p> <p>The State constitutes and carries out competition rules which accord with the socialist market economy, perfects macro-control, and advances a unified, open, competitive and orderly market system.</p>

\* The English version is available at 'The Ministry of Commerce of China'  
<<http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml>> accessed 30 January 2017.

<p>第五条</p> <p>经营者可以通过公平竞争、自愿联合，依法实施集中，扩大经营规模，提高市场竞争能力。</p>	<p><b>Article 5</b></p> <p>Business operators may, through fair competition or voluntary alliance, concentrate themselves according to law, expand the scope of business operations, and enhance competitiveness.</p>
<p>第六条</p> <p>具有市场支配地位的经营者，不得滥用市场支配地位，排除、限制竞争。</p>	<p><b>Article 6</b></p> <p>Any business with a dominant position may not abuse that dominant position to eliminate, or restrict competition.</p>
<p>第七条</p> <p>国有经济占控制地位的关系国民经济命脉和国家安全的行业以及依法实行专营专卖的行业，国家对其经营者的合法经营活动予以保护，并对经营者的经营行为及其商品和服务的价格依法实施监管和调控，维护消费者利益，促进技术进步。</p> <p>前款规定行业的经营者应当依法经营，诚实守信，严格自律，接受社会公众的监督，不得利用其控制地位或者专营专卖地位损害消费者利益。</p>	<p><b>Article 7</b></p> <p>With respect to the industries controlled by the State-owned economy and concerning the lifeline of national economy and national security or 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 progress.</p> <p>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.</p>
<p>第八条</p> <p>行政机关和法律、法规授权的具有管理公共事务职能的组织不得滥用行政权力，排除、限制竞争。</p>	<p><b>Article 8</b></p> <p>No administrative organ or organization empowered by a law or administrative regulation to administer public affairs may abuse its administrative powers to eliminate or restrict competition.</p>
<p>第九条</p> <p>国务院设立反垄断委员会，负责组织、协调、指导反垄断工作，履行下列职责：</p> <p>（一）研究拟订有关竞争政策；</p> <p>（二）组织调查、评估市场总体竞争状况，发布评估报告；</p> <p>（三）制定、发布反垄断指南；</p> <p>（四）协调反垄断行政执法工作；</p> <p>（五）国务院规定的其他职责。</p> <p>国务院反垄断委员会的组成和工作规则由国务院规定。</p>	<p><b>Article 9</b></p> <p>The State Council shall establish the Anti-monopoly Commission, which is in charge of organizing, coordinating, and guiding anti-monopoly work, and performs the following functions:</p> <p>(1) studying and drafting related competition policies;</p> <p>(2) organizing the investigation and assessment of overall competition situations in the market, and issuing assessment reports;</p> <p>(3) constituting and issuing anti-monopoly guidelines;</p> <p>(4) coordinating anti-monopoly administrative law enforcement; and</p> <p>(5) other functions as assigned by the State Council.</p> <p>The State Council shall stipulate the composition and working rules of the Anti-monopoly Commission.</p>

<p>第十条</p> <p>国务院规定的承担反垄断执法职责的机构(以下统称国务院反垄断执法机构)依照本法规定,负责反垄断执法工作。</p> <p>国务院反垄断执法机构根据工作需要,可以授权省、自治区、直辖市人民政府相应的机构,依照本法规定负责有关反垄断执法工作。</p>	<p><b>Article 10</b></p> <p>The anti-monopoly authority designated by the State Council (hereinafter referred to as the Anti-monopoly Authority under the State Council) shall be in charge of anti-monopoly law enforcement in accordance with this Law.</p> <p>The Anti-monopoly Authority under the State Council may, when needed, authorize the corresponding authorities in the people's governments of the provinces, autonomous regions and municipalities directly under the Central Government to take charge of anti-monopoly law enforcement in accordance with this Law.</p>
<p>第十一条</p> <p>行业协会应当加强行业自律,引导本行业的经营者依法竞争,维护市场竞争秩序。</p>	<p><b>Article 11</b></p> <p>A trade association shall intensify industrial self-discipline, guide business operators to lawfully compete, and safeguard the competition order in the market.</p>
<p>第十二条</p> <p>本法所称经营者,是指从事商品生产、经营或者提供服务的自然人、法人和其他组织。</p> <p>本法所称相关市场,是指经营者在一定时期内就特定商品或者服务(以下统称商品)进行竞争的商品范围和地域范围。</p>	<p><b>Article 12</b></p> <p>For the purposes of this Law, 'business operator' refers to a natural person, legal person, or any other organization that is in the engagement of commodities production or operation or service provision, and</p> <p>'relevant market' refers to the commodity scope or territorial scope within which the business operators compete against each other during a certain period of time for specific commodities or services (hereinafter generally referred to as 'commodities').</p>
<p><b>第二章 垄断协议</b></p>	<p><b>Chapter II Monopoly Agreement</b></p>
<p>第十三条</p> <p>禁止具有竞争关系的经营者达成下列垄断协议:</p> <p>(一) 固定或者变更商品价格;</p> <p>(二) 限制商品的生产数量或者销售数量;</p> <p>(三) 分割销售市场或者原材料采购市场;</p> <p>(四) 限制购买新技术、新设备或者限制开发新技术、新产品;</p> <p>(五) 联合抵制交易;</p> <p>(六) 国务院反垄断执法机构认定的</p>	<p><b>Article 13</b></p> <p>Any of the following monopoly agreements among the competing business operators shall be prohibited:</p> <p>(1) fixing or changing prices of commodities;</p> <p>(2) limiting the output or sales of commodities;</p> <p>(3) dividing the sales market or the raw material procurement market;</p> <p>(4) restricting the purchase of new technology or new facilities or the development of new technology or new products;</p> <p>(5) making boycott transactions; or</p> <p>(6) other monopoly agreements as determined by the Anti-monopoly Authority under the State Council.</p> <p>For the purposes of this Law, 'monopoly agreements' refer to</p>

<p>其他垄断协议。 本法所称垄断协议，是指排除、限制竞争的协议、决定或者其他协同行为。</p>	<p>agreements, decisions or other concerted actions, which eliminate or restrict competition.</p>
<p>第十四条 禁止经营者与交易相对人达成下列垄断协议：</p> <p>（一）固定向第三人转售商品的价格；</p> <p>（二）限定向第三人转售商品的最低价格；</p> <p>（三）国务院反垄断执法机构认定的其他垄断协议。</p>	<p><b>Article 14</b></p> <p>Any of the following agreements among business operators and their trading parties are prohibited:</p> <p>(1) fixing the price of commodities for resale to a third party;</p> <p>(2) restricting the minimum price of commodities for resale to a third party; or</p> <p>(3) other monopoly agreements as determined by the Anti-monopoly Authority under the State Council.</p>
<p>第十五条</p> <p>经营者能够证明所达成的协议属于下列情形之一的，不适用本法第十三条、第十四条的规定：</p> <p>（一）为改进技术、研究开发新产品的；</p> <p>（二）为提高产品质量、降低成本、增进效率，统一产品规格、标准或者实行专业化分工的；</p> <p>（三）为提高中小经营者经营效率，增强中小经营者竞争力的；</p> <p>（四）为实现节约能源、保护环境、救灾救助等社会公共利益的；</p> <p>（五）因经济不景气，为缓解销售量严重下降或者生产明显过剩的；</p> <p>（六）为保障对外贸易和对外经济合作中的正当利益的；</p> <p>（七）法律和国务院规定的其他情形。</p> <p>属于前款第一项至第五项情形，不适用本法第十三条、第十四条规定的，经营者还应当证明所达成的协议不会严重限制相关市场的竞争，并且能够使消费者分享由此产生的利益。</p>	<p><b>Article 15</b></p> <p>An agreement among business operators shall be exempted from application of articles 13 and 14 if it can be proven to be in any of the following circumstances:</p> <p>(1) for the purpose of improving technologies, researching and developing new products;</p> <p>(2) for the purpose of upgrading product quality, reducing cost, improving efficiency, unifying product specifications or standards, or carrying out professional labor division;</p> <p>(3) for the purpose of enhancing operational efficiency and reinforcing the competitiveness of small and medium-sized business operators;</p> <p>(4) for the purpose of achieving public interests such as conserving energy, protecting the environment and relieving the victims of a disaster and so on;</p> <p>(5) for the purpose of mitigating serious decrease in sales volume or obviously excessive production during economic recessions;</p> <p>(6) for the purpose of safeguarding the justifiable interests in the foreign trade or foreign economic cooperation; or</p> <p>(7) other circumstances as stipulated by laws and the State Council.</p> <p>Where a monopoly agreement is in any of the circumstances stipulated in Items 1 through 5 and is exempt from Articles 13 and 14 of this Law, the business operators must additionally prove that the agreement can enable consumers to share the interests derived from the agreement, and will not severely restrict the competition in relevant market.</p>
<p>第十六条</p> <p>行业协会不得组织本行业的经营者</p>	<p><b>Article 16</b></p> <p>Any trade association may not organize the business operators in its</p>

从事本章禁止的垄断行为。	own industry to implement the monopolistic conduct as prohibited by this Chapter.
<b>第三章 滥用市场支配地位</b>	<b>Chapter III Abuse of Market Dominance</b>
<p>第十七条</p> <p>禁止具有市场支配地位的经营者从事下列滥用市场支配地位的行为：</p> <p>（一）以不公平的高价销售商品或者以不公平的低价购买商品；</p> <p>（二）没有正当理由，以低于成本的价格销售商品；</p> <p>（三）没有正当理由，拒绝与交易相对人进行交易；</p> <p>（四）没有正当理由，限定交易相对人只能与其进行交易或者只能与其指定的经营者进行交易；</p> <p>（五）没有正当理由搭售商品，或者在交易时附加其他不合理的交易条件；</p> <p>（六）没有正当理由，对条件相同的交易相对人在交易价格等交易条件上实行差别待遇；</p> <p>（七）国务院反垄断执法机构认定的其他滥用市场支配地位的行为。</p> <p>本法所称市场支配地位，是指经营者在相关市场内具有能够控制商品价格、数量或者其他交易条件，或者能够阻碍、影响其他经营者进入相关市场能力的市场地位。</p>	<p><b>Article 17</b></p> <p>A business operator with a dominant market position shall not abuse its dominant market position to conduct the following acts:</p> <p>(1) selling commodities at unfairly high prices or buying commodities at unfairly low prices;</p> <p>(2) selling products at prices below cost without any justifiable cause;</p> <p>(3) refusing to trade with a trading party without any justifiable cause;</p> <p>(4) requiring a trading party to trade exclusively with itself or trade exclusively with a designated business operator(s) without any justifiable cause;</p> <p>(5) tying products or imposing unreasonable trading conditions at the time of trading without any justifiable cause;</p> <p>(6) applying dissimilar prices or other transaction terms to counterparties with equal standing;</p> <p>(7) other conduct determined as abuse of a dominant position by the Anti-monopoly Authority under the State Council.</p> <p>For the purposes of this Law, ‘dominant market position’ refers to a market position held by a business operator having the capacity to control the price, quantity or other trading conditions of commodities in the relevant market, or to hinder or affect any other business operator wishing to enter the relevant market.</p>
<p>第十八条</p> <p>认定经营者具有市场支配地位，应当依据下列因素：</p> <p>（一）该经营者在相关市场的市场份额，以及相关市场的竞争状况；</p> <p>（二）该经营者控制销售市场或者原材料采购市场的能力；</p> <p>（三）该经营者的财力和技术条件；</p> <p>（四）其他经营者对该经营者在交易上的依赖程度；</p> <p>（五）其他经营者进入相关市场的难</p>	<p><b>Article 18</b></p> <p>The dominant market status shall be determined according to the following factors:</p> <p>(1) the market share of a business operator in the relevant market, and the competition situation of the relevant market;</p> <p>(2) the capacity of a business operator to control the sales markets or the raw material procurement market;</p> <p>(3) the financial and technical conditions of the business operator;</p> <p>(4) the degree of dependence of other business operators upon the business operator in transactions;</p> <p>(5) the degree of difficulty for other business operators to enter the</p>



<p>易程度；</p> <p>(六)与认定该经营者市场支配地位有关的其他因素。</p>	<p>relevant market; and</p> <p>(6) other factors related to determining a dominant market position of the said business operator.</p>
<p><b>第十九条</b></p> <p>有下列情形之一的,可以推定经营者具有市场支配地位:</p> <p>(一)一个经营者在相关市场的市场份额达到二分之一的;</p> <p>(二)两个经营者在相关市场的市场份额合计达到三分之二的;</p> <p>(三)三个经营者在相关市场的市场份额合计达到四分之三的。</p> <p>有前款第二项、第三项规定的情形,其中有的经营者市场份额不足十分之一的,不应当推定该经营者具有市场支配地位。</p> <p>被推定具有市场支配地位的经营者,有证据证明不具有市场支配地位的,不应当认定其具有市场支配地位。</p>	<p><b>Article 19</b></p> <p>Where a business operator is under any of the following circumstances, it may be assumed to have a dominant market position:</p> <p>(1) the relevant market share of a business operator accounts for 1/2 or above in the relevant market;</p> <p>(2) the joint relevant market share of two business operators accounts for 2/3 or above; or</p> <p>(3) the joint relevant market share of three business operators accounts for 3/4 or above.</p> <p>A business operator with a market share of less than 1/10 shall not be presumed as having a dominant market position even if they fall within the scope of the second or third item above.</p> <p>Where a business operator who has been presumed to have a dominant market position can otherwise prove that they do not have a dominant market, they shall not be determined as having a dominant market position.</p>
<p><b>第四章 经营者集中</b></p>	<p><b>Chapter IV Concentration of Business Operators</b></p>
<p><b>第二十条</b></p> <p>经营者集中是指下列情形:</p> <p>(一)经营者合并;</p> <p>(二)经营者通过取得股权或者资产的方式取得对其他经营者的控制权;</p> <p>(三)经营者通过合同等方式取得对其他经营者的控制权或者能够对其他经营者施加决定性影响。</p>	<p><b>Article 20</b></p> <p>A concentration refers to the following circumstances:</p> <p>(1) the merger of business operators;</p> <p>(2) acquiring control over other business operators by virtue of acquiring their equities or assets; or</p> <p>(3) acquiring control over other business operators or the possibility of exercising decisive influence on other business operators by virtue of contract or any other means.</p>
<p><b>第二十一条</b></p> <p>经营者集中达到国务院规定的申报标准的,经营者应当事先向国务院反垄断执法机构申报,未申报的不得实施集中。</p>	<p><b>Article 21</b></p> <p>Where a concentration reaches the threshold of declaration stipulated by the State Council, a declaration must be lodged in advance with the Anti-monopoly Authority under the State Council, or otherwise the concentration shall not be implemented.</p>
<p><b>第二十二条</b></p> <p>经营者集中有下列情形之一的,可以</p>	<p><b>Article 22</b></p> <p>Where a concentration exists under any of the following</p>

<p>不向国务院反垄断执法机构申报：</p> <p>（一）参与集中的一个经营者拥有其他每个经营者百分之五十以上有表决权的股份或者资产的；</p> <p>（二）参与集中的每个经营者百分之五十以上有表决权的股份或者资产被同一个未参与集中的经营者拥有的。</p>	<p>circumstances, it may not be declared to the Anti-monopoly Authority under the State Council:</p> <p>(1) one business operator who is a party to the concentration has the power to exercise more than half the voting rights of every other business operator, whether of the equity or the assets; or</p> <p>(2) one business operator who is not a party to the concentration has the power to exercise more than half the voting rights of every business operator concerned, whether of the equity or the assets.</p>
<p><b>第二十三条</b></p> <p>经营者向国务院反垄断执法机构申报集中，应当提交下列文件、资料：</p> <p>（一）申报书；</p> <p>（二）集中对相关市场竞争状况影响的说明；</p> <p>（三）集中协议；</p> <p>（四）参与集中的经营者经会计师事务所审计的上一会计年度财务会计报告；</p> <p>（五）国务院反垄断执法机构规定的其他文件、资料。</p> <p>申报书应当载明参与集中的经营者的名称、住所、经营范围、预定实施集中的日期和国务院反垄断执法机构规定的其他事项。</p>	<p><b>Article 23</b></p> <p>A business operator shall, when lodging a concentration declaration with the Anti-monopoly Authority under the State Council, submit the following documents and materials:</p> <p>(1) a declaration paper;</p> <p>(2) explanations on the effect of the concentration on the relevant market competition;</p> <p>(3) the agreement of concentration;</p> <p>(4) the financial reports and accounting reports of the preceding accounting year of the business operator; and</p> <p>(5) other documents and materials as stipulated by the Anti-monopoly Authority under the State Council.</p> <p>Such items shall be embodied in the declaration paper as the name, domicile and business scopes of the business operators involved in the concentration as well as the date of the scheduled concentration and other items as stipulated by the Anti-monopoly Authority under the State Council.</p>
<p><b>第二十四条</b></p> <p>经营者提交的文件、资料不完备的，应当在国务院反垄断执法机构规定的期限内补交文件、资料。经营者逾期未补交文件、资料的，视为未申报。</p>	<p><b>Article 24</b></p> <p>Where the documents or materials submitted by a business operator are incomplete, it shall submit the rest of the documents and materials within the time limit stipulated by the Anti-monopoly Authority under the State Council; otherwise, the declaration shall be deemed as not filed.</p>
<p><b>第二十五条</b></p> <p>国务院反垄断执法机构应当自收到经营者提交的符合本法第二十三条规定的文件、资料之日起三十日内，对申报的经营者集中进行初步审查，作出是否实施进一步审查的决定，并书面通知经营者。国务院反垄断执法</p>	<p><b>Article 25</b></p> <p>The Anti-monopoly Authority under the State Council shall conduct a preliminary review of the declared concentration of business operators, make a decision whether to conduct further review and notify the business operators in written form within 30 days upon receipt of the documents and materials submitted by the business operators pursuant to Article 23 of this Law. Before such a decision is</p>

<p>机构作出决定前,经营者不得实施集中。</p> <p>国务院反垄断执法机构作出不实施进一步审查的决定或者逾期未作出决定的,经营者可以实施集中。</p>	<p>made by the Anti-monopoly Authority under the State Council, the concentration may not be implemented.</p> <p>Where the Anti-monopoly Authority under the State Council decides not to conduct further review or fails to make a decision at expiry of the stipulated period, the concentration may be implemented.</p>
<p><b>第二十六条</b></p> <p>国务院反垄断执法机构决定实施进一步审查的,应当自决定之日起九十日内审查完毕,作出是否禁止经营者集中的决定,并书面通知经营者。作出禁止经营者集中的决定,应当说明理由。审查期间,经营者不得实施集中。</p> <p>有下列情形之一的,国务院反垄断执法机构经书面通知经营者,可以延长前款规定的审查期限,但最长不得超过六十日:</p> <p>(一)经营者同意延长审查期限的; (二)经营者提交的文件、资料不准确,需要进一步核实的; (三)经营者申报后有关情况发生重大变化的。</p> <p>国务院反垄断执法机构逾期未作出决定的,经营者可以实施集中。</p>	<p><b>Article 26</b></p> <p>Where the Anti-monopoly Authority under the State Council decides to conduct further review, they shall, within 90 days from the date of decision, complete the review, make a decision on whether to prohibit the concentration, and notify the business operators concerned of the decision in written form. A decision of prohibition shall be attached with reasons therefor. Within the review period the concentration may not be implemented.</p> <p>Under any of the following circumstances, the Anti-monopoly Authority under the State Council may notify the business operators in written form that the time limit as stipulated in the preceding paragraph may be extended to no more than 60 days:</p> <p>(1) the business operators concerned agree to extend the time limit; (2) the documents or materials submitted are inaccurate and need further verification; (3) things have significantly changed after declaration.</p> <p>If the Anti-monopoly Authority under the State Council fails to make a decision at expiry of the period, the concentration may be implemented.</p>
<p><b>第二十七条</b></p> <p>审查经营者集中,应当考虑下列因素:</p> <p>(一)参与集中的经营者在相关市场的市场份额及其对市场的控制力; (二)相关市场的市场集中度; (三)经营者集中对市场进入、技术进步的影响; (四)经营者集中对消费者和其他有关经营者的影响; (五)经营者集中对国民经济发展的影响; (六)国务院反垄断执法机构认为应当考虑的影响市场竞争的其他因素。</p>	<p><b>Article 27</b></p> <p>In the case of the examination of the concentration of business operators, it shall consider the relevant elements as follows:</p> <p>(1) the market share of the business operators involved in the relevant market and the controlling power thereof over that market, (2) the degree of market concentration in the relevant market, (3) the influence of the concentration of business operators on the market access and technological progress, (4) the influence of the concentration of business operators on the consumers and other business operators, (5) the influence of the concentration of business operators on the national economic development, and (6) other elements that may have an effect on the market competition and shall be taken into account as determined by the Anti-monopoly</p>

	Authority under the State Council.
<p>第二十八条</p> <p>经营者集中具有或者可能具有排除、限制竞争效果的，国务院反垄断执法机构应当作出禁止经营者集中的决定。但是，经营者能够证明该集中对竞争产生的有利影响明显大于不利影响，或者符合社会公共利益的，国务院反垄断执法机构可以作出对经营者集中不予禁止的决定。</p>	<p><b>Article 28</b></p> <p>Where a concentration has or may have the effect of eliminating or restricting competition, the Anti-monopoly Authority under the State Council shall make a decision to prohibit the concentration. However, if the business operators concerned can prove that the concentration will bring more positive impact than negative impact on competition, or the concentration is pursuant to public interests, the Anti-monopoly Authority under the State Council may decide not to prohibit the concentration.</p>
<p>第二十九条</p> <p>对不予禁止的经营者集中，国务院反垄断执法机构可以决定附加减少集中对竞争产生不利影响的限制性条件。</p>	<p><b>Article 29</b></p> <p>Where the concentration is not prohibited, the Anti-monopoly Authority under the State Council may decide to attach restrictive conditions for reducing the negative impact of such concentration on competition.</p>
<p>第三十条</p> <p>国务院反垄断执法机构应当将禁止经营者集中的决定或者对经营者集中附加限制性条件的决定，及时向社会公布。</p>	<p><b>Article 30</b></p> <p>Where the Anti-monopoly Authority under the State Council decides to prohibit a concentration or attaches restrictive conditions on concentration, it shall publicize such decisions to the general public in a timely manner.</p>
<p>第三十一条</p> <p>对外资并购境内企业或者以其他方式参与经营者集中，涉及国家安全的，除依照本法规定进行经营者集中审查外，还应当根据国家有关规定进行国家安全审查。</p>	<p><b>Article 31</b></p> <p>Where a foreign investor merges and acquires a domestic enterprise or participates in concentration by other means, if state security is involved, besides the examination on the concentration in accordance with this Law, the examination on national security shall also be conducted in accordance with the relevant State provisions.</p>
<p><b>第五章 滥用行政权力排除、限制竞争</b></p>	<p><b>Chapter V Abuse of Administrative Power to Eliminate or Restrict Competition</b></p>
<p>第三十二条</p> <p>行政机关和法律、法规授权的具有管理公共事务职能的组织不得滥用行政权力，限定或者变相限定单位或者个人经营、购买、使用其指定的经营者提供的商品。</p>	<p><b>Article 32</b></p> <p>Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power, restrict or restrict in a disguised form entities and individuals to operate, purchase or use the commodities provided by business operators designated by it.</p>

<p>第三十三条</p> <p>行政机关和法律、法规授权的具有管理公共事务职能的组织不得滥用行政权力，实施下列行为，妨碍商品在地区之间的自由流通：</p> <p>（一）对外地商品设定歧视性收费项目、实行歧视性收费标准，或者规定歧视性价格；</p> <p>（二）对外地商品规定与本地同类商品不同的技术要求、检验标准，或者对外地商品采取重复检验、重复认证等歧视性技术措施，限制外地商品进入本地市场；</p> <p>（三）采取专门针对外地商品的行政许可，限制外地商品进入本地市场；</p> <p>（四）设置关卡或者采取其他手段，阻碍外地商品进入或者本地商品运出；</p> <p>（五）妨碍商品在地区之间自由流通的其他行为。</p>	<p><b>Article 33</b></p> <p>Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not have any of the following conducts by abusing its administrative power to block free circulation of commodities between regions:</p> <p>(1) imposing discriminative charge items, discriminative charge standards or discriminative prices upon commodities from outside the locality,</p> <p>(2) imposing such technical requirements and inspection standards upon commodities from outside the locality as different from those upon local commodities of the same classification, or taking such discriminative technical measures as repeated inspections or repeated certifications to commodities from outside the locality, so as to restrict them to enter local market,</p> <p>(3) exerting administrative licensing specially on commodities from outside the locality so as to restrict them to enter local market,</p> <p>(4) setting barriers or taking other measures so as to hamper commodities from outside the locality from entering the local market or local commodities from moving outside the local region, or</p> <p>(5) other conducts for the purpose of hampering commodities from free circulation between regions.</p>
<p>第三十四条</p> <p>行政机关和法律、法规授权的具有管理公共事务职能的组织不得滥用行政权力，以设定歧视性资质要求、评审标准或者不依法发布信息等方式，排斥或者限制外地经营者参加本地的招标投标活动。</p>	<p><b>Article 34</b></p> <p>Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power to reject or restrict business operators from outside the locality to participate in local tendering and bidding activities by such means as imposing discriminative qualification requirements or assessment standards or releasing information in an unlawful manner.</p>
<p>第三十五条</p> <p>行政机关和法律、法规授权的具有管理公共事务职能的组织不得滥用行政权力，采取与本地经营者不平等待遇等方式，排斥或者限制外地经营者在本地投资或者设立分支机构。</p>	<p><b>Article 35</b></p> <p>Any administrative organ or organization empowered by a law or administrative regulation to administer public affairs may not abuse its administrative power to reject or restrict business operators from outside the locality to invest or set up branches in the locality by imposing unequal treatment thereupon compared to that upon local business operators.</p>
<p>第三十六条</p> <p>行政机关和法律、法规授权的具有管</p>	<p><b>Article 36</b></p> <p>Any administrative organ or organization empowered by a law or</p>

<p>理公共事务职能的组织不得滥用行政权力,强制经营者从事本法规定的垄断行为。</p>	<p>administrative regulation to administer public affairs may not abuse its administrative power to force business operators to engage in the monopolistic conducts as prescribed in this Law.</p>
<p>第三十七条</p> <p>行政机关不得滥用行政权力,制定含有排除、限制竞争内容的规定。</p>	<p><b>Article 37</b></p> <p>Any administrative organ may not abuse its administrative power to set down such provisions in respect of eliminating or restricting competition.</p>
<p><b>第六章 对涉嫌垄断行为的调查</b></p>	<p><b>Chapter VI</b> <b>Investigation into Suspicious Monopolistic Conduct</b></p>
<p>第三十八条</p> <p>反垄断执法机构依法对涉嫌垄断行为进行调查。</p> <p>对涉嫌垄断行为,任何单位和个人有权向反垄断执法机构举报。反垄断执法机构应当为举报人保密。</p> <p>举报采用书面形式并提供相关事实和证据的,反垄断执法机构应当进行必要的调查。</p>	<p><b>Article 38</b></p> <p>The anti-monopoly authority shall make investigations into suspicious monopolistic conduct in accordance with the law.</p> <p>Any entity or individual may report suspicious monopolistic conduct to the anti-monopoly authority. The anti-monopoly authority shall keep the identity of the informer confidential.</p> <p>Where an informer makes a report in written form and provides relevant facts and evidence, the anti-monopoly authority shall carry out the necessary investigation.</p>
<p>第三十九条</p> <p>反垄断执法机构调查涉嫌垄断行为,可以采取下列措施:</p> <p>(一)进入被调查的经营者的营业场所或者其他有关场所进行检查;</p> <p>(二)询问被调查的经营者、利害关系人或者其他有关单位或者个人,要求其说明有关情况;</p> <p>(三)查阅、复制被调查的经营者、利害关系人或者其他有关单位或者个人的有关单证、协议、会计账簿、业务函电、电子数据等文件、资料;</p> <p>(四)查封、扣押相关证据;</p> <p>(五)查询经营者的银行账户。</p> <p>采取前款规定的措施,应当向反垄断执法机构主要负责人书面报告,并经批准。</p>	<p><b>Article 39</b></p> <p>The anti-monopoly authority may take any of the following measures in investigating suspicious monopolistic conduct:</p> <p>(1) conducting an inspection by entering the business premises of business operators under investigation or by entering any other relevant place,</p> <p>(2) inquiring of the business operators under investigation, interested parties, or other relevant entities or individuals, and requiring them to explain the relevant conditions,</p> <p>(3) consulting and duplicating the relevant documents, agreements, account books, business correspondence and electronic data, etc., of the business operators under investigation, interested parties and other relevant entities or individuals,</p> <p>(4) seizing and detaining relevant evidence, and</p> <p>(5) inquiring about the bank accounts of the business operators under investigation.</p> <p>Before the measures as prescribed in the preceding paragraph are approved, a written report shall be submitted to the chief person(s)-in-charge of the anti-monopoly authority.</p>

<p>第四十条</p> <p>反垄断执法机构调查涉嫌垄断行为，执法人员不得少于二人，并应当出示执法证件。</p> <p>执法人员询问和调查，应当制作笔录，并由被询问人或者被调查人签字。</p>	<p><b>Article 40</b></p> <p>When inspecting suspicious monopolistic conduct, there shall be at least two law enforcers, and they shall show their law enforcement certificates.</p> <p>When inquiring about and investigating suspicious monopolistic conduct, law enforcers shall make notes thereon, which shall bear the signatures of the persons under inquiry or investigation.</p>
<p>第四十一条</p> <p>反垄断执法机构及其工作人员对执法过程中知悉的商业秘密负有保密义务。</p>	<p><b>Article 41</b></p> <p>The anti-monopoly authority and functionaries thereof shall be obliged to keep confidential the trade secrets they have access to during the course of the law enforcement.</p>
<p>第四十二条</p> <p>被调查的经营者、利害关系人或者其他有关单位或者个人应当配合反垄断执法机构依法履行职责，不得拒绝、阻碍反垄断执法机构的调查。</p>	<p><b>Article 42</b></p> <p>Business operators, interested parties and other relevant entities and individuals under investigation shall show cooperation with the anti-monopoly authority in performing its functions, and may not reject or hamper the investigation by the anti-monopoly authority.</p>
<p>第四十三条</p> <p>被调查的经营者、利害关系人有权陈述意见。反垄断执法机构应当对被调查的经营者、利害关系人提出的事实、理由和证据进行核实。</p>	<p><b>Article 43</b></p> <p>Business operators and interested parties under investigation have the right to voice their opinions. The anti-monopoly authority shall verify the facts, reasons and evidence provided by the business operators and interested parties under investigation.</p>
<p>第四十四条</p> <p>反垄断执法机构对涉嫌垄断行为调查核实后，认为构成垄断行为的，应当依法作出处理决定，并向社会公布。</p>	<p><b>Article 44</b></p> <p>Where the anti-monopoly authority deems that monopolistic conduct is constituted after investigating and verifying suspected monopolistic conduct, it shall make a decision on how to deal with the monopolistic conduct, and publicize it.</p>
<p>第四十五条</p> <p>对反垄断执法机构调查的涉嫌垄断行为，被调查的经营者承诺在反垄断执法机构认可的期限内采取具体措施消除该行为后果的，反垄断执法机构可以决定中止调查。中止调查的决定应当载明被调查的经营者承诺的具体内容。</p>	<p><b>Article 45</b></p> <p>As regards suspected monopolistic conduct that the anti-monopoly authority is investigating, if the business operators under investigation promise to eliminate the impact of the conduct by taking specific measures within the time limit prescribed by the anti-monopoly authority, the anti-monopoly authority may decide to suspend the investigation. The decision on suspending the investigation shall specify the specific measures as promised by the business operators</p>

<p>反垄断执法机构决定中止调查的,应当对经营者履行承诺的情况进行监督。经营者履行承诺的,反垄断执法机构可以决定终止调查。</p> <p>有下列情形之一的,反垄断执法机构应当恢复调查:</p> <p>(一)经营者未履行承诺的;</p> <p>(二)作出中止调查决定所依据的事实发生重大变化的;</p> <p>(三)中止调查的决定是基于经营者提供的不完整或者不真实的信息作出的。</p>	<p>under investigation.</p> <p>Where the anti-monopoly authority decides to suspend the investigation, it shall supervise the implementation of the promise by the relevant business operators. If the business operators keep their promise, the anti-monopoly authority may decide to terminate the investigation.</p> <p>However, the anti-monopoly authority shall resume the investigation, where</p> <p>(1) the business operators fail to implement the promise,</p> <p>(2) significant changes have taken place to the facts based on which the decision to suspend the investigation was made; or</p> <p>(3) the decision to suspend the investigation was made based on incomplete or inaccurate information provided by the business operators.</p>
<p><b>第七章 法律责任</b></p>	<p><b>Chapter VII Legal Liabilities</b></p>
<p><b>第四十六条</b></p> <p>经营者违反本法规定,达成并实施垄断协议的,由反垄断执法机构责令停止违法行为,没收违法所得,并处上一年度销售额百分之一以上百分之十以下的罚款;尚未实施所达成的垄断协议的,可以处五十万元以下的罚款。</p> <p>经营者主动向反垄断执法机构报告达成垄断协议的有关情况并提供重要证据的,反垄断执法机构可以酌情减轻或者免除对该经营者的处罚。</p> <p>行业协会违反本法规定,组织本行业的经营者达成垄断协议的,反垄断执法机构可以处五十万元以下的罚款;情节严重的,社会团体登记管理机关可以依法撤销登记。</p>	<p><b>Article 46</b></p> <p>Where business operators reach a monopoly agreement and institute it in violation of this Law, the anti-monopoly authority shall order them to cease doing so, and shall confiscate the illegal gains and impose a fine of 1% up to 10% of the sales revenue in the previous year. Where the reached monopoly agreement has not been instituted, a fine of not more than 500,000 Yuan shall be imposed.</p> <p>Where any business operator voluntarily reports the conditions on which the monopoly agreement was reached and provides important evidence to the anti-monopoly authority, it may impose a mitigated punishment or may grant exemption from punishment as the case may be.</p> <p>Where a guild helps the achievement of a monopoly agreement by business operators in its own industry in violation of this Law, a fine of not more than 500,000 Yuan shall be imposed thereupon by the anti-monopoly authority; in cases of serious circumstances, the social group registration authority may deregister the guild.</p>
<p><b>第四十七条</b></p> <p>经营者违反本法规定,滥用市场支配地位的,由反垄断执法机构责令停止违法行为,没收违法所得,并处上一年度销售额百分之一以上百分之十</p>	<p><b>Article 47</b></p> <p>Where any business operator abuses its dominant market status in violation of this Law, it shall be ordered to cease doing so. The anti-monopoly authority shall confiscate its illegal gains and impose thereupon a fine of 1% up to 10% of the sales revenue in the previous</p>



以下的罚款。	year.
<p>第四十八条</p> <p>经营者违反本法规定实施集中的，由国务院反垄断执法机构责令停止实施集中、限期处分股份或者资产、限期转让营业以及采取其他必要措施恢复到集中前的状态，可以处五十万元以下的罚款。</p>	<p><b>Article 48</b></p> <p>Where any business operator implements concentration in violation of this Law, the anti-monopoly authority shall order it to cease doing so, to dispose of shares or assets, transfer the business or take other necessary measures to restore the market situation before the concentration within a time limit, and may impose a fine of not more than 500,000 Yuan.</p>
<p>第四十九条</p> <p>对本法第四十六条、第四十七条、第四十八条规定的罚款，反垄断执法机构确定具体罚款数额时，应当考虑违法行为的性质、程度和持续的时间等因素。</p>	<p><b>Article 49</b></p> <p>The specific amount of the fines as prescribed in Articles 46 through 48 shall be determined in consideration of such factors as the nature, extent and duration of the violations.</p>
<p>第五十条</p> <p>经营者实施垄断行为，给他人造成损失的，依法承担民事责任。</p>	<p><b>Article 50</b></p> <p>Where any loss was caused by a business operator's monopolistic conducts to other entities and individuals, the business operator shall assume the civil liabilities.</p>
<p>第五十一条</p> <p>行政机关和法律、法规授权的具有管理公共事务职能的组织滥用行政权力，实施排除、限制竞争行为的，由上级机关责令改正；对直接负责的主管人员和其他直接责任人员依法给予处分。反垄断执法机构可以向有关上级机关提出依法处理的建议。</p> <p>法律、行政法规对行政机关和法律、法规授权的具有管理公共事务职能的组织滥用行政权力实施排除、限制竞争行为的处理另有规定的，依照其规定。</p>	<p><b>Article 51</b></p> <p>Where any administrative organ or an organization empowered by a law or administrative regulation to administer public affairs abuses its administrative power to eliminate or restrict competition, the superior authority thereof shall order it to make correction and impose punishments on the directly liable person(s)-in-charge and other directly liable persons. The anti-monopoly authority may put forward suggestions on handling according to law to the relevant superior authority.</p> <p>Where it is otherwise provided in a law or administrative regulation for handling the organization empowered by a law or administrative regulation to administer public affairs which abuses its administrative power to eliminate or restrict competition, such provisions shall prevail.</p>
<p>第五十二条</p> <p>对反垄断执法机构依法实施的审查和调查，拒绝提供有关材料、信息，或者提供虚假材料、信息，或者隐匿、销毁、转移证据，或者有其他拒绝、</p>	<p><b>Article 52</b></p> <p>As regards inspection and investigation by the anti-monopoly authority, if business operators refuse to provide related materials and information, provide fraudulent materials or information, conceal, destroy or remove evidence, or refuse or obstruct the investigation in</p>

<p>阻碍调查行为的,由反垄断执法机构责令改正,对个人可以处二万元以下的罚款,对单位可以处二十万元以下的罚款;情节严重的,对个人处二万元以上十万元以下的罚款,对单位处二十万元以上一百万元以下的罚款;构成犯罪的,依法追究刑事责任。</p>	<p>other ways, the anti-monopoly authority shall order them to make rectification, impose a fine of not more than 20,000 Yuan on individuals, and a fine of not more than 200,000 Yuan on entities; and in cases of serious circumstances, the anti-monopoly authority may impose a fine of 20,000 Yuan up to 100,000 Yuan on individuals, and a fine of 200,000 Yuan up to one million Yuan on entities; where a crime is constituted, the relevant business operators shall assume criminal liabilities.</p>
<p><b>第五十三条</b></p> <p>对反垄断执法机构依据本法第二十八条、第二十九条作出的决定不服的,可以先依法申请行政复议;对行政复议决定不服的,可以依法提起行政诉讼。</p> <p>对反垄断执法机构作出的前款规定以外的决定不服的,可以依法申请行政复议或者提起行政诉讼。</p>	<p><b>Article 53</b></p> <p>Where any party concerned objects to the decision made by the anti-monopoly authority in accordance with Articles 28 and 29 of this Law, it may first apply for an administrative reconsideration; if it objects to the reconsideration decision, it may lodge an administrative lawsuit in accordance with law.</p> <p>Where any party concerned is dissatisfied with any decision made by the anti-monopoly authority other than the decisions prescribed in the preceding paragraph, it may lodge an application for administrative reconsideration or initiate an administrative lawsuit in accordance with law.</p>
<p><b>第五十四条</b></p> <p>反垄断执法机构工作人员滥用职权、玩忽职守、徇私舞弊或者泄露执法过程中知悉的商业秘密,构成犯罪的,依法追究刑事责任;尚不构成犯罪的,依法给予处分。</p>	<p><b>Article 54</b></p> <p>Where any functionary of the anti-monopoly authority abuses his/her power, neglects his/her duty, seeks private benefits, or discloses trade secrets he/she has access to during the process of law enforcement, and a crime is constituted, he/she shall be subject to criminal liability; where no crime is constituted, he/she shall be subject to a disciplinary sanction.</p>
<p><b>第八章 附则</b></p>	<p><b>Chapter VIII Supplementary Provisions</b></p>
<p><b>第五十五条</b></p> <p>经营者依照有关知识产权的法律、行政法规规定行使知识产权的行为,不适用本法;但是,经营者滥用知识产权,排除、限制竞争的行为,适用本法。</p>	<p><b>Article 55</b></p> <p>This Law does not govern the conduct of business operators seeking to exercise their intellectual property rights under laws and relevant administrative regulations on intellectual property rights; however, business operators' conduct seeking to eliminate or restrict market competition by abusing their intellectual property rights shall be governed by this Law.</p>
<p><b>第五十六条</b></p> <p>农业生产者及农村经济组织在农产</p>	<p><b>Article 56</b></p> <p>This Law does not govern the allied or concerted actions of</p>

品生产、加工、销售、运输、储存等经营活动中实施的联合或者协同行为，不适用本法。	agricultural producers and rural economic organizations in economic activities such as production, processing, sales, transportation and storage of agricultural products.
第五十七条 本法自 2008 年 8 月 1 日起施行。	<b>Article 57</b> This Law shall enter into force as of August 1, 2008.

**Guide of the Anti-Monopoly Committee of the State Council for the Definition of the Relevant Market (2009)\***

**国务院反垄断委员会关于相关市场界定的指南（2009）**

(Promulgated by the Anti-Monopoly Committee of the State Council of China on May 24, 2009)

（2009年5月24日）

<b>第一章 总则</b>	<b>Chapter I General Provisions</b>
<p><b>第一条 指南的目的和依据</b></p> <p>为了给相关市场界定提供指导，提高国务院反垄断执法机构执法工作的透明度，根据《中华人民共和国反垄断法》（以下称《反垄断法》），制定本指南。</p>	<p><b>Article 1 Purpose and Basis of this Guide</b></p> <p>To provide guidance for the definition of the relevant market and improve the transparency of the law enforcement work of the anti-monopoly law enforcement authority under the State Council, this Guide is formulated according to the Anti-monopoly Law of the People’s Republic of China (hereinafter referred to as the Anti-monopoly Law).</p>
<p><b>第二条 界定相关市场的作用</b></p> <p>任何竞争行为（包括具有或可能具有排除、限制竞争效果的行为）均发生在一定的市场范围内。界定相关市场就是明确经营者竞争的市场范围。在禁止经营者达成垄断协议、禁止经营者滥用市场支配地位、控制具有或者可能具有排除、限制竞争效果的经营集中等反垄断执法工作中，均可能涉及相关市场的界定问题。</p> <p>科学合理界定相关市场，对识别竞争者和潜在竞争者、判定经营者市场份额和市场集中度、认定经营者的市场地位、分析经营者的行为对市场竞争的影响、判断经营者行为是否违法以及在违法情况下需承担的法律贵任等关键问题，具有重要的作用。因此，相关市场的界定通常是对竞争行为进行分析的起点，是反垄断执法工作的重要步骤。</p>	<p><b>Article 2 Functions of Defining the Relevant Market</b></p> <p>All competitive behaviors (including those which have resulted or may result in excluding or limiting competition) occur within a particular market scope. Defining the relevant market means to define the market scope within which the business operators compete with each other. In the work of prohibiting monopoly agreements between business operators, prohibiting the abuse of dominant market positions by business operators, controlling the concentration of business operators that has resulted or may result in excluding or limiting competition and other work of anti-monopoly law enforcement, the definition of the relevant market may be involved.</p> <p>Defining the relevant market scientifically and reasonably is very important to such key issues as identifying competitors and potential competitors, determining the market share of business operators and the degree of market concentration, deciding the market position of business operators, analyzing the impact of business operators’ behaviors on market competition, judging whether business operators’ behaviors are illegal and what legal liabilities they need to assume if their behaviors are illegal. Therefore, the definition of the relevant market is usually the starting point for analyzing competitive behaviors and an important step of the anti-monopoly law enforcement</p>

\* The English version is available at ‘www.lawinfochina.com’ <<http://en.pkulaw.cn/display.aspx?cgid=118975&lib=law>> accessed 30 January 2017.

	work.
<p><b>第三条 相关市场的含义</b></p> <p>相关市场是指经营者在一定时期内就特定商品或者服务（以下统称商品）进行竞争的商品范围和地域范围。在反垄断执法实践中，通常需要界定相关商品市场和相关地域市场。</p> <p>相关商品市场，是根据商品的特性、用途及价格等因素，由需求者认为具有较为紧密替代关系的一组或一类商品所构成的市场。这些商品表现出较强的竞争关系，在反垄断执法中可以作为经营者进行竞争的商品范围。</p> <p>相关地域市场，是指需求者获取具有较为紧密替代关系的商品的地理区域。这些地域表现出较强的竞争关系，在反垄断执法中可以作为经营者进行竞争的地域范围。</p> <p>当生产周期、使用期限、季节性、流行时尚性或知识产权保护期限等已构成商品不可忽视的特征时，界定相关市场还应考虑时间性……</p>	<p><b>Article 3 Meaning of the Relevant Market</b></p> <p>Relevant market refers to a commodity scope and geographic scope within which business operators compete with each other in a certain period of time regarding particular commodities or services (hereinafter collectively referred to as ‘commodities’). In the practice of anti-monopoly law enforcement, it is usually required to define the relevant commodity market and the relevant geographic market.</p> <p>The term ‘relevant commodity market’ refers to a market comprised of a group or a category of commodities that are considered by consumers to have a relatively strong substitution relationship based on the characteristics, uses and prices of the commodities. These commodities have a relatively intense competitive relationship, and it may be considered as the commodity scope within which business operators compete with each other in the anti-monopoly law enforcement.</p> <p>The term ‘relevant geographic market’ refers to the scope of geographic areas within which consumers can acquire commodities that have a relatively strong substitution relationship. Such areas have a relatively intense competitive relationship with each other, and the geographic scope may be considered as the area within which business operators compete with each other in the anti-monopoly law enforcement.</p> <p>Where such factors as production cycle, life time, seasonal features, fashion style or protection period of intellectual property rights have become commodity characteristics that cannot be ignored, the factor of time shall be considered in the definition of the relevant market…</p>
<p><b>第二章</b> <b>界定相关市场的基本依据</b></p>	<p><b>Chapter II</b> <b>Basis for Defining the Relevant Market</b></p>
<p><b>第四条 替代性分析</b></p> <p>在反垄断执法实践中，相关市场范围的大小主要取决于商品（地域）的可替代程度。</p> <p>在市场竞争中对经营者行为构成直接和有效竞争约束的，是市场里存在需求者认为具有较强替代关系的商品或能够提供这些商品的地域，因此，界定相关市场主要从需求者角度</p>	<p><b>Article 4 Substitution Analysis</b></p> <p>In the practice of anti-monopoly law enforcement, the scope of the relevant market is primarily determined by the substitution level of commodities (geographic areas).</p> <p>Those that constitute the most direct and effective competition restraint on business operators’ behaviors in market competition are commodities considered by consumers as having a relatively strong substitution relationship or geographic areas where these commodities are supplied, so the demand substitution analysis shall be conducted</p>

<p>进行需求替代分析。当供给替代对经营者行为产生的竞争约束类似于需求替代时，也应考虑供给替代。</p>	<p>from the perspective of demanders in the definition of the relevant market. Where supply substitution constitutes a similar competitive restraint on business operators' behavior as demand substitution, supply substitution shall also be taken into consideration.</p>
<p><b>第五条 需求替代</b></p> <p>需求替代是根据需求者对商品功能用途的需求、质量的认可、价格的接受以及获取的难易程度等因素，从需求者的角度确定不同商品之间的替代程度。</p> <p>原则上，从需求者角度来看，商品之间的替代程度越高，竞争关系就越强，就越可能属于同一相关市场。</p>	<p><b>Article 5 Demand Substitution</b></p> <p>Demand substitution is to determine the substitution level among different commodities from the perspective of demanders based on their demand of the functions and uses of commodities, approval of the quality of commodities and acceptance of the price of commodities, as well as the availability of such commodities.</p> <p>In principle, from the perspective of demanders, the higher the substitution level of the commodities, the more intense the competitive relationship between them, and the greater the possibility that they belong to the same relevant market.</p>
<p><b>第六条 供给替代</b></p> <p>供给替代是根据其他经营者改造生产设施的投入、承担的风险、进入目标市场的时间等因素，从经营者的角度确定不同商品之间的替代程度。</p> <p>原则上，其他经营者生产设施改造的投入越少，承担的额外风险越小，提供紧密替代商品越迅速，则供给替代程度就越高，界定相关市场尤其在识别相关市场参与者时就应考虑供给替代。</p>	<p><b>Article 6 Supply Substitution</b></p> <p>Supply substitution is to determine the substitution level among different commodities from the perspective of business operators, based on factors such as the investment made by other business operators in renovating the production facilities, the risks undertaken by them and the time they enter into the target market.</p> <p>In principle, the less investment the other business operators make in renovating the production facilities, the less extraneous risks they would bear; the faster the close substitutes are supplied, the higher the supply substitution level is. Supply substitution shall be considered in defining the relevant market, especially in identifying the players in the relevant market.</p>
<p><b>第三章</b> <b>界定相关市场的一般方法</b></p>	<p><b>Chapter III</b> <b>General Method for Defining the Relevant Market</b></p>
<p><b>第七条 界定相关市场的方法概述</b></p> <p>界定相关市场的方法不是唯一的。在反垄断执法实践中，根据实际情况，可能使用不同的方法。界定相关市场时，可以基于商品的特征、用途、价格等因素进行需求替代分析，必要时进行供给替代分析。在经营者竞争的市场范围不够清晰或不易确定时，可以按照“假定垄断者测试”的分析思</p>	<p><b>Article 7 Brief Introduction to the General Method for Defining the Relevant Market</b></p> <p>The method for defining the relevant market is not the only one. In the practice of anti-monopoly law enforcement, different methods may be used for different circumstances. When defining the relevant market, demand substitution analysis can be conducted, based on the characteristics, uses and prices of commodities, and supply substitution analysis can be conducted when necessary. When the market scope within which business operators compete with each</p>

<p>路(具体见第十条)来界定相关市场。</p> <p>反垄断执法机构鼓励经营者根据案件具体情况运用客观、真实的数据,借助经济学分析方法来界定相关市场。</p> <p>无论采用何种方法界定相关市场,都要始终把握商品满足消费者需求的基本属性,并以此作为对相关市场界定中出现明显偏差时进行校正的依据。</p>	<p>other is not clear or is difficult to determine, the relevant market can be defined by the analysis approach of the ‘hypothetical monopolist test’ (detailed in Article 10).</p> <p>The anti-monopoly law enforcement authorities shall encourage business operators to use objective and authentic data, based on the actual circumstances of cases, and to use the economic analysis method to define the relevant market.</p> <p>No matter which method is adopted to define the relevant market, it must consider the basic commodities’ attribute of meeting the demands of consumers, and this attribute shall also be taken as the basis for correcting any obvious deviation in defining the relevant market.</p>
<p><b>第八条 界定相关商品市场考虑的主要因素</b></p> <p>从需求替代角度界定相关商品市场,可以考虑的因素包括但不限于以下各方面:</p> <p>(一)需求者因商品价格或其他竞争因素变化,转向或考虑转向购买其他商品的证据。</p> <p>(二)商品的外形、特性、质量和技术特点等总体特征和用途。商品可能在特征上表现出某些差异,但需求者仍可以基于商品相同或相似的用途将其视为紧密替代品。</p> <p>(三)商品之间的价格差异。通常情况下,替代性较强的商品价格比较接近,而且在价格变化时表现出同向变化趋势。在分析价格时,应排除与竞争无关的因素引起价格变化的情况。</p> <p>(四)商品的销售渠道。销售渠道不同的商品面对的需求者可能不同,相互之间难以构成竞争关系,则成为相关商品的可能性较小。</p> <p>(五)其他重要因素。如,需求者偏好或需求者对商品的依赖程度;可能阻碍大量需求者转向某些紧密替代商品的障碍、风险和成本;是否存在区别定价等。</p>	<p><b>Article 8 Major Factors to Be Considered in Defining the Relevant Commodity Market</b></p> <p>To define the relevant commodity market from the perspective of demand substitution, the factors to be considered shall include, but not be limited to, the following:</p> <ol style="list-style-type: none"> <li>1. Evidence showing that demanders shift or consider shifting to other commodities due to changes in the price or any other competitive factor of the commodities.</li> <li>2. Physical form, features, quality, technical characteristics and other general characteristics and uses of commodities. Commodities may vary in their characteristics, but demanders can still deem them as close substitutes based on their same or similar uses.</li> <li>3. Price differences among commodities. Usually, products having a strong substitution relationship share a similar range of prices and present the same trend in price changes. In price analysis, price changes caused by factors irrelevant to competition shall be excluded.</li> <li>4. Distribution channels of commodities. Commodities distributed through different channels may have different demanders, and it is very hard to form a competitive relationship among them, so they are less likely to constitute relevant commodities.</li> <li>5. Other important factors, such as the preference of demanders or the dependence of demanders on commodities, the barriers, risks and costs involved in preventing a large number of demanders from choosing certain close substitutes, whether differential pricing exists, etc.</li> </ol> <p>To define the relevant market from the perspective of supply, usually the following factors shall be considered: the evidence on other business operators’ response to changes in the price or any other</p>

<p>从供给角度界定相关商品市场，一般考虑的因素包括：其他经营者对商品价格等竞争因素的变化做出反应的证据；其他经营者的生产流程和工艺，转产的难易程度，转产需要的时间，转产的额外费用和 risk，转产后所提供商品的市场竞争力，营销渠道等。</p> <p>任何因素在界定相关商品市场时的作用都不是绝对的，可以根据案件的不同情况有所侧重。</p>	<p>competitive factor of commodities, the production flow and technique of other business operators, the difficulties for them to change the line of production, the time needed for changing the line of production, the extra costs and risks in changing the line of production, the market competitiveness and marketing channels of the commodities provided after the line of production is changed, etc.</p> <p>The role played by any factor in defining the relevant commodity market is not absolute. Emphasis can be alternated among different factors based on the actual circumstances of a case.</p>
<p><b>第九条 界定相关地域市场考虑的主要因素</b></p> <p>从需求替代角度界定相关地域市场，可以考虑的因素包括但不限于以下各方面：</p> <p>（一）需求者因商品价格或其他竞争因素变化，转向或考虑转向其他地域购买商品的证据。</p> <p>（二）商品的运输成本和运输特征。相对于商品价格来说，运输成本越高，相关地域市场的范围越小……</p> <p>（三）多数需求者选择商品的实际区域和主要经营者商品的销售分布……</p> <p>（五）其他重要因素……</p> <p>从供给角度界定相关地域市场时，一般考虑的因素包括：其他地域的经营者对商品价格等竞争因素的变化做出反应的证据；其他地域的经营者供应或销售相关商品的即时性和可行性，如将订单转向其他地域经营者的转换成本等。</p>	<p><b>Article 9 Major Factors to Be Considered in Defining the Relevant Geographic Market</b></p> <p>To define the relevant geographic market from the perspective of demand substitution, the factors to be considered shall include, but not be limited to, the following:</p> <ol style="list-style-type: none"> <li>1. Evidence showing that demanders shift or consider shifting to other geographic areas to buy commodities due to changes in the price or any other competitive factor of commodities.</li> <li>2. Transport costs and transport features of commodities. Compared with the price of commodities such as cement, the larger the transport costs, the smaller the scope of the relevant geographic market. For commodities such as industrial gas transported by pipelines, the transport features of commodities also decide the distribution area of the commodities.</li> <li>3. Actual areas where most demanders buy commodities and the distribution map of the commodities of major business operators...</li> <li>5. Other important factors...</li> </ol> <p>To define the relevant geographic market from the perspective of supply, usually the following factors shall be considered: the evidence showing the response of business operators in other geographic areas to changes in the price or any other competitive factor of commodities, whether business operators in other geographic areas can supply or distribute relevant commodities immediately and whether it is feasible to do so, including the cost for transferring orders to business operators in other geographic areas, etc.</p>
<p><b>第四章 关于假定垄断者测试分析思路的说明</b></p>	<p><b>Chapter IV Description of the Analysis Approach of the Hypothetical Monopolist Test</b></p>



#### 第十条 假定垄断者测试的基本思路

假定垄断者测试是界定相关市场的一种分析思路,可以帮助解决相关市场界定中可能出现的不确定性,目前为各国和地区制定反垄断指南时普遍采用。依据这种思路,人们可以借助经济学工具分析所获取的相关数据,确定假定垄断者可以将价格维持在高于竞争价格水平的最小商品集合和地域范围,从而界定相关市场。

假定垄断者测试一般先界定相关商品市场。首先从反垄断审查关注的经营者提供的商品(目标商品)开始考虑,假设该经营者是以利润最大化为经营目标的垄断者(假定垄断者),那么要分析的问题是,在其他商品的销售条件保持不变的情况下,假定垄断者能否持久地(一般为1年)小幅(一般为5%—10%)提高目标商品的价格。目标商品涨价会导致需求者转向购买具有紧密替代关系的其他商品,从而引起假定垄断者销售量下降。如果目标商品涨价后,即使假定垄断者销售量下降,但其仍然有利可图,则目标商品就构成相关商品市场。

如果涨价引起需求者转向具有紧密替代关系的其他商品,使假定垄断者的涨价行为无利可图,则需要把该替代商品增加到相关商品市场中,该替代商品与目标商品形成商品集合。接下来分析如果该商品集合涨价,假定垄断者是否仍有利可图。如果答案是肯定的,那么该商品集合就构成相关商品市场;否则还需要继续进行上述分析过程。

随着商品集合越来越大,集合内商品与集合外商品的替代性越来越小,最终会出现某一商品集合,假定垄断者可以通过涨价实现盈利,由此便界定出相关商品市场。

#### Article 10 Basic Method of the Hypothetical Monopolist Test

As an analytical method for defining the relevant market, the hypothetical monopolist test can help solve the uncertainties that may arise from the definition of the relevant market, and at present is being widely adopted by countries and regions in making the anti-monopoly guide. According to this method, people can use the relevant data obtained through analysis by using economic tools to determine the minimum commodity aggregate level and geographic area in which the hypothetical monopolist is able to maintain the price above the competitive price, thereby defining the relevant market.

Usually, the relevant commodity market is firstly defined with the hypothetical monopolist test. Starting with the commodity (target commodity) supplied by the business operator subject to the anti-monopoly examination, it hypothesizes that the business operator is a monopolist aiming at profit maximization (hypothetical monopolist), and then the issue to be analyzed shall be, under the precondition that the sales conditions of other commodities remain unchanged, whether the hypothetical monopolist is able to continuously (normally one year) increase the price of the target commodity by a small extent (normally 5 percent to 10 percent). Rise in price of the target commodity will result in demanders switching to other commodities which have a strong substitution relationship with the target commodity, and consequently lead to the decrease of the sales volume of the hypothetical monopolist. If, after the price of the target commodity increases, the hypothetical monopolist still stands to profit even if the sales volume drops, the target commodity constitutes the relevant commodity market.

If the rise in price results in demanders switching to other commodities which have a strong substitution relationship with the target commodity, and consequently the hypothetical monopolist has no money to make from the price increase, the substitutes shall be added to the relevant commodity market and form a commodity aggregate with the target commodity. Then analysis shall be made on whether the hypothetical monopolist can still make a profit if the price of the commodity has aggregately increased. If the answer is yes, the commodity aggregate constitutes the relevant commodity market, otherwise the aforesaid analysis process shall continue.

With the expansion of the commodity aggregate, the commodities inside and outside the aggregate become less and less substitutable. Eventually, a particular commodity aggregate emerges, in which the hypothetical monopolist can make a profit through a price increase.

<p>界定相关地域市场与界定相关商品市场的思路相同。首先从反垄断审查关注的经营者经营活动的地域(目标地域)开始,要分析的问题是,在其他地域的销售条件不变的情况下,假定垄断者对目标地域内的相关商品进行持久(一般为1年)小幅涨价(一般为5%—10%)是否有利可图。如果答案是肯定的,目标地域就构成相关地域市场;如果其他地域市场的强烈替代使得涨价无利可图,就需要扩大地域范围,直到涨价最终有利可图,该地域就是相关地域市场。</p>	<p>Hence, the relevant product market is defined.</p> <p>The method for defining the relevant geographic market is the same as that for defining the relevant commodity market. Starting with the geographic area (target geographic area) where the business operator subject to the anti-monopoly examination conducts business operations, the issue to be analyzed shall be, under the precondition that the sale conditions in other geographic areas remain unchanged, whether the hypothetical monopolist has a profit to make after continuously (normally one year) increasing the price of the relevant commodity in the target geographic area by a small extent (normally 5 percent to 10 percent). If the answer is yes, the target geographic area constitutes the relevant geographic market. If the strong substitutability of other geographic markets makes the price increase profitless, the geographic scope shall be expanded until the price increase eventually brings profits, and this is then defined as the relevant geographic market.</p>
<p><b>第十一条 假定垄断者测试的几个实际问题</b></p> <p>原则上,在使用假定垄断者测试界定相关市场时,选取的基准价格应为充分竞争的当前市场价格。但在滥用市场支配地位、共谋行为和已经存在共谋行为的经营者集中案件中,当前价格明显偏离竞争价格,选择当前价格作为基准价格会使相关市场界定的结果不合理。在此情况下,应该对当前价格进行调整,使用更具有竞争性的价格。</p> <p>此外,一般情况下,价格上涨幅度为5%—10%,但在执法实践中,可以根据案件涉及行业的不同情况,对价格小幅上涨的幅度进行分析确定。</p> <p>在经营者小幅提价时,并不是所有需求者(或地域)的替代反应都是相同的。在替代反应不同的情况下,可以对不同需求者群体(或地域)进行不同幅度的测试。此时,相关市场界定还需要考虑需求者群体和特定地域的情况。</p>	<p><b>Article 11 Several Practical Questions about the Hypothetical Monopolist Test</b></p> <p>In principle, when defining the relevant market with the hypothetical monopolist test, the benchmark price selected shall be the current market price in full competition. However, in cases of concentration of business operators who abuse their dominant market positions, try to practice collusion or have already practiced collusion, the current price may seriously deviate from the competitive price, and as a result, selecting the current price as the benchmark price may lead to an unreasonable definition of the relevant market. Under such circumstances, the current price shall be adjusted to a more competitive one.</p> <p>In addition, usually, the price increase is within a range of 5 percent to 10 percent, but in the practice of law enforcement, the range can be determined through analysis in light of the different circumstances of the different industries involved in individual cases.</p> <p>When business operators increase price to a small extent, not all demanders (or geographic areas) respond to substitution in the same way. When they have different responses, tests at different levels can be made on different demand groups (or geographic areas). In this case, the circumstances of demand groups and specific geographic areas shall be taken into consideration when defining the relevant market.</p>

**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\***  
**最高人民法院关于审理因垄断行为引发的民事纠纷案件适用法律若干问题的规定 [2012]**

(Promulgated by the Judicial Committee of the Supreme People’s Court of China on May 3, 2012, Judicial  
Interpretation [2012] No.5)

(2012年5月3日最高人民法院审判委员会第1539次会议讨论通过，法释〔2012〕5号)

<p>为正确审理因垄断行为引发的民事纠纷案件，制止垄断行为，保护和促进市场公平竞争，维护消费者利益和社会公共利益，根据《中华人民共和国反垄断法》、《中华人民共和国侵权责任法》、《中华人民共和国合同法》和《中华人民共和国民事诉讼法》等法律的相关规定，制定本规定。</p>	<p>For the purpose of properly hearing civil cases caused by monopolistic conducts, prohibiting monopolistic behaviors, protecting and promoting fair competition in the market, and protecting interests of consumers and the public, the Provisions herein are formulated in accordance with the Anti-Monopoly Law of the PRC, the Tort Liability Law of the PRC, the Contract Law of the PRC, the Civil Procedure Law of the PRC and other related laws.</p>
<p><b>第一条</b></p> <p>本规定所称因垄断行为引发的民事纠纷案件（以下简称垄断民事纠纷案件），是指因垄断行为受到损失以及因合同内容、行业协会的章程等违反反垄断法而发生争议的自然人、法人或者其他组织，向人民法院提起的民事诉讼案件。</p>	<p><b>Article 1</b></p> <p>The civil cases caused by monopolistic conducts mentioned in the Provisions (hereinafter referred to as civil dispute cases on monopoly), refer to civil cases filed before the People’s Court by any natural person, legal entities or other organizations that suffer losses because of monopolistic conducts or have disputes because the contents of contracts and articles of trade associations, etc., allegedly violate Anti-Monopoly Law.</p>
<p><b>第二条</b></p> <p>原告直接向人民法院提起民事诉讼，或者在反垄断执法机构认定构成垄断行为的处理决定发生法律效力后向人民法院提起民事诉讼，并符合法律规定的其他受理条件的，人民法院应当受理。</p>	<p><b>Article 2</b></p> <p>The People’s Court should accept and hear the case when the plaintiff directly brings a civil action before the People’s Court, or brings a civil action before the People’s Court after the determination of the Anti-Monopoly Law Enforcement Authority on the identification of monopolistic conducts becomes legally effective, and other acceptance conditions specified by law are all met.</p>
<p><b>第三条</b></p> <p>第一审垄断民事纠纷案件，由省、</p>	<p><b>Article 3</b></p> <p>The first instance of civil dispute cases on monopoly belongs to the</p>

\* The English version is available at ‘Competition Policy International’  
<[www.competitionpolicyinternational.com/assets/Free/SPCAMLJudicial-Interpretationeng.pdf](http://www.competitionpolicyinternational.com/assets/Free/SPCAMLJudicial-Interpretationeng.pdf)> accessed 30 January 2017.

<p>自治区、直辖市人民政府所在地的市、计划单列市中级人民法院以及最高人民法院指定的中级人民法院管辖。</p> <p>经最高人民法院批准，基层人民法院可以管辖第一审垄断民事纠纷案件。</p>	<p>jurisdiction of the Intermediate People’s Courts of provincial capital cities, autonomous region capital cities, municipalities directly under the Central Government and municipalities with independent planning status, and Intermediate People’s Courts designated by the Supreme People’s Court.</p> <p>With approval of the Supreme People’s Court, Primary People’s Courts may have jurisdiction over the first instance of civil dispute cases on monopoly.</p>
<p>第七条</p> <p>被诉垄断行为属于反垄断法第十三条第一款第（一）项至第（五）项规定的垄断协议的，被告应对该协议不具有排除、限制竞争的效果承担举证责任。</p>	<p><b>Article 7</b></p> <p>The plaintiff shall bear the burden of proof on the alleged fact that the agreement does not bring about the effect of eliminating and restricting competition, provided the alleged monopolistic conduct relates to monopoly agreements specified in Article 13, Paragraph 1, Sections 1 to 5 of the Anti-Monopoly Law.</p>
<p>第八条</p> <p>被诉垄断行为属于反垄断法第十七条第一款规定的滥用市场支配地位的，原告应当对被告在相关市场内具有支配地位和其滥用市场支配地位承担举证责任。</p> <p>被告以其行为具有正当性为由进行抗辩的，应当承担举证责任。</p>	<p><b>Article 8</b></p> <p>If the alleged monopolistic conduct relates to the abuse of market dominant position specified by Article 17, Paragraph 1 of the Anti-Monopoly Law, the plaintiff shall bear the burden of proof on the dominant position of the defendant in the relevant market, and their abuse of dominant market position.</p> <p>The defendant shall bear the burden of proof if it offers the defence that the conduct is justifiable.</p>
<p>第九条</p> <p>被诉垄断行为属于公用企业...滥用市场支配地位的，人民法院可以根据市场结构和竞争状况的具体情况，认定被告在相关市场内具有支配地位，但有相反证据足以推翻的除外。</p>	<p><b>Article 9</b></p> <p>Provided the alleged monopolistic conduct is the abuse of dominant market position attributed to a public enterprise or other undertaking legally possessing the dominant position, the People’s Court may on the basis of market structure and competition conditions identify that the defendant possesses dominant position in the relevant market, unless proven otherwise by countervailing evidences.</p>
<p>第十条</p> <p>原告可以以被告对外发布的信息作为证明其具有市场支配地位的证据。被告对外发布的信息能够证明其在相关市场内具有支配地位的，人民法院可以据此作出认定，但有相反证据足以推翻的除外。</p>	<p><b>Article 10</b></p> <p>The plaintiff shall take the information publicly released by the defendant as evidence of its occupation of dominant market position. The People’s Court may make affirmation on these grounds if the information publicly released by the defendant can prove its dominant market position in the relevant market, unless proven otherwise by countervailing evidences.</p>

<p>第十二条</p> <p>当事人可以向人民法院申请一至二名具有相应专门知识的人员出庭，就案件的专门性问题进行说明。</p>	<p><b>Article 12</b></p> <p>Parties shall apply to the People’s Court to have one or two specialists with relevant knowledge appear in court to provide explanations on specialty issues about the case.</p>
<p>第十三条</p> <p>当事人可以向人民法院申请委托专业机构或者专业人员就案件的专门性问题作出市场调查或者经济分析报告。经人民法院同意，双方当事人可以协商确定专业机构或者专业人员；协商不成的，由人民法院指定……</p>	<p><b>Article 13</b></p> <p>Parties shall apply to the People’s Court to entrust independent specialist agencies or specialized persons to conduct market research or produce an economic analysis report on specific issues of the cases. With permission of the People’s Court, the parties shall make an agreement to choose specialist agencies or specialized persons. If this agreement cannot be achieved, the People’s Court shall appoint the specialist agencies or specialized persons…</p>
<p>第十四条</p> <p>被告实施垄断行为，给原告造成损失的，根据原告的诉讼请求和查明的事实，人民法院可以依法判令被告承担停止侵害、赔偿损失等民事责任。</p> <p>根据原告的请求，人民法院可以将原告因调查、制止垄断行为所支付的合理开支计入损失赔偿范围。</p>	<p><b>Article 14</b></p> <p>Based on the claims of the plaintiff and the proven facts, the People’s Court shall order the defendant to cease the infringing action, to pay damages, or to undertake other civil responsibilities, provided that the monopolistic conduct of the defendant existed and has caused losses to the plaintiff.</p> <p>Upon the request of the plaintiff, the People’s Court may include reasonable expenses paid by the plaintiff for investigation and prohibition of monopolistic conduct, in the compensation for damages.</p>

# Civil Procedure Law of the People's Republic of China 2012\*

## 中华人民共和国民事诉讼法 2012

(Adopted at the Fourth Session of the Seventh National People's Congress on April 9, 1991; amended for the first time in accordance with the Decision on Revision of the Civil Procedure Law of China made at the Thirtieth Meeting of the Standing Committee of the Ninth National People's Congress on October 28, 2007; amended for the second time in accordance with the Decision on Revision of the Civil Procedure Law of China made at the Twenty-Eighth Meeting of the Standing Committee of the Tenth National People's Congress on August 31, 2012)

(1991年4月9日第七届全国人民代表大会第四次会议通过根据2007年10月28日第十届全国人民代表大会常务委员会第三十次会议《关于修改〈中华人民共和国民事诉讼法〉的决定》第一次修正根据2012年8月31日第十一届全国人民代表大会常务委员会第二十八次会议《关于修改〈中华人民共和国民事诉讼法〉的决定》第二次修正)

第十二章 第一审普通程序	<b>Chapter XII Ordinary Procedure of First Instance</b>
第一节 起诉和受理	<i>Section 1 Bringing a Lawsuit and Entertaining a Case</i>
第一百一十九条 起诉必须符合下列条件： （一）原告是与本案有直接利害关系的公民、法人和其他组织； （二）有明确的被告； （三）有具体的诉讼请求和事实、理由； （四）属于人民法院受理民事诉讼的范围和受诉人民法院管辖。	<b>Article 119</b>  The following conditions must be met when a lawsuit is brought:  (1) the plaintiff must be a citizen, legal person or any other organization that has a direct interest in the case; (2) there must be a definite defendant; (3) there must be specific claim or claims, facts, and cause or causes for the suit; and (4) the suit must be within the scope of acceptance for civil actions by the People's Courts and under the jurisdiction of the People's Court where the suit is entertained.

\* The English version is available at 'The Official Website of the Chinese Government' <[www.china.org.cn/english/government/207339.htm](http://www.china.org.cn/english/government/207339.htm)> accessed 30 January 2017.

# Companies Law of the People's Republic of China 2013\*

## 中华人民共和国公司法 2013

(Adopted at the Fifth Meeting of the Standing Committee of the Eighth National People's Congress on December 29, 1993; amended for the first time in accordance with the Decision on Revision of the Company Law of China made at the Thirteenth Meeting of the Standing Committee of the Ninth National People's Congress on December 25, 1999; amended for the second time in accordance with the Decision on Revision of the Company Law of China made at the Eleventh Meeting of the Standing Committee of the Tenth National People's Congress on August 28, 2004; and revised at the Eighteenth Meeting of the Standing Committee of the Tenth National People's Congress on October 27, 2005; revised for the third time in accordance with the Decision on Amending Seven Laws Including the Marine Environment Protection Law of China on December 28, 2013 at the Sixth Session of the Standing Committee of the 12th National People's Congress on December 28, 2013)

(1993年12月29日第八届全国人民代表大会常务委员会第五次会议通过 根据1999年12月25日第九届全国人民代表大会常务委员会第十三次会议《关于修改〈中华人民共和国公司法〉的决定》第一次修正 根据2004年8月28日第十届全国人民代表大会常务委员会第十一次会议《关于修改〈中华人民共和国公司法〉的决定》第二次修正 2005年10月27日第十届全国人民代表大会常务委员会第十八次会议修订 根据2013年12月28日第十二届全国人民代表大会常务委员会第六次会议《关于修改〈中华人民共和国海洋环境保护法〉等七部法律的决定》第三次修正)

<b>第一章 总则</b>	<b>Chapter I General Provisions</b>
<p>第五条</p> <p>公司从事经营活动，必须遵守法律、行政法规，遵守社会公德、商业道德，诚实守信，接受政府和社会公众的监督，承担社会责任。</p> <p>公司的合法权益受法律保护，不受侵犯。</p>	<p><b>Article 5</b></p> <p>A company shall, with all its legal person assets, operate independently and be responsible for its own profits and losses according to law. A company shall, under the macro-adjustment and control of the State, organize its production and operation independently in accordance with market demands for the purpose of raising economic benefits and labour productivity and maintaining and increasing the value of its assets.</p> <p>The legitimate rights and interests of companies shall be protected by law, and shall be inviolable.</p>

\* The English version is available at 'The Official Website of the Chinese Government' <[www.china.org.cn/english/government/207344.htm](http://www.china.org.cn/english/government/207344.htm)> accessed 30 January 2017.

# Administrative Procedure Law of the People's Republic of China 2015\*

## 中华人民共和国行政诉讼法 2015

(Adopted at the Second Meeting of the Standing Committee of the Seventh National People's Congress of China on April 4, 1989, promulgated by Order No. 16 of the President of China on April 4, 1989, and amended in accordance with the Decision of the Standing Committee of the National People's Congress on Amending the Administrative Procedure Law of the People's Republic of China adopted on November 1, 2014)  
(1989年4月4日第七届全国人民代表大会第二次会议通过 1989年4月4日中华人民共和国主席令第十六号公布 根据2014年11月1日《全国人民代表大会常务委员会关于修改〈中华人民共和国行政诉讼法〉的决定》修订)

<b>第一章 总则</b>	<b>Chapter I General Provisions</b>
<b>第二条</b> 公民、法人或者其他组织认为行政机关和行政机关工作人员的具体行政行为侵犯其合法权益，有权依照本法向人民法院提起诉讼……	<b>Article 2</b> If a citizen, a legal person or any other organization considers that his or its lawful rights and interests have been infringed upon by a specific administrative act of an administrative organ or its personnel, he or it shall have the right to bring a suit before a People's Court in accordance with this Law....
<b>第三条</b> 人民法院应当保障公民、法人和其他组织的起诉权利，对应当受理的行政案件依法受理。 行政机关及其工作人员不得干预、阻碍人民法院受理行政案件。	<b>Article 3</b> The People's Courts shall guarantee the rights of citizens, legal persons and other organizations to file a lawsuit and shall accept an administrative case that shall be accepted in accordance with the law. Administrative organs or its personnel, it or he shall not interfere with or impede the People's Court's acceptance of administrative cases.
<b>第四条</b> 人民法院依法对行政案件独立行使审判权，不受行政机关、社会团体和个人的干涉。 人民法院设行政审判庭，审理行政案件。	<b>Article 4</b> The People's Courts shall, in accordance with the law, exercise judicial power independently with respect to administrative cases, and shall not be subject to interference by any administrative organ, public organization or individual. The People's Courts shall set up administrative divisions for the handling of administrative cases.
<b>第十一条</b> 人民检察院有权对行政诉讼实行法	<b>Article 11</b> The People's Procuratorate shall have the right to exercise legal

\* The English version is available at 'The Official Website of the Chinese Government'  
<[www.china.org.cn/government/laws/2007-04/16/content\\_1207336.htm](http://www.china.org.cn/government/laws/2007-04/16/content_1207336.htm)> accessed 30 January 2017.



律监督。	supervision over administrative proceedings.
<b>第二章 受案范围</b>	<b>Chapter II Scope of Accepting Cases</b>
<p>第十二条</p> <p>人民法院受理公民、法人和其他组织对下列具体行政行为不服提起的诉讼：</p> <p>（一）对行政拘留、暂扣或者吊销许可证和执照、责令停产停业、没收违法所得、没收非法财物、罚款、警告等行政处罚不服的……</p> <p>（三）申请行政许可，行政机关拒绝或者在法定期限内不予答复，或者对行政机关作出的有关行政许可的其他决定不服的……</p> <p>（七）认为行政机关侵犯其经营自主权的……</p> <p>（八）认为行政机关滥用行政权力排除或者限制竞争的……</p> <p>（十一）认为行政机关不依法履行、未按照约定履行……</p> <p>（十二）认为行政机关侵犯其他人身权、财产权等合法权益的。</p> <p>除前款规定外，人民法院受理法律、法规规定可以提起诉讼的其他行政案件。</p>	<p><b>Article 12</b></p> <p>The People's Courts shall accept suits brought by citizens, legal persons or other organizations against any of the following specific administrative acts:</p> <p>(1) an administrative sanction, such as detention, temporary halting or rescission of a license or permit, order to suspend production or business, confiscation of property, fine, or warning which one refuses to accept...</p> <p>(3) refusal by an administrative organ to issue a permit or license, or its failure to respond to the application, which one refuses to accept...</p> <p>(7) infringement upon one's managerial decision-making powers, which is considered to have been perpetrated by an administrative organ...</p> <p>(8) cases where an administrative organ is considered to abuse their administrative powers to exclude or limit competition...</p> <p>(11) cases where an administrative organ is considered to have illegally demanded the performance of duties, or fails to perform in accordance with the terms of the agreement..., and</p> <p>(12) cases where an administrative organ is considered to have infringed upon other rights of the person or of property.</p> <p>Apart from the provisions set forth in the preceding paragraphs, the People's Courts shall accept other administrative suits which may be brought in accordance with the provisions of relevant laws and regulations.</p>
<p>第十三条</p> <p>人民法院不受理公民、法人或者其他组织对下列事项提起的诉讼：</p> <p>...（二）行政法规、规章或者行政机关制定、发布的具有普遍约束力的决定、命令...</p> <p>（四）法律规定由行政机关最终裁决的行政行为。</p>	<p><b>Article 13</b></p> <p>The People's Courts shall not accept suits brought by citizens, legal persons or other organizations against any of the following matters:</p> <p>... (2) administrative rules and regulations, or decisions and orders with general binding force formulated and announced by administrative organs...</p> <p>(4) administrative acts that shall, as provided for by law, be finally decided by an administrative organ.</p>
<b>第五章 证据</b>	<b>Chapter V Evidence</b>
第三十二条	<b>Article 32</b>

<p>被告对作出的具体行政行为负有举证责任,应当提供作出该具体行政行为的证据和所依据的规范性文件.....</p>	<p>The defendant shall have the burden of proof for the specific administrative act he has undertaken and shall provide the evidence and regulatory documents in accordance with which the act has been undertaken...</p>
<p><b>第九章 侵权赔偿责任</b></p>	<p><b>Chapter IX Liability for Compensation of Infringement of Rights</b></p>
<p>第六十七条  公民、法人或者其他组织的合法权益受到行政机关或者行政机关工作人员作出的具体行政行为侵犯造成损害的,有权请求赔偿.....</p>	<p><b>Article 67</b>  A citizen, a legal person or any other organization who suffers damage because of the infringement upon his or its lawful rights and interests by a specific administrative act of an administrative organ or the personnel of an administrative organ, shall have the right to claim compensation...</p>

## **Appendix 2**

### **Documents for Interviews and Surveys**



**PARTICIPANT CONSENT FORM**

**Title of the Project:** THREATS TO PRIVATELY-OWNED SMALL AND MEDIUM-SIZED ENTERPRISES (SMEs) IN CHINA FROM THE STATE-OWNED ENTERPRISE POLICY AND THE STATE’S INTEREST: TOWARDS DEVELOPING AN EFFECTIVE LEGAL FRAMEWORK FOR THE PROTECTION OF CHINESE PRIVATELY-OWNED SMEs

**Name and Contact Address of the Researcher:** Ms Jing Wang – School of Law, Bangor University, Bangor, Gwynedd, LL57 2DG (United Kingdom)

**Thank you for agreeing to participate in this interview. Please read the information in this form carefully and if you are willing to participate in this study tick  boxes after each statement and sign the declaration at the end. If you do not understand anything and would like more information, please feel free to ask me.**

- 1. I freely and voluntarily wish to be participant in the research project on the above-mentioned topic, which is to be conducted by Jing Wang, a Ph.D. Candidate, School of Law, Bangor University, United Kingdom.
  - 2. The researcher has assured me that my responses will be treated and kept strictly confidential and I can freely withdraw at any time during the interview or survey session if I feel unable or unwilling to continue. That is, my participation in this study is completely voluntary without negative consequences. In addition, should I not wish to answer any particular question(s), I am free to decline.
  - 3. I have had the research satisfactorily explained to me in verbal or written form by the researcher.
  - 4. Do you agree for me to record the interview by audiotape? The recorded data will be used solely for research purposes. Yes  No
  - 5. (a) I understand and give permission that all information about my responses and me will be treated in strict confidence; and that I will not be named in any written work arising from this study. My name will not be linked with the research materials, and I will not be identified or identifiable in any report subsequently produced by the researcher.
- Or
- (b) I understand and give permission that all information about my responses and me may be named in any written work arising from this study; and that my name may be linked with the research materials, and that I may be identified or identifiable in any report subsequently produced by the researcher.
- 6. I therefore freely give my consent to participation in this research study and I can have a copy of this form for my own information and record.

**Name of Participant:** \_\_\_\_\_ **Signature:** \_\_\_\_\_  
**Date:** \_\_\_\_\_

## **Declaration on Ethical Issues Raised in the Research Project**

**Ms Jing Wang (Ph.D. Candidate) under the Supervision of Professor Dermot Cahill at the School of Law  
in the College of Business, Law, Education and Social Sciences, Bangor University**

**Title of the Project:** Threats to Privately-Owned Small and Medium-Sized Enterprises (SMEs) in China from the State-Owned Enterprise Policy and the State's Interest: Towards Developing an Effective Legal Framework for the Protection of Chinese Privately-Owned SMEs

**Purpose of the Research:** This research is designed to assess what key elements would be required in order for China to develop an appropriate legal framework to enable, which would be based on the achievement of fair competition and the advancement of the "public interest" at the same time, thereby preventing SOEs and several administrative agencies from abusing their specific or exclusive rights, to the detriment of China's SME sector.

**Ethical Compliance:** As volunteers, all participants will be given clarification of the purpose and use of the research in verbal or written form before taking part in an interview or a survey. All information that participants provide, including their personal data, will remain confidential. There are no ethical issues in the research project mentioned above that do not follow the guidelines of the 'Universities Research Ethics Policy'. The researcher will strictly comply with the ethical research requirements of Bangor University's Ethics Policy Framework (2008) and the ESRC Framework for Research Ethics 2010 (revised Sept 2012).

Jing Wang



Ph.D. Candidate  
School of Law  
Bangor University

### **Appendix 3**

#### **Perspectives on *the Anti-Monopoly Law of China 2007* and the State's Industrial Policy**

**(From Interviews and Conferences)\***

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\* The interviews and surveys involved in Appendices 3-6 were conducted in Chinese, and the answers were translated into English by the author.

## Part I Summary of Interviews with Six Chinese Scholars on *the Anti-Monopoly Law of China 2007*\*

### ☞ *List of Scholars (Interviewees):*

Because these six Chinese scholars on *the Anti-Monopoly Law*, who consented to being interviewed, did not permit the researcher to use their names in any written work arising from the study, numbers have been used instead of names in the appendices, and their names have not been mentioned in the rest of this thesis.

#### **No.1 Professor of Law at a Chinese academy institution**

A leading academic expert on *the Anti-Monopoly Law of China*

Interviewed in Beijing, China, 2012

#### **No.2 Professor of Law at a top university in China**

A leading academic expert on *the Anti-Monopoly Law of China*

Interviewed in Beijing, China, 2012

#### **No.3 Professor of Law at a top university in China**

An academic expert on *the Anti-Monopoly Law of China*

Interviewed in Beijing, China, 2012

#### **No.4 Professor of Law at a university in China**

An academic expert on *the Anti-Monopoly Law of China*

Interviewed in Beijing, China, 2012

#### **No.5 Professor of Law at a top university in China**

An academic expert on *the Anti-Monopoly Law of China*

Interviewed in Beijing, China, 2012

#### **No.6 Professor of Law at a university in China**

An academic expert on *the Anti-Monopoly Law of China*

Interviewed in Shanghai, China, 2012

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\* These interviews focused on four questions in *the Anti-Monopoly Law of China*: (a) the position of the “public interest” in *the Chinese Anti-Monopoly Law 2007*; (b) administrative intervention in China; (c) the relationship between the Chinese Anti-Monopoly Law and the State’s industrial policy; (d) the practical functions of the Chinese anti-monopoly enforcement agencies. However, because these Chinese scholars specialize in different research areas, the researcher did not request that they answer all designed questions.

☞ **Brief Summary of Scholars' Opinions:**

**1. Is the Role of the “Public Interest” in *the Chinese Anti-Monopoly Law of China 2007 (the Chinese Anti-Monopoly Law 2007)* a Significant or Minor Element?**

Scholars	Answers
No.1	<ul style="list-style-type: none"> <li>➤ The “public interest” is not the only goal in <i>the Chinese Anti-Monopoly Law 2007</i>. The importance of “consumer welfare” should be emphasised all the time in this Law.</li> </ul>
No.2	<ul style="list-style-type: none"> <li>➤ The “public interest” is a significant element in <i>the Chinese Anti-Monopoly Law 2007</i>. However, it is difficult to achieve without an exact definition in <i>the Chinese Anti-Monopoly Law</i>.</li> <li>➤ Interests of different groups collide in China negating the “public interest”.</li> <li>➤ The “public interest” can be understood as follows: (a) the State should ensure all citizens obtain their legitimate interests equitably; (b) all citizens in China should be legally entitled to their interests or benefits after they have been obtained or received.</li> </ul>
No.3	<ul style="list-style-type: none"> <li>➤ The “public interest” is the ultimate goal and a significant element of <i>the Chinese Anti-Monopoly Law 2007</i>. But, due to the Chinese reality, it is difficult to achieve.</li> </ul>
No.4	<ul style="list-style-type: none"> <li>➤ The “public interest”, a significant element in <i>the Chinese Anti-Monopoly Law 2007</i>, is the object and purpose of this Law. However, it is difficult to achieve.</li> <li>➤ Balancing all interests in the Chinese market may be a modality to achieve the “public interest”.</li> </ul>
No.6	<ul style="list-style-type: none"> <li>➤ The “public interest” is a significant element in <i>the Chinese Anti-Monopoly Law 2007</i>. However, at present, because of the lack of an exact definition in the 2007 Act, it should be replaced by “consumer welfare”.</li> </ul>

**2. What is the Practical Effect of *the Chinese Anti-Monopoly Law 2007* on Administrative Intervention in China? Do You Think some of the effects are Inappropriate for the State’s Economic Development?**

Scholars	Answers
No.1	<ul style="list-style-type: none"> <li>➤ Inappropriate administrative intervention exists in China.</li> <li>➤ Because the implementation time of <i>the Chinese Anti-Monopoly Law 2007</i> is a bit short, staff members working in the Chinese anti-monopoly enforcement agencies and relevant scholars encounter problems when regulating administrative intervention.</li> </ul>
No.2	<ul style="list-style-type: none"> <li>➤ <i>The Chinese Anti-Monopoly Law 2007</i> has been challenged by inappropriate administrative intervention because a fair and competitive market model has not yet been implemented in China.</li> <li>➤ The economic analysis approach should be accepted to restrict administrative rights and powers in the Chinese market.</li> </ul>
No.3	<ul style="list-style-type: none"> <li>➤ <i>The Chinese Anti-Monopoly Law 2007</i> may reduce the frequency of inappropriate administrative intervention in China.</li> <li>➤ Due to historical inertia, China has been accustomed to administrative interventions, which often go against market mechanisms. And governments may</li> </ul>



	assume their interventions are lawful. Thus, in China, administrative interventions obstruct the implementation of <i>the Chinese Anti-Monopoly Law 2007</i> .
No.4	➤ <i>The Chinese Anti-Monopoly Law 2007</i> can reduce rather than eliminate inappropriate administrative interventions in the Chinese transition era.

3. **What is the Role of the State's Industrial Policy in the Process of the Chinese Economic Development? Can the State's Industrial Policy and *the Chinese Anti-Monopoly Law 2007* Successfully Work in Harmony?**

Scholars	Answers
No.1	<ul style="list-style-type: none"> <li>➤ At present, the State's industrial policy is important to economic development in China.</li> <li>➤ The aim of Article 7 of <i>the Chinese Anti-Monopoly Law 2007</i> is to ensure that the State's industrial policy and <i>the Anti-Monopoly Law</i> successfully work in harmony. However, in reality, they are in tension with each other.</li> <li>➤ Aiming to adjust the current situation, I [the professor] advised granting different kinds of policy-making powers to different Chinese national ministries, as well as to promoting coordination of Chinese policy-making ministries.</li> </ul>
No.2	<ul style="list-style-type: none"> <li>➤ The relationship between the State's industrial policy and <i>the Anti-Monopoly Law</i> is not promising. Although sometimes they work together to promote China's economic development, the State's industrial policy often occupies a dominant position.</li> </ul>
No.3	<ul style="list-style-type: none"> <li>➤ The State's industrial policy is important in the Chinese process of industrialisation.</li> <li>➤ One of the initial goals of <i>the Chinese Anti-Monopoly Law 2007</i> is to make the State's industrial policy and <i>the Anti-Monopoly Law</i> work harmoniously.</li> </ul>
No.4	<ul style="list-style-type: none"> <li>➤ The State's industrial policy is absolutely crucial to the Chinese economic development.</li> <li>➤ It is also vital to maintain a balance between the State's industrial policy and <i>the Chinese Anti-Monopoly Law 2007</i>.</li> </ul>

4. **What are the Chinese Anti-Monopoly Enforcement Agencies' Strong and Weak Points? What Reforms Need to Be Made to the Chinese Anti-Monopoly Enforcement Agencies?**

Scholars	Answers
No.1	<ul style="list-style-type: none"> <li>➤ In general, different kinds of anti-monopoly cases belong to different anti-monopoly enforcement agencies in China. However, in some situations, an anti-monopoly case could belong to more than one agency. Under such a situation, multi-agency competition may provide a better investigation, as well as bringing a weakness: wasting enforcement resources.</li> <li>➤ In order to ensure the effective implementation of <i>the Chinese Anti-Monopoly Law 2007</i>, establishing an independent anti-monopoly enforcement agency in China is necessary.</li> </ul>
No.2	<ul style="list-style-type: none"> <li>➤ Without an independent anti-monopoly enforcement agency in today's China, anti-monopoly investigations have to be carried out separately, thus wasting enforcement resources. Hence, it is important and necessary to establish an</li> </ul>

	<p>independent anti-monopoly enforcement agency.</p> <p>➤ In China, anti-monopoly investigations cannot be heard in public. This requires a change.</p>
No.3	<p>➤ Because the current multi-agency implementation working of <i>the Chinese Anti-Monopoly Law 2007</i> wastes enforcement resources, it is necessary to establish an independent anti-monopoly enforcement agency in the future.</p> <p>➤ Experts on <i>the Anti-Monopoly Law</i> should take part in anti-monopoly investigations as early as possible.</p>
No.5	<p>➤ In China, anti-monopoly investigations cannot be heard in public. This requires a change.</p> <p>➤ Both scholars and economists on <i>the Anti-Monopoly Law</i> should take part in anti-monopoly investigations as early as possible.</p>

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## Part II Perspectives of Officers Working on the Implementation of *the Anti-Monopoly Law of China 2007*\*

☞ **Mrs. Qing Li**

Deputy Director General, Price Supervision and Anti-Monopoly Bureau, National Development and Reform Commission (NDRC) of China

Asia Competition Association Beijing Conference, Beijing, China, 21 October 2012

### 1. Positive Changes in the Implementation of *the Chinese Anti-Monopoly Law 2007* since 2011

- The former ‘Price Supervision Department, NDRC’ was renamed as the ‘Price Supervision and Anti-Monopoly Bureau, NDRC’ in July 2011 to enhance Chinese anti-monopoly investigations.
- In order to strengthen anti-price monopoly enforcement, the Bureau added three institutions in 2011: the ‘First Division of Anti-Monopoly Investigation’, the ‘Second Division of Anti-Monopoly Investigation’ and the ‘Division of Competition Policy and International Cooperation’. The ‘Division of Competition Policy and International Cooperation’ focuses on administrative monopoly and industrial policy coordination problems in China.

### 2. Persistent Problems in Chinese Anti-Monopoly Implementation

- *The Chinese Anti-Monopoly Law 2007* grants large discretionary powers to the anti-monopoly enforcement agencies in deciding what constitutes monopoly agreements in China. However, because the definition of relevant market in China is a controversial issue, it is very difficult to make correct judgments on monopoly agreements for officers who work in the ‘Price Supervision and Anti-Monopoly Bureau, NDRC’.

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\* The researcher did not get permission to interview officers who work in the Chinese Anti-Monopoly Enforcement Agencies. All attitudes were received from speeches of officers at two international conferences on *the Chinese Anti-Monopoly Law*, namely Asia Competition Association Beijing Conference (21 October 2012) and the International Seminar on Assessing Economic and Legal Arguments in Antitrust Cases (9 November 2012).

- Chapter 5 of *the Chinese Anti-Monopoly Law 2007* tackles administrative monopoly. However, because of SOEs' privileged identities, administrative monopolies continue.

☞ **Mr. Ming Shang**

Director General, Anti-Monopoly Bureau, Ministry of Commerce (MOFCOM) of China  
Asia Competition Association Beijing Conference, Beijing, China, 21 October 2012

**1. Review of Merger Controls in China between 2008 and 2012**

- Between August 2008 and June 2012, the number of “concentration declarations” in China reached 518, of which 464 cases were concluded. Of those 464 cases, the MOFCOM unconditionally approved 449 cases, conditionally approved 14 cases, and only prohibited one case. Between July 2012 and September 2012, an additional 10 cases were concluded: one conditional approval case and nine unconditional approval cases.
- During the first half of 2012, the number of “concentration declarations” in China was 83. 36 of those cases involved State-owned enterprises.

☞ **Mr. Li Zhu**

Judge, Intellectual Property Tribunal of the Supreme People's Court of China  
Asia Competition Association Beijing Conference, Beijing, China, 21 October 2012

**1. Problems in Private Enforcement of *the Chinese Anti-Monopoly Law 2007***

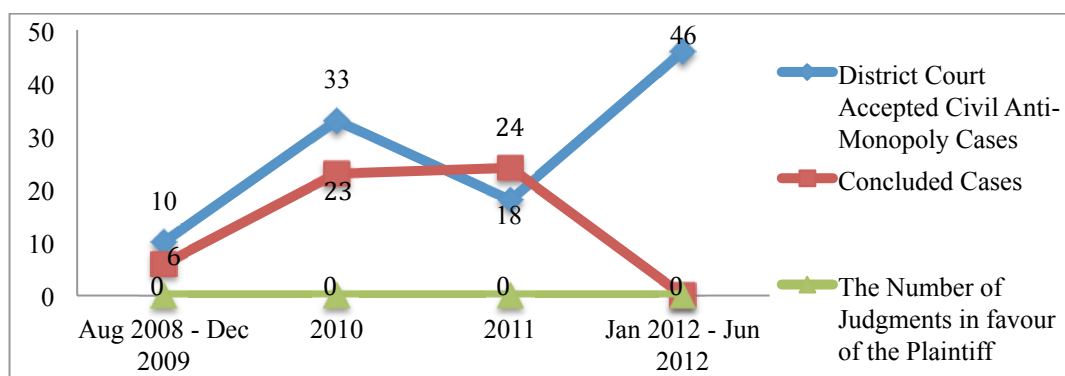
- Private Enforcement of *the Chinese Anti-Monopoly Law 2007* may be abused by SMEs as a way to challenge State-owned enterprises and disturb the market order in China.
- It is difficult for plaintiffs to obtain satisfied compensation in China via anti-monopoly civil procedure. First, the Chinese anti-monopoly civil procedure requires the actual losses caused by monopolistic behaviour. Second, until June 2012, there had been no judgments in favour of the plaintiff among anti-monopoly enforcement cases.
- To date, anti-monopoly civil procedure in China is simply a basic system. Problems which have been solved have been fewer than those left with unsolved issues.

☞ **Mr. Kesheng Jin**

Vice President, Intellectual Property Tribunal of the Supreme People's Court of China  
International Seminar on Assessing Economic and Legal Arguments in Antitrust Cases, Shanghai, China,  
9 November 2012

**1. The Tendency (Strong and Weak Points) of Civil Anti-Monopoly Cases in China**

- Since 2008, the number of civil anti-monopoly cases has ebbed and flowed (see table below). In the first half of 2012, the number of civil anti-monopoly cases in China showed a rapid growth.



Source: 'Results of Antimonopoly Civil Procedure of China'; table devised by the author.

### Part III Perspectives of an Officer Working on the State's Industrial Policy towards SMEs

☞ **Dr. Huiyong Shang**

Policy Planning Office, China Centre for Promotion of SME Development, Ministry of Industry and Information Technology of China

Interviewed in Beijing, China, 2012

#### 1. Functions of Privately-Owned Enterprises in the Chinese Traditional State-Controlled Industries

- China's on-going economic slowdown shows that State-owned assets find it difficult to maintain the State's economic development as before. This should be the right time to inject "new life" into the State's economy. Thus, encouraging private capital to participate in State-owned enterprises or sectors has become a popular approach in recent years.
- However, this is not a piece of good news for domestic privately-owned enterprises or private capital.

#### 2. Perspectives on the State's Industrial Policy

- The State's industrial policy occupies a dominant position in China.
- The State's industrial policy often has strong purposes without necessary restrictions, because there is no policy evaluation mechanism in China. Therefore, some administrative officials may obtain political gains by means of releasing new policies without considering the rules of the market and the actual effects of those policies.

#### 3. Changes of Salary of Employees Working in Privately-Owned SMEs in China

- From 2010 onwards, SMEs have provided nearly 80 percent of job opportunities in China. The wage growth of SME workers is significantly faster than that of SOE employees.
- However, the total income of privately-owned SMEs' employees only accounts for half of all Chinese industrial employees' incomes.

## **Appendix 4**

### **Perspectives on Administrative Mergers in the Chinese Steel Industry (From an Interview)**

☞ **Officical No.7\***

Senior Official, Kun Steel Holding (SOE), Kunming, Yunnan Province, China

Telephone Interview in Hebei Province, China, 2012

**1. Perspectives on Administrative Mergers which have Occurred in Kun Steel Holding**

- Kun Steel Holding has experienced two different kinds of merger, the provincial merger regime (steel enterprises merger within Yunnan Province) and the interprovincial merger regime (steel enterprises merger between Hubei Province and Yunnan Province) in the past few years. The merger process involving Kun Steel Holding have had the following characteristics:

(a) No privately-owned steel enterprise has been involved in the merger process of Kun Steel Holding.

(b) As a provincial steel enterprise, Kun Steel Holding was only a passive recipient in the interprovincial merger process. In fact, the merger with the central SOE, namely Wuhan Iron and Steel (Group) Corporation, was an administrative merger, carried out in accordance with the Chinese iron and steel industry policy. In the name of protecting State assets, this administrative merger forbid Kun Steel Holding from merging with a foreign company, namely ArcelorMittal.

(c) The strategic restructuring between enterprises has only been a combination in a certain form: the combination has only involved the accounting of their finances. Both of the enterprises operate separately and do not form a good interaction.

**2. The Perspective on Chinese Crude Steel Output Growth in the Past Few Years**

- The steel sector always faces an overcapacity problem. Crude steel output growth in China cannot be considered from a positive angle in almost every situation. The excessive growth in crude steel production, in the past few years, is the response to the Chinese “bubble” economy.

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\* The interviewee, who consented to being interviewed, did not permit the researcher to use the interviewee’s name in any written work arising from the study. Thus, a number has been used instead of the interviewee’s name in the appendices, and the interviewee’s name has not been mentioned in the rest of this thesis.

## **Appendix 5**

### **Survival Conditions of Privately-Owned Gas Stations in Three Cities Across China (From Interviews and Surveys)**

## Part I Perspectives of an SOE's Officer on Chinese Privately-Owned Gas Stations

### ☞ *Official No.8*\*

Senior Official, China Sinopec Hebei Branch, Shijiazhuang, Hebei Province, China

Interviewed in Shijiazhuang, Hebei Province, China, 2012

#### 1. **Roles of SOE-Owned Gas Stations and Privately-Owned Gas Stations in the Refined Oil Retail Market in Hebei Province, China**

- Until October 2012, there were over 6,000 gas stations in the Hebei refined oil retail market. More than half of them were owned by three petrol SOEs: China Petrochemical Corporation (Sinopec), China National Petroleum Corporation (PetroChina) and China National Offshore Oil Corporation. Those SOEs accounted for over 80 percent of the local refined oil retail market share.
- Although the China National Offshore Oil Corporation, a new market entrant, had only ten gas stations until October 2012, SOE-owned gas stations as a whole occupied the dominant position of sales in the local market.
- Compared with local privately-owned gas stations, SOE-owned gas stations in the local market have greater responsibilities to ensure product quality and quantity. Because consumers find it hard to distinguish product quality and to measure the quantity of products, only petrol SOEs can guarantee both of these.

#### 2. **Requirements for Privately-Owned Gas Stations to Entry into the Chinese Refined Oil Retail Market**

- Chinese privately-owned gas stations have experienced an evolution from scratch. Their history can be traced back to the late 1980s.
- In principle, if applicants can meet the admission requirements for establishing gas stations and are able to source refined petroleum, the State will encourage private capital to enter the refined oil retail market within the country. However, there is no guarantee that each applicant who meets the requirements will be licensed. Legal and policy requirements in China are not aligned with the reality because personal relationships are typically important.

#### 3. **Perspectives on Oil Shortages from 2008 in China:**

- The State imposes price controls on petroleum products. There is no automatic price adjustment. Up to the time of this interview, if international crude oil prices increased by over 4 percent in a period of 22 working days, the NDRC of China might adjust domestic oil prices. Therefore, the owners of Chinese privately-owned gas stations might have great expectations for the price changing tendency of petroleum products. In order to gain more profits, some privately-owned gas stations might store products for a suitable length of time until an oil shortage emerges.
- At the same time, SOE-owned gas stations must insist on uninterrupted oil sales to safeguard

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\* The interviewee, who consented to being interviewed, did not permit the researcher to use the interviewee's name in any written work arising from the study. Thus, a number has been used instead of the interviewee's name in the appendices, and the interviewee's name has not been mentioned in the rest of this thesis.



consumer welfare and maintain a normal routine/life in China.

#### **4. The Perspective on State Subsidies for Oil Shortages**

- There is no State subsidy towards oil shortages. In the Chinese petroleum and chemical industry, State subsidies only exist in the production area, but not in the circulation area.

#### **5. The Perspective on Chinese Petrol SOEs' High-Priced Acquisitions:**

- In the Chinese administrative intervention approach, petrol SOEs do pay above the market value for privately-owned gas stations in order to expand their market share. However, because supply exceeds demand in the refined oil retail market, this is in compliance with market mechanisms.

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## **Part II Brief Reports of Survival Conditions of Privately-Owned Gas Stations in Three Cities of China**

The researcher chose specific areas in three different-sized Chinese cities to conduct surveys on 'Obstacles to the Development of Chinese Privately-Owned Gas Stations'. (a) Tianzhu Town in Beijing, the capital city of China; (b) four districts (Tianhe District, Haizhu District, Baiyun District and Luogang District) in a well-developed city, Guangzhou, which is the capital of Guangdong Province and the largest city in the southern part of China; (c) downtown Cangzhou in Cangzhou City, an underdeveloped prefecture-level city in northern China, Hebei Province.

### **(i) Brief Report of Obstacles to the Development of Privately-Owned Gas Stations in a Small Area of Beijing, China**

Since the end of 2006, SOE-owned gas stations have dominated the Chinese refined oil retail market.<sup>1</sup> By 2012, two petrol SOEs, Sinopec and PetroChina, accounted for 75 percent of total number of gas stations in China.<sup>2</sup> The researcher chose a specific area in Beijing (Tianzhu Town, Shunyi District) to do surveys on 'Obstacles to the Development of Chinese Privately-Owned Gas Stations' in order to gather first-hand information on the survival conditions of local privately-owned gas stations.

There were approximately 20 gas stations in Tianzhu Town, Beijing, when the author conducted the survey in this area (October 2012). According to the names of those gas stations, which were displayed on the real-time 'Baidu Map'<sup>3</sup>, half of them ought to have been privately-owned. However, when the researcher carried out the fieldwork, only one privately-owned gas station, 'Tianrui Gas Station', remained. However, staff members of 'Tianrui Gas Station' refused to cooperate with the researcher by answering the questionnaire. Thus, no valid questionnaire was received from a privately-owned gas station in Tianzhu Town.

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<sup>1</sup> See Yong Huang and others, 'China's 2007 Anti-Monopoly Law: Competition and the Chinese Petroleum Industry' (2010) 31 Energy Law Review 337, 351.

<sup>2</sup> See China Daily, 'China Plans to Shut more Small-Scale Oil Refineries' *China Daily* (Beijing, 15 June 2009) <[www.chinadaily.com.cn/bizchina/2009-06/15/content\\_8285661.htm](http://www.chinadaily.com.cn/bizchina/2009-06/15/content_8285661.htm)> accessed 30 January 2017.

<sup>3</sup> 'Baidu' is a leading Chinese Internet search services company (Chinese version). 'Baidu Map', akin to 'Google Map', has been widely used in China.

In practice, the fieldwork in Tianzhu Town, which made it easy to see the change in ownership, did make sense for the researcher. Apart from ‘Tianrui Gas Station’, the other ten former privately-owned gas stations were all acquired by one of the three petrol SOEs, China Sinopec, PetroChina and China National Offshore Oil Corporation, in the last two years (probably between November 2010 and October 2012). China Sinopec acquired five of them; PetroChina purchased four, and China National Offshore Oil Corporation bought one in 2011.<sup>4</sup>

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**(ii) Questionnaire Data Summary of Obstacles to the Development of Chinese Privately-Owned Gas Stations in Guangzhou City, China\***

☞ *The Number of Gas Stations in Guangzhou City, China at the end of September 2012*

<b>Gas Stations in Guangzhou City, China</b>	<b>Amount</b>
China Sinopec Gas Stations (SOE)	320
China National Petroleum Corporation (CNPC) Gas Stations (SOE)	80-90
China National Offshore Oil Corporation Gas Stations (SOE)	1
BP-PetroChina Petroleum Company Gas Stations	96
Shell (China) Limited Gas Stations	5
<i>Chinese Privately-Owned Gas Stations</i>	<i>&gt; 60</i>
<b>Total</b>	<b>&gt; 562</b>

Source: BP China; table devised by the author.<sup>5</sup>

☞ **Brief Report**

Since it would have been difficult to obtain a high response rate if the questionnaires (‘Obstacles to the Development of Chinese Privately-Owned Gas Stations’) had been sent out by post, the researcher chose the face-to-face method. Due to the limited research time, the survey, which aimed to obtain information on the survival conditions of local privately-owned gas stations, involved four districts in Guangzhou City: Tianhe District, Haizhu District, Baiyun District and Luogang District. A total 18 questionnaires were completed, representing nearly 30 percent of all privately-owned gas stations in Guangzhou City.

From a grand total of 560 gas stations, China Sinopec (SOE), which accounts for nearly 57 percent, occupies the dominant position in the Guangzhou refined oil retail market. Local privately-owned gas stations only account for about 10 percent of the whole. According to the completed questionnaires, these

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<sup>4</sup> Interview with one staff member of China Sinopec Changqing Gas Station in Tianzhu Town, Beijing (the staff member did not permit the researcher to use the interviewee’s name in any written work arising from the study, but did consent to being interviewed) (Beijing, China, 2012).

<sup>\*</sup> Guangzhou, a well-developed city, is the capital of Guangdong Province. It is the largest city in the south-eastern part of China, with a population of some 13 million people, and covers a total area of 7434.40 square kilometres. It governs ten districts (Yuexiu, Haizhu, Liwan, Tianhe, Baiyun, Huangpu, Huadu, Panyu, Nansha and Luogang) and two county-level cities (Conghua and Zengcheng) before February 2014. See, e.g., The People’s Government of Guangzhou City, ‘Renkou Minzu’ [Population and Ethnic Groups] (*The People’s Government of Guangzhou City, China*, 2015) <[www.gz.gov.cn/gzgov/s2771/zjgzlistcon.shtml](http://www.gz.gov.cn/gzgov/s2771/zjgzlistcon.shtml)> accessed 30 January 2017; and The People’s Government of Guangzhou City, ‘Xingzheng Quyu’ [Administrative Regions] (*The People’s Government of Guangzhou City, China*, 2015) <[www.gz.gov.cn/gzgov/s2294/zjgzcon.shtml](http://www.gz.gov.cn/gzgov/s2294/zjgzcon.shtml)> accessed 30 January 2017.

<sup>5</sup> Email from BP-PetroChina Petroleum Company to author (2013).

privately-owned gas stations are SMEs. Approximately half of them have a turnover of less than 100 million RMB Yuan, and more than 70 percent of them have 10-49 employees.

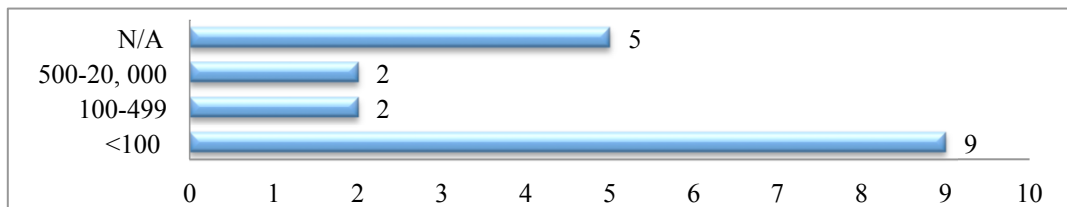
With regard to the survival conditions between 2006 and 2012, privately-owned gas stations in Guangzhou City said they faced many difficulties. First, although there was a slight increase in the number of consumers, the profitability of privately-owned gas stations stayed at the same level. Second, most of them considered that they faced increasing challenges from SOE-owned gas stations and nearly half of them considered they were operating in the poor condition in this market. However, they were not willing to provide further explanation for their poor condition. Third, more than half of the local privately-owned gas stations had suffered oil shortages since 2008, but only two of them had obtained State subsidies. Fourth, despite the fact that half of those privately-owned gas stations were familiar with the ‘Petrol and Chemical Industry 12th Five-Year Development Plan’ (2012), they did not think it could bring positive changes for them. On the other hand, there was still some optimistic news: first, only one participant intended to withdraw from the Guangzhou refined oil retail market and sell the gas station to any oil SOE. Second, two-thirds of Chinese privately-owned gas stations in Guangzhou City believed that the price controls system was good for them and for China’s refined oil retail market.

In brief, although Chinese privately-owned gas stations in Guangzhou City faced many difficulties, they still remained in the market.

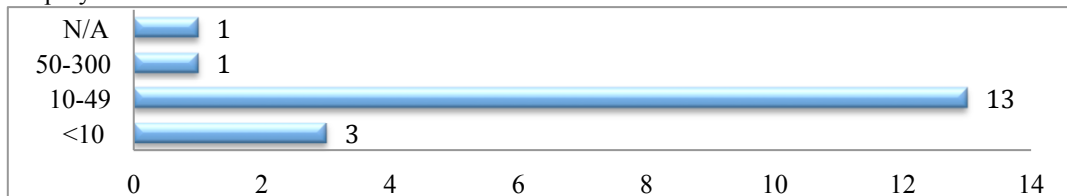
## ☞ *Data Summary*

### 1. General Data of Privately-Owned Gas Stations in Guangzhou City

#### 1) Turnover (RMB Millions)

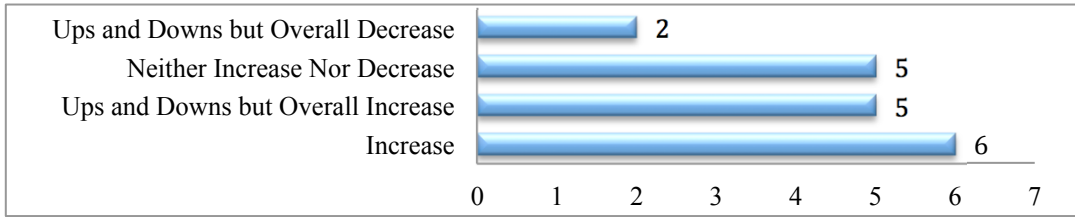


#### 2) Employees

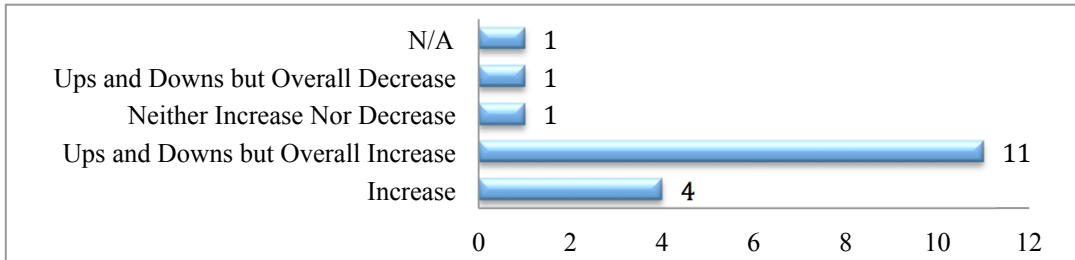


### 2. General Operating Conditions (October 2006-October 2012)

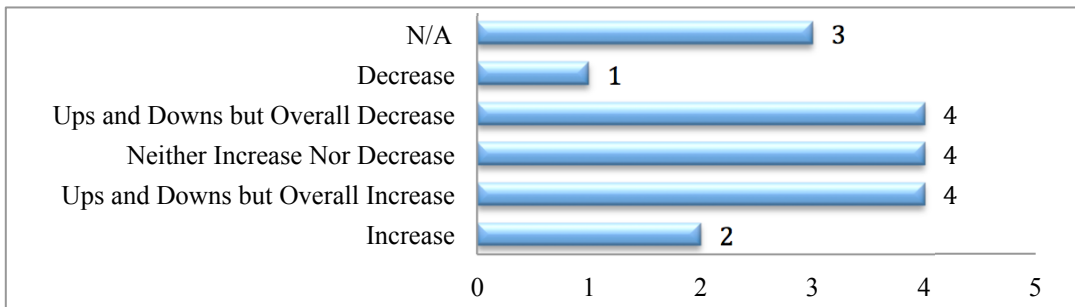
#### 1) Changes in the Number of Consumers of Chinese Privately-Owned Gas Stations in Guangzhou City, China



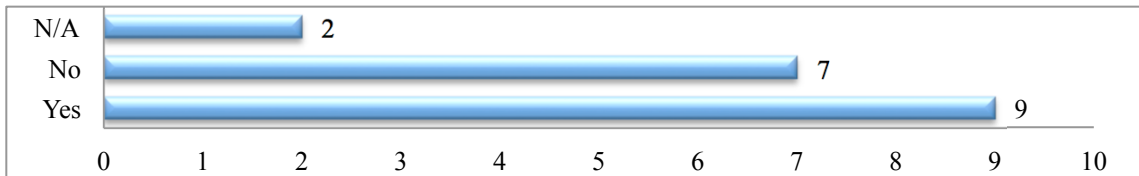
2) Changes in Gas Sale Prices of Chinese Privately-Owned Gas Stations in Guangzhou City, China



3) Changes in Profitability of Chinese Privately-Owned Gas Stations in Guangzhou City, China (2006-October 2012)

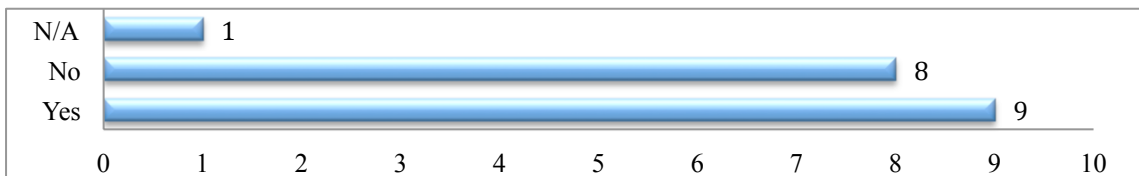


3. Do You Think Privately-Owned Gas Stations have Advantages in the Local Refined Oil Retail Market in Comparison with the SOE-Owned Gas Stations?

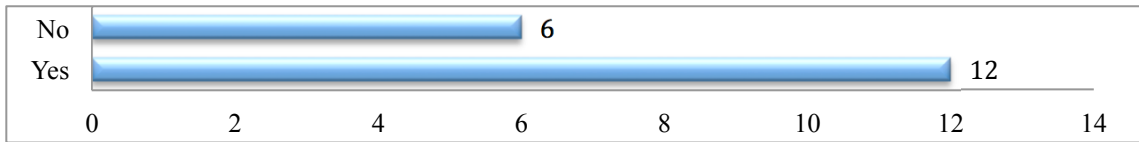


*Some Chinese privately-owned gas stations said they considered their advantages were better service (3 participants), advanced management model (1 participant) and business ideas (1 participant).*

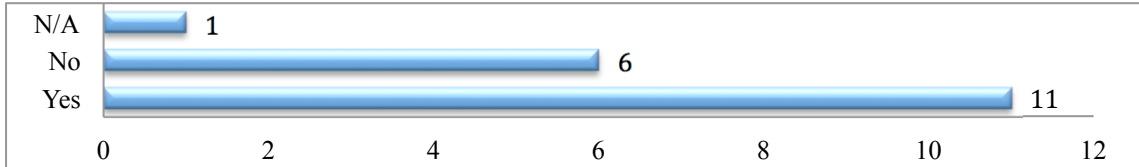
4. Do You Think Privately-Owned Gas Stations have Disadvantages in the Local Refined Oil Retail Market in Comparison with SOE-Owned Gas Stations?



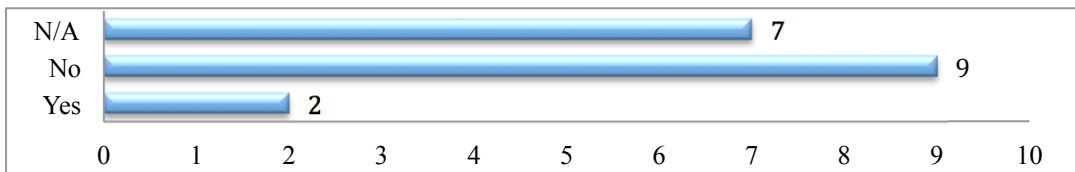
5. Do You Think Price Controls are Good for the Chinese Refined Oil Retail Market?



**6. Have You Suffered from Oil Shortages since 2008?**

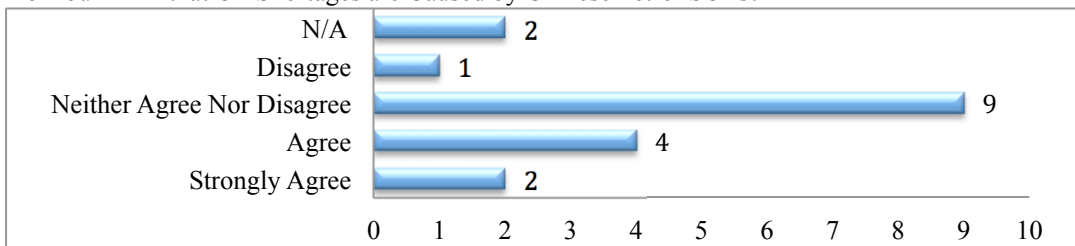


1) **Have You Ever Obtained State Subsidies to Compensate for Oil Shortages?**

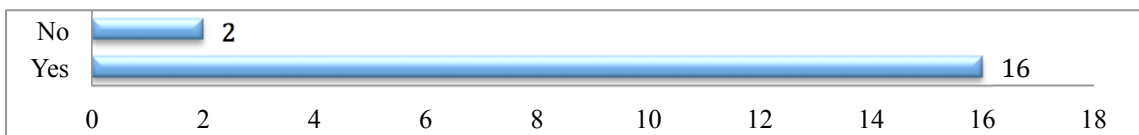


*2 participants said they believed only SOE-owned gas stations could obtain State subsidies.*

2) **Do You Think that Oil Shortages are Caused by Chinese Petrol SOEs?**

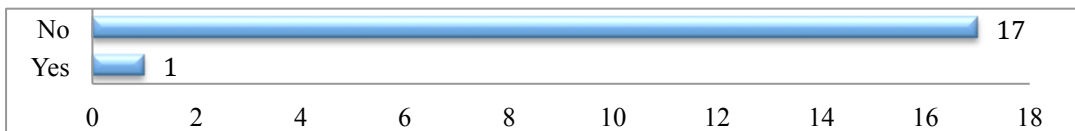


**7. Do You Consider that you are Facing Increasing Challenges in the Development of Competition with the SOE-Owned Gas Stations?**

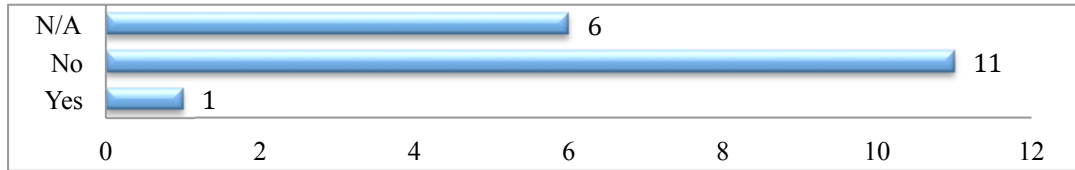


**8. About Withdrawal**

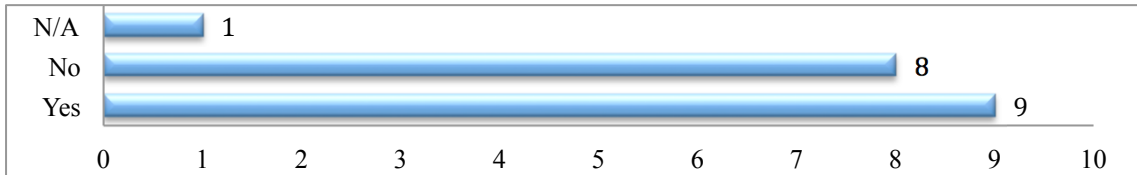
1) **Do You Intend to Withdraw from the Local Refined Oil Retail Market?**



2) **Would You Choose to Sell your Enterprise(s) to SOEs in China's Petrol and Chemical Industry?**



**9. Are You Familiar with the ‘Petrol and Chemical Industry 12th Five-Year Development Plan’ Released in 2012?**



**10. Do You Think the ‘Petrol and Chemical Industry 12th Five-Year Development Plan’ (2011) could Bring Positive Changes for Chinese Privately-Owned Gas Stations, such as by Providing More Room for Business and Development, and then Formatting a Higher and More Reasonable Industrial Structure among Different Scales of Enterprise?**



**(iii) Questionnaire Data Summary of Obstacles to the Development of Chinese Privately-Owned Gas Stations in Downtown Cangzhou, China<sup>6</sup>**

*The Number of Gas Stations in Cangzhou City, China at the End of September 2012*

Different Kinds of Gas Stations	Number in Cangzhou	Number in Downtown Cangzhou	Total
Chinese SOE-Owned Gas Stations	252	47	299
Chinese Privately-Owned Gas Stations	289	15	304
Foreign-Invested Gas Station	6	0	6
<b>Total</b>	547	62	609

Source: China Sinopec Cangzhou Branch;<sup>7</sup> table devised by the author

<sup>6</sup> Cangzhou is an underdeveloped prefecture-level city, in the north-eastern part of China, Hebei Province. Cangzhou City comprises two districts (Xinhua and Yunhe), four county-level cities (Huanghua, Renqiu, Botou and Hejian), ten counties (Cangxian, Qingxian, Dongguang, Haixing, Yanshan, Suning, Nanpi, Wuqiao, Xianxian and Mengcun), and three development areas (Cangzhou Bohai New Area, Cangzhou Economic Development Area and Cangzhou High-tech Industrial Development Area). This city had a population of more than 7.2 million people in 2012 and covers an area of about 14,000 square kilometres. Only Xinhua District and Yunhe District make up the downtown Cangzhou. The People’s Government of Cangzhou City, ‘About Cangzhou’ (*The People’s Government of Cangzhou City, China*, 18 April 2012) <[www.cangzhou.gov.cn/english/aboutcity/index.shtml](http://www.cangzhou.gov.cn/english/aboutcity/index.shtml)> accessed 30 January 2017.

<sup>7</sup> Interview with a staff member of China Sinopec Cangzhou Branch (the interviewee did not agree to the researcher using the interviewee’s name in any written work arising from the study, but did consent to being interviewed) (Cangzhou, China, 2012)

## **Brief Report**

Since it would have been difficult to obtain a high response rate if the questionnaires (‘Obstacles to the Development of Chinese Privately-Owned Gas Stations’) had been sent out by post, the researcher chose the face-to-face method. Due to the limited research time, the survey, which aimed to obtain information on the survival conditions of local privately-owned gas stations, only involved the downtown area.

There were 547 gas stations in Cangzhou City, China at the end of September 2012, of which over 52 percent were privately-owned gas stations. However, as regards downtown Cangzhou, the situation was totally different. Privately-owned gas stations constituted only about 24 percent of the local refined oil retail market. Because there were only 15 Chinese privately-owned gas stations in downtown Cangzhou, the researcher sought to conduct the questionnaire survey with all of them. However, only six questionnaires were completed, comprising 40 percent of the local market.

According to the completed questionnaires, these privately-owned gas stations were all small-scale. The annual turnover of most them was less than 100 million RMB, and they all employed less than 10 employees. The responses indicated that in the past six years, the number of consumers of most local privately-owned gas stations had remained relatively stable. Only one-third of them had seen continuous growth in the number of consumers. Their profitability had remained as a similar level.

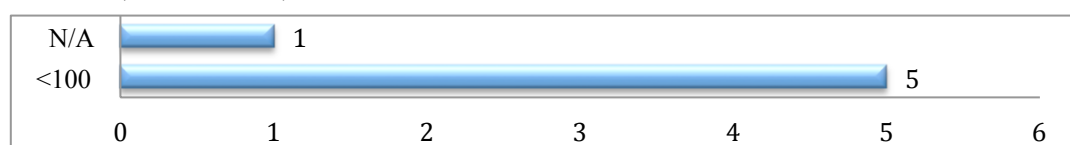
In comparison with Chinese SOE-owned gas stations, none of the privately-owned gas stations considered they had advantages in the local refined oil retail market. Conversely, more than 80 percent of them claimed that they were operating under disadvantageous conditions, because SOEs monopolised the petroleum resources. Furthermore, the majority of privately-owned gas stations in downtown Cangzhou considered that they faced increasing challenges from SOE-owned gas stations. However, four local participants held that they would not sell their gas stations to petrol SOEs.

As regards certain existing situations in China’s refined oil retail market, reactions varied from participant to participant. Two-thirds of privately-owned gas stations in downtown Cangzhou believed that the ‘price controls’ were not good for the market. Some of them even pointed out that price controls were an essential method for SOEs to control them. Regarding “oil shortages” since 2008, only one-third of privately-owned gas stations attributed such a situation to petrol SOEs.

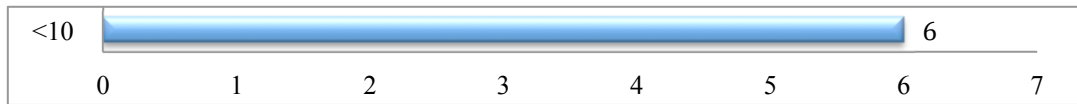
## **Data Summary**

### **1. General Data of Privately-Owned Gas Stations in Cangzhou City**

#### 1) Turnover (RMB Millions)

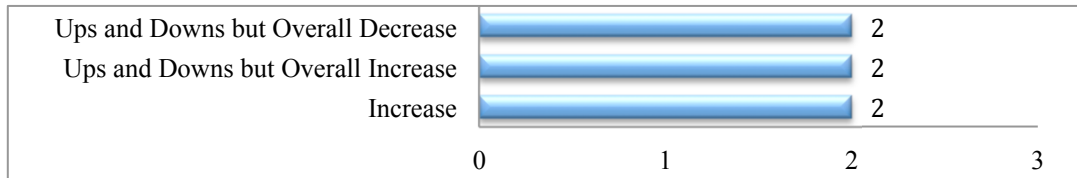


#### 2) Employees

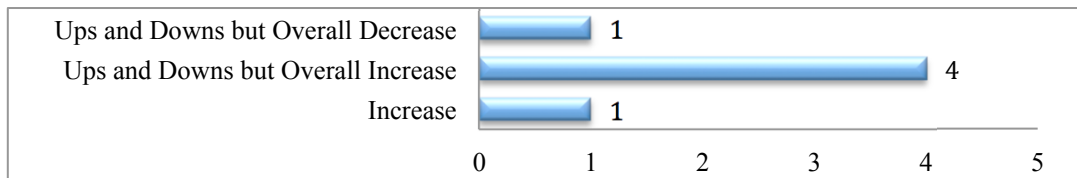


**2. General Operating Conditions (October 2006-October 2012)**

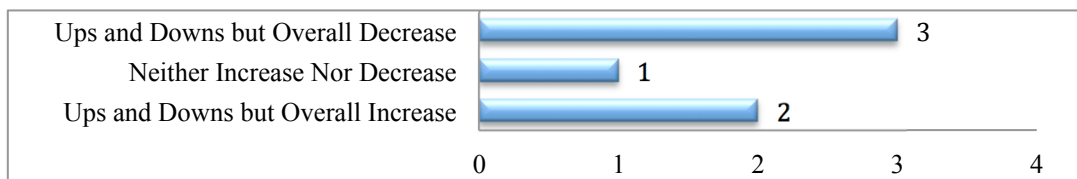
- 1) Changes in the Number of Consumers of Chinese Privately-Owned Gas Stations in Cangzhou City, China



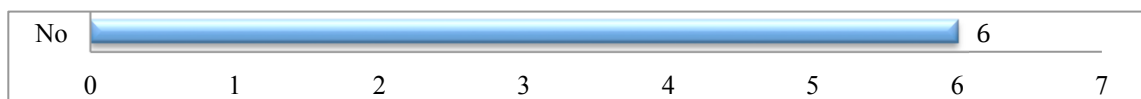
- 2) Changes in Gas Sale Prices of Chinese Privately-Owned Gas Stations in Cangzhou City, China



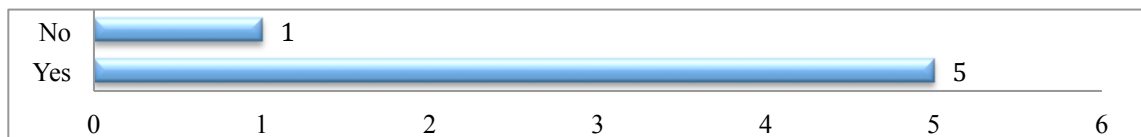
- 3) Changes in Profitability of Chinese Privately-Owned Gas Stations in Cangzhou City, China (2006-October 2012)



**3. Do You Think Privately-Owned Gas Stations have Advantages in the Local Refined Oil Retail Market in Comparison with the SOE-Owned Gas Stations?**



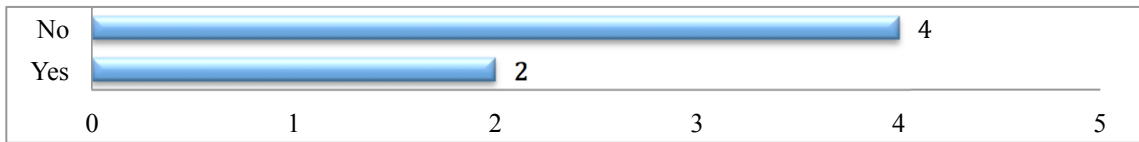
**4. Do You Think Privately-Owned Gas Stations have Disadvantages in the Local Refined Oil Retail Market in Comparison with the SOE-Owned Gas Stations?**



*Half of the 6 participants considered that SOEs monopolise petroleum resources in China. In addition, one participant added that SOEs in the Chinese petrol market have a strong bearing on competitiveness and growth.*

**5. Do You Think Price Controls are Good for the Chinese Refined Oil Retail Market?**



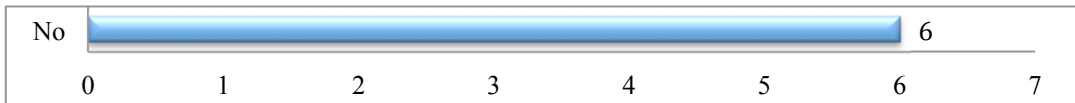


Two of the 6 participants maintained that SOEs controlled by means of price controls, and three of them held that SOEs were beneficiaries of “price controls”.

**6. Have You Suffered from Oil Shortages since 2008?**

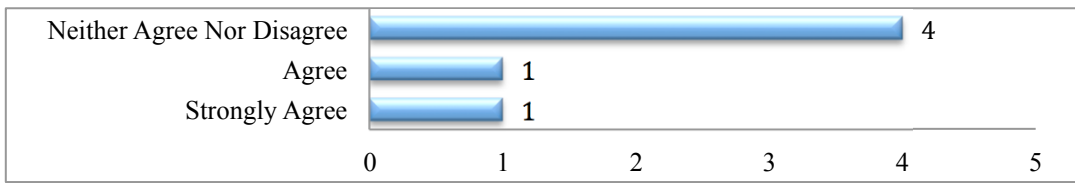


1) Have You Ever Obtained State Subsidies in times of Oil Shortages?

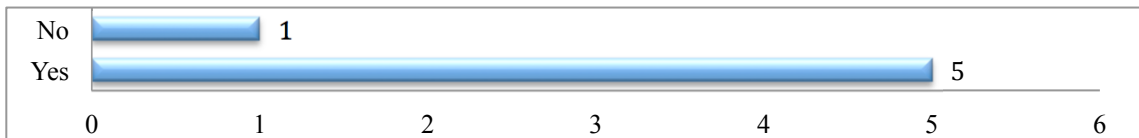


Two participants in downtown Cangzhou believed that only SOE-owned gas stations could obtain State subsidies.

2) Do You Think that Oil Shortages are Caused by Chinese Petrol SOEs?

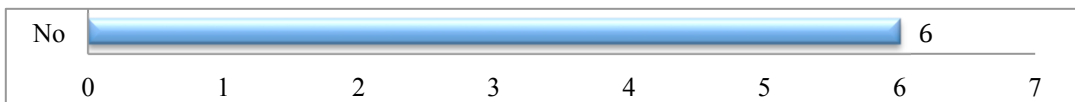


**7. Do You Consider that you are Facing Increasing Challenges in the Development of Competition with SOE-Owned Gas Stations?**

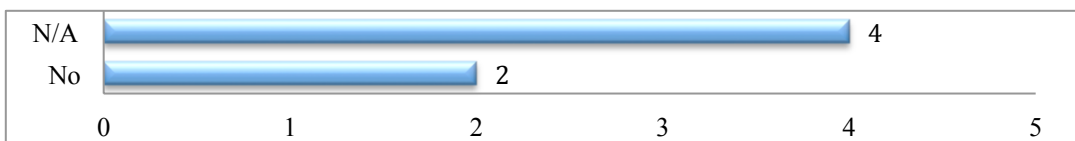


**8. About Withdrawal**

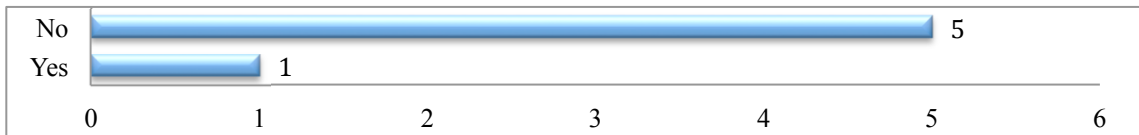
1) Do You Intend to Withdraw from the Local Refined Oil Retail Market?



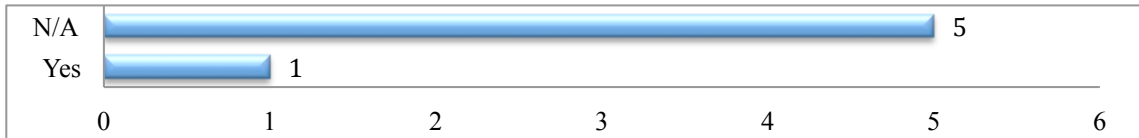
2) Would You Choose to Sell Your Enterprise(s) to China’s Petrol SOEs?



**9. Are You Familiar with the ‘Petrol and Chemical Industry 12th Five-Year Development Plan’ Released in 2012?**



10. Do You Think the ‘Petrol and Chemical Industry 12th Five-Year Development Plan’ (2011) could Bring Positive Changes for Chinese Privately-Owned Gas Stations, such as by Providing More Room for Business and Development, and then Formatting a Higher and More Reasonable Industrial Structure among Different Scales of Enterprise?



## **Appendix 6**

### **Survival Situations of Privately-Owned Fixed-Broadband Operators in Two Chinese Cities (From Interviews)\***

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\* The researcher originally planned to conduct interviews in four different-sized cities of China to examine the survival conditions of the Chinese fixed-broadband operators and the current status of “network interoperability” in the Chinese fixed-broadband industry. The first city is Beijing, the capital city of China. The second is Guangzhou, a well-developed city which is the capital and largest city in the south-eastern part of China, Guangdong Province. The third city is Cangzhou, an underdeveloped prefecture-level city in the northern part of China, Hebei Province. The fourth is Jimo, a county-level underdeveloped city in the north-eastern part of China, Shandong province. However, although the researcher had short conversations with two staff members in Beijing and Guangzhou and obtained some useful information, neither of them agreed to sign the ‘Participant Consent Form’. Hence, the interview results that could be used in this thesis were only from four staff members in telecommunications SOEs in Cangzhou and Jimo branches.

## Part I “Network Interoperability” in the Fixed-Broadband Industry in Two Chinese Cities

### (i) Cangzhou City

#### ☞ *List of Interviewees*

Because these two interviewees, who consented to being interviewed, did not permit the researcher to use their names in any written work arising from the study, numbers have been used instead of names in the appendices, and their names have not been mentioned in the rest of this thesis.

#### *Officer No.9*

An Officer of China United Network Communications Group Co., Ltd (China Unicom) Cangzhou Branch Interviewed in Cangzhou City, Hebei Province, China, 2012

#### *Officer No.10*

An Officer of China Telecommunications Corporation (China Telecom) Cangzhou Branch Interviewed in Cangzhou City, Hebei Province, China, 2012 and received an email to update the market share data in 2015

#### ☞ *Summary of the Opinions of the Interviewees*

#### 1. Market Share of Fixed-Broadband Operators in the Cangzhou Market, China

Types	Operators		The Number of Users (Thousands)	
			2012	2015
SOEs	China Unicom Cangzhou Branch		>1,700	Approximately 710
	China Telecom Cangzhou Branch		Approximately 118	Approximately 315
	China Broadcasting Network Cangzhou Branch		0 (Not existing at the interview time)	Approximately 9.68
	China Mobile Cangzhou Branch	China Mobile Cangzhou Branch	N/A (A Very Small Market Share)	Approximately 28.32
		China Railway Communication Co., Ltd. (China Railcom) Cangzhou Branch		Approximately 2.31
Privately- Owned Fixed- Broadband Operators	One Privately-Owned Fixed-Broadband SME in Cangzhou: <i>facing leasing restrictions of broadband equipment</i>		Approximately 60	0 (Not existing anymore)
	The Other Privately-Owned Fixed-Broadband SME in Cangzhou: <i>operating normally</i>		N/A (Providing Fixed-Broadband Internet Access for	

		Universities and Colleges)	
	Great Wall Broadband Network (The biggest privately-owned fixed-broadband operator in China; former owned by the CITIC Group Corporation, a central SOE, and nowadays owned by private funds)	N/A	Approximately 1.94

**2. Perspectives on Private Capital in the Chinese Fixed-Broadband Industry**

Interviewees	State's Attitude	Attitudes of Telecommunications SOEs' Local Branches
No.9	Encourage	No Initiatives
No.10		Restricting the Leasing of Broadband Equipment

**3. Perspectives on "Network Interoperability" in the Fixed-Broadband Industry in Cangzhou City, China**

Interviewees	State's Attitudes on		Attitude of Telecommunications SOEs' Local Branches on	
	Mainline of Network	Residential Broadband	Mainline of Network	Residential Broadband
No.9	Encourage	Ignore	Encourage and Implement	Ignore
No.10				

**(ii) Jimo City<sup>\*</sup>**

*List of Interviewees*

Because these two interviewees, who consented to being interviewed, did not permit the researcher to use their names in any written work arising from the study, numbers have been used instead of names in the appendices, and their names have not been mentioned in the rest of this thesis.

**Officer No.11**

An Officer of China Telecommunications Corporation (China Telecom) Jimo Branch  
Online Interview from Bangor, Gwynedd, North Wales, United Kingdom, 2013

**Officer No.12**

An Officer of China United Network Communications Group Co., Ltd (China Unicom) Jimo Branch  
Online Interview from Bangor, Gwynedd, North Wales, United Kingdom, 2013 and received an email to update the market share data in 2015

<sup>\*</sup> Jimo City is a county-level underdeveloped city in the north-eastern part of China, Shandong province. This city had nearly 1.2 million people by the end of 2012, and has a total area of about 1,780 square kilometres. The People's Government of Jimo City, 'Jimo Gaikuang' [About Jimo (author's translation)] (*The People's Government of Jimo City, China*, 28 January 2013) <[www.jimo.gov.cn/zoujinjimo/Columns/1521.asp?typeid=2862&parentid=2759&videos=&jms=277](http://www.jimo.gov.cn/zoujinjimo/Columns/1521.asp?typeid=2862&parentid=2759&videos=&jms=277)> accessed 30 January 2017.

☞ *Summary of the Opinions of the Interviewees*

**1. Market Share of Fixed-Broadband Operators in the Jimo Market, China**

Type	Operators		The Number of Users (Thousands)	
			2012	2015
SOEs	China Unicom Jimo Branch		Approximately 100	Approximately 160
	China Telecom Jimo Branch		Approximately 20	Approximately 30
	China Broadcasting Network Jimo Branch		0 (Not existing at the interview time)	Approximately 5
	China Mobile Jimo Branch	China Mobile Jimo Branch	0	Approximately 40
		China Railway Communication Co., Ltd. (China Railcom) Jimo Branch		Approximately 3
Privately-Owned Fixed-Broadband Operators	Three Privately-Owned Fixed-Broadband SMEs in Jimo City		N/A	0 (Not existing anymore)

**2. The Perspective on Private Capital in the Chinese Fixed-Broadband Industry**

Interviewees	State's Attitude	Attitude of Telecommunications SOEs' Local Branches
No.11	Encourage	No Initiatives
No.12		

**3. Perspectives on "Network Interoperability" in the Fixed-Broadband Industry in Jimo City, China**

Interviewees	State's Attitudes on		Attitudes of Telecommunications SOEs' Local Branches on	
	Mainline of Network	Residential Broadband	Mainline of Network	Residential Broadband
No.11	Encourage	Ignore	Encourage and Implement	Ignore and Refuse
No.12				

**Part II Impacts of the Anti-Monopoly Probe into China Unicom and China Telecom (2011) on the Chinese Broadband Access Business**

Question	Perspectives on the Anti-Monopoly Probe into China Unicom and China Telecom (2011)
Chinese Scholars on the <i>Chinese Anti-Monopoly Law 2007</i>	➤ Whatever the outcomes of the anti-monopoly probe into China Unicom and Telecom were, it was a checkpoint of change and a milestone for the improvement of anti-monopoly enforcement.

China Unicom	<ul style="list-style-type: none"> <li>➤ China Unicom headquarters mentioned that it held a dominant position with respect to the Chinese broadband access market.</li> <li>➤ Local China Unicom branch considered the anti-monopoly probe had no genuine impact on the local broadband access market in China.</li> </ul>
China Telecom	<ul style="list-style-type: none"> <li>➤ The anti-monopoly probe in the Chinese broadband access business was nothing to do with <i>the Chinese Anti-Monopoly Law 2007</i>. The real purpose of it was a redistribution of the broadband access market. Chinese National Ministries intended to make a change to China Broadcasting Network (CBN) to take a slice of pie from the Chinese broadband access business.</li> </ul>

## **Appendix 7**

### **Relevant Areas Involved in the Thesis on the Map of China**





**Relevant Areas Involved in the Thesis**

<b>Provinces/ Municipality</b>	Beijing	Hebei	Shandong	Hubei	Guangdong	Yunnan	Hunan
<b>Cities/Towns</b>	Tianzhu	Shijiazhuang	Rizhao	Wuhan	Guangzhou	Kunming	Loudi
		Tangshan					
		Wu'an	Jimo	Echeng			
		Cangzhou					

The author devised this table.