

Article

Consolidation of the State-Owned Enterprises in China: A Missed Opportunity for the EU Merger Control?

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I. Introduction

The growing presence of the Chinese state-owned enterprises (SOEs) on the global markets through trade and investments makes the potential cross-border (anti)competitive effects of their consolidations relevant to multiple jurisdictions around the world. The following examples from the European Union (EU) and US, two leading competition law enforcers, demonstrate the regulatory concerns arising in connection with the continuous consolidation of Chinese SOEs, which have achieved substantial business presence in both jurisdictions.

On 30 November 2020, the European Commission has received notification of the proposed concentration between China Baowu Steel Group (Baowu) and Taiyuan Iron & Steel Company (TISCO), two state-owned companies controlled by the State-owned Assets Supervision and Administration Commission (SASAC) of the State Council and the Shanxi provincial SASAC respectively. The notification was submitted under Article 3(1)(b) of the EU Merger Regulation (EUMR), which refers to an economic concentration in a form of acquisition.¹ Following the preliminary examination, the Commission concluded that 'the notified transaction could fall within the scope of the Merger Regulation' but reserved the final decision on this point and invited interested third parties to submit their possible observations on the proposed operation.² On 23 December 2020, Baowu informed the Commission that it withdrew its notification.³ As a result,

Key Points

- Mergers of China's state-owned enterprises (SOEs) aimed at increasing their competitiveness and their presence on global markets raised a number of challenging questions concerning their appraisal under merger control regimes worldwide.
- The review of the Commission's merger control practice reveals numerous instances where it presumed the existence of a 'single economic unit' comprising several Chinese SOEs when assessing competitive effects of Chinese SOEs' acquisitions in Europe.
- The assertion of merger control jurisdiction over a Chinese SOE-to-SOE merger would require the Commission to treat these SOEs as autonomous economic entities, which will have an impact on future assessments of Chinese SOEs' acquisitions of European companies.

the SOE consolidation escaped the scrutiny of the European competition law enforcer.

On 31 March 2021, the SASAC has officially announced that China's state-owned chemical industry giants Sinochem and ChemChina have implemented a 'joint reorganization', which was previously cleared by China's antitrust enforcer, the State Administration for Market Regulation (SAMR).⁴ ChemChina has featured prominently in the EU merger control in 2017 when the Commission has conditionally cleared ChemChina's acquisition of the Swiss company Syngenta AG, a leading manufacturer of seed and crop protection products.⁵

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1 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1, art 3(1)(b).

2 Prior notification of a concentration (Case M.10083 *China Baowu/Taiyuan Iron & Steel Group*) Candidate case for simplified procedure [2020] OJ C 424/36.

3 Withdrawal of notification of a concentration (Case M.10083 *China Baowu/Taiyuan Iron & Steel Group*) [2021] OJ C 6/10.

4 State Administration for Market Regulation, 'List of Cases of Concentration of Undertakings Approved Unconditionally from 31 August 2020 to 6 September 2020' (8 September 2020), available at: http://www.samr.gov.cn/fldj/ajgs/wtjjzajgs/202009/t20200908_321509.html.

5 *ChemChina/Syngenta* (Case M.7962) Commission Decision of 5 April 2017. See also *ChemChina/Adama* (Case M.8170) Commission Decision

The same merger was cleared by the US Committee on Foreign Investment (CFIUS) on security grounds.⁶ The announced mega-merger between ChemChina and Sinochem has prompted a group of Republican congressmen to request the US Department of Treasury to re-examine transaction.⁷ Since both ChemChina and Sinochem have been placed on the list of 'Communist Chinese military companies' by the U.S. Department of Defense,⁸ such re-examination could lead to a different result comparing to the 2016 clearance. As emphasized by the representative Michael T. McCaul, the CFIUS 'should use the ChemChina and Sinochem merger to correct its mistake of letting ChemChina acquire Syngenta in 2016 to begin with.'⁹

The above mergers are just two examples of the continuous consolidation of the Chinese SOEs. In contrast to several national competition authorities that scrutinized Chinese SOE consolidations within their merger control regimes, the Commission has yet to apply EU merger rules to a Chinese SOE-to-SOE merger. The present paper analyses the applicability of the EU merger control rules to SOE mergers taking into account the specifics of the corporate governance and state control over SOEs in China with the scope to ascertain whether and how Chinese SOE-to-SOE mergers would be appraised under the EU merger control. The discussion proceeds as follows. Section II reviews China's SOE reform by explaining the role of corporate consolidations of the SOEs through a process of mergers and acquisitions. Section III provides an overview of the regulatory approaches towards Chinese SOE consolidations under the national merger control regimes where these transactions were notified due to the substantial presence of the Chinese SOEs on the respective markets. Section IV addresses the question of applicability of EU merger control to Chinese SOE

consolidations taking into account how SOE-related mergers and acquisitions have been appraised by the Commission under the EUMR. Finally, the concluding Section V provides an outlook on the possible regulatory treatment of the Chinese SOE consolidations under the EU merger control regime.

II. China's reform of state-owned enterprises: consolidations and beyond

The current round of SOE reform in China dates back to 2013 when the Central Committee of the Communist Party of China (CPC) has adopted the Decision on comprehensively deepening the reform, which paved the path for strengthening the 'modern enterprise system' of SOEs.¹⁰ Subsequently, the 2015 Guiding Opinions on SOE reform issued by the State Council called for the development of 'stronger, better and larger SOEs'.¹¹ The reform proceeded with the categorization of the SOEs into two major groups: commercial or for-profit SOEs and public welfare SOEs.¹² The state control over commercial SOEs was supposed to be transformed by the establishment of the state owned capital investment and operating companies (SCIOCs) that would add another corporate layer between the SASAC and the SOEs.¹³ The SCIOCs possessing a financial expertise would focus on increasing investment returns and controlling the SOEs more effectively.¹⁴ The Guiding Opinions also called for reorganization and integration of the existing SOEs as well as 'organized exit' or 'orderly market exit' of certain SOEs in order to expedite the disposal of inefficient and non-performing assets and to eliminate obsolete production capacities.¹⁵ To prevent the cases of mismanagement and corruption during the reorganization, mergers and acquisitions as well as international operations of SOEs, the State Council has released a set of measures aimed at strengthening supervision over state owned assets.¹⁶

of 3 October 2016; *ChemChina/AKC/JV* (Case M.8422) Commission Decision of 1 August 2017.

- 6 See Michael Shields and Greg Roumeliotis, 'U.S. Clearance of ChemChina's Syngenta Deal Removes Key Hurdle' (*Reuters*, 22 August 2016), available at: <https://www.reuters.com/article/us-syngenta-ag-m-a-chemchina-approval-idUSKCN10X0DS>.
- 7 Congress of the United States, 'Letter to Janet Yellen, Secretary of Treasury' (9 April 2021), available at: https://gop-foreignaffairs.house.gov/wp-content/uploads/2021/04/4.9.21_CFIUS-letter_Syngenta.Review_FINAL.pdf.
- 8 United States Department of Defense, 'Qualifying Entities Prepared in Response to Section 1237 of the National Defense Authorization Act for Fiscal Year 1999' (3 June 2021), available at: https://media.defense.gov/v/2020/Aug/28/2002486689/-1/-1/1/LINK_1_1237_TRANCHE-23_QUALIFYING_ENTITIES.PDF.
- 9 Committee on Foreign Affairs, 'McCaul, Crawford Urge Treasury Department to Review Merger Between Chinese Government-Backed Military Companies' (15 April 2021), available at: <https://gop-foreignaffairs.house.gov/press-release/mccaul-crawford-urge-treasury-department-to-review-merger-between-chinese-government-backed-military-companies/>.

- 10 Decision of the Central Committee of the Communist Party of China on Several Major Issues of Comprehensively Deepening Reform (Third Plenary Session of the Eighteenth Central Committee of the Communist Party of China, 12 November 2013).
- 11 State Council, Guiding Opinions of the Central Committee of the Communist Party of China and the State Council on Deepening the Reform of State-Owned Enterprises (24 August 2015), para 1.
- 12 *Ibid*, para 4.
- 13 State-owned Assets Supervision and Administration Commission, Notice on the Issuance of the Opinions on Deepening the Experimental Reform of State Capital Investment Companies for Central Enterprises (29 March 2019).
- 14 See Barry Naughton, 'The Financialisation of the State Sector in China' (2019) 11 *East Asian Policy* 46, 50.
- 15 Guiding Opinions (n11), para 14.
- 16 Opinions of the General Office of the State Council on Strengthening and Improving Supervision Over State-Owned Assets in Enterprises to Prevent Loss of State-Owned Assets (31 October 2015).

Following the declared objectives of the SOE reform, the State Council acting through SASAC has implemented a series of SOE consolidations whereby the existing SOEs were reorganized through mergers and acquisitions. Thus, the year of 2013 witnessed the mergers of SOEs in the electronics,¹⁷ foodstuffs,¹⁸ and heavy industry.¹⁹ In 2015, three new SOE groups were created by merging the existing companies: State Power Investment Corporation,²⁰ China COSCO Shipping Corporation,²¹ and China Railway Rolling Stock Corporation (CRRC).²² In 2016, COFCO absorbed Chinatex Corporation Limited (Chinatex), while China Grain Reserves Corporation (Sinograin) acquired China National Cotton Reserves Corporation (National Cotton).²³ China Energy Investment Corporation was established in 2017 through a merger of electricity generator China Guodian Corporation (Guodian) and coal producer China Shenhua Group (Shenhua).²⁴ In 2018–2019 China consolidated its SOEs in the nuclear industry²⁵ and shipbuilding.²⁶ In 2020, the consolidation of pipeline networks of three SOEs²⁷ provided the basis for the newly established National Oil & Gas Pipeline Network Group.²⁸ The above consolidations of the SOEs that prior to merger maintained horizontal or vertical relationships demonstrates the intention of

the state shareholder to replace competition between the merged entities with synergies and efficiencies that could be realized from optimizing their production capacities, joining their supply and customer bases, generate additional capacities for overseas expansion.

The competition effects stemming from China's consolidation of the SOE sector have attracted a certain degree of regulatory attention in the EU, particularly in relation to the revamped trade defense mechanism against subsidized imports.²⁹ The Commission in its report on significant distortions in the economy of PRC investigated China's steel, aluminum, chemical and ceramic sectors.³⁰ In relation to steel sector, the Commission's report indicates that the 13th Five Year Plan envisages industry restructuring by setting up fewer but bigger steel enterprises to avoid 'competitive vicious circle' on certain steel products so that 60% of the industry shall be controlled by ten enterprises.³¹ China's Blueprint for the Steel Industry Adjustment and Revitalisation,³² issued in 2009 and covering the period of 2009–2011 called for an 'increase the concentration ratio and reorganisation within the industry, aiming at developing fewer but stronger super large steel companies like Baosteel, Anben Group and WISCO' and to 'facilitate mergers, acquisitions and reorganisation of steel mills'.³³ In 2016, the merger of Baoshan Iron and Steel Group (Baosteel) and Wuhan Iron and Steel Corp. (WISCO) created the Baowu Steel Group (Baowu).³⁴ The reorganization of the WISCO group has turned it into one of the most competitive steel companies in the world with investments in iron ore mines in Australia, Brazil, Canada, Liberia, and Madagascar.³⁵ In 2019, the Anhui province SASAC announced its decision to transfer a controlling stake (51%) in Maanshan Iron

17 China Electronics Technology Group Corporation (CETC) acquired Caihong Group Corporation (Caihong).

18 China National Cereals, Oils and Foodstuffs Corporation (COFCO) acquired China Grain and Logistics Corporation (China Grain).

19 China National Machinery Industry Corporation's (Sinomach) acquired China National Erzhong Group Corporation (Erzhong).

20 Through merger of China Power Investment Corporation (CPI) and State Nuclear Power Technology Corporation Limited (SNPTC).

21 Through merger of China Power Investment Corporation (CPI) and State Nuclear Power Technology Corporation Limited (SNPTC).

22 Through merger of China Northern Locomotive & Rolling Stock Industry Group (CNR) and China South Locomotive & Rolling Stock Industry Group (CSR). See Weihuan Zhou, Henry Gao, Xue Bai, 'Building a Market Economy Through WTO-Inspired Reform of State-Owned Enterprises in China' (2019) 68 *International and Comparative Law Quarterly* 977, 990–991.

23 See Sean O'Connor, *SOE Megamergers Signal New Direction in China's Economic Policy* (US-China Economic and Security Review Commission 2018) 14.

24 See State-owned Assets Supervision and Administration Commission of the State Council, 'China Guodian Corporation and China Shenhua Group Reorganize and Merge into China Energy Corporation on 28 August 2017' (28 August 2020), available at: http://en.sasac.gov.cn/2020/08/28/c_2177.htm.

25 China National Nuclear Corporation (CNNC) acquired China Nuclear Engineering and Construction Group (CNEC).

26 The newly established China Shipbuilding Group merged China State Shipbuilding Corporation (CSSC) and China Shipbuilding Industry Group Corporation Ltd (CSIC).

27 These were China National Petroleum Corporation (PetroChina), China Petroleum and Chemical Corporation (Sinopec), and China National Offshore Oil Corporation (CNOOC).

28 See Eric Ng, 'China's State-owned Pipeline Giant Pipechina Kicks Off Industry Restructuring With USD 460 Million Acquisition' (*South China Morning Post*, 22 July 2020), available at: <https://www.scmp.com/business/companies/article/3094255/chinas-state-owned-pipeline-giant-pipechina-kicks-industry>.

29 Regulation (EU) 2017/2321 of 12 December 2017 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union [2017] OJ L 338/1.

30 Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations SWD(2017) 483 final/2 (Commission Staff Working Document).

31 *Ibid* 349.

32 State Council, 'Blueprint for the Steel Industry Adjustment and Revitalisation' (20 March 2009), available at: http://www.gov.cn/zwqk/2009-03/20/content_1264318.htm.

33 Commission Staff Working Document (n30) 356. See also Chang-do Kim, 'Steel Industry Policies under the Xi Jinping Administration and Their Implications' (2018) 6 *Asian Steel Watch* 94.

34 The Ministry of Commerce approved the merger without conditions on 30 November 2016. See 'Unconditional Approval of the List of Cases of Concentration in the Fourth Quarter of 2016' (4 January 2017), available at: <http://fdj.mofcom.gov.cn/article/zcfb/201701/20170102495842.shtml>.

35 See Runhui Lin, Jean Jinghan Chen, Lie Xie, *Corporate Governance of Chinese Multinational Corporations: Case Studies* (Palgrave Macmillan 2020) 113–114.

& Steel Group to Baowu.³⁶ In 2020, Shanxi Province Government transferred 51% shareholding in Taiyuan Iron & Steel Group (TISCO) to Baowu.³⁷ This decision was characterized by Baowu as ‘the important measure to profoundly implement the spirits of General Secretary Xi Jinping’s important speech made during the inspection in China Baowu Masteel Group, practice the Party Central Committee and the State Council’s instructions to promote the healthy development of Chinese steel industry, deeply drive the distribution structural adjustment of state-owned sector, implement supply-side structural reform and accelerate the merging and reorganization of industries with overcapacity’.³⁸ Subsequently, Baowu has acquired control over provincial SOEs: Tibet Mining Development Corporation,³⁹ Chongqing Changshou Steel Co.,⁴⁰ Chongqing Iron & Steel Group,⁴¹ Kunming Iron & Steel Holding.⁴²

The Commission’s anti-dumping investigation into the Chinese steel sector concluded that ‘the steel SOEs are obliged to follow the plans and policies they act as an arm of the government and, since the government exercises meaningful control over them, they are in fact exercising government authority’.⁴³ While the Commission noted

that ‘the government directs and controls virtually every aspect in the development and functioning of the sector’,⁴⁴ it also acknowledged that the ‘major obstacle identified for an effective implementation of the government’s policies has been the absence of market-based policies which in turn allow local governments to resist plant closures in order to avoid the consequences of loss of employment’.⁴⁵ The state control over SOEs has been strengthened not only through consolidation of the SOE sector but also through the cadre management system, which included joint appointments (political and managerial positions) of the SOE executives and their frequent rotation,⁴⁶ as well as enhancing the role of the party committees within SOEs.⁴⁷ As demonstrated by the above review of the current round of SOE reform in China, it has predominantly focused on the consolidation of the SOEs in the strategic sectors with the aim of increasing their efficiency and competitiveness as well as to enhance the administrative and political control and supervision over SOEs. The ensuing section discusses how these consolidations and the influence of the Chinese State on commercial conduct of its SOEs were considered under national merger control regimes in those countries where the SOEs are active through trade and investment.

III. Chinese SOE mergers and national merger control regimes

The mergers of large companies with global presence can have cross-border anti-competitive effects in numerous national markets and present a legitimate target for merger control scrutiny. The International Competition Network (ICN) that brings together national competition authorities (NCAs) around the globe, in its Recommended Practices for Merger Notification and Review Procedures advises the national jurisdictions that merger review ‘should be asserted only over transactions that have a material nexus to the reviewing jurisdiction’.⁴⁸ This material nexus should be incorporated into the mandatory notification thresholds that would allow merging parties to ascertain whether their merger is notifiable

- 36 The SAMR approved the merger without conditions on 28 August 2019. See ‘Unconditional Approval of the List of Cases of Concentration from 26 August 2019 to 1 September 2019’ (4 September 2019), available at: http://www.samr.gov.cn/fldj/ajgs/wtjzajgs/201910/t20191024_307635.html. The merging parties have also reported that the transaction was cleared by the German competition authority on 29 July 2019 and by South Korean antitrust enforcer on 26 July 2019, available at: http://pdf.dfcfw.com/pdf/H2_AN201908261345089665_1.pdf.
- 37 See ‘Meeting Between Shanxi Provincial Party Secretary Lou and Baowu Chairman Chen, a Strategic Cooperation Framework Agreement Signed’ (Taiyuan Iron & Steel (Group) Co., Ltd., 22 August 2020), available at: <http://en.tisco.com.cn/CompanyNews/2020082609430353426.html>. The SAMR approved the merger without conditions on 6 November 2020. See ‘Unconditional Approval of the List of Cases of Concentration from 2 November 2020 to 8 November 2020’ (10 November 2020), available at http://www.samr.gov.cn/fldj/ajgs/wtjzajgs/202011/t20201110_323269.html.
- 38 ‘Shanxi Provincial People’s Government, Shanxi State-owned Capital Operation Co., Ltd. Signed Agreements with China Baowu Respectively’ (Baowu, 26 August 2020), available at: <http://www.baowugroup.com/en/#/aboutus/291/327?conid=999999999&artid=187453>.
- 39 The SAMR approved the merger without conditions on 1 September 2020. See ‘Unconditional Approval of the List of Cases of Concentration from 31 August 2020 to 6 September 2020’ (8 September 2020), available at: http://www.samr.gov.cn/fldj/ajgs/wtjzajgs/202009/t20200908_321509.html.
- 40 The SAMR approved the merger without conditions on 23 October 2020. See ‘Unconditional Approval of the List of Cases of Concentration from 19 October 2020 to 25 October 2020’ (27 October 2020), available at: http://www.samr.gov.cn/fldj/ajgs/wtjzajgs/202010/t20201027_322665.html.
- 41 The SAMR approved the merger without conditions on 15 January 2021. See ‘Unconditional Approval of the List of Cases of Concentration from 11 January 2021 to 17 January 2021’ (19 January 2021), available at: http://www.samr.gov.cn/fldj/ajgs/wtjzajgs/202101/t20210119_325343.html.
- 42 The SAMR approved the merger without conditions on 16 March 2021. See ‘Unconditional Approval of the List of Cases of Concentration from 15 March 2021 to 21 March 2021’ (23 March 2021), available at: http://www.samr.gov.cn/fldj/ajgs/wtjzajgs/202103/t20210323_327180.html.
- 43 Council Implementing Regulation (EU) No 215/2013 of 11 March 2013 imposing a countervailing duty on imports of certain organic coated steel

products originating in the People’s Republic of China [2013] OJ L73/26, para 72.

44 Commission Staff Working Document (n30) 375.

45 Commission Staff Working Document (n30) 373.

46 See Wendy Leutert, ‘Firm Control: Governing the State-Owned Economy under Xi Jinping’ (2018) 1–2 *China Perspectives* 27, 30.

47 See John Zhuang Liu and Angela Huyue Zhang, ‘Ownership and Political Control: Evidence from Charter Amendments’ (2019) 60 *International Review of Law and Economics* 105853.

48 International Competition Network, ‘Recommended Practices for Merger Notification and Review Procedures’ 3, available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRcPractices2018.pdf.

in certain jurisdiction. The ICN notes that the ‘most common means of providing for a material nexus is by requiring significant local sales or local asset levels in the merger notification thresholds.’⁴⁹ Most of the national merger control regimes require that at least two parties to the transaction have sufficient market presence in the relevant jurisdiction, while others also cumulatively consider the worldwide activities of the merging parties. Another important aspect covered in the ICN Recommended Practices is the nature of the transaction that should be notified for competitive assessment. The ICN advises the national jurisdictions to include in their merger laws ‘only transactions that result in a durable combination of previously independent entities or assets and are likely to materially change market structure.’⁵⁰ The ICN Working Group Mergers in its comments pointed out that ‘group-internal or intra-person restructuring should not be included within the scope of merger review as it has no effect on market structure.’ In relation to SOE mergers that would require the NCAs to ascertain whether two SOEs should be viewed as members of the same economic group or as two independent market players. In the first case, the SOE-to-SOE merger could be considered a group-internal restructuring and fall outside the scope of merger notification.

The merger of the Chinese high speed train manufacturers CNR and CSR with the establishment of CRRC in 2015 illustrates how the presence of the respective companies in various national markets as well as their relationship pre-merger have affected the merger control scrutiny of this consolidation. In 2016, the European MP Reinhard Bütikofer, who was subsequently sanctioned by China in 2021 for ‘severely harm[ing] China’s sovereignty and interests and maliciously spread[ing] lies and disinformation’⁵¹ requested the European Commission to explain why did it ‘approve the merger of these two Chinese rail manufacturers, given the magnitude of the merger and the state support the company enjoys?’⁵² In response to this inquiry, Commissioner Vestager explained that the ‘Commission did not have jurisdiction over the merger between the Chinese train builders CNR Corporation and CSR Corporation, given that the companies did not meet the relevant EU turnover thresholds’ but noted that ‘the German Bundeskartellamt had jurisdiction and approved

the merger.’⁵³ In 2019, Commissioner Vestager further reiterated that “transactions that do not reach the thresholds set by Article 1(2) of the [EUMR], such as the combination of CNR and CSR, are not legally reportable to the European Commission.”⁵⁴

At the same time, the CNR/CSR consolidation was notified to the Competition and Consumer Commission of Singapore (CCCS) where the merging parties argued that ‘although both the majority shareholders of CNR and CSR, being CNRG and CSRG, are under the ‘ownership of the whole people of the People’s Republic of China’ and under the immediate supervision and management of SASAC, the parties submitted that they are not directly or indirectly under the “control” of SASAC for the purposes of the Act.’⁵⁵ They noted among others that the state intervention in the railway sector is relatively minor, the SASAC does not interfere with the strategic decision-making of the SOEs, both SOEs are listed companies and the rules of the relevant stock exchanges require them to maintain independent directors in the company boards. The CCCS has accepted the parties’ submission and concluded that the transaction constitutes a merger under the relevant provisions of the Competition Act.⁵⁶

The *Baosteel/WISCO* merger was notified to the Turkish competition authority (Rekabet Kurumu). Its clearance decision⁵⁷ specifies that Central SASAC was acting as an investor, not manager, for both companies and did not interfere with their independent activities. The Turkish antitrust enforcer noted that the fact that an enterprise is wholly or partly owned by the state, or the state has the power to appoint the members of the board of directors, does not automatically mean that the said enterprise should be viewed as member of a ‘single economic unit’ comprising other state-owned or state-invested enterprises. The Turkish NCA concluded that the two SOEs should be viewed as independent undertakings due to the following criteria: (1) making strategic

49 Ibid 4.

50 Ibid 1.

51 Ministry of Foreign Affairs of the People’s Republic of China, ‘Foreign Ministry Spokesperson Announces Sanctions on Relevant EU Entities and Personnel’ (22 March 2021), available at: https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1863106.shtml.

52 European Parliament, ‘Question for Written Answer E-002040-16 to the Commission’ (Brussels, 8 March 2016), available at: https://www.europa.eu/parliament/doceo/document/E-8-2016-002040_EN.html.

53 European Parliament, ‘Answer Given by Ms Vestager on Behalf of the Commission on Question E-002040/2016’ (Brussels, 3 June 2016), available at: https://www.europarl.europa.eu/doceo/document/E-8-2016-002040-ASW_EN.html. In reply to our inquiry, the German NCA also confirmed that they received a notification of *Baowu/Magang* merger on 10 July 2019 and cleared it in first phase (preliminary proceeding) on 29 July 2019.

54 European Parliament, ‘Answer Given by Ms Vestager on Behalf of the Commission on Question E-001069/2019’ (Brussels, 13 May 2019), available at: https://www.europarl.europa.eu/doceo/document/E-8-2019-001069-ASW_EN.html.

55 *China CNR Corporation Limited/CSR Corporation Limited* (CCS 400/001/15) Competition and Consumer Commission of Singapore Decision of 17 February 2015, para 23.

56 Ibid, para 25.

57 *Wuhan Iron and Steel (Group) Corporation/Baosteel Group Corporation* (16-41/671-302) Turkish Competition Authority Decision of 24 November 2016.

decisions (business plan and budget) without state control; (2) absence of interlocking directorships; (3) no sharing of commercial information. The *Baowu/TISCO* merger was also notified to the Turkish NCA, which regarded the Central SASAC and Shanxi SASAC not as administrators but as investors/shareholders in the specified SOEs.⁵⁸ It analyzed the effects of this horizontal concentration on the market for electric steel in Turkey. Given the large number of competitors and negligible share of TISCO on the relevant market, Rekabet Kurumu concluded that the increase in market share of the merged entity will not have a significant effect on competition. These findings allowed the Turkish NCA to maintain jurisdiction over SOE-to-SOE mergers.

The 'joint reorganization' of Sinochem and ChemChina was notified to the Competition Commission of India (CCI), which in its clearance decision noted that 'per the laws applicable in China, Sinochem and ChemChina are regarded as independent economic entities with independent decision-making power and thus, belong to two independent economic groups'.⁵⁹ The merging parties argued that 'the proposed combination is only an internal strategic restructuring of Sinochem and ChemChina in China without any plans to alter the business operations either in China or outside including India'.⁶⁰ Nevertheless, the CCI has examined potential overlaps between the parties' business operations in India and due to the low market shares of the merged entity on the affected markets, concluded that the proposed merger 'is not likely to have any appreciable adverse effect on competition in India'.⁶¹ It should be noted that CCI's approach towards merger scrutiny of SOE-to-SOE merger also allowed it to maintain jurisdiction over domestic SOE consolidations. In order to avoid possible obstacles that could be presented by CCI's merger review, the Indian government has repeatedly exempted certain SOE reorganizations from application of merger control.⁶² The

COMESA Competition Commission proceeded along similar lines when it noted that both ChemChina and Sinochem are 'entitled the right of autonomy in business in line with the principle of separation of ownership and operational rights, and the separation of government functions from enterprise management provided for under the Chinese Law'.⁶³

Germany has been among the few jurisdictions that have issued a definitive interpretation of the 'single economic unit' concept in relation to the Chinese SOEs.⁶⁴ The Bundeskartellamt in its decision of 27 April 2020 has cleared the acquisition of German shunter manufacturer Vossloh Locomotives GmbH by CRRC Zhuzhou Locomotives Co, Ltd, a subsidiary of CRRC, a centrally controlled Chinese SOE.⁶⁵ In that case, the German NCA has attempted to ascertain the scope of the single economic unit to which the CRRC belongs. It has noted that the Central SASAC can influence the essential aspects of the CRRC's behavior and that the company follows the requirements of the 13th Five-Year Plan. As a result, the German NCA concluded that the relevant single economic unit should include all Chinese SOEs. In the present case, however, this finding was made primarily for the procedural reasons as the SOE

58 *Taiyuan Iron and Steel (Group) Company Ltd./China Baowu Steel Group Corporation Limited* (20-53/743-331) Turkish Competition Authority Decision of 10 December 2020.

59 *Sinochem Group Company Limited/China National Chemical Corporation Limited* (Combination Registration No. C-2020/09/776) Competition Commission of India Decision of 12 November 2020, para 2.

60 *Ibid*, para 9.

61 *Ibid*, para 13.

62 See e.g. Kalyani Singh, Vikram Sobti and Karan Singh Chandhiok, 'The Indian Government Exempts Oil and Gas State-owned Enterprises from Merger Control' (*e-Competitions*, 22 November 2017) Art. N° 85362, available at <https://www.concurrences.com/en/bulletin/news-issues/november-2017/the-indian-government-exempts-oil-gas-state-owned-enterprises-from-merger>; Man Mohan Sharma, 'The Indian Government Exempts All Central Public Sector Enterprises in the Oil and Gas Sector from Pre-merger Scrutiny by the Competition Authority' (*e-Competitions*, 22 November 2017) Art. N° 87489, available at <https://www.concurrences.com/en/bulletin/news-issues/november-2017/the-government-of-india-exempts-all-central-public-sector-enterprises-in-the>; Man Mohan

Sharma, 'The Indian Government Exempts Nationalized Banks from the Merger Control Regime by the Indian Competition Authority for 10 Years' (*e-Competitions*, 30 August 2017) Art. N° 87520, available at: <https://www.concurrences.com/en/bulletin/news-issues/august-2017/the-government-of-india-exempts-nationalized-banks-from-the-merger-control>.

63 COMESA Competition Commission, 'Decision of the Seventy-First Committee Responsible for Initial Determination Regarding the Merger Involving China National Chemical Corporation Ltd and Sinochem Group Co. Ltd' Case File No. CCC/MER/4/13/2020 (Malawi, 8 June 2020), para 4, available at: <https://www.comesacompetition.org/wp-content/uploads/2020/06/12.-Final-CID-Decision-ChemChina.pdf>.

64 The review of the merger control practices in the individual EU Member States demonstrated the lack of coherent application of the concept 'single economic unit' in cases involving Chinese SOEs. See Alexandr Svetlicinii, 'The Acquisitions of the Chinese State-Owned Enterprises under the National Merger Control Regimes of the EU Member States: Searching for a Coherent Approach' (2018) 2 Market and Competition Law Review 99.

65 See German Competition Authority, 'The German Competition Authority Clears Acquisition of Key European Shunter Manufacturer by Chinese State-owned Manufacturer of Railway Vehicles Because the Target Company's Competitiveness Has Been Decreasing for Years (*Vossloh Locomotives/CRRC Zhuzhou Locomotives*)' (*e-Competitions*, 27 April 2020) Art. N° 94675, available at: <https://www.concurrences.com/en/bulletin/news-issues/april-2020/the-german-competition-authority-clears-acquisition-of-key-european-shunter>; Marcio da Silva Lima and Jörg Witting, 'The German Competition Authority Approves an Acquisition Between Two Locomotives (*Vossloh/Zhuzhou*)' (*e-Competitions*, 27 April 2020) Art. N° 94981, available at: <https://www.concurrences.com/en/bulletin/news-issues/april-2020/the-german-competition-authority-approves-an-acquisition-between-two>; Porter Elliott, 'The German Competition Authority Approves an Acquisition Between Two Locomotives on the Basis That the Company's Competitiveness Decreased over the Years (*Vossloh/Zhuzhou*)' (*e-Competitions*, 27 April 2020) Art. N° 95162, available at: <https://www.concurrences.com/en/bulletin/news-issues/april-2020/the-german-competition-authority-approves-an-acquisition-between-two-95162>; Ingo Klaus and Roman Seifert, 'Germany: Merger—Chinese State-owned Companies' (2020) 41 European Competition Law Review 75.

would have to supply the competition authority with the relevant information concerning other companies under Chinese State's control. The sheer size of the economic group encompassing all Chinese SOEs created difficulties for the merging parties to supply the NCA with the relevant information concerning other SOEs, which led to the several suspensions of the appraisal procedure. The German NCA also pointed out that in the context of a state-dominated economy, the likelihood of anti-competitive strategies such as price undercutting that can be employed by the SOEs cannot be judged using the standard of the expected recoupment of losses because these commercial strategies may be adopted for political and strategic rather than purely economic reasons. In its report, the German Monopolies Commission also noted 'several politically-ordered major mergers between Chinese SOEs aimed at creating internationally-competitive companies'.⁶⁶ The Australian Competition and Consumer Commission reached a similar conclusion in the *Chinalco/Rio Tinto* case where it considered the following assumption: 'Chinalco, the Chinese Government, and Chinese purchasers of iron ore (i.e., Chinese steel mills) ought to be considered for the purposes of the competition assessment as a single entity'.⁶⁷

The above review of the national merger control practices concerning mergers of Chinese SOEs indicates that in line with the ICN recommendations, all of the jurisdictions surveyed applied the quantitative thresholds in order to assert jurisdiction to review these concentrations based on the turnovers realized by the merging parties in the jurisdictions concerned. On that basis, the consolidations of large centrally-controlled Chinese SOEs have been notified in numerous jurisdictions around the world. When it comes to the ICN recommendation that the intra-group transactions should not be subjected to merger control, the state of affairs is rather heterogeneous. Some of the jurisdictions surveyed (India, Singapore, Turkey, COMESA) regarded Chinese SOEs as autonomous (from each other and/or from the state) economic actors and thus preserved the jurisdiction to appraise their consolidations under national merger control rules. Others (Australia, Germany) admitted the possibility that Chinese SOEs behave on the market as members of a 'single economic unit', but this assumption is

made already at the stage of the substantive appraisal of the notified concentration. We have not identified a jurisdiction that would explicitly exclude Chinese SOE-to-SOE merger from scrutiny by concluding that such transactions represent an internal restructuring.

IV. EU merger control practice: *quo vadis* Commission?

In its merger control practice involving both European and foreign SOEs, the European Commission is guided by the principle of competitive and ownership neutrality embedded in the EUMR, which required it to 'respect the principle of non-discrimination between the public and the private sectors'.⁶⁸ Commissioner Vestager reiterated that the Commission 'must be impartial; it must be blind to the nationality of the companies we investigate; and it must be impeccable – if only because practically every decision we take must pass the muster of the European Court'.⁶⁹ At the same time, the following review of the Commission's merger practice indicates that Chinese SOEs are more frequently regarded as parts of a 'single economic unit' than companies owned by other states.

A. Merger cases concerning Chinese state-owned enterprises

In its appraisal in its appraisal of concentrations involving Chinese SOEs, the Commission on several occasions has applied the 'worst case scenario' approach by assuming that all Chinese SOEs active on the relevant market could behave as members of a 'single economic unit', which was considered for the purposes of competitive assessment.⁷⁰ For example, when assessing the ChemChina's acquisition of Syngenta in 2017, the Commission applied the 'worst case scenario' approach and held that 'for the purpose of the Transaction the Commission will leave the nature of the link between the Central SASAC/other SOEs and ChemChina open and consider the most restrictive approach under which ChemChina is regarded as one economic entity with other companies owned by the Chinese Central Government'.⁷¹ It should be noted that ChemChina argued that it is

66 Monopolies Commission, 'Chinese State Capitalism: a Challenge for the European Market Economy' (29 July 2020), para 562, available at: <https://www.monopolkommission.de/index.php/en/beitraege/344-biennial-report-xxiii-state-capitalism.html>.

67 *Chinalco (Aluminium Corporation of China)/Rio Tinto Ltd* (No.36476) Australian Competition and Consumer Commission Decision of 25 March 2009, para 37.

68 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/3, recital 22.

69 Margrethe Vestager, 'The Future of Competition' (*Foreign Policy Association*, New York, 1 October 2015), available at: https://ec.europa.eu/competition/speeches/index_2015.html.

70 See Alexandr Svetlicinii, *Chinese State Owned Enterprises and EU Merger Control* (Routledge 2020) 54–61.

71 *ChemChina/Syngenta* (Case M.7962) Commission Decision of 5 April 2017, para 88. See also *ChemChina/Adama* (Case M.8170) Commission Decision of 3 October 2016; *ChemChina/AKC/JVs* (Case M.8422) Commission Decision of 1 August 2017.

independent from the Central SASAC and cannot be regarded as part of the single economic entity with other SOEs controlled by the central government.⁷² It mentioned the investor functions of the SASAC and the latter's non-interference with strategic decisions of the company while the coordination with other SOEs was prohibited *inter alia* by China's Anti-Monopoly Law.⁷³ Therefore, according to ChemChina's position, it could not coordinate its economic activities with other SOEs, including Sinochem, implying that ChemChina and Sinochem are two independent undertakings within the meaning of the EUMR.

Sinochem also featured in the Commission's merger control practice on several occasions.⁷⁴ In *Sinochem/DSM/JV* case, the Commission noted that there is a number of provisions which can be read as suggesting that SASAC does in practice have certain powers to involve itself in Sinochem's commercial behaviour in a strategic manner, among others the right to approve mergers or of strategic investment decisions.⁷⁵ In the end, however, the Commission concluded that 'it is not possible to conclude whether or not Sinochem enjoys an independent power of decision in the sense of the Merger Regulation.'⁷⁶ Nevertheless, based on 'indications that the possibilities for SOEs to act completely independently might be more limited than for private enterprises in the sector in question,'⁷⁷ the Commission has considered a 'worst case scenario' where Sinochem does not have independent power of decision from the State. Since the combined market share of all Chinese SOEs on the relevant markets did not exceed 30–40% and the existing overcapacity of supply allowed for alternative sources, the Commission concluded that even under 'worst case scenario', the concentration would not raise anti-competitive concerns.⁷⁸

Up to date, the Commission acknowledged that Chinese SOEs form part of a 'single economic unit' on a single occasion—in the merger case *EDF/CGN/NNB*,⁷⁹ which involved China General Nuclear Power Corporation. In that case, the Commission found that SASAC can influence major strategic decisions of the SOEs under its control and can coordinate their market conduct.⁸⁰ On

that basis, it was concluded that Chinese SOEs active in the energy industry should not be viewed as independent from SASAC. It was noted that 'CGN decision is the first decision involving a Chinese SOE in which the Commission has taken a firm stance on jurisdiction and abandoned, although to a limited extent, its "wait and see" approach.'⁸¹ The finding of a 'single economic unit' comprising Chinese SOEs in the energy industry allowed the Commission to aggregate their turnover for the purpose of asserting jurisdiction under the EUMR. Later, in its competition assessment of the merger the Commission concluded that 'the question as to which companies shall be considered in the competitive assessment (i.e. CGN, Chinese SOEs controlled by Central SASAC and/or Chinese SOEs controlled by Local SASACs) can be left open, as the Transaction does not lead to competition concerns irrespective of the assessment of this point.'⁸² This conclusion demonstrates that the 'single economic unit' was determined primarily for jurisdictional purposes and was not considered in the competitive assessment.⁸³

B. Merger cases concerning other state-owned enterprises: from Saudi Arabia to Poland

Since the Commission's merger control practice has not yet encountered a Chinese SOE-to-SOE merger, the possible application of EUMR could be estimated on the basis of merger cases involving SOEs from other jurisdictions. For example, in January 2020, the Commission received a notification from Saudi Arabian Oil Company (Aramco) of its intended acquisition of 70% shareholding in Saudi Basic Industries Corporation (SABIC), which was controlled by the Public Investment Fund of Saudi Arabia (PIF), a sovereign wealth fund.⁸⁴ Although both Aramco and SABIC are Saudi SOEs, the Commission concluded that the transaction should be viewed as concentration pursuant to Article 3 EUMR as the two companies belong to different economic units.⁸⁵ In order to determine whether Aramco and SABIC have an independent power of decision, the Commission referred to the following criteria: (1) the SOEs' autonomy from the State

72 *ChemChina/Syngenta* (n 71), para 83.

73 *ChemChina/Syngenta* (n 71), paras 84–87.

74 See e.g. *Honeywell/Sinochem/JV* (Case M.6235) Commission Decision of 2 December 2011.

75 *DSM/Sinochem/JV* (Case M.6113) Commission Decision of 19 May 2011, para 15.

76 *DSM/Sinochem/JV* (n 75), para 16.

77 *DSM/Sinochem/JV* (n 75), para 26.

78 *DSM/Sinochem/JV* (n 75), para 30.

79 *EDF/CGN/NNB Group of Companies* (Case M.7850) Commission Decision of 10 March 2016.

80 *EDF/CGN/NNB Group of Companies* (n 79), para 49.

81 Kyriakos Fountoukakos and Camille Puech-Baron, 'China/EU: The Gradual Evolution of the EU Commission's Merger Control Decisional Practice Towards SOEs Amidst an Increasingly Protectionist World' (*Concurrences*, November 2017) 5 Art. N° 84891, available at: <https://www.concurrences.com/en/review/issues/no-4-2017/international/kyriakos-fountoukakos>.

82 *EDF/CGN/NNB Group of Companies* (n 79), para 72.

83 See Alexandr Svetlicinii, 'The Acquisitions of the Chinese State-Owned Enterprises under the EU Merger Control Regime: Time for Reflection?' (2017) 67 *Revue Lamy de la concurrence* 30.

84 *Saudi Aramco/SABIC* (Case M.9410) Commission Decision of 27 February 2020.

85 *Saudi Aramco/SABIC* (n 84), para 7.

in deciding strategy, business plan and budget; (2) the possibility for the State to coordinate commercial conduct by imposing or facilitating coordination.⁸⁶

In relation to SABIC, the Commission noted that the company is managed independently by the Supervisory Board, which is subject to conflict of interest provisions and SABIC's internal rules that are aimed to ensure that the members of the Supervisory Board do not take instructions from PIF but act in the interest of all shareholders.⁸⁷ The Commission also noted that unlike Aramco, which features several government ministers in its corporate board, the composition of SABIC's Supervisory Board does not include any ministers and the two companies don't have any interlocking directorships.⁸⁸ The Commission also accepted parties' submissions that as an institutional investor, PIF receives limited information concerning SABIC's operations and does not interfere with SABIC's business and strategy.⁸⁹ In order to demonstrate their independence from each other, the merging parties submitted evidence that the transaction was negotiated at arm's length, with substantial due diligence and non-disclosure arrangements, which would not be necessary if the transaction would be carried out as internal restructuring.⁹⁰ The Commission's findings align with those of the Turkish competition authority, which has cleared *Aramco/SABIC* merger after concluding that the two SOEs do not belong to the single economic unit, so the notification of their transaction was required under the applicable merger rules.⁹¹ The Commission's assessment was not affected by the fact that *Aramco/SABIC* consolidation was part of the Saudi government's plans to partially privatize Aramco through issuance of publicly traded shares and to diversify the PIF's investments into emerging and non-oil-related industries under Saudi industrial policy Vision 2030. The first plan required diversification of the Aramco's portfolio and increasing the company's transparency, while the second envisaged raising additional capital

for PIF's investments.⁹² As a result, the Commission's approach in *Aramco/SABIC* case demonstrated that the state ownership alone is not sufficient for determination that the merging parties belong to the 'single economic unit' and their transaction falls outside the merger review.

The Commission has further upheld this regulatory approach towards mergers involving state-owned and state-controlled entities in a number of recent cases involving Polish companies. One of these companies was petrochemical conglomerate PKN Orlen, where without holding the majority of shares, the Polish State was able to preserve substantial influence on the company's decision-making by utilizing statutory voting caps.⁹³ For example, at the general meeting of shareholders held on 14 June 2019, the State Treasury had 46.94% of votes (39.85% directly and 7.09% through another SOE, PERN) while the voting rights of all other participating shareholders that had at least 5% of voting rights amounted to 25.67%.⁹⁴ According to Poland's energy policy until 2030, the State will maintain its shareholding in PKN Orlen at least at its current level.⁹⁵ The company was used by the government as a vehicle for consolidation of the country's energy sector, aiming at regional competitiveness, energy independence and other strategic goals.⁹⁶

In 2020, PKN Orlen notified to the Commission its intended acquisition of Energa, a Polish SOE active in generation, supply, distribution, and retail of electricity.⁹⁷ Energa was controlled by the Polish State through the State Treasury, which held 51.52% shares representing 64.09% of the votes at the general meeting of shareholders.⁹⁸ In its assessment, the Commission concluded that PKN Orlen and Energa were not part of the same 'single economic unit' as they did not have any interlocking directorships, their management boards were separate and did not coordinate their day-to-day business

86 *Saudi Aramco/SABIC* (n 84), para 8.

87 *Saudi Aramco/SABIC* (n 84), para 10.

88 *Saudi Aramco/SABIC* (n 84), para 11.

89 *Saudi Aramco/SABIC* (n 84), paras 12–13.

90 *Saudi Aramco/SABIC* (n 84), para 15.

91 *SABIC/Saudi Aramco* (19–30/448–193) Turkish Competition Authority Decision of 29 August 2019. See also GönençGürkaynak, Onur Özgümüş, 'The Turkish Competition Authority Approves a Merger Focusing Its Analysis on Whether the Two State-owned Undertakings Belong to the Same Economic Unit and Whether Competition in the Relevant Product Markets Takes Place on a Global Level Due to Their Import-oriented Nature (*Sabic/Saudi Aramco*)' (*e-Competitions*, 29 August 2019) Art. N° 96505, available at: <https://www.concurrences.com/en/bulletin/news-issues/august-2019/the-turkish-competition-authority-approves-a-merger-focusing-its-analysis-on-en>.

92 See e.g. Jean-Francois Seznec, 'The Saudi Aramco-SABIC Merger: How Acquiring SABIC Fits into Aramco's Long-Term Diversification Strategy' (*Atlantic Council*, January 2020), available at: <https://www.atlanticcouncil.org/wp-content/uploads/2020/01/Saudi-Aramco-SABIC-final-web-version.pdf>.

93 The PKN Orlen's Articles of Association provided that no single shareholder, except for the State Treasury can exercise voting rights in excess of 10% at the general meeting of shareholders.

94 'Regulatory Announcement No. 29 of Shareholders with at least 5% of votes at OGM of PKN ORLEN' (*PKN Orlen*, 14 June 2019), available at: <https://www.orklen.pl/EN/InvestorRelations/RegulatoryAnnouncements/Pages/Regulatory-announcement-no-29-2019.aspx>.

95 'Priorities for managing the portfolio of entities supervised by the Minister of the Treasury until 2015' (Warsaw, 2014), Annex 1, available at: <http://static.pb.pl/atta/2715-trzy-listy-spolek-msp-dokument-w-pdf.pdf>.

96 See Nicola Dordevic, 'The thinking behind the merger of Poland's energy giants? Bigger is better' (*Emerging Europe*, 3 September 2020), available at: <https://emerging-europe.com/business/the-thinking-behind-the-merger-of-polands-energy-giants-bigger-is-better/>.

97 *PKN Orlen/Energa* (Case M.9626) Commission Decision of 31 March 2020.

98 *PKN Orlen/Energa* (n 97), para 4.

operations and did not share commercial sensitive information.⁹⁹

Next, PKN Orlen has notified its intention to acquire another Polish SOE, Lotos Group.¹⁰⁰ In that case the Commission decided to open an in-depth investigation due to concerns that ‘proposed acquisition of Lotos by PKN Orlen would affect several strategically important energy markets.’¹⁰¹ At the time of notification, the State Treasury held 53.5% shares of Lotos and 32.45% shares of PKN Orlen (27.52% directly and 4.9% through PERN).¹⁰² In order to exempt the transaction from the Commission’s appraisal under the EUMR, PKN Orlen argued that it is controlled by the Polish State *de facto* as the State Treasury exercises decisive influence over PKN Orlen’s supervisory board, which appoints the management of the company and approves its strategic decisions.¹⁰³ Furthermore, PKN Orlen submitted that the State Treasury as majority shareholder benefits from the voting cap imposed on other shareholders, which are widely dispersed and cannot outvote the state shareholder.¹⁰⁴ In its appraisal the Commission realized the dangerous precedent that could be set if PKN Orlen’s arguments were accepted: “if the Commission were to accept the [PKN Orlen]’s argument, all SOEs controlled by the same State by the mere virtue of its shareholding would always be deemed part of the same economic unit and therefore constitute one undertaking”.¹⁰⁵ By focusing its assessment on the past fierce competition between PKN Orlen and Lotos on the relevant markets for automotive fuels where the parties ‘adopted aggressive strategies vis-a-vis each other concerning for example access to key infrastructure’,¹⁰⁶ the Commission concluded that PKN Orlen and Lotos ‘constitute different economic units having an independent power of decision within the Polish State.’¹⁰⁷ This finding allowed the Commission to preserve its jurisdiction over the notified merger, and after allegedly experiencing strong political

pressure from Poland,¹⁰⁸ the Commission cleared the transaction subject to conditions. When PKN Orlen has notified another takeover, this time over PGNiG, a Polish SOE in the natural gas sector, the Commission has conveniently referred the concentration to the Polish NCA for appraisal.¹⁰⁹

C. State-owned enterprises and ‘single economic unit’: making a strategic choice

The above review of the Commission’s appraisals of economic concentrations involving foreign and European SOEs under the EUMR reveals the ‘strategic’ use of the concept of ‘single economic unit’ for the purposes of asserting merger control jurisdiction. The Commission’s practice contains several occasions¹¹⁰ where the finding of a broader ‘single economic unit’ encompassing several SOEs controlled by the same state raised the aggregate turnover of the merging parties up the threshold of ‘Community dimension’, which accorded to the Commission jurisdiction to review the transaction under EUMR. At the same time, in SOE-to-SOE merger cases the Commission frequently viewed the merging parties as distinct economic units, which allowed qualifying the transaction as concentration, as opposed to the internal restructuring that would place it outside the scope of EUMR.¹¹¹ The Commission’s approach towards concentrations involving state-owned entities in the recent string of cases concerning Polish SOEs also indicated a firm intention to preserve jurisdiction over SOE-related mergers to prevent possible anti-competitive effects in the internal market.¹¹² While the Commission has already attempted to ascertain the existence of a ‘single economic unit’ in relation to the Chinese SOEs when the latter acquired European companies, it was pointed out that ‘[t]he real test for the Commission’s policy vis-a-vis SOEs would come when the Commission would oppose mergers involving foreign SOEs, and in particular when SOEs which would not be parties to the merger would be involved.’¹¹³

99 *PKN Orlen/Energa* (n 97), para 5.

100 *PKN Orlen/Grupa Lotos* (Case M.9014) Commission Decision of 14 July 2020. See also Catherine Gordley, ‘The EU Commission Clears an Oil and Gas Merger After a Phase II investigation (*PKN Orlen/Lotos*)’ (*e-Competitions*, 14 July 2020) Art. N° 96286, available at: <https://www.competitions.com/en/bulletin/news-issues/july-2020/the-eu-commission-clears-an-oil-and-gas-merger-after-a-phase-ii-investigation>; Alexandr Svetlicinii, ‘State-Controlled Entities in the EU Merger Control: the Case of PKN Orlen and Lotos Group’ (2020) 13 *Yearbook of Antitrust and Regulatory Studies* 189.

101 European Commission, ‘Mergers: Commission Opens In-depth Investigation into PKN Orlen’s Proposed Acquisition of Lotos’ IP/19/5149 (Brussels, 7 August 2019).

102 *PKN Orlen/Grupa Lotos* (n 100), para 6.

103 *PKN Orlen/Grupa Lotos* (n 100), para 7.

104 *PKN Orlen/Grupa Lotos* (n 100), para 9.

105 *PKN Orlen/Grupa Lotos* (n 100), para 21.

106 *PKN Orlen/Grupa Lotos* (n 100), para 36.

107 *PKN Orlen/Grupa Lotos* (n 100), para 37.

108 See Thibault Larger, ‘Polish energy deal signals a more political Vestager’ (*Politico*, 28 September 2020), available at: <https://www.politico.eu/article/poland-energy-deal-pkn-orklen-lotos-margrethe-vestager/>.

109 *PKN Orlen/PGNiG* (Case M.9952) Commission Decision of 25 March 2021.

110 See e.g. *Prisko/OKD Nastupnicka* (Case M.8687) Commission Decision of 6 December 2017; *EDF/CGN/NNB Group of companies* (Case M.7850) Commission Decision of 10 March 2016.

111 See e.g. *Texaco/Norsk Hydro* (Case IV/M.511) Commission Decision of 9 January 1995; *Neste/IVO* (Case IV/M.931) Commission Decision of 2 June 1998.

112 See Alexandr Svetlicinii, ‘Economic Nationalism During COVID-19: is the EU Merger Control Ready?’ (2021) 42 *European Competition Law Review* 69.

113 Piet Jan Slot, ‘The Application of the EU Merger Control Rules to State Owned Enterprises’ (2015) 36 *European Competition Law Review* 484, 491.

So far, the Commission has not utilized the concept of 'single economic unit' to aggregate the turnovers of several Chinese SOEs and thus assert jurisdiction over Chinese SOE-to-SOE mergers. The silent withdrawal of the notification of *Baowu/TISCO* by the parties and the absence of *Sinochem/ChemChina* case in the Commission's docket of merger cases may indicate that the Commission may not be willing to assert its merger control jurisdiction over Chinese 'national champions'. As demonstrated on the example of previous SOE-related merger cases appraised by the Commission, the determination of the 'single economic unit' comprising Chinese SOEs may have jurisdictional consequences for the EU merger control. For instance, if the Commission would scrutinize *Baowu/TISCO* or *Sinochem/ChemChina* under the EUMR, it would have to conclude that these SOEs pre-merger constitute distinct economic units and therefore their consolidations represent concentrations notifiable under the EUMR. Such conclusion would make it then problematic for the Commission to assume the existence of a 'single economic unit' comprising several Chinese SOEs in other cases such as those where a Chinese SOE would notify an acquisition of a European company. Such approach may be understandable taking into account the alternative regulatory frameworks adopted by the EU for addressing potential market distortions and security risks that could be posed by the state-owned or state-subsidized acquisitions in the EU: the proposal for a regulation on foreign subsidies¹¹⁴ and the EU FDI Screening Regulation.¹¹⁵ Armed with these new regulatory tools, the Commission could see no added value in asserting jurisdiction over Chinese SOE consolidations using merger control rules and thus creating another point of tension with its 'cooperation partner' and 'systemic rival promoting alternative models of governance'.¹¹⁶

V. Conclusion

The preceding review of the objectives and methods through which the Chinese authorities have been carrying out the ongoing reform of the SOE sector demonstrated that the consolidation of SOEs through

mergers and acquisitions is aimed at strengthening the competitiveness and efficiency of these companies both domestically and in the global markets while maintaining state control through ownership-based mechanism and political supervision channels. Due to the sheer size of the Chinese SOEs and their growing presence on global markets, these consolidations were scrutinized in several national jurisdictions, which applied two basic principles for asserting merger control jurisdiction in line with the respective ICN recommendations: (1) establishing the nexus between the merging parties and the jurisdiction, normally by calculating the turnover realized by the merging parties within that jurisdiction; (2) applying merger control rules to mergers and acquisitions where the parties belong to different economic units prior to the transaction i.e. acted as independent players on the relevant markets. Despite the widely available evidence of *de jure* and *de facto* control over its SOEs exercised by the Chinese State, the majority of the surveyed jurisdictions have asserted their merger control jurisdiction over SOE-to-SOE mergers by treating merging parties as independent economic entities.

While several jurisdictions around the world had an opportunity to review Chinese SOE-to-SOE mergers within their merger control frameworks, the European Commission's merger control practice has not yet encountered such transactions. While certain stakeholders, both in the EU and in the US have continuously urged their respective regulators to scrutinize the Chinese SOE-to-SOE mergers under FDI screening and merger control regimes, the current state of affairs indicates that the Commission may not be currently willing to proceed with scrutinizing Chinese SOE consolidations under EU merger control regime. The heated debates following Commission's blocking of *Siemens/Alstom* transaction¹¹⁷

114 Commission Proposal for a Regulation on foreign subsidies distorting the internal market COM(2021) 223 final.

115 Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L79. See also Alexandr Svetlicinii, 'The Interactions of Competition Law and Investment Law: The Case of Chinese State-Owned Enterprises and EU Merger Control Regime' in Julien Chaisse, Leïla Choukroune, Sufian Jusoh (eds.) *Handbook of International Investment Law and Policy* (Springer 2019) 15.

116 European Commission and High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication 'EU-China—A strategic outlook' JOIN(2019) 5 final (Brussels, 12 March 2019) 1.

117 *Siemens/Alstom* (Case No. COMP/M.8677) Commission Decision of 6 February 2019. See also David Henry and Jacques Buhart, 'The EU Commission Prohibits a Merger in the Railway Sector and Reaffirms That Industrial Policy Objectives Have No Role to Play when It Comes to Applying the EU Merger Control Rules (*Siemens/Alstom*)' (*e-Competitions*, 6 February 2019) Art. N° 89282, available at: <https://www.concurrences.com/en/bulletin/news-issues/february-2019/the-eu-commission-prohibits-a-merger-in-the-railway-sector-and-reaffirms-that>; Jean-Mathieu Cot, 'Prohibition: the European Competition Prohibits a Merger Between the Two Main European Players in the Railway Signalling Systems and Very High-speed Train Industries (*Siemens/Alstom*)' (*e-Competitions*, 6 February 2019) Art. N° 92344, available at: <https://www.concurrences.com/en/review/issues/no-4-2019/case-comments/prohibition-the-european-competition-prohibits-a-merger-between-the-two-main>; Alain Ronzano, 'Relevant Market: the European Commission Publishes the Decision in Favour of Which It Declared that the Acquisition Project in the Market for Very High-speed Trains and Railway Signalling Was Incompatible with the Internal Market (*Siemens/Alstom*)' (*e-Competitions*, 6 February 2019) Art. N° 91823, available at: <https://www.concurrences.com/en/review/issues/no-2-2019/alerts/relevant-market-the-european-commission-publishes-the-decision-in-favour-of>; Porter Elliott, 'The EU Commission

generated calls for ‘reforming’ or ‘politicizing’ EU merger control that according to the advanced proposals would apply more stringently to foreign SOE acquisitions while paving the path for the creation of ‘European champions’.¹¹⁸ It was clear from the outset that the Commission is unwilling to integrate non-competition concerns into the merger assessment under the EUMR as the merger rules should be equally applicable to Chinese and European undertakings. As a result, the New Industrial Strategy for Europe does not propose to review merger rules concluding instead that ‘an independent EU competition policy has served Europe well by helping

to level the playing field, driving innovation and giving consumers more choice.’¹¹⁹ Nevertheless, once a SOE-to-SOE merger of Chinese companies would reach the Commission’s docket under the EUMR, a challenging determination of a ‘single economic unit’ would have to be made producing important consequences for the jurisdictional and substantive scope of application of EU merger rules to economic concentrations involving Chinese ‘national champions’.

<https://doi.org/10.1093/jeclap/lpab073>

Prohibits a Merger in the Market for Railway Signaling and Very High-speed Trains (*Siemens/Alstom*)’ (*e-Competitions*, 6 February 2019) Art. N° 89603, available at: <https://www.concurrences.com/en/bulletin/news-issues/february-2019/the-eu-commission-prohibits-a-merger-in-the-market-for-railway-signalling-and-89603>.

118 See ‘A Franco-German Manifesto for a European Industrial Policy Fit for the 21st Century’ (19 February 2019), available at: <https://www.gouvernement.fr/en/a-franco-german-manifesto-for-a-european-industrial-policy-fit-for-the-21st-century>; Federal Ministry for Economic Affairs and Energy, ‘Industrial Strategy 2030: Guidelines for a German and European Industrial Policy’ (29 November 2019), available at: <https://www.bmwi.de/Redaktion/EN/Publikationen/Industry/industrial-strategy-2030.html>.

119 European Commission, ‘A New Industrial Strategy for Europe’ COM(2020) 102 final, 5.