

# The Treatment of State-owned Enterprises in EU Competition Law: New Developments and Future Challenges

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Authors: Geneviève Lallemand-Kirche, Caroline Tixier, and Henri Piffaut\*

- *European competition rules apply to State-owned enterprises in the same manner as they apply to private undertakings, but the specificities of their corporate governance create some challenges for competition enforcers both for establishing jurisdiction and for carrying out the substantive assessment.*
- *The European Commission has historically dealt with State-owned enterprises in the context of merger control in relation to jurisdiction issues within the EEA. The principles developed in the EU decisional practice have recently been transposed to foreign State-owned enterprises, such as in the recent case EDF/CGN/NNB Group of companies.*
- *Beyond jurisdictional questions in merger control, the issue of the independence of State-owned enterprises is relevant in the substantive assessment of competition cases under all instruments (concentrations, antitrust, State aid).*

The Treaty on the Functioning of the European Union<sup>1</sup> ('TFEU') provides that the European Union ('EU') must remain neutral in matters of ownership of companies, i.e. vis-à-vis privately and State-owned enterprises ('SOEs').<sup>2</sup> This is an important issue for Member States, as some of them own a relatively large number of companies active in sectors they consider to be of strategic or public interest. The energy sector in particular is a field where the number and importance of SOEs is notable. The EU Merger Regulation<sup>3</sup> ('EUMR') reiterates the principle of non-discrimination between the public and the private sector exposed in the TFEU. However, compared to private companies, SOEs may be subject to specific corporate governance models, which could make them independent or, to the contrary, controlled by the State in their commercial decision making. The EUMR therefore includes specific rules on the treatment of SOEs,<sup>4</sup> and in particular as regards the assessment of their

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\* Respectively Case Handler, Case Handler and Advisor to the Deputy Director General for Mergers and Fellow at Harvard University, Directorate General for Competition. The views expressed are purely those of the writers and may not in any circumstances be regarded as stating an official position of the European Commission. The authors of this article would like to thank Céline Gauer for the revision of the article and her precious advice. Many thanks also to Eline Vanhollebeke for the quality support she provided on the drafting of this article.

<sup>1</sup> Consolidated version of the Treaty on the Functioning of the European Union (C 326/49), OJ C 326, 26.10.2012.

<sup>2</sup> Article 345 of the TFEU.

<sup>3</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.01.2004, pages 1–22.

<sup>4</sup> Recital 22 of the EUMR.

autonomy from the State. Establishing whether or not they are independent from each other is also crucial for competition enforcement in several respects:

- To establish whether turnover thresholds are met, i.e. to establish jurisdiction in merger cases (application of the EUMR).
- To define the market position of an undertaking, i.e. to establish dominance (application of Article 102 of the TFEU).
- To assess the competition impact of transactions (application of the EUMR), of agreements (application of Article 101 of the TFEU), or of State measures (application of Article 107 of the TFEU).
- To design remedies (in all competition fields) or calculate fines.

The decisional practice was mainly developed on the basis of the Commission's experience with companies owned by States in the European Economic Area ('EEA'). When it comes to SOEs established outside the EEA, the challenge is increased by the difficulty to gather evidence on governance and control within the State concerned, and interpret foreign law. The recent increase of Chinese Foreign Direct Investment ('FDI') in Europe has led to a higher and possibly further increasing number of notifications of such cases under the EUMR.

Prior to the adoption of the decision EDF/CGN/NNB Group of Companies<sup>5</sup> in March 2016, a number of other decisions had been published relating to the treatment of SOEs for the purpose of establishing EU jurisdiction in the context of merger control. In this article, we first give an overview of the legal basis and the criteria developed in the Commission's decisional practice (Section I). We then analyse the challenges raised by non-EEA companies and why the Commission decision in EDF/CGN/NNB Group of Companies can be considered notable for the purpose of analysing concentrations involving Chinese SOEs (Section II). Finally, we discuss the implications of the established principles on the independence of SOEs on the competitive assessment in all competition law instruments (Section III).

## **I. Overview of merger control rules applicable to SOEs for assessing their independence**

### *A. Legal basis for analysing concentrations involving SOEs in accordance with non-discrimination principle between private companies and SOEs*

Article 345 TFEU and Recital 22 of the EUMR provide for a principle of non-discrimination between the public and the private sector. In order to ensure that the SOEs that are operating autonomously from each other on the market are not erroneously considered as forming part of the same group, the EUMR also specifies that only undertakings making up an economic unit with an independent power of decision should be considered together for the purpose of calculating the turnover and establishing whether the Commission has jurisdiction over the transaction.

The purpose of these rules is to allow the Commission to take into account the specificities of the governance of State controlled companies. While a private company may be assumed to have decisive influence over the companies in which it has a majority shareholding, a State may have different structural layers (e.g. the State itself, regional governments, etc.) or may have put in place a specific system of governance such that in fact, the State does not have a decisive influence over the activity of all SOEs. While it can therefore not be presumed that the State exercises decisive influence on SOEs' commercial decision, it cannot be presumed either that SOEs are independent from each other. Such an assumption could lead States to circumvent merger control rules by creating, for instance, investment vehicles for each of their planned acquisitions. As explained in a recent article: *'the entire corporate group forms a single economic undertaking for competition law purposes. SOEs do not have a corporate group as they are ultimately owned by the state. The question from a merger control perspective is which entities, beyond the direct party to the transaction, should be included in the*

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<sup>5</sup> See Case No. COMP/M.7850 – EDF/CGN/NNB Group of Companies.

*single economic undertaking for the purposes of the merger review*.<sup>6</sup> The absence of a clear definition of a ‘group’ for SOEs could lead to a gap in the jurisdictional net.

In addition to the EUMR, the Jurisdictional Notice sets out more precise rules on the calculation of SOEs’ turnover.<sup>7</sup> It specifies that where an SOE is not subject to any coordination<sup>8</sup> with other SOEs, it should be treated as independent, and the turnover of other SOEs should not be taken into account. Conversely, where several SOEs are controlled by the same independent decision-making centre, these businesses should be considered to be part of the group to which the undertaking involved in the transaction belongs. Their turnover should therefore be included in the calculation when establishing the Commission’s jurisdiction.<sup>9</sup>

A number of Commission decisions have also helped to develop a more precise interpretation of this body of rules specific to SOEs.<sup>10</sup> The earlier decisions related to cases involving EEA SOEs. The increased number of transactions involving Chinese companies seen in recent years has led to a number of cases being reviewed by the Commission. The analysis of the related decisions shows that the transposition of these rules to Chinese SOEs raises specific challenges (see Section II below on challenges raised by non-EEA SOEs).

### *B. Assessment based on a body of evidence*

The independence of SOEs in the Commission’s decisional practice has been assessed on the basis of all elements available, considered as a body of evidence. While there are a range of criteria that can be applied to assess the independence of SOEs, it is not necessary to demonstrate that every single criterion has been met. Certain elements are sufficient evidence to demonstrate the lack of independence but are not necessary conditions. For example, the presence of interlocking directorships has been considered as a useful indicator, as those could facilitate coordination between SOEs. Nonetheless, the absence of interlocking directorships cannot in itself be considered to demonstrate independence. After all, the absence of interlocking directorships would not prevent the ultimate controlling entity from influencing the SOE’s commercial strategy. The same is true with regard to the absence or existence of confidentiality provisions between SOEs.<sup>11</sup>

The scope of potential sources and market investigation tools is wide but the relevance of each of them in the assessment appears to vary depending on the issue analysed. In order to analyse the governance system of an SOE, the key source of information consists in the governance documents and legislative rules applicable to SOEs. Evidence gathered through external studies – such as those produced by the OECD or by academics specialised in public governance in given countries for instance – can provide specialists’ opinions on the matter and thus also be informative. Specific measures or instructions adopted by the public authorities can show the degree of intervention of the State in one or several SOEs or, more generally, in the SOEs active in a particular sector. In order to analyse to what extent

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<sup>6</sup> B. Batchelor and T. Jenkins, *EU merger decision shines light on state-owned enterprises*, International Law Office, 2016.

<sup>7</sup> Paragraph 192–194 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01), OJ C 95, 16.04.2008.

<sup>8</sup> For clarification, throughout this article, the term ‘coordination’ does not refer to ‘coordinated effects’ as understood under merger control rules, but in the meaning of paragraph 194 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01), OJ C 95, 16.04.2008.

<sup>9</sup> Paragraph 194 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01), OJ C 95, 16.04.2008.

<sup>10</sup> Past decisional practice on concentrations where one of the parties to a transaction is an SOE has been accurately described by K. Fountoukakos and C. Puech-Baron, in *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, 2012, vol.1, pages 44–54. This article describes both the practice with regards to EEA SOEs and the 2011 wave of Chinese SOEs’ cases.

<sup>11</sup> See for example Case No. COMP/M.5549 – *EDF/Segebel*, paragraph 96.

two SOEs appear to compete against each other, submissions from competitors or customers can also prove to be useful.

In its past decisional practice, the Commission has also demonstrated pragmatism in deciding the type of evidence that can be accepted. For example, instead of requiring a precise figure for turnover corresponding to the exact boundaries set for the economic unit, the Commission allowed the parties to provide the turnover of just one additional SOE in the economic unit, as this was sufficient to demonstrate that the thresholds were exceeded.

### *C. Criteria developed in EU decisional practice to assess independence of SOEs*

On the basis of the general rules defined in the EUMR and the Jurisdictional Notice, the Commission has developed a decisional practice whereby the definition of the relevant economic unit is evaluated by identifying whether or not the SOE has an independent decision-making power and whether the State could establish a common commercial conduct between several SOEs under its control. This consisted in practice in identifying which State entity ultimately enjoys independent decision-making power. This identification of the group of SOEs to be taken into account in EU merger control essentially mirrors the objective to define the relevant scope of a 'group' for private companies.

At least three main types of criteria were considered in past decisions to establish whether the SOE involved was independent of the State: (i) the involvement of the State in decisions concerning commercial activities, either directly or indirectly (e.g. through the nomination of a majority of board members); (ii) the existence of formal or informal relations between SOEs (e.g. through interlocking directorships); (iii) the existence of coordination of the SOEs' activities in the past.

In *Texaco/Norsk Hydro* (1995),<sup>12</sup> one of the first merger decisions involving SOEs, all three categories of criteria were considered. The transaction consisted in the creation of a joint venture by Texaco<sup>13</sup> and Norsk Hydro. The Norwegian State owned 51 per cent of Norsk Hydro and 100 per cent of Statoil, a major player on the markets on which the joint venture would operate. The Commission established for the purpose of conducting the substantive assessment of the transaction that: (i) the Norwegian State was not involved in decisions concerning Norsk Hydro's commercial activities; (ii) there was no formal or informal relation between Norsk Hydro and Statoil pertaining to the Norwegian State's shareholding position in both companies; and (iii) the investigation gave the Commission grounds to believe that the commercial activities of the two companies were not coordinated by means of the intervention of their common shareholder, the Norwegian State. For these reasons, Norsk Hydro was found to be an autonomous entity having independent power of decision from Statoil. Its market position was analysed on a standalone basis in the competitive assessment.

In *Neste/IVO* (1998),<sup>14</sup> the decision was primarily based on the first and the third criteria exposed above, i.e. the involvement in commercial decisions and the existence of coordination. To determine whether it had jurisdiction or whether the merger between Neste and IVO, two Finnish SOEs, could be regarded as an internal restructuring and thus not as a concentration for the purpose of EU merger control, the Commission established that: (i) the operations of both companies were conducted independently by the respective managements; (ii) the State exercised its ownership control only in questions relating to its shareholding;<sup>15</sup> and (iii) there was no indication that the commercial conduct of Neste and IVO had been coordinated in the past. The Commission concluded that Neste and IVO each had independent power of decision.

Several decisions on transactions involving companies active in the financial sector<sup>16</sup> very well illustrate the fact that the absence of sufficient governance provisions or safeguards preventing the State to involve itself in commercial decisions leads to conclude that the State (or the relevant State

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<sup>12</sup> See Case No. COMP/IV/M.511 – *Texaco/Norsk Hydro*, paragraphs 4, 26.

<sup>13</sup> The entity mentioned was Texaco a/s, a Danish company belonging to Texaco Inc.

<sup>14</sup> See Case No. COMP/IV/M.931 – *Neste/IVO*, paragraphs 7–10.

<sup>15</sup> Such as sales of shares and listings.

<sup>16</sup> See Case No. COMP/M.5508 – *SoFFin/Hypo Real Estate*, Case No. COMP/ M.5861 – *Republic of Austria/Hypo Group Alpe Adria*, Case No. COMP/ M.6812 – *SFPI/Dexia*.

entity) does, or can in the future, exercise decisive influence over the SOE involved. These decisions also have in common that they concern the acquisition of control by EEA States or public agencies. These decisions thus imply for the company involved a change of status from privately owned to State-owned enterprise, while previous decisions involved companies which already had an SOE status. The analysis of the existence of past coordination for the company concerned was thus not possible in this case.

In *SoFFin/Hypo Real Estate* (2009),<sup>17</sup> in the wake of the financial crisis the State vehicle SoFFin acquired shares in Hypo Real Estate, a German financial institution, thus acquiring *de facto* control over Hypo Real Estate. The Commission considered that (i) the State would exercise decisive influence over the company were the acquisition to take place, as it could not find any holding arrangement, special provisions or other safeguards that would ensure Hypo Real Estate to take independent decisions relating to its strategy, business plan and budget; (ii) SoFFin was subject to legal and substantive supervision by the German Federal Ministry of Finance ('the Ministry'), as the Ministry was allowed under German law to take decisions in general or in individual cases instead of SoFFin, and therefore to substitute SoFFin in the decision-making, and to give instructions to SoFFin; (iii) Kreditanstalt für Wiederaufbau ('KfW') was also included in the economic unit, despite the fact that the parties argued that SoFFin's and KfW's activities were managed by different departments within the Ministry: this is because the Ministry supervised KfW, the amendments to KfW's by-laws had to be approved by the Ministry, the German Federal Government ('the German Government') guaranteed KfW's liabilities and could assign certain activities (e.g. securities dealing) to KfW, and finally more than half of the members of the supervisory board, that generally takes its decision by a simple majority, were appointed by the German Government. The Commission included KfW turnover and concluded that the transaction had EU dimension, but left open whether the appropriate economic unit with independent power of decision was at the level of the Ministry or at a higher level such as the German Government.

In *Republic of Austria/Hypo Group Alpe Adria* (2010),<sup>18</sup> the Austrian Federal Ministry of Finance ('the Ministry') acquired sole control over the banking group Hypo Group Alpe Adria ('HGAA'). As there were no provisions or other safeguards ensuring independent power of decision for HGAA with respect to its strategy, budget, or business plan, the Commission concluded that HGAA would no longer constitute an autonomous economic entity and that the transaction constituted a concentration within the meaning of the EUMR. Given that the Ministry had previously acquired control over another bank, namely Kommunalkredit Austria AG ('KA'), the Ministry could be considered to control both HGAA and KA. Since aggregating the turnovers of the Parties was sufficient for determining jurisdiction, the Commission did not make any conclusion on the question of which entity, among the Ministry, the Austrian government or the Austrian Republic, was the ultimate controlling entity.

In *SFPI/Dexia* (2013),<sup>19</sup> Dexia, after having faced severe financial problems as a consequence of the financial crisis, launched a capital increase, to which the Belgian State (through the investment company SFPI/ FPIM<sup>20</sup>) subscribed. To determine whether this recapitalisation constituted a concentration notifiable under the EUMR, the Commission had to assess whether Dexia would still constitute an economic unit with independent power of decision after the transaction. Were this not the case, the transaction would have been considered as giving rise to an acquisition of control. The Commission found that no holding arrangement, special provisions or other safeguards suggested that the strategy, business plan or budget of Dexia would be decided autonomously further to the transaction, or that Dexia would have its own management. Consequently, the Commission found that it could not be excluded that, following the transaction, Dexia's commercial conduct would fall under the same centre of decision-making as that of other entities controlled by the Belgian State or by SFPI/FPIM, in particular the banking company Belfius. For the purpose of the decision, it was

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<sup>17</sup> See Case No. COMP/M.5508 – *SoFFin/Hypo Real Estate*, paragraphs 5–25.

<sup>18</sup> See Case No. COMP/M.5861 – *Republic of Austria/Hypo Group Alpe Adria*, paragraphs 4–10.

<sup>19</sup> See Case No. COMP/M.6812 – *SFPI/Dexia*, paragraphs 10–21.

<sup>20</sup> 'SFPI/FPIM' stands for 'Société Fédérale de Participations et d'Investissement/Federale Participatie- en Investeringsmaatschappij'.

sufficient to consider the turnover of SFPI/FPIM (which includes that of Belfius). The question of which entity was the ultimate controlling entity above SFPI/FPIM (if any) was therefore left open.

In EDF/Segebel (2009),<sup>21</sup> as EDF was already an SOE contrary to the three banking companies involved in the cases discussed above, the Commission could base its analysis on past evidence and considered the three categories of criteria mentioned above (involvement of State in commercial decisions, relations between SOEs, coordination of SOEs in the past). The Commission concluded that two companies in which the French State had a shareholding (EDF and GDF Suez) had independent power of decision, in light of the evidence found on their independence vis-à-vis one another. The decision assessed the proposed acquisition of the Belgian company Segebel by the French company EDF (both active in the energy sector). The Belgian competition authority argued that there was a risk that EDF and the utility company GDF Suez would coordinate their activities, because the investment vehicle used by the French State, the Agence des Participations de l'Etat ('APE'), had shareholding positions in both companies. The Commission based its reasoning on the following arguments: (i) EDF had in the past expressed concerns about the merger between GDF and Suez; (ii) EDF had ambitious plans for expansion which would affect GDF Suez in particular; (iii) there were no interlocking directorships and the directors were bound by the confidentiality and independence requirements applicable to listed companies;<sup>22</sup> and (iv) EDF was able to draw up its business plans independently from those of GDF Suez and in accordance with its own commercial interests.<sup>23</sup>

Overall, several types of evidence were used to demonstrate whether an SOE can be considered as independent and which other SOEs can be part of the same single economic unit. Elements constituting the body of evidence supporting or dismissing independence are first the involvement of the State in decisions concerning commercial activities, or its ability to influence such activities. To analyse this, the presence of specific holding arrangements, governance provisions and other safeguards ensuring that the entity retains its independent power of decision regarding its strategy, business plan and budget was taken into account. To the contrary, the legal ability of the State to take decisions for the SOE, the State's right to give instructions to the SOE, its powers of supervision, the possibility of approving the amendment of the SOE's by-laws, its power of guaranteeing liabilities of the SOE, its ability of appointing board members so as to have the majority of voting rights, etc. supported the absence of independence. Additionally, other elements indicated control by the State, such as the existence of formal or informal relations between SOEs, in particular through interlocking directorships.

While the ability of the State to coordinate SOEs was the key element considered in past cases for assessing the independence of SOEs, some decisions also reviewed the past relationship between two SOEs controlled by the same State entity. The question in such cases was whether the two SOEs' operative matters were run independently, by separate management, and whether the State only exercised its ownership control in questions relating to the shareholding of the State.<sup>24</sup> In some decisions the Commission's investigation showed that the SOEs' commercial activities had not been subject to coordination in the past. This was however often mentioned in addition to other elements, as part of the body of evidence available.

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<sup>21</sup> See Case No. COMP/M.5549 – *EDF/Segebel*, paragraphs 172–181 (Art. 9 (3) decision) and paragraphs 89–99 (Art. 6(1)(b) decision).

<sup>22</sup> See Case No. COMP/M.5549 – *EDF/Segebel*, paragraph 96 and footnote 77: '*They follow the governance principles applicable to listed companies, as described in the guidelines published on 17 December 2003, entitled 'Enforcement of the Financial Security Act with regard to the chairman's report on internal control procedures established by the company' by the Association Française des Entreprises Privées ('AFEP') and the Mouvement des Entreprises de France ('MEDEF').*'

<sup>23</sup> Although the Commission conducted this analysis as part of the assessment of coordinated effects, and not under the EUMR provisions on independence of SOEs, the assessment of both the relationship between the two SOEs, and the relationship between the SOEs and the State entity they are ultimately owned by, provides a useful illustration of the type of evidence that is considered adequate to demonstrate independence.

<sup>24</sup> See in particular Case No. COMP/IV/M.511 – *Texaco/Norsk Hydro*, Case No. COMP/M.931 – *Neste/IVO* and Case No. COMP/M.5549 – *EDF/Segebel*.

## II. Challenges raised by non-EEA SOEs when analysing their independence for the purpose of establishing EU jurisdiction

### A. Gathering relevant evidence and understanding foreign legal and economic systems

The Commission has had to analyse an increased number of concentrations involving non-EEA SOEs as of 2011. These cases primarily concerned Chinese SOEs, but the Commission also reviewed in 2013 a transaction involving Russian SOEs (Rosneft/TNK-BP).<sup>25</sup>

Non-EEA SOEs raise specific challenges when it comes to analysing their independence from the State. This primarily stems from the scarcity of the information and the difficulty to verify information received by the parties to the transaction. It indeed requires interpreting foreign law, understanding the governance structure and apprehending the extent and forms of potential links between SOEs.<sup>26</sup> Third parties are usually very useful sources of information for the substantive assessment of a merger and can provide informative elements concerning jurisdictional matters (customers and competitors in particular, but also economic institutions such as OECD, foreign law experts, etc.). When jurisdictional issues involve governance issues and turnover data however, other sources of information, in particular the parties to the transaction, appear to be more central for the assessment of such issues. In particular, it is not possible to notify at EU level without the information required to define the boundaries of the single economic unit, as a matter of completeness of the notification. Such information can only be provided by the parties to the transaction.<sup>27</sup>

Chinese SOEs in particular, which have been involved in a number of Commission reviews, are typically managed and supervised by State Owned Assets and Supervision and Administration Commissions ('SASACs'). SASACs are special commissions or agencies within the government of the People's Republic of China's ('PRC') that are responsible for supervising, maintaining and strengthening the value of China's SOEs.<sup>28</sup> Two levels can be distinguished: the central level, where Central SASAC is responsible for supervising 106 central SOEs;<sup>29</sup> and the local level, where 32 regional SASACs are responsible for supervising SOEs at provincial level.<sup>30</sup> There are also local SASACs at lower levels of government.<sup>31</sup> A reform of Chinese SOEs is currently under way, and should be implemented by 2020. One of the objectives of this reform is to reduce the number of SOEs active in similar fields through consolidation and restructuring.<sup>32</sup> While the restructuring of Chinese SOEs may lead to there being a smaller number of more efficient companies, it may also create competition issues, including outside China. Whether such consolidations will constitute concentrations or internal restructuring is likely to be an important issue in the coming years.

It is important to understand the exact role of SASACs as well as the various forms of relationships between SOEs at both central and local (regional or municipal) level, in order to determine whether

<sup>25</sup> Case No. COMP/M.6801 – *Rosneft/TNK-BP*.

<sup>26</sup> As an example of scarcity of information in relation to Chinese SOEs, the authors of *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, Stanford Law Review, 2013, page 735, point to the difficulty to have access to the number of employees of Central SASAC which is considered as confidential by the Chinese agency. The difficulty to apprehend the corporate governance rules and the links of SOEs with the political system in China is also identified by the authors of this article on pages 737–743.

<sup>27</sup> Specifically, turnover information from the other SOE(s) subject to coordination is necessary for completeness of the notification (or at least sufficient information on turnover of such SOEs to establish jurisdiction). Similarly, the Commission should always be in a position to verify that the rule requiring that two thirds of turnover is not achieved in one Member State as provided in Article 1(1)(2) and Article 1(1)(3) EUMR is not fulfilled so as to ensure that the transaction has an EU dimension (and thus does not fall under the jurisdiction of the relevant national competition authority).

<sup>28</sup> W. Leutert, *Challenges Ahead in China's Reform of State-Owned Enterprises*, Asia Policy, 2016, page 87.

<sup>29</sup> W. Leutert, *Challenges Ahead in China's Reform of State-Owned Enterprises*, Asia Policy, 2016, page 86.

<sup>30</sup> See Case No. COMP/M.7911 – *CNCE/KM Group*, paragraph 8.

<sup>31</sup> SASACs at regional or lower levels are referred to as local SASACs.

<sup>32</sup> EPRS European Parliamentary Research Service, Briefing: State-owned enterprise (SOE) reforms in China: A decisive role for the market at last?, 2016, page 4.

particular Chinese SOEs can be considered to be independent. First, the rules governing Central SASAC in particular appear to give it the power to influence commercial decision-making within Chinese SOEs it supervises (e.g. the approval of business plans and strategic decisions and the appointment of senior management) and to impose or facilitate coordination between different SOEs.<sup>33</sup> Second, it is important to understand the extent to which companies controlled by Central SASAC can be coordinated with SOEs controlled by local SASACs. The links between Chinese SOEs of different levels indeed appear to have evolved over time, with more or less incentive alignments between companies depending from Central SASAC and companies depending from local SASACs.<sup>34</sup>

In Rosneft/TNK-BP (transaction involving Russian SOEs), it was sufficient to analyse the structure, appointment rules and rights of the Board of Directors. However, the control and influence of States may occur through different means in different countries, depending on the political system and the governance rules applicable to companies. For instance, as far as China is concerned, the importance of the public sector and of the Chinese Communist Party ('CCP'), the specificity of the governance rules and the existence of other potential sorts of links than direct shareholding may lead to different forms of control than those usually found in the EEA.<sup>35</sup> For that reason, it is essential to examine foreign systems properly and to avoid hasty analogies with familiar political and corporate governance systems. Some scholars, for example, have pointed to the links existing between the regular corporate management system and the Chinese Communist Party system, and the practice of rotating top managers among firms in the same industry.<sup>36</sup> Others also underline that direct application of EU governance rules to Chinese companies will lead to wrong conclusions: general managers of Chinese companies for example are often assimilated to CEOs, while the Board chair is often the actual decision maker.<sup>37</sup> This also raises the question of how to objectivise the potential influence of a State and assess the evidentiary value of publicly available information in case no or limited information is provided. Some external commentators have therefore called for the single economic unit to be defined by an even wider perimeter than the one set in EDF/CGN/NNB Group of Companies, i.e. beyond SOEs controlled by Central SASAC active in the energy field.

First, it has been argued that all Chinese SOEs' turnovers should be aggregated as one, and not just those active in the energy sector.<sup>38</sup> After all, in principle, Chinese legislation applies the same basic rules to all Chinese SOEs, irrespective of the sectors, which arguably makes possible for the State to coordinate, in theory, all SOEs. Coordination would thus potentially not be limited to the energy sector, but could apply to all SOEs collectively. However, while arguing that the turnover of all SOEs under the supervision of Central SASAC should be aggregated would possibly appropriately reflect the legislative framework, the Commission went forward and gathered evidence of control and of the State's ability to coordinate in practice. It therefore took a holistic approach, and defined the perimeter of the single economic unit only insofar as to say that it includes at least all Chinese SOEs active in the energy sector. This means that the question of whether the turnover of all SOEs should be aggregated for the purpose of determining jurisdiction has, to date, been left open. This was also the approach taken in Rosneft/TNK-BP, where the Commission considered whether all Russian SOEs active in the same sector (i.e. the oil and gas sector) could be considered as forming a single economic unit.

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<sup>33</sup> See for example Case No. COMP/M.7850 – *EDF/CGN/NNB Group of Companies*. For a more extensive explanation of the role of SASAC, see L.-W. Lin and C. J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, Stanford Law Review, 2013, pages 735–746.

<sup>34</sup> See for example the central-local intergroup networks analysed in L.-W. Lin and C. J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, Stanford Law Review, 2013, page 725.

<sup>35</sup> See for example L.-W. Lin and C. J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, Stanford Law Review, 2013, pages 726–732.

<sup>36</sup> See for example the central-local intergroup networks analysed in L.-W. Lin and C. J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, Stanford Law Review, 2013, pages 737 and 745.

<sup>37</sup> See for example F. Jiang and K. A. Kim, *Corporate governance in China: a modern perspective*, Journal of Corporate Finance, 2015, vol. 32, page 209.

<sup>38</sup> A. Riley, *Nuking Misconceptions: Hinkley Point, Chinese SOEs and EU Merger Law*, European Competition Law Review, 2016, page 2.

Aggregating activities of companies operating in unrelated sectors is in any event unlikely to be decisive in most cases.

Second, some commentators have even argued that the Commission could have gone further than explored above, and could in addition have taken into account the turnover of privately-owned companies. They refer to scholars which consider that ‘*in the context of Chinese state capitalism, private ownership does not mean autonomy from the state*’ because of ‘*formal membership of top management in party-state organs, large government subsidies, and extralegal control by the state*’.<sup>39</sup> In addition, some Chinese firms appear to actually be mixed-ownership entities, in which the ownership and management is shared between the State and private shareholders.<sup>40</sup> As a consequence, it is argued that, although not under the supervision of any SASAC, some privately-owned companies may nonetheless be controlled or at least significantly influenced by the Chinese government. The authors of the present article have not themselves examined the relationship between privately-owned enterprises and the Chinese State (either through the CCP or through other bodies), and are therefore not in a position to comment on this point.

Gathering relevant evidence to assess independence of non-EEA SOEs – which were mostly Chinese SOEs – interpreting foreign law in light of the EUMR and understanding the formal and informal rules of corporate governance has therefore proved a challenge. While for some time there was no need for the Commission to take firm conclusions in relation to the status of non-EEA SOEs, it may not be the case in the future.

#### *B. Past practice left open the scope of the single economic unit formed by non-EEA SOEs*

In light of the difficulties raised by non-EEA SOEs and the fact that the prevailing rules have primarily been designed on account of the existence of EEA SOEs, it would be legitimate to ask whether the criteria developed through decisional practice could be equally effectively applied to SOEs established outside the EEA. Most of the precedents regarding non-EEA SOEs left the question of independence open. Only in Rosneft/TNK-BP decision<sup>41</sup> and more recently in EDF/CGN/NNB Group of Companies decision,<sup>42</sup> the Commission addressed the issue of independence of non-EEA SOEs. It however partially conclude on the independence of Russian and Chinese companies, as it considered that the SOE involved was not independent from the State, but did not concluded on the exact scope of the relevant single economic unit. The analysis of these two decisions also demonstrate that, despite the fact that different evidence may have been considered in each decision depending on each individual situation, structure of governance, applicable legislation, etc., the same rules have been applied to all SOEs irrespective of their nationality.

Indeed, in Rosneft/TNK-BP (2013),<sup>43</sup> the Commission considered two categories of criteria used in past decisions involving EEA companies, i.e. whether the State had the ability to influence and even influenced in practice Rosneft’s commercial decisions, and whether there were formal or informal relations between SOEs. The Commission had to decide whether Rosneft and a number of other Russian SOEs active in the oil and gas sector, namely Gazprom, Zarubezhneft and Transneft, constituted a single economic unit. In making its assessment, the Commission considered the following facts: (i) the Russian Federation (through Rosneftegaz) represented more than the majority at Rosneft’s shareholders meetings; (ii) there were interlocking directorships as members of the Board of Directors of Rosneft were simultaneously members of the Board of other Russian SOEs, some of which were active in the oil and gas industry; (iii) in some important matters, board members were

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<sup>39</sup> N. Petit, *Chinese State capitalism and Western Antitrust Policy*, 2016, page 15, also available on SSRN at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2798162](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2798162), page 5. Curtis J. Milhaupt and Wentong Zheng, *Beyond Ownership: State Capitalism and the Chinese Firm*, The Georgetown Law Journal, Vol. 103:665, pages 683–684.

<sup>40</sup> W. Leutert, *Challenges Ahead in China’s Reform of State-Owned Enterprises*, Asia Policy, 2016, pages 95–96.

<sup>41</sup> See Case No. COMP/M.6801 – *Rosneft/TNK-BP*.

<sup>42</sup> See Case No. COMP/M.7850 – *EDF/CGN/NNB Group of Companies*.

<sup>43</sup> See Case No. COMP/M.6801 – *Rosneft/TNK-BP*, paragraphs 7–9.

required to vote in accordance with directives issued by the Russian government; and (iv) the Russian State (through Rosneftegaz) was able to influence strategic business decisions. The Commission nevertheless concluded that there was no need to decide on how to calculate the relevant turnover, as the parties' turnover alone met the thresholds determining whether the EU had competence.

In all other publically available cases – which all concerned Chinese SOEs – the Commission left the question of the independence of non-EEA SOEs open, except the recent EDF/CGN/NNB Group of Companies decision (which will be analysed in more details in the Section II. C. below). This is firstly because when calculating turnover to determine jurisdiction, the company generally met the thresholds alone; secondly, for the competitive assessment, the transaction did not in any case give rise to any substantive competition issues. This was the case in *Petrochina/Ineos/JV* (2011),<sup>44</sup> in *China National Bluestar/Elkem* (2011)<sup>45</sup> and *CNRC/Pirelli* (2015)<sup>46</sup> where the question of independence was raised: several scenarios were considered (e.g. considering the SOE involved as independent, all SOEs under Central SASAC as part of the same group, or all SOEs under both Central and local SASACs as part of the same group) but no conclusion was brought, in the absence of any jurisdictional or competition issues under any of the considered scenarios.

In *DSM/Sinochem/JV* (2011),<sup>47</sup> the Commission elaborated more on its reasoning. The transaction concerned the creation of a joint venture between the Dutch company DSM<sup>48</sup> and the Chinese SOE Sinochem for the production of certain pharmaceutical products. On this occasion, the Commission mentioned that the '*legislation and the associated information*' suggested that Central SASAC had certain powers to involve itself in Sinochem's commercial behaviour in a strategic manner. It had, among others, the right to approve mergers or strategic investment decisions. Moreover, the Commission referred to external sources such as OECD reports and academic sources<sup>49</sup> which suggested that commercial decisions taken by SOEs could be influenced by the Chinese State, both through formal channels such as Central SASAC, and through less formal channels. In addition, the decision mentions that Sinochem and Central SASAC's own official statements provided certain indications to this effect.<sup>50</sup> In the end, and as in other precedents, the question was left open as the parties alone already achieved the turnover required to establish jurisdiction.

In addition to the cases mentioned above, there have also been a certain number of simplified cases, for which the Commission's reasoning is not public, related to Chinese acquisitions.<sup>51</sup>

### *C. Recent development in energy field with decision EDF/CGN/NNB Group of Companies*

The EDF/CGN/NNB Group of Companies decision is the first public decision of the Commission which concludes on the lack of independence of a Chinese SOE. The transaction related to the

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<sup>44</sup> See Case No. COMP/M.6151 – *Petrochina/Ineos/JV*, paragraphs 30–32, where three newly created joint ventures were to be jointly controlled by Ineos, a European petrochemical manufacturing company, and Petrochina, a subsidiary of CNPC group, a Chinese SOE active in the petroleum and gas industries.

<sup>45</sup> See Case No. COMP/M.6082 – *China National Bluestar/Elkem*, paragraphs 5–35, where the transaction concerned the acquisition of the Norwegian silicon metal producer Elkem by Bluestar, part of ChemChina, a Chinese SOE reporting to Central SASAC.

<sup>46</sup> See Case No. COMP/M.7643 – *CNRC/Pirelli*, paragraphs 2–3, 6–21. CNRC stands for China National Tyre & Rubber Co. Ltd., where it concerned an acquisition by China National Tyre & Rubber Co. Ltd ('CNRC'), a company wholly owned by the China National Chemical Corporation ('ChemChina'), which is a Chinese SOE reporting to Central SASAC, of the whole of the Italian company Pirelli & C S.p.A. active in the manufacture and distribution of tyres.

<sup>47</sup> See Case No. COMP/M.6113 – *DSM/Sinochem/JV*, paragraphs 5, 8–16.

<sup>48</sup> DSM stands for 'Koninklijke DSM N.V.'.

<sup>49</sup> For example, OECD, *OECD Reviews of Regulatory Reform: China - defining the boundary between the Market and the State* (2009); B. J. Naughton, *The Chinese economy: Transitions and Growth*, 2007, MIT Press.

<sup>50</sup> For example, Sinochem's Annual Report showed that there is at least a very close cooperation between Sinochem and the Chinese Government.

<sup>51</sup> See for example Cases No. COMP/M.6715 – *CNOOC/Nexen*; COMP/M.7405 – *Yanfeng/JCI Interiors Business* and COMP/M.8170 – *ChemChina/Adama*.

acquisition of joint control over NNB Companies<sup>52</sup> by Electricité de France S.A. ('EDF') and China General Nuclear Power Corporation ('CGN'). CGN, owned for 90 per cent by Central SASAC, is one of the main Chinese SOEs active in the energy sector, and has a specific focus on the nuclear industry. As CGN's turnover did not meet the EU thresholds on its own, it was in this case necessary for the Commission to establish the perimeter of the relevant economic unit in order to determine whether or not the transaction had an EU dimension, i.e. whether or not it was notifiable.

### 1. Applicable legislative texts and Central SASAC prerogatives

In order to identify the economic unit to be considered for jurisdictional purposes, the Commission needed to clarify the nature of CGN's relationship with Central SASAC, and assess whether it could be considered to have independent power of decision.<sup>53</sup>

In accordance with the relevant criteria, the Commission evaluated *inter alia* the Chinese legislation relevant to the matter, and concluded that the provision specifying the separation of government bodies and enterprises and the non-intervention in business operations was not sufficient to ensure independence.<sup>54</sup> The wording itself was very general, while at the same time a number of provisions contained in Chinese law on SOEs and the Interim Measures on Supervision<sup>55</sup> supported the view that Central SASAC exercises an influence on CGN's major decisions relating, for example, to its strategy, its business plan and its budget.<sup>56</sup>

In reaching this conclusion, the Commission highlighted a number of provisions contained in the Chinese legislation, notably those stipulating that: (i) Central SASAC appoints CGN's senior management;<sup>57</sup> (ii) Central SASAC conducts '*annual and office term assessments of the enterprise managers appointed by it, and decides the rewards and punishments to the enterprise managers according to the assessment results*'<sup>58</sup> and (iii) the functions performed by Central SASAC relate to '*large-sized State-invested enterprises that have bearings on the national economic lifeline and State security determined by the State Council and the State-invested enterprises in such fields as important infrastructures and natural resources*'<sup>59</sup>, which the energy sector can be considered to belong to.

Moreover, the Interim Measures on Supervision provided that (i) SOEs that report to Central SASAC must '*submit their annual investment plan*' to Central SASAC;<sup>60</sup> (ii) if an enterprise '*superadds any project beyond the annual investment plans, it shall report the relevant information to the SASAC in time*'; (iii) Central SASAC must '*implement the administration*' of the enterprise's investment

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<sup>52</sup> NNB Companies consists of three holding companies (HPC Holding, SZC Holding and BRB Holding), incorporated for the purposes of investing into the three JVs responsible for the construction and operation of three newly built nuclear power plants respectively at Hinkley Point, Sizewell and Bradwell.

<sup>53</sup> See Case No. COMP/M.7850 – EDF/CGN/NNB Group of Companies, paragraphs 29–50.

<sup>54</sup> Article 6 of the Law of the People's Republic of China on the State-Owned Assets of Enterprises of 2008 ('PRC law on SOEs'); see Case No. COMP/ M.7850 – EDF/CGN/NNB Group of Companies, paragraphs 30, 37–38, 42.

<sup>55</sup> Interim Measures for the Supervision and Management of State-owned Assets of Enterprises of 27 May 2003 ('Interim Measures on Supervision').

<sup>56</sup> See Case No. COMP/M.7850 – EDF/CGN/NNB Group of Companies, paragraphs 37–42.

<sup>57</sup> Article 22 of the PRC law on SOEs, see Case No. COMP/M.7850 – EDF/CGN/NNB Group of Companies, paragraph 38: '*appoint[s] and remove[s] the president, vice-presidents, person in charge of finance and other senior managers [...] the chairman and vice-chairmen of the board of directors, directors, chairman of the board of supervisors, and supervisors of a wholly state-owned company*' and '*propose[s] the director and supervisor candidates to the shareholders' meeting*'.

<sup>58</sup> Article 27 of the PRC law on SOEs, see Case No. COMP/M.7850 – EDF/ CGN/NNB Group of Companies, paragraph 38.

<sup>59</sup> Article 4 of the PRC law on SOEs, see Case No. COMP/M.7850 – EDF/CGN/NNB Group of Companies, paragraph 38.

<sup>60</sup> Article 8 of the Interim Measures on Supervision, see Case No. COMP/M.7850 – EDF/CGN/NNB Group of Companies, paragraph 39.

activity;<sup>61</sup> and (iv) Central SASAC must ‘*supervise and administrate the investment activities of these enterprises, and guide them to establish and improve the procedures of investment decision-making and management systems*’.<sup>62</sup>

In addition, Chinese law provides that ‘*a body performing the contributor’s functions on behalf of [Central SASAC] shall enjoy the return on assets, participation in major decision-making, selection of managers and other contributors’ rights*’.<sup>63</sup> This provision undermines, and potentially even contradicts, the argument made by the parties on the basis of the supposed non-intervention of the State in business operations.

Furthermore, the information available on Central SASAC’s website included a number of provisions that could be interpreted as suggesting that it did, in practice, have certain powers that allowed it to influence SOEs’ commercial behaviour in a strategic manner, including the right to approve mergers or strategic investment decisions.<sup>64</sup>

Finally, Chinese law provides that the State has to 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*’.<sup>65</sup> CGN is active in the energy sector (both nuclear and renewable energies), which is an important industry that plays a role in determining the national economic lifeline and in ensuring State security.

Overall, although strategic decisions were prepared by CGN’s management, Central SASAC nonetheless could exercise a decisive influence on CGN’s major commercial decisions.

## 2. Evidence of influence in practice

Beyond the influence that the Chinese State could exercise on CGN on the basis of legal applicable texts and Central SASAC’s prerogatives, a number of other factors further showed that the Chinese State, via Central SASAC, had the power to influence SOEs and in practice influenced companies active in the energy industry and the nuclear industry in particular. In January 2014, a number of Chinese SOEs active in the nuclear industry formed the China Nuclear Industry Alliance.<sup>66</sup> According to the World Nuclear Association,<sup>67</sup> the creation of the China Nuclear Industry Alliance was ‘*directed by the [Chinese] government to achieve some synergy*’ and was ‘*designed to eliminate detrimental or unseemly competition in export markets*’.<sup>68</sup> The Chinese State’s role in coordinating the behaviour of SOEs demonstrates the power it can exercise over their decisions.

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<sup>61</sup> Article 10 of the Interim Measures on Supervision (2003), see Case No. COMP/M.7850 – EDF/CGN/NNB Group of Companies, paragraph 39.

<sup>62</sup> Article 4 of the Interim Measures on Supervision, see Case No. COMP/M.7850 – EDF/CGN/NNB Group of Companies, paragraph 39.

<sup>63</sup> Article 12 of the PRC law on SOEs, see Case No. COMP/M.7850 – EDF/CGN/NNB Group of Companies, paragraph 40.

<sup>64</sup> See Case No. COMP/M.7850 – EDF/CGN/NNB Group of Companies, paragraph 41 and footnote 32. See also Case No. COMP/M.6113 – DSM/Sinochem/JV, paragraph 15.

<sup>65</sup> Article 7 of the PRC law on SOEs, see Case No. COMP/M.7850 – EDF/CGN/NNB Group of Companies, paragraph 43.

<sup>66</sup> See Case No. COMP/M.7850 – EDF/CGN/NNB Group of Companies, paragraph 44.

<sup>67</sup> The World Nuclear Association is the international organisation that promotes nuclear energy. It counts as members a large number of nuclear players (including EDF, CGN’s subsidiaries and CNNC), see Case No. COMP/M.7850 – EDF/CGN/NNB Group of Companies, footnote 34.

<sup>68</sup> World Nuclear Association website, Nuclear power in China, Appendix 1: Government Structure and Ownership, <http://www.world-nuclear.org/information-library/country-profiles/countries-a-f/appendices/nuclear-power-in-china-appendix-1-government-struct.aspx> (Accessed on 9 October 2016); see Case No. COMP/M.7850 – EDF/CGN/NNB Group of Companies, footnote 35.

Additional information on the procurement strategy contained in the Term Sheet for Industrial Cooperation Agreement between EDF and CGN also supported the view that Central SASAC can impose or facilitate coordination between SOEs.<sup>69</sup>

Moreover, with regard to the SOEs active in the nuclear industry in particular, CGN and China National Nuclear Cooperation ('CNNC'), another Chinese SOE controlled by Central SASAC, had signed an agreement in 2015, in which they committed to creating a joint venture for the continued development and marketing in China and abroad of the Hualong One technology, which they had developed together.<sup>70,71</sup> This additional element of cooperation between two SOEs active in the same markets (horizontal overlaps) reinforced the overall body of evidence that CGN was not independent from other SOEs.

The above elements further pointed to the fact that CGN did not have independent power of decision and that Central SASAC was able to coordinate the actions of at least CGN and its sister SOEs active in the nuclear industry.

Alongside their activity in the nuclear sector, the same Chinese SOEs were active and had, in parallel, been making acquisitions and investments in other energy sectors.<sup>72</sup> The ability of the SOEs to coordinate their actions via the China Nuclear Industry Alliance, or to be subject to coordination by Central SASAC, could extend beyond the nuclear sector alone, to the energy sector more generally. There appears to be no reason to have considered that Central SASAC could only coordinate these companies in relation to their activities in the nuclear sector.

Whether SOEs beyond companies in the energy sector are independent from Central SASAC was however left open.

### 3. A body of evidence demonstrating the lack of independence

The above arguments together formed a body of evidence demonstrating that Central SASAC could impose or facilitate coordination between SOEs at least in the energy industry. CGN and other Chinese SOEs in that industry could not, therefore, be deemed to have powers of decision such as to be independent from Central SASAC. Consequently, the turnover to be considered was the turnover of all companies controlled by Central SASAC that are active in the energy sector.

This decision illustrates the test to be applied to SOEs in general, for the purpose of determining jurisdiction, and will facilitate the assessment of future transactions involving Chinese SOEs. It also shows that there is no general presumption of dependence or independence for Chinese SOEs, as the question of independence beyond the energy sector was left open. The analysis of this decision also shows that the same criteria were applied in this case as in other cases involving EEA and non-EEA SOEs, i.e. (i) the involvement of the State in decisions concerning commercial activities, either directly or indirectly; (ii) the existence of formal or informal relations between SOEs and (iii) the existence of coordination of the SOEs' activities in the past.

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<sup>69</sup> See Case No. COMP/M.7850 – *EDF/CGN/NNB Group of Companies*, paragraph 45.

<sup>70</sup> Bloomberg, *China's CGN, CNNC Establish Hualong Nuclear Power Joint Venture*, <https://www.bloomberg.com/news/articles/2016-03-17/china-s-cgn-cnnc-establish-hualong-nuclear-power-joint-venture> accessed 20 September 2016.

<sup>71</sup> World Nuclear News website, *Chinese firms joint forces to market Hualong One abroad*, 2015 (accessed on 9 October 2016 on <http://www.world-nuclear-news.org/C-Chinese-firms-join-forces-to-market-Hualong-One-abroad-31121502.html>); see Case COMP/M.7850 – *EDF/CGN/NNB Group of Companies*, footnote 37.

<sup>72</sup> For an example of CGN's investment in solar energy in France (EUR 1 billion investment), see Reuters article, *China's CGN to invest 1 billion euros in French solar project*, 2015 (accessed on 9 October 2016 on <http://uk.reuters.com/article/us-france-solar-china-cgn-idUKKBN0TS2FY20151209>); for an example of CGN's investment in UK wind farms, see Reuters article, *China's CGN to buy three small UK wind farms from EDF*, 2014, accessed 9 October 2016 on <http://uk.reuters.com/article/us-edf-britain-chinawindfarm-idUSKBN0JT10020141215>).

### III. Implications for substantive assessment of competition cases

#### *A. Independence of SOEs is essential for competitive assessment*

Previous Commission decisions mainly focused on the independence of SOEs for jurisdictional purposes. However, the boundaries of the economic unit determined at the stage of establishing jurisdiction have a significant influence on the substantive part of Commission decisions, i.e. the competitive assessment. Indeed, should an SOE be considered as forming a group with other SOEs, that SOE would at first glance be expected to be considered as being part of the same economic unit for the competitive assessment. Beyond merger control, the issue can also be crucial when it comes to conducting the substantive assessment of a competitive case irrespective of the instrument (concentration, State aid, conduct of companies). In addition, the question of the independence of SOEs in the context of the competitive assessment is common to both the Commission and other competition authorities in the world.

#### 1. Importance of the issue of independence in substantive assessment

First of all, in case of a concentration, whether an SOE is considered independent or not from other SOEs can lead to completely different outcomes. In case of independence, only its own activities would be taken into account, in principle. In the opposite situation, the activities of the other SOEs forming part of the same economic unit would be added; this may lead to very different market positions and the transaction may as a consequence raise competition issues. Therefore, for the purposes of the competitive assessment, it may not be possible to ultimately leave the question of independence open, even in cases where it is not decisive to establish jurisdiction.

The Commission may also have to conclude on the independence of SOEs in remedied competition cases involving an SOE. Should an SOE be a potential acquirer of a business divested in order to remedy competition issues raised by a transaction, an anticompetitive behaviour or a State aid, the question of its independence with other SOEs will be crucial. This issue would be faced, for instance, where the business divested by an SOE is to be acquired by another SOE controlled by the same State. Depending on whether these two SOEs have or do not have an independent power of decision, the purchaser could then either be suitable or not.

Furthermore, SOEs that are considered today as lacking independence could tomorrow find it difficult to argue that they actually compete and hence that one of them could be a suitable purchaser for the divested business of the other. This necessary coherence should also not be forgotten by companies when they submit evidence in other transactions subject to merger control review. For instance, in EDF/Segebel, evidence submitted in the course of the investigation during Gaz De France/Suez (2006)<sup>73</sup> subsequently supported the independence of EDF and GDF Suez.<sup>74</sup>

#### 2. Implications of conclusion on independence in one instrument on substantive assessment in other instruments

Likewise, conclusions on the independence of an SOE in one competition law instrument may have implications on other instruments. As highlighted in a number of articles on SOEs,<sup>75</sup> if individual SOEs were to be found dependent of the State and thus be part of a single economic unit together with

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<sup>73</sup> See Case No. COMP/M.4180 – *Gaz de France/Suez*.

<sup>74</sup> See Case No. COMP/M.5549 – *EDF/Segebel*, paragraph 94: ‘*In the market of supply of gas to electricity customers, EDF expressed its concerns that ‘the GDF/Suez merger would [...]’.*’

<sup>75</sup> A. Riley, *Nuking Misconceptions: Hinkley Point, Chinese SOEs and EU Merger Law*, European Competition Law Review, 2016. N. French and N. Dodoo, *EU Antitrust Regulator Widens Its Net to Review Chinese SOE Transactions*, Freshfields Bruckhaus Deringer LLP, 2016, available on [http://knowledge.freshfields.com/en/global/r/1504/eu\\_antitrust\\_regulator\\_widens\\_its\\_net\\_to\\_review\\_chinese](http://knowledge.freshfields.com/en/global/r/1504/eu_antitrust_regulator_widens_its_net_to_review_chinese).

other SOEs, it is possible that EU law prohibiting cartels and other agreements between independent undertakings would not apply.

This single entity-approach might also have consequences with regard to the level of fine applicable. This is a central issue in cartel cases.<sup>76</sup> If a State entity is considered as controlling an SOE, it may be considered as jointly liable for its subsidiary's infringements and the 10 per cent cap on fines then applies to the combined turnover of the State entity and the companies it is considered to control, thus increasing the level of fine imposable. There could also be similar consequences in the case of infringements committed by joint ventures, where the two parent companies can be held jointly liable. In addition, if another SOE that forms part of the same decisional entity has committed infringements in the past, the fines imposed on an SOE could be increased on the grounds of recidivism.

Other authors have, however, argued that the test used when establishing jurisdiction for merger control relies on '*more drastic legal doctrines that minimize the risk of non-notification*'. Accordingly, the standard applied in merger control would differ from the one used when assessing coordination in antitrust proceedings, which by definition relate to past actions.<sup>77</sup>

Moreover, considering certain SOEs as part of the same economic unit may have repercussions on other policy areas, such as the unbundling rules provided for in the Third Energy Package.<sup>78</sup> Should two SOEs active in the energy sector (one as energy producer or supplier, the other as Transmission System Operator) be considered as being part of the same group in the context of a competition case, could they comply with the obligation to keep those activities separate? This question was raised recently by Kathleen Van Brempt, Member of the European Parliament following the conclusion in EDF/CGN/NNB Group of Companies.<sup>79</sup>

Overall, it can be concluded that there are clear commonalities between all competition instruments in relation to the independence of SOEs. In addition, treating a group of SOEs as a single entity would have a number of implications for the compliance of companies with rules on conduct of companies (in particular in relation to the imposition of fines, the liability of parent companies, recidivism and the application of EU law to anticompetitive agreements in general), and with specific sectorial rules.

### *B. Limited practice from the Commission*

Although the question of the independence of SOEs may be key for the substantive assessment of competition cases, the Commission only has a limited practice in this respect, irrespective of the instrument.

Some Commission decisions touch upon the issue of the independence of SOEs and the boundaries of the relevant economic unit when conducting the substantive assessment of a competition case. However, there was generally no need so far to conclude on this point in order to exclude competition concerns in merger cases (such as China National Bluestar/Elkem,<sup>80</sup> DSM/Sinochem/JV,<sup>81</sup> Petrochina/Ineos/JV,<sup>82</sup> CNRC/Pirelli,<sup>83</sup> EDF/CGN/NNB Group of Companies,<sup>84</sup> SoFFin/Hypo Real

<sup>76</sup> This might also be an important issue in merger cases, e.g. in case misleading information are provided to requests for information of the Commission or in case of gun-jumping.

<sup>77</sup> N. Petit, *Chinese State capitalism and Western Antitrust Policy*, 2016, page 15, also available on SSRN at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2798162](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2798162).

<sup>78</sup> Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC.

<sup>79</sup> Question for written answer to the Commission, Rule 130, Kathleen Van Brempt (S&D), 21 September 2016, P-007014–16. See also answer given by Mr Arias Cañete on behalf of the Commission, of 21 October 2016, which indicates that national regulatory authorities have to assess on a case-by-case basis whether the respective public bodies of a given Member State or third country fulfill the requirements of Article 9(6) of Directive 2009/72/EC and that this approach is applicable also to a participation of China in transmission system operators active in the EU.

<sup>80</sup> See Case No. COMP/M. 6082 – *China National Bluestar/Elkem*, paragraphs 17–32.

<sup>81</sup> See Case No. COMP/M.6113 – *DSM/Sinochem/JV*, paragraphs 24–35.

<sup>82</sup> See Case No. COMP/M.6151 – *Petrochina/Ineos/JV*, paragraphs 31.

<sup>83</sup> See Case No. COMP/M.7643 – *CNRC/Pirelli*, paragraphs 8–21.

Estate,<sup>85</sup> Rosneft/TNK-BP<sup>86</sup>). To date, all the cases seen in the Commission's decisional practice have been such that no competition concerns arose even under a worst case scenario, which would usually mean considering as one economic unit all SOEs under the control of the same State and active in the same or in vertically-related markets.

The current practice is, accordingly, to analyse all relevant scenarios. However, with the likely increase of notifications involving Chinese SOEs, cases would be expected to arise where the conclusion on this point will be decisive for the outcome of the assessment, thus requiring to close the issue.

Beyond merger control, the Commission analysed the independence of SOEs in two decisions relating to the energy sector: a case concerning the development of two new nuclear reactors in Hungary, in which the Commission opened proceedings in response to the possible granting of State aid,<sup>87</sup> and an abuse of dominance case involving Ente Nazionale Idrocarburi ('ENI'), which is active on the market for the transport of gas to Italy and on the gas supply market in Italy.<sup>88</sup>

The first case concerned possible State aid granted by the Hungarian State to the Paks nuclear power station.<sup>89</sup> The project in question involved an intergovernmental agreement between the Russian Federation and Hungary aiming to ensure the maintenance and further development of the existing Paks nuclear power plant ('NPP') in Hungary. Under the terms of the agreement, both Russia and Hungary were required to designate an experienced State-owned and State-controlled organisation as contractor/owner of the project. Hungary appointed MVM Paks II Nuclear Power Plant Development Private Company Limited by Shares ('Paks II') to own and operate the two new power units. Hungary also committed to directly finance the investment made by Paks II in the design, construction and commissioning of these two power units. According to Hungary, the project was of economic nature and the funding was made in accordance with EU State aid rules.<sup>90</sup>

On this occasion, the Commission preliminarily concluded that the financing of the project could be considered to be State aid and could distort competition on the Hungarian market.<sup>91</sup> The Commission expressed the opinion that the distortive impact could be even greater if the operators of Paks I (i.e. the existing Paks power units) and Paks II were not held under entirely separate ownership, and were not independent and unconnected within the meaning of competition rules. It is interesting to note that the Commission followed the same independence test as the one adopted in merger control and referred to its decision on the acquisition of the Belgian energy operator Segebel by the French company EDF.<sup>92</sup>

In the second case referred to above, in the area of antitrust, ENI, a company controlled by the Italian State, committed to divest its shareholdings in companies active in international gas transmission pipelines (TENP, Transitgas and TAG<sup>93</sup>) to purchasers independent of and unconnected to ENI. The

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<sup>84</sup> See Case No. COMP/M.7850 – *EDF/CGN/NNB Group of Companies*, footnote 43.

<sup>85</sup> See Case No. COMP/M.5508 – *SoFFin/Hypo real Estate*.

<sup>86</sup> See Case No. COMP/M.6801 – *Rosneft/TNK-BP*.

<sup>87</sup> Case No. COMP/SA.38454 – *Hungary – Possible aid to the Paks nuclear power station* [2015].

<sup>88</sup> Case No. COMP/39315 – *ENI* [2010].

<sup>89</sup> Case No. COMP/ SA.38454 – *Hungary – Possible aid to the Paks nuclear power station*.

<sup>90</sup> State aid is defined as State support to a public or private company which confers a selective advantage to the beneficiary. It is prohibited in case it distorts competition and affects trade between Member States, unless government intervention is necessary for a well-functioning and equitable economy.

<sup>91</sup> The Commission has not yet published its final decision, but approved the financial support granted on 6 March 2017 on the basis of commitments made by Hungary to limit distortions of competition. The Commission indicated in its press release that 'To avoid market concentration, Paks II will be functionally and legally separated from the operator of the Paks nuclear power plant (the incumbent MVM Group) and any of its successors or other state-owned energy companies.'

<sup>92</sup> Case No. COMP/M.5549 – *EDF/Segebel* [2009].

<sup>93</sup> Together with the Austrian undertaking OMV, ENI owned and controlled Trans Austria Gasleitung GmbH ('TAG GmbH'), which operated a pipeline (TAG) between Baumgarten near the Austrian/Slovak border and Italy. Together with the German undertaking E.ON Ruhrgas AG ('E.ON'), ENI owned and controlled Trans Europa Naturgas Pipeline GmbH & Co. KG ('TENP KG'), which owned a pipeline (TENP) between the Dutch/Belgian/German border and Wallbach at the German/Swiss border. Gas flowing through the

commitments relating to TAG provided that the pipeline would be divested to a public entity directly or indirectly controlled by the Italian government, which was likely to be Cassa Depositi e Prestiti Spa ('CDP'). CDP is a joint-stock company under the control of the Italian government, via the Ministry of Economy and Finance. As the Italian State had shareholding in both ENI and CDP, the Commission had to analyse whether TAG could be held by CDP without contravening the requirement that TAG's purchaser be independent of and unconnected to ENI.

In its analysis, the Commission made reference to the Jurisdictional Notice on the control of concentrations<sup>94</sup> and came to the conclusion that CDP's organisation and governance was such that this obligation of independence between the two entities could be fulfilled.<sup>95</sup>

#### IV. Conclusion

The Commission has elaborated over time a well-developed decisional practice, based on provisions of the EU Treaties, the EUMR and the Commission Jurisdictional Notice, on how to assess whether SOEs are to be considered independent from the State in their decision-making. The analysis of the Commission precedents clearly shows that a large variety of situations have come to test the solidity of the criteria established in past decisions (acquisitions by an SOE, acquisition of control by a State through the recapitalisation of a bank, creation of joint ventures, etc.). It also brings to light the significant number of these transactions that involved companies active in the energy sector (Russian gas companies, Norwegian oil companies, French and Belgian electricity companies, Chinese companies active in the nuclear sector, etc.).

The Commission developed on this basis a broad set of criteria for the purpose of defining what a 'group' of SOEs means in the context of merger control. While the Commission was confronted with very diverse cases, involving various countries, governance rules and political systems, it has managed to develop a consistent approach. It indeed reviewed each case on the basis of a body of evidence taking into account the specificities of each situation and has been able to conclude on a case-by-case basis whether SOEs were or not independent, while applying the same overarching principle in all cases, i.e. the existence or absence of autonomous decision-making of the SOE. The Commission decisions for example established criteria allowing to demonstrate that two companies which have the same State entity as shareholder can be considered independent (e.g. EDF/Segebel, Texaco/Norsk Hydro) or lacking independence (e.g. SoFFin/Hypo Real Estate, Republic of Austria/Hypo Group Alpe Adria).

The recent case EDF/CGN/NNB Group of companies adds a further string to the Commission's bow: this is the first decision in which the Commission concludes on the question of the independence of the Chinese SOEs concerned. It complements the type of evidence that can be used in future cases, and again demonstrates that a body of evidence specific to the situation at hand should be evaluated.

Considering this decision as well as the precedents of the Commission as a whole, it should not be taken for granted that the transactions between two SOEs belonging to the same State body are necessarily to be viewed as internal restructuring. It will be for the Commission to assess, based on the evidence submitted by the parties and any other evidence available, whether the SOEs can be coordinated or not. Also, more generally, these decisions should all be interpreted as a strong signal on the risks of lacking to provide the necessary information and thus infringing EU notification requirements. Criteria established in Commission precedents can rightfully guide SOEs that are party to transactions in the future to assess which economic unit should be taken into account and whether they pass the EU thresholds. In doubt, and to avoid significant consequences (incompleteness, gun-

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TENP pipeline is further transported to Italy through Switzerland via the Transitgas pipeline, jointly owned and controlled by ENI and the Swiss company Swissgas AG ('Swissgas').

<sup>94</sup> See Case No. COMP/39.315 – *ENI*, footnote 54, which makes a reference to paragraphs 52–53 of the Commission Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentration between undertakings (2008/C 95/01), OJ C 95, 16.04.2008.

<sup>95</sup> Case No. COMP/39315 – *ENI*, paragraphs 96–112.

jumping, etc.), the services of the Commission can always be consulted on a specific point of law or procedure. This provides reassurance and legal certainty to the parties.

Finally, some commentators argue that the Commission could use the test designed to assess the independence of SOEs as a way of ‘extending’ its jurisdiction to cover a transaction that it would not otherwise have been competent to review (i.e. had the jurisdiction been determined on the basis of the turnover of the company alone). However, extending the boundaries of what can constitute a single economic unit to serve this purpose would be a double-edged sword. Indeed, it could lead to the Commission not being able to assess transactions between the SOEs belonging to the same economic unit, as such transactions would then be considered as internal restructuring (unless proven the SOEs are independent). The test of independence should thus exclusively serve to fulfil the objectives described at the beginning of this article, i.e. to determine and clarify whether or not a certain transaction is notifiable under the EUMR, and what entity should be taken into account in the context of the competitive assessment.