THE ACQUISITIONS OF THE CHINESE STATE-OWNED ENTERPRISES UNDER THE EU MERGER CONTROL REGIME: TIME TO REVISIT THE CONCEPTS OF 'CONTROL' AND 'SINGLE ECONOMIC ENTITY'?

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Abstract: The acquisitions notified by the Chinese state-owned enterprises (SOEs) under EU merger control regime have raised a number of questions as to the suitability of the current merger control rules and standards applied by the EU Commission for the ex ante assessment of the likely impact of such transactions on competition in the EU Internal Market. The present paper provides an overview of the EU Commission's practice to date with special focus on the concepts of "single economic entity", "decisive influence" and "control" that have been applied by the EU Commission in the cases involving Chinese SOEs.

With the rapidly unfolding China's "One Belt, One Road" initiative and the ongoing reform of the state-owned enterprises (SOEs), the number of overseas acquisitions by the Chinese SOEs in various industrial and services sectors is constantly on the rise. Besides the national security review, which is a subject on its own, these acquisitions have raised a number of questions in terms of assessment of market concentrations' potential impact on competition and challenged the

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traditional assessment tools employed by the merger control regimes. The proposed presentation examines the evolving experience of Chinese SOEs' acquisitions in the European Union (EU), which were subject to *ex ante* assessment under both EU and national merger control regimes. The analysis of the merger assessment practice of the EU Commission culminating in the recent conditional approval of the *ChemChina/Syngenta* merger indicates that the traditional assessment tools such as "single economic entity" and "control" applied to the acquisitions by Chinese SOEs may be no longer adequate to capture the extent of their potential effect on competition. The review of the merger cases including the application of the "worst case scenario" when determining the relationship between the state and its SOEs cannot serve as a long-term solution and does not provide sufficient legal certainty to the merging parties as well as to the competition authorities in Europe and beyond, which are faced with the growing number of acquisitions and growing market shares of the SOEs in various industries. The presentation explores possible ways of modifying the interpretation of the above mentioned legal concepts in order to reflect the economic and legal realities of the commercial conduct of the SOEs on the global markets. It is argued that the lack of adequate competition law assessment tools may lead to further expressions of economic nationalism and the adoption of more arbitrary legal assessment tools thus decreasing predictability and legal certainty to all parties concerned.

Keywords: Competition law; merger control; China; European Commission; SASAC; state-owned enterprise; Belt and Road Initiative; single economic entity; economic concentration; state control; state ownership.

Introduction

In 2013 the Chinese President Xi Jinping has officially unveiled the Belt and Road Initiative at the Nazarbayev University in Astana.[1] This grand strategy labelled as "globalization with Chinese characteristics"[2] has promptly become one of the top priorities for China's foreign policy discussed at the

1 Ministry of Foreign Affairs of the People's Republic of China, *President Xi Jinping Delivers Important Speech and Proposes to Build a Silk Road Economic Belt with Central Asian Countries* (7 September 2013), http://www.fmprc.gov.cn/mfa_eng/topics_665678/xjpfwzysiesgjtfhshzzfh_665686/t1076334.shtml.

2 See e.g. Jason Zukus, Globalization with Chinese Characteristics: A New International Standard? *The Diplomat* (9 May 2017), https://thediplomat.com/2017/05/globalization-with-chinese-characteristics-a-new-international-standard/.

Periphery Diplomacy Work Forum in October 2013.[3] On 28 March 2015 with the endorsement of the State Council, the National Development and Reform Commission, the Ministry of Foreign Affairs, and the Ministry of Commerce have jointly released the Action Plan on the Belt and Road Initiative.[4] One of the cooperation priorities is unimpeded trade, which implies the improvement of the investment and trade facilitation and removal of the recurrent investment and trade barriers. The grand strategy provides for USD 900 billion in planned investments in infrastructure across Central and South Asia, the Middle East, and Central and Eastern Europe (CEE).[5] Chinese investments in CEE are planned under the so-called "16+1" framework, which brings together eleven EU Member States and five Balkan nations aspiring for EU membership.[6] The first examples of such investments include the Port of Piraeus, and high-speed railways from Piraeus to Budapest via Belgrade.[7]

Another important direction for the Chinese outward foreign direct investment (OFDI) is "Made in China 2025" strategy launched in 2015, which aims at modernization of the Chinese manufacturing sector and should lead to the gradual replacement of foreign technologies with Chinese ones in the domestic market and the increased presence of Chinese technology companies

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3 See e.g. Michael D. Swaine, "Chinese Views and Commentary on Periphery Diplomacy" (2014) *China Leadership Monitor* 44 http://www.hoover.org/sites/default/files/research/docs/clm44ms.pdf; Michael D. Swaine, "Xi Jinping's Address to the Central Conference on Work Relating to Foreign Affairs: Assessing and Advancing Major-Power Diplomacy with Chinese Characteristics" (2015) *China Leadership Monitor* 46, http://www.hoover.org/sites/default/files/clm46ms.pdf.

4 State Council, *Full text: Action plan on the Belt and Road Initiative* (30 March 2015), http://english.gov.cn/archive/publications/2015/03/30/content_281475080249035.htm.

5 See The Hague Centre for Strategic Studies, *A Road to Riches or a Road to Ruin? The Geo-economic Implications of China's New Silk Road* (15 August 2017), https://hcss.nl/sites/default/files/files/reports/Geoeconomics_Behind_OBOR_FINAL%20%283%29.pdf, p. 3. The financial support for the Belt and Road projects will be provided by the Asian Infrastructure Development Bank (with USD 100 billion in authorized capital), the New Development (BRICS) Bank, the New Silk Road Fund (with USD 40 billion capital), Investment Cooperation Fund between China and Central and Easter European countries (USD 3 billion), etc.

6 The "16+1" forum brings together the following states: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Macedonia, Montenegro, Poland, Romania, Serbia, Slovakia, and Slovenia. See Cooperation between China and Central and Eastern European Countries, http://www.china-ceec.org/eng/.

7 See Gisela Grieger, *One Belt, One Road (OBOR): China's regional integration initiative* (European Parliamentary Research Service, July 2016), http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586608/EPRS_BRI(2016)586608_EN.pdf.

on international market.[8] One of the methods by which these objectives are being pursued is the state-guided and state-supported investments abroad resulting in the acquisition of foreign high-tech companies. According to the report by Mercator Institute for China Studies, the EU continues to be a favorite destination for Chinese investors, with 2016 seeing a 77% increase in Chinese OFDI compared to 2015.[9] The advanced manufacturing sector has been the primary target of Chinese acquisitions with Germany and United Kingdom seeing the bulk of Chinese OFDI flows.

For the substantial part, these investments have been made by the Chinese national champions – the state-owned enterprises (SOEs) under supervision of the State-owned Assets Supervision and Administration Commission of the State Council (SASAC) and backed by the capital from the state-owned banks and financial institutions.[10] In the words of the Chinese Premier Li Keqiang, "Chinese SOE's participation in global cooperation on production capacity, especially through the newly introduced Silk Road Economic Belt and the 21st Century Maritime Silk Road, will benefit not only the Chinese economy but also other economies."[11]

In the EU these acquisitions of the Chinese SOEs' have been assessed by the EU Commission under the merger control regime under the EU Merger Regulation.[12] The EU merger control rules require any economic concentration reaching the "Community dimension" thresholds[13] to be notified and cleared by the EU Commission. In 2011 after clearing a string of acquisitions by Chinese SOEs the EU Commissioner for Competition Policy Joaquín Almunia emphasized that the EU Commission's "analysis is based on competition considerations only, and is irrespective of the nationality of the companies".[14] Nevertheless, the

8 See e.g. Mercator Institute for China Studies, *Made in China 2025: The Making of a High-Tech Superpower and Consequences for the Industrial Countries* (December 2016), https://www.merics.org/fileadmin/user_upload/downloads/MPOC/MPOC_Made_in_China_2025/MPOC_No.2_MadeinChina_2025.pdf.

9 Mercator Institute for China Studies, *Record Flows and Growing Imbalances: Chinese Investment in Europe in 2016* (January 2017), https://www.merics.org/fileadmin/user_upload/downloads/MPOC/COFDI_2017/MPOC_03_Update_COFDI_Web.pdf.

10 See e.g. Ivana Casaburi, *Chinese Investment in Europe 2015-16*, ESADE China Europe Club, http://itemsweb.esade.edu/wi/documentos/prensa/Chinese%20investment%20in%20Europe.pdf.

11 Xing Zhigang, Li calls on SOEs to keep 'going global', *China Daily* (21 September 2015), http://europe.chinadaily.com.cn/business/2015-09/21/content_21931678.htm.

12 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation), OJ L 24, 29.1.2004, p. 1–22.

13 EU Merger Regulation, Article 1.

14 Joaquín Almunia, Policy Objectives in Merger Control, speech/11/561, Fordham Competition

transactions notified by the Chinese SOEs have raised a number of questions as to the suitability of the current merger control rules and standards applied by the EU Commission for the *ex ante* assessment of the likely impact of such transactions on competition in the EU Internal Market. The present paper provides an overview of the EU Commission's practice to date with special focus on the concepts of "single economic unit", "decisive influence" and "control" that have been applied by the EU Commission in the cases involving Chinese SOEs.

(1) EU Merger Control and State-Owned Undertakings

The EU Merger Regulation proclaims the general principle of non-discrimination between the public and the private sectors: "In the public sector, calculation of the turnover of an undertaking concerned in a concentration needs, therefore, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them".[15] According to the Jurisdiction Notice, "whether the operation is to be regarded as an internal restructuring depends in turn on the question whether both undertakings were formerly part of the same economic unit".[16] Therefore, "a merger or an acquisition of control arising between two undertakings owned by the same State (or the same public body) may constitute a concentration if the undertakings were formerly part of different economic units having an independent power of decision. If this is the case, both of them will qualify as undertakings concerned although both are owned by the same State."[17]

The existence of a single economic unit is decided on the basis of the independent power of decision that such unit should be able to exercise. In the case of SOEs, the Notice clearly distinguishes between the powers exercised by the state as a public authority and its powers of a controlling shareholder exercised over the SOE.[18] The regulatory powers of the state exercised in the

Conference (8 September 2011), http://europa.eu/rapid/press-release_SPEECH-11-561_en.htm?locale=en.

15 EU Merger Regulation, recital 22.

16 Jurisdictional Notice, para 52.

17 Jurisdictional Notice, para 153.

18 Jurisdictional Notice, para 53: "the prerogatives exercised by a State acting as a public authority rather than as a shareholder, in so far as they are limited to the protection of the public interest, do not constitute control within the meaning of the Merger Regulation to the extent that they have neither the aim nor the effect of enabling the State to exercise a decisive influence over the activity of the undertaking.

public interest are not regarded as control within the meaning of the EU Merger Regulation. According to the Notice, "where a State-owned company is not subject to any coordination with other State-controlled holdings, it should be treated as independent".[19] Therefore, the identification of the single economic unit in cases involving SOEs and/or their substantive will be essential for the jurisdictional aspects of the EU merger control regime: (1) the ascertaining whether the notified transaction constitutes an economic concentration of previously independent undertakings; and (2) the calculation of annual turnover of the companies included in the "single economic unit" in order to determine the existence of "Community dimension". The identification of the "single economic unit" will be also important for the subsequent assessment of the concentration's likely effect on competition under the "significant impediment to effective competition"[20] test.

The identification of the "single economic unit" involving SOEs can be exemplified by *Rosneft/TNK-BP* merger cleared by the EU Commission in 2013.[21] Rosneft was a Russian oil company indirectly controlled by the Russian State through a 75.16% of its shares held by OJSC Rosneftegaz, a wholly-owned Russian SOE. The EU Commission concluded that Rosneft cannot be deemed to have an independent power of decision from the Russian State for the following reasons: (1) the members of the board of directors are appointed and removed by the controlling shareholder, which is Russian State; (2) the members of the current board of directors were concurrently members of other Russian SOEs (interlocking directorships); (3) the state-nominated members of the board of directors were required by law to cast their vote in accordance with any directives issued by the Russian Government.[22] As a result, in its competitive assessment the EU Commission considered a scenario where Rosneft and other Russian SOEs were considered to be part of a single economic unit. The *Rosneft/TNK-BP* case can be viewed as typical in terms of the EU Commission's approach to evaluation of regulatory and corporate governance frameworks when identifying a single economic unit that includes SOEs. The following review identifies the challenges of applying this approach in cases involving SOEs controlled by the Chinese State.

(2) Chinese SOEs' acquisitions under the EU Merger Regulation

Bluestar/Elkem was among first such cases where the EU Commission examined the acquisition of the Norwegian company Elkem SA, active in the

19 Jurisdictional Notice, para 194.

20 EU Merger Regulation, Article 2.

21 Case No. COMP/M.6801 *Rosneft/TNK-BP*, decision of 8 March 2013.

22 COMP/M.6801, para 7.

production and sale of silicon related materials such as silicon metal, ferrosilicon and microsilica, by China National Bluestar Group.[23] Bluestar was a subsidiary of China National Chemical Corporation (ChemChina), an SOE wholly owned by the Chinese State and controlled by the SASAC. The EU Commission set out to establish whether ChemChina is an independent economic unit or whether it belongs to a wider economic unit encompassing all Chinese SOEs. The EU Commission considered among others the following factors: (1) the possible power of the state to influence the SOEs' commercial strategy; (2) the likelihood for the state to coordinate the commercial conduct of SOEs; (3) the existence and degree of interlocking directorships between SOEs; (4) the existence of adequate safeguards ensuring that commercially sensitive information is not shared among SOEs.[24]

In relation to the above mentioned criteria the merging parties argued that: (1) SASAC exercises only basic ownership functions as a non-managerial trustee representing the state; (2) SASAC does not interfere with the strategic decision-making of ChemChina such as approval of the business plan or budget; (3) SASAC does not request commercial information from ChemChina.[25] The parties also attempted to differentiate between the central SASAC and regional SASACs advancing the following arguments: (1) central SASAC has no operational control over regional SASACs; (2) regional SASACs are supposed to act primarily in their own interest; (3) managerial appointment authority for regional SASACs resided with the local governments; (4) central and regional SASACs pursue different strategies and objectives and central SASAC does not exercise strong authority over regional SASACs and SOEs under their control.[26] Since the market power of the Chinese SOEs was limited in the markets concerned, the EU Commission left the question of ChemChina's independence from the central SASAC open.[27]

On 19 May 2011 the EU Commission cleared a joint venture in the petroleum sector with the participation of Sinochem, a Chinese SOE under supervision of the central SASAC.[28] Quite predictably, the merging parties submitted that Sinochem was a separate economic entity with independent power of decision from the Chinese state. They referred to the Law on State-Owned Assets of Enterprises[29]

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23 Case No. COMP/M.6082 *China National Bluestar/Elkem*, decision of 31 March 2011.

24 COMP/M.6082, paras 10-11.

25 COMP/M.6082, paras 18-21.

26 COMP/M.6082, paras 23-30.

27 COMP/M.6082, paras 22, 34.

28 Case No. COMP/M.6113 *DSM/Sinochem/JV*, decision of 19 May 2011.

29 The Law of the People's Republic of China on State-Owned Assets in Enterprises, adopted at the 5th Meeting of the Standing Committee of the Eleventh National People's Congress of the People's Republic of China on 28 October 2008, http://www.npc.gov.cn/englishnpc/Law/2011-02/15/content_1620615.htm.

and Interim Regulations on Supervision and Management of State-Owned Assets of Enterprises,[30] which allegedly prevent SASAC from exercising a decisive influence over Sinochem and from intervening in the strategic decision-making process of this SOE.[31] EU Commission, on the other hand, has referred to the OECD report[32] indicating that commercial decisions of Chinese SOEs can be influenced by the Chinese state both through formal channels and less formal ways.[33] Nevertheless, "in the absence of representations by the Chinese State and accompanying evidence, it is not possible to conclude whether or not Sinochem enjoys an independent power of decision".[34] As a result, the EU Commission considered a "worst case" scenario when Sinochem's market position was taken together with other Chinese SOEs. This case represented a missed opportunity for the EU Commission to address the relationship between the corporate (board of directors) and political (party) structures in the management of the Chinese SOEs, which have been noted by the commentators as an important control mechanism over the top SOE managers.[35]

Another merger case where the EU Commission assessed the independence of ChemChina as a separate economic unit was acquisition of joint control by China National Agrochemical Corporation (CNAC), a subsidiary of ChemChina, and Israeli company Koor Industries over Makhteshim Agan Industries (Israel).[36] Following its previous practice in *Bluestar/Elkem*[37] and *DSM/Sinochem*,[38] the EU Commission considered the "worst case" scenario and left the question open. One of the respondents in the market investigation expressed the concern that Chinese consortia for certain active ingredients used in the crop protection industry, such as recently created China Crop Protection Industry Association, may facilitate

30 Interim Regulations on Supervision and Management of State-owned Assets of Enterprises, adopted at the 8th Executive Meeting of the State Council on 13 May 2003, http://en.sasac.gov.cn/n1408035/c1477199/content.html.

31 COMP/M.6113, para 14.

32 OECD Reviews of regulatory reform: China 2009 Defining the boundary between the market and the state, available at http://www.oecd.org/publications/oecd-reviews-of-regulatory-reform-china-2009-9789264059429-en.htm.

33 COMP/M.6113, para 15.

34 COMP/M.6113, para 16.

35 See Li-Wen Lin and Curtis J. Milhaupt, "We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China" (2013) *Stanford Law Review* 65: 697-759.

36 Case No. COMP/M.6141 *China National Agrochemical Corporation/Koor Industries/Makhteshim Agan Industries*, decision of 3 October 2011.

37 COMP/M.6082.

38 COMP/M.6113.

price coordination.[39] The EU Commission firmly rebutted this argument by stating that "this practice could fall under the antitrust rules of the Treaty on the Functioning of the European Union. They have thus an incentive not to engage in such practices."[40]

On 13 May 2011 the EU Commission cleared the joint venture of PetroChina and Ineos AG (Switzerland) establishing joint control over the existing Ineos refining business in Scotland and France.[41] PetroChina was an SOE, publicly listed subsidiary of China National Petroleum Corporation (CNPC). The EU Commission considered a "worst case" scenario taking into account the market shares of other Chinese SOEs active in the petroleum sector (such as China Petrochemical Corporation (Sinopec) and China National Offshore Oil Corporation (CNOOC)). Since the results of the above assessment did not alter the competitive conditions on the relevant market the EU Commission decided that there was no need to conclude whether CNPC group and other Chinese SOEs in oil sector should be considered as belonging to the same economic entity.[42]Another acquisition in petroleum industry assessed by the EU Commission under the EU Merger Regulation concerned the joint control acquired by Sinopec and Mercuria Energy Group (Cyprus) over Vesta Terminal B.V., a Dutch company active in the storage of petroleum products and biodiesel at port terminals in Belgium, Netherlands, and Estonia.[43] The transaction was cleared under the "worst case" scenario assessment considering the activities of other Chinese SOEs.[44]

In 2015 China National Tyre & Rubber Co (CNRC) sought to acquire Italian manufacturer of tires Pirelli & Co SpA.[45] The acquiring undertaking was wholly owned by ChemChina, SOE supervised by central SASAC. When evaluating the decisional independence of ChemChina from other Chinese SOEs controlled by SASAC the EU Commission considered the "traditional" factors including the degree of interlocking directorships and safeguards preventing exchange of commercial information. In reply to these criteria the merging parties have showed that none of the board members of ChemChina or CNRC has any official function in other Chinese SOEs. They also argued that SASAC does not require SOEs to

39 COMP/M.6141, para 77.

40 COMP/M.6141, para 78.

41 Case No. COMP/M.6151 *PetroChina/Ineos/JV*, decision of 13 May 2011.

42 COMP/M.6151, para 31.

43 Case No. COMP/M.6807 *Mercuria Energy Asset Management/Sinomart KTS Development/Vesta Terminals*, decision of 7 March 2013.

44 COMP/M.6807, para 33.

45 Case No. COMP/M.7643 *CNRC/Pirelli*, decision of 1 July 2015.

share any commercially sensitive information.[46] Once again, due to the limited market power of the parties the EU Commission decided to leave the question ChemChina's independence from other SOEs open.[47]

In 2016 China National Chemical Equipment (CNCE), a wholly owned subsidiary of ChemChina sought to acquire control over KraussMaffei Group (Germany), a global market leader in the plastics and rubber processing machinery industry.[48] The merging parties followed the well-established strategy of arguing that SASAC is required to observe the principle of separation between ownership and operational capacity of SOEs.[49] They also pointed out that there is no command-relationship between central and regional SASACs.[50] The EU Commission has followed its own practice of reaching no definitive conclusion on the ultimate control and functional independence of ChemChina.[51]

A definitive step forward in resolving the complex issues of state control over Chinese SOEs has been made by the EU Commission in *EDF/CGN/NNB*[52] case involving a joint acquisition of control by Electricite de France SA and China General Nuclear Power Corporation (CGN) over NNB Holding Company operating three nuclear power plants in the United Kingdom. When addressing the parties' submission concerning the influence on SOEs' commercial conduct exercised by SASAC, the EU Commission referred to the same Chinese legislation and concluded that "Central SASAC has influence on CGN's major decision making and therefore CGN does not enjoy autonomy from the State in deciding major matters like strategy, business plan or budget".[53] In relation to its "traditional" criteria on assessment of functional independence of companies, the EU Commission clarified that "the absence of cross-directorships with other SOEs and the existence of confidentiality provisions do not preclude Central SASAC from influencing CGN's commercial strategy in light of the different powers mentioned above".[54] Moreover, the EU Commission noted that Chinese State had other means to influence coordination between companies active in energy sector and in the nuclear industry in particular. In 2014, for example, CGN

46 COMP/M.7643, paras 11-12.

47 COMP/M.7643, para 21.

48 Case No. COMP/M.7911 *CNCE/KM Group*, decision of 15 March 2016.

49 COMP/M.7911, para 7.

50 COMP/M.7911, para 9.

51 COMP/M.7911, para 11.

52 Case No. COMP/M.7850 *EDF/CGN/NNB*, decision of 10 March 2016.

53 COMP/M.7850, para 37.

54 COMP/M.7850, para 42.

together with several other Chinese SOEs formed the China Nuclear Industry Alliance, allegedly designed for creating synergies and eliminating detrimental competition in export markets.[55] As a result, the EU Commission concluded that SASAC can impose or facilitate coordination between SOEs in the energy industry and, therefore, CGN and other Chinese SOEs in the energy sector should be considered as a single economic unit and their turnover should be aggregated for the purposes of establishing the Community dimension under the EU Merger Regulation.[56] As noted by the commentators, such definitive conclusion that all Chinese SOEs under control of central SASAC active in certain industry/market would make it problematic for the EU Commission to reach a different conclusion in future cases concerning the same industry/market.[57] Moreover, by concluding that all Chinese SOEs in a particular economic sector should be treated as part of a single economic unit, the EU Commission has arguably exempted mergers between such SOEs from notification under EU Merger Regulation as they would constitute an internal reorganization as opposed to concentration between previously independent undertakings.[58]

The conclusion reached by the EU Commission in *EDF/CGN/NNB* case that at least some Chinese SOEs (for example those in the energy sector) constitute a "single economic unit" controlled by SASAC may imply that "intra-group" relations (agreements and concerted practices) may fall outside the scope of EU competition law.[59] This is especially worrisome given the EU Commission's statement in *CNAC/Koor Industries* merger case[60] that EU antitrust rules should serve as an incentive for the Chinese SOEs not to engage in foreclosure practices or price coordination. Based on the application of the anti-monopoly law to the actions of the SOEs in China, the scholars conclude that at least for China "taming the Chinese leviathan [SOEs] through antitrust law is unfortunately a false hope for future reform of Chinese SOEs".[61] Furthermore, it has been noted that the

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55 COMP/M.7850, para 44.

56 COMP/M.7850, para 49.

57 See Kyriakos Fountoukakos and Camile Puech-Baron, "The EU merger regulation and transactions involving states or state-owned enterprises: Applying rules designed for the EU to the People's Republic of China" (2012) *Concurrences Review* 1-2012: 44-54, p. 52.

58 See Angela Huyue Zhang, "The Single-Entity Theory: An Antitrust Time Bomb for Chinese State-Owned Enterprises?" (2012) *Journal of Competition Law & Economics* 8(4): 805-830, p. 830.

59 See Adrian Emch, "EU merger control complications for Chinese SOE transactions", Kluwer Competition Law Blog (27 May 2016), http://competitionlawblog.kluwercompetitionlaw.com/2016/05/27/eu-merger-control-complications-for-chinese-soe-transactions/.

60 COMP/M.6141, para 78.

61 Angela Huyue Zhang, "Taming the Chinese Leviathan: Is Antitrust Regulation a False Hope?" (2015)

selective antitrust enforcement by the Chinese authorities targeting certain SOEs "suggests that the government does not view standard mechanisms of corporate control as its most effective means of influencing SOE behavior".[62] This aspect in the state control over Chinese SOEs would be certainly missed under "ownership-neutral" provisions of the EU Merger Regulation and the Jurisdictional Notice.[63]

Most recently, the EU Commission has adopted its first conditional clearance decision in a merger case involving Chinese SOE – the acquisition of Swiss agro-chemical company Syngenta by ChemChina.[64] The merging parties have advanced "traditional" arguments as to the ChemChina's independence from SASAC and other Chinese SOEs: (1) SASAC is required to respect the principles of separation between government and enterprise and non-intervention in the legitimate and independent business operations of SOEs; (2) SASAC's rights are restricted by law and "do not go beyond typical minority shareholders protection rights";[65] (3) ChemChina has the independent authority to decide its budget, business plan and commercial strategies; (4) there are no interlocking competition between directorships in ChemChina and other SoEs and Chinese competition law prohibits the exchange of competitively sensitive information between competing companies.[66] The EU Commission has left the above arguments unanswered and considered the "worst case" scenario under which ChemChina was regarded as one economic entity with other companies owned by the Chinese Central Government.[67] By leaving the identification of the "single economic unit" in *ChemChina/Syngenta* open, the EU Commission has made a "step back" in relation to its more resolute conclusion reached in *EDF/CGN/NNB*. This approach may be seen as problematic given the fact that with the growing presence of Chinese SOEs on the global markets the continuous application of the "worst case scenario" assessment would lead to the need for commitments, remedies or even prohibitions of the notified concentrations.

Beyond the EU Merger Regulation: EU Screening of Foreign Investments

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Stanford Journal of International Law 51: 195-228, p. 228.

62 Curtis J. Milhaupt and Wentong Zheng, "Beyond Ownership: State Capitalism and the Chinese Firm" (2015) *Georgetown Law Journal* 103: 665-722, p. 683.

63 Jurisdictional Notice, para 53.

64 Case No. COMP/M.7962 *ChemChina/Syngenta*, decision of 5 April 2017. See EU Commission, press release IP/17/882 *Mergers: Commission clears ChemChina acquisition of Syngenta, subject to conditions* (5 April 2017), http://europa.eu/rapid/press-release_IP-17-882_en.htm.

65 COMP/M.7962, para 85.

66 COMP/M.7962, paras 83-87.

67 COMP/M.7962, para 88.

As the reform of the EU Merger Regulation in the light of the challenges posed by the jurisdictional and substantive assessment of the Chinese SOEs' acquisitions seems an unlikely venture, the EU Commission decided to resort to strengthen another regulatory mechanism, namely – the screening of foreign investments on grounds of public order and security. In his 2017 State of the Union address, the EU President Juncker stated: *"Europe must always defend its strategic interests. This is why today we are proposing a new EU framework for investment screening. If a foreign, state-owned, company wants to purchase a European harbour, part of our energy infrastructure or a defence technology firm, this should only happen in transparency, with scrutiny and debate."*[68] *This move was applauded by Germany, France and Italy "as an important step towards a level playing field in Europe"*.[69]

In September 2017 the EU Commission tabled a proposal for a regulation establishing a framework for screening of foreign direct investments into the European Union.[70] The proposed system in based on the screening mechanisms operated by the EU Member States at the national level[71] and the proposed screening procedure to be carried out by the EU Commission. When screening a foreign direct investment on the grounds of security or public order, Member States and the EU Commission may consider the following factors: (1) critical infrastructure, including energy, transport, communications, data storage, space or financial infrastructure, as well as sensitive facilities; (2) technologies, including artificial intelligence, robotics, semiconductors, technologies with potential dual use applications, cybersecurity, space or nuclear technology; (3) the security of supply of critical inputs; (4) access to sensitive information or the ability to control

68 EU Commission, press release State of the Union 2017 - Trade Package: European Commission proposes framework for screening of foreign direct investments (14 September 2017), http://europa.eu/rapid/press-release_IP-17-3183_en.htm.

69 Joint press release by Germany, France, Italy "EU proposal on investment vetting is an important step towards level playing field in Europe and better protection in case of corporate acquisitions" (13 September 2017), https://www.bmwi.de/Redaktion/EN/Pressemitteilungen/2017/20170913-eu-vorschlag-zu-investitionspruefungen-wichtiger-schritt-fuer-faire-wettbewerbsbedingungen-in-europa-und-besseren-schutz-bei-firmenuebernahmen.html.

70 EU Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union, COM (2017) 487 final, https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-487-F1-EN-MAIN-PART-1.PDF.

71 For the overview of the national FDI screening mechanisms see Gisela Grieger, Foreign direct investment screening: A debate in light of China-EU FDI flows (European Parliamentary Research Service, May 2017), http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603941/EPRS_BRI(2017)603941_EN.pdf.

sensitive information.[72] While the Member States will be able to maintain their existing investment screening mechanisms,[73] the EU Commission will be able to screen foreign direct investments that are likely to affect "projects or programmes of Union interest".[74] In case of such projects or programmes the EU Commission "may issue an opinion addressed to the Member State where the foreign direct investment is planned or has been completed", while the Member State concerned "shall take utmost account of the Commission's opinion and provide an explanation to the Commission in case its opinion is not followed".[75]

Since the proposed foreign direct investment screening mechanism will not abolish the EU merger control regime, the question arises as to how the proposed framework will correlate with Member States' right under the EU Merger Regulation Member to block concentrations on the basis of "legitimate interests other than those taken into consideration by this Regulation" such as public security, plurality of the media and prudential rules.[76] Any other interests have to be notified to the EU Commission for prior approval.[77] According to the EU Commission's explanation contained in the proposal, the grounds for screening foreign direct investments and "legitimate interests" under EU Merger Regulation should be interpreted in a coherent manner guided by the general principles and other provisions of EU law.[78]

Conclusion

Based on the above review of the Chinese SOEs' acquisitions in the EU

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72 Proposal, Article 4.

73 Member States that do not maintain screening mechanisms shall provide the Commission with an annual report covering foreign directs investments that took place in their territory, on the basis of information available to them. Proposal, Article 7. Currently, the following Member States have screening mechanisms in place: Austria, Denmark, Germany, Finland, France, Latvia, Lithuania, Italy, Poland, Portugal, Spain, and the United Kingdom.

74 According to the proposal, the following are projects or programmes of Union interest:
European GNSS programmes (Galileo & EGNOS), Copernicus, Horizon 2020,
Trans-European Networks for Transport (TEN-T), Trans-European Networks for Energy (TEN-E), Trans-European Networks for Telecommunications. See Annex 1 to the Proposal, https://ec.europa.eu/info/law/better-regulation/initiatives/com-2017-487_en.

75 Proposal, Article 9.

76 EU Merger Regulation, Article 21(4).

77 See Lucrezia Busa and Elisa Zaera Cuadrado, "Application of Article 21 of the Merger Regulation in the E.ON/Endesa case" *Competition Policy Newsletter* (2008) 2: 1-3, http://ec.europa.eu/competition/publications/cpn/2008_2_1.pdf.

78 Proposal, recital 23.

screened under provisions of the EU Merger Regulation, they have presented the following challenges for interpretation and application of the concepts such as "concentration", "single economic unit", "control" and "decisive influence", which can affect the following steps in the merger assessment process: (1) determination whether the notified transaction constitutes a concentration (of previously independent undertakings) or an internal reorganization; (2) calculation of the turnover for the purpose of ascertaining the existence of "Community dimension"; (3) substantive assessment of the notified concentration on compatibility with the internal market. The first question has not yet presented any difficulties in the EU merger control practice as the EU Commission has not yet evaluated the merger between two or more Chinese SOEs. The second question has been left largely unanswered since the annual turnover of a single Chinese SOE was sufficient to establish the existence of the "Community dimension", which triggered the applicability of the EU Merger Regulation. Nevertheless, the remaining uncertainty will continue to pose substantial administrative burden on the merging parties, which would have to proceed with notification of their concentration under "worst case scenario". The third question, namely the competitive assessment of concentrations involving Chinese SOEs remains a subject that requires further research and consideration.

The above mentioned merger cases demonstrated that the EU Commission is often unable on the basis of the submitted evidence to ascertain the influence of the Chinese State on the SOEs' decision-making, which also entail the possibility to coordinate the activities of formally separate SOEs in the same sector or even across different sectors in pursuit of the industrial policies such as Made in China 2025 and infrastructure investments under the Belt and Road Initiative. Unfortunately, none of these questions have been addressed in the public consultation on the evaluation of procedural and jurisdictional aspects of EU merger control carried out by the EU Commission in 2016-2017.[79] As suggested by scholars, "instead of focusing on ownership, the EU should look into the state-centered institutional framework in which firms operate in China."[80] Thus a deeper understanding of the Chinese state-centered economic model and the role of SOEs in China's industrial policies is a prerequisite for an adequate competitive assessment of the economic concentrations involving Chinese SOEs.

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79 http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html.

80 Alicia García-Herrero and Jianwei Xu, How to handle state-owned enterprises in EU-China investment talks (June 2017) *Bruegel Policy Contribution* No. 18, http://bruegel.org/wp-content/uploads/2017/06/PC-18-2017_2.pdf, p.12.