ABSTRACT: This review intends to provide the reader with a general overview of the most recent work by Alexandr Svetlicinii: Chinese State Owned Enterprises and EU Merger Control.

To this end, this review is divided into three major parts: (i) an introductory part, where the scope and relevance of the theme are presented; (ii) a second part containing a brief analysis of the book’s structure and content; and (iii) a conclusive critical analysis.


1. Introduction
The rise of Chinese investments in Europe¹, mainly derived from the China Going Global strategy, has raised some challenges to merger control regimes in the EU.

It is acknowledged that Chinese State Owned Enterprises (SOEs) may introduce distortions into markets, mainly when heavily subsidised by the State. This compromises the level playing field both in the Chinese Market – where EU companies might find it hard to compete with local companies – and in the EU Single Market – where the growing dimension and influence of Chinese companies can no longer be ignored. The presence of these companies, and the eventual rise of (hostile) takeovers of European companies, lead us to the question of whether (and how) competition policy should serve the goals of industrial policy, mainly regarding the creation and protection of European and national champions. However, problems arise regarding the real scope and boundaries of competition policy.

“Chinese State Owned Enterprises and EU Merger Control”, published in December 2020, is the most recent work by Alexandr Svetlicinii, and its ultimate goal is to demonstrate how the EU Merger Regulation (EUMR), blind to the nationality of the companies investigated, might be applied to Chinese SOEs, whose features include, among others, a strong State-influenced corporate governance.

Given the rising interest in the topic, particularly in the last few years, this book comes at a perfect time and allows the author to focus on the new regulatory tools that have been or are about to be adopted by the Commission on this matter. The time is also perfect considering the EU-China Comprehensive Agreement on Investment (CAI), concluded on 30 December 2020, followed by the publication of the text on 22 January 2021 and the publication of the market access offers on 12 March 2021. The issue of Chinese SOEs and transparency of subsidies is addressed as part of the CAI commitments. And we must not forget the debate on the need to reform the EUMR, which has reawakened after the Commission’s Siemens/Alstom prohibition in 2019 and comprehends some disagreement among scholars as to whether “politics should stay out of EU Merger control”.

Thus, it is expected that this work will, in particular, assist practitioners and academics, especially those who work with the topic in their professional activities, providing them with a clear starting point and a compendium of the challenges they might be faced with.

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The author’s experience and his close relationship with the University of Macau allow him to provide the readers with a realistic approach to the subject, therefore sharing a unique and privileged vision.

2. Book chapters

*Chinese State Owned Enterprises and EU Merger Control* is a well-structured book organised into four main chapters followed by a concluding chapter.

The topics that headline each of the chapters and their sub-chapters are interconnected, providing the reader with an overview of the author’s purpose.

**Chapter 1**
The author starts by invoking article 345 of the Treaty on the Functioning of the European Union (TFEU), which provides for the principle of neutrality or non-discrimination between State-owned (SOEs) and privately-owned companies, an idea which is also enshrined in recital 22 of the EUMR as a principle of competitive neutrality.

Alexandr Svetlicinii addresses the legal framework of SOEs, which, in his view, and despite the differences between SOEs and privately-owned companies, are not entitled to a specific status under the EUMR, being regarded as “undertakings” (“the actors in the transaction in so far as they are the merging, or acquiring and acquired parties”, according to the Commission Notice on the concept of undertakings concerned under EUMR), while States and their authorities, when exercising ownership rights, are regarded as “persons” (“any natural or legal persons or entities that exercise or acquire control over an undertaking”).

In this respect, the author notes that the notion of State as a “person” raises the problem of identifying when (or on what basis) SOEs should be considered as part of a “single economic unit” or, rather, two independent entities. To this end, the author analyses relevant case practice where the EU Commission decided both ways, nearly in the light of the (non) existence of an independent power of decision between SOEs.

Additionally, Svetlicinii highlights the importance of concluding whether SOEs are part of the same economic unit. In his opinion, such an assumption is particularly relevant for (i) ascertaining whether the merger has a “Community dimension” by reference to the respective turnover calculation (aggregated as a group or as an independent entity) and, (ii) if
considered as a group, whether it should be considered as a merger covered by the scope of EUMR or as an internal restructuring within a group.

By analysing the Commission’s decision-making practice (especially regarding the Russian SOEs), the author concludes that the “decisions in merger cases involving SOEs do not contain a detailed assessment on the scope of the respective economic unit”. When the turnover is per se sufficient for the fulfilment of the “Community dimension” criteria, the Commission seems to prefer to avoid “a higher evidentiary burden” and when forced, at a later stage, to consider the potential anticompetitive effects of the notified concentration, it “resorts to the so-called worst case scenario”, considering the situation where the SOEs, as members of a “single economic unity”, “would indeed coordinate their commercial practices”.

Finally, Svetlicinii addresses the issue of non-controlling shareholdings under the EUMR, concluding that the existence of minority shareholdings can also represent a de facto relevant form of control (e.g., the existence of shares with special voting rights) and must, therefore, be considered by the Commission during the competitive assessment of a concentration.

Chapter 2
Chapter 2, which deals directly with Chinese SOEs, provides us with a regulatory framework for these SOEs as pillars of “socialism with Chinese characteristics”.

The author frames Chinese SOEs within a historical-political perspective which became evident (or at least more visible) with the China Going Global strategy, from which Belt and Road Initiative (2013) and Made in China 2025 emerged.

Svetlicinii explains that Chinese SOEs are mostly controlled by the State Owned Assets Supervision and Administration Commission (SASAC) – as a State shareholder – and “subject to the industrial policies set by the National Development and Reform Commission (NDRC) and other sector-specific regulators”.

Additionally, the author explains the rooted political influence behind SOEs, which is also visible in their articles of association and turns Chinese SOEs into a bastion of political strategies, starting within their members and their “close relationships with the authorities”.

Lastly, Svetlicinii addresses China’s anti-monopoly law, which states that Chinese SOEs merger control is assumed by the Ministry of Commerce (MOFCOM). Despite this formal mechanism of prior control of mergers,
there is no effective deterrence for those who do not comply with the prior notification. Indeed, there are cases where reorganisation occurred before the MOFCOM merger’s clearance.

Chapter 3
In this chapter, the author analyses Chinese SOEs under EUMR, starting by presenting the potential challenges arising from the different nature of Chinese and EU SOEs.

In a path that seems contradictory to such spotted differences (essentially those regarding political interference in SOE governance), Svetlicinii states that the majority of Chinese SOE “concentrations have been cleared under a simplified procedure” that “normally do[es] not include a detailed description of the relevant market or the anticipated market conduct of the merging parties”. Despite this, though, when assessing the competitive impact of a Chinese SOEs merger, the Commission’s clearance decisions seem to represent a “middle ground approach”, including “a more detailed assessment of the “novel legal issues of a general interest” addressing the specific features of the merging parties and their relationship with the Chinese State”.

The author then proceeds to what he considers to be an “initial approach” to the relevant case practice, analysing whether the Commission considers Chinese SOEs as part of a “single economic unit” in what respects SOEs controlled by the Central SASAC and those owned by the regional SASACs, concluding that, in most cases, the Commission adopted the “worst case scenario” approach by assuming that all Chinese SOEs act in a coordinated manner. Nonetheless, as in most cases, the market power of Chinese SOEs on the relevant markets was considered to be insufficient, and there were no significant market barriers. The Commission opted, therefore, to clear those merges without any further analysis on whether Chinese SOEs should be considered as a “single economic unit”.

The exception to the “wait and see” rule, to which the author dedicates an autonomous sub-chapter, emerged in 2016 with the EDF/CGN/NNB decision. In this important precedent, the Commission determined the “single economic unit” of two SOEs in the energy industry to reach the “Community dimension” under EUMR. However, as the author points out, “the subsequent mergers involving Chinese SOEs demonstrate that “wait and see” flexible approach therefore remains the Commission’s preferred approach”.
On this basis, Svetlicinii criticises this Commission’s approach and suggests a more factual and credible analysis based on other criteria, “such as instances of past coordination facilitated by the state, the existence of the state policies that require coordination, or certain strategic behaviour of its SOEs on the global markets”, rather than just an analysis based on “ownership trap” or “ownership bias”.

Finally, in what regards this (reportedly needed) two-level analysis of corporate governance (legal and political), the author conclusively reminds that (i) the Commission should be able to clarify whether a SASAC is acting as a shareholder or as a public authority, and that (ii) the political approach should not be used to extend the “single economic unit” to eventually all Chinese SOEs, but rather for a more thorough assessment of the likelihood of anticompetitive scenarios, thereby avoiding “a wave of notifications”.

**Chapter 4**

In this chapter, Svetlicinii goes through the proposed reforms of the EUMR and addresses new regulatory tools such as the EU Foreign Direct Investment “FDI” Screening Regulation and the White Paper on Foreign Subsidies.

Starting with the proposals fostered, in particular, by heavily subsidised companies such as Chinese SOEs, and the correspondent need to create a “fairer and more effective global level playing”, the author lists some of the stakeholders’ proposals towards the “modernisation” of EUMR guidelines based on the need to promote an EU industrial policy, also taking into account State control and support of foreign SOEs.

As the author recalls, these proposals became even more significant after the Commission prohibited the Siemens/Alstom merger in February 2019. Despite recognising this issue’s relevance, the Commission opted to create additional regulatory tools rather than amend the EUMR or propose new EUMR guidelines which, in any case, and as the author particularly suggests, could mitigate the different regimes on SOE-related mergers in the EU Member States.

Svetlicinii then analyses the EU FDI Screening Regulation (Regulation 2019/452), adopted by the EU Council on 5 March 2019 (fully operational on 11 October 2020), which “allows EU Members and the Commission to take into account the context and circumstances of the foreign direct investment, in particular whether a foreign investor is controlled directly or indirectly, for example through significant funding, including subsidies,
by the government of a third country, or is pursuing State-led outward projects or programmes”. The author also points out that this new tool introduced another level of scrutiny of the transactions and there may be an overlap with EUMR regarding the public interest exceptions under 21(4) EUMR.

The author also believes that the Covid-19 pandemic will also increase the implementation and application of the EU FDI Screening Regulation due to EU Member States’ adoption of protectionist measures.

Finally, Svetlicinii sheds some light on the Commission’s commitment regarding the New Industrial Strategy for Europe, an initiative based on the White Paper on Foreign Subsidies, which is expected to be adopted during the second half of 2021 and will create a third regulatory framework applicable to SOE acquisitions in the EU. In this regard, we must note that following the public consultation, the Commission published a roadmap presenting three different approaches to levelling the playing field of foreign subsidies. The feedback period ended on 29 October 2020 and the regulatory options/approaches were preferred.

Nevertheless, as duly observed by the author, there may be another overlap between the EUMR, the EU FDI Screening Regulation, and the foreign subsidies’ screening.

**Conclusion**

In this conclusive chapter, Alexandr Svetlicinii summarises the previous chapters, highlighting the need for the Commission to define its strategical response to (Chinese) SOEs and to “develop a detailed guidance on merger assessment of SOE-related concentrations”.

Thus, unlike some authors who have advocated for changes to the EUMR, Svetlicinii calls for more straightforward and detailed guidelines. However, in our view, the author does not formulate detailed proposals, nor does he explore the Commission’s role on this matter. Instead, he

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seems to prefer to open another debate focused on basic concepts, addressing, for instance, what should be considered a group of undertakings and the grounds for distinguishing between a merger and an internal reorganisation under the EUMR.

3. Critical analysis

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; and it must be impeccable – if only because practically every decision we take must pass the muster of the European Court”.

The principle of competitive neutrality, implicit in Margrethe Vestager’s words and addressed by the author in Chapter 1, has sought to justify the Commission’s positioning towards Chinese SOEs under EUMR.

In *Chinese State Owned Enterprises and EU Merger Control*, Alexandr Svetlicinii provides us with a well-written, well-structured, well-researched and, above all, a timely guide on the issue, whose particular challenges will undoubtedly contribute to its enormous relevance, especially to legal practitioners, national competition authorities, policymakers and government officials.

Although the author does not exactly present detailed proposals for addressing the topic, he undoubtedly brings some thoughts into the discussion through systematisation and his knowledge of Chinese SOEs, corporate governance, and treatment under the EUMR. It is important to note that by stressing the differences of the Chinese industrial strategy – that enhances the creation of “Chinese champions” (in clear opposition with the EU view) –, the author furthers the discussion on the need for a EUMR’s reform and the question of whether more straightforward guidelines by the Commission are preferred as an alternative for amending the EUMR.

The work is therefore valuable since it reminds us of the need to refocus the debate on the basic concepts underlying the EUMR. Although these concepts are not sufficiently densified yet, defining and precisely their boundaries might be a tool to better address the issue of heavily subsidised Chinese SOEs.

In fact, as far as the new regulatory tools are concerned, we believe that, as much as these new regulatory tools seek to address the problem
of foreign SOEs regarding the screening of foreign subsidies, one thing should be clear: such screening does not solve – or at least cannot claim to solve – this issue if one bears in mind that this is not an exclusive problem of foreign SOEs.

Thus, it seems to us that, sooner or later, the Commission will have to deal with the issue of domestic SOEs, which are increasingly emerging, a trend that got supported by the protectionist measures adopted under the Covid-19 pandemic. To do otherwise would be to perpetuate a real “blind spot” or “regulation gap” that the Commission must not ignore. Therefore, the solution may lie in Svetlicinii’s proposal: to refocus the debate on the basic, yet not densified concepts under the EUMR.

Bibliography