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China/EU: The gradual evolution of the EU Commission's merger control decisional practice towards SOEs amidst an increasingly protectionist world

International | Concurrences N° 4-2017
www.concurrences.com

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ABSTRACT

Cet article met à jour l'article publié par les auteurs en 2012 relatif à l'application du règlement européen sur les concentrations aux entreprises publiques chinoises qui prennent part au rachat d'entreprises européennes. Dans cette version actualisée, les auteurs traitent des enseignements apportés en la matière par la décision de la Commission européenne dans l'affaire EDF/CGN/NNB. Ils expliquent que bien que cette décision apporte des éclaircissements bienvenus, de nombreuses questions restent encore en suspens permettant ainsi à la Commission européenne de conserver une large marge de manœuvre pour l'avenir. De manière plus générale, les auteurs s'interrogent également sur la place de la protection de l'intérêt général dans la politique économique européenne, sujet d'actualité avec la toute récente adoption d'une proposition de règlement visant à contrôler certains investissements directs dans l'UE par la Commission européenne.

This article updates the article published by the authors in 2012 on the treatment of Chinese SOEs involved in acquisitions of European companies under the EU Merger Regulation. In this updated version, the authors discuss the lessons learnt in this regard from the European Commission decision in the EDF/CGN/NNB case. They explain that, in fact, despite providing some helpful clarifications, this decision still leaves many questions open for future determination, thus enabling the European Commission to retain flexibility for future cases. More broadly, the authors also consider public interest considerations in M&A policy towards Chinese SOEs which recently culminated in the adoption by the European Commission of a draft European regulation aiming to screen certain foreign direct investments in the EU.

*The contents of this article are for reference purposes only: they do not constitute legal advice and should not be relied upon as such. All views expressed are personal.

The authors would like to thank their colleagues Mark Jephcott (Partner, Herbert Smith Freehills LLP, London and Hong Kong), Adelaide Luke (Senior Associate, Herbert Smith Freehills LLP, Hong Kong), Maximilian Zedtwitz and Arne Gayk (Associates, Herbert Smith Freehills LLP, Düsseldorf) and Joshua Butler (Trainee Solicitor, Herbert Smith Freehills LLP, Tokyo) for providing helpful input and comments.

China/EU: The gradual evolution of the EU Commission's merger control decisional practice towards SOEs amidst an increasingly protectionist world

I. Introduction

1. Investment by foreign companies into an economy—and in particular investment by companies owned by foreign states—raises sensitive issues. Should regulators be agnostic, treat those foreign acquirers as any private company and apply pure competition tests? Or should they be more cautious (some would say suspicious) and always think of the state behind those companies and take into account non-competition issues including reciprocity (is the foreign state equally open to investment?), impact on sensitive sectors of the domestic economy, and political concerns? These issues have come to the fore in recent years, in particular with regard to investments by Chinese state-owned enterprises ("SOEs").

2. The topic is not new, however. Indeed, five years ago, we published an article discussing the European Commission's (the "Commission") application of the EU Merger Regulation to transactions involving Chinese SOEs (the "2012 Article").[1] Developments in the Commission's practice since then (in particular the *CGN* Commission decision[2] of last year), the current political context in

1 *See* Kyriakos Fountoukakos and Camille Puech-Baron, *The EU Merger Regulation and transactions involving States or State-owned enterprises: Applying rules designed for the EU to the People's Republic of China*, Concurrences N° 1-2012, available at: http://www.concurrences.com/en/review/issues/No-1-2012/Articles-1238/The-EU-merger-regulation-and.

2 Case COMP/M.7850 – *EDF/CGN/NNB Group of Companies*, Commission decision of 10 March 2016 (the "*CGN* decision").

the EU and beyond, as well as the rise of protectionist sentiments worldwide, called for another piece on this topic. The result is the current article that looks at key recent developments.

3. In the 2012 Article, we explained that the five Commission clearance decisions involving Chinese SOEs adopted in 2011[3] demonstrated the Commission's deliberate choice to adopt a cautious, flexible, "wait and see" approach towards Chinese SOEs. This meant that the Commission considered the hypothetical "worst case scenario" to ensure that Chinese investments in the European economy were assessed as a whole to check for aggregated market power. This was achieved by an approach which aggregated—at least hypothetically—activities of SOEs under a "China, Inc." group. The Commission left many questions open deliberately in order to retain flexibility in future cases.

4. In particular, we noted in the 2012 Article that the question of the exact delineation of the "group" of Chinese SOEs reporting to Central SASAC, which is critical both from a jurisdictional and from a substantive perspective, was left unanswered. This was because, irrespective of the exact scope of the "group" of the Chinese SOEs involved in the transaction, the Commission concluded in each of these five cases that (i) it had jurisdiction to review the transaction (because the turnover thresholds were met by the Chinese SOE participating in the transaction without needing to add turnover of other Chinese SOEs, and the counterparty/ies to the transaction); and (ii) the transaction would not give rise to any competition concerns irrespective of the exact delineation of the "group."

5. We commented in the 2012 Article that the Commission would not be able to "hide" behind such a "wait and see" approach indefinitely, and that it would necessarily have to adopt firmer conclusions in future cases. This is required not only for the sake of legal certainty, but also because the assessment of transactions involving Chinese SOEs acquiring control over EU companies has a clear political dimension which could prove sensitive depending on the sector concerned.

6. In this article, we look at the developments since 2011 in the Commission's practice and we also briefly address the increasing debate concerning foreign investment more generally with protectionism on the rise.

7. First with regard to the Commission's practice, five years after the publication of the 2012 Article, what is left of the Commission's "wait and see" approach? Quite a lot, it seems. The Commission's approach has evolved but is still not set in stone and will continue to evolve in the future. The Commission has adopted a number of merger decisions involving SOEs,[4] and in particular Chinese SOEs.[5] In the *CGN* decision, the Commission held as follows: "*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.*"[6]

8. Following the *CGN* decision, it is now clear that concentrations involving Chinese SOEs active in the energy sector and reporting to Central SASAC will in principle be found to have a Union dimension and therefore to be notifiable to the Commission provided at least one other party involved in the transaction also meets the EU turnover thresholds. Nonetheless, the precaution that the Commission took by indicating that the conclusion was reached "*in the case at hand*," leaves some doors open.

9. The *CGN* decision is indeed very far from shedding light on each and every aspect of the treatment of Chinese SOEs under the EU Merger Regulation and still leaves many questions open. How should the "group" of Chinese SOEs active in the energy sector be defined for the purposes of the competition assessment? What about Chinese SOEs active in a sector other than the energy sector? What about Chinese SOEs active in the energy sector but reporting to Regional/Local SASAC? We discuss the value of the *CGN* decision as a precedent in Section II below.

10. Last but not least, we look at the political dimension surrounding extra-EU, and in particular Chinese, SOE investment and how this has developed since the 2012 Article. This dimension seems even more alive today in cases where EU "national champions" are taken over by extra-EU companies, whether state-owned or not. A number of EU Member States have adopted or intend to adopt stricter rules increasing their power to take appropriate measures to protect "legitimate public interests" that are not taken into consideration under the EU Merger Regulation. The debate has also started at the EU level, opposing members of the EU Parliament and some Member States (including in particular France and Germany) advocating for the introduction of some form of control at the EU level over non-EU direct investment,

3 Case COMP/M.6111 – *Huaneng/OTPPB/InterGen*, Commission decision of 11 February 2011; Case COMP/M.6082 – *China National Bluestar/Elkem*, Commission decision of 31 March 2011; Case COMP/M.6151 – *PetroChina/Ineos/JV*, Commission decision of 13 May 2011; Case COMP/M.6113 – *DSM/Sinochem/JV*, Commission decision of 19 May 2011; and Case COMP/M.6141 – *China National Agrochemical Corporation/Koor Industries/Makhteshim Agan Industries*, Commission decision of 3 October 2011.

4 *See*, e.g., Case COMP/M.6812 – *SFPI/Dexia*, Commission decision of 21 February 2013; Case COMP/M.6801 – *Rosneft/TNK-BP*, Commission decision of 8 March 2013; Case COMP/M.7318 – *Rosneft/Morgan Stanley Global Oil Merchanting Unit*, Commission decision of 3 September 2014.

5 *See* Case COMP/M.6461 – *TPV/Philips TV Business*, Commission decision of 24 February 2012; Case COMP/M.6715 – *CNOOC/Nexen*, Commission decision of 7 December 2012; Case COMP/M.7643 – *CNRC/Pirelli*, Commission decision of 1 July 2015; Case COMP/M.7850 – *EDF/CGN/NNB Group of Companies*, Commission decision of 10 March 2016; Case COMP/M.7911 – *CNCE/KM Group*, Commission decision of 15 March 2016; Case COMP/M.8169 – *Verlinvest/CRC/JV*, Commission decision of 9 September 2016.

6 *CGN* decision, para. 49.

and the Commission which, after refusing to move down that road so as to keep the EU economy as open and attractive as possible, very recently proposed a draft regulation establishing a framework for the screening of foreign direct investments into the EU limited to the grounds of public order and security.[7] It is clear that, in light of the current political climate, public interest considerations will be at the heart of many M&A deals in sensitive sectors. We briefly discuss such considerations in M&A policy in Section III below.

II. The *CGN* decision or the end of the Commission's "wait and see" approach?

11. Since the publication of the 2012 Article, the Commission has adopted a number of merger decisions involving SOEs, and in particular Chinese SOEs.[8]

12. Before the *CGN* decision adopted in March 2016, the Commission was able to follow its "wait and see" approach in relation to transactions involving Chinese SOEs, leaving the exact scope of the group of companies controlled by Central SASAC open (Section 1). The *CGN* decision is the very first decision involving a Chinese SOE in which the Commission had to reach some firm conclusions, abandoning somewhat its "wait and see" approach and setting a precedent for future cases. The *CGN* decision nonetheless still leaves a number of questions open for future determination (Section 2).

1. The Commission's approach towards Chinese SOEs between 2012 and the *CGN* decision: The status quo

13. Between the publication of the 2012 Article and the *CGN* decision, the Commission adopted three merger decisions involving Chinese SOEs.[9] One of these decisions, *CNOOC/Nexen*, was adopted following the simplified procedure and does not therefore provide any indication as to the Commission's approach. It is clear, however, from the Commission's approach in the other two decisions, *TPV/Philips TV Business* and *CNRC/Pirelli*, that the Commission was willing to maintain its "wait and see" approach. The specificities of these two cases enabled the Commission not to reach any firm conclusion.

14. For example, in relation to the jurisdictional assessment, the Commission noted in its *TPV/Philips TV Business* decision that: "*The Chinese CEC Group owns 35.06% of TPV's shares and is the largest TPV's shareholder. The State-owned Assets Supervision and Administration Commission (SASAC) is an entity established directly under the supervision of the State Council of the People's Republic of China responsible for oversight and management of State Owned Enterprises. SASAC holds 100% of CEC's shares. The question may therefore arise of which turnover is attributable to TPV pursuant to recital 22 of the Merger Regulation which provides that for public sector undertakings, calculation of the turnover of an undertaking concerned in a concentration needs to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them. In the present case, it is not necessary to conclude whether or not CEC enjoys independent power of decision over TPV in the sense of the Merger Regulation. The issue can be left open since the merging parties achieve the required turnover for EU jurisdiction to apply irrespective of this consideration. The notified operation accordingly has an EU dimension.*"[10]

15. In its *CNRC/Pirelli* decision, the Commission analysed in detail whether CNRC's parent company, ChemChina, was "*an independent economic unit, or whether it is part of a wider economic unit that includes all the Chinese State-owned enterprises*" for the purposes of its substantive assessment of the notified transaction.[11] Applying the principles derived from its previous decisional practice, the Commission analysed in particular whether ChemChina had independent decision-making power, and found that such power belonged either to ChemChina itself, or to Central SASAC.[12] The Commission then assessed whether the activities of the other SOEs under the control of Central SASAC were relevant for the purposes of its substantive assessment of the transaction. It found that there was no horizontal overlap between the activities of these SOEs and the activities of the parties, but that certain SOEs operated in markets that were vertically related to the parties' activities.[13] However, in light of the limited market

7 Proposal for a Regulation of the European Parliament and of the Council establishing a framwork for screening of foreign direct investments into the European Union, SWD(2017) 297 final, available at: http://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-487-F1-EN-MAIN-PART-1.PDF.

8 *See*, e.g., Case COMP/M.6461 – *TPV/Philips TV Business*, Commission decision of 24 February 2012; Case COMP/M.6715 – *CNOOC/Nexen*, Commission decision of 7 December 2012; Case COMP/M.6812 – *SFPI/Dexia*, Commission decision of 21 February 2013; Case COMP/M.6801 – *Rosneft/TNK-BP*, Commission decision of 8 March 2013; Case COMP/M.7318 – *Rosneft/Morgan Stanley Global Oil Merchanting Unit*, Commission decision of 3 September 2014; Case COMP/M.7643 – *CNRC/Pirelli*, Commission decision of 1 July 2015; Case COMP/M.7850 – *EDF/CGN/NNB Group of Companies*, Commission decision of 10 March 2016; Case COMP/M.7911 – *CNCE/KM Group*, Commission decision of 15 March 2016; Case COMP/M.8169 – *Verlinvest/CRC/JV*, Commission decision of 9 September 2016.

9 *See* Case COMP/M.6461 – *TPV/Philips TV Business*, Commission decision of 24 February 2012; Case COMP/M.6715 – *CNOOC/Nexen*, Commission decision of 7 December 2012; and Case COMP/M.7643 – *CNRC/Pirelli*.

10 Case COMP/M.6461 – *TPV/Philips TV Business*, Commission decision of 24 February 2012, footnote 7.

11 Case COMP/M.7643 – *CNRC/Pirelli*, Commission decision of 1 July 2015 ("*CNRC/Pirelli*"), para. 8.

12 *CNRC/Pirelli*, para. 10.

13 *CNRC/Pirelli*, para. 14 and 15.

shares of these SOEs on upstream and downstream markets to the parties' activities, the Commission found that there was no risk of input or customer foreclosure.[14] The Commission therefore concluded that "*given that the possible vertical links between the Parties and the SOEs is unlikely to give rise to serious doubts as to the Transaction's compatibility with the internal market, it is not necessary for the Commission to reach a definitive conclusion on the ultimate control of ChemChina, and in particular on the question of its independence from the Central SASAC as such a relationship would not affect the outcome of the Commission's competition assessment in the present case*."[15]

2. The Commission's approach towards Chinese SOEs in the *CGN* decision: The aggregation of all Chinese SOEs reporting to Central SASAC active in the energy sector for jurisdictional purposes

16. The *CGN* decision marks a notable change in the Commission's approach. For the very first time in relation to a Chinese SOE, the Commission had to reach a firm conclusion as to the exact scope of the "group" to which that SOE belongs for jurisdictional purposes. This is because, on the basis of CGN's turnover alone, the turnover thresholds were not met. After summarising the relevant parts of the *CGN* decision (Section 2.1), we will discuss its practical implications for future cases (Section 2.2).

2.1 Summary of the *CGN* decision

17. By way of background, the *CGN* decision relates to the acquisition by the French state-owned electricity provider EDF and China General Nuclear Power Corporation (CGN), a Chinese SOE 90% owned by Central SASAC and 10% owned by the People's Government of Guangdong Province (the "Local Guangdong SASAC"), of joint control over three NNB companies active in the nuclear industry in the UK.

18. In its jurisdictional assessment, the Commission explained that "[i]*n order to assess whether the Transaction has an EU dimension, it is necessary to determine which turnover should be attributed to CGN, given that it is a State-owned enterprise and that the majority of its shares are held by Central SASAC*."[16] The Commission started by recalling its settled decisional practice according to which the relevant criteria in order to assess whether two SOEs have independent decision-making power include: (i) the SOE's autonomy from the state in deciding its strategy, business plan and budget; and (ii) the possibility for the state to coordinate commercial conduct by imposing or facilitating coordination. Such coordination is assessed on the basis of factors such as interlocking directors or the existence of safeguards to prevent sharing of commercially sensitive information between SOEs.[17]

19. The Commission then considered and rejected the arguments put forward by the parties to demonstrate that CGN was independent from Central SASAC, namely:[18]

- the fact that Article 6 of the Law of the People's Republic of China on the State-Owned Assets of Enterprises of 2008 (the "PRC law on SOEs") specifies that the government shall perform the contributor's function "*based on the principles of separation of government bodies and enterprises, separation of the administrative functions of public affairs and the functions of the state-owned assets contributor, and non-intervention in the legitimate and independent business operations of enterprises*" ("Argument 1");
- the fact that Central SASAC would not determine CGN's strategic commercial behaviour and CGN's management structure. For example, the Articles of Association of CGN only provide that Central SASAC can remove directors that it originally appointed to the shareholders' meeting (i.e., seven out of nine directors) if a director acts improperly or in violation of the laws and/or the Articles of Association of CGN ("Argument 2");
- the fact that CGN would not have any interlocking directors with Central SASAC and would have an internal confidentiality policy which precludes any exchange of confidential information with any other SOE ("Argument 3").

20. The Commission rejected Argument 1. It noted that Article 6 of the PRC law on SOEs provides, in very broad terms, a general principle of separation of government bodies and enterprises and non-intervention in business operations. However, it found that there were other provisions, both in the PRC law on SOEs and in other instruments, supporting the fact that Central SASAC has influence on CGN's major decisions and that CGN has therefore no independent decision-making power from the Chinese state in relation to decisions regarding its strategy, business plan or budget.[19]

21. The Commission rejected Arguments 2 and 3 as follows: "*Central SASAC participates in major decision making, in the selection and supervision of senior management of SOEs and can interfere with strategic investment decisions. The Commission considers that the absence, according to the Parties, of cross-directorships between CGN, on the one hand, and Central SASAC or other Chinese SOEs, on the other hand, does not necessarily*

14 *CNRC/Pirelli*, para. 15 to 20.

15 *CNRC/Pirelli*, para. 21.

16 *CGN* decision, para. 29.

17 *CGN* decision, para. 30 and 31.

18 *CGN* decision, para. 34 to 36.

19 *CGN* decision, para. 37.

imply that CGN has a power of decision independent of Central SASAC. The absence of cross-directorships with other SOEs and the existence of confidentiality provisions do not preclude Central SASAC from influencing CGN's commercial strategy."[20]

22. Further, the Commission had regard to the fact that the case at hand concerned the energy sector, and in particular the nuclear industry, in which the state is very much involved and has the power to influence coordination between SOEs active in that sector. For example, the Commission cited the fact that CGN and other Chinese SOEs are part of the China Nuclear Industry Alliance whose creation was directed by the Chinese state,[21] and alluded to the fact that the Chinese state may have a role in the SOEs' procurement and investment strategy.[22] The Commission also quoted Article 7 of the PRC law on SOEs, which provides as follows: "*The state shall take measures to promote the centralization of state-owned capital to the important industries and key fields that have bearings on the national economic lifeline and state security, optimize the layout and structure of the state-owned economy, promote the reform and development of state-owned enterprises, improve the overall quality of the state-owned economy, and strengthen the control force and influence of the state-owned economy*."[23]

23. The Commission concluded as follows: "*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.*"[24] "*The question whether Local SASACs (such as Local Guangdong SASAC) shall be considered as forming a single entity with CGN can be left open, as the turnovers of Chinese SOEs controlled by Central SASAC meet the thresholds of the Merger Regulation irrespective of the assessment of this point*."[25]

24. It is interesting to note that, although the Commission concluded that "[t]*he turnover of all companies controlled by Central SASAC that are active in the energy industry should (…) be aggregated*," it only took into account the turnover of CGN and of ChemChina, noting that "[i]*nformation on the turnover of a company like China National Chemical Corporation ('ChemChina') is sufficient to determine EU jurisdiction*."[26]

25. As regards the substantive analysis, the Commission left open "[t]*he question as to which companies shall be considered in the competitive assessment (i.e. CGN, Chinese SOEs controlled by Central SASAC and/or Chinese SOEs controlled by Local SASACs)* (…)*, as the Transaction does not lead to competition concerns irrespective of the assessment of this point*."[27]

26. On the substantive analysis, the Commission therefore adopted a conservative approach by taking into account all the Chinese SOEs active in the relevant markets in question (i.e., a worst case scenario basis). For example, in its assessment of the vertical relationships between the upstream market for the design and manufacture of nuclear islands and the downstream market for the generation and wholesale supply of electricity, the Commission took into account the activities of CGN as well as those of the seven other Chinese SOEs active in the market for the design and manufacture of nuclear islands.[28] It found that the aggregated market shares of the Chinese SOEs were slightly above 30% in that market (under a narrow market definition)[29] and remained moderate post-transaction (below 33.6%). It also noted that most of the sales of these Chinese SOEs were made in China.[30] In light of the alternatives to the Chinese SOEs' products available to NNB's competitors active in the downstream market for the generation and wholesale supply of electricity, the Commission indicated that the Chinese SOEs were very unlikely to have the ability to engage in input foreclosure behaviour.[31] It concluded that the vertical relationship between these two markets would not raise competition concerns.[32]

2.2 The practical implications of the *CGN* decision for future cases

27. The *CGN* decision is the first decision involving a Chinese SOE in which the Commission has taken a firm stance on jurisdiction and abandoned, although to a limited extent, its "wait and see" approach. The Commission's hand was forced: it had to decide one way or another. Had the Commission not aggregated CGN's turnover with that of other Chinese SOEs under the supervision of Central SASAC and active in the energy sector, it would not have had jurisdiction over the case as CGN's EU-wide turnover was too low to meet the EU-wide turnover threshold. On this basis, it would have had to adopt a decision pursuant to Article 6(1)(a) of the EU Merger Regulation recording that it did not have

20 *CGN* decision, para. 42.

21 *CGN* decision, para. 44.

22 *CGN* decision, para. 45 to 47.

23 *CGN* decision, para. 43.

24 *CGN* decision, para. 49.

25 *CGN* decision, para. 50.

26 *CGN* decision, footnote 41.

27 *CGN* decision, footnote 43.

28 *See CGN* decision, footnote 69, which lists all the Chinese SOEs active in this market—namely, CGN, CNNC, State Power Investment Corporation, Chinergy (a joint venture of Tsinghua and China Nuclear Engineering Group Corporation (CNEC)), Dongfang Electric Corporation, Harbin Power Electric Group China, First Heavy Industries China and Erzhong Heavy Industry.

29 The global market for pressurised water reactors excluding countries subject to export restrictions and countries exclusively supplied by national suppliers (*CGN* decision, para. 72).

30 *CGN* decision, para. 73.

31 *CGN* decision, para. 74.

32 *CGN* decision, para. 75.

jurisdiction in relation to this transaction, which would have also constituted a precedent for future transactions, signalling to market players that the Commission would not review transactions involving Chinese SOEs that have insufficient EU-wide turnover.

28. The *CGN* decision constitutes a clear precedent for jurisdictional purposes for future transactions involving Chinese SOEs. However, the Commission still wanted to retain some flexibility going forward.

29. The conclusion in the *CGN* decision is worth setting out again here: "*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.*"[33]

30. It is evident that the Commission wanted to try to limit the precedent to the circumstances at hand and not abandon completely its "wait and see" approach. Does the precedent only apply to SOEs in the energy (or even just nuclear) sector, or does it apply more widely? To a certain extent, this remains unclear.

– It is clear the precedent does apply to SOEs active in the energy and nuclear sectors. The conclusions on SASAC's control over SOEs should, in principle, remain unchanged in the future so long as the relevant provisions in Chinese law do not change. In addition, the provisions relating to SASAC's coordination in the energy/nuclear sector will also be applicable unless there are changes to the law or facts.

– It is therefore reasonable to conclude that, each time a Chinese SOE active in the energy/nuclear sector participates in a transaction deemed to constitute a concentration for EU merger control purposes, its turnover will (or at least is very likely to) de facto exceed the EU turnover thresholds. This is because its turnover will (or is very likely to) be aggregated with that of all the other Chinese SOEs controlled by Central SASAC that are active in the energy sector, including ChemChina's.[34] Therefore, provided at least one other party participating in the transaction meets the EU turnover thresholds, the transaction will be notifiable to the Commission. This means that transactions in the energy sector involving Chinese SOEs may fall within the jurisdiction of the Commission even if the Chinese SOE directly involved in the transaction is not active in the EU and generates no turnover in the EU. Any transaction in the energy sector involving a Chinese SOE should therefore be carefully examined to avoid missing an EU filing which may have severe consequences.[35]

– However, what about SOEs in sectors other than the energy/nuclear sector? The fact that the sector concerned in the *CGN* case was the energy sector, i.e., a particularly sensitive and strategic sector, certainly played an important role in the Commission's approach and the Commission was at pains to use arguments specifically relating to coordination in that sector to limit the precedent.

– It therefore remains to be seen whether the same conclusions will be reached in other sectors. Certainly the *CGN* precedent is likely to apply to the overall control by SASAC over SOEs but the additional arguments relating to the nuclear sector which the Commission also relied on in the *CGN* decision may be absent. The devil may still be in the detail.

– The issue of SOEs under bodies other than Central SASAC has also been left open, notably those SOEs under the supervision of Regional/Local SASACs.

31. The *CGN* decision does not therefore completely mark the end of the Commission's "wait and see" approach. As explained in the 2012 Article, such a flexible approach allows the Commission to tailor its decision-making to the individual case at hand and conforms to the Commission's usual practice of leaving various questions open whenever possible in order to retain flexibility in future cases.[36]

32. Indeed, decisions adopted after the *CGN* decision do retain a more flexible, ambiguous approach. For example, in its decision in the *CNCE/KM Group* case,[37] which post-dates the *CGN* decision, the Commission considered the activities of Chinese SOEs other than CNCE/ChemChina[38] in the relevant markets.[39] The Commission however made it clear that it left the question of the independence of ChemChina from the Chinese state open: "(…) *given that the possible links between the Parties and the Chinese SOEs are unlikely to give rise to serious doubts as to the Transaction's compatibility with*

33 *CGN* decision, para. 49.

34 *CGN* decision, footnote 41 ("*Information on the turnover of a company like China National Chemical Corporation ('ChemChina') is sufficient to determine EU jurisdiction*").

35 Where the EU turnover thresholds are met, filing is mandatory. The Commission may impose fines of up to 10% of an undertaking's group-wide worldwide turnover for failure to notify a reportable transaction. This possibility is not merely theoretical as shown by the €20 million fine imposed by the Commission on Electrabel for failure to notify its acquisition of Compagnie Nationale du Rhône (Case COMP/M.4994 – *Electrabel/Compagnie Nationale du Rhône*, Commission decision of 10 June 2009). The Commission's fining decision was upheld by the General Court of the EU (Case T-332/09 – *Electrabel v. Commission*, ECLI:EU:T:2012:672) and subsequently by the European Court of Justice (Case C-84/13P – *Electrabel v. Commission*, ECLI:EU:C:2014:2040). In addition, where a transaction that has been implemented prior to obtaining clearance is found to raise serious competition concerns which cannot be remedied and leads the Commission to adopt a prohibition decision, the Commission may order the unwinding of the transaction.

36 2012 Article, para. 68.

37 Case COMP/M.7911 – *CNCE/KM Group*, Commission decision of 15 March 2016 ("*CNCE/KM Group*").

38 CNCE is a subsidiary of ChemChina.

39 The relevant markets in this case were (i) the manufacture and sale of plastics and rubber processing machinery; and (ii) the manufacture and sales of tyres.

the internal market, it is not necessary to reach a definitive conclusion on the ultimate control and the functional independence of ChemChina."[40]

33. Interestingly, the Commission not only considered Chinese SOEs under the supervision of Central SASAC, but also Chinese SOEs under the supervision of Regional SASACs,[41],[42] consistent with its "worst case scenario" approach. It noted that "[i]*n view of the limited activities of the companies concerned, notably in the EEA, their activities will not be discussed further in this decision*."[43]

34. By way of comparison, and consistent with this, the Commission also retained a flexible approach in its decision in the *Rosneft/TNK-BP* case.[44] The Commission conducted a detailed analysis to determine whether Rosneft and other Russian SOEs active in the oil and gas sector (Gazprom, Zarubezhneft and Transneft) were deemed to constitute a single economic unit for the purposes of the competition assessment.[45]

35. The Commission found that "*the Russian Federation does indeed have major powers to involve itself in Rosneft's commercial behaviour in a strategic manner, in particular as regards the right to interfere with strategic investment decisions*"[46] and concluded as follows: "(…) *the competitive analysis of the proposed transaction is undertaken under a "worst case scenario" where Rosneft and other Russian* [SOEs] *active in the oil and gas sector, namely Gazprom, Zarubezhneft and Transneft, are deemed to constitute one single economic unit and their respective market positions should be combined*."[47]

36. The Commission's wording of a "*worst case scenario*" suggests that the Commission leaves this question open. Indeed, in a later decision involving Rosneft,[48] the Commission ignored the other Russian SOEs active in the oil and gas sector in its analysis. The "wait and see" flexible approach therefore remains the Commission's preferred approach, even post-*CGN*, wherever possible.

3. What's next?

37. The Commission's decisional practice towards transactions involving Chinese SOEs shows a willingness to remain prudent, and to proceed on a case-by-case basis, tailoring the approach to the specificities of each particular case. In fact, adopting a firm approach could cut both ways and this explains further the Commission's cautious approach. If the Commission were to consider two Chinese SOEs as part of a single "group," then it could not review a merger between them because this should then, in principle, be considered as "internal restructuring." Similarly, if the Commission were to consider a Chinese SOE to be independent, then it may not have jurisdiction to review a merger involving that Chinese SOE and an EU company if the Chinese SOE's turnover is too low to meet the EU-wide turnover thresholds. Yet, in both cases, the merger could raise actual competition problems in the EU: in the first case, if the two SOEs are, in fact, independent and compete within the EU and the merger reduces competition between them; in the second case, if the SOE is, in fact, dependent on SASAC/other SOEs which are active in the EU in a similar market as (or in a market upstream or downstream of) the EU company and its market power is therefore masked if one were to look at it separately from its "sister" companies.

38. Finding the right approach to Chinese SOEs in the abstract is therefore extremely difficult. The Commission's case-by-case, prudent approach[49] to date has been a sensible solution, but can it last forever? A scenario in which the outcome of a competition analysis would change depending on the exact scope of the group of companies taken into account in the analysis is yet to materialise. If and when such a scenario materialises, the Commission will have no option but to reach a firmer conclusion as to the scope of the "group" of Chinese SOEs that should be taken into account in the competition analysis.

39. Similarly, the upcoming merger between two large Chinese SOEs active in the chemicals sector, Sinochem and ChemChina, both of which meet the EU-wide turnover thresholds, will force the Commission to take position: if they belong to the same "group," the Commission will not have jurisdiction to review their merger, which may, however, have implications for the EU market.[50]

40 *CNCE/KM Group*, para. 11.

41 Regional SASACs are described by the Commission as "*provincial and regional/municipal authorities*" (*CNCE/KM Group*, para. 8).

42 The Chinese SOEs considered include the following: under the supervision of Central SASAC: Aviation Industry Corporation of China, China National Petroleum Corporation and China Petroleum & Chemical Corporation (Sinopec); under the supervision of Regional SASACs: Dalian Rubber and Plastics Machinery and Qingdao Double Star (*CNCE/KM Group*, footnote 7).

43 *CNCE/KM Group*, footnote 7.

44 Case COMP/M.6801 – *Rosneft/TNK-BP*, Commission decision of 8 March 2013 ("*Rosneft/TNK-BP*").

45 *Rosneft/TNK-BP*, para. 7 et seq.

46 *Rosneft/TNK-BP*, para. 8.

47 *Rosneft/TNK-BP*, para. 9.

48 Case COMP/M.7318 – *Rosneft/Morgan Stanley Global Oil Merchanting Unit*, Commission decision of 3 September 2014.

49 National competition authorities within the EU have also been prudent in their approach towards Chinese SOEs. For example, in January 2015, the German Federal Cartel Office cleared the merger between two Central SASAC-owned SOEs active in the manufacture of trains, China CNR Corporation Limited (CNR) and CSR Corporation Limited (CSR). The Federal Cartel Office could have declined jurisdiction on the basis that this transaction amounts to internal restructuring; instead, by avoiding to take a firm stance on the scope of the "group" of these companies, the Federal Cartel Office kept its powder dry for future cases.

50 *Financial Times*, ChemChina and Sinochem plan merger, 8 May 2017, available at: https://www.ft.com/content/08a29238-2ed2-11e7-9555-23ef563ecf9a.

40. In the meantime, EU Member States, and in particular France and the UK, but also non-EU Member States, have been increasingly making use of the possibility to "protect" various interests (including arguably to simply protect their national champions) by relying on public interest tests included in their merger control rules and/or specific legislation on foreign direct investment. Public interest considerations, in particular vis-à-vis Chinese SOEs, are more than ever a hot topic, both within and outside the EU. We briefly look at those issues in Section III below.

III. Public interest considerations in M&A policy towards Chinese SOEs: Disguised protectionism?

41. The outcome of the referendum on Brexit in the UK, the election of Donald Trump in the US and the rise of populism and nationalist political parties throughout the EU have completely changed the political agenda with wide-ranging effects in every area of public life. Merger control has not been immune either. Protectionism is a hot topic again. The globalist economic orthodoxy—markets open for investment by domestic and foreign companies alike, pure competition tests—has been shaken.

42. In reality, it was never earthquake-proof to begin with! The craze for more protectionism—or at least for increased protection of "public interests" (beyond competition)—is not new.

43. Over the years, protectionist action by EU Member States has resurfaced with differing degrees of intensity, and this has intensified again in the last few years, no doubt at least partially as a result of the ever increasing foreign (including Chinese) investment into the EU economy. For example, the UK—which had gone from having a wide and loose "public interest" test in merger control to a pure competition test—has been considering expanding its rules on the protection of public interests again.[51] France expanded the scope of activities falling within the framework of its rules on foreign direct investment relatively recently.[52] The US—which already has an active foreign investment test under its Committee on Foreign Investment in the United States ("CFIUS") rules—is considering expanding the powers of that body.[53] Some countries, like South Africa, go even further by placing public interest considerations, including issues such as employment and Black Economic Empowerment, at the very heart of the merger control review process.

44. In the 2012 Article, we concluded that the assessment of transactions involving Chinese SOEs acquiring stakes in EU companies has a fundamental political dimension which could prove sensitive in future cases.[54] The EU Merger Regulation itself does not allow for political considerations to be taken into account by the Commission as part of the merger review process, but Article 21(4) of the EU Merger Regulation enables EU Member States to take appropriate measures to protect legitimate interests, including public security, plurality of the media, prudential rules, and any other interest raised by an EU Member State and considered by the Commission to be compatible with EU law. Article 21 of the EU Merger Regulation is therefore an acknowledgment that Member States would be tempted, and should therefore legally not be allowed, to impact EU mergers on non-competition grounds without supervision by the Commission under the EU Merger Regulation. As noted in the 2012 Article, nothing excludes the possibility that the Commission and EU Member States will use these provisions in the future to prohibit concentrations involving Chinese companies to safeguard public interests, noting nonetheless that the Commission has a good track record of applying the EU Merger Regulation without having regard to political or other non-competition criteria.[55]

45. To date, there is no legislation at the EU level providing for the control of foreign (i.e., non-EU) direct investment into EU companies on non-competition grounds. Calls have been issued, however, as early as 2012 to introduce such legislation, and this debate has been reopened lately, in the wake of the ever-increasing investment by extra-EU (including Chinese) companies into the EU economy, and in particular in Germany. Some members of the EU Parliament as well as national politicians consider that the current instruments are not sufficient to protect the EU from investment coming from "*third countries that don't comply with market rules or where acquisitions are facilitated by State subsidies*."[56] In particular, members of the EU Parliament have recently called for the creation of a European Committee on Foreign Investment with

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51 There is ongoing debate in the UK as to whether a public interest test should be included in legislation to enable the UK authorities to invoke broader legitimate public interests, including in relation to concentrations having an EU dimension. In particular, Theresa May, in her campaign to be leader of the Conservative Party, said that a "*proper industrial strategy*" was needed to defend certain sectors (*see* Briefing Paper No. 05374 of 1 September 2016 published by the House of Commons Library, available at: http://researchbriefings.files.parliament.uk/documents/SN05374/SN05374.pdf).

52 *See* A. Biache, *Revue Sorbonne OFIS*, Décret "Montebourg" – La défense des intérêts nationaux français face aux capitaux étrangers, November 2014, available at: http://www.univ-paris1.fr/fileadmin/diplome_M2OFIS/OFIS_2014-2015/Articles/_4_2014_Article_Revue_OFIS_-_D%C3%A9cemnbre_2014_-__D%C3%A9cret___Montebourg__.pdf.

53 *See* Lawfare blog, Foreign Investment, China, and Trump, 15 December 2016, available at: https://www.lawfareblog.com/foreign-investment-china-and-trump.

54 2012 Article, para. 77.

55 2012 Article, para. 82 and 83.

56 *See* MLex Comment: Foreign mergers, acquisitions, need more EU vetting, politicians say, 21 March 2017, available at: http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=875420&siteid=190&rdir=1.

a functioning similar to the CFIUS, which would be entrusted with reviewing acquisitions of EU companies by foreign persons in strategic sectors, including energy, transport, telecommunications, health and water.[57] In February 2017, Germany, France and Italy presented the Commission with a common position on the control of non-EU direct investment.[58] The newly elected French President Emmanuel Macron has also been actively advocating for a "Buy European Act."[59]

46. 47. Faced with the Commission's reluctance to engage with such initiatives (*see e.g.*, the statement of Commission Vice-President Jyrki Katainen that "*[The EU] want[s] to be open to foreign direct investment; [the EU] [doesn't] need to be protectionist*"[60]), members of the EU Parliament have decided to take the debate one step further by increasing pressure on the Commission to come up with a draft regulation on the control of non-EU investment by the end of the year. It is reported that 60% of the EU members of Parliament support the idea of introducing some rules to vet non-EU investment into the EU economy.[61] The calls for vetting powers of non-EU investment at the EU level have finally been heard by the Commission: on 13 September 2017, it proposed a draft regulation establishing a framework for the screening of foreign direct investments into the EU limited to the grounds of public order and security.[62] The proposal has been welcomed by France, Italy and Germany[63] but criticised by other EU Member States, including Estonia, Sweden, Denmark and Finland.[64] The proposal will be considered and debated by the EU Parliament and Council and is expected to be adopted at the end of 2018 at the earliest.

48. In any event, if the EU does not act, Member States may be tempted to seize the initiative and act themselves to restrict inbound Chinese investment in the European economy. They appear increasingly ready to do so.

49. It is worth noting in this regard that the transaction that was authorised by the Commission in the *CGN* decision was also reviewed by the UK government. This review resulted in the UK government (with the prime minister being personally involved) authorising the construction of the Hinkley Point nuclear power plant, while announcing that there would be new restrictions on future investments in critical infrastructure if there were national security concerns.[65] Amongst the reasons that led Theresa May to delay approval were concerns around the project's high costs, technology and the role of the Chinese investor.[66] By way of another recent example, in Germany, the Federal Ministry of Economics and Energy withdrew in October 2016 the clearance certificate it had granted in September 2016 to the Chinese fund Fujian Grand Chip Investment Fund LP (FGC) ("Fujian") for the acquisition of the German chipmaker Aixtron SE and reopened proceedings.[67] It closed the case without completing its review following President Obama's prohibition of the acquisition of the US subsidiary of Aixtron by Fujian, and Fujian's subsequent withdrawal of its bid.[68]

IV. Conclusion

50. At the time of publication of the 2012 Article, it was already clear that there was an increasing suspicion surrounding investment by Chinese SOEs into the European economy with the Commission adopting a prudent jurisdictional approach to extend its reach over such investments and with public interest and political considerations gradually gaining momentum in merger control review processes, in the EU and beyond.

51. The momentum has become greater in a world that has seen an increasing move away from the globalisation agenda and towards economic protectionism. States may find themselves under increased pressure to adopt more protectionist policies and to use merger control as an instrument of such policies.

52. In this context, the necessity for the EU to reaffirm its stance in favour of free trade appears particularly crucial in order to attract foreign investment to the EU and retain a competition-focussed merger control regime.

57 Ibid.

58 *See* European Council on Foreign Relations, Germany's turnabout on Chinese takeovers, 21 March 2017, available at: http://www.ecfr.eu/article/commentary_germanys_turnabout_on_chinese_takeovers_7251.

59 *See* Politico, Macronomics: French front-runner seeks to reinvent EU trade, 5 March 2017, available at: http://www.politico.eu/article/macronomics-french-front-runner-seeks-to-reinvent-eu-trade/.

60 *See* MLex Insight: EU notes foreign-takeover concerns, but warns against new vetting powers, 10 May 2017, available at: http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=887030&siteid=190&rdir=1.

61 *See* MLex Insight: EU lawmakers join push for stronger laws to vet foreign investments, 15 June 2017, available at: http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=895558&siteid=190&rdir=1.

62 Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union, SWD(2017) 297 final, available at: http://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-487-F1-EN-MAIN-PART-1.PDF.

63 *See* Reuters, France, Germany, Italy welcome EU push to curb foreign takeovers, 13 September 2017, available at: https://money.usnews.com/investing/news/articles/2017-09-13/france-germany-italy-welcome-eu-push-to-curb-foreign-takeovers.

64 *See* MLex Insight, EU proposal on screening Chinese investments might face delay after Estonian intervention, 19 September 2017, available at: http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=920779&siteid=190&rdir=1.

65 *See* BBC News, Hinkley Point: UK approves nuclear plant deal, 15 September 2016, available at: http://www.bbc.co.uk/news/business-37369786; The Guardian, Hinkley Point: ministers sign go-ahead for nuclear power plant, 29 September 2016, available at: https://www.theguardian.com/uk-news/2016/sep/29/hinkley-point-ministers-sign-go-ahead-for-nuclear-power-plant.

66 *See* PaRR, Chinese SOEs should approach EC at early M&A stage – advisors, 31 May 2017, available at: https://app.parr-global.com/intelligence/view/1541876?src_alert_id=3617.

67 *See* Aixtron press release available at: https://www.aixtron.com/en/press/press-releases/archive-2015/detail/aixtron-se-widerruf-der-unbedenklichkeitsbescheinigung-und-wiederaufnahme-des-pruefverfahrens-durch-das-bundeswirtschaftsministerium-im-rahmen-der-uebernahme-durch-die-grand-chip-investment-gmbh.

68 *See* US News, Germany says Aixtron case 'closed' after Chinese bid blocked, 9 December 2016, available at: https://www.usnews.com/news/business/articles/2016-12-09/germany-says-aixtron-case-closed-after-chinese-bid-blocked.

53. In its assessment of foreign investment under the EU Merger Regulation, the Commission currently continues to have an obligation to apply a pure competition test and to avoid any discriminatory treatment on the basis of nationality or state ownership. The clarification of the application of the EU merger control rules to Chinese SOEs brought by the *CGN* decision enhances legal clarity but still leaves questions open for future assessment. By opening the door to the possible aggregation of all Chinese SOEs (at least those active in the energy sector) reporting to Central SASAC in the competition assessment, this precedent necessarily lowers the threshold for triggering a review, thus providing the means to the Commission to block a transaction where appropriate, without resorting to public interest or political considerations which, in any event, would fall outside the scope of its review.

54. The *CGN* decision, combined with the continuation of the "wait and see" approach, and the availability of Article 21(4) of the EU Merger Regulation where national interests—beyond competition—are at stake provide the EU (and Member States) with a toolbox of solutions to defend against foreign takeovers in sensitive sectors in these uncertain times. The danger, however, is that such concerns may pollute a pure merger control, competition analysis. It would be far preferable for any public interest concerns to remain separate from the merger control assessment and conducted either by separate EU bodies under new EU foreign investment rules, or by Member States but under strict supervision by the Commission within the confines of Article 21 of the EU Merger Regulation.

56. The legal and business community and competition regulators appear to be now also weighing in on this debate.[69] They will play an important role in trying to advocate for open markets focussed on competition, clarity in the rules, and with public interest concerns remaining separate and applied in a restrictive manner only where really necessary and for legitimate rather than protectionist reasons.

55. Calls for a more interventionist stance will however continue and it will be interesting to see how the EU Parliament and Council will reconcile opposing views amongst Member States and ultimately translate the Commission's draft proposal for screening foreign direct investments into legislation.

57. In the meantime, foreign direct investment in the EU, in particular from China, keeps progressing: 164 Chinese companies bought or took over EU companies during the first half of 2016 (compared to 183 Chinese takeovers in 2015) and, during these six months, China invested more than $70 billion in EU companies, which is equivalent to its investment in EU companies in 2013, 2014, and 2015 together.[70] There are clear economic benefits to a "Europe open" approach. But the suspicion over foreign takeovers and the debate on public interest tests will no doubt continue. ■

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69 *See*, for example, reports on the various debates on this issue at the IBA pre-ICN conference in Porto on 9 May 2017 and at the ICN conference in Porto from 10 to 12 May 2017: PaRR, Merger reviews should keep public interest, competition assessments separate – IBA Porto, 9 May 2017, available at: https://app.parr-global.com/intelligence/view/1533819?src_alert_id=3627; MLex Insight: ABA task force to study competition, public interest, 9 May 2017, available at: http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=886814&siteid=190&rdir=1.

70 *See* the E&Y report of July 2016 available at: http://www.ey.com/Publication/vwLUAssets/ey-chinesische-unternehmenskaeufe-in-europa/$FILE/ey-chinesische-unternehmenskaeufe-in-europa.pdf.

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