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Interview of Alexandr Svetlicinii on his book *Chinese State Owned Enterprises and EU Merger Control (Routledge 2020)*

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His recent book Chinese State Owned Enterprises and EU Merger Control (Routledge 2020) analyzes the specifics of corporate governance of China's State Owned Enterprises (SOEs) and their assessment under EU merger control, which is reflected in the European Commission's screening of the notified economic concentrations. Guided by 'go global' policy and the Belt and Road Initiative, Chinese SOEs have expanded their global presence considerably. Driven by the need to acquire cutting-edge technologies and other industrial policy considerations, Chinese SOEs have engaged in a series of corporate acquisitions in Europe. The book demonstrates the conceptual and regulatory challenges of applying traditional merger assessment tools in cases involving Chinese SOEs due to the specifics in their corporate governance and the regulatory framework under which they operate in China. The author also explores the connection between the challenges experienced by the merger control regimes in the EU and the recent introduction of the EU foreign direct investment screening framework followed by a proposal concerning foreign subsidies.

The detailed reviews of this book were published in Market and Competition Law Review, Concurrences, EU Law Live, EUPLANT Blog, Nordic Journal of European Law, and Chinese Journal of Comparative Law.

1 - How did this book's idea come up?

The idea to explore the assessment challenges encountered by the EU merger control vis-a-vis mergers and acquisitions of the Chinese SOEs in Europe first appeared in 2017 when the Commission has issued several relevant decisions under the EU Merger Regulation (EUMR) (*ChemChina/Syngenta*, *ChemChina/AKC*, *COSCO Shipping/OOIL*, etc.). At that time, the Chinese SOE investments in Europe were on the rise and it was striking that in the majority of the merger decisions involving Chinese SOEs the Commission has adopted a "wait and see" approach without clarifying which SOEs should be regarded as members of the same "single economic unit" and how the State ownership and control will affect their market conduct post-merger. In a paper published in the Revue Lamy de la concurrence I have discussed how these SOE-related mergers have challenged the application of the "traditional" merger control concepts such as "concentration", "single economic unit", "control" and "decisive influence". In 2018, this research was followed by a study of the national merger control regimes of the EU Member States and the way their national competition authorities (NCAs) have handled Chinese SOE-related concentrations. The resulting paper was published in the Market and Competition Law Review. It demonstrated that in the absence of a clear guidance from the Commission or the European Competition Network, the issues of State ownership and State control are largely marginalized in the competitive assessment carried out by the NCAs. There are always exceptions to the general trend, and in 2021, in its merger decision *CRRC/Vossloh* the Bundeskartellamt (German NCA) has conducted a detailed assessment of the State control and subsidies received by the acquiring undertaking.

During the writing process I have presented and discussed the preliminary results of this study within various academic networks including the Jean Monnet Network "EU-China Legal and Judicial Cooperation" (EUPLANT), the Academic Society for Competition Law (ASCOLA), the Asian Society of International Law (ASIL), the Asian Law and Society Association (ALSA), the China International Business and Economic Law (CIBEL) Centre Global Network, the Swedish Network for European Legal Studies, the International Economic Law Interest Group of the European Society of International Law (ESIL), the Asia Legal Information Network (ALIN) and several others. This research has been also supported by the Asia Europe Comparative Studies Research Project – IEEM Academic Research Grant 2019 awarded by the Institute of European Studies of Macau.

2 - The merger control of the Chinese state-owned firms is a challenging issue for the European Commission. Can we believe in a competitive neutrality when facing the Chinese state-owned firms? How can we avoid reverse discrimination for European state-owned firms?

Article 345 TFEU establishes a principles of ownership neutrality by stipulating that the EU law should not prejudice "the rules in Member States governing the system of property ownership". The same principle is embedded in the EUMR: "arrangements to be introduced for the control of concentrations should . . . respect the principle of non-discrimination between the public and the private sectors" (recital 22). Besides maintaining ownership neutrality, the Competition Commissioner Margrethe Vestager also pledged to follow the "nationality neutrality" in competition law enforcement: "When we look at individual cases and the Commission takes decisions on them, competition enforcement follows its own principles and rules – and they are cast in stone: it must be impartial; it must be blind to the nationality of the companies we investigate". The Commission has not deviated from the ownership neutrality when assessing economic concentrations involving Chinese SOEs. In these cases, it has largely considered the same factors that it used to assess the relationship between the Member States and their SOEs. However, in cases involving Chinese SOEs, the EU competition watchdog was way more cautious not to issue any definitive conclusions concerning the decision-making autonomy of the Chinese SOEs from the State. This cautious approach was dropped only in *EDF/CGN/NNB* case, where it was held that CGN and other Chinese SOEs in the energy industry are not independent from the State and should be viewed as members of a "single economic unit". This conclusion, however, was made primarily for jurisdictional reasons so that the concentration would reach a certain turnover threshold and fall under the Commission's competence to assess mergers of "Community dimension".

At the same time, we cannot speak of an intentional "reverse discrimination" for the European SOEs, which have been routinely subjected to the scrutiny of the EU merger control. In fact, many of the merger review standards explored in the book were developed by the Commission when assessing concentrations of the SOEs owned by the Member States: *Alcan/Insepal/Palco* (Spain), *Neste/IVO* (Finland), *Soffin/Hypo Real Estate* (Germany), etc. The relaxation of the EU merger control for the "European champions" was sought by certain Member States in the aftermath of the Commission's prohibition of the *Siemens/Alstom* merger due to anti-competitive concerns. For example, Germany, France, Italy, and Poland have called upon the Commission to revise horizontal merger guidelines to ensure "more justified and reasonable flexibility" for European companies. The Commission has followed a different path and tabled the New Industrial Strategy for Europe, which provides for targeted support of certain industries while maintaining independent competition policy to safeguard competition and level playing field in the internal market. This approach demonstrates its unwillingness to bend the EU merger control to accommodate the industrial policy aspirations of certain Member States at the expense of the competitive environment in the internal market.

3 - How does the Commission assess horizontal effects in the SOE-related mergers? In other words, are there criteria such as *Airtours* to assess the risks of coordinated effects in the context of mergers involving Chinese state-owned firms?

When examining the Commission's forecast of the collective dominant position in the prohibition of *Airtours/First Choice* merger, the Court of First Instance (CFI) demanded more clarity as to the nature of the "economic links" that create an inter-dependency among the competitors and lead them towards adoption of a common commercial policy on the relevant market. The CFI noted *inter alia* that "the Commission does not appear to have considered the effect of the economic logic of the group, namely maximising income by maximising overall profits for the group as a whole" (para 290).

When assessing mergers involving Chinese SOEs, the Commission also had to ascertain the likelihood of common commercial practices that could be adopted by the SOEs post-merger and their likely effect on competition. Due to the uncertainty as to the existence of a "single economic unit" encompassing all or some of the Chinese SOEs, it was subsequently not possible to predict with a requisite degree of certainty whether Chinese SOEs would engage in coordination of their market conducts post-merger. As a result, the coordinated conduct of SOEs post-merger was examined by the Commission as one of the possible scenarios. For example, in *Bluestar/Elkem* it has undertaken a "worst case scenario" assessment by assuming that all Chinese SOEs on the relevant market would act in a coordinated manner. Due to the low market shares of the Chinese SOEs on the relevant markets the "worst case scenario" did not reveal anti-competitive risks and the notified concentration was cleared without conditions. Similarly, in *PetroChina/Ineos*, the Commission did not consider it necessary to ascertain the boundaries of the "single economic unit" since the combined market share of the Chinese petroleum companies did not exceed 25% on the relevant markets. In *CNAC/Koor*, the Commission noted insufficient market power of the Chinese

SOEs, which would not allow to implement a predatory pricing strategy: "for such a strategy to be successful, other companies than just Chinese SOEs would need to participate given the limited market shares of Chinese SOEs in the active ingredients that are produced by either MAI or ChemChina/CNAC" (para 61). It should be also noted that up to date, none of the merger cases involving Chinese SOEs where the Commission applied "worst case scenario" approach by assuming that Chinese SOEs would act in coordination was challenged before the General Court. This is due to the fact that all of the relevant cases resulted in unconditional clearance (except for *ChemChina/Syngenta*, which was cleared with conditions).

4 - The concept of "single economic unit" is essential to the EU merger control. In the case of the Chinese state-owned firms, you say that the Commission seems to make a case-by-case assessment of this concept, which does not seem to promote legal certainty. Are there any criteria that can give a more or less accurate determination of "single economic unit" in mergers involving SOEs?

The ascertaining of the "single economic unit" on a case-by-case basis in itself does not automatically diminish legal certainty as the Commission through its merger control practice has developed a set of factors that can be considered in such assessment. For example, the Commission routinely referred to the following criteria when determining whether two or more SOEs belong to the same "single economic unit": "(1) the existence of interlocking directorships between undertakings owned by the same acquiring entity; (2) the existence of adequate safeguards ensuring that commercially sensitive information is not shared between such undertakings" (*EDF/Segebel*, para 93). However, there is no exhaustive list of factors that would be applicable in every case so the earlier merger decisions cannot be fully used as "precedents" for the future assessments. For example, in *PKN Orlen/Grupa Lotos*, two Polish companies have attempted to escape the Commission's merger scrutiny by arguing that they belong to the same "single economic unit" controlled by the Polish State. In their submission, the parties referred to the previous Chinese SOE-related merger cases where the Commission admitted the existence of a "single economic unit" because the Chinese State had several channels to influence the decision-making of its SOEs. The Commission has rejected the analogy pointing out to the concrete evidence of past aggressive competition between the parties, which proved that the Polish State's participation did not abolish the autonomy in their decision-making. I further explore the Commission's competitive assessment in that case in an article published in the Yearbook of Antitrust and Regulatory Studies.

Another question that remains unanswered is whether the EU merger control can be applied to a merger of two Chinese SOEs. The answer to this question will also depend on the application of the "single economic unit" concept and determination whether two SOEs are autonomous entities and their merger should be viewed as "concentration" in the sense of the EUMR or it is an "internal reorganization" of the two companies that belong to the same "single economic unit". At the end of 2020, two Chinese SOEs in the steel industry – China Baowu Steel Group (Baowu) and Taiyuan Iron & Steel Company (TISCO) have notified their merger to the Commission under the EUMR. However, the notification was withdrawn by the parties shortly thereafter. Although several NCAs have asserted their merger control jurisdictions over SOE-to-SOE merger, the Commission has yet to clarify its stance on this matter. I further explore the perspectives of reviewing Chinese SOE mergers under the EUMR in a recent article published in the Journal of European Competition Law & Practice.

5 - Regulation 139/2004 has broadened the criteria of assessing mergers in the EU beyond the traditional search for a dominant position. In view of the increased investment of Chinese firms in the EU, can this criterion allow for the consideration of industrial policy objectives and promote the creation of "European champions" to compete with Chinese firms?

Even though the Regulation 139/2004 has changed the substantive merger assessment test from the finding of dominance to the "significant impediment to effective competition", the merger assessment remains focused on the (anti)competitive effects of the notified concentrations. This exclusive focus on competition and consumer welfare does permit the Commission to apply a more stringent standard to the foreign SOE-related mergers or to be more lenient towards mergers of the European companies that wish to be more competitive on the global markets. This exclusive focus on competition in the internal market was recently evidenced by the prohibition of *Siemens/Alstom* merger, which was actively promoted by the French and German governments. The subsequently released "Franco-German Manifesto for a European Industrial Policy Fit for the 21st Century" questioned whether the existing regulatory framework allows the European companies to compete effectively with the Chinese SOEs. On this point I would side with the group of competition policy scholars led by Massimo Motta and Martin Peitz who insisted that "competition policy should be independent from political interference based on perceived European industrial goals, and respond to efficiency considerations and the protection of the competitive process". The Austrian NCA also cautioned that the "creation of supposed national or European champions holds the danger of arbitrary regulatory decision-making and, as a result of this, would ultimately harm European and Austrian companies more than it would benefit them".

In fact, there are examples where the establishment of the national champions through mergers was not prevented by the EU merger control as these concentrations did not lead to "significant impediment of effective competition" (*Sanofi/Aventis*, *Gaz de France/Suez*). In other cases, where the industrial consolidations would produce anti-competitive effects, the mergers were blocked under the EUMR (*Aerospatiale-Alenia/de Havilland*, *Volvo/Scania*, *Schneider/Legrand*, *Olympic/Aegean Airlines*). At the same time, the establishment or strengthening of the "national champions" can be promoted by the Member States through concentrations that do not reach the "Community dimension" thresholds and don't have to be notified to the Commission for scrutiny under the EUMR. I further explore the industrial policies and the role of the national merger control regimes using the example of Poland in an article published in the Journal of Antitrust Enforcement.

6 - What are the perspectives of merger control for the Chinese firms in the EU?

As discussed above, the EU merger control based on "ownership neutrality" and "nationality neutrality" principles with its exclusive focus on (anti)competitive effects does not permit applying a more stringent substantive standard of assessment vis-a-vis Chinese SOEs and their acquisitions in the internal market. As discussed in the book, the complexity and obscurity of the corporate and political channels of control used by the Chinese State in relation to its SOEs create significant assessment challenges for the Commission and the NCAs in their attempts to ascertain the autonomy of SOEs in their decision-making and commercial practices. Other concerns, such as public security or level playing field cannot be addressed through merger control directly. For instance, the Commission emphasized that the "EU merger control does not allow the Commission to intervene against the acquisition of a European company solely on the grounds that the buyer benefitted from foreign subsidies".
These concerns have prompted the adoption of two distinct legal frameworks: (1) the EU FDI Screening Regulation establishing the cooperation mechanism between the Member States and the Commission when screening foreign investments on the ground of security and public order; and (2) the

proposal for a Regulation on foreign subsidies distorting the internal market. As a result, the Chinese SOE investments in the EU will be facing "three great mountains" of regulatory scrutiny: merger control (competition-based), FDI screening (security-based) and foreign subsidies control.