

The Antitrust Paradox of China, Inc.

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Abstract:

Common ownership by the Chinese State caused a stir in Europe recently. During its review of a joint venture involving a Chinese nuclear power company, the European Commission (“Commission”) held that it would treat all Chinese state-owned enterprises (SOEs) in the energy sector as a single entity. This decision carries significant legal and practical implications for both businesses and the regulator. It also contradicts the Commission’s previous approach to European SOEs. In this Article, I argue that the legal framework under the E.U. Merger Regulation (EUMR) is unsuited to deal with the anticompetitive effects of state ownership. While the delineation of the boundary of an undertaking is a prerequisite for merger review, ownership and control are not absolute. Importantly, the extent to which the coordination by the Chinese State has lessened competition is a quantitative question, rather than a qualitative one. Consequently, a bright-line approach to defining an undertaking is both over and under-inclusive. To address the European Union’s dilemma in handling Chinese SOEs, I propose that the Commission should view national security review as a complement to its merger review. The optimal regulatory response to Chinese acquisitions hinges not only on economics, but also, perhaps more importantly, on politics.

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Introduction

Common shareholding has recently caused an uproar in the United States. Some academic papers have shown that horizontal shareholding by U.S. institutional investors facilitates collusion and raises prices in industries such as the airline and banking sectors.¹ These findings caused alarm in the antitrust community and have led prominent scholars to call for legal action against anticompetitive horizontal shareholding.² On the other side of the Atlantic, common ownership has also caused a stir. However, what concerned European policymakers was not financial institutions, but rather the Chinese State. Since the start of the Great Recession, the European Union has experienced a significant surge of foreign direct investment (FDI) from China. From 2011 to 2015, annual Chinese FDI in Europe averaged more than EUR 10 billion, compared to an average of EUR 1 billion annually in the previous five years.³ The latest figure from the Rhodium Group shows that in 2015 alone, Chinese companies invested EUR 20 billion in the European Union, a forty-four percent increase from the previous year.⁴ This figure further rose to EUR 35 billion in 2016, another seventy-seven percent increase from 2016.⁵

Such a large influx of capital into Europe alarmed European regulators. Some were concerned about strategically—and politically—motivated takeovers by Chinese firms,⁶ particularly those in which the Chinese government holds a controlling interest—entities known as state-owned enterprises (SOEs).⁷ Indeed, several features of Chinese State ownership present significant challenges for antitrust enforcement. China is the world's second-largest economy, and it also has an unusually large state-owned sector.⁸ According to the Chinese Ministry of Finance, as of 2013, China has

¹ E.g., José Azar, Martin C. Schmalz & Isabel Tecu, *Anti-Competitive Effects of Common Ownership*, J. FIN. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2427345; José Azar, Sahil Raina & Martin Schmalz, *Ultimate Ownership and Bank Competition* (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2710252.

² E.g., Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1301–14 (2016); Jonathan B. Baker, *Overlapping Financial Investor Ownership, Market Power, and Antitrust Enforcement: My Qualified Agreement with Professor Elhauge*, 129 HARV. L. REV. F. 212 (2016); Eric A. Posner, Fiona Scott Morton & E. Glen Weyl, *A Proposal to Limit the Anti-Competitive Power of Institutional Investors*, ANTITRUST L. J. (forthcoming), <http://faculty.som.yale.edu/FionaScottMorton/documents/COpolicyALJ.pdf>.

³ Thilo Hanemann & Mikko Huotari, *A New Record Year for Chinese Outbound Investment in Europe*, MERCATOR INST. FOR CHINA STUD. 3 (Feb. 2016),

http://www.merics.org/fileadmin/user_upload/downloads/COFDI_2016/A_New_Record_Year_for_Chinese_Outbound_Investment_in_Europe.pdf

⁴ *Id.*

⁵ Thilo Hanemann & Mikko Huotari, *Record Flows And Growing Imbalances: Chinese Investment in Europe in 2016*, MERICS PAPERS ON CHINA 3 (Jan. 2017), http://rhg.com/wp-content/uploads/2017/01/RHG_Merics_COFDI_EU_2016.pdf

⁶ See John W. Miller, *Chinese Companies Embark on Shopping Spree in Europe*, WALL ST. J., (June 6, 2011), <https://www.wsj.com/articles/SB10001424052748704355304576214683640225122> (citing examples of some individuals in the E.U. who are unsure of whether Chinese investment is a positive or a negative); see also Maaïke Okano-Heijmans & Frans-Paul van der Putten, *Europe Needs to Screen Chinese Investment*, E. ASIA F. (Aug. 18, 2009) (raising concern that commercially motivated investments by Chinese SOEs may be used to pursue political goals in the future).

⁷ For purposes of this article, SOEs are defined broadly to not only include those that are wholly- or majority-owned by the State, but also those upon which the State can exercise decisive influence through its control of voting rights, assets, or contract, despite a lack of majority ownership.

⁸ *The World Bank in China*, WORLD BANK, <http://www.worldbank.org/en/country/china/overview> (last updated Mar. 28, 2017); Scott Cendrowski, *China's Global 500 Companies Are Bigger than Ever-and*

about 150,000 SOEs with a combined assets of USD \$16.8 trillion.⁹ A recent economic study estimated that SOEs account for thirty-five percent of China's GDP.¹⁰ Backed by cheap government financing and state support, Chinese SOEs are venturing abroad and becoming dominant players in China's outbound investment. Meanwhile, China applies a centralized model to manage its vast state assets, and most major industrial SOEs are supervised by the State Asset Supervision and Administration Commission (SASAC).¹¹ This suggests that an extensive amount of Chinese State assets are managed under one roof, with SASAC as the world's largest controlling shareholder.¹² Moreover, SASAC desires to dominate a few key sectors closely linked to national security and the lifelines of the economy, and to maintain a strong presence in several pillar industries.¹³ This arrangement raises suspicion about the independence of Chinese SOEs under SASAC's control. Even worse, Chinese SOEs have long been beset by problems such as opaque organization structure, lack of sound corporate governance, and pervasive control by the Chinese Communist Party (CCP).¹⁴

The increased vigilance surrounding Chinese investment coincided with the Commission's tightening of scrutiny over merger transactions involving Chinese SOEs. Since 2011, the Commission has applied a "worst-case scenario" approach when reviewing merger transactions involving Chinese SOEs.¹⁵ Under this cautious

Mostly State-Owned, FORTUNE (July 22, 2015), <http://fortune.com/2015/07/22/china-global-500-government-owned/>

⁹ ARTHUR R. KROEBER, CHINA'S ECONOMY: WHAT EVERYONE NEEDS TO KNOW 99 (2016).

¹⁰ *Id.* at 101.

¹¹ Certainly, not all Chinese SOEs are supervised by SASACs. For example, State-owned financial institutions are supervised by the China Banking Regulatory Commission, China Insurance Regulatory Commission, and China Securities Regulatory Commission. There are also SOEs whose supervisory authorities are in individual central government ministries other than SASAC, such as the Ministry of Commerce, Ministry of Education, Ministry of Industry and Information Technology. OECD WORKING GRP. ON PRIVATISATION AND CORP. GOVERNANCE OF STATE OWNED ASSETS, STATE OWNED ENTERPRISE IN CHINA: REVIEWING THE EVIDENCE 8 (2009).

¹² Marcos Aguiar et al., *SASAC: China's Megashareholder*, BCG PERSPECTIVES (Dec. 1, 2007), http://www.bcgperspectives.com/content/articles/globalization_strategy_sasac_chinas_megashareholder.

¹³ See Guanyu Tuijin Guoyou Ziben Tiaozheng he Guoyou Qiye Zhongyue Zhidao Yijiande Tongzhi (关于推进国有资本调整和国有企业重组指导意见的通知) [Guiding Opinion on Promoting the Adjustment of State-Owned Capital and the Reorganization of State-Owned Enterprises] (promulgated by St. Council, Dec. 5, 2006, effective May 12, 2006), <http://en.pkulaw.cn/display.aspx?cgid=82473&lib=law>. In particular, "absolute control" is generally understood to be majority ownership and "strong control" reflects an ownership share of thirty to fifty percent. See *China's Indus. Policy and Its Impact on U.S. Cos., Workers and the Am. Econ.: Hearing Before the U.S.-China Econ. & Sec. Review Comm'n*, 111th Cong. 78-79 (2009) (statement of Terrence P. Stewart).

¹⁴ See Li-Wen Lin & Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697, 738 (2013) (noting that only 51 of the core companies of the 117 national business groups in 2012 had boards of directors).

¹⁵ See Angela Huyue Zhang, *Foreign Direct Investment from China: Sense and Sensibility*, 34 NW. J. INT'L L. & BUS. 395, 435 (2014) (describing how in recent cases involving Chinese SOEs, the Commission has considered the "worst-case scenario"). See, e.g., Commission Decision No. COMP/M.6151 (Petrochina/Ineos), slip op. ¶ 31; Commission Decision No. COMP/M.6113 (DSM/Sinochem), slip op. ¶ 8 (May 19, 2011); Commission Decision No. COMP/M.6141 (China National Agrochemical Corporation/Koor Industries/Makhteshim Agan Industries), slip op. ¶ 7 (Oct. 3, 2011); Commission Decision No. COMP/M.6235 (Honeywell/Sinochem), slip op. ¶ 29 (Dec. 2, 2011); Commission Decision No. COMP/M.6700 (Talisman/Sinopec)(Nov. 16, 2012); Commission Decision No. COMP/M.6715 (CNOOC/NEXEN)(Dec. 7, 2012).

approach, the Commission considers whether a given transaction could pose anticompetitive harm, while assuming that all Chinese SOEs in the same sector are treated as a single entity.¹⁶ Such an approach is akin to treating a large part of the Chinese economy as a firm—China, Inc. Until the end of 2015, the Commission unconditionally cleared all such transactions because even under the “worst-case scenario,” they would not pose any anticompetitive concern.¹⁷ This also made it possible for the Commission to leave open the issue of how it would determine the exact scope of China, Inc. However, in 2016, the Commission found it difficult to dodge this issue when asked to scrutinize the proposed joint venture between France’s EDF and China’s state-owned China General Nuclear Power Corporation (CGN) (EDF/CGN).¹⁸ Because CGN has little turnover in Europe, the Commission would not have been able to exert jurisdiction over this deal if CGN was viewed as an independent undertaking separate from other Chinese SOEs. Then the Commission, for the first time, concluded that all Chinese SOEs in the energy sectors would be treated as a single entity for the purpose of merger analysis.¹⁹ This determination allowed the Commission to scrutinize the deal, even though it ultimately cleared the transaction without imposing any remedies.

The EDF/CGN decision has significant repercussions for future antitrust cases involving Chinese SOEs.²⁰ From a procedural standpoint, the decision means that more deals involving Chinese SOEs will be notifiable to the Commission, which could cause delays. The EDF/CGN decision also makes it more likely for the deal to be held up by the Brussels authority. Instead of focusing on the target and the acquiring Chinese SOE alone, the competitive assessments would focus on the target *and* all the Chinese SOEs in the same sector, or even the whole public economy in China. Such assessment would significantly increase the potential horizontal and vertical overlaps between the parties, which could adversely affect transactions. It also has implications for remedies—a Chinese SOE may be deemed unsuited to be a purchaser for the divested business of another SOE because they are deemed to belong to the same entity.²¹ Practitioners have warned that the problems could go beyond antitrust law.²² If other European regulators—such as those in charge of securities regulation—take a similar view, then a Chinese SOE may be required to provide financial disclosure of all the other SOEs operating in the same sector, as they are concert parties.²³ A few Commission officials suggested that the issue of the

¹⁶ Zhang, *supra* note 15.

¹⁷ *Id.* Nicholas French & Ninette Dodoo, *EU Antitrust Regulator Widens Its Net to Review Chinese SOE Transactions*, LEXOLOGY (May 16, 2016), <http://www.lexology.com/library/detail.aspx?g=176114c2-d471-4860-a14e-acbedb4183ea>.

¹⁸ Commission Decision No. M.7850 (EDF/CGN/NNB), slip op. ¶ 102 (Mar. 10, 2016).

¹⁹ *Id.* ¶ 49 (“In view of the fact that Central SASAC can interfere with strategic investment decisions and can impose or facilitate coordination between SOEs at least with regard to SOEs active in the energy industry, the Commission concludes in the case at hand that CGN and other Chinese SOEs in that industry should not be deemed to have an independent power of decision from Central SASAC. The turnover of all companies controlled by Central SASAC that are active in the energy industry should therefore be aggregated.”).

²⁰ Michelle Price, *Chinese State-Owned Companies Face Greater Scrutiny of EU Deals After Ruling*, REUTERS (June 12, 2016), <http://www.reuters.com/article/us-china-eu-m-a-idUSKCN0YZ00U>.

²¹ Geneviève Lallemand-Kirche, Caroline Tixier & Henri Piffaut, *The Treatment of State-Owned Enterprises in EU Competition Law: New Developments and Future Challenges*, 8 J. EUR. COMPETITION L. & PRAC. 295, 305 (2017).

²² French & Dodoo, *supra* note 17.

²³ *Id.*

independence of Chinese SOEs could also have repercussions on state-aid law enforcement.²⁴ They noted that two Chinese SOEs considered to be part of the same group in a competition case may have trouble complying with the unbundling rules provided in the Third Energy Package in the European Union.²⁵ At the same time, the Commission's adoption of this seemingly cautious approach is also fraught with legal risks. As I have argued in a previous paper, treating a large number of Chinese SOEs as part of China, Inc. can jeopardize the Commission's future jurisdiction over cases involving mergers or agreements between these SOEs.²⁶ The European Union may have an interest in intervening in such cases if the market positions of the Chinese SOEs pose a threat to European consumers. As such, the Commission's approach not only creates uncertainties for the business community, but also carries grave legal risks for the Commission itself.

In this Article, I argue the Commission's fundamental challenge in tackling Chinese SOE cases stems from the inherent difficulty of applying the concept of an undertaking to state ownership. Under the E.U. Merger Regulation (EUMR), the assessment of control is crucial for the delineation of the boundary of an undertaking, which in turn determines whether a transaction results in a change of control and is subject to review. However, a literal application of the concept of control could lead to an over-inclusive outcome. While in theory a State has the voting power to influence its SOEs, it may not necessarily have the incentive to coordinate their competition. Even if it does, the State may lack the ability to exert control over those SOEs' commercial decisions. This is notably the case for China. After over three decades of market reform, most of the economic sectors in China have been liberalized.²⁷ Competition was deliberately injected into those sectors to stimulate growth and to enhance productivities of the SOEs.²⁸ Moreover, even if the SOEs still command a significant share of national assets in the country, the power to manage and control the SOEs is fragmented due to China's highly decentralized economy.²⁹ Rampant agency problems also make it difficult for SASAC to exert control over the SOEs, especially central SOEs that are corporate behemoths with tremendous political clout within the bureaucracy.³⁰ As such, the Chinese State's formal corporate rights over an SOE may have a weak correlation to the anticompetitive effects such ownership could cause.

At the same time, the reliance on the EUMR to deal with SOE cases could lead to an under-inclusive outcome. Abundant literature has shown that minority shareholding in rivals can lead to anticompetitive effects.³¹ In fact, economists have shown that even a

²⁴ Lallemand-Kirche et al., *supra* note 21, at 306.

²⁵ *Id.*

²⁶ See Angela Huyue Zhang, *The Single Entity Theory: An Antitrust Time Bomb for Chinese State-Owned Enterprises?* 8 J. COMPETITION L. & ECON. 805, 825-26 (2012) (noting that if Chinese SOEs in the same sector are treated as part of a single entity, agreements, as well as mergers between them, would arguably be exempted from E.U. competition law).

²⁷ See Angela Huyue Zhang, *Taming the Chinese Leviathan: Is Antitrust Regulation a False Hope?* 51 STAN. J. INT'L L. 195, 201-02 (2015) (explaining how for the past few decades the main agenda of SOE reform has been to grant more autonomy to SOEs to motivate them to pursue growth and profit).

²⁸ *Id.* at 202.

²⁹ *Id.* at 207-08.

³⁰ See *infra* Part II(i)(2)(b).

³¹ See *infra* Part II(ii)(1).

non-voting cross-ownership in concentrated industries could be anticompetitive.³² However, acquisitions of a significant but non-controlling interest are currently exempt from the EUMR.³³ Therefore, minority acquisitions by SOEs may not withstand proper antitrust scrutiny by the Commission. Chinese SOEs pose particular challenges in this respect due to their deep pockets, their easy access to state financing, and their desire to acquire strategic assets in concentrated industries overseas. Moreover, regulators tend to overlook the fact that Chinese State ownership manifests itself in diverse forms, and that the line between SOEs and privately-owned enterprises (POEs) is increasingly blurred in China. Consequently, an SOE can escape the Commission's scrutiny entirely if it employs a non-controlling subsidiary as a vehicle to acquire European assets.

The fact that the EUMR can simultaneously lead to both over-inclusive and under-inclusive outcomes is not self-contradictory. Such a divergent outcome derives from the inherent differences between the incentives and abilities of the Chinese State—a sovereignty with a highly complex utility function and a vast, intricate bureaucracy—and those of an SOE—a commercial entity which has the strong desire to maximize financial returns in its overseas expansion. This does not deny the possibility that the Chinese State could have the incentive or the ability to coordinate its SOEs. Rather, the purpose of this Article is to provide a more comprehensive and nuanced analysis of the actual competitive landscape in China, refuting the simplistic view that the Chinese State will always coordinate its SOEs. Nor does this Article suggest that an SOE's sole goal is to maximize profits—it is possible that an SOE has other political or social objectives. However, as few Chinese SOEs can afford to be indifferent to the financial returns on their investments, regulators should be alert to the risks to competition when a Chinese SOE holds cross-ownership in concentrated industries.

Given the inadequacy of the EUMR in tackling SOE issues, the Commission should not tie its hands by fixating on defining the scope of the undertaking, as this may limit the EUMR's review only to those cases in which the Chinese SOEs acquire a controlling interest. The fundamental question, after all, is not how to define and fit China, Inc. into legal framework under the EUMR; rather, the question is about identifying the anticompetitive effects of state ownership. Unfortunately, this is far from an easy task. Indeed, recognizing the clear incompatibility of its legal framework when applied to SOEs, the EUMR narrows its assessment of control from *de jure* to *de facto* control.³⁴ Such an approach fundamentally shifts the paradigm of the merger review from a form of *ex ante* enforcement, which turns purely on the structural incentives, to one that emphasizes evidence of communication. However, it is extremely difficult to compile evidence of actual coordination by the Chinese State.³⁵ In fact, communication between the State investor and the management is not necessary for any coordination to occur. Further, the anticompetitive effect does not require communication among firms when the Chinese SOE indirectly invests in a minority stake in a competing business. The interlocking ownership in itself leads to the structural incentives that could reduce competition.³⁶ Furthermore, due to their

³² *Id.*

³³ *See infra* Part II(ii).

³⁴ *See infra* Part II(ii)(1).

³⁵ *See infra* Part I(iii).

³⁶ *Id.*

superior political and economic status, Chinese SOEs could wield power and control that exceeds their formal corporate rights as a minority shareholder.

Paradoxically, addressing both the over-inclusion and under-inclusion problems that Chinese SOEs have posed to the existing legal framework would require the Commission to simultaneously narrow and expand the concept of control, a mission impossible to achieve within the EUMR. To address this dilemma, I propose that the Commission ought to view national security review as a complement to its merger review. Both antitrust and national security law share an overlapping interest in preventing a foreign State from accumulating a significant market position in a strategic domestic product market, but national security review provides more flexibility and room for regulators to preemptively deal with such competition concerns. More fundamentally, the basis for the optimal regulatory response to acquisitions by SOEs hinges not only on economics, but also, perhaps more importantly, on politics. I thus caution against deploying competition policy too broadly when reviewing Chinese acquisitions. Indeed, the European Union's concern about a regulatory vacuum seems overstated. To the extent that coordination by the Chinese State poses any competition concern in Europe, it would have been subject to national security review at the level of the E.U. member states. Therefore, adding a further layer of antitrust regulatory screening is unnecessary as it will unduly burden businesses. Moreover, it will carry grave risks for the Commission, as it could jeopardize the Commission's jurisdiction over future cases involving Chinese SOEs.

My analysis will proceed in three steps. Part I analyzes the rationale behind the EUMR provisions regarding the assessment of mergers between SOEs. After comparing the Commission's precedents dealing with European and Chinese SOEs, Part I reveals that the Commission has applied a double standard in its current approach to Chinese SOEs. Part II examines how the EUMR has failed to address the fundamental problem of anticompetitive effects of state ownership, thus resulting in both over-inclusive and under-inclusive outcomes. Part III cautions against adopting a formalistic approach in dealing with state ownership and presents the solution of using national security review as a complement to antitrust review of acquisitions by Chinese SOEs.

I. The Dilemma of the EUMR

Under the E.U. competition law, determining the boundary of an undertaking is crucial to whether competition law applies³⁷ Article 101 of the Treaty on the Functioning of the European Union (TFEU) applies to agreements and concerted conduct between separate undertakings,³⁸ whereas the EUMR only applies to corporate reorganization between undertakings.³⁹ Moreover, under E.U. law, the boundary of an undertaking is relevant for the assessment of liabilities and fines. While this issue has been a perennial topic of fascination to policymakers and academics in Europe, scholars have tried in vain to identify a consistent and coherent

³⁷ See generally Alison Jones, *The Boundaries of an Undertaking in EU Competition Law*, 8 EUR. COMPETITION J. 301 (2012) (explaining how boundaries must be clearly defined to ensure that potentially anticompetitive arrangements between firms do not escape review under international competition laws).

³⁸ Consolidated Version of the Treaty on the Functioning of the European Union art. 101, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

³⁹ Council Regulation 139/2004, 2004 O.J. (L24) art. 3 [hereinafter EUMR].

approach.⁴⁰ Intractable as it is to define an undertaking, the EUMR is built upon such a concept. Indeed, it is crucial to delineate the boundary of an undertaking to determine whether a transaction constitutes a concentration, whether it falls within the Commission's jurisdiction, and how to conduct the competitive assessment. Article 3(2) of the EUMR defines control as having the possibility of exercising decisive influence over an undertaking.⁴¹ Since concentrations within the meaning of the EUMR are limited to changes in control,⁴² a merger between SOEs belonging to the same State should not be deemed to trigger a change in control, thus exempting consolidations between SOEs from E.U. regulation.

To avoid discrimination between the public and private sector, Recital 22 of the EUMR creates an exception. Recital 22 provides that for mergers between SOEs belonging to the same State, account must be taken of “the 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.”⁴³ The Commission's Jurisdictional Notice expands further on this point:

[W]here a State-owned company is not subject to any coordination with other State-controlled holdings, it should be treated as independent for the purposes of Article 5, and the turnover of other companies owned by that State should not be taken into account. Where, however, several State-owned companies are under the same independent center of commercial decision-making, then the turnover of those businesses should be considered part of the group of the undertaking concerned for the purposes of Article 5.⁴⁴

But how is it possible for an SOE to have independent decision-making when the State, as the controlling shareholder, could influence the firm's corporate governance? In the following discussion, I analyze the logic of Recital 22, compare the governance structure of Chinese and French SOEs, and discuss the challenges the Commission faces in applying this provision to SOE cases.

i. The Logic of Recital 22

As demonstrated by Oliver Hart's Nobel winning scholarship, the defining feature of ownership is that the owner will retain residual control.⁴⁵ Because transaction costs are never zero, contracting parties could never write a contract that anticipates all contingencies.⁴⁶ As a consequence, not all rights conferred by ownership will be contracted away and an owner can always retain some residual control over their property. As Wouter Wils succinctly points out:

[I]f the parent company has the possibility to exercise decisive influence over the strategic commercial behaviour of the subsidiary, the subsidiary cannot have real freedom to determine its course of

⁴⁰ See generally Jones, *supra* note 37.

⁴¹ See *id.* art. 3(2).

⁴² Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the Control of Concentrations Between Undertakings 2008 O.J. (C 95), ¶ 51 [hereinafter *Jurisdictional Notice*].

⁴³ See EUMR, *supra* note 39, ¶ 22.

⁴⁴ See Jurisdictional Notice, *supra* note 42, ¶ 194.

⁴⁵ OLIVER HART, FIRMS, CONTRACTS, AND FINANCIAL STRUCTURE 29–55 (1995).

⁴⁶ *Id.* at 30.

action on the market. Even if the parent company happened not actually to exercise its influence, the subsidiary's apparent freedom would only exist by the parent company's grace, which could change at any time.⁴⁷

Applying this logic to SOEs, a State owner will always retain some residual control over its SOEs. Through residual rights of control, the State has the power to influence such firms, regardless of whether such influence has actually been exerted or is explicitly specified. Thus, strictly speaking, no SOEs can enjoy decision-making powers completely independent from the State.

Moreover, the requirement that SOEs need to have sole autonomy in running their businesses independently of their owners interferes with the basic requirements for sound corporate governance. The fundamental issue in corporate governance is to address the agency problem, an inherent concern in any modern corporation where ownership and control are separate.⁴⁸ To safeguard the State's interests in the SOEs, it is essential for the State investor to actively exercise its voting rights as a shareholder to engage in corporate governance. If a large investor completely cedes control over the firm to the management, the management will be subject to little monitoring from the shareholders. For this reason, Ronald Gilson and Jeffrey Gordon have advocated using law to encourage activist investing in the United States, as activist investors are more motivated than large institutional shareholders to achieve vigorous corporate governance.⁴⁹ In a similar vein, it should be efficient for a State shareholder to actively participate in the governance of the firms it owns.

The above analysis shows that the State, by simply voting its stock, can always influence its SOEs. Accordingly, if the State is solely profit-driven like a firm, then it will have the incentive to coordinate its SOEs to maximize the joint profit. In that case, it is not even necessary to engage with the de facto question of whether such coordination has indeed occurred. Thus, to make sense, Recital 22 must assume that a State has a utility function different from an ordinary commercial entity, and the key issue here lies in examining de facto control rather than de jure control. That is, while the State in theory can influence its SOEs, if the SOEs in fact operate independently from each other, then a merger between them will deprive the market of two real competitors. This provides the basis for the Commission to intervene. Such an interpretation is consistent with the Commission's own Jurisdictional Notice, which focuses on whether the State in fact attempts to coordinate competition among its SOEs.⁵⁰

Such a legal framework, however, results in a paradigm shift in the way that merger review is conducted. As a form of ex-ante enforcement, merger review focuses on whether the integration of two otherwise independent competitors will result in a substantial lessening of competition. The loss of competition depends on how the

⁴⁷ See Wouter P.J. Wils, *The Undertaking as Subject of E.C. Competition Law and the Imputation of Infringements to Natural or Legal Persons*, 25 EUR. L. REV. 99, 107–08 (2000).

⁴⁸ Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J. L. & ECON. 301, 304 (1983).

⁴⁹ Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 896–7 (2013).

⁵⁰ Jurisdictional Notice, *supra* note 42, ¶ 194.

incentives of the firms to compete have been reduced because of the change in the structure of the market. Consistent with this logic, Article 3(2) of the EUMR defines control as “the possibility of exercising decisive influence on an undertaking,” and “it is therefore not necessary to show that the decisive influence is or will be actually exercised.”⁵¹ Such a legal design makes sense from a practical standpoint. As Wouter Wils has pointed out, *de facto* control is extremely difficult and costly to identify.⁵² Indeed, explicit communication is not necessary for the State to exert control over the SOEs. Even if the State does not participate in the firm’s activities directly, the State has the opportunity to appoint executives to the board, who will then participate in the company’s important commercial decisions, such as its budget, business plans, and commercial strategies. To display loyalty to the State, management may have an incentive to act according to the State’s wishes. Therefore, despite engaging in a passive investment strategy, the State investor would have the opportunity to indirectly influence the actions of the SOEs by simply exercising its basic voting rights. This is the same for all SOEs, whether they are Chinese or non-Chinese.

Further, the State can design incentive packages for executives at SOEs in a way that discourages competition with their state-owned rivals. This is especially the case when the structure of executive compensation links the firm’s profitability to the industry or competitor’s profitability.⁵³ Recent empirical research on common shareholding by institutional shareholders shows that commonly-owned firms are more likely to compensate CEOs based on industry performance rather than on performance relative to competitors.⁵⁴ CEOs are therefore incentivized to soften competition with rivals to maximize their own compensation. In fact, even if the State has absolutely no voting power, there are other means not available to ordinary commercial investors through which the State can exert influence over firms. For instance, managers could have incentives to obey the State if the State can somehow influence their future employment upon departure, especially if the managers ultimately desire political careers.⁵⁵ Similarly, the State can influence a firm’s commercial decisions if it can entice the firm with cheaper financing than what is available on the market or if it promises to bail out a firm when it is in trouble. The corporate governance of Chinese and French SOEs illustrates the challenges that the Commission faces in applying Recital 22 to SOEs.

ii. Comparing the Chinese and French SOEs

In China, most industrial firms are currently supervised by SASAC, a special commission directly subordinate to the State Council. In the pre-reform era, all industrial Chinese SOEs were owned and managed by various central ministries. After several rounds of market reform, the control rights were transferred from the ministries to SASAC, an independent agency created in 2003. Thus, the establishment of SASAC—a move intended to separate the government’s public role from its role as an investor—is an important step in China’s market reform.⁵⁶ Local governments—

⁵¹ *Id.* ¶ 16.

⁵² Wils, *supra* note 47, at 107.

⁵³ David Gilo, *The Anticompetitive Effect of Passive Investment*, 99 MICH. L. REV. 1, 26 (2000); *see also* Elhauge, *supra* note 2, at 1278–81.

⁵⁴ Miguel Antón et al., *Common Ownership, Competition, and Top Management Incentives* 3-5 (Ross Sch. of Bus., Working Paper No. 1328, 2017).

⁵⁵ *See infra* Part I(ii).

⁵⁶ *See* SASAC, *China State-Owned Asset Management System Reform Entering New Stage* (May 23, 2003), article on file with editor.

including provincial and municipal governments—were also directed to establish their own local SASACs, which represent the local government’s ownership of assets and are not subordinate to the central SASAC.⁵⁷ According to an estimate in 2011, there were approximately 300 SASACs in China, including the central SASAC, approximately 30 provincial SASACs, and scores of municipal SASACs.⁵⁸ At its inception, SASAC oversaw 196 SOEs at the central level.⁵⁹ However, by the end of 2016, that number decreased to 102, as SASAC encouraged the consolidation of SOEs or the sale of non-strategic SOEs to local governments.⁶⁰

Notably, SASAC’s role in the management of state assets was only formally recognized upon the promulgation of the Enterprise State-Owned Assets Law (the “State Assets Law”) in 2008.⁶¹ This law explicitly designates SASAC as a fiduciary for the State’s ownership interest. Under the State Assets Law, SASAC is entitled to rights as a shareholder, including returns on its investments and approval of any major ownership decisions such as mergers, bankruptcy, and the issuance of new securities of the firm.⁶² In addition, SASAC has the authority to appoint directors, managers, and supervisors of wholly state-owned enterprises and may nominate directors and supervisors in partially state-owned enterprises.⁶³ Other than in the exercise of such rights, SASAC is not allowed to intervene directly in management or day-to-day operations.⁶⁴ The central SASAC also promulgates rules for SOEs and oversees the activities of local SASACs to ensure compliance with government mandates.⁶⁵

While on the surface the establishment of SASAC has weakened the administrative ties between the government and the SOEs, their link has not been completely severed. Richard McGregor, a former bureau chief of the Financial Times, detailed as much in *The Party*, an influential book published in 2010 that attempts to unravel the mystery behind the CCP’s control over various aspects of the Chinese political economy.⁶⁶ In *The Party*, McGregor coined and popularized the term “China, Inc.,” telling vivid stories of how the CCP was able to maintain a tight grip on the Chinese state-owned behemoths in the oil, mineral, and banking sectors.⁶⁷ The success of *The Party* has generated further suspicion of the independence of the Chinese SOEs under SASAC’s supervision. Indeed, one of the most important controls that the CCP can

⁵⁷ Barry Naughton, *The State Asset Commission: A Powerful New Government Body*, 8 CHINA LEADERSHIP MONITOR 1, 3 (2003).

⁵⁸ Yongsheng Deng et al., *Monetary and Fiscal Stimuli, Ownership Structure, and China's Housing Market* 48 (Nat’l Bureau of Econ. Research, Working Paper No. 16871, 2011).

⁵⁹ See SASAC, *supra* note 56.

⁶⁰ *The List of Central SOEs*, SASAC (Dec. 20, 2016), <http://www.sasac.gov.cn/n86114/n86137/index.html>.

⁶¹ Zhōng huá rén mín gòng hé guó qǐ yè guó yǒu zī chǎn fǎ (中华人民共和国企业国有资产法) [Law of the People’s Republic of China on the State-Owned Assets of Enterprises] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 28, 2008, effective May 1, 2009), <http://www.lawinfochina.com/Display.aspx?lib=law&Cgid=109891>.

⁶² *Id.* arts. 12, 16, 18, 21, 30–38.

⁶³ *Id.* art. 22.

⁶⁴ See *id.* arts. 6, 14.

⁶⁵ ORG. FOR ECON. CO-OPERATION AND DEV. [OECD], OECD REVIEWS OF REGULATORY REFORM: CHINA—DEFINING THE BOUNDARY BETWEEN THE MARKET AND THE STATE 59 (2009).

⁶⁶ RICHARD MCGREGOR, *THE PARTY: THE SECRET WORLD OF CHINA’S COMMUNIST RULERS* (2010).

⁶⁷ *Id.* at 34–49.

exert over the SOEs is through personnel appointment.⁶⁸ Although SASAC in theory has the right to appoint and select managers, in practice it exercised such rights in the shadow of party control. The top leaders of the fifty-three central companies, who have the equivalent bureaucratic ranking of vice-ministers, are directly appointed by the Department of Organization, the human resource department of the CCP.⁶⁹ Moreover, the executive positions in Chinese SOEs are not solely awarded based on financial performance. For the top executives at the leading central SOEs, their career paths upon leaving the firms are determined by the CCP.⁷⁰ Furthermore, because SASAC only has a limited capacity and lacks management expertise in a diverse range of industries, in practice it relies heavily on industry regulators for recommendations for the appointment of senior executives and the exercise of shareholders' right in the SOEs.⁷¹

Yet, China is not unique in applying a centralized model to manage state assets.⁷² Such a model has also been adopted in a number of European countries, including Denmark, the Netherlands, Spain, Norway, Sweden, Belgium, France, and Poland, often as a result of the implementation of privatization reforms.⁷³ Among these countries, France is the most similar to China because it has established a specialized independent agency, the Government Shareholding Agency (APE), to manage state assets.⁷⁴ Established in 2004, the APE is the French counterpart of SASAC. Acting under the joint authority of the Minister of Finance, the Public Budget, and the Minister for the Economy, Industry and Digital Affairs, the APE's statutory mission is to preserve the patrimonial interests of the French government and to fulfill the mission of the State-shareholder in French SOEs.⁷⁵ As of the end of 2014, it manages 74 SOEs on behalf of the French government and oversees assets of over 110 billion euros.⁷⁶ French State ownership is most common in the energy sector (72%),

⁶⁸ See Zhang, *supra* note 26, at 814–15 (explaining how the CCP's control over personnel allowed them to overhaul companies while still maintaining leverage); see generally Jiangyu Wang, *The Political Logic of Corporate Governance in China's State-Owned Enterprises*, 47 CORNELL INT'L L. J. 631 (2014) (discussing how controlling personnel allows the CCP to also control the decision-making processes).

⁶⁹ Wang, *supra* note 68, at 659; see also Lin & Milhaupt, *supra* note 14, at 737–38 (noting that this practice of appointing top leaders of the fifty-three central SOEs is a legacy of the appointment practice prior to the establishment of SASAC).

⁷⁰ See Nan Lin, *Capitalism in China: A Centrally Managed Capitalism (CMC) and Its Future*, 7 MGMT. & ORG. REV. 63,74 (2010); see also Wang, *supra* note 68, at 660 (noting that as of 2010, 43 of the 263 governors and vice governors for China's provinces and provincial-level municipalities had business backgrounds and 23 of China's 31 provinces had governors or vice governors who had worked as SOE executives).

⁷¹ Deng Feng, *Indigenous Evolution of SOE Regulation*, in REGULATING THE VISIBLE HAND? THE INSTITUTIONAL IMPLICATIONS OF CHINESE STATE CAPITALISM 14, 14–16 (Benjamin L. Liebman & Curtis J. Milhaupt eds., 2016).

⁷² See generally Maria Vagliasindi, *Governance Arrangements for State Owned Enterprises* (World Bank Sustainable Dev. Network, Working Paper No. 4542, 2008) (listing several countries that use a centralized model, including but not limited to: Denmark, Spain, Sweden, and Belgium).

⁷³ *Id.* at 11–14.

⁷⁴ E.g. AGENCE DES PARTICIPATIONS DE L'ÉTAT, THE GOVERNMENT AS SHAREHOLDER: 2014 ANNUAL REPORT, http://www.economie.gouv.fr/files/files/directions_services/agence-participations-etat/ANG-Panorama.pdf [2014 Annual Report].

⁷⁵ Décret 2004-963 du 9 septembre 2004 portant création du service à compétence nationale Agence des participations de l'Etat [Decree 2004-963 of September 9, 2004 establishing the national service State Shareholding Agency], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Sept. 10, 2004, p. 341.

⁷⁶ 2014 Annual Report, *supra* note 74, at 8.

followed by the defense (13.3%), transport (9.5%), and telecom sectors (4.9%).⁷⁷ Legislation on the APE's representatives allows the APE to appoint representatives to the company's board of directors, supervisory board, or other deliberative bodies if it directly or indirectly owns more than fifty percent of the capital in the firm.⁷⁸ Legislation also allows the APE to appoint representatives to the company's deliberative bodies if it owns more than ten percent of the capital in the firm.⁷⁹ According to the APE's 2014 annual report, the French government appointed 761 directors on the boards of directors or the supervisory boards of these SOEs that year.⁸⁰ The report also shows that the agency attended 287 board of directors or supervisory board meetings and 274 specialized committee meetings since June 2014.⁸¹ In addition, legislation on the APE's representatives allows the representatives of the French State to exercise the same rights and powers as those provided by other members of the board of directors, the supervisory boards, or the governing body in place.⁸²

At least on paper, the French style of state holding is similar to the Chinese model. Consider EDF, the counterparty to the Chinese SOE in the EDF/GCN case and also one of the largest SOEs owned by the French State. The French government owns 84.5% of EDF, according to the latest annual report by APE.⁸³ In fact, EDF's statute restricts non-state ownership to thirty percent.⁸⁴ At the end of 2014, the composition of the board on EDF consisted of eleven directors appointed at the general meeting of shareholders—five were recommended by the French State, one APE representative, and six directors elected by employees.⁸⁵ The chairman and the CEO of EDF are appointed by the decree of the French President upon the recommendation of the board of directors.⁸⁶ Any major commercial decisions, such as mergers and acquisitions, investments, and executive compensation, require the approval of the French State.⁸⁷ Therefore, even if the French government adopts a passive investment strategy, it can indirectly influence the strategy of EDF through the appointment of executives to EDF. For instance, Gérard Magnin, who recently resigned from the board of EDF in opposition to its EDF/GCN project, was appointed by the French government in 2014.⁸⁸ Given Magnin's background in alternative energy, his

⁷⁷ These statistics are current through April 2014. *Id.* at 33.

⁷⁸ Ordonnance 2014-948 du 20 août 2014 relative à la gouvernance et aux opérations sur le capital des sociétés à participation publique [Ordonnance 2014-948 of August 20, 2014 on the governance and capital transactions of publically-controlled companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 23, 2014, p. 14011.

⁷⁹ *Id.*

⁸⁰ 2014 Annual Report, *supra* note 74, at 9.

⁸¹ *Id.* at 9.

⁸² Ordonnance 2014-948, *supra* note 78, at 14011.

⁸³ 2014 Annual Report, *supra* note 74, at 19.

⁸⁴ Loi 2004-803 du 9 août 2004 relative au service public de l'électricité et du gaz et aux entreprises électriques et gazières [Law 2004-803 of August 9, 2004 relating to the public service of electricity and gas and to electric and gas companies], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 11, 2004, p. 14256 (noting in Article 24 that the State retains seventy percent of the capital of the company).

⁸⁵ EDF, *2014 Facts and Figures*, EDF.FR 21–22,

https://www.edf.fr/sites/default/files/documents/faits_et_chiffres/2015/F%26F_EDF_2014_VA.pdf.

⁸⁶ *Id.* at 27.

⁸⁷ *Id.*

⁸⁸ Graham Ruddick, *Resignation of EDF Director Paves Way for Hinkley Point Go-Ahead*, GUARDIAN (July 28, 2016), <https://www.theguardian.com/uk-news/2016/jul/28/resignation-edf-director-hinkley-point-gerard-magnin>.

appointment at that time was widely speculated to be a strategic move by the French government to encourage the firm to invest more in renewable energy.⁸⁹ In 2014, the French parliament introduced a new decree granting long-term shareholders automatic double voting powers, unless a firm's articles of association forbid them.⁹⁰ Some commentators suggested that the aim of the new law was to allow the State the flexibility to divest its holding in SOEs while retaining or even strengthening its control over SOEs in strategic industries.⁹¹ The new law also allows the French government to fend off unwanted takeovers of French companies.⁹² For instance, the French government now has double voting rights in EDF, thus allowing the government to exert a much greater influence on the firm's commercial activities beyond its existing shareholding.⁹³

Similar to Chinese SOEs, political appointments of representatives at large French SOEs is not uncommon. As an OECD report points out, "In a number of cases there is a direct political dimension to the nomination with the direct involvement of the Council of Ministries or even the President, such as in France for Chairmen and CEOs of some large SOEs."⁹⁴ A recent example is the French socialist government's move to oust Henri Proglio in 2014 as chief executive of EDF France, as he was particularly close to the former center right president Nicolas Sarkozy.⁹⁵ Anecdotal evidence suggests that the French government had also interfered in the daily operation of SOEs. For instance, the French government has reportedly pressured its SOEs to buy products of Alstom to prop up the ailing SOE.⁹⁶ On another occasion, the French government's concern about job loss prompted the government to spend 600 million euros on a high-speed train in order to save a failing Alstom engineering plant.⁹⁷

A comparison of the respective corporate governance structures of the Chinese and French SOEs is revealing. First, as fiduciaries of the State, both SASAC and APE assume the management role of safeguarding state assets. As such, they need to be involved in the SOEs' commercial decision-making, either directly or indirectly. It is unrealistic to expect the State to completely tie its hands so that the SOEs will have sole autonomy to run the company, as the EUMR suggests. Such a demand is not efficient from a corporate governance standpoint either. Second, both SASAC and

⁸⁹ *Id.*

⁹⁰ Tony Barber, *Illusionary French Sell-Off Plan Lacks Authenticity of Old*, FIN. TIMES (Nov. 26, 2014), <https://www.ft.com/content/56eacd34-748f-11e4-8321-00144feabdc0>; see Loi 2014-384 du 29 mars 2014 visant à reconquérir l'économie réelle [Law 2014-384 of March 29, 2014 to reclaim the real economy ("Loi Florange")], Journal Officiel de la République Française [J.O.] [Official Gazette of France], Apr. 1, 2014, p. 6232

⁹¹ Curtis Milhaupt & Mariana Pargendler, *Governance Challenges of Listed State-Owned Enterprises Around the World: National Experiences and a Framework for Reform* 11 (European Corp. Governance Inst., Working Paper No. 352/2017, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2942193.

⁹² Barber, *supra* note 90.

⁹³ EDF, *supra* note 85, at 26.

⁹⁴ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES: A SURVEY OF OECD COUNTRIES 91 (2005).

⁹⁵ Michael Stothard & Hugh Carney, *French Government Ousts Proglio at EDF*, FIN. TIMES (Oct. 15, 2014), <https://www.ft.com/content/fa74939a-545a-11e4-b2ea-00144feab7de>.

⁹⁶ Simon C.Y. Wong, *Improving Corporate Governance in SOEs: An Integrated Approach*, 7 CORP. GOVERNANCE INT'L 9, 13 (2004).

⁹⁷ Ann-Sylvaine Chassany, *France to Buy Unneeded Train to Save Belfort Factory*, FIN. TIMES (Oct. 4, 2016), <https://www.ft.com/content/9e7deeee-8a07-11e6-8aa5-f79f5696c731>.

APE can influence the commercial strategies of the SOEs indirectly through the appointment of executives, even if they are not directly involved in any decision-making and have delegated much discretion to the management. Neither agency needs to rely on explicit mechanism to control its management, nor is communication necessary. Therefore, as long as the government retains the power to control the personnel within the SOEs, the ties between the government and the business cannot be completely severed. Third, even if French SOEs have established a better corporate governance structure, injected more transparency in its operation, and provided more public disclosure about its management than their Chinese counterparts, they are not completely immune from political interference. Thus, the question confronting the Commission is not a qualitative one about whether the SOEs have the independent power of decision-making as laid down in Recital 22. None of them do. The real question is quantitative—to what degree does the SOE’s power of decision-making allow it to compete in the market independent from other SOEs?

iii. Applying a Double Standard

The Commission has applied Recital 22 to examine merger transactions involving both European and Chinese SOEs. Officials from the Commission have stated that the Commission has applied the same criteria to assess both cases involving Chinese SOEs and European SOEs.⁹⁸ In reality, the Commission’s approach has not been anything but consistent. While the Commission focuses on actual control when scrutinizing cases involving European SOEs, it has implemented a more onerous test when reviewing cases involving Chinese SOEs.

In Neste/IVO, a merger transaction between two Finnish SOEs in 1998, the Commission found that the Finnish government could exercise its shareholding rights and vote on important commercial issues such as mergers and acquisitions and listing.⁹⁹ However, the Commission found no indications that the commercial conduct of Neste and IVO had been coordinated in the past; rather, the Commission determined that the two SOEs’ operative matters were run independently by their respective operating management.¹⁰⁰ The Commission therefore concluded that these two Finnish SOEs acted independently on the market.¹⁰¹

In EDF/Segebel, an acquisition by EDF of a Belgian electricity company in 2009, the Commission had to decide whether GDF Suez, which is also a portfolio company of APE, should be deemed independent from EDF.¹⁰² The Commission acknowledged that the APE is responsible for managing the French State’s shareholding in both SOEs; however, the Commission noted that the role of the APE was “clearly limited” and does not appear to affect “the commercial and business autonomy of these companies.”¹⁰³ The Commission also pointed to three pieces of evidence suggesting that these two French SOEs are in fact independent: first, EDF can independently set

⁹⁸ Joaquin Almunia, Speech at the Eighteenth St. Gallen International Competition Law Forum ICF: Recent Developments and Future Priorities in E.U. Competition Policy (Apr. 8, 2011); Cecilio Madero Villarejo, Deputy Director General for Antitrust Directorate General for Competition European Commission, Speech at the Seventh International Conference on Competition Law and Policy in Beijing: Recent Trends in EU Merger Control (June 1, 2011).

⁹⁹ Commission Decision No. IV/M.931 (Neste/IVO), slip op. ¶ 8 (Sept. 17, 2002).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Commission Decision No. COMP/M.5549 (EDF/Segebel), slip op. (Nov. 12, 2009).

¹⁰³ *Id.* ¶ 98.

its business plan in relation to GDF Suez and in accordance with its own commercial interest;¹⁰⁴ second, there is no interlocking directorship between these two SOEs;¹⁰⁵ and third, there are adequate safeguards to ensure that commercially sensitive information is not shared between these two entities.¹⁰⁶ Based on the totality of the circumstances, the Commission concluded that EDF and GDF Suez were separate undertakings.¹⁰⁷

In both the Neste/IVO case and the EDF/Segebel case, the Commission explicitly recognized that the respective States involved had voting power in the SOEs, which would presumably give the States the power to intervene in many important commercial decisions, including the appointment of executives to the boards of these entities. However, the Commission seemed undisturbed by de jure control, noting that the power and the role of the State in these situations was limited. Rather, the Commission focused on de facto control, that is, whether the underlying SOEs in fact coordinated competition between themselves. This focus on de facto control contrasts with the Commission's approach to reviewing foreign-controlled SOEs. For instance, during its recent review of a transaction involving Rosneft, a Russian SOE, the Commission highlighted the fact that the Russian Federation's power to control the appointment and removal of members of the board of directors is an important factor indicating that it can influence the commercial and strategic decisions of Rosneft.¹⁰⁸ But such power is a norm among all SOEs. If it did not cause any concern for the Commission in Neste/IVO and EDF/Segabel, why did it become a problem in Rosneft's proposed merger with TNK-BP? The answer may lie in the fact that the Commission was suspicious of the Russian government's influence over the commercial decisions of Rosneft and other SOEs. However, because it is difficult for the Commission to obtain direct evidence of such coordination, it fell back on the evidence of de jure control. This is tautological, but it seems to be exactly what happened in the cases involving Chinese SOEs as well.

The first case in which the Commission raised suspicions about the independence of Chinese SOEs is China National Bluestar/Elkem ("Bluestar/Elkem"), a proposed acquisition of the Norwegian silicon producer Elkem by China National Bluestar in 2011.¹⁰⁹ China National Bluestar is a subsidiary of ChemChina, which reports directly to the central SASAC. The parties in Bluestar/Elkem argued that ChemChina had decision-making power independent of central SASAC, which essentially exercises the basic ownership functions on behalf of the Chinese State as a non-managing trustee.¹¹⁰ The parties also argued that local SASACs are independent from central SASAC.¹¹¹ They noted that the central SASAC has no authority to appoint management for SOEs that operate under regional SASACs; rather, this authority resides exclusively with local governments and local political organs.¹¹² In addition, the parties in Bluestar/Elkem submitted that SASAC's key functions are limited to

¹⁰⁴ *Id.* ¶ 97.

¹⁰⁵ *Id.* ¶ 93.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* ¶ 94.

¹⁰⁸ Commission Decision No. COMP/M.6801 (Rosneft/TNK-BP), slip op. ¶ 7 (Mar. 8, 2013).

¹⁰⁹ Commission Decision No. COMP/M.6082 (China National Bluestar/Elkem), slip op. ¶ 7 (Mar. 31, 2011).

¹¹⁰ *Id.* ¶ 18.

¹¹¹ *Id.* ¶ 15.

¹¹² *Id.* ¶¶ 25, 26.

actions such as nominating the top management, reviewing the annual results of the SOEs and ensuring that the SOEs are operating within the permitted license.¹¹³ Additionally, the parties argued that the level of state intervention in the industry sectors relevant to the transaction is very minor¹¹⁴ and that SASAC does not interfere with the strategic decision-making of the SOEs, such as approval of business plans or budget.¹¹⁵ The parties proffered three pieces of evidence to show the lack of state intervention in the SOEs: (1) SASAC had never requested commercial information from the SOEs or in any other way influenced the commercial operations of the SOEs,¹¹⁶ (2) the dividend policy of the SOEs is not established by SASAC on a case-by-case basis but rather is set consistently across all central SOEs, and (3) management is compensated based on a point-system that takes into account various factors.¹¹⁷ The parties in Bluestar/Elkem also noted that SASAC has limited capacity to oversee the SOEs. At that time, the central SASAC oversaw 125 large central SOEs and employed only 800 people.¹¹⁸

The findings the Commission gathered during its own market investigation seem to support the parties' position. First, the concerned underlying market is highly fragmented with more than 200 firms, many of which are privately owned.¹¹⁹ Second, almost all the state-owned firms in the market belong to the local governments and ChemChina is the only SOE that reports to the central SASAC.¹²⁰ Third, customers in Europe did not believe that there was coordination among the producers.¹²¹ These findings suggest that local SOEs, together with private domestic firms, appear to exercise effective competitive constraint on ChemChina. Thus, had the Commission applied the same de facto standard as it had in Neste/IVO and EDF/Segebel, it should have endorsed the parties' position. The Commission, however, was reluctant to do so. When summarizing previous precedents dealing with European SOEs, the Commission noted that the overall assessment was "guided by the *possible* power of the State to influence the companies' commercial strategy and the *likelihood* for the State to actually coordinate their commercial conduct, either by imposing or facilitating such coordination."¹²² The emphasis on the "probabilistic" nature of the State's power to influence these SOEs deviates from the Commission's decisional practice in previous European cases. Indeed, unconvinced by the parties' arguments, the Commission carried out a detailed assessment examining the product overlaps between Elkem's activities and the activities of ChemChina and other SOEs under the supervision of central SASAC as well as the local SASACs.¹²³

Similar issues arose during the Commission's assessment of a joint venture between Koninklijke DSM N.V (DSM), a Dutch company, and Sinochem, another SOE under the supervision of central SASAC. Again the Commission was not convinced that

¹¹³ *Id.* ¶ 18.

¹¹⁴ *Id.* ¶ 15.

¹¹⁵ *Id.* ¶ 19.

¹¹⁶ *Id.* ¶ 20.

¹¹⁷ *Id.* ¶ 21.

¹¹⁸ *Id.* ¶¶ 14, 21.

¹¹⁹ *See id.* ¶ 16.

¹²⁰ *Id.*

¹²¹ *Id.* ¶ 33. (the Commission found no evidence that there was any signs of coordination in the industries concerned.)

¹²² *Id.* ¶ 10 (emphasis added).

¹²³ *Id.* ¶¶ 36–134.

Sinochem was truly independent from SASAC.¹²⁴ The Commission pointed to the core legislation of the State Assets Law and the associated information on SASAC's website as evidence suggesting that the SOEs do not have independent power of decision-making.¹²⁵ The specific language was quoted by the Commission as follows:

SASAC guides and pushes forward the reform and restructuring of state-owned enterprises, advances the establishment of modern enterprise system in SOEs, improves corporate governance, and propels the strategic adjustment of the layout and structure of the state economy [and]

SASAC is responsible for the fundamental management of the state-owned assets of enterprises, works out draft laws and regulations on the management of the state-owned assets, establishes related rules and regulations and directs and supervises the management work of local state-owned assets according to law.¹²⁶

It is not entirely clear why the above language raised the Commission's suspicion, as it appears to simply outline the normal functions of a state asset management firm. In addition, the Commission cited an OECD report and a book by Barry Naughton suggesting that commercial decisions of Chinese SOEs could be influenced by the Chinese State through both formal channels such as SASAC and in less formal ways.¹²⁷ The Commission noted that SASAC's own official statements provided certain indications in this regard. It further quoted a sentence from Sinochem's Annual Report as indicating that there was cooperation between Sinochem and the Chinese Government: "As the key state-owned enterprise, Sinochem Group is dedicated to serving the greater good of the national political stability, economic development, and social progress."¹²⁸

The aforementioned evidence gathered by the Commission in the case involving Sinochem suggests that SASAC has the power to influence the decision-making of the SOEs it supervises. However, it provides no indication that SASAC had actually done so in an effort to limit competition between Sinochem and other SOEs in the same industry sector. The results from the market investigation are mixed. On the one hand, the Commission found that the possibilities for these SOEs to act independently might be more limited than with private enterprises.¹²⁹ Some respondents expressed concern that the proposed joint venture and other Chinese SOEs could have incentives to coordinate in the markets and that such coordination is likely.¹³⁰ Respondents also noted that the transaction was part of Chinese SOEs' attempt to gain more leverage in the markets concerned.¹³¹ At the same time, Europe-based customers and one respondent in China indicated that Chinese suppliers do compete with one another to a certain degree.¹³²

¹²⁴ Commission Decision No. COMP/M.6113 (DSM/Sinochem), slip op. ¶ 16 (May 19, 2011).

¹²⁵ *Id.* ¶ 15.

¹²⁶ *Id.* ¶ 15 n.8.

¹²⁷ *Id.* ¶ 15 n.9.

¹²⁸ *Id.* ¶ 15 n.10.

¹²⁹ *Id.* ¶ 24.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* ¶ 25.

The Commission revisited the same issue about the independence of the SOEs in subsequent cases but ultimately left open the question of how to determine the scope of the SOEs in its official decisions.¹³³ But the Commission was no longer able to dodge the issue in EDF/CGN. Because CGN has little turnover in Europe, the only way for the Commission to exert jurisdiction over the EDF/CGN transaction was to enlarge the scope of the SOEs involved in this case. To do this, the Commission pointed to the State Assets Law and its interim measures allowing SASAC to vote on important business decisions, such as strategies, business plans, or budgets.¹³⁴ The Commission used these provisions as evidence that SASAC can influence the commercial decisions of the SOEs under its supervision. This is puzzling, as SASAC, like all state investors, would need to exercise its basic voting rights to govern the SOEs it supervises.

Perhaps what most concerned the Commission was that the EDF/CGN case involved the nuclear industry, a highly sensitive and important industry sector. Again, the Commission relied on the specific wording in the State Assets Law, noting that the Chinese government will promote the centralization of state-owned capital in important industries that have bearings on the national economic lifeline and national security.¹³⁵ It is possible that because nuclear power is such an important industry, the Commission believed that the Chinese government had a strategic interest in coordinating competition of firms in this industry. While the Commission did not identify explicit evidence of coordination, it nonetheless found some evidence of the establishment of a strategic alliance among Chinese nuclear companies.¹³⁶ As quoted by the Commission, the creation of the China Nuclear Industry Alliance was “directed by the [Chinese] government to achieve some synergy” and is “designed to eliminate detrimental or unseemly competition in export market.”¹³⁷ This seems to indicate that Chinese nuclear power companies may be engaging in export cartels, but there is not sufficient evidence to conclude that they are acting like a single firm. Moreover, it would not make sense for the Commission to do so—if these Chinese nuclear companies do in fact engage in export cartels, such conduct is clearly prohibited under Article 101 of the TFEU.¹³⁸ However, because the Commission has decided that all Chinese SOEs operating in the energy sector are to be treated as one entity, this may allow Chinese nuclear companies to defend themselves on the basis of single firm conduct.

Finally, the Commission pointed to the fact that CGN had signed an agreement to create a joint venture with CNNC, another SOE in the nuclear sector, for the

¹³³ Zhang, *supra* note 15.

¹³⁴ Commission Decision No. M.7850 (EDF/CGN/NNB Group of Companies), slip op. ¶¶37–42 (Mar. 10, 2016).

¹³⁵ *Id.* ¶ 43.

¹³⁶ *Id.* ¶ 44.

¹³⁷ *Id.*

¹³⁸ A complicated issue, however, is whether such a cartel would be treated as compelled by the State and thus may be exempt from antitrust law. This decision would turn on the specific facts of the case. Notably, a Chinese vitamin company recently successfully defended its action on the basis of foreign sovereignty compulsion defense in the United States. Ian Simmons et al., *International Comity Saves Vitamin C Defendant*, LAW 360 (Sept. 28, 2016, 12:47 PM EDT), <https://www.law360.com/articles/845695/international-comity-saves-vitamin-c-defendants>.

development and marketing of a nuclear technology globally.¹³⁹ Such a strategic link could be subject to antitrust scrutiny,¹⁴⁰ but again, it is far from clear that they are acting like a single firm. Based on the above facts, the Commission decided that Central SASAC has the power to interfere with the strategic investment decisions and can facilitate coordination between Chinese SOEs, at least with regard to those in the energy sector.¹⁴¹ The Commission therefore concluded that CGN and other Chinese SOEs in the energy sector should be deemed a single entity, and that their turnover should be aggregated for the purpose of merger notification.¹⁴² Ultimately, the transaction was cleared because even if all Chinese SOEs in the energy sector are viewed as a single entity, the deal would not pose any competitive concern.¹⁴³ The Commission left open the question of how to treat other SOEs, including those that are not operating in the energy sector and those that are owned by local governments.¹⁴⁴

The EDF/CGN case caused a stir in the European antitrust community.¹⁴⁵ Law firm partners scurried to send alert memos to their clients advising of the potential implications of such decisions. Several European scholars and commentators expressly endorsed the Commission's decision and called on the Commission to take a bolder and more stringent approach in scrutinizing future Chinese investment.¹⁴⁶ In particular, Alan Riley, a senior fellow for the Institute for Statecraft based in London, suggested that the Commission should treat all SOEs, not just those in the same sector, as one entity for the purpose of merger assessment.¹⁴⁷ This approach is akin to asking the Commission to treat all Chinese SOEs as constituting a China, Inc. Nicolas Petit, a professor at the University of Liège in Belgium, went even further, suggesting that all Chinese firms with a CCP link should be treated as a single entity, regardless of their ownership status.¹⁴⁸ The gist of Petit's argument is that Chinese firms operate as a Party-led syndicate that is analogous to those super-trusts that fueled social

¹³⁹ Commission Decision No. M.7850 (EDF/CGN/NNB Group of Companies), slip op. ¶ 47 (Mar. 10, 2016).

¹⁴⁰ Economic links like this may form the basis for a finding of collective dominance as the General Court decided in *Italian Flat Glass*. Joined Cases T-68/89, T-77/89, and T-78/89, *Società Italiana Vetro SpA v. Comm'n*, 1992 E.C.R. II-01403. However, collective dominance is no longer the enforcement priority for the Commission in recent years. See Thomas K. Cheng & Kelvin H. Kwok, *A Neglected Theory of Harm: Joint Ventures as Facilitators of Collusion Across Markets*, 5 J. ANTITRUST ENFORCEMENT 434, 437-58 (discussing how agencies must be cognizant of the manner in which joint ventures can potentially cause competitive harm).

¹⁴¹ Commission Decision No. M.7850 (EDF/CGN/NNB Group of Companies), slip op. ¶ 48 (Mar. 10, 2016).

¹⁴² *Id.* ¶ 49.

¹⁴³ *Id.* ¶ 111.

¹⁴⁴ *Id.* ¶ 50.

¹⁴⁵ French & Dodoo, *supra* note 22; see also Adrian Emch, *EU Merger Control Complications for Chinese SOE Transactions*, KLUWER COMPETITION L. BLOG (May 27, 2016), <http://kluwercompetitionlawblog.com/2016/05/27/eu-merger-control-complications-for-chinese-soe-transactions/>.

¹⁴⁶ Alan Riley, *Nuking Misconceptions: Hinkley Point, Chinese SOEs and EU Merger Law*, EUR. COMPETITION L. REV. (forthcoming July 2016), <https://ssrn.com/abstract=2778229>; Nicolas Petit, *Chinese State Capitalism and Western Antitrust Policy* 15–16 (June 22, 2016), <https://ssrn.com/abstract=2798162>; see also Sebastian Heilmann, *Europe Needs Tougher Response to China's State-Led Investments*, FIN. TIMES (June 9, 2016), <https://www.ft.com/content/98ec136e-6dd9-36c0-bc58-8b7635e21bb6> (arguing that it is critical for the E.U. to systematically deploy merger control procedures to prevent market distortion).

¹⁴⁷ Riley, *supra* note 146.

¹⁴⁸ Petit, *supra* note 146, at 11–13.

demand for antitrust regulation in the twentieth century.¹⁴⁹ Since all Chinese SOEs and many large private domestic Chinese companies have established party organizations, Petit's proposal would require treating the majority of firms operating in China as a single firm.

Given the pervasive political control that the CCP exerted over SOEs and the opacity of the corporate governance within these firms, it is understandable that policymakers and academics are skeptical about the independence of Chinese SOEs. The problem, however, is that they have misinterpreted and misapplied Recital 22. Instead of focusing on the actual influence exerted by a State on an SOE, they have focused on the *possibility* of the Chinese State to influence the SOEs—particularly the structural links between SASAC and the SOEs concerned. Indeed, Recital 22 places the Commission in a difficult position. While the regulator is correctly concerned that SASAC—and the CCP by extension—may be working behind the scenes to influence the competitive strategies of those SOEs within their control, the evidence of coordination is extremely hard to ascertain. Consequently, the Commission fell back on the evidence of *de jure* control and used it to infer *de facto* control. This is clearly inconsistent with the standard that the Commission applied to European SOEs, jeopardizing its hard-earned image as an impartial and nondiscriminatory regulator. As discussed in Part II below, the challenges that the Commission faced in applying Recital 22 to SOEs are deeply rooted in the legal framework upon which the EUMR is built.

II. When the EUMR Fails in Applying to Chinese SOEs

The EUMR applies to concentrations that have a community dimension.¹⁵⁰ As such, the delineation of the boundary of an undertaking is a prerequisite for the Commission to exert jurisdiction and to conduct the competitive assessment. Such a legal design, however, is premised on two assumptions: first, the ultimate controlling entity of the undertaking must have an incentive to coordinate the competition among those firms within its control; and second, it must have the ability to do so. While this would normally make sense for commercial entities, those assumptions could not be taken for granted when it comes to SOEs, especially for Chinese SOEs. This results in an over-inclusive outcome where two independent Chinese SOEs who are actually competing with each other are treated as part of China, Inc. At the same time, applying the concept of an undertaking to Chinese SOEs can lead to an under-inclusive outcome. Currently, the EUMR only covers acquisitions of control; it does not apply to acquisitions of a minority interest that does not confer control. However, ownership and control are not absolute, as anticompetitive effects could arise even when the State only acquires a non-controlling minority interest in a rival firm. Such cases, however, fall outside the ambit of the EUMR.

i. The Problem of Overinclusion

As Holmstrom and Tirole have long demonstrated, competition is an effective safeguard on the performance of firms.¹⁵¹ Chinese leadership has long embraced this logic, allowing the entry of private capital into most economic sectors. As non-state firms intensively compete with SOEs in liberalized sectors, the government has little

¹⁴⁹ *Id.* at 2–3.

¹⁵⁰ EUMR, *supra* note 39, art. 9.

¹⁵¹ Bengt R. Homstrom & Jean Tirole, *The Theory of the Firm*, in HANDBOOK OF INDUSTRIAL ORGANIZATION 94, 96–97 (Richard Schmalensee & Robert Willig eds., 1989).

incentive to coordinate competition among SOEs in those sectors. Thus, even if the CCP maintains political control over SOEs, such control does not necessarily translate into control over competitive strategies. On the other hand, the Chinese State, despite its power and influence, is not omnipotent. While political power is highly centralized in the hands of the CCP, the economic rights of governance are in fact highly decentralized. Consequently, there is a lack of unity of interest among SOEs owned by the local governments, which account for the majority of the SOEs in China.¹⁵² Moreover, the existence of rampant agency problems in SOEs at all levels poses a significant challenge for the government when it comes to controlling these SOEs. Therefore, even when the government has an interest to coordinate competition, it often fails to achieve such.

(1) *The Utility Function of the Chinese State*

Barry Naughton, a well-known expert on the Chinese economy, has tried to resolve the puzzle of how China could sustain high economic growth in the absence of adequate protection of individual property rights.¹⁵³ The answer, he argues, lies in the establishment of a competitive mechanism which imposes disciplines on SOEs.¹⁵⁴ According to Naughton, the competition from private domestic firms and foreign-invested firms have exerted pressures on the state-owned incumbents and forced them to up their game.¹⁵⁵ The history of Chinese economic reform attests to Naughton's theory.

When China embarked on market reform in 1978, the Chinese economy was predominantly controlled by the Chinese State.¹⁵⁶ All prices and quantities were determined under a centrally planned system modeled after the former Soviet Union. There is little doubt that at the time the Chinese economy was run like a giant China, Inc., but such a business model is beset with serious agency problems. Because the input and output prices were determined by the Chinese government, it was impossible for the government to evaluate the performance of the SOEs' management or to discipline the managers by simply observing the firm's profitability.¹⁵⁷ To tackle this problem, the government introduced a series of SOE reforms starting in the 1980s, with the main agenda of granting autonomy to SOEs to motivate them to pursue profit and growth.¹⁵⁸ Decisions permitting SOEs to sell some of their outputs to the market and to source some of their inputs from the market partially contributed

¹⁵² ANDREW SZAMOSSZEGI & COLE KYLE, AN ANALYSIS OF STATE-OWNED ENTERPRISES AND STATE CAPITALISM IN CHINA 26 (2011), available at http://sites.utexas.edu/chinaecon/files/2015/06/US-China-Commission_State-Owned-Enterprises-and-State-Capitalism.pdf (For instance, while Chinese statistics indicate that SOEs exceeded 100,000 in 2010, the number of SOEs controlled by the central government was only 120 that year. Regional governments controlled all the remaining numbers).

¹⁵³ See generally BARRY NAUGHTON, GROWING OUT OF THE PLAN: CHINESE ECONOMIC REFORM, 1978–1993 (1995) (discussing how, even with no democratization and a limited period of political relaxation, Chinese economic progress was able to continue).

¹⁵⁴ *Id.* at 8–11.

¹⁵⁵ See generally *id.* at 200–43 (explaining how the entry of non-state actors was critical for the overall process of marketization, as they helped ensure the healthy development of the market sphere).

¹⁵⁶ Xiaodong Zhu, *Understanding China's Growth: Past, Present and Future*, 26 J ECON. PERSPECTIVE 103, 114 (2012).

¹⁵⁷ See Justin Yifu Lin et al., *Competition, Policy Burdens, and State-Owned Enterprise Reform*, 88 AM. ECON. REV. 422, 423 (1998) (explaining how the influence of the managers' actions on the profitability of an SOE was secondary to the input and output prices controlled by the state).

¹⁵⁸ BARRY NAUGHTON, THE CHINESE ECONOMY: TRANSITIONS AND GROWTH 92 (2007).

to the growth of non-state firms, especially the ownership and village enterprises (TVEs).¹⁵⁹ The successes of these TVEs in turn exerted significant competitive pressures on the SOEs, thus further triggering the Chinese government to deepen economic reform.¹⁶⁰ Empirical evidence shows that the managerial incentives and the total factor productivity of SOEs were significantly improved due to the increase in management autonomy and the competitive pressures from TVEs.¹⁶¹ The profits of Chinese SOEs declined sharply, however, as they could no longer derive monopoly rents in many markets.¹⁶² This provided the impetus for China to conduct a round of privatization in the late 1990s, resulting in a massive reduction of SOEs between 1994 and 2000.¹⁶³ Large SOEs also underwent a partial privatization by listing some of their best assets in domestic and foreign stock exchanges.¹⁶⁴

Market reform is not yet complete in China, and SOEs still maintain a powerful presence in the Chinese economy. Meanwhile, China is a vast country with a huge bureaucracy.¹⁶⁵ As each component of the bureaucracy may have its own bureaucratic interest, the goal of the Chinese State is not necessarily coherent when it comes to the economic policy of SOEs. Although SASAC is a product of China's market reform, it has also emerged as a powerful and vocal bureaucratic department vying for the interests of the SOEs.¹⁶⁶ Central SASAC's clear objective is to encourage the consolidation of SOEs and turn them into "national champions," as this is directly related to its own bureaucratic interest.¹⁶⁷ The growth of the SOEs signals the strength of Chinese state capitalism, and the entrenched interest of these giant SOEs helps further enhance the interests of SASAC as a state asset management bureaucracy.

At the same time, other bureaucratic departments have different policy goals. For instance, the Price Supervision and the Anti-Monopoly Bureau within the National Development and Reform Commission (NDRC) is tasked with controlling price inflation and tackling anticompetitive conduct. If prices are too high, this will destabilize the whole economic system and may even lead to political turmoil that jeopardizes the legitimacy of the governing party.¹⁶⁸ However, because prices are

¹⁵⁹ See Lin et al., *supra* note 157, at 424 (illustrating the process of economic reform that led to the unexpected growth of non-state firms like TVEs).

¹⁶⁰ *Id.* at 425.

¹⁶¹ See generally Wei Li, *The Impact of Economic Reform on the Performance of Chinese State Enterprises, 1980-1989*, 105 J. POL. ECON. 1080 (1997) (demonstrating the improvements in the marginal productivity of factors and in TFP by investigating a panel of 272 state enterprises); Lixin Colin Xu, *Control, Incentives and Competition: The Impact of Reform on Chinese State-Owned Enterprises*, 8 ECON. TRANSITION 151, 165-66 (2000).

¹⁶² See Lin et al., *supra* note 157, at 425 (showing that, despite large amounts of implicit subsidies, over forty percent of SOEs are operating at a loss due partly to the dissipation of monopoly rent); see also Li, *supra* note 161, at 1084 (explaining how the formerly monopolistic industrial structure, when broken up, led to increased competition as new players were able to enter the market).

¹⁶³ NICOLAS R. LARDY, *MARKETS OVER MAO* 45 (2014) (citing statistics from the National Bureau of Statistics of China); see also Barry Naughton, *Top-Down Control: SASAC and the Persistence of State Ownership in China* (June 23, 2006) (unpublished manuscript),

<https://www.nottingham.ac.uk/gep/documents/conferences/2006/june2006conf/naughton-june2006.pdf>.

¹⁶⁴ OECD, *supra* note 65, at 42..

¹⁶⁵ Angela Huyue Zhang, *Bureaucratic Politics and China's Anti-Monopoly Law*, 47 CORNELL INT'L L. J. 671, 684 (2014); Yasheng Huang, *Managing Chinese Bureaucrats: An Institutional Economic Perspective*, 50 POL. STUD. 61, 66-67 (2002).

¹⁶⁶ Naughton, *supra* note 57, at 2.

¹⁶⁷ See Aguiar et al., *supra* note 12.

¹⁶⁸ Zhang, *supra* note 165, at 694-96.

liberalized, the agency has very limited tools to achieve its aim to control prices.¹⁶⁹ Antitrust was then viewed as an effective tool to discipline the high prices charged by firms, including SOEs.¹⁷⁰ This is most evident by looking at the record of Chinese antitrust enforcement. For example, in 2011, NDRC announced its investigation into China Telecom and China Unicom, the two largest SOEs in the telecommunication industry.¹⁷¹ Other frequent targets are local SOEs, such as premium white liquor manufacturers, gold retailers in Shanghai, large cement manufacturers, insurance companies, auto manufacturers, and so on.¹⁷²

The utility function of the Chinese State is therefore highly complex. On the one hand, the government endorses competition and has liberalized most of its economic sectors over the past few decades. In those liberalized sectors, the Chinese government allows non-State firms to compete freely with SOEs.¹⁷³ On the other hand, power is fragmented within the Chinese bureaucracy and each governmental department has its own departmental interest in promoting or limiting competition for SOEs. SASAC, for instance, advocates for the expansion of the State sector and endorses the monopoly positions held by the largest Chinese SOEs. This is often at odds with market reform and discourages competition from private companies. It also clashes with the objectives of other departments, such as the antitrust unit within NDRC, which advocates for consumer welfare.

(2) *The Limits of the Chinese State*

Antitrust takes for granted that a controlling owner can coordinate firms within its control. It assumes that the owner can dictate the firm's actions. However, when the owner is a State, the question is more nuanced. Two inherent problems in the Chinese economy have made it extremely difficult for the State to exercise effective control and coordinate the SOEs: (1) the highly decentralized Chinese economy and (2) the severe agency problems that exist in SOEs.

(a) *The Decentralized Economy*

On the surface, the Chinese State is highly centralized and the Communist Party keeps a tight grip on every level of the Chinese government. But while political power is concentrated in Beijing, most of the rights of economic governance have been delegated to local governments. Chenggang Xu has characterized the Chinese economy as a “regionally decentralized authoritarian (RDA) regime,” where a centralized, one-party, authoritarian State presides over a dynamic, decentralized economy.¹⁷⁴ Indeed, if we measure degree of decentralization by looking at statistics, China is the most decentralized country on earth.¹⁷⁵ In 2008, local government's share

¹⁶⁹ *Id.* at 696 (noting that during the financial crisis in 2008, NDRC invited many industry associations for chats, and bullied them to suppress prices to avoid inflation. The results were not satisfactory.).

¹⁷⁰ *Id.* at 697–98.

¹⁷¹ CCTV, *Fagaiwei Zheng Diao cha Zhongguo Dianxin He Zhongguo Liantong Shexian Longduan [The NDRC Is Investigating the Broadband Monopoly Issues of China Telecom and China Unicom]*, XINLANG CAIJING [SINA FIN.] (Nov. 9, 2011), <http://finance.sina.com.cn/g/20111109/121510782543.shtml>.

¹⁷² Zhang, *supra* note 26, at 198–99.

¹⁷³ Fan Gang & Nicholas C. Hope, *The Role of State-Owned Enterprises in the Chinese Economy*, in US-CHINA ECONOMIC RELATIONS IN THE NEXT TEN YEARS pt. II, 7–10 (2013).

¹⁷⁴ Chenggang Xu, *The Fundamental Institutions of China's Reforms and Development*, 49 J. ECON LITERATURE 1076, 1078 (2011).

¹⁷⁵ KROEBER, *supra* note 9, at 111.

of fiscal revenue and expenditure was forty percent and seventy-three percent respectively, far exceeding the OECD average of nineteen percent and thirty-two percent.¹⁷⁶ A recent empirical study found that local information is key to understanding the governance of SOEs in China.¹⁷⁷ Zhangkai Huang and his coauthors found that when the distance to the government is farther (and hence the government has less direct observation over the firm), the SOE is more likely to be decentralized (i.e. managed by a lower level of the government).¹⁷⁸ However, such a link is muted when it comes to central SOEs in strategic industries.¹⁷⁹ Notably, large centrally-owned SOEs only account for one third of the total number of SOEs in China and control slightly less than half of all the State assets.¹⁸⁰ Consequently, most of the SOEs and the State assets belong to the local governments.

Meanwhile, decentralization has been viewed as the driving force behind China's phenomenal economic growth, despite the lack of good institutional support.¹⁸¹ First, local governments have incentives to foster their local businesses which are cronies of the local leaders.¹⁸² Formally, the success of the local businesses increases the tax revenues received by the local governments, expands the employment base, and helps the local government officials obtain political credits for economic achievements in their areas.¹⁸³ Informally, local business owners can reward officials with bribes and even grant them stakes in the local business.¹⁸⁴ Local officials thus become high-power incentive agents with vested interests in the local businesses. Because China is a vast country, thousands of local governments are in effect competing with each other.¹⁸⁵ While each local government is incentivized to erect barriers of entry to protect its own cronies, the existence of the competition from cronies fostered by other local governments counteracts the negative effects arising from local protectionism.¹⁸⁶

One example can be found in the automobile industry. The automobile industry is a tightly regulated sector where foreign car makers have to partner with Chinese domestic SOEs in order to access the Chinese market.¹⁸⁷ The central government initially wanted to foster three large state-owned automobile manufacturers and was not willing to grant licenses to other companies.¹⁸⁸ Thus, in the early 2000s, the

¹⁷⁶ *Id.* at 111–12.

¹⁷⁷ See generally Zhangkai Huang et al., *Hayek, Local Information, and Commanding Heights: Decentralizing State-Owned Enterprises in China*, AM. ECON. REV. (forthcoming 2017) (analyzing the manner in which local information affects decentralization of firms in a market economy).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ KROEBER, *supra* note 9, at 99.

¹⁸¹ Chong-En Bai et al., *Crony Capitalism with Chinese Characteristics* 3 (May 2014) (unpublished manuscript), http://cowles.yale.edu/sites/default/files/files/conf/2014/ma_song.pdf. (noting that the decentralized political and economic system in China tend to ameliorate the negative dynamic consequences of crony capitalism).

¹⁸² *Id.* at 2–3.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 2 (noting the economic benefits that party cadres can obtain from their interactions with the business sector).

¹⁸⁵ *Id.* at 3.

¹⁸⁶ *Id.*

¹⁸⁷ MICHAEL J. DUNNE, AMERICAN HEELS, CHINESE ROAD: THE STORY OF GENERAL MOTORS IN CHINA 8 (2011).

¹⁸⁸ Bai et al., *supra* note 181, at 5–7.

Chinese automobile market was dominated by a few large state-owned players who partnered with foreign firms, such as the partnership between Shanghai Automotive Industry Company and General Motors (SAIC-GM).¹⁸⁹ However, since the 2000s, a number of small, startup car manufacturers, sponsored by the local governments, started to appear and become serious rivals to these large SOEs.¹⁹⁰ One of them is Chery, which was started in 1997 by the Wuhan city government.¹⁹¹ Michael Dunne, a veteran in the Chinese auto industry, told the tale of how Chery was able to beat SAIC-GM with the launch of a new car model similar to the one that SAIC-GM had wanted to release.¹⁹² To be sure, both SAIC-GM and Chery are owned by the Chinese State, but they actually belong to different owners and are fierce competitors.

While decentralization has promoted China's astounding economic growth in the past few decades, it has also had undesirable consequences. The Chinese government has faced severe overcapacity in many industry sectors.¹⁹³ Local governments are particularly reluctant to close down businesses, as this results in loss of GDP growth and employment, which also threatens the social stability in the region.¹⁹⁴ Thus, local governments have incentives to prop up SOEs even if they are terminally ill.¹⁹⁵ Although the central government has repeatedly tried to orchestrate competition among SOEs in these sectors, it has often failed to do so.¹⁹⁶ One example of this failure can be found in the steel industry. Despite numerous attempts to reduce competition among Chinese steel manufacturers, the severe problem of overcapacity remains.¹⁹⁷ Thus, the central government recently encouraged the tie-up between Baosteel and Wuhan Iron and Steel, two large state-owned steel makers.¹⁹⁸ Clearly these two SOEs are not completely independent from the Chinese State since the State can influence their merger decisions. Yet, if the government could perfectly coordinate the competition among these two SOEs as if they were its own subsidiaries, there would be no need for these two SOEs to merge in the first place.

The cases that the Commission has investigated so far are also good illustrations of economic fragmentation in China. In Bluestar/Elkem, the Commission found that the silicon market is highly fragmented with SOEs engaging in head-to-head competition with private firms.¹⁹⁹ In fact, ChemChina is the only centrally owned SOE in the silicon metal market; the rest of the SOEs all belong to various local governments.²⁰⁰ The evidence from the Commission's market investigation also confirms that these

¹⁸⁹ *Id.*

¹⁹⁰ DUNNE, *supra* note 187, at 125–36.

¹⁹¹ *Id.* at 125.

¹⁹² *Id.* at 125–36.

¹⁹³ Shuaihua Wallace Cheng, *Overcapacity a Time Bomb for China's Economy*, SOUTH CHINA MORNING POST (Sept. 28, 2015) (noting that the overcapacity rate surpassed thirty percent in industry sectors such as iron, steel, glass, cement, aluminum, solar panel and power generation equipment).

¹⁹⁴ KROEBER, *supra* note 9, at 114.

¹⁹⁵ *Id.*

¹⁹⁶ Zhang, *supra* note 26, at 208–9.

¹⁹⁷ Wataru Kodaka, *The Chinese Steel Industry's Moment of Truth*, NIKKEI ASIAN REV. (July 7, 2016), <https://asia.nikkei.com/magazine/20160707-Deciphering-Duterte/Business/The-Chinese-steel-industry-s-moment-of-truth>.

¹⁹⁸ *Id.*

¹⁹⁹ Commission Decision No. COMP/M.6082 (China National Bluestar/Elkem), slip op. ¶ 16 (Mar. 31, 2011).

²⁰⁰ *Id.* ¶ 16 n.6.

local SOEs and private firms are effective competitive constraints on ChemChina.²⁰¹ This seems to suggest that the fragmented nature of the market makes it costly for the government to coordinate these firms should it desire to do so. The Commission identified a similar phenomenon in DSM/Sinochem/JV, though the evidence gathered during that market investigation was mixed.²⁰² To the extent that these two SOEs do compete, it would be problematic to treat them as a single entity for the purpose of antitrust assessment. True, the competition among these SOEs may have been fiercer had the government not intervened, but it is unequivocal that a merger between these SOEs would also reduce competition.

Similarly, the Commission's decision in the EDF/GCN case—which treats all SOEs in the energy sector as a single entity—is unnecessarily broad and fails to understand the competitive landscape of the energy sector. The energy sector is deemed highly important for the Chinese economy and falls within the “key” and “pillar” industries identified by SASAC. Energy, though, is a vast industry that includes oil, gas, electricity, nuclear power, coal, and renewable energy—many of which remain very fragmented. For instance, Nicolas Lardy, an expert on the Chinese economy, notes that in the coal mining sector alone there were 880 SOEs as of 2011.²⁰³ Even assuming the Chinese government would like to coordinate the competition between these SOEs, the cost of coordination would be prohibitively high. Moreover, private firms exert competitive pressures on these SOEs. As pointed out by Lardy, trade liberalization and foreign direct investment are also important competitive constraints on the SOEs.²⁰⁴

(b) *Agency Problems*

Agency problems are not unique to SOEs, but they are particularly severe for SOEs. As Milhaupt and Pargendler have succinctly outlined, there are many unique challenges to the governance of SOEs including the weak exit options enjoyed by citizens as opposed to shareholders and the collective action problem faced by the citizens in monitoring the SOEs, as well as the ambiguity of the objectives of the government's pursuit and the means to achieve such objectives.²⁰⁵

Agency problems are not unique to SOEs, but they are particularly serious problems for Chinese SOEs due to the size and unique bureaucratic status of the entities. Many of the Chinese SOEs in the strategic sectors are among the largest companies in the world. These companies were spun off from large central ministries, which in turn dissolved and transferred most of the administrative, institutional, and personnel capacity to the SOEs.²⁰⁶ Even though these SOEs continue to be subjected to regulation, the regulatory power over the industry tends to be fragmented, and the agencies often lack sufficient political clout and resources to effectively monitor them.²⁰⁷ In fact, some Chinese SOEs have captured industry regulators and have

²⁰¹ *Id.*

²⁰² Commission Decision No. COMP/M.6113 (DSM/Sinochem), slip op. ¶¶ 15, 24 (May 19, 2011).

²⁰³ LARDY, *supra* note 163, at 24.

²⁰⁴ *Id.*, at 36–37 (noting that the ratio of imports to GDP has increased since China joined the WTO and that subsidiaries of foreign firms also sell to the domestic market).

²⁰⁵ Milhaupt & Pargendler, *supra* note 91.

²⁰⁶ OECD, *supra* note 65, at 93–94.

²⁰⁷ *Id.* at 97.

come to dominate the government.²⁰⁸ In these situations, regulatory agencies rely heavily on SOEs and defer to them for important policy questions.²⁰⁹ Moreover, Chinese SOEs still enjoy bureaucratic ranks, and the chairmen of the top fifty-three central SOEs enjoy a bureaucratic status parallel to either the head of the central SASAC or to a vice-ministerial rank.²¹⁰ It is thus no surprise that in practice, SASAC finds itself lacking the political clout to effectively check these large SOEs.²¹¹

In a previous article on Chinese outbound investment, I attributed empire-building as one important factor driving Chinese SOEs' overseas forays.²¹² In China, the size of the SOE matters. The bigger it is, the more powerful it becomes; the more powerful it is, the easier it becomes for it to obtain resources to expand further and become even bigger.²¹³ One example can be found in China's oil and gas sector. China's national oil companies (NOCs) are the most active players in overseas acquisitions.²¹⁴ On the surface, the Chinese government seems to play a key role in coordinating the efforts of these NOCs in their quest for oil and natural gas assets; the reality, however, is that it was those NOCs that were driving their forays overseas.²¹⁵ As pointed out by Erica Downs, a China energy expert, the political clout of an NOC is determined by the amount of the high quality assets that it possesses.²¹⁶ The better the assets that an NOC acquires, the more likely it is to obtain diplomatic and financial assistance from the Chinese government for future investments.²¹⁷ This explains the lack of coordination among Chinese NOCs in their race for overseas expansion.²¹⁸

Indeed, problems of coordination have motivated SASAC to promote consolidation among large central SOEs in recent years.²¹⁹ One example is the tie-up between two state-owned rolling stock companies, China CNR Corporation and CSR Corporation, into China Railway Rolling Stock Corporation.²²⁰ According to Chinese media, these two firms have engaged in cutthroat competition with each other in bidding overseas projects, and thus the transaction is expected to strengthen their competitive strength in international competition.²²¹ In fact, since 2015, China has witnessed a new wave of mergers among Chinese SOEs. In addition to the CNR/CSR merger, another ten

²⁰⁸ BO KONG, CHINA'S INTERNATIONAL PETROLEUM POLICY 93–94 (David L. Goldwyn & Jan H. Kalicki eds., 2010); Erica Downs, *Business Interest Groups in Chinese Politics: The Case of the Oil Companies*, in CHINA'S CHANGING POLITICAL LANDSCAPE: PROSPECTS FOR DEMOCRACY 121, 122 (Cheng Li ed., 2008); Edward A. Cunningham, *China's Energy Governance: Perception and Reality*, MIT CENTER FOR INT'L STUD. AUDITS OF CONVENTIONAL WISDOM (Mar. 2007), <https://cis.mit.edu/sites/default/files/documents/Cunningham0307Audit.pdf>.

²⁰⁹ KONG, *supra* note 208, at 16.

²¹⁰ Lin & Milhaupt, *supra* note 14, at 737–38.

²¹¹ NAUGHTON, *supra* note 57, at 7.

²¹² Zhang, *supra* note 15, at 441–45.

²¹³ *Id.* at 442.

²¹⁴ *Id.* at 446.

²¹⁵ *Id.* at 447–48.

²¹⁶ Erica S. Downs, *The Fact and Fiction of Sino-African Energy Relations*, 3 CHINA SEC. 42, 50 (2007).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ Matthew Miller & Charlie Zhu, *Made in China: Beijing Plans New Wave of State Firm Consolidation*, REUTERS (Mar. 11, 2015), <http://uk.reuters.com/article/uk-china-parliament-reform-idUKKBN0M70LL20150311>.

²²⁰ Tom Mitchell, *China Railway Strategy Goes Off Track*, FIN. TIMES (Dec. 23, 2014), <https://www.ft.com/content/1b72fba0-875e-11e4-8c91-00144feabdc0>.

²²¹ *Id.*

mega-mergers between large Chinese SOEs have taken place in industries such as shipping, energy, commerce, construction, and steel.²²² Some economists have warned that the consolidation may even worsen the agency problem, as the Chinese government may have less bargaining power and find it even more difficult to control these corporate behemoths.²²³ In any event, the European Union would have an interest in intervening in those transactions if they pose a threat to European consumers. However, the Commission would have no basis to do so if it adopts the view that Chinese SOEs are to be treated as one single entity.

To rein in the rampant agency problems, President Xi Jinping has called for stronger and improved leadership for the CCP over SOEs since 2016.²²⁴ A series of policy documents have emerged granting the Party Committee within the SOEs more power to exercise oversight.²²⁵ Clearly, this is the government's deliberate attempt to tighten political control over SOEs, but such control and influence does not necessarily translate into anticompetitive effects. The perennial challenge faced by Chinese leadership is how to strike the balance between granting autonomy to management in order to motivate them to pursue growth and profits, and ensuring good corporate governance so that State assets are not looted by management. For instance, it is well-known that top Chinese SOEs have routinely rotated their senior corporate and party leaders.²²⁶ Some European academics have used this as an example of the Chinese government attempting to coordinate competition among them.²²⁷ While such rotation has obviously flouted the standard corporate law concept of the separate identity of the corporation, western scholars have overlooked the fact that the move was primarily motivated by a desire to curb nepotism and corruption.²²⁸ Top executives at large SOEs have enormous influence, and their most important source of power lies in their control of personnel. As such, long tenure at a large SOE enables the top executives to create a large personnel network within the firm. Those within the network collude with each other and share their risks and illegal profits.²²⁹ In a recent book on corruption in China, Minxin Pei investigated fifty cases and found that the buying and selling of appointments and promotions is a widespread practice in Chinese SOEs.²³⁰ A recent scandal at China National Petroleum Corporation, one of the largest state-owned oil firms, reveals how Jieming Jiang, the former chairman of

²²² Wendy Leutert & Francois Godement, *Big is Beautiful? State-Owned Enterprise Mergers Under Xi Jinping*, EUR. COUNCIL ON FOREIGN REL. (Nov. 30, 2016), http://www.ecfr.eu/publications/summary/china_state_owned_enterprise_mergers_under_xi_jinping7196.

²²³ *Id.*

²²⁴ Keith Zhai & Yinan Zhao, *Xi Boosts Party in China's \$18 Trillion State Company Sector*, BLOOMBERG NEWS (July 7, 2016), <https://www.bloomberg.com/news/articles/2016-07-07/xi-boosts-party-say-in-china-s-18-trillion-state-company-sector>.

²²⁵ Lucy Hornby, *China Rows Back on State-Sector Reform*, FIN. TIMES (June 14, 2016), <https://www.ft.com/content/92e52600-31f7-11e6-ad39-3fee5ffe5b5b>.

²²⁶ See Lin & Milhaupt, *supra* note 14, at 740 (discussing the rotation of top executives in the oil, energy, and telecom sectors). The authors examine data suggesting that most of the corporate rotations are of directors or vice CEOs, and the party rotations are for positions below Secretary of the Party Committee. But, SASAC has from the time to time rotated top executives in key industries including petroleum, energy and telecommunications. *Id.*

²²⁷ Riley, *supra* note 146, at 21, 30.

²²⁸ Shu Wang, *Yangqi Yibashou Da Nuoyi, Weisha? [Why Rotate the Heads of Central SOEs?]*, XIN JIN WAN [NEW BEIJING NET] (Sept. 18, 2015), <http://www.bjnews.com.cn/news/2015/09/18/378018.html>.

²²⁹ MINXIN PEI, *CHINA'S CRONY CAPITALISM: THE DYNAMICS OF REGIME DECAY 172-73* (2016).

²³⁰ *Id.*

the firm who later briefly became the head of SASAC, stole a vast fortune from the State.²³¹

ii. The Problem of Underinclusion

Abundant economic studies have shown that minority shareholding in rival businesses can cause anticompetitive harm.²³² However, there is currently a gap in addressing acquisitions of non-controlling interest at the E.U. level.²³³ The EUMR defines control as the power to exercise decisive influence over a firm. Generally speaking, a firm will be deemed to have control over another firm if it owns more than half of the voting interest in that entity.²³⁴ Meanwhile, the Commission's Jurisdictional Notice also recognizes de facto control through minority interest.²³⁵ For instance, if a minority shareholder has the right to manage the activities of the company, or if the other shareholders are dispersed and small, then even a minority stake enables it to exercise control.²³⁶ For joint ventures, control can also be established through deadlock situations where a minority shareholder can block a strategic commercial decision.²³⁷ However, falling short of establishing sole or joint control in the above circumstances, a minority investment would normally fall outside the jurisdiction of the EUMR.

This has two implications for when the EUMR is applied to acquisitions by State investors. First, if a State investor acquires a significant but non-controlling interest in a European firm, then it would not be deemed to have acquired control in that firm. The transaction would not constitute a concentration and would not be subject to the EUMR. Second, if an SOE holds a significant but non-controlling right in a firm that is majority controlled by private investors, that firm would be treated as a privately owned firm (POE), rather than an SOE under the EUMR. If the POE then acquires control over a European firm, the SOE would not be deemed an ultimate controlling entity and would not be regarded as part of the same undertaking as the European firm. In the above two scenarios, the SOE directly or indirectly acquires a minority interest

²³¹ *Id.* at 170–73.

²³² Gilo, *supra* note 53; PATRICIA YPMA ET AL., EUR. COMMISSION, SUPPORT STUDY FOR IMPACT ASSESSMENT CONCERNING THE REVIEW OF MERGER REGULATION REGARDING MINORITY SHAREHOLDINGS (2016); Organisation for Economic Co-operation and Development [OECD], *Antitrust Issues Involving Minority Shareholding and Interlocking Directorates*, at 9, OECD Doc. DAF/COMP(2008)30 (June 23, 2009), <https://www.oecd.org/competition/mergers/41774055.pdf>; see Steven C. Salop & Daniel P. O'Brien, *Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*, 67 ANTITRUST L.J. 559 (2000) (describing the opposite effects on competition that horizontal and vertical acquisitions typically have on markets); see generally David Gilo et al., *Partial Cross Ownership and Tacit Collusion*, 37 RAND J. ECON. 81 (2006) (employing economic theorems to explain how passive investments can lead to coordinated anticompetitive effects and raise antitrust concerns).

²³³ In 2014, the Commission published a White Paper proposing a “targeted transparency system” specially designed to handle notifications of acquisitions of minority interests. However, the Commission's proposal received fierce criticisms during public consultations and the new EU Competition Commissioner Margrethe Vestager stated in 2016 that she was not convinced that the EUMR needs changing. As a consequence, the plan to tackle minority shareholding issue was put on hold indefinitely. *Commission White Paper Towards More Effective E.U. Merger Control*, at 12, COM (2014) 449 final (July 9, 2014).

²³⁴ Jurisdictional Notice, *supra* note 42, ¶ 56.

²³⁵ *Id.* ¶¶ 59–60.

²³⁶ *Id.* ¶ 59.

²³⁷ *Id.* ¶¶ 62–63.

in a European firm, but its involvement is completely outside the scrutiny of the EUMR.

The concern about the gap in dealing with minority shareholding is not new, but acquisitions by Chinese SOEs pose a particular competition worry. Chinese SOEs are now among the largest companies in the world. In 2016, more than twenty percent of those who made the Fortune Global 500 List were Chinese companies, the majority of which were State-owned. These SOEs not only have deep pockets, but also the government's political and financial support to engage in overseas expansion. As these SOEs face heavy regulations in the domestic market, they are highly profit-driven in their overseas expansion. These SOEs also show interest in investing in relatively concentrated industries, such as energy, high technology, utilities, and finance.²³⁸

Consider the following hypothetical. Suppose an acquiring Chinese SOE has a subsidiary that competes with the target European firm in the same product market. The acquisition by the Chinese SOE could create incentives for the target to compete less aggressively in the relevant market. If the Chinese SOE raises prices and reduces the output of the target, some of the target's customers will move to its competitors, but the Chinese SOE is entitled to a share of profits from its subsidiary. Anticompetitive effects, therefore, could arise when the SOE has the incentive and ability to heavily invest in a concentrated sector. Similarly, if a Chinese SOE has a minority interest in a POE, the SOE may find it profitable to raise prices and reduce output of its subsidiary. Even if some of its sales are shifted to the European target, it is entitled to a share of the POE's profits. Coordinated effects also become more likely because of the common ownership of the Chinese SOE in both its subsidiary and the European target firm. Indeed, one may envisage that if western regulators, such as the Commission, tighten their scrutiny over Chinese SOEs, then Chinese SOEs may try to use POEs as vehicles for overseas acquisitions to obviate the Commission's scrutiny.

Some may be puzzled: if the Chinese State may lack the incentive and ability to coordinate those SOEs in which it holds majority controls, would not it be even less likely for SOEs to coordinate firms in which they only have minority interests? Not necessarily. There is a fundamental difference between the Commission's concerns regarding the coordination among Chinese SOEs and minority shareholding by Chinese SOEs. The former was built on the premise that the State (via central or local SASACs) would coordinate competition among ostensibly independent SOEs, whereas the latter assumes that a single SOE would coordinate firms that it partially owns. Although the incentive and the ability of SASAC to coordinate a large number of SOEs belonging to multiple levels of government in different regions is ambiguous, as elaborated in Part (II)(i), the incentive and ability of a SOE to do so is firmly grounded in economic circumstances, as discussed below.

(1) Direct Acquisition of Minority Interest

Minority shareholding is an increasingly popular means of investment for Chinese SOEs when they expand overseas. Annex I provides a list of the minority shares (less

²³⁸ Am. Enter. Inst. & Heritage Found., *Worldwide Chinese Investment & Construction (2005-2017)*, AEI.ORG: CHINA GLOBAL INVESTMENT TRACKER, <https://www.aei.org/china-global-investment-tracker/> (last visited Nov. 13, 2017).

than fifty percent) that Chinese companies have invested in Europe since 2005.²³⁹ As shown in the list, some of the largest deals made by Chinese firms in Europe in recent years are minority acquisitions, including ChemChina and SAFE's \$7.86 billion investment in Pirelli.²⁴⁰ Even though these Chinese SOEs did not acquire majority control over the European assets, such investments may nonetheless pose competition concerns.

State Grid, a Chinese SOE under the supervision of central SASAC, offers a prime example. State Grid now ranks as the world's largest public utility company by revenue and was the second-largest company on the Fortune 500 List in 2016, generating over \$50 billion in cash that year.²⁴¹ Since 2011, it has made several high-profile acquisitions in Western Europe, all of which are minority interests.²⁴² Its first acquisition was made in 2012, when it purchased a twenty-five percent stake in Redes Energeticas Nacionais (Ren), the largest energy network in Portugal.²⁴³ State Grid became an active investor in Ren and sent senior executives to participate in the firm's management.²⁴⁴ State Grid is now the single largest shareholder in Ren, which has a fragmented share structure with thirty-five percent shares public and the rest held by seven investors.²⁴⁵ Two years later, State Grid spent \$2.8 billion to acquire a thirty-five percent interest in Cassa Depositi e Prestiti, an Italian energy grid unit.²³⁸ State Grid also actively participates in the management and controls two of the five seats on the board of directors of the Italian grid.²⁴⁶

In the past year, State Grid attempted to make a further foray into Western Europe. In June 2016, it won a bid to acquire a fourteen percent stake in Eandis Assets, a Belgian gas and power distribution firm.²⁴⁷ The deal was later blocked by the Belgian authority, citing a concern over the possible takeover of the distribution networks by the Chinese investors.²⁴⁸ Notably, the deal would have given State Grid only three

²³⁹ See *infra* Annex I.

²⁴⁰ *Id.*

²⁴¹ *State Grid*, FORTUNE, <http://fortune.com/global500/state-grid/> (last visited Nov. 13, 2017).

²⁴² See *infra* Annex I.

²⁴³ *SGCC Completes Acquiring a 25% Stake of REN*, STATE GRID: CORP OF CHINA (June 1, 2012), <http://www.sgcc.com.cn/ywlm/mediacenter/corporatenews/06/273922.shtml>.

²⁴⁴ *Id.*; Geert De Clercq et al., *China State Grid Quietly Builds Mediterranean Power Network*, REUTERS (Aug. 10, 2014), <http://uk.reuters.com/article/utilities-mediterranean-china-idUKL6N0QB5NF20140810> (a State Grid official was quoted as follows: "State Grid is not just a passive financial investor. It will actively take part in the management of CDP-Reti. This is not a financial investment, more like a strategic investment."); see also Peter Wise & Leslie Hook, *China's State Grid to Take 25% Stake in REN*, FIN. TIMES (Feb. 2, 2012), <https://www.ft.com/content/41a0c572-4dba-11e1-b96c-00144feabdc0> (explaining that State Grid is committed to helping REN expand both in Portugal and overseas).

²⁴⁵ *Shareholder Structure*, REN, https://www.ren.pt/en-GB/investidores/estrutura_acionista/ (last visited Nov. 24, 2017).

²³⁸ Chu Daye, *State Grid Buys Stake in Italian Firm for \$2.8 Billion*, GLOBAL TIMES (Aug. 1, 2014), <http://www.globaltimes.cn/content/873704.shtml>.

²⁴⁶ *Id.*

²⁴⁷ *China State Grid in Talks to Buy 14 Percent of Belgium's Eandis*, REUTERS (June 3, 2016), <http://af.reuters.com/article/energyOilNews/idAFL4N18V2WC>.

²⁴⁸ NERA Econ. Consulting, *Global Energy Regulation: China's State Grid Fails to Acquires Shares in Flemish Distribution Network 4*, NERA.COM (Oct. 2016), http://www.nera.com/content/dam/nera/publications/newsletters/global-energy-regulation/NL_Global_Energy_Regulation_Issue%20209.pdf.

seats on the forty-member board of directors.²⁴⁹ In late 2016, State Grid purchased a twenty-four percent stake of ADMIE, a Greek power transmission company.²⁵⁰ State Grid's expansion into Europe is highly strategic. According to China Daily, State Grid is "considering building an ultra-high-voltage global power network to transmit electricity from country to country and continent to continent, a goal that may cost \$50 trillion to develop by 2050."²⁵¹ So far, State Grid has boosted its overseas investment to over \$10 billion in regions including Europe, South American, and Asia, and it is expected to increase its investment to \$50 billion by 2020.²⁵² State Grid's minority acquisitions in Europe seem to be the starting points for its ultimate vision to build a global power super-grid.²⁵³ Thus far, it is not entirely clear if European firms that State Grid has invested in compete with each other, as energy distribution networks tend to be natural monopolies. However, when such networks become more integrated within the European Union,²⁵⁴ there is a foreseeable risk that these networks would compete with each other.

Importantly, even if the SOE never casts a vote to sway management, its minority investment could harm competition under certain circumstances, especially if the firm invests in concentrated sectors. As long-standing antitrust literature has shown, passive investment without voting power could cause anticompetitive harm.²⁵⁵ Sovereign Wealth Funds (SWFs) pose a particular concern, as they regularly invest in minority interests.²⁵⁶ Empirical studies have also found that SWFs are not pure passive investors, and in many instances, they actively monitor their investments or seek to influence those firms' commercial activities.²⁵⁷ Moreover, because SWFs possess superior information due to their proximity to the government and are able to influence government policies in ways that may benefit SWFs, investors of the target firm generally react positively to a SWF's investment and negatively to a SWF's

²⁴⁹ *Id.*

²⁵⁰ Ilias Bellos, *China Extends Penetration of Greek Market*, EKATHIMERINI (Jan. 8, 2017), <http://www.ekathimerini.com/215103/article/ekathimerini/business/china-extends-penetration-of-greek-market>.

²⁵¹ Zheng Xin, *State Grid Takes Stake in Greek Power Network*, CHINA DAILY (Dec. 20, 2016), http://europe.chinadaily.com.cn/business/2016-12/20/content_27716287.htm.

²⁵² Shunsuke Tabeta, *China Power Giant Gobbling Up Foreign Players*, NIKKEI ASIAN REV. (Jan. 25, 2017), <http://asia.nikkei.com/Business/Companies/China-power-giant-gobbling-up-foreign-players?page=1>.

²⁵³ State Grid, *supra* note 241.

²⁵⁴ *Second Report on the State of the Energy Union: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the regions and the European Investment Bank*, at 13, COM(2017) 53 final (Feb. 1, 2017), http://eur-lex.europa.eu/resource.html?uri=cellar:16b10dae-e931-11e6-ad7c-01aa75ed71a1.0003.02/DOC_1&format=PDF.

²⁵⁵ Salop & O'Brien, *supra* note 232, at 568–84; *see also* Gilo, *supra* note 53, at 8–28 (explaining how even very small stakes in competing firms by the manager can substantially lessen competition); *see generally* Elhauge, *supra* note 2 (outlining the anticompetitive effects that horizontal investing has had on several different industries).

²⁵⁶ *See generally* Ronald J. Gilson & Curtis J. Milhaupt, *Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism*, 60 STAN. L. REV. 1345, 1350–54 (2008) (describing the minimal oversight and regulation to which the acquisition of significant, but non-controlling stakes in domestic companies by portfolio investors affiliated with foreign governments are subjected).

²⁵⁷ Kathryn L. Dewenter et al., *Firm Values and Sovereign Wealth Fund Investments*, 98 J. FIN. ECON. 256, 274 (2010).

divestment.²⁵⁸ As such, even if an SWF possesses no formal voting interest in a firm, management could have an incentive to cater to the SWF's preference, as the loss of the SWF's long-term investment could send a bad signal to the market and adversely affect the firm's stock performance.²⁵⁹

Take China Investment Corporation (CIC) as an example. As the official SWF from China, the fund ranked the fourth-largest in 2016.²⁶⁰ CIC's operation is very opaque with little public disclosure about its investment activities. However, information gathered by intelligence agencies has revealed some of its footprints in recent years. Since its establishment in 2007, CIC has been aggressively making investments overseas.²⁶¹ Based on the data collected by the American Enterprise Institute and the Heritage Foundation, CIC has invested widely in the financial, energy, real estate, and agriculture industries.²⁶² In Europe, CIC has invested in real estate, energy, utilities, technology, and transport industries.²⁶³ CIC often acquires a significant interest in targets,²⁶⁴ and, notably, does not simply adopt a passive investment strategy. Since 2010, CIC has gained influence on the board of four companies in which it has acquired a stake of ten percent or more.²⁶⁵

Moreover, despite the fact that in most circumstances CIC has limited control rights over companies in its portfolio, scholars have suggested that CIC is able to exert influence beyond its formal corporate rights.²⁶⁶ This is because CIC's close connection with the Chinese government is often viewed as an important strategic asset for its portfolio companies, especially when the latter are contemplating expansion into the Chinese market or partnership with other Chinese SOEs.²⁶⁷ For instance, after CIC's investment in GDF Suez in 2011, the two firms agreed to a plan of strategic cooperation in the Asian-Pacific region.²⁶⁸ Subsequently, GDF Suez entered into several high-profile cooperation projects with leading Chinese state-

²⁵⁸ *Id.* at 258 (finding on average a statistical significant positive abnormal return of 1.5% upon SWF acquisition announcements and a statistical significant negative abnormal return of -1.4% upon SWF divestment announcements).

²⁵⁹ Li Jing, *State as an Entrepreneur: A Study of the Investment Contractual Terms and Level of Control of China's Sovereign Wealth Fund in Its Portfolio Firms*, 3 PEKING U. TRANSNAT'L L. REV. 1, 21 (2015).

²⁶⁰ *Fund Rankings: Tracking the Activity of Sovereign Wealth Funds, Pensions, Endowments and Other Public Funds*, SWFI – SOVEREIGN WEALTH FUND INST., <http://www.swfinstitute.org/fund-rankings/> (last visited Nov. 13, 2017).

²⁶¹ IACOB N. KOCH-WESER & OWEN D. HAACKE, U.S.-CHINA ECON. & SEC.COMM'N, CHINA INVESTMENT CORPORATION: RECENT DEVELOPMENTS IN PERFORMANCE, STRATEGY AND GOVERNANCE 19–22 (2013).

²⁶² This is based on the data collected by American Enterprises Institute & the Heritage Foundation. See Am. Enter. Inst. & Heritage Found., *supra* note 238.

²⁶³ *Id.*

²⁶⁴ *Id.* For instance, CIC made a purchase of thirty percent stake in GDF Suez in 2011, a seven percent interest in a French satellite fleet operator Eutelsat in 2012, a nine percent investment in British Thames Water in 2012, a ten percent interest in Heathrow Holding in 2012, an acquisition of the entire radio frequency power company from the Dutch NXP Semi in 2016, and an eleven percent acquisition in British National Grid. *Id.*

²⁶⁵ KOCH-WESER & HAACKE, *supra* note 261, at 30 (noting that the companies in which CIC appointed management include Teck Resource, a Canadian company in which it owns 17.2%, AES, a US energy group in which it owns 15%, Shanduka Group, a South African firm in which it owns 25.1%, and Heathrow, a British transportation firm in which it owns 10%).

²⁶⁶ Jing, *supra* note 259, at 79–80.

²⁶⁷ *Id.* at 81; Dewenter et al., *supra* note 257, at 274.

²⁶⁸ Jing, *supra* note 259, at 85.

owned energy firms.²⁶⁹ Thus, to determine an SWF's actual influence over a portfolio company, competition regulators cannot solely rely upon the formal corporate rights of the SWF. Indeed, if Chinese SWFs continue to invest in highly concentrated markets, there will be a foreseeable risk that this would give rise to anticompetitive concerns similar to those generated by U.S. institutional shareholders. Wrestling with the concept of China, Inc. in those circumstances is unhelpful, as it eschews the fundamental question about the anticompetitive effects of State ownership.

(2) *Indirect Acquisition of Minority Interest*

The policy debate on Chinese state capitalism has so far been fixated on the Chinese SOEs. However, as Milhaupt and Zheng note in an insightful article, “[D]rawing a stark distinction among Chinese firms based on the ownership of enterprise (SOE versus POE) to frame Chinese state capitalism . . . misperceives the reality of that country’s institutional environment”²⁷⁰ Chinese state capitalism is manifested in a highly diverse form of ownership. Although Chinese SOEs have undergone several rounds of privatization, many of them did not completely sell off their State assets and instead became firms with mixed ownership.²⁷¹ Mixed ownership enterprises (MOEs) have a substantial presence in the Chinese economy.²⁷² According to an annual industrial survey, MOEs accounted for twenty percent of the total number of industrial firms from 2004 to 2010.²⁷³ Economists have estimated that MOEs constitute about forty percent of the Chinese economy in terms of assets and industrial value added.²⁷⁴

Indeed, there is a trend that the line between SOEs and POEs will become increasingly blurred in China. At the Third Plenum of the 18th CCP Central Committee in 2013, the Chinese government endorsed the market economy and advocated for mixed ownership reform, which is intended to promote cross-holding and mutual fusion between public and private capital.²⁷⁵ Since 2014, Chinese governments at all levels have started to adopt guidelines and plans to convert SOEs into MOEs.²⁷⁶ This reform intends to bring further market disciplines to the SOEs, thereby improving their financial performance and productivity.²⁷⁷ To be sure, since the State’s financial interest in the MOEs has been diluted, the State’s control over the firms has been weakened. However, the Chinese State is not an ordinary investor. It not only plays the role of an investor, but also of a financier and a regulator. Thus, the State’s power and influence over an MOE could far exceed what a common minority shareholder can wield over a firm.

²⁶⁹ *Id.*

²⁷⁰ Curtis J. Milhaupt & Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, 103 GEO. L.J. 665, 668 (2015).

²⁷¹ Marshall W. Meyer & Changqi Wu, *Making Ownership Matter: Prospects for China’s Mixed Ownership Economy*, PAULSON INST. 6 (Sept. 2014), http://www.paulsoninstitute.org/wp-content/uploads/2017/01/PPM_Making-Ownership-Matter_Meyer-and-Wu_English_R.pdf.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening the Reform*, CHINA.ORG.CN (Jan. 16, 2014), http://www.china.org.cn/china/third_plenary_session/2014-01/16/content_31212602.htm.

²⁷⁶ Meyer & Wu, *supra* note 271, at 1–2.

²⁷⁷ *Id.* at 2.

Consider the following hypothetical. Suppose that Firm A is an SOE controlled by the local SASAC. Firm A holds a significant but non-controlling interest in Firm B, while the rest of its stock is held by private investors. Suppose that Firm B acquires sole control of a European Firm C. Meanwhile, Firm A has a wholly-owned subsidiary, Firm D, that competes with Firm C. Pursuant to the EUMR, the Commission will consider Firm C and D as independent competitors in the market, despite the common ownership by Firm A. However, Firm A's minority interest in Firm B will soften the competition between Firms C and D, especially if they operate in a highly concentrated market. Notably, Firm A may be able to exert such influence not only directly through its ownership, but also indirectly through alternative means such as financing or attractive strategic cooperation opportunities. Suppose that Firm E, another subsidiary of Firm A, offers to help Firm B finance its acquisition. In return for the cheap financing provided by Firm E, the other shareholders of Firm B agree to the strategic alliance between Firms C and D, thus further facilitating and reinforcing the collusion between these two firms. This example shows the risk of coordination posed by minority state ownership as the Chinese State has more resources than private firms to facilitate collusion.

A recent Chinese investment highlights such a risk, as illustrated in Figure 1 below. In 2016, Fujian Grand Chip Investment Fund (FGC) attempted to acquire Aixtron, a German semiconductor equipment maker.²⁷⁸ FGC is forty-nine percent held by Xiamen Bohao, another fund controlled by Xiamen municipal government, and the other fifty-one percent is held by Liu Zhengdong, a Chinese citizen.²⁷⁹ According to the New York Times, a web of intricate relationships was suspected to be behind FGC.²⁸⁰ First, San'an Optoelectronics, also based in the same province as FGC, has been a big customer of Aixtron.²⁸¹ In 2015, San'an suddenly canceled a large order at the last minute, causing Aixtron's stock prices to crash.²⁸² This sparked speculation that FGC had coordinated with San'an to orchestrate the abrupt price crash. Reporters were able to identify some commonality of interest between Bohao and San'an, including a preexisting financial relationship and a common shareholder by a State-run investment fund based in Xiamen.²⁸³ Moreover, Sino IC Leasing, in which San'an has a five percent interest,²⁸⁴ helped FGC finance the deal.²⁸⁵ Further, a national

²⁷⁸ Paul Mozur, *Germany Withdraws Approval for Chinese Takeover of Aixtron*, N.Y. TIMES (Oct. 24, 2016), https://www.nytimes.com/2016/10/25/business/dealbook/germany-china-technology-takeover.html?_r=0.

²⁷⁹ Paul Mozur & Jack Ewing, *Rush of Chinese Investment in Europe's High-Tech Firms Is Raising Eyebrows*, N.Y. TIMES (Sept. 16, 2016), <https://www.nytimes.com/2016/09/17/business/dealbook/china-germany-takeover-merger-technology.html>.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

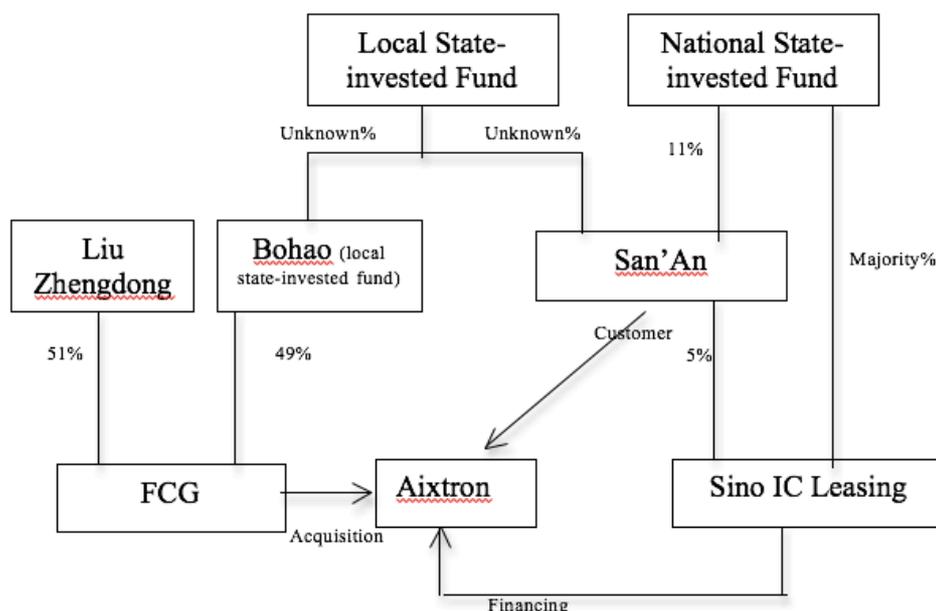
²⁸³ *Id.*

²⁸⁴ *Aixtron Investor Presentation: First Half 2016 Results*, AIXTRON 16 (Aug. 11, 2016), http://www.aixtron.com/fileadmin/images/investors/visuals/Q2-2016_Result_Presentation_final.pdf.

²⁸⁵ Larry G. Franceski *et al.*, *President Obama Blocks Proposed Chinese Acquisition of Controlling Interest in German Chip Maker*, NORTON ROSE FULLBRIGHT (Dec. 2016), <http://www.nortonrosefulbright.com/knowledge/publications/145144/president-obama-blocks-proposed-chinese-acquisition-of-controlling-interest-in-german-chip-maker>

State-investment fund held an eleven percent interest in San'an²⁸⁶ and was also an owner of Sino IC Leasing.²⁸⁷ There could be nothing wrong with these links between a large customer and a potential acquirer of Aixtron, but these intricate relationships raise serious suspicions about the actual independence of these companies. Indeed, these multiple layers of common ownership by various local and national State funds provide the structural link between Bohao, a minority shareholder of the acquirer, and San'an, a large customer of the target. Yet, the involvement of those SOEs is probably outside antitrust scrutiny in the European Union, as they only hold minority interest in the parties involved.

Figure 1: State Ownership and Structural Links in the Aixtron Deal



Sources: NY Times and other media outlets

This transaction also highlights the risk of coordination among Chinese SOEs. Since 2014, the Chinese government has been aggressively promoting the development of a robust domestic semiconductor capability with the goal of becoming a leader in the industry by 2030.²⁸⁸ Massive national and local state funds were raised to finance the investment and acquisitions in this sector.²⁸⁹ The Aixtron transaction is an example of the overseas acquisitions by such State-sponsored funds, with the government providing generous financing to facilitate such a move. For instance, in addition to support from the National State-investment fund, FGC also received financing from

²⁸⁶ 三安光电股份有限公司 2015 年年度报告[2015 Annual Report of San'An], MORNINGSTAR (Dec. 31, 2015), <http://quote.morningstar.com/stock-filing/Annual-Report/2015/12/31/t.aspx?t=XSHG:600703&ft=&d=4f68f406ad678af6a497b38a7f9a3d25>.

²⁸⁷ Aixtron, *supra* note 284.

²⁸⁸ *China's 13th Five-Year Plan: Opportunities & Challenges for the U.S. Semiconductor Industry: Hearing on China's 13th Five-Year Plan Before the US-China Econ. & Sec. Review Comm'n* (2016) (written testimony of Jimmy Goodrich, Vice President of Global Policy, Semiconductor Industry Association) [hereinafter Goodrich Testimony].

²⁸⁹ *Id.*

the China Development Bank in Xiamen and the Agricultural Bank in Shanghai.²⁹⁰ While this may suggest that the Chinese government is facilitating the acquisition behind the scenes, it is extremely hard to identify evidence of explicit communication among these funds. It is also difficult to obtain sufficient evidence to show that the government has coordinated their activities.

The Aixtron deal also illustrates the difficulties antitrust regulators would face in handling a similar transaction. For example, one such difficulty is the opacity of the SOE's investment in a transaction. On first impression, FGC is majority-controlled by Zhengdong Liu, a Chinese businessman; however, there has been much suspicion in the West about whether Liu does indeed control the fifty-one percent shares he owns on paper.²⁹¹ Liu has kept a very low profile during the acquisition, and a glance at his resume shows that he has mostly invested in mining business—it is not entirely clear why he would want to expand his investment into the semiconductor industry.²⁹² A number of Chinese news reports have suggested that the real supporter behind Mr. Liu is Huaxin Fund, another State-owned fund in the semiconductor industry.²⁹³

Notably, the potential competition issue among these Chinese entities has been addressed by the U.S. and German governments on national security grounds. The U.S. government has been vigilant about China's aggressive expansion into the semiconductor industry.²⁹⁴ Because Aixtron has some assets in the United States, the deal was blocked by the United States government on national security grounds.²⁹⁵ The German government also withdrew its approval for the transaction, citing concern about national security review. As elaborated in detail below, national security review can serve as an important complement to address the potential anticompetitive issue with Chinese state ownership.²⁹⁶

III. National Security Review as a Complement

As analyzed in Part II, the application of the concept of an undertaking to SOEs could lead to both over-inclusive and under-inclusive outcomes. There is no easy solution to this problem, as it would require the Commission to simultaneously narrow and expand the concept of control under the EUMR, which is impossible to achieve

²⁹⁰ Jost Wübbecke et al., *Made in China 2025: The Making of a High-Tech Superpower and Consequences for Industrial Countries*, MERCATOR INST. FOR CHINA STUD. 53 (2016), <https://www.merics.org/en/merics-analysis/papers-on-china/made-in-china-2025/>.

²⁹¹ See David Böcking, *Chinesischer Aixtron-Investor: Herr Liu versteht die deutsche Angst nicht* [*Chinese Aixtron Investor: Mister Liu Does Not Understand the German Fear*], SPIEGEL ONLINE (Apr. 10, 2016, 4:00 PM), <http://www.spiegel.de/wirtschaft/unternehmen/aixtron-investor-liu-zhendong-spricht-erstmal-ueber-plaene-a-1115032.html> (explaining that the remaining percentage of FGC is indirectly in the possession of the State, something that raised concerns regarding who would be making the decision for Aixtron were the deal to go through).

²⁹² *Id.*

²⁹³ *San'an Guang Dian Huo Can Yu Shougou Aisiqiang* [*San'an Might Participate in Acquiring Aixtron*], ZHONGGUO DIANZI BAO [CHINA ELECTRONIC NEWS] (May 26, 2016), http://semi.cena.com.cn/2016-05/26/content_329842.htm.

²⁹⁴ David Lawder, *U.S. Commerce Chief Warns Against China Semiconductor Investment Binge*, REUTERS (Nov. 3, 2016), <http://www.reuters.com/article/us-usa-china-trade-semiconductors/u-s-commerce-chief-warns-against-china-semiconductor-investment-binge-idUSKBN12Y0EG>; see also Goodrich Testimony, *supra* note 288.

²⁹⁵ Shawn Donnan, *Obama Blocks Chinese Takeover of Tech Group Aixtron*, FIN. TIMES (Dec. 2, 2016), <https://www.ft.com/content/0c940900-b8e2-11e6-ba85-95d1533d9a62>.

²⁹⁶ Guy Chazan, *Germany Withdraws Approval for Chinese Takeover of Tech Group*, FIN. TIMES (Oct. 24, 2016), <https://www.ft.com/content/f1b3e52e-99b0-11e6-8f9b-70e3cabccfae>.

within the existing legal framework. But the EUMR is not the only legal tool that can address the Commission's concern. From a competition law perspective, what most concerns regulators is whether the Chinese State will acquire a critical block of ownership from Europe that would allow it to accumulate significant market power in a particular product market. Such an acquisition not only generates antitrust concerns, but it could also pose a threat to national security, especially when the acquisition would allow a single State to monopolize the supply of a strategic product or service. It should be noted that the line between strategic and non-strategic sectors is increasingly blurred. For example, in the United States, the Committee on Foreign Investment (CFIUS) has investigated acquisitions of meat-processing firms and cinema chains.²⁹⁷ When Pepsi was rumored to potentially acquire Danone, a dairy company and a source of national pride in France, it generated a huge political backlash within the French government.²⁹⁸

There are several obvious advantages of using national security review to address anticompetitive concerns regarding coordination by SOEs belonging to the same State. First, it allows the regulator to conduct its investigation in a more comprehensive and flexible manner without compromising its future jurisdiction over potentially important cases involving SOEs. As I pointed out in an earlier paper, however, a rigid application of the concept of an undertaking to SOEs could lead to unintended consequences.²⁹⁹ If Chinese SOEs are deemed a single entity, then the Commission would not be able to intervene in cartels among Chinese SOEs or mergers between them. Given that many Chinese SOEs actively invest in European countries or export their products to European markets, the Commission would have an interest in intervening in such cases. For instance, if Chinese nuclear power companies collude when they sell to the European market, the Commission should intervene to protect the welfare of the consumers in Europe. But, the Commission's existing position in EDF/CGN would jeopardize such legal action, as the Chinese nuclear companies could defend themselves on the basis that the coordination was a single firm's conduct.

Second, using national security review helps maintain the logical coherence of the Commission's legal position. A logical interpretation of Recital 22 would require the Commission to focus on *de facto*, rather than *de jure* control when it analyze SOEs. However, the Commission seems to be applying a double standard. It used the *de jure* test in cases involving Chinese SOEs and the *de facto* test in cases involving European SOEs. Indeed, if the Commission insists upon using a *de jure* approach to deal with Chinese SOEs, then it should treat all Chinese SOEs—regardless of the sectors in which they operate, regardless of whether they are owned by the local or central government, and regardless of whether they actually compete with each other—as one single entity. Clearly such a conclusion is a stark contradiction with the economic reality in China today. Practically speaking, the *de jure* approach would

²⁹⁷ *Shuanghui International Receives CFIUS Clearance for Its Purchase of Smithfield Foods* SULLIVAN & CROMWELL LLP (Sept. 10, 2013), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_Shuanghui_International_Receives_CFIUS_Clearance_for_its_Purchase_of_Smithfield_Foods.pdf.

²⁹⁸ Franck Riboud, *France Flouts the Pepsi Challenge*, TELEGRAPH (July 24, 2005), <http://www.telegraph.co.uk/finance/2919479/France-flouts-the-Pepsi-challenge.html>.

²⁹⁹ Zhang, *supra* note 26, at 825-6.

also create an undue burden for businesses, resulting in many superfluous and unnecessary merger notifications.

Furthermore, experts in charge of national security would be in a superior position to antitrust regulators to assess the motives of a State and to navigate its complex political and economic institutions in order to determine the State's ability to actually exert its influence over its SOEs. This would also allow the regulators to capture those cases in which the Chinese SOEs employ a non-controlling subsidiary as a vehicle to acquire European assets. Importantly, the concern that the Chinese State can strategically coordinate its SOEs to monopolize a certain product or service market is not just about economics, but also about politics. As the Aixtron transaction illustrates, competition regulators may not be able to rely on what they see on the surface to determine who is the ultimate controlling entity of the acquirer. An SOE can exert influence via various means and even an entity that seems privately-controlled may actually be controlled by an SOE.³⁰⁰

Finally, national security review reduces the risk of potential retaliation from the Chinese State. When the Commission tightens its antitrust scrutiny over Chinese firms, it should expect that China will respond in kind. China adopted an Anti-Monopoly Law in 2007 and established a comprehensive merger review system similar to that of the European Union. Therefore, the Chinese authority cannot only exert jurisdiction over transactions involving the acquisition of a Chinese firm, but can also intervene in offshore transactions involving European firms. The enforcement record of the Chinese antitrust authority has shown that the Chinese merger review agency has significant discretion to impose remedies on large offshore merger transactions and has not shied away from blocking a transaction, even on dubious grounds.³⁰¹ There is also the risk that the Chinese government may react strongly to the tightening of national security review. The difference, however, is that merger review casts a much wider net than national security review, as the former involves a burdensome *ex ante* screening process while the latter only intervenes when the deal poses a serious threat to national security.

At the same time, despite the advantages of national security review, there is currently no foreign investment control at the E.U. level. Although such investment control may exist at the national level, investment security regimes vary widely across Europe. Countries such as France and Germany have established investment reviews used to address security concerns, whereas Belgium, the Czech Republic, Hungary, Iceland, Ireland, and the Netherlands do not have any investment measures related to public order and essential security considerations.³⁰² The European Union in general

³⁰⁰ See *infra* Part (II)(ii)(2).

³⁰¹ See Angela Huyue Zhang, *Problems in Following EU Competition Law: A Case Study of Coca-Cola/Huiyuan*, 3 PEKING U. J. LEGAL STUD. 96, 112–17 (2011) (discussing the large role that MOFCOM plays in each review and the few checks and balances that are in place); see also Xinzhu Zhang & Vanessa Yanhua Zhang, *Chinese Merger Control: Patterns and Implications*, 6 J. COMPETITION L. & ECON. 477, 486–90 (2009) (explaining the rationale used by MOFCOM in blocking the Coca-Cola/Huiyuan merger).

³⁰² See generally U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-320, FOREIGN INVESTMENT: LAWS AND POLICIES REGULATING FOREIGN INVESTMENT IN 10 COUNTRIES (2008); ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], IDENTIFICATION OF FOREIGN INVESTORS: A FACT FINDING SURVEY OF INVESTMENT REVIEW PROCEDURES (2010); GETTING THE DEAL THROUGH, FOREIGN INVESTMENT REVIEW: MERGERS, NATIONAL INTEREST & NATIONAL SECURITY IN 26

endorses free trade, and it only allows its Member States to retain the right to impose restrictions on foreign investment based on public security considerations, as long as those restrictions do not result in arbitrary discrimination or a disguised restriction on trade.³⁰³ Some policymakers are therefore concerned that the current patchwork of FDI rules at the E.U. Member State level risks sparking a race to the bottom, as some Member State authorities may rush to attract Chinese money and abandon attempts to screen security concerns.³⁰⁴

In practice, such fear seems exaggerated. Recent acquisitions by Chinese companies in the strategic sectors have been subject to scrutiny at the Member State level. For instance, when EDF wanted to partner with CGN to build several nuclear power plants in Britain, the British government conducted rounds of intensive review of the transaction.³⁰⁵ The deal eventually received the green light from the British government, with certain remedies imposed to address the potential national security concern.³⁰⁶ Midea, a Chinese electronics company, had to obtain clearance from both Germany's Directorate of Defense Trade Control and CFIUS when it acquired Kuka, a German robot company.³⁰⁷ In 2016 alone, two Chinese investments stumbled in Europe due to national security concerns. In the first deal, the city of Antwerp blocked State Grid's attempted acquisition of Eandis, a power distribution company based in Belgium.³⁰⁸ The Belgian authority allegedly received intelligence from the Belgian State Security Service warning of the links between State Grid, the CCP, and the military.³⁰⁹ This caused a Belgian Minister for energy to reverse his support for the deal.³¹⁰ This case shows that even if Belgium has not established a formal national security review regime, the Belgian government can still block a deal on alternative regulatory grounds.

Similarly, in the face of growing protectionist backlash against Chinese investment, the German government withdrew its approval for the acquisition of Aixtron in

JURISDICTIONS WORLDWIDE (Oliver Borgers, ed. 2012).

³⁰³ TFEU, *supra* note 38, art. 346.

³⁰⁴ Sophie Meunier, *Political Impact of Chinese Foreign Direct Investment in the European Union on Transatlantic Relations* 7 (European Parliament Briefing Paper, 2012), https://scholar.princeton.edu/sites/default/files/meunier_final_0.pdf; François Godement et al., *The Scramble for Europe*, EUR. COUNCIL ON FOREIGN REL. 1 (July 2011), http://www.ecfr.eu/page/-/ECFR37_Scramble_For_Europe_AW_v4.pdf (“China is buying up Europe. Its automobile manufacturers have bought MG and Volvo and taken a life-saving stake in Saab. Its transportation firms are acquiring, leasing or managing harbours, airports, and logistical and assembly bases across the continent. Its development bank is financing projects in Europe's periphery much like it does in Africa.”).

³⁰⁵ Graham Ruddick & Jamie Grierson, *Hinkley Point C in Doubt After British Government Delays Approval*, GUARDIAN (July 29, 2016), <https://www.theguardian.com/business/2016/jul/28/hinkley-point-c-to-go-ahead-after-edf-board-approves-project>.

³⁰⁶ Andrew Ward et al., *Hinkley Go-Ahead After 'National Security' Safeguards*, FIN. TIMES (Sept. 15, 2016), <https://www.ft.com/content/0cde26b6-7b66-11e6-b837-eb4b4333ee43>.

³⁰⁷ Edward Taylor et al., *China's Midea Receives U.S. Green Light for Kuka Takeover*, REUTERS (Dec. 30, 2016), <http://uk.reuters.com/article/us-kuka-m-a-mideamidea-group-idUKKBN14JOSP>.

³⁰⁸ Michael Torfs, *“Mysterious Letter” Warns Against “Chinese Danger” Involving State Grid Deal*, FLANDERS NEWS (Sep. 27, 2016), <http://deredactie.be/cm/vrtnieuws.english/News/1.2779200>

³⁰⁹ *Id.*

³¹⁰ Latika Bourke, *Belgian Spies Urge ‘Extreme Caution’ on China Citing Australia’s Ausgrid Decision*, SUNDAY MORNING HERALD (Sept. 28, 2016), <http://www.smh.com.au/world/belgian-spies-urge-extreme-caution-on-china-citing-australias-ausgrid-decision-20160927-grpwn8.html>.

October 2016.³¹¹ According to existing German law, the German Economic Ministry has the authority to review any deals where non-E.U. investors acquire at least twenty-five percent of the voting right of a German company and must block the deal if it “poses a threat to Germany’s public order or security.”³¹² The concept of “public order or security” is vague and can be interpreted to cover a large number of industry sectors. Notably, as many multinational companies operate on a global scale, Chinese acquisitions of European assets are not only vetted by target countries in the European Union, but also in other countries such as the United States. A good example is the previously-mentioned Aixtron deal where CFIUS exerted jurisdiction over the transaction on the basis of Aixtron’s assets in the United States.³¹³ In another 2016 deal, a consortium of Chinese investors failed to acquire Opera Software, a Norwegian browser company, because it did not obtain the requisite approval from CFIUS.³¹⁴

As illustrated above, national security review has provided a much more intrusive and flexible intervention into Chinese investment in Europe. To the extent that the Chinese State can acquire substantial strategic assets in Europe and accumulate significant market power, or even become a monopoly in the E.U. or global market, this would certainly trigger national security review by E.U. Member States or other countries such as the United States. That said, the interests of the European Union and some of its Member States might not entirely align, and there could be a situation where a Member State may welcome Chinese investment but the European Union does not. In 2011, Antonio Tajani, a former European Commissioner for Industry and Entrepreneurship, called for an E.U.-wide foreign investment review to protect European know-how and technology from Chinese investors.³¹⁵ The European Parliament echoed such concerns and called for a European body to conduct an ex ante evaluation of strategic investment by foreign companies, similar to CFIUS.³¹⁶ However, the establishment of such an E.U.-wide body analogous to CFIUS is likely to be met with significant opposition from some Member States who are reluctant to cede their jurisdictions to the E.U. government. Since the Commission is already empowered to conduct merger review at the E.U. level, some have suggested that E.U. competition policy could be a convenient tool to strengthen the monitoring of Chinese FDI.³¹⁷ However, such should not be an excuse for the Commission to block investments based on improper antitrust grounds.

³¹¹ Chazan, *supra* note 296.

³¹² *Id.*

³¹³ Donnan, *supra* note 295.

³¹⁴ Stine Jacobsen & Paul Carsten, *Chinese Takeover of Norway’s Opera Fails, Alternative Proposed*, REUTERS (July 18, 2016), <http://www.reuters.com/article/us-opera-software-m-a-china-idUSKCN0ZY0CA>.

³¹⁵ John W. Miller, *Chinese Companies Embark on Shopping Spree in Europe*, WALL ST. J. (June 6, 2011), <http://online.wsj.com/article/SB10001424052748704355304576214683640225122.html>. (quoting Commissioner Tajani as saying, “The time to fireproof your house is before it catches fire [w]e want to be sure we know who is investing in Europe, and why.”).

³¹⁶ Resolution of 23 May 2012 on EU and China: Unbalanced Trade?, EUR. PARL. DOC. P7_TA(2012)0218 (2012).

³¹⁷ See Meunier, *supra* note 304, at 9 (explaining the need to strengthen the monitoring of foreign investment, particularly with regard to China, on grounds of competition policy); see also Godement et al., *supra* note 304 (discussing the use of E.U. subsidies as a way to ensure equal competition).

IV. Conclusion

Despite decades of market reform, China remains a State-dominated economy in which the CCP maintains pervasive control over the SOEs. But, this is only one side of the story. Market reform has also resulted in a dynamic private sector which competes fiercely with SOEs in the liberalized sectors. Moreover, the Chinese State, due to its sheer size, its vast and intricate bureaucracy, and its highly decentralized economic system, has a different utility function than what is commonly assumed about a commercial entity, and there is a limit on what the State can do. Too often, western policymakers and academics ignore this facet.

The Commission's recent regulatory response to Chinese acquisitions illustrates such a misconception. During its antitrust review of the merger transactions involving Chinese SOEs, the Commission has focused on analyzing the possibility of the Chinese State influencing its SOEs. This assessment misses the point. If a State retains voting power in its SOEs, it will always have the power to influence their commercial decisions. This is true for all SOEs, regardless of their nationalities. The real question is not whether a State can control SOEs, but whether it does. Indeed, in previous cases involving European SOEs, the Commission focused on *de facto* control by the State, but it shifted its standard to *de jure* control when scrutinizing Chinese cases.³¹⁸ In this regard, the Commission appears to be applying a double standard to Chinese SOEs.

Thus far, the Commission's has focused on defining the scope of China, Inc. involved in the transaction. The problem, however, is that there is no clear distinction between ownership and control for Chinese firms. Consequently, a bright-line approach would result in both over-inclusive and under-inclusive outcomes. Moreover, from an economic standpoint, the extent to which coordination by the Chinese State has lessened competition is a quantitative question, rather than a qualitative one. Therefore, a thoughtful response to the acquisitions by Chinese SOEs would require the regulator to shift its focus from defining the undertaking to understanding the effects of Chinese State ownership. This, however, is far from an easy task. Since the Commission's current approach towards dealing with Chinese SOE cases carries grave legal risks for itself and causes significant uncertainties for businesses, I caution against deploying competition policy too broadly in reviewing Chinese SOE acquisitions. Instead, national security review could be employed as a useful complement to antitrust review.

³¹⁸ See *infra* Part (I)(iii).

Annex I

List of Acquisitions of Minority Interests in Europe by Chinese Firms (2006-2015)

Year	Chinese Investor	Quantity in Millions	Share Size	Target	Sector	Country
2006	China Development Bank	\$800	1%	Anglo-American	Metals	Britain
2007	China Development Bank	\$3,040	3%	Barclays	Finance	Britain
2007	Ping An	\$2,700	4%	Fortis	Finance	Belgium
2008	SAFE	\$2,800	2%	Total	Energy	France
2008	SAFE	\$2,010	1%	BP	Energy	Britain
2009	CIC	\$370	1%	Diageo	Britain	
2009	CIC	\$450	19%	Songbird Estates	Real estate	Britain
2009	Unicom	\$1,000	1%	Telefonica	Technology	Spain
2010	CIC	\$960	2%	Apax Finance	Finance	Britain
2011	China Unicom	\$500	1%	Telefonica	Technology	Spain
2011	Fosun	\$120	10%	Folli Follie	Other	Greece
2011	CIC	\$3,240	30%	GDF Suez	Energy	France
2011	SAFE	\$720	3%	Munich Re	Finance	Germany
2011	Three Gorges	\$3,510	21%	Energias de Portugal	Energy	Portugal
2012	CIC	\$920	9%	Thames Water	Utilities	Britain
2012	Sinochem	\$260	35%	Siat	Energy	Belgium
2012	State Grid	\$510	25%	REN	Energy	Portugal
2012	SAFE	\$200	10%	Veolia Water	Utilities	Britain
2012	CIC	\$490	7%	Eutelsat	Technology	France
2012	Sinopec Shandong	\$1,500	49%	Talisman Energy	Energy	Britain
2012	Heavy	\$930	25%	Kion	Real estate	Germany
2012	CIC	\$730	10%	Heathrow Holding	Transport	Britain
2012	Three Gorges	\$470	49%	Renovaveis Compagnia Italiana Forme	Energy	Portugal
2012	Zoomlion	\$240	40%	Acciaio	Real estate	Italy
2013	China Merchants	\$530	49%	CMA CGM	Transport	France
2013	SAFE	\$110	49%	One Angel Square	Real estate	Britain
2013	SAFE	\$840	40%	UPP Group	Real estate	Britain

2013	HNA	\$310	20%	NH Hoteles	Tourism	Spain
2013	Fosun	\$360	46%	Club Med	Tourism	France
2013	Henan Civil Aviation	\$220	35%	Cargolux Airlines	Transport	Luxembourg
2014	Dongfeng	\$1,100	14%	Pugeot	Transport	France
2014	Fosun	\$140	19%	BHF	Finance	Germany
2014	China Power Investment	\$440	33%	EneMalta	Energy	Malta
2014	Shanghai Electric	\$560	40%	Ansaldo Energia	Energy	Italy
2014	SAFE	\$170	49%	Statkraft	Energy	Britain
2014	SAFE	\$520	2%	Telecom Italia	Technology	Italy
2014	SAFE	\$110	2%	Prysiam	Technology	Italy
2014	SAFE	\$280	2%	Fiat	Transport	Italy
2014	Fosun	\$110	23%	Tom Tailor	Other	Germany
2014	SAFE	\$630	2%	Generali	Finance	Italy
2014	SAFE	\$140	2%	Mediobanco	Finance	Italy
2014	State Grid	\$2,500	35%	CDP Reti	Energy	Italy
2014	SAFE	\$100	2%	Saipem	Energy	Italy
2014	Shandong Hi-Speed	\$190	25%	Friedmann Pacific Asset Management	Transport	France
2015	Fosun	\$140	5%	Thomas Cook Group	Tourism	Britain
2015	CEFC	\$100	5%	J&T Finance	Finance	Czech Republic
2015	Jin Jiang Hotels	\$430	4%	Accor Hotels	Tourism	France
2015	ChemChina and SAFE	\$7,860	26%	Pirelli	Transport	Italy
2015	SAFE	\$1,220	2%	Intesa Sanpaolo	Finance	Italy
2015	SAFE	\$820	2%	Unicredit	Finance	Italy
2015	Guangdong Midea	\$170	5%	Kuka	Germany	
2015	CEFC	\$100	5%	J&T Finance	Finance	Czech Republic
2015	CITIC China	\$670	25%	Royal Albert Docks	Real estate	Britain
2015	Minsheng Investment	\$130	34%	Luxaviation	Transport	Luxembourg
2015	China Media Capital and CITIC	\$400	13%	City Football Group	Britain	
2016	ChemChina	\$360	12%	Mercuria	Energy	Switzerland
2016	Jin Jiang Hotels	\$110	2%	Accor	Tourism	France
2016	Jin Jiang Hotels	\$450	6%	Accor	Tourism	France

2016	Guangdong Midea	\$140	5%	Kuka	Germany	
2016	CEFC	\$1,020	40%	J&T Finance	Finance	Czech Republic
2016	Jin Jiang Hotels	\$280	3%	Accor	Tourism	France
2016	Guangdong Midea	\$150	3%	Kuka	Germany	
2016	China Ocean Shipping	\$140	35%	Euromax Terminal Rotterdam	Transport	Netherlands
2016	COSCO	\$1,440	49%	Nidera	Netherlands	
2016	State Grid	\$350	24%	Public Power Banco Commercial Portugues	Energy	Greece
2016	Fosun Jiangsu Shagang led consortium	\$180	17%	Global Switch	Finance	Portugal
2016	CIC	\$2,960	49%	National Grid	Technology	Britain
2016		\$1,780	11%		Energy	Britain

Source: American Enterprise Institute & the Heritage Foundation³¹⁹

³¹⁹ Am. Enter. Inst. & Heritage Found., *supra* note 238.