

The 2007 Anti-Monopoly Law of China Facing Efficacy Challenges from the Ongoing Mixed-Ownership Reform

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Abstract: The efficacy of *China's Anti-Monopoly Law 2007* (AML) has been challenged by State intervention since the adoption of the AML. Observed by China's chief antitrust policy-maker and regulatory authority, the 2020 & 2021 AML reform proposals were launched to establish AML's supremacy and achieve competitive neutrality. However, the ongoing Mixed-ownership reforms demonstrate that the 2020 & 2021 reform proposals are inefficacious in restricting State intervention.

1. Introduction

This article will unveil a fundamental question concerning the efficacy of *the Anti-Monopoly Law of China 2007* (hereafter 'the AML'): Is the AML's fate of being sidelined unalterable when facing State intervention?¹ This is not a new question, but the author will illustrate the question from a new perspective – the ongoing China's Mixed-ownership reforms². Under such reforms the development environment of privately-owned small and medium-sized enterprises (hereafter 'SMEs') in the Chinese marketplace meets unchangeable difficulties (i.e., State intervention) which cause competition concerns and challenge the efficacy of the AML.

The Mixed-ownership reform has been in place since 2013³, with the original aim of introducing private funds into State-owned enterprises (hereafter 'SOEs') in order to improve the private sector and boost the development of SOEs along with enhancing the competitiveness of these SOEs in the domestic and international markets.⁴ Since 2020, the Mixed-ownership reform has expanded its objectives by introducing SOE's funds into the private sector.⁵ However, this two-way traffic under the ongoing Mixed-ownership reform seems only to provide developing opportunities to SOEs⁶ and large-scale privately-owned enterprises⁷, rather than promoting privately-owned SMEs.⁸

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¹ Neal D Woods, 'Regulatory Analysis Procedures and Political Influence on Bureaucratic Policymaking' (2018) 12 Regulation & Governance 299; Angela Huyue Zhang, 'Antitrust Regulation of Chinese State-Owned Enterprises', in Benjamin Liebman and Curtis J Milhaupt (eds), *Regulating the Visible Hand?: The Institutional Implications of Chinese State Capitalism* (OUP 2015).

² Curtis J Milhaupt and Wentong Zheng, 'Beyond Ownership: State Capitalism and the Chinese Firm' (2015) 103 Georgetown Law Journal 665; Zhong Nan, 'SOE Reforms to Drive Economic Development' *China Daily* (Beijing, 5 June 2020) 14.

³ Yu Zheng, 'China's State-Owned Enterprise Mixed Ownership Reform' (2014) 4 East Asian Policy 39.

⁴ Changhong Pei, Chunxue Yang and Xinming Yang, 'Rationalizing Institutional Mechanisms, Developing Mixed Ownership' in Changhong Pei, Chunxue Yang and Xinming Yang, *The Basic Economic System of China* (Springer 2019) 185.

⁵ Wang Lu, '项目批量涌现 国资民企双向混改提速' [Emerging Projects Showing in the Speeding up of the Mixed-Ownership Reform] *经济参考报* [*Economic Information Daily*] (Beijing, 18 November 2020) A2.

⁶ 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).

⁷ See further in Section 2(2)(b).

⁸ Xiaoye Wang, 'Six Severe Challenges in Implementing China's Anti-Monopoly Law' (2018) 14 Competition Policy International 1, 3.

This article, therefore, will demonstrate that: First, State intervention winning over the AML to put *SOEs first and privately-owned SMEs second* is continued by the Mixed-ownership reform in the Chinese marketplace.⁹ The AML fails to change such an economic development approach during thirteen years of its implementation.¹⁰ A Pyrrhic Victory for SOEs caused by State intervention that occurred before 2008 (when the AML came into force), could happen again¹¹ given the inefficacy of the AML on regulating the Mixed-ownership reform's market intervention.

Second, although, in theory, the Mixed-ownership reform should not challenge the AML and its goals¹² by obstructing the achievement of a level playing field for all market actors, it does happen (for example, in the petroleum industry and the telecom industry). The author will consider the different development environment between privately-owned SMEs *vis-à-vis* SOEs and privately-owned large-scale enterprises in Part Two of this Article. Furthermore, China's State Administration for Market Regulation (hereafter 'SAMR') launched its reform proposals to revise the AML in January 2020; however, the reform proposals also find hard to achieve the aim of establishing AML's priority over State intervention in the marketplace.¹³ In Part Three, this observation will be supported by revealing new changes brought in by the 2020 proposals and reflecting on their effects of Mixed-ownership reforms on privately-owned SMEs. This article will then conclude by answering whether the AML could obtain a chance, or not, to be effective against State intervention under Mixed-ownership reforms.

2. A Low-Profile AML vs. High-Profile SOEs in the Chinese Marketplace

A government-oriented development approach – *SOEs first*¹⁴, *privately-owned SMEs second* – is reflective of China's culture of intervention in the marketplace: SOEs are closely intertwined with the State's economic interest, and take a dominant position in the relationship between enterprises and the government.¹⁵ Given the fact that the AML, the first competition law in China, solely came into force in 2008, the *SOEs first* development approach had been practiced for decades directed by State intervention rather than competition policies.¹⁶ However, after 2008, modifications to the very approach based on the AML have hardly been seen. For example, forcing mergers in the steel industry

⁹ 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 (pointing out that "[i]f we evaluate China's government-SOEs relationship [...] it seems reasonable to call [the] Chinese economic system a state-led economy. For a relatively long time, China's economy has featured as [a] semi-market owing to the obvious governmental dominance").

¹⁰ Angela Huyue Zhang, 'Strategic Public Shaming: Evidence from Chinese Antitrust' (2019) 1 China Quarterly 1.

¹¹ Jian Guan and others, 'Does the mixed ownership reform work? Influence of board chair on performance of State-Owned Enterprises' (2021) 122 Journal of Business Research 51.

¹² The Anti-Monopoly Law of China 2007, Art 1 (states "The 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.")

¹³ SAMR, the 'Draft (for public comment) on the Amendment of Anti-Monopoly Law 2007', Arts 4 & 9.

Article 4: The State strengthens the fundamental position of competition regulation [...]

Article 9: The State establishes and implements a fair-competition review system, in order to regulate government administrative actions and prevent industrial policies from restricting competition.

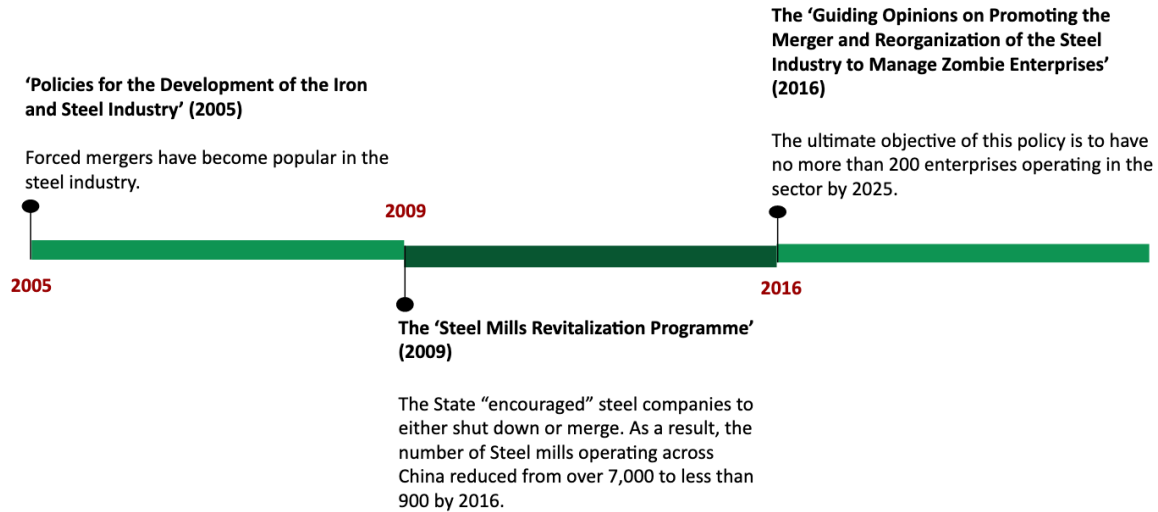
¹⁴ Thomas K Cheng, 'Competition and the State in China' in Thomas K Cheng, Ioannis Lianos and D Daniel Sokol (eds), *Competition and the State* (Stanford University Press 2014) 172.

¹⁵ Bing Song, 'Competition Policy in a Transitional Economy: The Case of China' (1995) 31 Stanford Journal of International Law 387.

¹⁶ 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.

which started before the existence of the AML (i.e. 2005), have carried on for years (see Chart 1 below), regardless of any requirements from the AML on State intervention¹⁷ and the merger regulation.¹⁸

Chart 1: Forcing Mergers Policies in the Steel Industry and their Objectives¹⁹



SOEs have made a significant contribution to China's economic development (e.g., contributed nearly 40 percent of annual GDP from year to year in the 21st century²⁰). However, they are also described as "dying dinosaurs that continuously absorb resources from the economy but produce little economic value."²¹ The *SOEs first* development approach could also result in tough times for privately-owned SMEs²², and sometimes for the State-run economy as a whole²³, because economic development

¹⁷ Arts 8 and 37 of the AML clearly state that administrative agencies (including industrial policymakers) should not abuse their powers to restrict competition in the market: The Anti-Monopoly Law of China 2007

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 37: Any administrative organ may not abuse its administrative power to set down such provisions in respect of eliminating or restricting competition.

¹⁸ *Ibid*, Arts 5 & 28.

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

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 may decide not to prohibit the concentration.

¹⁹ Sources: This chart was compiled by the author arising from the combination of multiple policies.

²⁰ Chunlin Zhang, 'How Much Do State-Owned Enterprises Contribute to China's GDP and Employment?' (2019) World Bank Working Paper No. 32306.

²¹ Nicholas Lardy, 'China's Rise is a Credit to Private Enterprise not State Control' *Financial Times (Asia)* (Beijing, 16 September 2014) 9.

²² Dermot Cahill and Jing Wang, 'How Competition Ideals Are Emasculated in Key Industries in China, and Pathways to Reform' (2021) 44 *Fordham International Law Journal* 609, 627-40.

²³ For example, in the mid-2010s, "[a]bout 2,000 central SOEs (with total assets of about 4 percent of GDP) and over 7,000 local SOEs have officially been identified as zombie firms": see W. Raphael Lam, Alfred Schipke, Yuyan Tan and Zhibo Tan, 'Resolving China's Zombies: Tackling Debt and Raising Productivity' (2017) IMF Working Paper No. WP/17/266.

requires a balance between all market actors.²⁴ This part of the article will therefore focus on SOE supporting strategies, such as the “*Guojin Mintui*” (国进民退)²⁵ and Mixed-ownership reforms to address this argument by comparing data between SOEs and non-SOEs to showcase SOE’s heavy burden victory in the past as well as in the foreseeable future.

(1) Sidelining the AML when Strengthening SOEs

(a) “*Guojin Mintui*”: An Example of the Inefficacy of the AML

In parallel with the AML coming into force, China’s economy faced the impacts from the 2007/2008 global financial crisis: Market actors thereby went through a difficult situation and sought supports from the government.²⁶ China’s Government invested trillions of dollars to stimulate SOEs and driven the economy.²⁷ Accordingly, by November 2011, the gross industrial output value of SOEs enjoyed double-digit-value growth.²⁸ Such a success of SOEs led to an ideal time for a new pattern in the process of economic development to emerge, namely “*Guojin Mintui*”: “the State advances while the private sector retreats”.²⁹

It was akin to a tonic administered to alleviate the economic situation, and seemed at first sight to be a sensible move. However, for long-term economic development, it could be questionable³⁰ as this trend could equate to a decrease in the size of the private sector.³¹ For instance, with the myopic expansion of steel SOEs in order to raise industrial concentration (i.e., achieving 60 percent by 2025³²), privately-owned steel SMEs have continuously disappeared (either merged by SOEs, or forced to shut-down by State intervention³³); therefore the market has been steadily losing competition. However, the whole government-oriented merger and shut-down procedure has been carried out without any consideration given to the requirements stipulated by merger control in the AML.³⁴ Even though the SAMR released reform proposals to revise the AML in 2020 to emphasize the priority of the AML in the Chinese marketplace shall not be challenged by State intervention³⁵, the proposals is still upon the approval. In fact, the AML stays away from “*Guojin Mintui*”, as well as Mixed-ownership reforms,

²⁴ Xiaoye Wang, ‘Six Severe Challenges in Implementing China’s Anti-Monopoly Law’ (2018) 14 Competition Policy International 1.

²⁵ In English, “the State advances while the private sector retreats”.

²⁶ Yongding Yu, ‘Asia: China’s Policy Responses to the Global Financial Crisis’ (2010) 1 Journal of Globalization and Development 1.

²⁷ Michael Wines, ‘China Fortifies State Businesses to Fuel Growth’ *The New York Times* (New York, 30 August 2010) A1.

²⁸ Xinhua News, ‘Centrally Administered SOEs Profits Rise 3.6% in Jan-Nov’ (*China.org.cn*, 19 December 2011) <www.china.org.cn/business/2011-12/19/content_24192570.htm> accessed 23 April 2021.

²⁹ 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.

³⁰ Anders C Johansson and Xunan Feng, ‘The State Advances, the Private Sector Retreats? Firm Effects of China’s Great Stimulus Programme’ (2015) 40 Cambridge Journal of Economics 75.

³¹ World Bank Office, Beijing, ‘China Quarterly Update’ (World Bank, November 2010).

³² ‘Guiding Opinions on Promoting the Merger and Reorganisation of the Steel Industry to Mange Zombie Enterprises’ (2016).

³³ The ultimate objective of the government-oriented merger and shut-down process in the steel industry is to reduce the number of steel enterprises to no more than 200: ‘Guiding Opinions on Promoting the Merger and Reorganization of the Steel Industry to Mange Zombie Enterprises’ (2016).

³⁴ Mark Furse, ‘Evidencing the Goals of Competition Law in the People’s Republic of China: Inside the Merger Laboratory’ (2018) 41 World Competition 129.

³⁵ SAMR, the ‘Draft (for public comment) on the Amendment of Anti-Monopoly Law 2007’, Arts 4 & 9.

which shall be the focus of the next section.

(b) The Mixed-Ownership Reform: An “Icebreaker” Reform for SOEs?

In 2013, the Mixed-ownership reform was introduced to encourage SOEs and non-SOEs to combine their strengths so their growth could be promoted.³⁶ Considerable progress has been achieved from the policymaker’s point of view: For instant, at the end of 2016, the Mixed-ownership reform was established in seven traditional State-controlled sectors by inviting private investments (i.e., the electricity, crude oil, natural gas, railway, civil aviation, telecoms, and defense sectors)³⁷; by June 2017, further 48 SOEs had completed Mixed-ownership reforms³⁸; in 2018, the Mixed-ownership reform was enriched by involving locally-administered SOEs with a wider range of business categories³⁹; in 2019, it was further expanded in *zombie* SOEs⁴⁰; and in 2020, the Mixed-ownership reform has been promoted in several key industries, such as the steel, airline, postal industries.⁴¹ However, has the Mixed-ownership reform lived up to its promise to change the government’s preference for SOEs over the private sector? Is this so-called “icebreaker” intervention for SOE reform⁴² in terms of inviting private investments, true to its name with regard to the development of both SOEs and non-SOEs?⁴³

Although the government speaks highly of Mixed-ownership reform because the reform offers more opportunities to private capital investment to take part in SOEs’ “operation”, simultaneous criticism exists because “no matter how many shares are privately owned, the decision lies with the State.”⁴⁴ In 2015, the Central Government of China launched a plan for further reform of SOEs⁴⁵, which continuously enhances government control of the Chinese economy and restricts large-scale privatisation.⁴⁶ In 2020, the Mixed-ownership reform has stepped further to encourage mergers and acquisitions (M&A) between SOEs and non-SOEs.⁴⁷ Although it has been stated in the ‘Three-Year Action Plan for State-Owned Enterprise Reform (2020-2022)’, that *full play* will be given to non-SOEs

³⁶ Yu Zheng, ‘China’s State-Owned Enterprise Mixed Ownership Reform’ (2014) 4 East Asian Policy 39.

³⁷ Zheng Xin, ‘Mixed Ownership Reform Expanded’ *China Daily* (23 December 2016) Business 4.

³⁸ David Stanway and Jing Wang, ‘China State Firms Complete 48 ‘Mixed Ownership’ Reforms This Year: Paper’ (*Reuters*, 21 June 2017) <www.reuters.com/article/us-china-soe-idUSKBN19C09K> accessed 23 April 2021.

³⁹ Zhong Nan, ‘Mixed Ownership Reform to Expand’ *China Daily* (21 November 2018) Business 1.

⁴⁰ Zhong Nan, ‘Mixed-Ownership Reform in SOEs to Be Expanded’ *China Daily* (18 January 2019) Weekend Life 4.

⁴¹ Liliang Liu, ‘混改加快步入“升级版”阶段’ [The Mixed-Ownership Reform Entering into An Acceleration and Upgrade Phase] *China Securities Journal* (Shanghai, 3 June 2020) <www.cs.com.cn/xwzx/hg/202006/t20200603_6063283.html> accessed 23 April 2021.

⁴² “Liu He, deputy head of the National Development and Reform Commission, described the mixed-ownership pilots as an ice breaker for SOE reform, and asked for quicker measures to push SOEs to the market, limit the blind expansion of the public sector and improve efficiency”: see Xinhua News, ‘China Makes Headway in SOE Reform’ *China Daily* (9 December 2016) <www.chinadaily.com.cn/business/2016-12/09/content_27621374.htm> accessed 23 April 2021.

⁴³ Zhiqiang Zhou, Xinyu Xu, Lirong Huang and Shengzong Liu, ‘The Impact of Private Enterprises’ Participation in State-Owned Enterprises Mixed Ownership Reform on Corporate Performance under the Background of Sharing Economy’ (2018) September Conference Proceedings of the International Conference on Data Science and Business Analytics (pointing out the Mixed-ownership reform benefit SOEs rather than private enterprises).

⁴⁴ 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).

⁴⁵ ‘中共中央国务院关于深化国有企业改革的指导意见’ [CPC Central Committee’s and the State Council’s Guidance on Deepening SOE Reform] (2015).

⁴⁶ 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); Jane Cai, ‘Forget Privatisation, Xi Has Other Big Plans for Bloated State Firms’ *South China Morning Post* (6 September 2017).

⁴⁷ Three-Year Action Plan for State-Owned Enterprise Reform (2020-2022) (2020).

shareholders after they merge with SOEs, the ‘Three-Year Action Plan’ has also addressed that the government will strengthen the overall leadership on SOEs.⁴⁸

Therefore, the Mixed-ownership reform which encourage private funds enter into SOEs, could boost SOEs’ development and improve their competitiveness, as well as expanding government control over private funds.⁴⁹ Accordingly, privately-owned SMEs become less competitive in the SOE dominated industries and unfair competition caused by the lack of a level playing field between SOEs and non-SOEs becomes unavoidable.⁵⁰ However, the AML has never been mentioned to regulate any SOE mixed-ownership reforms.⁵¹ It is thereby not hard to conclude that the Mixed-ownership reform has stuck with the government-oriented economic development approach – *SOEs first, privately-owned SMEs second*.⁵²

(2) A Pyrrhic Victory for SOEs

Tracking SOE development since 1978 (when private funds were fully allowed to participant in the Chinese market⁵³), in an overall picture, the SOE proportion of total enterprises has dramatically decreased, while the value of gross output per SOE has increased (see Chart 2 below). Towards the end of the 2010s, approximately one fifth the Fortune Global 500 were Chinese SOEs.⁵⁴ From these perspectives, the development of SOEs has achieved a degree of success. However, after an analysis of data on a range of criteria, such as State investment, Return to Equity (hereafter “ROE”), employment rate, and wages, the growth of SOEs may be described as somewhat disappointing compared to the private sector, which has received much less government support.⁵⁵ Such tendency could continue with the Mixed-ownership reform which follows the same idea of putting SOEs first. Industrial examples (e.g., the telecoms industry) will be brought into this section later as supportive evidence.

Chart 2: SOE’s Contribution to China’s GDP⁵⁶

Year	1978	1998	2008	2018
SOE’s percentage of enterprises in China ⁵⁷	>90%	<40%	<5%	1.3%

⁴⁸ Jun Wang, ‘New Three-Year Action Plan to Speed up SOE Reform’ *Beijing Review* (16 July 2020) 29.

⁴⁹ Curtis J Milhaupt and Wentong Zheng, ‘Why Mixed-Ownership Reforms Cannot Fix China’s State Sector’ (2016) Paulson Policy Memorandum.

⁵⁰ See further in Section 2(2)(b).

⁵¹ See further in Part 3.

⁵² Ann Listerud, ‘MOR Money MOR Problems: China’s Mixed-Ownership Reforms in Practice’ *South China Morning Post (Center for Strategic & International Studies)*, 1 October 2019) 39, 43.

⁵³ The Reform and Opening Up Policy (1978).

⁵⁴ Amir Guluzade, ‘Explained, the Role of China’s State-Owned Companies’ (World Economic Forum, 7 May 2019).

⁵⁵ 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* 491.

⁵⁶ Sources: This chart was compiled by the author arising from the combination of existing literature (listed in footnotes 57 & 58 below).

⁵⁷ Zeng Yuping, ‘我国法人单位数量进入快速增长期’ [The Number of Legal Entities Entered the Period of Rapid Growth] (*National Bureau of Statistics of China (NBS)*, 22 January 2020); Ligang Song, ‘State-Owned Enterprise Reform in China: Past, Present and Prospects’ in Ross Garnaut, Ligang Song and Cai Fang (eds), *China’s 40 Years of Reforms and Development: 1978-2018* (Australian National University Press 2018) 353; Chen Yongjie and others, ‘我国民营经济发展状况和经营环境问题研究’ [Research on Business Environment for the Private Economy and their Development] (2013) 44 *Review of Economic Research* 3.

SOE's GDP Contribution ⁵⁸	77%	>37%	Approx. 30%	34%
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(a) SOEs vs. Non-SOEs: Data Compression

State investment and ROE: SOEs comprised more than half of the State's investment in 1990; however, 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 enterprises in China.⁵⁹ In 2009 SOEs accounted for over 30 percent of the State's investment⁶⁰; however, the ROE of those SOEs was only close to one half of non-SOEs'.⁶¹ Although the ROE of SOEs in general increased before 2006, it has continued to decrease afterwards.⁶² In the past two decades, ROE of SOEs was significantly lower compared to privately-owned enterprises⁶³ (see Chart 3 below as examples).

Chart 3: ROE of Chinese SOEs and Private Sector between 2006 and 2010⁶⁴

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

Employment rate and wages: Since the mid-1990s the percentage of employment opportunities in SOEs and total wages paid by SOEs in China's urban communities decreased continuously, but the per capita income for each worker in SOEs rose.⁶⁵ However, the situation for non-SOE workers has been different: Despite announcements that in the late 2000s the wages of workers in privately-owned SME experienced a higher growth rate than those of SOE workers⁶⁶, this tendency does not continue and the average annual wages for SME workers are still much lower than SOE workers (over £4,000 difference annually in 2017 and 2018) (see Chart 4 below).

Chart 4: Average Annual Wage of Employees in SOEs and Private Sector 2010-2018⁶⁷

⁵⁸ He Weiwen, 'Washington Misinterprets China's System' *China Daily* (17 January 2020); OECD Working Group on Privatisation and Corporate Governance of State Owned Assets, 'State Owned Enterprises in China: Reviewing the Evidence' (OECD, 26 January 2009) 6-7; Zhou Liqun and Xie Siqian (eds), *中国经济改革30年: 民营经济卷 (1978-2008)* [*China's 30-Year Reforms: Volume of the Private Economy 1978-2008*] (Chongqing University Press, China 2008) Ch3.

⁵⁹ '1990 Annual Statistical Bulletin of China' (NBS, 22 February 1991).

⁶⁰ Andrew Szamoszegi 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) <www.uscc.gov/sites/default/files/Research/10_26_11_CapitalTradeSOEStudy.pdf> accessed 5 May 2021.

⁶¹ Liu Xueshan, '国有企业效率评价及改革' [Efficiency Evaluation and Reform of China's SOEs] *Study Times, China* (Beijing, 26 December 2011) 11.

⁶² Karen Jingrong Lin, Xiaoyan Lu, Junsheng Zhang and Ying Zheng, 'State-Owned Enterprises in China: A Review of 40 Years of Research and Practice' (2020) 13(1) *China Journal of Accounting Research* 31, 34.

⁶³ Hong Cheng, Hongbin Li and Tang Li, 'The Performance of State-Owned Enterprise: New Evidence from the China Employer-Employee Survey' (2021) 69(2) *Economic Development and Cultural Change* 513; 'Global Financial Stability Report: Fostering Stability in a Low-Growth, Low-Rate Era' (IMF, 2016).

⁶⁴ Source: Author's data collected from China NBS. See also Huang Zhilong, '为什么是国有企业在拉低社会投资回报率?' [Why are SOEs pulling down ROE?] (*Suning Financial Research Institute, China*, 2016).

⁶⁵ Andrew Szamoszegi 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).

⁶⁶ Interview with a researcher at the Policy Planning Office, China Centre for Promotion of SME Development, Ministry of Industry and Information Technology of China, Beijing, 22 October 2012.

⁶⁷ Sources: This chart was compiled by the author arising from the combination of data collected from China NBS.



SOE's *weak performance in ROE* and *good performance in wages* form a strong contrast, and indicate their heavy burden victory. On contrast, the Chinese market experiences the success of the private sector: for example, SMEs constitute a huge proportion of the number of China's domestic enterprises (e.g., 97.6 percent in 2018⁶⁸; 97.9 percent in 2014⁶⁹), and offer abundant job opportunities (e.g., more than 80 percent in 2018⁷⁰; 82 percent in 2014⁷¹), as well as increasing productivity and profitability.⁷² The market now looks for more participation of privately-owned SMEs which could not only influence SOEs (e.g. enhancing competition) but also contribute to industrial reconstruction.⁷³ However, privately-owned SMEs still feel that the State does not adequately protect them from the excesses of SOEs (e.g., SMEs' difficulties arising from financial capital, see Chart 5 below). This observation shall be discussed further under the Mixed-ownership reform examples in the following section.

Chart 5: Chain of SMEs' Capital Shortfalls in China⁷⁴



(b) Who are the beneficiaries in the Mixed-ownership reform?

The petroleum industry: In 2014, responding to the Mixed-ownership reform, China Petrochemical Corporation (hereafter “Sinopec”) took the lead in signing “capital injection agreements” with 25

⁶⁸ SME Bureau of Ministry of Industry and Information Technology (MIIT), ‘2018 China SME Performance Review’ (NBS, 21 May 2019).

⁶⁹ NBS, *China Statistical Yearbook 2015* (China Statistics Press 2015).

⁷⁰ SME Bureau of MIIT, ‘2018 China SME Performance Review’ (NBS, 21 May 2019).

⁷¹ NBS, *China Statistical Yearbook 2015* (China Statistics Press 2015).

⁷² ‘Editorial: China’s Small Businesses Need Effective Support’ (*Caixin, China*, 28 August 2018) <www.caixinglobal.com/2018-08-28/editorial-chinas-small-businesses-need-effective-support-101319746.html> accessed 23 April 2021; 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.

⁷³ Julian M. Müller and Kai-Ingo Voigt, ‘Sustainable Industrial Value Creation in SMEs: A Comparison between Industry 4.0 and Made in China 2025’ (2018) 5 *International Journal of Precision Engineering and Manufacturing-Green Technology* 659.

⁷⁴ Sources: This chart was compiled by the author arising from the combination of existing literature: Qin Gou, Yiping Huang and Jianguo Xu, ‘Does ownership matter in access to bank credit in China?’ (2018) 16 *The European Journal of Finance* 1409; ‘Guidance on Promoting the Healthy Development of Small and Medium-Sized Enterprises’ (2019).

privately-owned investors.⁷⁵ While this action injected a certain amount of new blood into the upstream refining business in the petroleum industry⁷⁶ which encouraged other traditional State-controlled industries to participate in the Mixed-ownership reform, nevertheless the government still ensures that SOEs are in control⁷⁷: Private investors have a share limit of no more than 49 percent.⁷⁸

However, State monopolies in the petroleum industry began to face challenges from the Ministry of Commerce of China (hereafter “MOFCOM”)’s new rule on crude oil imports⁷⁹: terminating SOEs’ exclusive position in crude oil imports, and allowing non-SOEs to import crude oil. Privately-owned filling stations thereby could expect better market opportunities in the future, such as obtaining supply at lower prices from private suppliers. Notwithstanding, this good start hardly changes the reality that SOEs are dominant in the market: For example, petroleum SOEs control the import of crude oil (approx. 90 percent of domestic imported crude oil)⁸⁰, and State investment contributed by various SOEs (e.g., China Life Insurance and China Tobacco) hold over 90 percent of the total shares of Sinopec.⁸¹ Accordingly, the market share of non-SOEs in the petroleum industry is going to be continually squeezed, and SOEs boosted by State funds and private funds, become the only beneficiaries in Sinopec’s Mixed-ownership reform. As a result, fair competition between petroleum SOEs and non-SOEs still has long way to go.

The telecom industry: During the Mixed-ownership reform process, China United Network Communications Group Co. Ltd. (hereafter “China Unicom”) reduced its holding to 36.7 percent from 62.7 percent⁸². However, China Unicom stay in control of State funds because (a) China Unicom remains the largest shareholder after the Mixed-ownership reform reform, and (b) State investment received from other SOEs (e.g., China Life Insurance) in total comprises approximately 53 percent of the total shareholding.⁸³

Fundamental questions must be asked here: Why China Unicom was selected in the telecom industry as one of the first batch of SOEs singled out for Mixed-ownership reform? What was the original purpose of this decision? First, the debt-to-total assets ratio of China Unicom was at the top of the list among all telecom SOEs prior to the reform.⁸⁴ Second, compared with SOE competitors, namely China Mobile Communications Corporation (hereafter “China Mobile”) and China Telecommunications Corporation (hereafter “China Telecom”), China Unicom had a low net profit margin before undergoing

⁷⁵ ‘Discloseable Transaction Capital Injection and Investor Introduction of Sinopec Marketing Co., Ltd.’ (*China Petroleum & Chemical Corporation*, 12 September 2014).

⁷⁶ Du Juan, ‘Sinopec is Allowing in Private Investors’ *China Daily* (Beijing, 20 February 2014).

⁷⁷ Margit Molnar and Jiangyuan Lu, ‘State-Owned Firms Behind China’s Corporate Debt’ (2019) OECD Economics Department Working Paper No. 1536.

⁷⁸ ‘China Makes Headway in SOE Reform’ *China Daily* (9 December 2016) <www.chinadaily.com.cn/business/2016-12/09/content_27621374.htm> accessed 23 April 2021.

⁷⁹ ‘Ministry of Commerce Circular on Crude Oil Processing Enterprises to Apply for Non-State Trading Import Eligibility to Work’ (2015).

⁸⁰ Siyuan Chen, Qi Zhang, Benjamin McLellan and Tiantian Zhang, ‘Review on the Petroleum Market in China: History, Challenges and Prospects’ (2020) 17 *Petroleum Science* 1779, 1783.

⁸¹ Jiangyu Wang and Cheng-Han SC Tan, ‘Mixed Ownership Reform and Corporate Governance in China’s State-Owned Enterprises’ (2020) 53 *Vanderbilt Journal of Transnational Law* 1055, 1084.

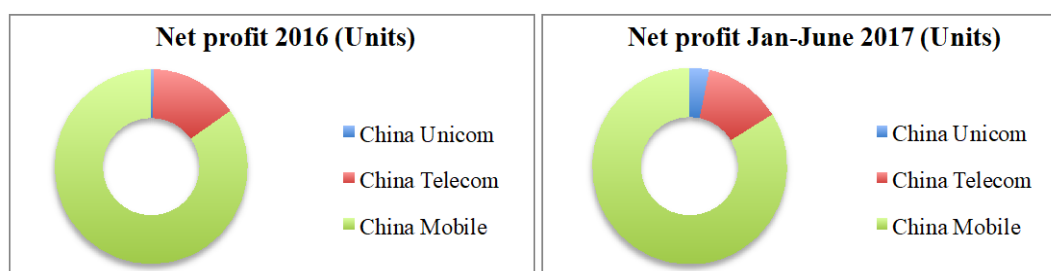
⁸² ‘2017 Corporate Social Responsibility Report’ (*China Unicom*, 1 July 2018) 7.

⁸³ Sarah Y Tong and Xiangru Yin, ‘Mixed Ownership Reforms of China’s State-owned Enterprises’ (2019) 11 *East Asian Policy* 104.

⁸⁴ Jiao Likun, ‘Liuwen Liantong Hungai’ (六问联通混改) [Six Questions of China Unicom’s Mixed-Ownership Reform] *Morning Post, China* (21 August 2017) B2.

Mixed-ownership reform in 2017 (see Chart 6 below).

Chart 6: Net Profit of China Mobile, China Telecom and China Unicom⁸⁵



By contrast, after the Mixed-ownership reform, China Unicom's net profit surged over 400 percent in 2018⁸⁶ after private funds and State funds were injected, and up by 11.1 percent in 2019.⁸⁷ It is therefore not hard to surmise that the Mixed-ownership reform was carried out to animate China Unicom.⁸⁸

To date, the Mixed-ownership reform has been progressing well in terms of SOE outcome⁸⁹: For the first half of 2017, all SOEs reported better than expected net profits, which jumped to 535.32 billion yuan (approximately £61.4 billion).⁹⁰ The momentum continues: SOEs' profits rose over 13 percent in 2018⁹¹ and profits of central SOEs⁹² increased 7.4 percent in the first nine months of 2019.⁹³ This outcome indicates that as designed, the Mixed-ownership reform benefits SOEs and makes a better future for them through the contribution of private funds.⁹⁴ However, would such short-term success last? After exercising sharp increase in net profit, Sinopec faces a small decrease in 2019⁹⁵, and even lose in the first half of 2020.⁹⁶ China Unicom has experienced net profit increase since the Mixed-

⁸⁵ Sources: These two charts were compiled by the author arising from the combination of data collected from Eva Yoo, 'China Mobile Takes 80% of all Net Profit in China's Telecom Market' (*Technode*, 25 August 2017) <<http://technode.com/2017/08/25/china-mobile-takes-80-net-profit-chinas-telecom-market/>> accessed 23 April 2021, and *ibid.*

⁸⁶ Xinhua News, 'China Unicom Reports Soaring Profit Growth' *China Daily* (14 March 2019).

⁸⁷ Wang Xiaochu, '2019 Annual Results Announcement Presentation Transcript' (*China Unicom*, 2020) 2; Joseph Waring, 'China Unicom Profit Climbs Despite Mobile Weakness' (*Mobile World Live*, 21 October 2019) <www.mobileworldlive.com/featured-content/top-three/china-unicom-profit-climbs-despite-mobile-weakness> accessed 23 April 2021.

⁸⁸ "China Unicom's mixed-ownership reforms showed initial results: cooperation with strategic investors and innovation in business models powerfully drove a "Double V" turnaround in the Company's revenue and profit. Through deleveraging and debt reduction, the Company's gearing ratio reduced to a safe level [...]": see '2017 Corporate Social Responsibility Report' (*China Unicom*, 1 July 2018) 8.

⁸⁹ Xiaoqian Zhang, Mingqiang Yu and Gaoquan Chen, 'Does mixed-ownership reform improve SOEs' innovation? Evidence from State Ownership' (2020) 61 *China Economic Review* 101450.

⁹⁰ Zhong Nan, 'SOEs Post 18.6% Profits in 1st Half of Year' *China Daily (European)* (14 July 2017) 14.

⁹¹ Zhong Nan, 'State-Owned Enterprises Record Profit Increase' *China Daily* (16 January 2019).

⁹² Central SOEs are a small group of Chinese SOEs (96 by June 2020) which are under the direct supervision of the Central Government. See 'Directory of Central SOEs' (*State-owned Assets Supervision and Administration Commission of the State Council, China*, 2020) <<http://en.sasac.gov.cn/directory.html>> accessed 23 April 2021.

⁹³ 'China's Central SOEs Report Steady Net Profit Growth in Jan-Sept' (*Xinhua, China*, 17 October 2019) <www.xinhuanet.com/english/2019-10/17/c_138479856.htm> accessed 23 April 2021.

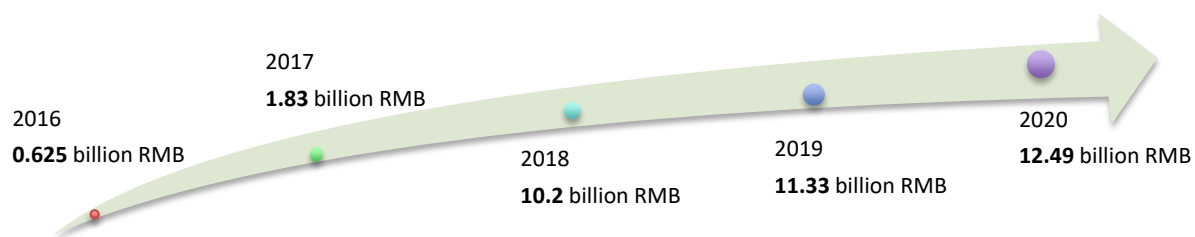
⁹⁴ Clare Jim and Julie Zhu, 'State-Owned China Unicom to Raise \$12 Billion from Alibaba, Tencent, Others' (*Reuters*, 16 August 2017) <www.reuters.com/article/us-china-unicom-results-idUSKCN1AW0JP> accessed 23 April 2021.

⁹⁵ '2019 Annual Report and Accounts' (*Sinopec*, 27 March 2020) 3.

⁹⁶ '2020 Interim Report' (*Sinopec*, 28 August 2020) 4, identified that the SOE experienced more than 228 billion RMB (approximately £26 billion) loss, although COVID-19 is an unavoidable influence to this result.

ownership reform; however, the growth rate has been reduced sharply (see Chart 7 below).

Chart 7: Net Profit of China Unicom (2016-2020) (billion RMB)⁹⁷



On the other hand, privately-owned SMEs competing with these Mixed-ownership reformed SOEs are unable to experience any subsequent stable growth during the reform process, as their fate remains in the hands of SOEs. The government has not stopped its traditional intervention approach⁹⁸: *SOEs first, privately-owned SMEs second*. Unfair competition against privately-owned SMEs in the government-oriented market⁹⁹ remains which results in that competition norms have no presence in China. Therefore, it is foreseeable that the interim victory of SOEs comes with heavy burden from the government-oriented sacrifice of private investments and privately-owned SMEs.

3. No Presence: The Role of the AML in the Mixed-Ownership Reform

To anticipate the potential slowdown brought about by State intervention, and in parallel to start to move away from such an intervention approach that supports SOEs but at the same time harms privately-owned SMEs¹⁰⁰, the supremacy of the AML in the Chinese marketplace should be empowered to restrict State intervention from interrupt competition. However, an examination of the implementation of the AML (2008 – to date) illustrates that the AML has been overlooked in the government-oriented intervention process.¹⁰¹ For example, the 2015 development plans launched by China's SASAC (the State-Owned Assets Supervision and Administration Commission of the State Council) to boost SOE growth have been following *government directives and intervention only*.¹⁰²

In the past seven years, while practices of the Mixed-ownership reform have been done as exemption from the AML¹⁰³, nevertheless Mixed-ownership reforms could create competition issues, such as resulting in a smaller market share for privately-owned SMEs and low-level of competitiveness of these

⁹⁷ Sources: The chart was compiled by the author arising from the combination of data collected from 'Annual Report 2020' (China Unicom, 2020) 5; 'Annual Report 2019' (China Unicom, 2019) 5; 'Annual Report 2018' (China Unicom, 2018) 5; 'Annual Report 2017' (China Unicom, 2017) 5.

⁹⁸ Barry Naughton, 'China's State Enterprise Reform: The Latest Development' (2018) East Asian Institute (EAI) National University of Singapore (NUS) Working Paper No. 1364.

⁹⁹ 国务院关于国有企业发展混合所有制经济的意见 [Opinions of the State Council on the Development of Mixed-ownership Reform in SOEs] (2015) clearly states the insistence of State intervention – 政府引导, 市场运作 [government orientation and market operation].

¹⁰⁰ Thomas J Horton, 'Antitrust or Industrial Protectionism?: Emerging International Issues in China's Anti-Monopoly Law Enforcement Efforts' (2016) 14 Santa Clara Journal of International Law 118.

¹⁰¹ Fang Xiaomin, 'The Application of the Chinese Antimonopoly Law to State-Owned Enterprises' in Fabiana Di Porto and Rupprecht Podszun (eds), *Abusive Practices in Competition Law* (Edward Elgar 2018).

¹⁰² Jiangyu Wang and Cheng-Han SC Tan, 'Mixed Ownership Reform and Corporate Governance in China's State-Owned Enterprises' (2020) 53 Vanderbilt Journal of Transnational Law 1055.

¹⁰³ Sean O'Connor, 'SOE Megamergers Signal New Direction in China's Economic Policy' (24 May 2018) U.S.-China Economic and Security Review Commission Staff Research Report 6-7.

SMEs, since only selected private investors and invited privately-owned enterprises are able to take part in the Mixed-ownership reform.¹⁰⁴ Accordingly, development gaps between SOEs and privately-owned SMEs could be deepened. Such a situation reveals that nothing has changed in the government-oriented intervention approach: granting special or exclusive powers to SOEs and helping them to improve their market power and to increase their market share. However, in return, SOEs could obstruct the growth of privately-owned SMEs.¹⁰⁵ These anti-competitive activities have never been investigated under the AML, although Article 7 of the AML clearly states that SOEs have no exemption from operating lawfully in line with maintaining market competition¹⁰⁶, and Article 8 of the AML in theory restricts industrial policymakers' intervention powers in the market in order to protect competition. However, the AML has been inefficacy during the Mixed-ownership reform process. We shall now indicate arguments from the following three aspects: (1) barriers to entry for privately-owned SMEs in Mixed-ownership reformed industries; (2) the empty-shell objectives of the AML in terms of overcoming State intervention in the market, and (3) SAMR's 2020 reform proposals rarely making any changes to guarantee the supremacy of the AML.

(1) Market Entry Barriers for SMEs: By Invitation Only?

Mixed-ownership reform opens the door to private market actors, however, instead of leveling the playing field, it actually creates formidable barriers to entry against privately-owned SMEs across industries¹⁰⁷ (e.g., telecoms). This is because the Mixed-ownership reform could form exclusive invitation-only clubs: Privately-owned industry giants and SMEs with technological or product advantages are the most likely ones to be invited to take part in the Mixed-ownership reform.¹⁰⁸ For example, China Unicom's Mixed-ownership reform does not mean that privately-owned SMEs are now granted an opportunity to participate in China Unicom's operations.¹⁰⁹ Rather, a significant number of private investors involved in this reform process are large or even industrial leading enterprises in industry verticals¹¹⁰, such as Baidu Inc.¹¹¹, Tencent Holdings¹¹², Alibaba Group¹¹³ and JD.com Inc.¹¹⁴ Although allowing privately-owned operators to enter the broadband market has been emphasized by

¹⁰⁴ Chunling Li, 'Does the Mixed-Ownership Reform Affect the Innovation Strategy Choices of Chinese State-Owned Enterprises' (2020) 12 Sustainability 15-16; David Keohane, 'SOE You Think You Can Reform? Mixed-Ownership Edition' *Financial Times* (28 September 2015).

¹⁰⁵ In theory, this should be restricted. See the Anti-Monopoly Law of China 2007, Art 6: "Any business with a dominant position may not abuse that dominant position to eliminate, or restrict competition".

¹⁰⁶ The Anti-Monopoly Law of China 2007, Art 7.

¹⁰⁷ "A level playing field [between SOEs and non-SOEs in the Chinese marketplace] can be created by reducing the barriers to entry [for privately-owned SMEs]." See Guo Kai and Alfred Schipke (eds), *Opening Up and Competitive Neutrality: The International Experience and Insights for China* (2019) Conference Proceedings of the People's Bank of China and International Monetary Fund Seventh Joint Conference, 39 & 58; Chi Hung Kwan, 'China's Unfinished Ownership Reform: Privatization and a Fair and Competitive Environment Remain to be Achieved' (2020) 16 Public Policy Review, Japan 1, 20.

¹⁰⁸ Flora Wu and others, 'Focus on Mixed-Ownership Reform: Deloitte SOE Transformation White Paper – Issue 2' (2015) Deloitte Report 6.

¹⁰⁹ Jiangyu Wang and Cheng-Han SC Tan, 'Mixed Ownership Reform and Corporate Governance in China's State-Owned Enterprises' (2020) 53 Vanderbilt Journal of Transnational Law 1055, 1079.

¹¹⁰ Daniel Shane, 'China's "Mixed Ownership" Reform to Benefit Investors: China Unicom will Sell Small Stakes to Four Chinese Internet Companies in a Test Case of the Nation's Efforts to Reform Its State-Owned Enterprises' (*Barron's*, 19 August 2017) <www.barrons.com/articles/chinas-mixed-ownership-reform-to-benefit-investors-1503111665> accessed 23 April 2021.

¹¹¹ The no. 1 search engine in China.

¹¹² A leading Internet-related services/products, entertainment and artificial intelligence in China.

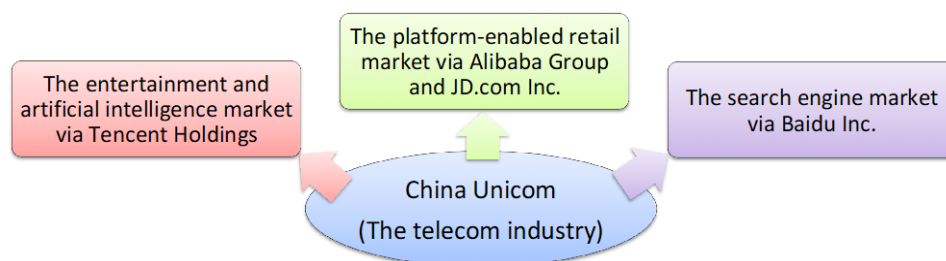
¹¹³ A leading technology company in China whose businesses are comprised of core commerce, cloud computing, digital media and entertainment, and innovation initiatives.

¹¹⁴ A leading retail-enabling platform in China.

the Chinese government with regard to improving competition and accelerating SOE reforms¹¹⁵, China Unicom’s Mixed-ownership reform in reality helps vertical monopoly¹¹⁶, and privately-owned SMEs have never been considered in this reform.

With an injection of “new blood”, China Unicom becomes stronger and recovers from its weak position (low profits but high debt-to-total-assets ratio¹¹⁷), which is not only in the sense of profit making, but also in the sense of linking to the relevant vertical market through the Mixed-ownership reform (see Chart 8 below). This change reflects the State economic development strategy on “steer[ing] the economy toward innovation and technology-driven high-quality growth.”¹¹⁸ As a consequence, China Unicom has been much competitive than before, but privately-owned SMEs find more difficult to enter into the domestic broadband market: According to the market share data, privately-owned broadband operators have completely disappeared from the Chinese market by 2019, and three telecom SOEs occupied the entire fixed-broadband market in China: China Unicom had a 20.3 percent market share; China Telecom occupied 36.8 percent; China Mobile occupied the rest 42.9 percent.¹¹⁹

Chart 8: China Unicom’s Links to New Markets¹²⁰



While China Unicom’s Mixed-ownership reform has been conducted without any AML restrictions, this, nevertheless, ought to be changed because the reform increases the barriers to entry for SMEs and then affects fair competition in the relevant market. However, in reality, the AML’s inefficacy on China Unicom’s Mixed-ownership reform activities could be hard to change for the following reasons:

First, it is hard to the AML to restrict barriers to entry against privately-owned SMEs directly, because all Articles in the AML related to the issue are examined under either *abuse of dominant position* or *merger*.¹²¹ However, defining China Unicom’s dominant position in the telecom market is currently

¹¹⁵ e.g., 关于鼓励和引导民间资本进一步进入电信业的实施意见 [Implementing Opinions to Encourage and Guide Further Investment of Private Capital in the Telecommunications Industry] (2012).

¹¹⁶ Wang Zheng, ‘从联通方案看央企混改’ [From China Unicom’s Reform Plan to Seeing Central SOEs’ Mixed-Ownership Reform] *China Daily* (Beijing, 25 August 2017) 2.

¹¹⁷ See above Chart 7: Net Profit of China Unicom (2016-2020).

¹¹⁸ Xinhua News, ‘China Unicom Reports Soaring Profit Growth’ *China Daily* (14 March 2019); Zhong Nan, ‘SOE Reforms to Drive Economic Development’ *China Daily* (Beijing, 5 June 2020) 14.

¹¹⁹ Wu Beihui, ‘三大运营商宽带份额大逆转 中国移动反超电信成第一’ [A Broadband Market Share Reversal for Three Operators, China Mobile Surpassing Telecom to Be No.1] (*telworld.com.cn*, 28 August 2019) <<https://tech.sina.com.cn/roll/2019-08-28/doc-ihytcitn2500809.shtml>> accessed 23 April 2021.

¹²⁰ Sources: This chart was compiled by the author arising from the combination of existing literature.

¹²¹ The Anti-Monopoly Law of China 2007, Arts 18 & 27.

Article 18: The dominant market status shall be determined according to the following factors: [...] (5) the degree of difficulty for other business operators to enter the relevant market [...]

Article 27: In the case of the examination of the concentration of business operators, it shall consider the relevant elements as follows: [...] (3) the influence of the concentration of business operators on the market

non-achievable, because (a) China Unicom does not have a more than 50% market share¹²² in the relevant market; (b) there is no requirement to examine China Unicom's market power across several relevant markets that Unicom expanded through its selected private investigators (e.g., the search engine market, the digital platforms market).

Second, for an SOE (e.g., China Unicom) that previously faced an anti-monopoly probe¹²³ because it (a) refused to provide network interoperability (sharing the broadband backbone¹²⁴) to support the development of privately-owned broadband operators, and (b) abused its market power to reduce the market share of privately-owned broadband operators¹²⁵, taking part in the Mixed-ownership reform could hardly change China Unicom's attitude on privately-owned SMEs.

Regulating and restricting anti-competitive activities of corporate giants (e.g. China Unicom) is not only a hot potato for the AML; the EU digital market is also facing somewhat similar challenges relating to barriers to entry and vertical monopoly (e.g., Amazon, Apple's App Store). However, EU moves a step further to deal with the anti-competitive activities. With regard to *barriers to entry*, the European Commission brought charges against Amazon with breaching EU competition rules, as Amazon takes advantage of non-public business data of third-party sellers which operate business on Amazon platform, in order to know what products are popular so Amazon could boost sales of its own-label goods.¹²⁶ This results in unfair competition and Amazon could easily squeeze market share of relevant third party sellers and create difficulties for new third party sellers to come into the relevant market, even though Amazon disagrees with the Commission's decision and expresses that Amazon has supported small businesses for years.¹²⁷ With regard to *vertical monopoly*, Amazon's logistics and delivery services, which are on the way of creating vertical monopoly together with Amazon's online retail business, have also been under European Commission's antitrust investigation.¹²⁸ The recent development in the EU indicates that Competition Law is able to deal with corporate giants' anti-competitive issues, if competition law authorities are willing to do so to empower competition law.

access [...]

¹²² *Ibid*, Arts 19 (states "Where a business operator is under any of the following circumstances, it may be assumed to have a dominant market position: (1) the relevant market share of a business operator accounts for 1/2 or above in the relevant market [...]")

¹²³ In 2011, China Unicom was one of two large-scale telecom SOEs in China faced an anti-monopoly probe because of abusing their dominant position to refuse to facilitate "network interoperability" for privately-owned broadband operators: Angela Huyue Zhang, 'The Role of Media in Antitrust: Evidence from China' (2017) 41 *Fordham International Law Review* 473, 475; 'Anti-Monopoly Probe into Telecom Giants Confirmed' (*China Daily*, 9 November 2011) <www.chinadaily.com.cn/business/2011-11/09/content_14066568.htm> accessed 23 April 2021.

¹²⁴ Network interoperability could ensure that high-speed low-cost broadband services would be available to the end users. See Paulo Teixeira de Sousa and Peter Stuckmann, 'Telecommunication Network Interoperability' in Paolo Bellavista (ed), *Telecommunication Systems and Technologies* (EOLSS Publishers 2009) 267.

¹²⁵ See telecoms case study in Dermot Cahill and Jing Wang, 'How Competition Ideals Are Emasculated in Key Industries in China, and Pathways to Reform' (2021) 44 *Fordham International Law Journal* 609, 635-40.

¹²⁶ European Commission, 'Antitrust: Commission Sends Statement of Objections to Amazon for the Use of Non-Public Independent Seller Data and Opens Second Investigation into Its E-Commerce Business Practices' (*European Commission*, 10 November 2020).

¹²⁷ 'Amazon Charged with Abusing EU Competition Rules' (*BBC*, 10 November 2020) <www.bbc.co.uk/news/business-54887650> accessed 23 April 2021.

¹²⁸ European Commission, 'Antitrust: Commission Sends Statement of Objections to Amazon for the Use of Non-Public Independent Seller Data and Opens Second Investigation into Its E-Commerce Business Practices' (*European Commission*, 10 November 2020).

Such an idea has been proved by China SAMR's recent decision (April 2021)¹²⁹: fined an equivalent to \$2.8 billion against Alibaba (owner of the leading business to consumer online shopping platform in China) because its "choosing one from two" practice breached the AML.¹³⁰ The "choosing one from two" practice reduced competition by preventing traders selling products on Alibaba's platform (i.e., Tmall.com) from trading on other competitors / platforms (e.g., JD.com). However, whether such a positive change would be expanded from a privately-owned enterprise (Alibaba) to SOEs, is still unknown.

(2) Public Interest: A Pale Shadow Giving the Green Light to the Mixed-Ownership Reform

China Unicom's Mixed-ownership reform indicates that the Mixed-ownership reform solely benefits certain stakeholders, such as SOEs; large-scale private entities, rather than privately-owned SMEs, and results in the reduction in competition for non-SOEs. This tendency increases unbalanced interests between SOE stakeholders and non-SOE stakeholders, and leads to fewer competitors in the relevant market which could limit consumer's choices and affect their welfare. However, Mixed-ownership reforms (or State intervention) still operates ignoring the goals of the AML, such as "preventing and restraining monopolistic conduct"; "protecting fair competition in the market"; "safeguarding the interests of consumers", and "safeguarding the public interest".¹³¹

The existence of this tendency is partially because of a specific character of the AML – setting "safeguarding the public interest and promoting the development of economy" as its ultimate goal in Article 1, which has often been misunderstood as *the State interest and promoting the growth of SOEs*.¹³² This written down standard prepares "cultivated soils" under the AML for the State to ignore SOEs' anti-competitive activities and continue its market intervention approach – *SOEs first and privately-owned SMEs second*. There is no doubt that the Mixed-ownership reform can pass the test of "safeguarding the State interest and promoting the growth of SOEs" by introducing private funds to enhance SOEs. However, fair competition between market actors regardless their ownerships has been far from realization, and privately-owned SMEs have been left behind by Mixed-ownership reforms.¹³³

It might worth to expect that the adoption of the SAMR's 2020 reform proposals will have a real effect on changing such situation and creating the priority of the AML in the Chinese marketplace.¹³⁴ However, Article 1 of SAMR's 2020 reform proposals stays the same with Article 1 of the AML 2007, apart from a new non-State-intervention-related element: "the AML encourages innovation".¹³⁵

¹²⁹ 国家市场监督管理总局行政处罚决定书, 国市监处 (2021) 28 号 [SAMR's Decision on Administrative Punishment, No.28 of 2021].

¹³⁰ The Anti-Monopoly Law of China 2007, Art 17(4) (states "A business operator with a dominant market position shall not abuse its dominant market position to conduct the following acts: [...] (4) requiring a trading party to trade exclusively with itself or trade exclusively with a designated business operator(s) without any justifiable cause [...]")

¹³¹ *Ibid*, Art 1.

¹³² Dermot Cahill and Jing Wang, 'How Competition Ideals Are Emasculated in Key Industries in China, and Pathways to Reform' (2021) 44 Fordham International Law Journal 609, 613-16.

¹³³ See further above in Section 2(2)(b).

¹³⁴ SAMR, the 'Draft (for public comment) on the Amendment of Anti-Monopoly Law 2007', Art 4.

¹³⁵ *Ibid*, Art 1.

Article 1: The law is enacted for the purpose of preventing and restraining monopolistic conduct, protecting fair competition in the market, encouraging innovation, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, and promoting the healthy development of the socialist market

Hence, the pale shadow in the goals of the AML, namely “safeguarding the public interest and promoting the development of economy”, still exists in SAMR’s 2020 reform proposals and seems highly unlikely to be removed from the future amended AML. It will stay and continue to give the green light to the Mixed-ownership reform and other State intervention strategies to support SOEs.

However, the misinterpreted ultimate goal of the AML (i.e., “safeguarding the public interest and promoting the development of economy”) is not equal to that the future AML has no chance to regulate State intervention. Instead, escaping from the shadow is achievable, because this ultimate goal of the AML has nothing wrong, if it could be understood properly by industrial policymakers and competition law enforcers, and accordingly be applied to restrict / support State intervention appropriately, rather than narrowly and negligently (i.e., regard as the same as “the State interest and the growth of SOEs”). Consequently, fair competition between SOEs and non-SOEs could be achievable. Whether this expectation is reasonable or not under the SAMR’s 2020 reform proposals, the following Part of this article shall provide a clue.

(3) SAMR’s 2020 Reform Proposals: How far from achieving competitive neutrality?

This part will inspect whether there are any Articles in SAMR’s 2020 reform proposals could ensure a non-twisted application of the ultimate goal of the AML and overcome State intervention powers in the Chinese marketplace, in order to grant top priority to the future AML.

(a) Fair-Competition Review: Symbolic or Effective?

A non-ignorable positive change brought by SAMR’s 2020 reform proposals is in Article 4, emphasising the fundamental position of competition regulation in the marketplace. However, how to make sure this article would be implemented without any delays or a plot twist is equally important. Article 9 of SAMR’s 2020 reform proposals aims to support Article 4 by confirming the establishment and implementation of “a fair-competition review system” in order to restrict State intervention and ensure the primacy of the AML in China’s marketplace.¹³⁶ In addition, Article 42 affirms that fair-competition reviews should be carried out to review administrative agencies and organisations’ policies and regulations that relate to market entities’ economic activities.¹³⁷ These three articles indicate improvements SAMR’s 2020 reform proposals brought in for enhancing the authority of the AML. However, these three Articles (4, 9 & 42) are quite general, and catchy slogans do not equate to an effective implementation. Further explanation on the implementation of fair-competition review is lacking in SAMR’s 2020 reform proposals.

Fair-competition review is not a creation of SAMR’s 2020 reform proposals. In 2016, the idea of establishing a fair-competition review system was officially introduced by China’s State Council¹³⁸

economy.

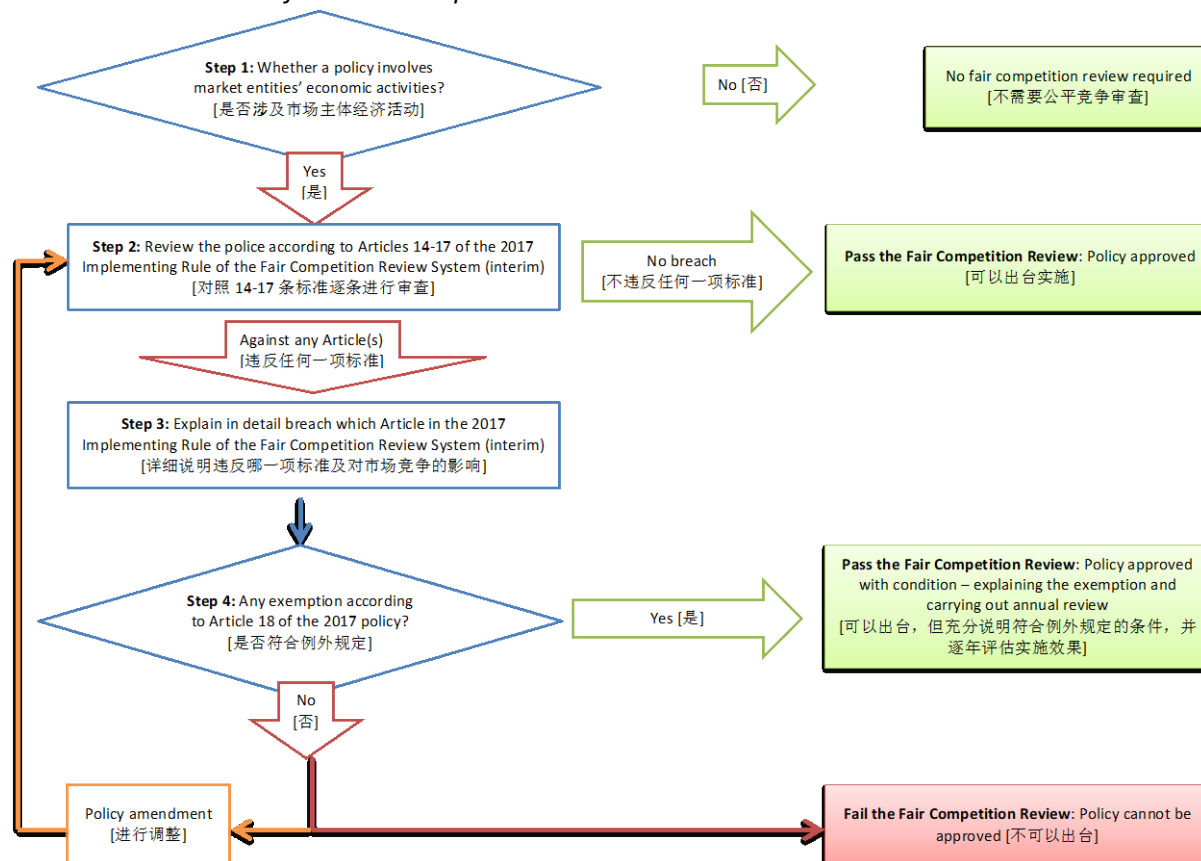
¹³⁶ *Ibid*, Art 9.

¹³⁷ *Ibid*, Art 42(2).

¹³⁸ The State Council of China, ‘Opinions on Establishment of the Fair Competition Review Mechanism in the Development of Market System’ (2016).

with the aim of regulating administrative intervention in the market to prevent anti-competitive policies relating to market access, industrial development, investment promotion, business practices, and so on.¹³⁹ In 2017, the *Implementing Rule of the Fair Competition Review System (interim)* (hereafter “the 2017 Fair Competition Review Policy”) unveiled the basic process of China’s fair competition review (see Chart 9 below), which could make a decision on a market intervention policy is going to be approved, amended or prohibited.

Chart 9: Basic Process of the Fair-Competition Review¹⁴⁰



It is worth noting that “the 2017 Fair Competition Review Policy” grants exemptions to State intervention in Article 18 (see “Step 4” in Chart 9 above), which overcome requirements of protecting consumer welfare set up in the AML.¹⁴¹ In detail, Article 18 of “the 2017 Fair Competition Review Policy” states that if an anti-competition policy falls in the scope of protecting certain national interests (e.g., economic security and the public interest), the policy could be approved when it meet the following three requirements at the same time:

¹³⁹ Shuping Lyu, Caroline Buts and Marc Jegers, ‘China’s Fair Competition Review System and Market Access: The Case of Shenzhen THSware Technology’ (2020) *Journal of European Competition Law & Practice*, lpaa065; Shuping Lyu, Caroline Buts and Marc Jegers, ‘Comparing China’s Fair Competition Review System to EU State Aid Control’ (2019) *European State Aids Law Quarterly* 37.

¹⁴⁰ Sources: This chart was translated and compiled by the author from Annex 1 of the *Implementing Rule of the Fair Competition Review System (interim)* (2017).

¹⁴¹ Art 7 of the Anti-Monopoly Law of China 2007 grant special or exclusive rights to SOEs but still require them “[...] not damage the interest of consumers by virtue of their dominant or exclusive positions”; further, Art 15 of the AML provides several exemptions for market actors with regard to monopoly agreements, but also require market actors to protect consumer welfare.

- (1) The policy is indispensable for the realization of the objectives of the very policy;
- (2) Market competition will not be eliminated or restricted *severely*;
- (3) The policy is only temporary (with a clear implementation timeline).¹⁴²

Such exemptions provide enough protection to State intervention: For instance, policies to carry out Mixed-ownership reforms are specific and would be designed for individual SOE to carry out their own Mixed-ownership reform, which solely exist for the reform period. In addition, “the rule of seriously restricting competition” is a subject standard and could be applied (or not applied) whenever it does not suit the State interest. Therefore, it is questionable that the current fair-competition review system could proof its efficacy on reducing State intervention in China’s marketplace.¹⁴³

Even though the 2017 fair-competition review system is more like a symbolic movement, it is still positive in the sense of making a clear idea to the public of regulating administrative powers in the market in order to provide an opportunity to achieve fair competition between SOEs and non-SOEs. In 2019, SAMR improved the 2017 fair-competition review system by introducing a third-party evaluation guidance.¹⁴⁴ Although the fair-competition review authorities have no obligation to accept the third-party’s evaluation results, having the third person’s point of view could provide opportunities to SAMR (China’s chief competition regulatory authority) to take a broader view on administrative intervention policies.

However, SAMR’s 2020 reform proposals spare no effort to turn the fair-competition review symbol into an effective measure to restrict State intervention strictly and ensure the supremacy of the AML. The fair competition review process has never been either improved by the 2020 reform proposals to overcome the exemption shortfall caused by Article 18 of “the 2017 Fair Competition Review Policy”, or included (or re-introduced) in the 2020 proposals in detail. Thus, a potential danger of that the fair competition review system could protect State intervention from the implementation of the AML remains and such a danger seems will not go away anytime soon.

(b) New Rules on Concentration: Nothing to do with SOEs’ Dominant Position

Although the increase of SOEs’ market share has lead to a collective dominant position¹⁴⁵, their dominant position is unable to be defined under the AML because a collective dominant position of SOEs has not been accepted by the Chinese competition law regime.¹⁴⁶ Instead, SOEs in the same industry have been treated as competitors.¹⁴⁷ Therefore, it is hard for the AML to deal with the high

¹⁴² The ‘Implementing Rule of the Fair Competition Review System (interim)’ (2017), Art 18.

¹⁴³ Zhai Wei, ‘The Interpretation and Reconstruction of Environmental Protection Exemption Standard under the Framework of Fair Competition Review System’ (2019) 2 Competition Policy Research.

¹⁴⁴ SAMR, the ‘Implementation Guidelines for Third-Party Evaluation of the Fair-Competition Review’ (2019).

¹⁴⁵ The notion of collective dominance has been elaborated upon by the EU Courts and EU Commission in TFEU art. 102 cases such as: Joined Cases T-68,77&78/89, Societa Italiana Vetro SpA v. Commission, 1992 E.C.R. II-1403; Joined Cases C-395 & 396/96P, Compagnie Maritime Belge Transports SA v. Commission, 2000 E.C.R. I-1365; Joined Cases T-191&212-214/98, Atlantic Container Line AB and Others v. Commission, 2003 E.C.R. II-3275; Case T-193/02, Laurent Piau v Commission, 2005 E.C.R. II-209; Case T-228/97, Irish Sugar plc v. Commission, 1999 E.C.R. II-2969.

¹⁴⁶ Angela Huyue Zhang, ‘The Antitrust Paradox of China, Inc.’ (2017) 50 New York University Journal of International Law and Policy 159.

¹⁴⁷ The plaintiff, Mr Yang, claimed China Telecom abused its dominant position in Shanghai (in case *Yang Zhiyong v China Telecom*); however, Judgment no.23 handed down by the Shanghai People’s High Court in 2015 held that China Telecom (SOE)

percentage market share of SOEs in the same industry, and SAMR's 2020 reform proposals for amending the AML have made no contribution to introduce SOEs' collective dominant positions.¹⁴⁸

Advantages of SAMR's 2020 reform proposals, regarding concentration, include: First, SAMR can formulate and/or modify application standards of concentration according to the level of economic development and the scale of certain industries.¹⁴⁹ Second, where the concentration participant does not meet the application standards of concentration, but they have or may have the effects of eliminating or restricting competition in the relevant market, SAMR could conduct investigations and make a decision to either approve, or prohibit the concentration.¹⁵⁰ Such changes bring more authority and also flexibility to SAMR; it would therefore be able to enhance market competition. However, the exemption standard – *the public interest* – that SAMR relies on to make its decision on approving or prohibiting concentration has not changed, as Article 32 of SAMR's 2020 reform proposals solely repeats Article 28 of the AML 2007, stating that “if the business operators concerned can prove that [...] the concentration is pursuant to *public interests*, the Anti-monopoly Authority under the State Council may decide not to prohibit the concentration”.¹⁵¹ This turns back to the understanding of “the public interest” in the Chinese competition law context. If the State interest remains to replace the public interest, SAMR's 2020 reform proposals improvements regarding concentration could be meaningless.

To conclude, after an article-by-article review on certain changes made by SAMR's 2020 reform proposals from perspectives of restricting State intervention and SOE's market power, the effectiveness (or realisation) of all these amendments or changes has been linked to the ultimate goal of the AML, namely “safeguarding the public interest and promoting economic development”. However, an examination of the ultimate goal in the State intervention process (e.g., Mixed-ownership reforms) showcases that such goals have been twisted to *the State interest and promoting the growth of SOEs* all the time. SOEs have often taken advantages through State intervention and a level playing field has not emerged for SOEs and privately-owned SMEs. Hence, competitive neutrality stays as a slogan, and unexpectedly, turning the slogan into reality remains an unavoidable challenge for SAMR's 2020 reform proposals (or the revised AML). In other words, the efficacy of the revised AML will be as questionable as the AML 2007, when facing State intervention.

4. Conclusion

This article demonstrates that the ongoing Mixed-ownership reform fails to improve the growth of privately-owned SMEs from the perspective of the AML. Instead, it depowers privately-owned SMEs and reveals that the AML 2007 has been facing efficacy challenges from State intervention and the SAMR's 2020 reform proposals seem unable to erase the efficacy challenges to ensure the supremacy of the AML in China's marketplace for the revised AML.

Due to a long history of State intervention in the Chinese market, the government-oriented model has

did not having a dominant position as claimed because there were “competitors” in the market, such as China Mobile (SOE).

¹⁴⁸ SAMR, the ‘Draft (for public comment) on the Amendment of Anti-Monopoly Law 2007’.

¹⁴⁹ *Ibid*, Art 24(2).

¹⁵⁰ *Ibid*, Art 24(3) & 34.

¹⁵¹ The Anti-Monopoly Law 2007, Article 28; *Ibid*, Art 32.

played a pivotal role in the State's economic development progress.¹⁵² No matter how much the model changes (e.g., from “*Guojin Mintui*” to the Mixed-ownership reform), SOEs are the constant beneficiary. While anti-monopoly issues are very clear with regard to market share, barriers to entry and the goals of competition law, the AML has not provided any substantial help in limiting SOEs' anti-competitive behaviour towards protection privately-owned SMEs.

SOEs have positive surface effects on the State's economic development.¹⁵³ 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 mainly for the benefit of SOEs. However, privately-owned SMEs have become a dynamic factor in the domestic market according to their performance (e.g., number of enterprises, ROE, number of employees). Thus, a fair competition environment is required by privately-owned SMEs to ensure that the State conforms to the application of its industrial policies under the requirement of competition law, and guarantees a level playing field between SOEs and non-SOEs.¹⁵⁴

An examination of Mixed-ownership reform reveals that the government still prioritizes SOEs rather than treats privately-owned SMEs and SOEs equally. However, the very reform, which works as a tool to boost the growth of SOEs via private entities' support, has been considered outside the scope of the AML. Although this standpoint is untenable, especially from the perspective of market share, entry barriers and the public interest in the AML context, the AML is currently doing nothing to prevent the existing and/or foreseeable anti-competitive issues caused by Mixed-ownership reforms. What concerns the author even more is that although “a fair-competition review” and “competitive neutrality” have been written into SAMR's 2020 reform proposals, the 2020 proposals are not a shortfall-free one with regard to State intervention. The proposals are lack of implementation rules on how to regulate State powers in the marketplace and then to achieve competitive neutrality. In brief, the supremacy of the AML remains on hold, when the AML comes to restricting State intervention and providing a level playing field for privately-owned SMEs in the Chinese marketplace.

¹⁵² 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.

¹⁵³ Mike W Peng, Garry D Bruton, Ciprian V Stan and Yuanyuan Huang, ‘Theories of the (State-Owned) Firm’ (2016) 2 *Asia Pacific Journal of Management* 293.

¹⁵⁴ Jinbiao Xia, ‘Create a Level Playing Field for SOEs and Private Enterprises via Competitive Neutrality’ *China Economic Times* (Beijing, 8 November 2018) 6; Pin-guang Ying, ‘Competitive Neutrality and SOEs Reform: Recent Development and China's Practice’ (UN Economic and Social Commission for Asia and the Pacific (ESCAP), Beijing, China, September 2014).