Monopolkommission

Chinese state capitalism: A challenge for the European market economy

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The Monopolies Commission is a permanent, independent expert committee which advises the German government and legislature in the areas of competition policy-making, competition law and regulation. Its legal responsibilities encompass, among others, the preparation of a Biennial Report analysing the development of competition on a biannual basis. The Monopolies Commission has five Members appointed by the Federal President based on a proposal of the German government. Prof. Achim Wambach, Ph.D., is the chairman of the Monopolies Commission.

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Summary

The People's Republic of China has undergone an impressive economic development since the introduction of market economy reforms several decades ago. Measured in terms of gross domestic product, which is adjusted in terms of purchasing power, China is the largest economy in the world. At the same time, **China's importance for the global economy has increased considerably** in recent decades; especially since China's accession to the World Trade Organization in 2001, there have been shifts in world trade. Excluding trade in goods between the Member States of the European Union, China's share (excluding Hong Kong) in global exports of goods rose from around 7% to around 17% between 2002 and 2018. In the same period, the shares of the EU and the United States have fallen from around 18.3% and 15.2% to around 15.6% and 11.3%, respectively. After the USA, China is currently the EU's **second largest trading partner and the EU is China's largest trading partner**.

Today, China is neither a market economy nor a planned economy, but with its "Socialist Market Economy with Chinese Characteristics" it pursues a hybrid economic model that contains both state-economy and market-economy elements. **More strongly than in European market economies, the Chinese state intervenes in economic affairs in many different ways to achieve its industrial policy goals.** Of **particular importance** in this context are **economic benefits (subsidies)** which state or private undertakings enjoy. In the international context, such state intervention can lead to competitive advantages for Chinese undertakings over non-subsidised undertakings. Due to China's growing economic importance, such state intervention is increasingly affecting the EU economy and putting European undertakings at a competitive disadvantage vis-à-vis their Chinese competitors.

In order to avoid **competitive disadvantages for European undertakings**, there has been an increasing debate for some time about possible reforms to European foreign trade and competition law. It should be noted that the **influence of third countries on the economy is already subject to rules**. In cross-border trade, European undertakings are already protected by **anti-dumping and anti-subsidy instruments**. The anti-dumping instrument takes into account the particularities of the Chinese economic system. Hence, comparative prices are not determined in the Chinese home country as long as they "do not result from the free play of market forces". However, it should be noted that especially when anti-dumping instruments are used, the protection of European undertakings in terms of a European industrial policy is in the foreground and the protection of competition takes a back seat. For consumers, this means that possible price competition from Chinese suppliers is also weakened. In order to preserve the positive effects of price competition from Chinese competitors, the protection of competition in the application of anti-dumping law should therefore be given greater weight in future. Anti-subsidy law also has an industrial policy focus. Against this backdrop, it gives little weight to the positive effects of subsidies, which are particularly evident in the form of lower import prices. On the other hand, there is a normative interest in the compensation of competitive advantages caused by subsidies.

Complementing the trade instruments, the **EU competition rules** are not directly applicable to measures of third countries, but they are **applicable to the behaviour of undertakings from third countries in the EU**. When assessing the market position of such undertakings (in abuse and merger control) it can also be taken into account that a third country is behind them. Irrespective of this, the question of whether corporate conduct violates the prohibition of cartels or abuses (Art. 101 or Art. 102 TFEU) must be answered solely on the basis of the constituent elements of the relevant provisions. It is not possible to take into account, in addition to these prerequisites, that the conduct is due to the special circumstances in a third country or was even deliberately encouraged by that country.

In the case of company acquisitions, a distinction must be made between the merger control assessment of whether the transaction gives rise to market power and any examination under State aid law of economic support for the acquisition by a Member State. Third-country subsidies for the acquisition are as such not yet subject to review. In view of this, a stronger use of **investment control** is also regularly discussed. This control has already been adapted and tightened several times in the meantime. However, it is primarily **aimed at protecting public safety and order** and should also be limited to this. Industrial policy use should be avoided.

With regard to **Member State procurement**, the existing rules serve the dual objective of avoiding distortions in European procurement markets and contributing to maintaining reciprocity in access to foreign procurement markets. The fact that a bidder is subject to state control or financing and may therefore submit its bids according to criteria other than market economy criteria cannot be uniformly covered in the existing legal framework – apart from the possibility of taking into account "criteria other than those relating to the award of the contract". Instead, there is a large number of individual rules that serve different objectives. This results in a confusing situation, which leaves it **questionable** whether it can actually guarantee **effective protection of equal opportunities against state-induced distortions of competition**.

Thus, the protection of European undertakings or the European market economy under the existing rules is incomplete in certain situations. This is **particularly** the case **if third countries provide subsidies** which give undertakings a competitive advantage over undertakings not subsidised by third countries when operating in the EU, and if those subsidised undertakings can subsequently gain market share at the expense of these competitors. Competitive disadvantages for European undertakings not covered by the existing legal framework (*i.e.*, the foreign trade and competition rules) may be assumed, for example, if undertakings subsidised by third countries **relocate their production to the EU** and sell their products here in order to circumvent anti-dumping or countervailing duties. The same applies if they provide subsidised **services**, since services – unlike goods – cannot be covered by foreign trade instruments. Competitive disadvantages also exist if undertakings subsidised by third countries are able to submit better bids than their non-subsidised competitors due to the subsidy in **company acquisition** or **procurement transactions**. It is true that the EU benefits from subsidies financed by the Chinese taxpayer, which result in low-priced input products or consumer goods for the manufacturing industry or European consumers. However, the understanding of competition in the EU, which is shaped by the European Treaties, also includes a competitive level playing field for undertakings operating in the internal market. To this end, the EU internal market is subject to State aid control in accordance with Article 107 ff. TFEU. This is not applicable to third-country support measures with effects on the internal market. This is true even if companies are able to successively build up market power due to third party subsidies or if, conversely, companies withdraw from competition with subsidised competitors or abandon their own research and development efforts. In these cases there are regulatory gaps because the existing instruments do not cover third country subsidies.

To close the existing gaps, various **proposals** have recently been made, either to ensure **equal treatment of third country and Member State subsidies or to ensure fair competition by subjecting subsidised undertakings to stricter behavioural requirements (*e.g.*, dominant undertakings)**. The European Commission has presented a White Paper on ensuring fair competition conditions for subsidies from third countries. In this White Paper, three instrumental modules are proposed that should neutralise third-country subsidies in the sense of aid equivalence. One of the sub-instruments should generally allow for ex officio review of third-country subsidies, while the other two would specifically address the review of acquisitions and procurement transactions and would lead to a review upon notification. If a distortion of the EU internal market is found to exist, the subsidy could be required to be repaid or remedial action could be imposed on undertakings. The European Commission would be responsible for the application of the second sub-instrument, and responsibility would be shared between the Commission and Member State authorities. The White Paper had been preceded by proposals from the Netherlands and from associations, among others.

Based on the preceding considerations, the **Monopolies Commission advocates the introduction of an instrument for third-party aid, which would put third-country subsidies and Member State aid on an equal footing** as far as possible. In contrast to the considerations of the European Commission, however, this should be a **single instrument** without a breakdown into several sub-instruments. The modules proposed by the European Commission moreover relate to subsidies within the meaning of the Anti-Subsidy Regulation and sectoral competition law. The instrument advocated by the Monopolies Commission, on the other hand, would apply to all third-country subsidies which, as a Member State measure, would violate Article 107 (1) TFEU. Such an instrument **could be based on Articles 103, 109 in conjunction with Article 352 TFEU** and would likely be compatible with WTO law. The instrument would only ensure that all undertakings are treated equally in their economic activities in the EU internal market. The existing self-discrimination with regard to State aid would be reduced. The **possibility of recognising subsidy control regimes** comparable to EU State aid law would moreover limit the application of the newly proposed instrument to cases in which undertakings are effectively disadvantaged in their economic activities due to different treatment of subsidies. However, in order to minimise the potential for conflict with existing regulations, the instrument should be applied **subordinate to existing regulations under foreign trade and EU competition law**. To this end, the Monopolies Commission advocates the **procedural design as a power to intervene**. Especially **in cases of company acquisitions and** in the case of **Member State procurement** procedures where the subsidy is passed on to third parties, a **standstill obligation** should apply to all parties concerned, *i.e.*, the procedure should be suspended pending the examination of the third country aid. This would prevent the subsidy from flowing to the seller in cases of business acquisition or, in the case of purchases, to the agent of the tendering body, which would then have to impose a possible countervailing duty on this indirect beneficiary.

The **competence** for the application of the instrument should **lie uniformly with the European Commission**. The procedure should be triggered by a **notification of the receipt of third-country subsidies** by the undertakings concerned. The European Commission would then have **to decide whether to open an investigation procedure**. This would be based on the likelihood that intervention may be necessary to eliminate the subsidy advantage in order to protect the EU internal market. In the investigation procedure, the European Commission would examine whether the subsidy is compatible with the EU internal market, taking into account the Union interest. If the answer is no, the European Commission would **oblige the undertakings concerned to pay a compensatory levy** to the EU budget. Alternatively, the undertakings concerned should be allowed to repatriate the economic advantage received to the third country. **Fines could be imposed** in the event of **non-cooperation**.

The EU authorities' **lack of information on** third-country subsidies for **state-owned enterprises (SOEs)** should be addressed by a presumption that undertakings with a third-country shareholding above a certain threshold (*e.g.*, 20%) are benefiting from subsidies. It should also be possible to impose special **transparency obligations** on such undertakings in the event of intervention. Where information is not fully and accurately provided on request, the European Commission should generally be entitled to **rely on the facts available**. This could relate to accounting, the cost of goods and services or the volume or value of third country financing.

In this Biennial Report, the Monopolies Commission presents its **own draft regulation** in which it sets out its ideas on an instrument of third-country aid. The instrument could be set out in an EU regulation which would address both the distortions of competition in favour of undertakings subsidised by third countries and the information deficits regarding the subsidies.

The Monopolies Commission also proposes to adapt the **European merger control rules**. Where undertakings merge that may be exposed to potential competition from third-country undertakings, greater account should be taken in future of the fact that the **market entry of** such **undertakings may depend on political-strategic** and not just economic **considerations**. It should therefore be considered to make a corresponding addition to the Commission guidelines on the assessment of horizontal mergers.

In addition to the protection of competition in the EU internal market (defensive instruments), measures to protect European companies in the event of distortions of competition caused by third countries and to **enforce European competition principles in relation to third countries** (offensive instruments) are also being discussed. The Monopolies Commission points out that "defensive mergers" for the protection against companies subsidised by third countries - if necessary with political support - can pose similar competition problems as defensive or export cartels or defensive aid (use of so-called matching clauses). Apart from this, the Monopolies Commission comments on three partial aspects of the discussion on instruments that can be used to regulate relations with third countries: (i) the introduction of an international public procurement instrument, (ii) the EU connectivity strategy and (iii) the envisaged EU–China investment agreement.

The **International Procurement Instrument** (IPI), which has been discussed for some time, could help to address the existing inequalities in access to procurement markets in the EU and China. The purpose of the IPI is to allow price adjustment measures for bids from third country bidders in cases where third countries are not prepared to negotiate reciprocal market access and themselves disadvantage EU companies in public procurement. However, in dealing with Chinese state capitalism, the **creation of a competitive level playing field** in the EU internal market should be considered **a priority**.

The **EU connectivity strategy** is a counterpart to the Chinese project of a “Belt and Road” initiative in relation to third countries. The EU connectivity strategy includes financial instruments to be used for investments in third countries, which can be used to fill gaps in financing for investments in the common interest, but also to offset competition-distorting Chinese financial measures. The EU should ensure that the EU connectivity strategy focuses on **pursuing common interests with the third countries concerned**. The pursuit of a unilateral interest in promoting European undertakings could hinder the development of markets in the third countries concerned and thus also their rapprochement to the EU internal market.

Finally, it would be desirable for a possible **agreement on EU–China economic relations to cover in particular state subsidies**. This should not be limited to the investment sector, but should also cover goods and services in general. In negotiations on investment protection, it must be avoided that possible adjustments to the European legal framework as a result of a possible agreement conflict with standards of investment protection law. Conversely, effective enforcement must be ensured.

1 Introduction

551. The People's Republic of China (below: China) has undergone an impressive economic development in recent decades. This positive economic development was triggered by the economic reforms that were introduced under Deng Xiaoping from 1978 onwards, which gradually led to elements of a market economy being introduced into China's previously purely plan-based economic system. Today, China is neither a market nor a planned economy, but rather follows its own economic system, which is also referred to as a "Socialist market economy with Chinese characteristics". This is a hybrid economic model incorporating both state and a market economy elements and is characterised by a considerable degree of industrial policy intervention and state influence on companies.

552. China's accession to the World Trade Organization (WTO) in 2001 constituted a considerable milestone for its economic development. This led to a major reduction in trade barriers between China and other WTO States. China's share of global trade has increased significantly since it joined the WTO, so that China now is the world's largest trading nation, and in particular its largest exporting nation. Measured in terms of global gross domestic product (GDP), adjusted for purchasing power, China was moreover the largest economy in the world in 2018, with a share of roughly 18.7 percent, ahead even of the United States with its share of roughly 15.2 percent.[1]

553. The Chinese economy is currently in a transitional phase. Whilst it was still achieving double-digit annual growth rates up until only a few years ago, today's growth figures are much lower. A major reason for this is the end of the so-called "catch-up growth" which had strongly influenced the Chinese economic development in the previous decades. China today thus faces the challenge of how to identify a new development and growth model.[2] The Chinese State is accompanying the change to a more productive and innovative economic structure with an active industrial policy. One example of this is the "Made in China 2025" industrial strategy, which aims amongst other things to make the country the world market leader in ten industries. Large and innovative Chinese technology companies such as Alibaba, Huawei or Tencent also illustrate China's ongoing transformation from the world's extended workbench to a more productive and innovative economy.

554. The Communist Party of China (CPC) continues to lay claim to unlimited political power within the Chinese one-party system. Since Xi Jinping took power, the role of the CPC has been expanded further, at the expense of the governing bodies. This is also reflected in the fact that the CPC and/or the Chinese government have exerted even greater influence on individual companies. All in all, China can be seen to be turning away from the long-prevalent gradual expansion of market economic mechanisms. The hopes that had been sown in the West with China's accession to the WTO, namely that China might develop to become a market economy and a more open society, have not come to fruition.[3]

555. China's increased economic importance for the global economy is accompanied by increased political self-confidence and a greater claim to power by Beijing. China is attempting to expand its political as well as economic influence both in the Asian region, as well as worldwide. The project for a "New Silk Road" ("Belt-and-Road Initiative" – BRI) can be seen in this light. In official terms, the goal pursued by this project is to create new intercontinental trade and infrastructure networks between China and numerous countries in Africa, Asia and Europe. At the same time, however, the investments made within the BRI also enable the Chinese State to take opportunities arising to exert influence on political decisions in the countries in question. In the European Union (EU), the takeo-

[1] International Monetary Fund, World Economic Outlook Database, version October 2019, quoted from Statista, Die 20 Länder mit dem größten Anteil am kaufkraftbereinigten globalen Bruttoinlandsprodukt (BIP) im Jahr 2018, https://de.statista.com/statistik/daten/studie/166229/umfrage/ranking-der-20-laender-mit-dem-groessten-anteil-am-weltweiten-bruttoinlandsprodukt, retrieved on 12 June 2020.

[2] Taube, M., Grundzüge der wirtschaftlichen Entwicklung und ihre ordnungspolitischen Leitbilder in der VR China seit 1949, Duisburger Arbeitspapiere Ostasienwissenschaften, No. 96/2014, pp. 15 ff.

[3] BDI, Grundsatzpapier China. Partner und systemischer Wettbewerber – Wie gehen wir mit Chinas staatlich gelenkter Volkswirtschaft um?, January 2019, pp. 2-3.

ver of the Greek port of Piraeus was completed particularly as part of the BRI. From a European point of view, importance furthermore attaches to the "17+1 format", within which annual meetings take place between the Chinese Prime Minister and the heads of government of Central and Eastern European countries. Here, too, the main focus is on developing business relations between the countries and investment opportunities for Chinese companies.. At the same time, however, China may also be able to use these relationships and the economic dependences that they create in order to exert greater influence on decisions taken by these countries, and hence therefore on decisions on the part of the EU.

556. In view of China's economic catching-up process and of the differences in political and economic systems, there is already some talk of systemic competition between the market economy, liberal political systems of the West, and the authoritarian, state-capitalist system prevalent in China.[4] The European Commission too recently referred to China in a strategy paper as a "systemic rival promoting alternative models of governance".[5] In this communication, it names several measures from different policy areas that should be taken vis-à-vis China or in cooperation with China. With regard to economic relations, the EU intends in particular to call for greater reciprocity from China. This should particularly involve a reform of the WTO, as well as the conclusion of an Agreement on Investment with regard to which negotiations with China have been ongoing for some time. In addition, in view of potential competition problems, existing gaps in EU law need to be identified in order to "deal with the distortive effects of foreign state ownership and state financing of foreign companies on the EU internal market". Announcements in this vein can also be found in the European Commission's new industrial strategy.[6] This strategy provides for a review of existing EU competition rules in areas such as merger control and state aid. The European Commission furthermore published a White Paper in June 2020 which discusses the distortions in competition that foreign subsidies may cause in the internal market, as well as foreign access to public procurement procedures in the EU and to EU funds.[7] A legislative proposal will be presented in 2021 to address the distortions of competition caused by third country subsidies.

557. In this chapter, as per its mandate, the Monopolies Commission addresses the relationship between China and the EU primarily in terms of competition. To this end, first of all a description is provided of China's state capitalist system, as well as of China's significance for the global economy, and in particular for the EU. The chapter then goes on to discuss potential problems related to competition that may emerge from the numerous market interventions and state support measures provided by the Chinese State, particularly in the form of subsidies, in international competition, and especially in the EU internal market. It then studies the degree to which these competition-related problems could be adequately addressed with the help of the existing instruments of competition law and foreign trade, and where reforms are needed.

558. It does not touch on problems related solely to the Chinese market which cannot be resolved by protecting competition in the EU internal market (such as protection of intellectual property and the obligation to enter into a joint venture in China). This does not mean that such problems cannot exert a major impact on the competitiveness of European companies in the EU and on the world markets. A solution to such problems can however only be found within China, and together with China, on the basis of joint agreements.

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[4] See for instance BDI, Grundsatzpapier China. Partner und systemischer Wettbewerber – Wie gehen wir mit Chinas staatlich gelenkter Volkswirtschaft um?, January 2019; Fuest, C., ifo Standpunkt No. 200: Der dritte Systemwettbewerb, 8 November 2018.

[5] European Commission and High Representative of the Union for Foreign Affairs and Security Policy, Communication to the European Parliament, the European Council and the Council, EU-China – A strategic outlook, 12 March 2019, JOIN (2019) 5 final, p. 7 (EU strategy paper);

[6] European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, A new industrial strategy for Europe, , COM(2020) 102 final, 10 March 2020.

[7] European Commission, White Paper on levelling the playing field as regards foreign subsidies, COM(2020) 253 final, 17 June 2020.

1.1 The characteristics of Chinese state capitalism

559. China itself refers to its economic system today as a "Socialist market economy with Chinese characteristics". This is a hybrid economic model incorporating elements of both a state economy and a market economy. The major characteristic of this economic system is the prominent, steering role played by the State and by the Communist Party of China (CPC).

560. Centralist economic planning plays a significant role in the Chinese economic system. Specific economic goals and visions, such as achieving specific economic growth or lending strategic support to individual economic sectors or key industries, are defined in overarching plans of the central government. These include the national Five-Year Plan, but also the "Made in China 2025" strategy or the "Belt-and-Road Initiative". Large numbers of subplans are then in turn derived from these overarching plans of the central government, progressing along administrative hierarchies, organisational competences, topical areas or sectoral structures.[8] There are also so-called catalogues which translate the goals contained in the plans into measurable key performance indicators, as well as "implementation documents" which identify the concrete policy instruments that are used. These plans are however primarily indicative in their significance, and are continually adjusted as needed. As such, they are above all an approximate guideline that the governments and institutions at different levels of the State, as well as Chinese companies, can use as an orientation.

561. A special role in Chinese state capitalism attaches to state-owned enterprises (SOEs). The large SOEs in particular are traditionally active in strategic sectors or key industries. SOEs do not pursue solely commercial interests, but are frequently also a tool of the government to retain control of employment and of the orientation of the economy.[9] In this framework, they are for instance intended to help safeguard China's competitiveness in key sectors, to maintain economic and social stability, as well as to make public goods available. Information on the number of SOEs in China varies due to differences in their definition and difficulties encountered when it comes to distinguishing what exactly constitutes a state-owned enterprise. As a minimum, the definitions have in common that there is a state capital holding or (not narrowly-defined) state ownership.[10] According to a report published by the World Bank, there were approx. 167,000 non-financial SOEs in China in 2015.[11] The number of SOEs increased by approx. 52 percent between 2008 and 2015. Other sources estimate the number of SOEs at approx. 150,000.[12] Roughly one-third of the SOEs are controlled by the central government, whilst the others are owned by provincial and municipal governments. Currently, 97 of the large corporations that are within the portfolio of the central government are subject to the direct supervision of the State-owned Assets Supervision and Administration Commission of the State Council (SASAC).[13] The SASAC is tasked amongst other things with ensuring that the large

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8 Taube, M./in der Heiden, P. T., Assessment of the normative and policy framework governing the Chinese economy and its impact on international competition. Final Extended Report, Opinion for AEGIS Europe, 13 August 2015, https://static1.squarespace.com/static/5537b2fbe4b0e49a1e30c01c/t/55d1966ae4b02198ab303ccb/1439798890849/MES%2BChina%2BStudy_Taube_Full%2BVersion-13August15_F.pdf, retrieved on 30 June 2020.

9 Zumholz, M., Staatsunternehmen, in: Darimont, B., Wirtschaftspolitik der Volksrepublik China, Wiesbaden 2020, pp. 70 and 76.

10 See for instance OECD: "state exercises legal ownership"; see OECD, Competitive Neutrality, Report, 2012, p. 17; OECD Guidelines on Corporate Governance of State-Owned Companies, Edition 2015, p. 14, https://www.oecd-ilibrary.org/docserver/9789264244160-en.pdf?expires=1595971161&id=id&accname=guest&checksum=1DDEBC179649F0E2C235655528469B25, retrieved on 30 June 2020.

11 World Bank/Development Research Center of the State Council, the People's Republic of China, Innovative China. New Drivers of Growth, 2019, p. 42.

12 European Commission, Commission staff working document on significant distortions in the economy of the People's Republic of China for the purposes of trade defence investigations, SWD(2017) 483 final/2, 20 December 2017, pp. 88-89; Zumholz, M., Staatsunternehmen, in: Darimont, B., Wirtschaftspolitik der Volksrepublik China, Wiesbaden, 2020, p. 74.

13 See on this the list on the website of the SASAC, http://www.sasac.gov.cn/n2588035/n2641579/n2641645/index.html, retrieved on 12 June 2020.

corporations under its supervision are competitive and profitable in an international comparison. What is more, it is intended to prevent an outflow of state funds. The SASAC has also been mandated since 2010 with performing tasks related to restructuring, regulation and supervision, as well as with the strategic organisation of the state sector.[14] The local governments at provincial or municipal level have a similar administrative apparatus to the SASAC.

562. Despite their central position in the Chinese economic system, SOEs have become less relevant overall in recent decades, even though, contrary to this trend, their importance has been increasing again in recent years. The initial decline was due in particular to comprehensive economic reforms that have promoted and facilitated the economic activity of private companies. Information on the quantitative significance of SOEs for the Chinese economy varies. An older study drawn up by the World Bank for instance estimates that the share of SOEs in total industrial employment fell from approx. 61 to roughly 19 percent from 1998 to 2010, and their share in the total number of industrial enterprises fell from approx. 39 to roughly 4.5 percent.[15] For 2015, the World Bank reports the share of non-financial SOEs in Chinese gross domestic product (GDP) at approx. 52 percent.[16] Another study estimates for 2017 the share of SOEs in total employment in China at approx. 5 to 16 percent, and their share of Chinese GDP at approx. 23 to 28 percent.[17] Regardless of this, the significance of SOEs has increased again, in particular since President Xi Jinping took office. This is revealed not lastly in several politically-ordered major mergers between Chinese SOEs aimed at creating internationally-competitive companies. The International Monetary Fund (IMF) also points out in a Country Report that SOEs have grown since the financial crisis, and that they could potentially crowd out private sector development under the current reform plans.[18]

563. The significance of private companies for the Chinese economy has increased since the introduction of economic reforms in 1978. Many former SOEs have been transferred to the private sector in recent decades. Private companies furthermore serve as the main driver of China's economic growth.[19] Their share in Chinese GDP is estimated at up to 70 percent, and their share in total employment at approx. 60 to 85 percent, albeit the figures vary widely in some instances.[20] In comparison with Chinese SOEs, Chinese private companies as a whole are regarded as much more productive and successful, not least because they are more market orientated. Chinese private companies are also much less indebted than Chinese SOEs. For example, the leverage ratio, *i.e.*, the ratio between balance sheet debt and equity, of private companies was around 105 percent in 2016 and that of SOEs around 160 percent.[21]

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14 Zumholz, M., Staatsunternehmen, in: Darimont, B., Wirtschaftspolitik der Volksrepublik China, Wiesbaden 2020, p. 73.

15 World Bank/Development Research Center of the State Council, the People's Republic of China, China 2030: Building a Modern, Harmonious, and Creative Society, 2013, http://www.worldbank.org/content/dam/Worldbank/document/China-2030-complete.pdf, retrieved on 2 June 2020.

16 World Bank/Development Research Center of the State Council, the People's Republic of China, Innovative China. New Drivers of Growth, 2019, p. 42.

17 Zhang, C., How Much Do State-Owned Enterprises Contribute to China's GDP and Employment?, 15 July 2019, http://documents.worldbank.org/curated/en/449701565248091726/pdf/How-Much-Do-State-Owned-Enterprises-Contribute-to-China-s-GDP-and-Employment.pdf, retrieved on 12 June 2020.

18 International Monetary Fund, IMF Country Report No. 17/247: The People's Republic of China – 2017 Article IV Consultation, August 2017, p. 16.

19 See on this for instance World Economic Forum, Explained, the role of China's state-owned companies, https://www.weforum.org/agenda/2019/05/why-chinas-state-owned-companies-still-have-a-key-role-to-play, retrieved on 12 June 2020.

20 Cordes, E. et al., Privatunternehmen, in: Darimont, B., Wirtschaftspolitik der Volksrepublik China, Wiesbaden 2020, pp. 85 ff.

21 Cordes, E. et al., *ibid.* , p. 90; Lardy, N. R., The State Strikes Back. The End of Economic Reform in China?, Washington, DC 2019, p. 61.

564. Regardless of the extant differences between state and private companies, there is a need to note that it is not always expedient to break Chinese companies down solely as to whether they are privately or state owned.[22] There are for instance both state and private companies which are more closely associated with the State and receive considerable state support, and more market-based, competition-orientated Chinese companies.[23] The Chinese State furthermore exerts influence both on SOEs and on many private companies, in particular those whose products are considered to be strategically important. A characteristic of the Chinese political economic system in this regard is a "broad congruence of interests" between the CPC, the government, and the companies, as well as a "broad identicalness" between the elites and decision-makers in the CPC and the state government as well as those in charge of in top Chinese companies.[24] The increasing influence of the Chinese State in recent years is furthermore revealed by an increase in the number of communist party cells in private companies. Significance finally also attaches in this context to the "Corporate Social Credit System", by means of which the Chinese State is ultimately able to monitor and sanction companies' conduct.

565. Apart from this influence exerted on corporate decisions, the Chinese State intervenes in economic activities in various ways in order to achieve its industrial policy goals. This relates, firstly, to pricing in many areas. Price-distorting interventions primarily take place upstream, such as when it comes to prices for capital, land, labour and energy, whilst free pricing prevails particularly in consumer goods.[25] Secondly, the State intervenes targetedly on markets via state support measures for specific sectors or companies. This takes place for instance in the shape of economic benefits (subsidies), in direct form such as financial aid, but also indirectly in the form of tax breaks. It is important to stress here that both state and private companies can benefit from such measures taken by the Chinese State to support or subsidise individual companies or sectors.

566. A potential consequence of China's interventionist policy which has repeatedly occurred in recent years is the build-up of overcapacity. Examples of this can be found in the aluminium and steel industries, which have particularly benefited from considerable energy subsidies from the Chinese State. If such overcapacities in these sectors also lead to increased supply abroad via exports, these distortions initially restricted to the Chinese market also exert an impact internationally, to the disadvantage of foreign competitors.

567. Finally, there are many restrictions in China which result in discrimination against foreign companies. This particularly relates to market access, which is restricted for foreign companies in many sectors. For instance, in some sectors there are bans on investment or limitations of the shares held, whilst in other economic sectors market access is only possible by partnering with a Chinese company in a joint venture. Such restrictions are applied amongst other things in order to deliberately steer foreign investments into specific sectors, or to use the technology and know-how of foreign companies in China. Additionally, non-Chinese companies are also placed at a disadvantage in public procurement procedures. Reference is made in this respect for instance to "incomprehensible standards", "Buy Chinese" obligations, as well as points systems which place foreign companies at a disadvantage vis-à-vis Chinese ones.[26]

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22 See on this for instance European Commission, Commission staff working document on significant distortions in the economy of the People's Republic of China for the purposes of trade defence investigations, SWD(2017) 483 final/2, 20 December 2017.

23 Huotari, M., Staat und Wirtschaft, in: Heilmann, S., Das politische System der Volksrepublik China, Wiesbaden 2016, pp. 199-200.

24 Taube, M., Chinas Streben nach Zukunftstechnologien – partnerschaftliches Agieren von Staat und Unternehmertum als Erfolgsgeheimnis, ifo Schnelldienst 71(14), 2018, p. 18.

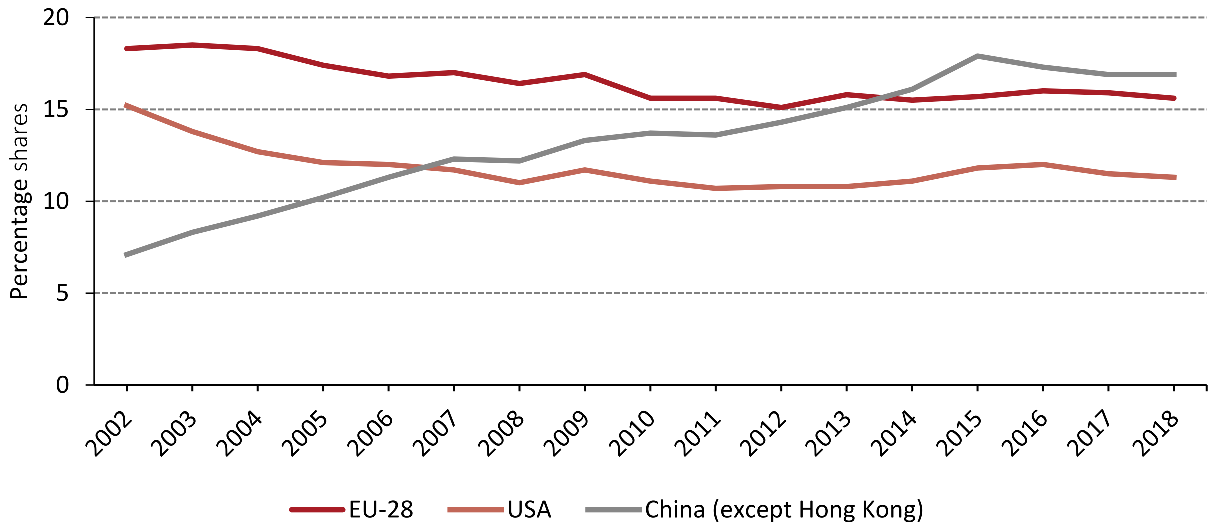
25 European Commission, Commission staff working document on significant distortions in the economy of the People's Republic of China for the purposes of trade defence investigations, SWD(2017) 483 final/2, 20 December 2017; Taube, M./in der Heiden, P. T., *ibid.*

26 See BDI, Grundsatzpapier China. Partner und systemischer Wettbewerber – Wie gehen wir mit Chinas staatlich gelenkter Volkswirtschaft um?, January 2019, p. 16.

1.2 China's significance for the global economy and the European Union is on the rise

568. China's significance for the global economy has increased considerably in recent decades. In particular since China joined the WTO in 2001, there have been considerable shifts in world trade. The share of worldwide goods exports accounted for by China (except Hong Kong) increased from approx. 7 to roughly 17 percent from 2002 to 2018, not taking trade in goods within the EU into account, whilst the shares accounted for by the EU and the United States (USA) fell from about 18.3 and 15.2 percent, respectively, to approx. 15.6 and 11.3 percent, respectively.[27] If we take imports of goods, the share accounted for by China (except Hong Kong) increased in the same period from approx. 6 to roughly 14 percent, whilst the share accounted for by the EU has fallen from roughly 18.4 to 15.2 percent, and that of the USA from almost 25 to approx. 17 percent.

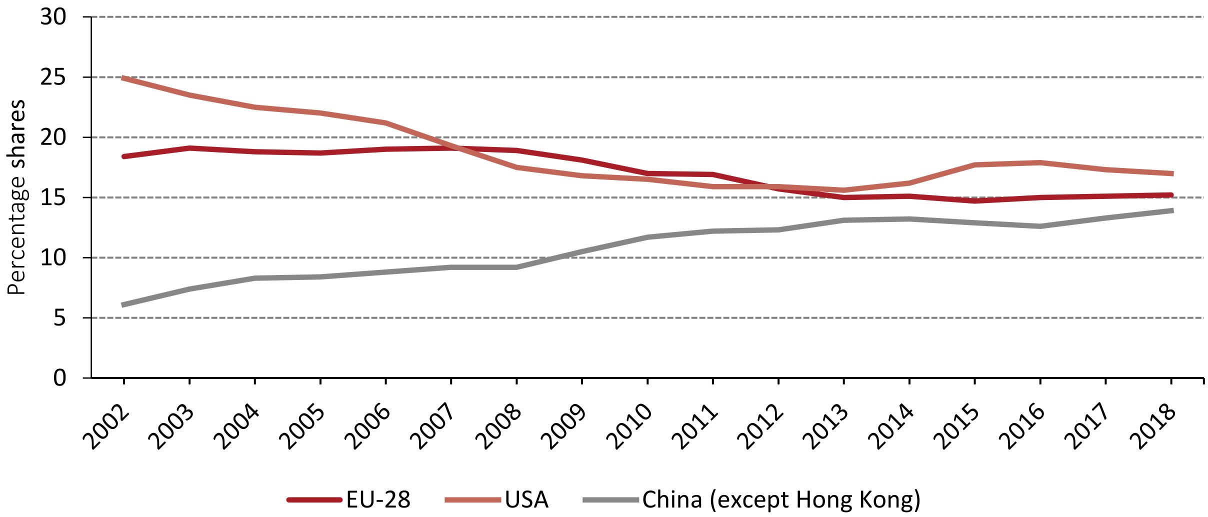
Figure 1: Development in shares of worldwide goods exports



Source: Eurostat (ext_lt_introle); own illustration

[27] Cf. Eurostat, Share of EU in the World Trade, http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ext_lt_introle, retrieved on 12 June 2020.

Figure 2: Development in shares of worldwide imports of goods



Source: Eurostat (ext_lt_introle); own illustration

569. The rise of China on the international stage has led to changes in the economic structure in many regions of the world. Many countries have experienced market exits, and concomitant job losses, as a result of the increased import competition arising from the growth in imports from China, with which domestic companies were unable to compete in price terms. A study for the USA shows for instance that China's accession to the WTO had a negative impact on jobs and on the wages of low-skilled workers in the USA.[28] By contrast, no such impact can be detected for Germany in the aggregate.[29] This is traced back amongst other things to the fact that German industry had previously already adjusted to cheaper competition from Eastern Europe, that new export opportunities arose as a result of the opening to the East, and that new sales opportunities arose in China for high-quality German products.[30]

570. If we look at bilateral trade relations between China and the EU, China today is the second largest trading partner of the EU, after the USA, and the EU is China's largest trading partner. The volume of goods traded between China and the EU has increased considerably since China's accession to the WTO. The volume of goods traded between the EU and China (except Hong Kong) in 2019 was approx. EUR 645 billion.[31] Approx. EUR 225 billion of this was accounted for by exports from the EU to China, and roughly EUR 420 billion by imports from China to the EU. The share accounted for by China in the EU's goods exports rose between 2002 and 2019 from approx. 4 to roughly 11 percent, and the share of goods imported to the EU rose from approx. 9.7 to approx. 20.4 percent. If one additionally observes the EU's goods trade with Hong Kong, which included approx. EUR 36.7 billion in EU exports and approx. EUR 11.3 billion in EU imports in 2019, China's share (incl. Hong Kong) of EU exports in 2019 rose to approx. 12.8 percent, and its share of the EU imports rose to approx. 21 percent. By contrast, the volume of goods traded between the EU and the USA was approx. EUR 744 billion in 2019, approx. EUR 450 billion

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[28] Autor, David H. et al., The China Syndrome: Local Labor Market Effects of Import Competition in the United States, American Economic Review 103(6), 2013, pp. 2162–68.

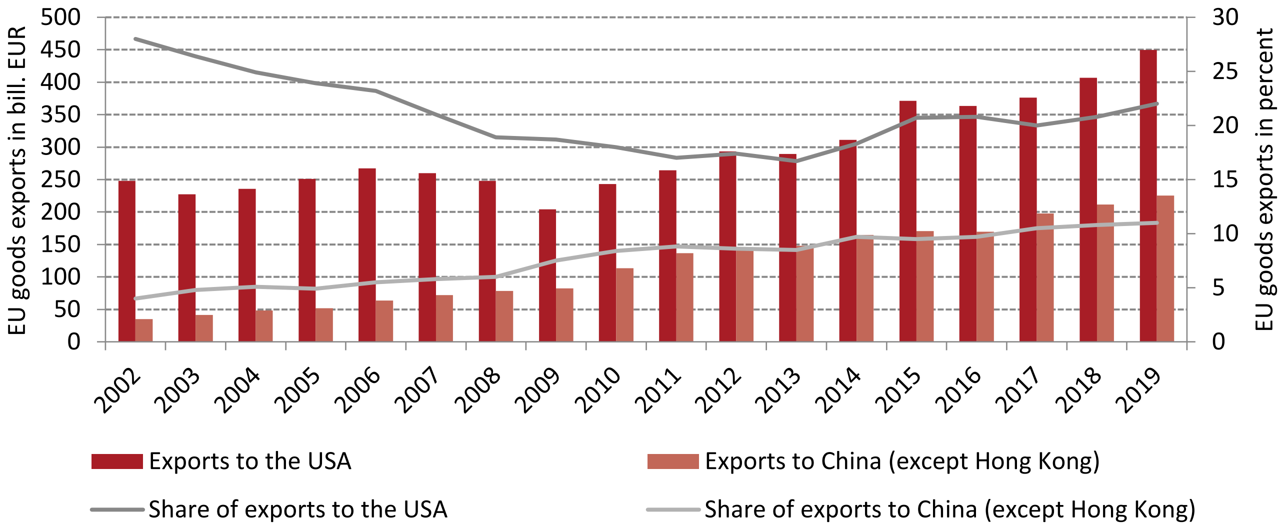
[29] Dauth et al., The Rise of the East and the Far East: German Labor Markets and Trade Integration, Journal of the European Economic Association 12(6), 2014, pp. 1643–75.

[30] Cf. Marin, D., Der Chinaschock: Was macht Deutschland anders?, Ökonomenstimme, 25 September 2017, https://www.oekonomenstimme.org/artikel/2017/09/der-china-schock-was-macht-deutschland-anders, retrieved on 12 June 2020, as well as the literature cited therein.

[31] Eurostat, Extra-EU trade by partner (ext_lt_maineu), https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=ext_lt_maineu&lang=en, retrieved on 12 June 2020.

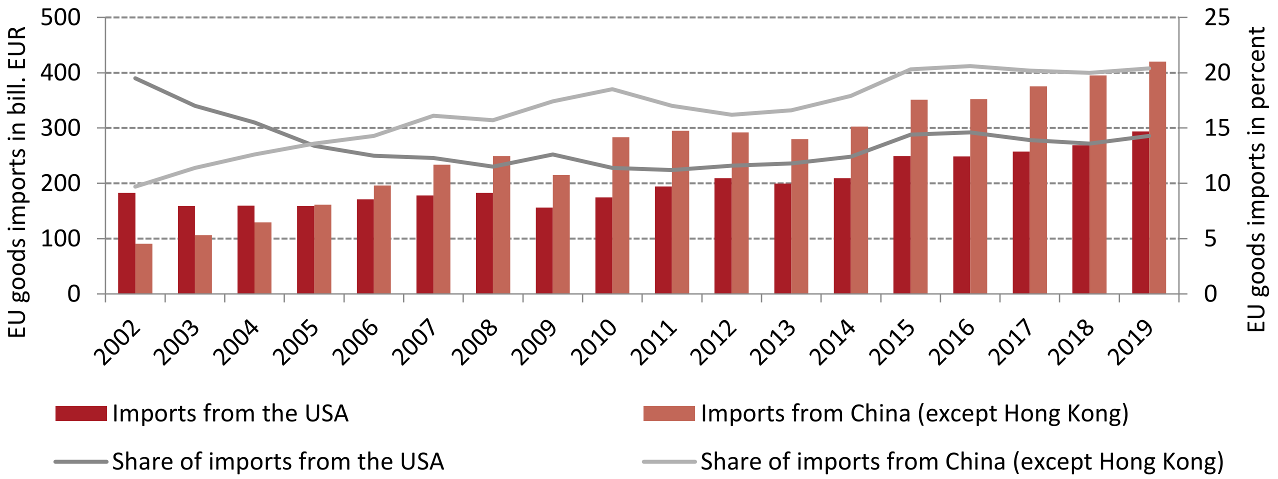
of which was accounted for by exports from the EU to the USA, and approx. EUR 294 billion by imports to the EU from the USA. The share of goods exported to the USA fell from approx. 28 to approx. 22 percent, and the share of goods imported from the USA fell from approx. 19.5 to approx. 14.3 from 2002 to 2019.

Figure 3: Amount and shares of goods exported by the EU 28 to China and the USA



Source: Eurostat (ext_lt_maineu); own illustration

Figure 4: Amount and shares of goods imported by the EU 28 from China and the USA



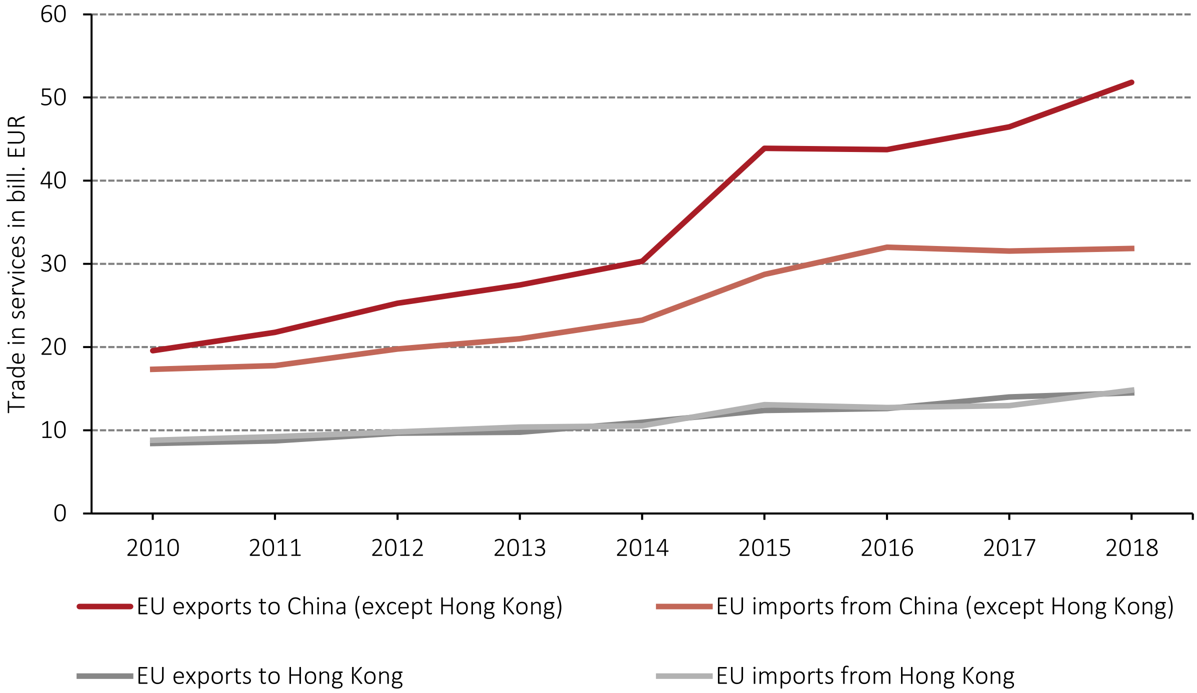
Source: Eurostat (ext_lt_maineu); own illustration

571. Compared to trade in goods, trade in services between the EU and China is less developed. China is the EU's third-largest trading partner in the service sector after the USA (approx. EUR 494 billion) and Switzerland (approx. EUR 192 billion). The volume of services traded between the EU and China (except Hong Kong) rose between 2010 and 2018 from approx. EUR 36.9 billion to approx. EUR 83.7 billion, and from approx. EUR 54 billion to approx. 113 billion (including Hong Kong).[32] In 2018, approx. EUR 51.8 billion were accounted for by EU exports to and approx. EUR 31.9 billion by EU imports from China (except Hong Kong), as well as approx. EUR 14.5 billion by EU

[32] Eurostat, International trade in services (since 2010) (BPM6), https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=bop_its6_det&lang=en, retrieved on 12 June 2020.

exports to and approx. EUR 14.8 billion by EU imports from Hong Kong. All in all – and unlike in goods traded – the EU hence has a surplus in trade in services with China. Not including Hong Kong, China's share of the EU's exports and imports in the service sector in 2018 was approx. 5.4 and approx. 4.1 percent, respectively; including Hong Kong, these shares rose to approx. 6.9 and approx. 6 percent, respectively. The USA, by contrast, accounted for a share of approx. 26.8 percent of services exported from the EU and 30.5 percent of services imported to the EU.

Figure 5: Developments in trade in services between the EU 28 and China



Source: Eurostat (bop_its6_det); own illustration

572. In addition to trade in goods and services, the volume of Chinese direct investment in the EU, in particular in the form of company acquisitions and takeovers, also rose markedly in the past two decades. Approx. 40 percent of Chinese direct investment in 2018 was made in Europe.[33] The figures relating to the amount of Chinese direct investment vary depending on their source because of differences in calculation methods.[34] According to a study by Rhodium Group (RHG) and the Mercator Institute for China Studies (MERICS), Chinese direct investment in the EU 28 rose from approx. EUR 0.1 billion per year in 2000 to roughly EUR 11.7 billion in 2019.[35] Having peaked in 2016 at approx. EUR 37.3 billion, the volume of annual Chinese direct investment is declining, and is currently roughly at the level of 2013/2014.[36] The traditionally large share of Chinese state enterprises in Chinese direct

33 Felbermayr, G. et al., Feindliche Übernahme? Chinas Auslandsinvestitionen unter der Lupe, ifo Schnelldienst 72(8), 2019, pp. 27–39.

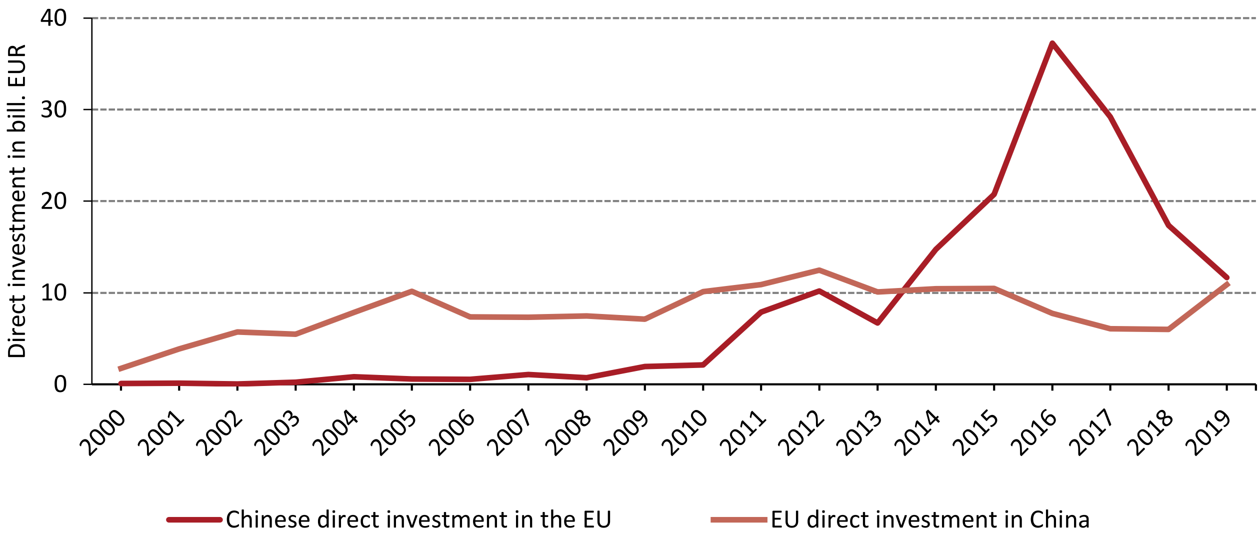
34 According to the official definition, direct investment takes place when the investor acquires at least ten percent of the ordinary shares or voting rights, and hence can exert an influence on the foreign company. According to this definition, for instance, Geely's 9.7 percent shareholding in Daimler, acquired in 2018, cannot be regarded as a direct investment.

35 Rhodium Group/Merics, Chinese FDI in Europe: 2019 Update. Special Topic: Research Collaborations, April 2020.

36 The main reason for the fall in direct investment since 2016, which mirrors the drop in Chinese investments worldwide, is given as the ongoing capital controls and a shortage of liquidity in China. Additionally, new regulations are pointed to in investment control in some Member States, so that Chinese foreign investment is increasingly being examined for security risks. This could have delayed or even prevented investments. See on this Rhodium Group/Merics, Chinese FDI in Europe: 2018 Trends and Impact of New Screening Policies, March 2019.

investment in the EU is also decreasing. In 2019, Chinese state enterprises only accounted for 11 percent of Chinese direct investment in the EU, in comparison with more than 70 percent in the period from 2010 to 2015.[37] Despite the current decline, annual Chinese direct investment has significantly exceeded direct investment by the EU in China in recent years. The latter accounted for approx. EUR 10.9 billion in 2019.

Figure 6: Developments in annual direct investment between the EU 28 and China



N.B.: Data represents the combined value of direct investment transactions of companies from mainland China and the EU, including greenfield projects and acquisitions that result in significant ownership control (>10% of equity).

Source: Rhodium Group; own illustration

573. The above data illustrate the increasing activity of Chinese investors in the EU in recent years. Regardless of this, the stock of Chinese direct investment in the EU remains low, for instance in comparison to that of US direct investment. For instance, the stock of US direct investment in the EU at the end of 2018 was approx. EUR 2,180 billion, whilst that of Chinese direct investment was approx. EUR 63 billion (except Hong Kong) and approx. EUR 231 billion (incl. Hong Kong).[38] However, the stock of Chinese direct investment in the EU has risen continually in recent years, whilst that of US direct investment has been in decline, since peaking at approx. EUR 2,568 billion in 2016. At the same time, the stock of EU direct investment in China, at approx. EUR 190 billion (except Hong Kong) and EUR 351 billion (incl. Hong Kong), was still higher at the end of 2018 than that of Chinese direct investment in the EU.

574. Apart from the fundamental increase in the number of transactions, the pronounced increase in the volume of Chinese direct investment overall is driven by individual, very large investments. One example that should be mentioned here with regard to Germany is the takeover of Kuka by Midea in 2016, amounting to EUR 4.5 billion.[39] A recent study also shows that company acquisitions by Chinese investors differ from those by investors from oth-

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[37] The decline is traced back, firstly, to considerable direct investment by Chinese private companies, as well as secondly to restrictions in China itself, as well as to defensive measures and a changing regulatory environment in the EU. See on this Rhodium Group/Merics, Chinese FDI in Europe: 2019 Update. Special Topic: Research Collaborations, April 2020

[38] Eurostat, EU direct investment positions, flows and income, breakdown by partner countries (BPM6), https://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=bop_fdi6_geo&lang=en, retrieved on 12 June 2020.

[39] Geely's investment in Daimler, at approx. EUR 7.5 billion in 2018, is also significant. Since however Geely obtained fewer than 10 percent of the voting rights, many sets of statistics do not record this transaction as foreign direct investment.

er countries. According to the study, Chinese investors primarily buy companies with a higher level of debt and lower profitability.[40] There are furthermore differences between the investments made by Chinese state and private companies. The investments made by Chinese SOEs are very much orientated towards the strategic goals as set out in the state plans such as the “Belt-and-Road Initiative” and “Made in China 2025”. No such focus can be made out for private Chinese investors, by contrast.

1.3 Relevance for the European Union in terms of competition

575. Against the background of increasing competition between European and Chinese companies, several industrial policy practices used by China which lead to distortions of competition on different markets are increasingly facing criticism. It is possible to make an approximate distinction here between measures that restrict access to the Chinese market for European companies, and those which on the other hand lead to competitive advantages for Chinese companies that may have an impact on both China itself and on international trade and on the EU internal market.[41]

576. As was already stated, market access to the Chinese market for European companies is highly restricted. No foreign investments at all are possible in some sectors, whilst in other sectors a joint venture must be entered into. Such measures constitute an attempt on the part of the Chinese State to targetedly guide foreign investments into specific sectors. In contrast, access to the European internal market is comparably open for Chinese companies, albeit there has also been some tightening up within the EU in the meantime when it comes to reviewing foreign direct investment. The different levels of openness in the Chinese economy as compared to the EU are also made vividly clear by the OECD’s “FDI Regulatory Restrictiveness Index”. In this ranking, China occupied only 65th place in 2018 out of 70 countries considered. Germany took 15th place, and the USA reached place 46.[42]

577. In order to reduce these asymmetrical market access conditions, the EU, as well as European industry, have been pushing for some time for greater opening of the Chinese market, and in general for greater reciprocity in relations with China. Improving market access for European companies in China is also a central demand of the EU as part of the investment agreement with China, which has been negotiated since 2013 and is to be concluded by the end of 2020, replacing the existing bilateral investment agreements between the individual Member States and China. This Agreement is intended to reduce market access barriers, as well as to create a simple and secure legal framework for investors on both sides.[43]

578. The focus of the present report is meanwhile placed on measures enacted by the Chinese State which may be harmful to competition in the EU internal market. It should be stressed in advance that the very fact that Chinese companies can produce more cheaply does not lead to an impermissible competitive advantage. Where Chinese companies benefit from advantageous local production conditions that are in line with market conditions and that do not exist in similar form in the EU, this is a comparative advantage accruing to China which must also be accepted by European competitors. This may also include different social and labour standards, as long as these do not undermine internationally-agreed minimum standards. For this reason, competitive advantages emerging from the existence of advantageous production conditions in China also do not constitute an impediment to well-functioning competition in the internal market. In particular with regard to the assessment of Chinese subsidies, it should furthermore be considered that it is virtually impossible to make an unambiguous distinction between

[40] Fuest, C. et al., What Drives Chinese Overseas M&A Investment? Evidence from Micro Data, EconPol Working Paper 33, November 2019.

[41] Distortions of competition may also occur on third markets.

[42] The index can take values between 0 (=economy open to FDI to a maximum extent) and 1 (= economy absolutely closed to FDI). A value of 0.251 was stated for China for 2018. The values for Germany and the USA are 0.023 and 0.089, respectively. The average value for the OECD countries is 0.065. See OECD, OECD FDI Regulatory Restrictiveness Index, https://stats.oecd.org/Index.aspx?datasetcode=FDIINDEX#, retrieved on 12 June 2020.

[43] See on this Section 4.2.3.

justified and unjustified subsidies. True, it can be argued in economic terms that subsidies can particularly be justified if they help remedy “market failure”. However, there are further reasons over and above this for granting subsidies, and these are frequently driven by distributive policies.[44] It should moreover be pointed out that subsidies distorting competition are not a specifically Chinese problem, but can have a particularly serious effect because of the size of the country and of the strength of its economy.

579. Competition problems may however arise if Chinese companies are placed in a better competitive position because of the market-distorting general economic framework in China, or because of selective state support measures motivated by industrial policy which are not justified according to European standards.

580. With regard to the general framework in China, competitive advantages for Chinese companies may arise in particular given the fact that the Chinese State intervenes in the pricing of upstream production factors. This particularly concerns prices for capital, land, labour or also energy, thus resulting in production cost advantages for Chinese companies vis-à-vis European competitors.[45] Advantages may furthermore also be created for instance from inadequately-protected intellectual property rights and regulations on technology transfer, which may be reflected in lower research and development costs.[46] Furthermore, statutory regulations which discriminate against foreign competitors may have an advantageous effect for Chinese companies. For instance, restricted market access opportunities for foreign companies in China may help Chinese companies to achieve additional economies of scale and scope on their domestic market.[47] Another aspect is the possibility to waive regulation for market-dominating companies in China, so that these companies are able to make additional profits in their home market.[48] Companies might use these additional profits to leverage their market power on the Chinese market to other markets such as the EU internal market through cross-subsidisation.

581. In addition, competitive advantages for Chinese companies can arise in particular as a result of the extensive direct or indirect subsidies selectively granted to individual Chinese companies or industries in China by the Chinese State for industrial policy purposes.[49] Examples of such subsidies include direct financial aid, tax breaks or attractive (export) loans. Such subsidies frequently lead to a cost and hence a competitive advantage for the recipient companies, even though the precise effects on competition may differ according to the type of subsidy.[50] Where these subsidies are related to intermediates, they furthermore impact downstream stages of production, so that companies which process these products also benefit indirectly from the subsidies at the upstream level. Subsidies are given at both centralist and sub-national level. Additionally, depending on the type, they may be

[44] European State aid law also has many exceptions for granting State aid, so that the distortion of competition caused by the State aid or subsidy is accepted for other overriding reasons in these cases.

[45] European Commission, Commission staff working document on significant distortions in the economy of the People’s Republic of China for the purposes of trade defence investigations, SWD(2017) 483 final/2, 20 December 2017; Taube, M. /in der Heiden, P. T., *ibid*.

[46] Bertelsmann Stiftung, Beyond investment screening. Expanding Europe’s toolbox to address economic risks from Chinese state capitalism, October 2019, p. 12, https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/DA_Studie_ExpandEurope_2019.pdf, retrieved on 12 June 2020.

[47] Likewise, p. 9.

[48] The Netherlands, Non-paper - Strengthening the level playing field on the internal market, 9 December 2019, https://www.permanentrepresentations.nl/documents/publications/2019/12/09/non-paper-on-level-playing-field, retrieved on 16 June 2020.

[49] See on this Section 3.2.1 and 3.2.2 further below (on anti-subsidy law and State aid law).

[50] A subsidy which directly impacts the course of business, and which for instance leads to a reduction in the variable costs, can directly impact prices, and hence competitors and consumers, whilst an investment grant may have more medium- to long-term effects on market entries or exits. The impact of a subsidy is furthermore dependent on whether it is a one-off or a recurrent support measure, and how selectively it is granted. See here for instance Schwalbe, Ökonomische Grundlagen der Beihilfenkontrolle, in: Münchener Kommentar Europäisches und Deutsches Wettbewerbsrecht, Band 5Beihilfenrecht, 2nd edition 2018, Einleitung para. 101.

granted both directly from the Chinese State, and indirectly via (state-owned) companies that it controls, e. g. in the form of attractive loans at non-market conditions via state-controlled banks. Due to the deep roots of the Chinese party structure within the Chinese economy, it is ultimately hardly possible to determine where the Chinese state stands behind the granting of advantages. In particular the role of Chinese state-owned enterprises is not clear from a European perspective.

582. The main common feature of the different market interventions and state support measures in China is that they either lead to cost advantages for the beneficiary Chinese companies or that these companies have additional financial resources (or financing advantages), either on the basis of the surplus profits made, or of financial grants given by the Chinese State. In both cases, distortions of competition initially occur in China itself. In particular, selectively granting subsidies to specific undertakings or branches of production may have major negative effects in terms of competition where companies are subsequently able to build up or expand their market power and behave in a way that restricts competition, or if inefficient companies are artificially kept alive.

583. These distortions on the Chinese market may furthermore impact the EU internal market. Firstly, the export of subsidised Chinese products to the EU could mean that European competitors who cannot keep up with the prices of the subsidised Chinese products may be driven out of the market or prevented from entering the market, even if they are as such more efficient than their Chinese competitors.[51] Secondly, Chinese companies which have high levels of financial resources might be tempted to build up market power on the EU internal market by pushing their way into the market with low prices that are cross-subsidised by financial benefits from the Chinese State or by surplus profits in their home market, for example due to an unregulated dominant position.[52] In both cases, the Chinese companies in question might gradually establish market power in the EU internal market and, like other companies, abuse this market position, for instance in the form of excessive prices. Such a development could also have a negative impact on the innovative capacity of the European economy.[53] In addition to these direct effects in terms of competition, it should be pointed out that a lower level of competitiveness on the part of European companies could also have negative consequences in strategic terms, for example if Europe's ability to develop critical technology or to maintain highly-qualified employment were to be affected.

584. With regard to the high importance of Chinese state-owned enterprises, it should furthermore be taken into account in this context that such companies may be subject to less stringent economic constraints or financial restrictions than private companies.[54] In particular, they do not primarily have to work in such a way as to maximise profit, but may be targetedly deployed in order to pursue strategic political goals of the Chinese State. In order to achieve these goals, they may also engage in competition-distorting conducts in order to expand their market share, and, in this context, possibly drive more efficient companies out of the market. With regard to any predatory pricing or cut throat strategy, it should be taken into account that, unlike private companies which trade in a purely profit-orientated manner, SOEs do not necessarily have to compensate for their (temporary) losses in the near future by increasing their prices. In fact, they may as a matter of principle also make losses over a very long period, and even do without subsequently recouping their losses. Specifically with regard to China, it should be stressed that this consideration is fundamentally not only applicable to Chinese SOEs, but also to private Chinese companies where they are acting on behalf of the Chinese State and are provided by the latter with appropriate financial resources or if the latter covers their losses.

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51 See on the following also The Netherlands, Non-paper - Strengthening the level playing field on the internal market, 9 December 2019, https://www.permanentrepresentations.nl/documents/publications/2019/12/09/non-paper-on-level-playing-field, retrieved on 16 June 2020.

52 See on this specifically Section 3.1.1 (on anti-dumping law).

53 It is also likely to be significant from a politico-economic point of view that any market exit by European companies may also cause jobs to be lost in the EU.

54 Heim, M., How can European competition law address market distortions caused by state-owned enterprises?, Bruegel Policy Contribution No. 18, December 2019, pp. 5-6; see on this Section 3.2.3 further below (on public enterprises in the EU).

585. In addition to the situation described in which subsidies or other advantages accruing to Chinese companies in their domestic market may distort competition in the EU internal market, it is also possible that the Chinese State grants subsidies to EU-based companies.[55] Analogously to the situation described above and to State aid from EU Member States, such subsidies lead to competitive advantages for the companies in question relative to their competitors. For example, depending on the type of subsidy, subsidised companies may offer their products at lower prices and subsequently increase their market share at the expense of non-subsidised companies, even if the latter are more efficient. Unlike aid granted by Member States, such subsidies from third countries to companies based in the EU can be captured only to a very limited extent under the existing rules.[56]

586. In order to avoid negative effects on competition in the EU internal market or competitive disadvantages for European companies caused by foreign subsidies, the introduction of new instruments is currently being discussed. These instruments are primarily aimed at restoring equal and fair competitive conditions.[57] It should however be stressed that while third country subsidies can lead to competitive disadvantages for the non-subsidised companies concerned, the EU as a whole often benefits from third country subsidies, *e.g*. in the form of lower prices of subsidised goods, and is not injured per se. From an economic point of view, a competition problem exists above all if the beneficiary companies have market power in the EU internal market or can build up market power as a result of the foreign subsidy. As long as this is not the case, no intervention under competition law is in principle necessary when considering European welfare. There is indeed unequal treatment of Chinese and third country subsidies and EU aid, as the EU Member States are only permitted to grant aid to companies subject to a state aid review. However, a difference in the assessment of European aid and third country subsidies arises in so far as the former are financed by European tax revenues and a subsidy race between the EU Member States is to be prevented, while the latter are paid by the third countries concerned. By contrast, from an economic point of view, the aim of avoiding international subsidy races that lead to global welfare losses could militate in favour of greater coverage of third country subsidies, apart from the interest in creating a level playing field.

587. A problem of a fundamentally different nature occurs when companies in China actively plan or agree on strategies that restrict competition, and the Chinese State refrains from intervening. This kind of situation is conceivable in particular when the conducts in question target not the Chinese market, but solely markets abroad (such as export cartels; coordination between the undertakings involved in a merger and other companies in China). The situation is similar when the Chinese State causes SOEs to leverage their market power in China to other countries. Such conducts are legally to be judged according to the general rules, and are prohibited depending on the expected competition-restricting effects. In fact, from a European perspective, the problem however exists that the information required to detect and pursue competition violations may only be available in China, and may be inaccessible without the cooperation of the Chinese State.[58]

588. There is furthermore discussion as to the degree to which the exertion of influence by the Chinese State on company acquisitions may lead to competition problems. It is possible in particular that Chinese companies may pay excessive prices because of state subsidies, and may systematically outbid their European competitors in com-

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[55] See on this also European Commission, White Paper on levelling the playing field as regards foreign subsidies, COM(2020) 253 final, 17 June 2020.

[56] In particular, it does not constitute aid within the meaning of Article 107 TFEU, since the support is not granted by a Member State. Thus, only the strengthening of financial strength as a result of the subsidy can be recorded as such (*e.g*., in merger and abuse control). Sections 3.1.2.1, 3.2.2.3 and 3.3.2.3 below provide further details on this.

[57] EU Commission, White Paper on levelling the playing field as regards foreign subsidies, COM(2020) 253 final, 17 June 2020; Netherlands, Non-paper - Strengthening the level playing field on the internal market, 9 December 2019, https://www.permanentrepresentations.nl/documents/publications/2019/12/09/non-paper-on-level-playing-field, available on 16 June 2020; see also Section 3.3.2 (in particular Section 3.3.2.3) and Section 4.1 below.

[58] For further detail on this see Section 3.1.2.1 below (in general on breaches of competition by companies in China) and Section 3.2.3 (once more on Chinese SOEs). On coordination in concentrations, see also Federal Cartel Office, Order of 27 April 2020, B4-115/19 – Vossloh Locomotives GmbH/CRRC Zhuzhou Locomotives Co., and paras. 919 ff. below.

pany acquisitions.[59] In this respect, it is conceivable that a subsidy is granted explicitly for the acquisition of a specific EU target company or that a subsidy indirectly strengthens the financial strength of the potential acquirer. Such subsidies could prevent non-subsidised companies from obtaining efficiency gains or gaining access to key technologies by acquiring the respective target company, which could have a negative impact on their competitiveness and innovation potential.[60]

589. However, the theoretical analysis of whether a competition problem exists is habitually focussed on competition on product markets. It hence abstracts from national interests, such as competition regarding political influence associated with specific acquisitions. Accordingly, a subsidised takeover in particular would lead to a competition problem if the concrete merger were to lead to a marked increase in the market power of the merged company in the product market observed. Regardless of whether a subsidy takes place or not, preventing this is the task of European merger control, to which Chinese companies too are subject. Apart from this, as has already been stated, in particular the investments of Chinese SOEs are influenced by the strategic goals of the Chinese State. There are however no clear empirical results regarding the hypothesis that Chinese companies are systematically outbidding their European competitors in company acquisitions.[61]

590. Additional problems may arise of a security policy nature if the Chinese State exerts a direct influence on the purchase decision of Chinese companies in company acquisitions in order to assert strategic political power interests.[62] In Germany, for instance, the takeover of the robot manufacturer Kuka by Midea in 2016 may perhaps be seen as an example. Additionally, security policy concerns were also put forward in the case of the planned investment by the Chinese SOE SGCC in the transmission network of the Belgian-German electricity network operator 50 Hertz. In such cases, due to the underlying strategic interests, the acquisitions are not always independent and have to be considered individually; in particular when the acquisitions are carried out by state-owned enterprises.[63] If the European authorities intervene in such company acuisitions, account must be taken not only of the interest in protecting competition, but also of the interest in protecting European security and order (such as the protection of critical infrastructures, defence policy interests). The abovementioned cases were already the trigger for a tightening up of investment control in Germany and the creation of an EU framework regulation in this area.[64]

591. Apart from possible competition problems in the acquisition of companies, there have been some general warnings of China's interest in terms of industrial strategy when it comes to building up market dominance in individual sectors or to increasing its political influence in the EU. The warnings speak in this regard of a "sell-off" of European companies and an outflow of technological know-how. There is however no unambiguous proof of this.[65]

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59 See Section 3.3.2.3 (on EU merger control) for more on this.

60 European Commission, White Paper on levelling the playing field as regards foreign subsidies, COM(2020) 253 final, 17 June 2020, p. 7, 22 ff.

61 Fuest, C. et al. (2019) show that Chinese investors did not pay more for comparable firms than investors from other countries in the period from 2002 to 2017. In contrast, Urbšienė, L. et al. (2015) reach the conclusion with regard to company purchases in Europe in the period from 2000 to 2013 that Chinese and European investors paid different premiums for comparable companies. Accordingly, Chinese investors paid twice the premiums on average for comparable firms than European investors did. Cf. Fuest et al., What Drives Chinese Overseas M&A Investment? Evidence from Micro Data, EconPol Working Paper 33, November 2019; Urbšienė, L. et al., Comparison of Premiums of Chinese and European Companies in Mergers and Acquisitions in Europe, Organizations and Markets in Emerging Economies 6(2), 2015, pp. 67–102.

62 See on this additionally Section 3.3.1 (on investment control).

63 Cf. Art. 5(2) subparagraph 2 of Regulation 139/2004 (on turnover) on comprehensive assessments in merger control.

64 See on this Section 3.3.1.

65 See para. 572 above.

592. In the view of the Monopolies Commission, it should nonetheless be stressed with regard to the evaluation of Chinese acuisitions of European companies or direct investment in the EU that competition policy aspects need to be strictly separated from aspects relating to public security and order. Any security policy arguments should in particular not be misused in order to prohibit non-security-relevant acquisitions for purely industrial policy reasons. The countries affected might otherwise in turn react to such protectionist measures by taking countermeasures, which would ultimately be disadvantageous to the European economy. In fact, it should be ensured that the EU remains attractive for foreign direct investment, which can help promote economic growth in the EU and create jobs. Acquisitions should therefore only be prohibited or subjected to conditions if there are well-founded competition or security policy concerns.

593. Finally, disadvantages in competition for European companies should be mentioned that may occur in the context of public tenders and procurement procedures.[66] This concerns, firstly, the abovementioned aspect of discrimination against European companies in public procurement procedures in China. Additionally, however, disadvantages in competition may also occur in public procurement procedures in the EU if state-supported Chinese companies can offer lower prices than EU companies trading under market-economy conditions. In addition, non-subsidised suppliers could possibly be deterred from participating in the procurement procedures at all. True, lower bids are as a matter of principle advantageous to the contracting authorities from an economic point of view, regardless of how they come about. However, the European Commission considers it necessary to counter discrimination of European companies against subsidised companies from third countries in public procurement procedures in the EU in order to protect bidder equality in competition for public contracts.[67]

594. Against the background of the current reform debate in the EU, the following sections analyse the degree to which the challenges posed by Chinese state capitalism, and in particular the massive state support for companies in the shape of subsidies, can be countered by existing competition and foreign trade legislation and the extent to which there is a need for adjustment to avoid competition problems. As has already been stressed, it should be taken into account here that foreign subsidies are not bad for the EU per se. In fact, consumers and all users of imported, subsidised products benefit in the shape of lower prices. These advantages for consumers or parts of the European economy stand vis-à-vis any competitive disadvantages for the European companies directly affected. These opposing impacts exerted by foreign subsidies on the EU should be looked at in the discussion regarding possible reforms. In economic terms, a problem arises if, overall, any welfare losses exceed the welfare gains. What is more, as has already been explained, the fact should be taken into account that the EU Member States also grant subsidies. The main problem in this respect are Chinese subsidies which have an effect in the EU and which – if they were equated to state aid within the meaning of Article 107(1) TFEU – would not be compatible with EU State aid law. This is because the understanding of competition as defined by the European treaties presupposes, among other things, equality of opportunity for companies in the EU internal market, which is achieved through effective State aid control.

2 Competition policy linkage and conflicting objectives

595. In order to develop options for action with which to react to the challenges in terms of competition posed by Chinese state capitalism, the following sections first set out the political and legal framework, based on the stipulations made in the EU Treaties. The EU Treaties make key political choices which restrict the political options available. These political choices are determined by the legal interests (also: system principles) and their interrelationship, both as defined in the Treaties. The legal interests also have a guiding function where the individual provisions of the Treaties, when looked at in isolation, do not say anything about the relationship between the EU and China.

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[66] See on this Section 3.2.4 further below.

[67] European Commission, White Paper on levelling the playing field as regards foreign subsidies, COM(2020) 253 final, 17 June 2020, section. 4.3 (S. 30 ff.).

2.1 System decision and function guarantees of European economic order

596. In accordance with Art. 3(1) TEU, the EU's general objective "is to promote peace, its values and the well-being of its peoples". This objective is detailed in Art. 3(2)-(4) TEU with regard to internal relations, and in Art. 3(5) TEU for the EU's foreign relations.

597. Concerning internal relations, Art. 3(2) TEU provides that the EU is to create "an area of freedom, security and justice without internal frontiers". Art. 3(3), first sentence, TEU lends this concrete form in that the EU is to establish an internal market. It emerges from the ensuing sentences of this provision that the European Treaties take a system decision in favour of an open, highly-competitive social market economy with free and genuine competition (= market economy system).[68] The EU internal market is fleshed out by the stipulations contained in Art. 3(4) TEU for the coordination mechanism of the economic and monetary union, and otherwise in the Treaty on the Functioning of the European Union (Art. 3 ff. TFEU). The option in favour of the EU internal market is surrounded here by a large number of decisions favouring further high-ranking legal interests in relation with which this option is to be brought into balance (environmental protection, social policy, etc.).[69] In the event of conflicting legal interests, the European Court of Justice fundamentally presumes that the legal interests are equivalent, and grants the acting bodies a wide margin of appreciation.[70]

598. Art. 3(5) TEU provides that the European Union is to protect and promote "its values and interests" in relations with the wider world, and to contribute to the protection of its citizens. The further objectives referred to in the provision include "free and fair trade", whilst the remaining goals are not economic in nature. That having been said, the reference back to the internal goals shows that the EU also endeavours as a matter of principle to create a market economy system in its external relations.[71]

599. Additional weight attaches to economic aspects by virtue of the fact that the EU has exclusive competence for the common commercial policy in accordance with Art. 3(5) and 21 TEU in conjunction with Art. 3, 205 ff. TFEU. This competence is to be exercised such that the EU upholds its "fundamental interests", encourages "the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade", and promotes "an international system based on stronger multilateral cooperation and good global governance"[72]. To this end, the EU has broad competences in the common commercial policy (cf. Art. 207 TFEU).

600. All in all, the European economic constitution hence does not pursue a classical market model such that it stipulates the "mere implementation of specific economic policy principles".[73] The established functioning condi-

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[68] See for more detail Art. 3(4) TEU and 119 and 120 TFEU, as well as Protocol (No 27) on the internal market and competition, OJ C 202 of 7 June 2016, p. 308.

[69] See on this also the "horizontal clauses" (*e.g.*, Art. 8 ff. or 167(4) TFEU). This term refers to provisions contained in the Treaties which aim to harmonise different policy areas. Cf. Wegener, B., in *ibid* (ed.), Enzyklopädie Europarecht, Vol. 8, Europäische Querschnittspolitiken, Baden Baden 2014, § 1.

[70] Cf. for instance ECJ, Judgment of 13 June 1958, 9/56 – Meroni/High Authority, [1958] ECR 9 (43), ECLI:EU:C:1958:7; Judgment of 29 October 1980 139/79 – Maizena/Council, [1980] ECR 3393, ECLI:EU:C:1980:250, para. 23; Judgment of 17 October 1995, C-44/94 – National Federation of Fishermen's Organisations, [1995] ECR I-3115, ECLI:EU:C:1995:325, para. 37.

[71] Cf. Art. 3(5), first sentence, TEU: "In its relations with the wider world, the Union shall uphold and promote its values and interests […]".

[72] Art. 21(1) and (2) TEU.

[73] Hatje, A., in: von Bogdandy, A./Bast, J., Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge, Berlin/Heidelberg 2009, p. 805.

tions of a market economy system however form an external framework for economic policy decisions that is to be adhered to.[74] This rules out any system change towards for instance a system of state capitalism.

601. Furthermore, the European economic constitution lends a new form to the "economic-policy-neutral" orientation of the German Basic Law (*Grundgesetz*).[75] The discussion that has been underway in Germany for quite some time concerning the fundamental orientation of the Basic Law with regard to the German economic constitution has thus been fundamentally concluded.[76] Exceptions exist solely where Germany continues to have competence on the basis of the European distribution of competences. This is however not the case when it comes to interests regarding the market economy system and the system of genuine competition as such. In this regard, solely the primacy of application of the provisions on the protection of genuine competition in the internal market applies (Art. 101 ff. TFEU). According to established EU case-law, purely economic motives could, additionally, not constitute compelling grounds of the public interest which might justify a restriction being placed on a fundamental freedom that is guaranteed in the Treaty.[77]

602. By contrast, the Member States are left with latitude with regard to non-competition-related interests, such as to facilitate research and development, for services of general interest, to protect public security and order. This is also of significance in the present context since the Member States can for instance hand down their own investment control regulations.[78] Such regulations are not precluded by the exclusive EU competences to establish the competition rules required for the functioning of the internal market and in the area of the common commercial policy (Art. 3(1)(b) and (e) TFEU), or by the restrictions on the national legislative competences where fundamental freedoms are concerned, as stated in para. 601.

603. The system decision for an open, highly-competitive social market economy is broken down – in line with the statement above – into several justiciable function guarantees of a market economic order, within the framework of which the planned reforms for dealing with China need to fit.[79] These include:

- the principle of private autonomy, which is guaranteed by legal subjectivity as is assumed in Art. 20 ff. TFEU (in accordance with Art. 54 TFEU also for legal persons), by freedom of action connected with this (such as

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74 ECJ, Judgment of 3 October 2000, C-9/99 – Échirolles Distribution, 2000, I-8207, ECLI:EU:C:2000:532, para. 25 reads as follows: "As regards Articles 3a, 102a and 103 of the Treaty, which refer to economic policy, the implementation of which must comply with the principle of an open market economy with free competition (Articles 3a and 102a), those provisions do not impose on the Member States clear and unconditional obligations which may be relied on by individuals before the national courts. What is involved is a general principle whose application calls for complex economic assessments which are a matter for the legislature or the national administration."

75 Federal Constitutional Court (BVerfG), judgment of 20 July 1954, 1 BvR 459 – Investment aid, Decisions of the Federal Constitutional Court (BverfGE) 4, 7 (17-18).

76 Cf. once more Art. 3(3), first sentence, TEU, as well as ECJ, Judgment of 15 July 1964, 6/64 – Costa/ENEL, ECLI:EU:C:1964:34, [1964] ECR 1251 (1269-1270), ECLI:EU:C:1964:66 ("own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply" = priority application of European law); Judgment of 21 February 1973, 6/72 – Continental Can, [1973] ECR 215, ECLI:EU:C:1973:22, para. 23 ("The Applicants' argument [Art. 3 (f) EEC Treaty = Art. 3(1) TEU in conjunction with Protocol No. 27 on protection of genuine competition] that this provision merely contains a general programme devoid of legal effect, ignores the fact that Article 3 considers the pursuit of the objectives which it lays down to be indispensable for the achievement of the Community's tasks. As regards in particular the aim mentioned in (f), the Treaty in several provisions contains more detailed regulations for the interpretation of which this aim is decisive.").

77 See for greater detail Monopolies Commission, Special Report 80, Fixed Book Prices in a Changing Market Environment, 1st ed. 2018, para. 299 and the case-law quoted there in footnote 337.

78 See for greater detail on this Section 3.3.1 below.

79 Re the function guarantees: Basedow, Von der deutschen zur europäischen Wirtschaftsverfassung, 1992, pp. 15 ff. and 25 ff.; Hatje, in: von Bogdandy/Bast (ed.), Europäisches Verfassungsrecht: Theoretische und dogmatische Grundzüge, Berlin/Heidelberg 2009, pp. 811 ff.

Art. 15-17 CFR and Art. 6(1) TEU), as well as by the principle of the equality of market players (cf. Art. 12 TFEU, the fundamental freedoms, as well as Art. 20, 21 & 23 CFR);

- a system of genuine competition (Art. 101 ff. TFEU, Protocol No. 27) and of a common market without internal borders (Art. 3(3), first sentence, TEU) which is supplemented for the individual market players by related Union fundamental rights (Art. 15-17 CFR) and the European fundamental freedoms (Art. 34 ff. TFEU). The relevant provisions emanate here into other policy areas as horizontal clauses;[80]

- finally, an external dimension of openness (Art. 3(3), second sentence, TEU, as well as Art. 206 TFEU). This aims to bring about, firstly, market access by European legal subjects to non-European markets, as well as at the same time market access of non-EU market players to the internal market. Implementation is carried out by the law on foreign trade on the basis of Art. 206 and 207 TFEU.

604. European industry policy is possible in accordance with Art. 173 TFEU (industry). At the same time, however, the term "industry policy" is not defined in the EU Treaties or in European case-law, but is likely to comprise state measures to (targetedly) promote the industry and companies.[81] That said, no such measures would be permissible as part of industry policy "which could lead to a distortion of competition".[82] Industry policy within the meaning of the provision must therefore be compatible with the competition goals of Art. 101 ff. TFEU and of Protocol No. 27.

2.2 Competition law, as well as fundamental freedoms and fundamental rights

605. The openness of the markets in internal relations is based primarily on the protection of entrepreneurial competition and on reducing barriers between the EU Member States. Free coordination on open markets is secured by competition law vis-à-vis distortions attributable to private undertakings (Art. 101 ff. TFEU) or to the EU Member States (Art. 106(1) and 107 ff. TFEU).[83] The competition rules are intended to guarantee genuine, effective competition on the internal market, and to contribute towards integration between the individual European economies.[84] Protection also exists to the degree that it benefits individual market players (consumers in particular).[85] The competitiveness of individual Member State economies or of their economic operators is not a decisive factor from the point of view of EU competition law, on which the internal market is based.

606. Furthermore, the Union's fundamental rights and fundamental freedoms, and its competition rules, are interdependent. The Union's fundamental rights protect the economic activity of individual market players, whilst fundamental freedoms protect the market players in cross-border economic exchange.[86] In addition to the system decision in favour of market economic principles, these rights hence also share the European integration function

[80] Wegener, B., in: *ibid*. (ed.), Enzyklopädie Europarecht, Vol. 8, Europäische Querschnittspolitiken, 1st ed., Baden-Baden 2014, § 1 paras. 18 ff.

[81] Cf. Classen, in: von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, 7th ed., Baden-Baden 2015, Art. 173 TFEU para. 6 with further references.

[82] Art. 173(3) subparagraph 2 TFEU.

[83] See for a definition of distortion of competition in this context for instance ECJ, Judgment of 14 July 1972, C-48/69 – ICI, [1972] ECR 619, ECLI:EU:C:1972:70, para. 104; Judgment of 13 July 1966, 56 and 58/64 – Consten and Grundig, [1966] ECR 299, 391, ECLI:EU:C:1966:41.

[84] On this dual aim: ECJ, Judgment of 6 October 2009, C-501/06 P et al. – GlaxoSmithKline and Others, 2009, I-9374, para. 61 and the case-law listed therein.

[85] ECJ, Judgment of 4 June 2009, C-8/08 – T-Mobile Netherlands, [2009] ECR I-4529, ECLI:EU:C:2009:343, para. 38; Judgment of 6 October 2009, C-501/06 P et al. – GlaxoSmithKline and Others, [2009]ECR I-9374, ECLI:EU:C:2009:610, para. 63; Judgment of 17 February 2011, C-52709 – Telia Sonera Sverige AB, [2011] ECR I-527, ECLI:EU:C:2011:83, para. 24.

[86] Cf. Art. 3(1)(b) TFEU: "[…] the establishing of the competition rules necessary for the functioning of the internal market"

that they pursue (cf. also Art. 119(1) TFEU). Where the completion of the internal market has been achieved, they supplement the protection that is guaranteed by the competition rules against potential fragmentation.

607. True, the legal framework described above refers solely to the EU internal market, and hence does not contain any statements regarding third countries or on the market players from such countries. Having said that, it is possible to derive more far-reaching stipulations specifically from the assets to be protected by genuine competition which must also be taken into account when the internal market is opened up to market players from third countries. Such an opening has already taken place vis-à-vis market players from China.

608. It is therefore necessary to clarify from a perspective focussing on the internal market whether and subject to what preconditions this market opening is amenable to impact the legal interest in undistorted competition in a legally relevant fashion. The starting point here is the presumption that market players from China are subject to influence exerted by the Chinese State, and that this leads to the possibilities of distortion of competition in the EU internal market as set out in paras. 578-593. Therefore, in order to clarify the possible risks for the protected legal interest of undistorted competition in the EU internal market, recourse should be had to the legal principles or instruments which have already been developed on the exertion of state influence on competition.

609. The focus is placed in this respect on the "market investor test", which makes it possible as part of EU State aid control to distinguish between strategic political encroachments on competition and mere state participation in competition.[87] Despite its narrow designation ("market investor" test), this test can be basically applied to all measures taken by a state (selectively) vis-à-vis individual enterprises or also towards entire economic sectors.[88] In this regard, it is therefore more of a "market conformity test". The test is also not contingent on there being a burden on the state budget.[89] It hence offers an approach to cover all kinds of advantages granted by the state or obligations imposed by the State in the broadest sense, and to assess them using a uniform set of standards.[90] The use of the test also appears expedient in the present context.

610. The market investor test may furthermore be applied on principle regardless of whether the state measure has an impact on the market directly or indirectly via companies (with or without a state shareholding). Consequently, the test is for instance applicable to measures by means of which specific companies are granted different economic opportunities than their competitors (such as enhancing their financial resources). It is however for instance also applicable if a State ensures that specific companies show different conduct than others (such with dumping prices brought about by the State). The expanded opportunities open to companies may become relevant where the market position of the company is to be verified (in merger control/in accordance with Art. 102 TFEU). The derogating conduct of the companies is only relevant if it is related to competition and in this regard contradicts the stipulations of Art. 101 and 102 TFEU for conduct in conformity with competition.

611. It is however necessary to make a distinction in each case as to whether the State is acting as an economic operator or as a public authority. The market investor test is only applicable in case of participation in economic transactions. There is a need to verify in this case whether the State's actions are taking place subject to "normal market conditions" and "in compliance with market conditions".[91] A state measure satisfies these preconditions

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87 See European Commission, Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262 of 19 July 2016, p. 1 (Notice on the notion of State aid), paras. 73 ff.

88 State aid control nonetheless only takes place with regard to selective measures; see on this Art. 107(1) TFEU ("certain undertakings or the production of certain goods") and European Commission, Notice on the notion of State aid, paras. 117 ff.

89 State aid control additionally requires it to be verified whether the state budget is drawn on; see on this further below para. […] and the European case-law quoted there.

90 Cf. European Commission, Notice on the notion of State aid, para. 77.

91 European Commission, Notice on the notion of State aid, paras. 76, 83 ff.

with transactions that would be carried out under the same conditions ("*pari passu*") when carried out by public bodies and private economic operators, or if they relate to the sale and purchasing of assets, goods and services (or other comparable transactions) in a competition-based, transparent, non-discriminatory, non-conditional tendering procedure.

612. The market investor test is not applicable to measures linked to the role of the State as a public authority.[92] An economic operator cannot act as a public authority from the outset. If the State acts as a public authority, and for instance creates non-market-economy production conditions, or fails to regulate market-dominating companies, then there is also no transaction that could be implemented by public authorities and private economic operators under the same conditions. That said, a State's sovereign activity may at least be verified as to whether a legal objective is being pursued that is recognised in EU law and is legitimate in this regard, and whether the State is restricting encroachments on the market enacted in order to achieve this goal to suitable, necessary measures (proportionality test). Such a legitimate objective can also be an industry policy objective, but only if it does not entail encroachments on the market constituting a distortion of competition (see Art. 173 TFEU once more).[93]

613. In the context at hand, when the market investor test is used (for participation in economic transactions), or in the proportionality test (in the case of sovereign encroachments on economic transactions), it is possible to distinguish between several groups of state measures:

a) exercise of a determining influence on specific undertakings, or one that is at least relevant in terms of competition ("commitments") which may impact their conduct in the EU internal market;[94]

b) granting economic advantages for specific undertakings which may impact their economic opportunities in the EU internal market;[95]

c) failing to regulate market-dominating undertakings (or at least those holding market power) and creating or maintaining (other) non-market-economy production conditions.

614. With regard to the groups of cases named, it is possible to derive from the criteria designated in paragraphs 611-612 the conditions under which they exert a competition-distorting impact in the EU internal market.[96] Specifically the measures of the latter mentioned group of cases c) primarily impact the third-country market concerned. The test may however indicate whether the undertakings are given production cost advantages which would not accrue to them in a market economy system. What is more, undertakings which hold a non-regulated position of market power in their home market, and are unregulated in this regard, may achieve above-average revenues.[97] Such distortions may lead to advantages for undertakings from third countries in international competition, and hence also to distortions of competition in the EU, since European undertakings may not benefit from similar state support due to provisions of State aid and other competition law.

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92 European Commission, Notice on the notion of State aid, para. 77.

93 See on this para. 604 above.

94 Cf. European Commission, Consolidated Jurisdictional Notice, paras. 16 ff.

95 See European Commission, Notice on the notion of State aid, paras. 66 ff.

96 Likelihood to distort competition may be sufficient regardless of the concrete impact; cf. European Commission, Communication from the Commission — Notice — Guidelines on the application of Article 81(3) of the Treaty, OJ C 101 of 27 April 2004, p. 97, para. 24 (re Art. 101(1) TFEU); ECJ, Judgment of 27 March 2012, C-209/10 – Post Danmark, ECLI:EU:C:2012:172, para. 44; Judgment of 6 September 2017, C-413/14 P – Intel, ECLI:EU:C:2017:632, para. 136 ff.; European Commission, Communication from the Commission - Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, OJ C 45 of 24 February 2009, para. 19 (re Art. 102 TFEU).

97 The Netherlands, Non-paper - Strengthening the level playing field on the internal market, 9 December 2019, https://www.permanentrepresentations.nl/documents/publications/2019/12/09/non-paper-on-level-playing-field, retrieved on 16 June 2020.

2.3 Foreign trade law

615. Significance attaches to the criterion of openness, not only internally between the EU Member States, but also in external relations with third countries (Art. 3(5) TEU and 206 ff. TFEU). This external dimension is channelled by the Union's "common commercial policy" (Part Five, Title II of the TFEU). The EU thus "shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers" (Art. 206 TFEU). The external dimension is important in the present context because China is a third country, and is hence neither subject to the obligations ensuing from the EU Treaties, nor is it otherwise covered by the regulations agreed on therein.

616. The opening up towards the outside thus takes place gradually, unlike within the internal market, and always as the result of a political weighing-up decision. The decision can be taken here on the basis of the weighing up of gains in welfare that are to be calculated in economic terms vis-à-vis asymmetric disadvantages for the Union.[98] In comparison to a welfare-related evaluation, however, precedence is to be granted to the cohesion of the internal market as a matter of principle. This lends expression to the integrative nature of the internal market.

617. This objective of the common commercial policy, orientated towards the outside, is channelled by foreign trade law, which includes legally-based, mutual market access (trade agreements), as well as regulations to protect the internal market. It supplements the inwardly-orientated tools for the functioning of the EU internal market and to create an EU customs union (Art. 28 TFEU). It harmonises the Member States' foreign trade relations, and imposes conditions for the market entry of external economic operators into the EU's internal market (Art. 26, 28-33 and 206 TFEU). In doing so, it expands amongst other things the protection of the market economic order via the internal market rules by providing the EU with tools to combat non-market-economy conduct. Foreign trade law is always obliged here to also pursue the goals of other EU foreign policies in accordance with Art. 21(2) TEU (detailed by Art. 206 TFEU).[99]

618. The EU admittedly has exclusive competence for the common commercial policy area apart from individual areas such as portfolio investment (Art. 3(1)(e) and 207 TFEU).[100] This means in practical terms that Germany is as a rule only able to exercise its influence within the EU institutions. Other than in the field of competition policy, the Member States also do not retain any residual competence for regulations not related to the internal market. The reform approaches to be discussed are orientated to the inner system of the common commercial policy. A distinction needs to be made here between commercial policy under the Treaties, as well as autonomous commercial policy (Sections 2.3.1 and 2.3.2).

2.3.1 Contractual trade policy

619. Contractual trade policy comprises international agreements which the EU concludes with third countries (the WTO, free trade and investment protection agreements, etc.). Calls for reciprocity such as through equal access to public contracts can only be addressed via treaty-based trade policy. Given its role as a coordinating body in a multilateral order for the global economy, the WTO – founded in 1994 – is the starting point in this respect. Provisions which can be agreed on within the WTO apply to each of the currently 164 members. Over and above this, the WTO's Dispute Settlement Body (DSB) provides a tool with which to enforce the mutual obligations.

98 Müller-Graff, P.-C. in: *ibid*.., Enzyklopädie Europarecht, Vol. 4, Europäisches Wirtschaftsordnungsrecht, 1st ed., Baden-Baden 2015, § 1 para. 47.

99 ECJ, Opinion of 16 May 2017, Opinion 2/15 – Accord de libre-échange avec Singapour, ECLI:EU:C:2017:376, para. 142.

100 ECJ, Opinion of 16 May 2017, Opinion 2/15 – Accord de libre-échange avec Singapour, ECLI:EU:C:2017:376, Summary. Additionally, for instance, the area of weapons of war is within the jurisdiction of the Member States (cf. Art. 346(1)(b)) TFEU).

620. The active role played by the State within the Chinese economic system was already an important topic during China's accession to the WTO.[101] Given the special systemic conditions, China committed on its accession to a whole range of different individual concessions vis-à-vis the other WTO members laid down both in the report of the working party, and in particular within the Protocol of Accession.[102] According to the case-law of the DSB, the concessions are a binding component of WTO law, without China at the same time being able to rely on general exceptions outside the accession documents.[103]

621. WTO law does not contain any comprehensive rules on competition. The approach taken by the WTO so far is to use mutual concessions on market access to ensure equal competition conditions. The benchmark for this approach emerges from the WTO consensus, which constitutes a minimum standard in this regard. If the WTO members go beyond this, they do so on the basis of mutual concessions (WTO-Plus). Since the first rounds of negotiations on the General Agreement on Tariffs and Trade (GATT) took place in 1947, the concessions constituting the WTO consensus have been sub-divided into so-called tariff and non-tariff trade barriers, and negotiated on correspondingly. Whilst the focus originally lay on reducing tariff restrictions on trade, it was shifted after a number of negotiation rounds to the trade-restricting effect of non-tariff barriers to trade. The WTO has so far stuck on the consensus of 1994. Besides the GATT, this consensus comprises a number of agreements for specific areas such as the Anti-Dumping Agreement (Agreement on the Implementation of Art. VI GATT; ADA), the Agreement on Subsidies and Countervailing Measures (ASCM), or the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). They do not include any competition rules in the sense of Art. 101 ff. TFEU.

622. The European Union published in 2018 a concept paper which includes extensive proposals on the reform of the WTO such as rules on mutual market access for investments and services, SOEs, technology transfers, as well as industrial subsidies.[104] However, the reform process has not developed much further in recent decades. Furthermore, the appellate body of the Dispute Settlement Body has not been functional since 11 December 2019 because of a blockade by the USA in the appointment of new judges.[105] Thus, although the WTO would be the best starting point for (re-)establishing a competitive *level playing field*[106], the likelihood of reform is currently rather low.

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101 WTO Working Party on the Accession of China, Report of the Working Party on the Accession of China, 1 October 2001, WT/ACC/CHN/49 (below: WPRC).

102 WTO, Accession of the People's Republic Of China – Decision of 10 November 2001, 23 November 2001, WT/L/432 (below: CBP); paragraph 1.2 in conjunction with para. 342 of the WPRC.

103 WTO, China – Measures Related to the Exportation of Various Raw Materials, Panel Report of 5 July 2011, WT/DS394/R, WT/DS395/R, WT/DS398/R, as well as Appellate Body Report of 30 January 2012, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R; China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum, Panel Report of 26 March 2014, WT/DS431/R, WT/DS432/R, WT/DS433/R, as well as Appellate Body Report of 7 August 2014, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R.

104 EU, WTO modernisation – Future EU proposal on rulemaking, https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf, retrieved on 30 June 2020 .

105 Martin, World Trade Organization in trouble: What you need to know, 11 December 2019; https://www.dw.com/en/world-trade-organization-in-trouble-what-you-need-to-know/a-51592575, retrieved on 30 June 2020.

106 For instance also European Commission and High Representative of the Union for Foreign Affairs and Security Policy, Communication to the European Parliament, the European Council and the Council, EU China, EU-China – A strategic outlook, 12.3.2019, JOIN (2019) 5 final, p. 7 (EU strategy paper); Business Europe, The EU and China – Addressing the systemic Challenge, January 2020, Section 3.1; The Netherlands, Non-paper - Strengthening the level playing field on the internal market, 9 December 2019, https://www.permanentrepresentations.nl/documents/publications/2019/12/09/non-paper-on-level-playing-field, retrieved on 30 June 2020; BDI, Grundsatzpapier/China – Partner und systemischer Wettbewerber – Wie gehen wir mit Chinas staatlich gelenkter Volkswirtschaft um?, January 2019, Section 2.4 (BDI-Papier).

623. As a consequence of the deadlock at WTO level, the EU has been highly active in negotiating a "new-generation" of free trade agreements in recent years[107]. The new more detailed free trade agreements enable more comprehensive market integration and regulatory cooperation. In accordance with the meaning of Art. 206 TFEU[108], the EU is already trying to "export" provisions for dealing with SOEs and its own competition law standards, such as prohibitions of cartels and abuse, and in particular rules in line with EU state aid law.[109]

2.3.2 Autonomous trade policy

624. Autonomous trade policy includes those policies within the meaning of WTO law which a member such as the EU can carry out independently. Within this framework, the EU regulates the import and export of goods, as well as of services and capital. The EU needs to comply with its obligations under international law, which emerge in particular from the agreements reached within the WTO, when shaping its autonomous trade policy. The obligations result, firstly, from international law itself (Art. 26 of the Vienna Convention on the Law of Treaties, *pacta sunt servanda*, as well as customary international law[110]), and secondly also via Art. 216(2) TFEU, which states in Union law that "Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States".

625. The focus is placed on the "trade defence instruments", as specific tools of autonomous trade policy in dealing with Chinese state capitalism. As a rule, these are unilateral market access regulations of the EU, which directly serve to protect certain Union industries and are also used to settle distribution policy conflicts.[111] They permit, each under special conditions, the time-limited collection of additional tariffs on imported goods, and therefore also relate to the importation into the internal market such as import duties, volume restrictions or import bans.[112] An exception is constituted by the commercial policy instrument for strengthening the common commercial policy, which provides for a formal right of complaint against trade restrictions on third markets.[113]

626. The entire area of the trade defence instruments is sub-divided into four categories:

- protection of the Union industry against damage caused by dumped goods via anti-dumping measures;
- protection of the Union industry against damage caused by subsidised goods via anti-subsidy measures;
- protection of the Union industry against damage caused by goods imported suddenly and in high volumes via safeguards;

107 They are characterised in content terms by the fact that they include "[…] in addition to the classical elements in such agreements, such as the reduction of tariff and non-tariff barriers to trade in goods and services — other aspects that are relevant, or even essential, to such trade.", cf. ECJ, Opinion of 16 May 2017, Opinion 2/15 - Accord de libre-échange avec Singapour, para. 140.

108 Art. 206 TFEU: "By establishing a customs union in accordance with Articles 28 to 32, the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers."

109 Cf. for instance the Free Trade Agreement between the European Union and the Republic of Singapore, ST/7972/2018/ADD/5, OJ L 294 of 14 November 2019, Chapter 11 (Competition and Related Matters) or European Commission, Proposal for a Council Decision on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, COM/2018/691 final, Chapters 10 and 11.

110 On the EU's ties to customary international law, cf. ECJ, Judgment of 24 November 1992, C-286/90 – Anklagemyndigheden/Peter Michael Poulsen and Diva Navigation Corp, [1992] I-6019, ECLI:EU:C:1992:453, para. 9; Judgment of 16 June 1998, C-162/96 – Racke/Hauptzollamt Mainz, [1998] ECR I-3655, ECLI:EU:C:1998:293, paras. 45-46.

111 Nettesheim, M., in: Grabitz/von Bogdandy/Ders., Europäisches Außenwirtschaftsrecht, Munich 1994, p. 187; *ibid.*, Ziele des Antidumping- und Antisubventionsrechts, Munich 1994, p. 35.

112 Herrmann, C/Michl, W., Grundzüge des europäischen Außenwirtschaftsrechts, ZEuS 2008, 81, (128).

113 Nettesheim, M., in: Grabitz, E./von Bogdandy, A./*ibid.*, Europäisches Außenwirtschaftsrecht, Munich 1994, p. 189.

- protection of Union industry against damage caused by trade practices of a third country, against which the international trade rules provide the right of challenge, by means of EU trade policy action (commercial policy instrument for strengthening the common commercial policy).

627. Anti-dumping and anti-subsidy measures are regularly referred to as protection against "unfair trade practices", as they are intended to ensure fair competition between domestic and foreign players.. In contrast, safeguards designed to counter the effects of a high import quota are referred to as "fair trade practices"..[114] Since safeguards by themselves serve to mitigate trade diversions to the disadvantage of the EU, and hence already contradict the basic idea of free trade in goods, they are tied to stricter requirements, and may also give rise to an obligation incumbent on the importing countries to provide compensation.[115] It can be stated as a matter of principle that there are no concrete legal or economic criteria for categorising trade practices as “fair” and “unfair”. The commercial policy tool to strengthen the common commercial policy, however, links at least in normative terms to concessions agreed in the context of contractual trade policy, and enables undertakings within the Union to claim a breach by a third country vis-à-vis the EU in order to cause the EU where appropriate to take trade policy action. Such action can consist of initiating dispute settlement proceedings, or the withdrawal of concessions made vis-à-vis the country in question.

628. The legal basis for the EU’s trade defence instruments is formed by the anti-dumping regulation[116], the Anti-Subsidy Regulation[117], the regulations on common rules for imports[118], as well as the trade barriers regulation[119]. These contain the main preconditions for issuing trade defence measures, including rules on the procedure. The European Commission now has exclusive competence within the EU for handling trade defence instruments, whilst the Council has no role to play when it comes to individual decisions.[120] Instead, the Member States take on a controlling function on the basis of the “Comitology Regulation”[121], which is exercised in the form of a committee procedure (Art. 15 of the Basic Anti-dumping Regulation, Art. 25 of the Anti-Subsidy RegulationAnti-Subsidy Regulation, as well as Art. 7 of the Trade Barriers Regulation).[122]

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114 Nettesheim, M., Ziele des Antidumping- und Antisubventionsrechts, Munich 1994, pp. 30 ff..; Hoffmeister in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, AD-GVO 2016, EL 12 (October 2018), Recitals para. 1.

115 Hoffmeister in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, AD-GVO 2016, EL 12 (October 2018), Recitals para. 2.

116 Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, OJ L 176 of 30 June 2016, p. 21 version amended by Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017, OJ L 338 of 19 July 2017, 1, as well as by Regulation (EU) 2018/825 of the European Parliament and of the Council of 30 May 2018, OJ 2018 L 143 of 7 June 2018, p. 1.

117 Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, OJ L 176 of 30 June 2016, p. 55 in the version amended by Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017, OJ L 338 of 19 December 2017, p. 1, as well as by Regulation (EU) 2018/825 of the European Parliament and of the Council of 30 May 2018, OJ L 143 of 7 June 2018, p. 1

118 Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 March 2015 on common rules for imports, OJ 2015 L 83/16, as well as Regulation (EU) 2015/755 of the European Parliament and of the Council of 29 April 2015 on common rules for imports from certain third countries, OJ L 123 of 19 May 2015, p. 33.

119 Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union’s rights under international trade rules, in particular those established under the auspices of the World Trade Organization, OJ 2015 L 272/1.

120 Hoffmeister in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, AD-GVO 2016, 12th ed. (October 2018), Recitals paras. 41 and 43.

121 Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers, OJ L 55 of 28 February 2011, p. 13 (Comitology Regulation).

122 In specific terms, an advisory procedure (Art. 4 of the Comitology Regulation, Art. 15(2) of the Anti-Dumping Regulation, Art. 25(2) of the Anti-Subsidy Regulation, as well as Art. 7(2) of the Trade Barriers Regulation), and secondly an examination procedure

629. In accordance with provisions of international law, and with Art. 216(2) TFEU, the institutions of the Union are bound by international agreements concluded by the EU, and must comply with and enforce them in all their actions. In terms of EU law, such agreements have a status between primary and secondary law, and apply directly, *i.e.*, they do not require an act of transformation.[123] This direct application does not however have the same significance as granting direct rights and obligations (direct effect). The European Court of Justice has found in this regard in settled case-law that the law of the WTO in particular does not take on such direct effect.[124] It is only to be permissible in exceptional cases to have recourse to a provision contained in secondary EU law not being in compliance with WTO law of in those cases in which there is an explicit implementation.[125] Over and above this, the Member States, as well as the bodies of the Union, are to "take into account" the law of the WTO as far as possible.[126] The law of the WTO contains a number of stipulations for each of the abovementioned defence instruments.[127] The EU implements large sections of WTO law virtually verbatim. At the same time, however, it should be pointed out that, in its settled case-law, the European Court of Justice grants considerable latitude to the bodies of the EU with regard to the common commercial policy, given the "complexity of the economic, political and legal situations which they have to examine", in particular when it comes to trade defence instruments.[128]

2.4 The interrelationship between foreign trade and competition rules

630. The characteristics of Chinese state capitalism that are relevant to competition require a link to be made between the protection of the EU internal market by the competition rules (the internal dimension), as well as European commercial policy (the external dimension). The central challenge for concrete reforms here is to identify, in a first step, the tools that are available. In a second step, it is then necessary to examine their respective suitability to address the challenges posed by state-capitalist systems, as well as potential reforms, against the background of an overall macroeconomic view. For the purposes of the present report, therefore, the tools of competition law, as well as of foreign trade law, are to be regarded in terms of the areas in which they overlap.

(Art. 5 of the Comitology Regulation, Art. 15(3) of the Anti-Dumping Regulation, Art. 25(3) of the Anti-Subsidy Regulation, as well as Art. 7(3) of the Trade Barriers Regulation) are available. When it comes to anti-dumping law and anti-subsidy law, there is also a separate procedure for immediately applicable implementing acts (Art. 8 of the Comitology Regulation, Art. 15(4) of the Anti-Dumping Regulation, as well as Art. 25(4) of the Anti-Subsidy Regulation). The advisory procedure is to be applied here for instance for the acceptance of undertakings (Art. 8(1) of the Anti-Dumping Regulation, as well as Art. 13(1) of the Anti-Subsidy Regulation), the examination procedure for instance for the introduction of definitive duties (Art. 9(4) of the Anti-dumping Regulation, as well as Art. 15(1) of the Anti-Subsidy Regulation), or the suspension of a procedure in accordance with the Trade Barriers Regulation (Art. 12(1) of the Trade Barriers Regulation).

123 Schmalenbach, in: Calliess/Ruffert, TFEU/TEU/CFR, 5th ed., Munich 2016, Art. 216 TFEU, para. 28.

124 ECJ, Judgment of 5 October 1994, C-280/93 – Germany/Council, [1994] ECR I-4973, ECLI:EU:C:1994:367; Judgment of 23 November 1999, C-149/96 – Portugal/Council, [1999] ECR I-8395, ECLI:EU:C:1999:574; Judgment of 1 March 2005, C-377/02 – Van Parys, 2005, I-1465, ECLI:EU:C:2005:121.

125 ECJ, Judgment of 22 June 1989, 70/87 – Fediol/Council, [1989] ECR 1781, ECLI:EU:C:1989:254, para. 22; Judgment of 7 May 1991, C-69/89 – Nakajima All Precision/Council, [1991] ECR I-2069, ECLI:EU:C:1991:186, para. 31; Judgment of 5 October 1994, C-280/93 – Germany/Council, [1994] ECR I-4973, ECLI:EU:C:1994:367, para. 111.

126 ECJ, Judgment of 14 December 2000, C-300/98 – Dior and others, [2000] ECR I-11307, ECLI:EU:C:2000:688, para. 47; Judgment of 16 November 2004, C-245/02 - Anheuser-Busch, [2004] ECR I-10989, ECLI:EU:C:2004:717, para. 55.

127 These are Art. VI, XVI and XIX of the General Agreement on Tariffs and Trade (GATT), as well as the Agreement on Implementation of Article VI of GATT (Anti-Dumping Agreement), the Agreement on Subsidies and Countervailing Measures, and the Agreement on Safeguards. The relevant framework for action on the basis of the Trade Barriers Regulation is formed by the related dispute resolution regulations contained in Art. XXIII GATT, by the individual understandings, and in particular by the Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding) the. All the regulations can be retrieved at https://www.wto.org/english/docs_e/legal_e/final_e.htm, retrieved on 30 June 2020.

128 ECJ, Judgment of 4 October 1983, 191/82 - Fediol/Commission, [1983] ECR 2913, ECLI:EU:C:1983:259, para. 26; Judgment of 7 May 1987, 255/84 – Nachi Fujikoshi/Council, [1987] ECR 1861, ECLI:EU:C:1987:203, para. 21; Judgment of 27 September 2007, C-351/04 – Ikea Wholesale, [2007] ECR I-7723, ECLI:EU:C:2007:547, para. 40; Judgment of 5 April 2017, C-376/15 P and C-377/15 P – Changshu City Standard Parts Factory and Ningbo Jinding Fastener/Council, ECLI:EU:C:2017:269, para. 47.

631. It was stated above with regard to the competition rules that the market investor test used in State aid control provides criteria for determining the conditions under which measures of the Chinese State impact on the EU internal market in such a way as to distort competition. A question that needs to be answered independently of this is whether (state or private) undertakings the actions of which are not in compliance with market conditions because of such measures of the Chinese State are subject to increased responsibility in accordance with Art. 101 and 102 TFEU, or may be subject to such responsibility, without any amendment being made to the EU Treaties. The same applies with regard to the EU Member States, or indeed to the Chinese State itself, in the framework of Art. 106(1) TFEU, and under State aid control in accordance with Art. 107 ff. TFEU. The question also arises as part of merger control as to whether more stringent standards may be applicable if a concentration is influenced by the Chinese State. Conversely, however, it is also possible to ask whether defensive measures of domestic market players or the EU Member States need to be or indeed can be subject to a more favourable assessment if they constitute a reaction to the influence exerted by the Chinese State. The law as it stands only provides limited latitude for this if one looks at competition rules in isolation.

632. Foreign trade law however supplements the competition rules which guarantee conduct on the part of undertakings and of the Member States in the EU internal market which is in compliance with the market economy, and which protect the market structure regarding competition.[129] The anti-dumping rules link into undertakings' market conduct in the same way as the ban on cartels and the prohibition of abusive practices (Art. 101 - 102 TFEU). The anti-subsidy rules, as well as the rules on State aid (Art. 107 - 108 TFEU), by contrast, also link to state measures to fund enterprises. The anti-subsidy rules thereby relate to the conduct of third countries, whilst the rules on State aid refer to financing measures of EU Member States. Merger and investment control, finally, protect the market structure, albeit with different objectives. Merger control prohibits concentrations, which significantly impede effective competition in the EU internal market, in particular by the creation or amplification of a market-dominating position. Investment control, by contrast, permits foreign investments – including takeovers – to be restricted if these may be detrimental to public security and order. In cases in which undertakings in the EU are affected which operate for instance critical infrastructure or resources, both control systems may apply equally.

633. The debate currently underway on reform aims, firstly, to make better use of the discretion available in the abovementioned existing tools. Secondly, however, there is also discussion of supplementing them to include new types of other instruments. Greater attention will be paid to these questions below (Sections 2.3 and 3.3.1).

3 Further developments in existing tools

634. The challenges emerging from the state capitalist system for the European economy have triggered a debate on reforming economic policy entailing a discussion both on proposals relating to industry policy, but also on amendments to European economic law. Such reforms can be linked, firstly, to interference in the market through conduct on the part of undertakings influenced by a third country not in conformity with the market economy (Section 3.1). Secondly, the rules in question may however also link directly to non-market-economy third-country measures (Section 3.2) or to interventions in the market structure (section 3.3).

3.1 Instruments to defend competition in state-influenced corporate behaviour

635. Where interference in the market takes place by means of corporate behaviour that is influenced by a third country, and hence cannot be explained in market economic terms purely and simply, it can be countered above all in terms of commercial policy with anti-dumping measures although these are based on a price comparison and therefore not on specific State interference (Section 3.1.1). However, only relatively little latitude is available

[129] See paras. 597-48 and para. 617 above.

to take account of third-country influence on corporate behaviour within the competition rules to protect the EU internal market. A third-country influence on the economy can as such ultimately not be taken into account within the competition rules (Section 3.1.1).

3.1.1 Anti-dumping measures

636. Anti-dumping measures target price practices of an exporter from a specific country of origin which are regarded as being unfair.[130] At its core is a behaviour whereby similar products are sold on different national markets at different prices.[131]

637. The idea of anti-dumping law has developed historically, and was originally linked to a general fear of the negative economic impact of price discrimination, in particular predatory pricing, as is known for instance also from antitrust law.[132] Based on the development of mass production as well as a systematic observation of price differentiations and the trade conflicts caused by them, different national anti-dumping laws developed towards the end of the 19th century.[133] In the course of the efforts to establish a multilateral regulatory framework for the world economy, Art. VI of the GATT in 1947 was the first international regulation on anti-dumping measures..[134] It aims to harmonise the anti-dumping legislation of the individual countries. By contrast, the WTO's anti-dumping law does not take up an unambiguous position on dumping itself. Although Art. VI:1 GATT speaks of a condemnation of dumping, the rules themselves, however, aim exclusively at restraining the anti-dumping legislation of WTO members and the handling of this legislation. The Anti-Dumping Agreement which specifies the content of Art. VI GATT and has applied to all members since the establishment of the WTO, does not itself contain any statement on the evaluation or purpose of anti-dumping, but sets out more detailed requirements for the adoption of an anti-dumping measure and includes additional procedural rules.

638. Looked at in economic terms, the need for countervailing with regard to dumping has been the subject of dispute since then. Many conducts which lead to dumping and price differentiation are unproblematic in terms of competition. For instance, price differentiation between different countries may be simply an expression of different demand elasticities in the countries of export and import. Low prices may also be used in order to develop new markets, reduce overcapacities, or gain market shares from competitors. It should furthermore be emphasised that the importing country initially benefits from low import prices. A real competition problem exists in economic terms above all when the low prices are an expression of a predatory pricing strategy.[135] Such predatory-pricing dumping entails an exporting undertaking temporarily using cut-throat prices in order to squeeze competitors out of the market, and increasing its prices after having reached a position of monopoly or market power. The positive welfare transfers initially resulting for the importing country from the lower import prices are hence overcompensated by the subsequent welfare losses caused by excessive prices. This kind of predatory-pricing dumping is however encountered only rarely, particularly since it only has prospects for success if there are specific market structures.[136] In addition to predatory dumping, it is sometimes also pointed out that so-called strategic

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[130] Hoffmeister in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, AD-GVO 2016, EL 12 (October 2018), Recitals para. 5.

[131] Viner, J., Dumping: A problem in International Trade, Chicago 1923, p. 8.

[132] On this overlap between anti-dumping law and cartel law Müller-Ibold, T., in: Kokott, J./Pohlmann, P./Polley, R., Europäisches, deutsches und internationales Kartellrecht – Festschrift für Dirk Schroeder, Cologne 2018, p. 543.

[133] Viner, J., Dumping: A problem in International Trade, Chicago 1923, pp. 35 ff. and 192 ff.

[134] Hoffmeister in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, AD-GVO 2016, EL 12 (October 2018), Recitals para. 26.

[135] See on this for instance Willig, Robert D., Economic Effects of Antidumping Policy, Brookings Trade Forum: 1998, pp. 57-79.

[136] The preconditions for this include the existence of high market entry barriers in the importing country, and that the supply is highly concentrated on the world market.

dumping has likewise injurious effects.[137] In this case, an undertaking engaging in dumping operates from a protected home market, in an industry with economies of scale. It is able to use the surplus or profits that it has skimmed off in its home market in order to subsidise its exports, and thus to achieve additional economies of scale at the expense of its competitors in the importing country, which are reflected in lower costs and hence in higher future profits. The prospects for success of this kind of strategic dumping are however also subject to strict preconditions. In particular, the domestic market must be sufficiently large in relation to the rest of the world market.

639. Worldwide anti-dumping law has now moved far away from its origins in antitrust law. As a rule, its purpose is linked to the term "*level playing field*", entailing the goal of creating equal competition conditions for domestic companies and their foreign competitors.[138] The idea that was developed for US trade defence instruments, namely that they constitute an interface between two different national economies, goes in a similar direction.[139] These two approaches implicitly make the lack of reciprocity (*asymmetrical market conditions*) one of the causes of the use of trade defence measures.[140] This also allows for a political justification.

640. Economic criticism vis-à-vis anti-dumping law is however also expressed at another level. Apart from the meaning and purpose of the instrument, its concrete design is also frequently criticised. The relevant criteria of the anti-dumping procedure are seen as too imprecise leaving too much latitude to the authorities, so that in practice domestic industry is protected to a greater degree than would be necessary, and excessive damage is thus done to competition.[141] In its Biennial Report IX ("*Wettbewerbspolitik oder Industriepolitik*" [Competition or industry policy]), the Monopolies Commission already pointed to the lacking connection with the market conditions and to the danger of the abusive exploitation in favour of the domestic industry.[142] The analysis and evaluation is to be maintained for the EU's current anti-dumping law.

3.1.1.1 Regarding the preconditions for the application of anti-dumping measures

641. In accordance with Art. 1(1) of Regulation (EU) 2016/1036 (below: Anti-Dumping Regulation), an anti-dumping duty may be imposed on any good which is considered to be dumped and whose introduction into the internal market causes injury.[143] Specifically, this requires first a finding of dumping in accordance with Article 2 of the Anti-Dumping Regulation. In addition, dumping must cause or threaten to cause injury to a Union industry or the material retardation of the establishment of such an industry (Art. 3 of the Anti-Dumping Regulation). Finally, the levying of an anti-dumping duty must also be in the "Union interest" (Art. 21 of the Anti-Dumping Regulation).

Dumping

642. A major precondition for anti-dumping measures is the determination that a product that has been imported is "dumped" (Art. 1(1) of the Anti-dumping Regulation). In accordance with Art. 1(2) of the Anti-Dumping Regula-

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137 Willig, Robert D., Economic Effects of Antidumping Policy, Brookings Trade Forum: 1998, p. 64 f.

138 Nettesheim, M., Ziele des Antidumping- und Antisubventionsrechts, Munich 1994, p. 41; Müller, W./Khan, N./Scharf, T., EC and WTO Antidumping Law, 2nd Edition, Oxford 2009, paras. I.09 ff.

139 Nettesheim, M., Ziele des Antidumping- und Antisubventionsrechts, Munich 1994, p. 42.

140 Müller, W./Khan, N./Scharf, T., EC and WTO Antidumping Law, 2nd Edition, Oxford 2009, paras. I.09 ff.

141 Finger, J. M., Dumping and Antidumping: The Rhetoric and the Reality of Protection in Industrial Countries, The World Bank Research Observer 7 (2), July 1992, pp. 121 – 143; Hoekman, B. M./Mavroidis, P. C, Antitrust-Based Remedies and Dumping in International Trade, World Bank Policy Research Working Paper 1347, 1994; Zheng, W., Reforming Trade Remedies, Michigan Journal of International Law 34 (2012), pp. 151 – 207.

142 Monopolies Commission, Biennial Report IX 1990/1991, Wettbewerbspolitik oder Industriepolitik, Baden-Baden 1991, Chapter VII, paras. 1155 ff.

143 See Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, OJ L 176 of 30 June 2016, p. 21.

tion, a product is deemed as being dumped “if its export price to the Union is less than a comparable price for a like product, in the ordinary course of trade, as established for the exporting country”. The determination of dumping hence focuses on a price comparison. The individual parameters of this are set out in Art. 2 of the Anti-Dumping Regulation. Two basic groups of goods are subject to this rule, namely “the product under consideration” and the “like product” (Art. 1(4) of the Anti-Dumping Regulation). On the one hand, the “product under consideration”, which is to be looked at within the anti-dumping procedure, is to be compared with the “like products” manufactured in the Union. In accordance with Art. 1(4) of the Anti-Dumping Regulation, the latter must be identical with the product under consideration “that is to say, alike in all respects, to the product under consideration, or, in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product”. On the other hand, in order to establish the “normal value”, the product imported into the Union by the foreign producer is compared with the products which it itself sells in its home country, thus leading to a dual identity or likeness relationship.[144] The definition of “product” in anti-dumping proceedings also relies on criteria which are known from market definitions within competition law, such as interchangeability from the consumer’s point of view, but the final decision is always a trade policy one, in which the European Commission has considerable discretion and scope for assessment.[145]

643. Over and above this, the country of export must be determined (cf. Art. 5(2)(b) and (10) of the Anti-Dumping Regulation). In accordance with Art. 1(3), first sentence, of the Anti-Dumping Regulation, this is first and foremost the country of origin as a matter of principle. The country referred to as the country of origin is the country in which the product constituting the subject-matter of the proceedings has its non-preferential origin in terms of customs law[146].[147] In special cases, however, the European Commission may also aim to take into account an intermediate country, except where, for example, the products are merely transhipped through that country, or the products concerned are not produced in that country, or there is no comparable price for them in that country (Art. 1(3), second sentence, of the Anti-dumping Regulation).

644. Dumping is established in four main steps:

- The first step consists of determining the normal value (Art. 2(1)-(7) of the Anti-Dumping Regulation). To this end, Art. 2 of the Anti-Dumping Regulation in turn provides for four different methods. The prime one consists of determining the normal value using the seller or producer’s prices for sales in the country of export (Art. 2(1) subparagraph 1 of the Anti-Dumping Regulation). If this is not possible in the absence of representative sales, the normal value is to be established on the basis of prices of other sellers or producers (Art. 2(1) subparagraph 2 of the Anti-dumping Regulation). Where it is impossible to use prices in the country of export as a whole, the normal value is to be calculated on the basis of the cost of production, or on the basis of export prices to an appropriate third country (Art. 2(3) of the Anti-Dumping Regulation).
- The second step consists of determining the “export price” (Art. 2(8) and (9) of the Anti-Dumping Regulation). In accordance with Art. 2(8) of the Anti-Dumping Regulation, this is the price actually paid or payable for the product when sold for export from the exporting country to the Union.

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144 Hoffmeister in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, AD-GVO 2016, EL 12 (October 2018), Art. 1 paras. 29-30.

145 Hoffmeister in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, AD-GVO 2016, EL 12 (October 2018), Art. 1 paras. 31 and 33 ff.

146 The non-preferential origin (also in terms of commercial policy) corresponds to the general attribution of a product to a country of origin under customs law. This does not necessarily have to be the country of consignment. Cf. https://www.zoll.de/DE/Fachthemen/Warenursprung-Praeferenzen/Nichtpraeferenzieller-Ursprung/nichtpraeferenzieller-ursprung_node.html, retrieved on 30 June 2020 .

147 On this Hoffmeister in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, AD-GVO 2016, EL 12 (October 2018), Art. 1 para. 24.

- In order to make it possible to strike a “fair comparison“ between the normal value and the export price, the third step entails an “adjustment” of differences which exert a negative influence on the comparability of the two values (Art. 2(10)(a) – (k) of the Anti-Dumping Regulation). This means for instance that an adjustment is made for differences in the costs directly related to the packing of the product concerned, or for differences in the commissions paid in respect of the sales under consideration (Art. 2(10) lit. f) and i of the Anti-Dumping Regulation).
- The fourth and final step consists of establishing the “margin of dumping” by carrying out a comparison between the two values for the investigation period (Art. 2(11) and (12) of the Anti-Dumping Regulation). The European Commission has three methods at its disposal here: Either the weighted average normal value is compared with a weighted average of prices of all export transactions to the Union in accordance with Art. 2(11), first sentence, of the Anti-Dumping Regulation (first symmetrical method), or the individual normal values are compared on the basis of individual transactions with the individual prices in exports to the Union per business transaction (second symmetrical method), or by a comparison of the weighted average normal value and individual export prices to the Union on a transaction-to-transaction basis in accordance with the second sentence (asymmetrical method). The method chosen is at the discretion of the European Commission as a matter of principle.[148] In accordance with Art. 2(11), second sentence, of the Anti-Dumping Regulation, however, recourse to the asymmetrical method is contingent on there being a significant price difference in export transactions among different purchasers, regions or time periods, and on the methods specified in the first sentence of this paragraph not being able to reflect the full degree of dumping being practised. In practice, average values are regularly used as a comparison of transaction values is considered impractical and sometimes somewhat arbitrary.[149] The dumping margin, finally, is the amount by which the normal value exceeds the export price (Art. 12(12) Anti-Dumping Regulation).

Injury

645. A mere determination that imported goods are dumped is not sufficient to issue anti-dumping measures. In addition, it must be determined that the dumped imports are causing a material injury or a threat of material injury to the Union industry or a material retardation of the establishment of such an industry (Art. 3(1) of the Anti-Dumping Regulation). Virtually no relevance has yet attached in practice to the threat of an injury and the case of a material retardation, the determination of which is subject to stringent requirements.[150] In accordance with Art. 4 of the Anti-Dumping Regulation, a Union industry is considered to be “the Union producers as a whole of the like products or […] those of them whose collective output of the products constitutes a major proportion”.[151] A determination of a major proportion of the products requires an case-by-case analysis to be carried out, for which there is no fixed reference value, but it must be a relatively large share.[152]

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148 ECJ, Judgment of 27 September 2007, C-351/04 – Ikea Wholesale, 2007, I-7723, ECLI:EU:C:2007:547, para. 41 with further references, as well as most recently also judgment of 5 April 2017, C-376/15 P and C-377/15 P – Changshu City Standard Parts Factory and Ningbo Jinding Fastener/Council, ECLI:EU:C:2017:269, para. 47.

149 Krzeminska-Vamvaka, in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, AD-GVO, 1. GL 1 (August 2012), Art. 2 para. 669.

150 Kuplewatzky/Maxian Rusche in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, AD-GVO 2016, EL 12 (October 2018), Art. 3 paras. 18 ff. and 28 ff.

151 Art. 4 of the Anti-Dumping Regulation rules out producers which are commercially related to the exporters or importers, or are themselves importers of the allegedly dumped product (Art. 4(1)(a) and (2) of the Anti-Dumping Regulation). Conversely, in exceptional circumstances one may assume two or more competitive markets or regional markets which are then to be regarded as a separate Union industry (Art. Art. 4(1)(b) and (3) of the Anti-Dumping Regulation).

152 Rados, in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, AD-GVO 2016, EL 12 (October 2018), Art. 4 para. 9.

646. An injury is determined according to a comparable principle for all trade defence instruments:[153] A "material injury" is contingent on the Union industry in question being in a bad economic or financial state, or on a considerable worsening vis-à-vis the period prior to dumping.[154] Art. 3 of the Anti-Dumping Regulation hence requires a determination of how the financial and economic situation of the Union industry would have developed without the dumping practices.[155] Art. 3(2) of the Anti-Dumping Regulation requires "positive evidence" in this regard, as well as an "objective examination" of the volume of the imports and their effect on prices for like products in the Union market, as well as the consequent impact of those imports on the Union industry. Thus, the examination of injury, on the one hand, targets import-related factors (Art. 3(3) of the Anti-dumping Regulation), and on the other hand company-related factors (Art. 3(5) of the Anti-dumping Regulation). There are no fixed rules for the weighting of the individual characteristics. Paragraphs 3 and 5 however each indicate that none of the criteria stated therein are necessarily to be regarded as being decisive. At this point, the European Commission has considerable leeway.[156]

647. Art. 3(3) of the Anti-Dumping Regulation, requires that account be taken of the volume and price effects of the dumped imports.. First and foremost, as an indication of the existence of an injury, there is a need to determine whether imports increased considerably in absolute terms, or in ratio to production or consumption. This also includes a considerable increase of a small market share only.[157] Furthermore, price developments in imports are to be examined, as well as whether there has been "significant price undercutting", or whether the effect of such imports has otherwise "depressed prices to a significant degree or prevented price increases, which would otherwise have occurred, to a significant degree". Price undercutting by dumped products is a core point of determining injury, and hence takes on primary significance as against the volume of imports.[158] It is a matter, first and foremost, of determining the average price of the Union industry for the like product, albeit individual subcategories need to be distinguished, depending on the product.[159] Secondly, the average price of the dumped product is determined accordingly, *i.e.*, also in line with possible sub-categories. Finally, adjustments are to be carried out in turn in the respective average prices in order to facilitate a fair comparison. If products manufactured in the Union and those imported into the Union are not (any longer) in competition with one another in a geographical market, this lack of competition is to be examined in terms of whether dumping practices on the part of the exporter have caused this.[160]

648. If price undercutting cannot be presumed to have taken place, in accordance with the second alternative of Art. 3(3), second sentence, of the Anti-Dumping Regulation, it is necessary to ask whether the effect of such imports was otherwise to depress prices to a significant degree, or to prevent price increases which would otherwise have occurred "to a significant degree". To this end, first of all the profit margin of the Union industry needs to be established. If no reasonable profit can be determined here, the European Commission calculates a hypothetical

153 For anti-subsidy law: Lukas in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, ASub-GVO, EL 2 (April 2013), Art. 8 para. 14; Van Bael & Bellis, EU Anti-Dumping and Other Trade Defence Instruments, Sixth Edition, Alphen aan den Rijn 2019, § 11.07. The Trade Barriers Regulation is based as a matter of principle on a comparable method, but the lack of stipulations under WTO law permits greater latitude here, and hence in the final analysis a derogation from the principles of anti-dumping law and of anti-subsidy law, cf. Berrisch/Kamann in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, Handelshemmnis-VO, EL 2 (April 2013), Art. 2 para. 22.

154 Kuplewatzky/Maxian Rusche in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, AD-GVO 2016, EL 12 (October 2018), Art. 3 para. 14.

155 *Ibid*.

156 *Ibid.*, para. 4.

157 *Ibid*., para. 40.

158 *Ibid*., paras. 42 and 44.

159 For details on the calculation principle: *Ibid*, paras. 45 - 46.

160 *Ibid*., para. 51.

domestic price ("target price") giving rise to expectations of a reasonable profit and based on the manufacturing cost (taking account of future production costs in view of new requirements under environmental law), as well as on a reasonable profit margin (before tax).[161] This process is to be based on the profit existing in the Union prior to the entry of the dumped import.[162]

649. Given the complex nature of the economic circumstances, the European Commission enjoys broad margin discretion which can only be examined as to "whether the procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of powers".[163]

650. In accordance with Art. 3(5) of the Anti-Dumping Regulation, the impact of the dumped imports on the Union industry is to be examined. This entails an evaluation of all relevant economic factors and indices having a bearing on the state of the Union industry. A list in paragraph 5 which cannot be regarded as exhaustive names the magnitude of the actual margin of dumping, actual and potential decline in sales, profits, output, market share, productivity, return on investments and utilisation of capacity. Over and above this, factors also need to be taken into account affecting Union prices, actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments, as well as the fact that an industry is still in the process of recovering from the effects of past dumping or subsidisation.[164] This does not oblige the European Commission to explore all the above factors in its examination, nor is it restricted to the above factors.[165] The weighting of the factors is not reviewed by the European courts.[166]

Causality between dumping and injury

651. The existence of dumping, as well as of an injury, is not sufficient for the issuance of an anti-dumping measure until sufficient causality has also been determined between the two elements (Art. 1(1) in conjunction with Art. 3(6), first sentence, of the Anti-Dumping Regulation). In accordance with Art. 3(6) of the Anti-Dumping Regulation, it must be demonstrated first and foremost that the volume and/or price levels of the dumped imports are at least responsible for an impact on the Union industry, and that that impact exists to a degree which enables it to be classified as material.[167] This means that the dumped imports do not have to be the sole cause of a negative development of the Union industry, but they must simply have made a considerable contribution to the injury.[168] In a second step, in accordance with Art. 3(7) of the Anti-Dumping Regulation, it is to be determined via negative analysis of negative imputation whether the preliminary causality is not rescinded by other factors such as the volume and prices of non-dumped imports, contraction in demand or changes in the patterns of consumption, restrictive trade practices of, and competition between, third-country and Union producers, developments in

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161 *Ibid.*, para. 52.

162 GC, Judgment of 28 October 1999, Case T-210/95 – EFMA/Council, [1999] ECR II-3291, ECLI:EU:T:1999:273, para. 60. This judgment presumes a profit under "normal competition conditions".

163 ECJ, Judgment of 18 October 2018, C-100/17 – Gul Ahmed Textile Mills/Council, ECLI:EU:C:2018:842, para. 63; Judgment of 10 July 2019, C-345/18 P - Caviro Distillerie and others/ Commission, ECLI:EU:C:2019:589, paras. 14 - 15.

164 On the individual categories of injury: Kuplewatzky/Maxian Rusche in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, AD-GVO 2016, EL 12 (October 2018), Art. 3 paras. 55 ff.

165 Kuplewatzky/Maxian Rusche in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, AD-GVO 2016, EL 12 (October 2018), Art. 3 paras. 53 - 54.

166 *Ibid*.

167 Kuplewatzky/Maxian Rusche in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, AD-GVO 2016, EL 12 (October 2018), Art. 3 para. 69.

168 For instance the view taken in Kuplewatzky/Maxian Rusche in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, AD-GVO 2016, EL 12 (October 2018), Art. 3 paras. 69 and 71.

technology and the export performance and productivity of the Union industry. The causality is however only completely suspended if other factors do not leave any genuine own injury attributable to the dumped imports. In practice, it is very difficult for exporters to present sufficient reasons to the European Commission.[169]

The Union interest

652. A particularity of EU anti-dumping law consists of the fact that, in accordance with Art. 21 of the Anti-Dumping Regulation, the "Union interest" must call for intervention. WTO law calls on its members in Art. 9.1 ADA not to estimate the full value of the margin of dumping as the basis for imposing the duty, but this does not give rise to any further obligations for the members.

653. The determination of Union interest is based on an appreciation of all the various interests involved, including the interests of the domestic industry, users and consumers (Art. 21(1) of the Anti-Dumping Regulation). This is ultimately based on a largely open weighing up of interests, which is intended to ensure that the protection of the interests of the sector concerned is not adversely affected by an overriding public interest of the Union.[170] Art. 21(1), second sentence, of the Anti-Dumping Regulation points out in this context that "the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition shall be given special consideration". From a competition point of view, anti-dumping measures are not intended to secure a monopoly or cartel on the part of Union industry, but this does not prevent the Union institutions from protecting even a dominant Union producer in external relations.[171] The third sentence also restrictively states that "the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the Union's interest to apply such measures". This finally makes clear the restrictive nature of the Union interest as an element of examination.[172] The principle of *ex officio* investigation applies in this context.[173] In addition, the parties affected have rights of information and participation in accordance with Art. 21(2) – (3) of the Anti-Dumping Regulation. However, due to the complexity of the weighing process itself, the European Commission ultimately has a wide discretion which can only be reviewed to a limited extent.[174]

3.1.1.2 No further need to reform anti-dumping law

654. Anti-dumping law is repeatedly mentioned in connection with potential European reactions to Chinese state capitalism. The Monopolies Commission does not however consider there to be any (further) need for action in this regard. Firstly, anti-dumping law has already been reformed for dealing with products from countries where the economic system shows "significant distortions" (paragraphs 105 ff.). Secondly, further proposals for reforms would be neither practicable nor desirable (paragraphs 113 ff.). The suitability of anti-dumping law to precisely deal with Chinese state capitalism is questionable as a matter of principle (paras. 122 ff.).

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169 Kuplewatzky/Maxian Rusche in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, AD-GVO 2016, EL 12 (October 2018), Art. 3 para. 69.

170 Hartmann in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, AD-GVO 2016, EL 12 (October 2018), Art. 21 para. 3.

171 Hartmann in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, AD-GVO 2016, EL 12 (October 2018), Art. 21 paras. 36 ff.

172 Hartmann in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, AD-GVO 2016, EL 12 (October 2018), Art. 21 para. 41.

173 Hartmann in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, AD-GVO 2016, EL 12 (October 2018), Art. 21 paras. 49 ff.

174 Hartmann in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, AD-GVO 2016, EL 12 (October 2018), Art. 21 paras. 77 ff.

Anti-dumping law already takes account of deviations from market conditions in the country of export

655. Even though, at first sight, anti-dumping law is linked to private market conduct, state interventions or framework conditions nonetheless play a major role in the practice of determining dumping. A Supplementary Provision to Art. VI:1 GATT already recognises that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability, and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate. This provision is transferred into the anti-dumping agreement in accordance with Art. 2.7 ADA and affects the structure of national anti-dumping law.

656. On the basis of the finding that the non-market-economy conditions in a country of export may make it impossible to carry out a dumping calculation according to the general standards, or may distort such calculation, Regulation 1681/79[175] already included a specific provision in EU's anti-dumping law which provided for the normal value to be "determined in an appropriate and not unreasonable manner" for non-market-economy countries, and which was repeatedly adjusted in following reforms.[176] The economic reforms in China and Russia were taken as a reason from 1998 onwards for enabling both countries to refute their non-market-economy status.[177]

657. By including this possibility to refute the non-market-economy status, the countries of export were subdivided from 1998 onwards within Art. 2(7) of the Anti-Dumping Regulation into those with and those without market-economy conditions. In the case of a "non-market economy" within the meaning of lit. a, "the normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Union". In cases where this was not possible, it was to be determined "on any other reasonable basis, including the price actually paid or payable in the Union for the like product, duly adjusted if necessary to include a reasonable profit margin". For Russia and China, by contrast, in accordance with lit. b, a standard normal value calculation could be carried out where the importers were able to provide evidence in a written application that they are operating in the country of export under market-

[175] Council Regulation (EEC) No 1681/79 of 1 August 1979 amending Regulation (EEC) No 459/68 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community, OJ L 196 of 2 August 1979 pp. 1-6.

[176] See on this Schmidt, in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, AD-GVO, GL 1 (August 2012), Art. 2 paras. 199 - 200.

[177] Müller, W./Khan, N./Scharf, T., EC and WTO Antidumping Law, 2nd Edition, Oxford 2009, para. 2.454.

economy conditions within the meaning of lit. c.[178] The individual conditions in this regard had to be fulfilled cumulatively.[179]

658. The difficulties of using price and cost data in China also played a role in the WTO accession and ultimately led to Section 15(a) CBP, which established treatment of China within the meaning of the former version of Article 2(7) of the Anti-Dumping Regulation.[180] However, this provision was limited to 15 years in accordance with Art. 15(d) CBP, so that it expired in December 2016. A debate started thereafter as to whether this gave rise to an obligation to grant China the status of a market economy.[181] The reform of the Anti-Dumping Regulation in 2016 explicitly left China as a non-market economy within the meaning of Art. 2(7)(b) Anti-Dumping Regulation, but the following reform that took place in 2017[182] completely gave up the previous sub-division, and since then Art. 2(7) of the Anti-Dumping Regulation explicitly remains restricted to countries which are not WTO Members at the time of the investigations.

659. Instead of this, a new Art. 2(6a) was inserted into the Anti-dumping Regulation which provides in the case of "significant distortions" that the normal value is to be constructed on the basis of costs of production and sale "reflecting undistorted prices or benchmarks". Art. 2(6a)(b) defines "significant distortions" as "those distortions which occur when reported prices or costs, including the costs of raw materials and energy, are not the result of

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178 Art. 2(7)(c) of the Anti-Dumping Regulation 1998 read as follows:

"A claim under point (b) must be made in writing and contain sufficient evidence that the producer operates under market-economy conditions, that is if:

— decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in that regard, and costs of major inputs substantially reflect market values,

— firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,

— the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market-economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,

— the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and

— exchange rate conversions are carried out at the market rate."

179 Müller, W./Khan, N./Scharf, T., EC and WTO Antidumping Law, 2nd Edition, Oxford 2009, para. 2.456.

180 This provision reads:

"(a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:

(i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;

(ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product."

181 EPRS, Die Zuerkennung des Marktwirtschaftsstatus an China - Eine Analyse der WTO-Vorschriften und der Politik ausgewählter WTO-Mitglieder, November 2015, https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/571325/EPRS_IDA(2015)571325_DE.pdf, retrieved on 30 June 2020 .

182 Regulation (EU) 2017/2321 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, OJ L 338 of 19 December 2017, p. 1.

free market forces because they are affected by substantial government intervention". Furthermore, the following elements are to be taken into account when assessing the question of whether significant distortions exist:

"— the market in question being served to a significant extent by enterprises which operate under the ownership, control or policy supervision or guidance of the authorities of the exporting country;

— state presence in firms allowing the state to interfere with respect to prices or costs;

— public policies or measures discriminating in favour of domestic suppliers or otherwise influencing free market forces;

— the lack, discriminatory application or inadequate enforcement of bankruptcy, corporate or property laws;

— wage costs being distorted;

— access to finance granted by institutions which implement public policy objectives or otherwise not acting independently of the state."

660. It is commonly assumed that the criteria are ultimately the same considerations as were already found in the old version of Art. 2(7)(c),.[183] What is new in Art. 2(6a)(c) of the Anti-Dumping Regulation is the possibility that is available to the European Commission to produce a country report, where it appears appropriate, describing the market circumstances where there are "well-founded indications" of the possible existence of significant distortions as referred to in lit. b in that country or in a certain sector in that country. The first country report of the European Commission, published shortly after the introduction of the new paragraph 6a, deals with China. It contains over 400 pages of information on the market distortions caused by Chinese state capitalism. [184]

661. The European Commission makes it clear that the reforms which took place in 2017 focus on the influence of state interference in the market, which shows that they are primarily directed against China.[185] It therefore comes as no particular surprise that the country report was already used in new anti-dumping proceedings against China as evidence of the existence of significant distortions, and has always led to the fulfilment of the requirements of para. 6a.[186] Hence, an alternative calculation method is currently already always used in relations with China.

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183 Vermulst. E./Sud, D., in: Bungenberg, M./ Hahn, M./Herrmann, C./Müller-Ibold, T., The Future of Trade Defence Instruments, European Yearbook of International Economic Law, Cham 2018, pp. 63-87, 76; *ibid*., in Nedumpara/Zhou, Non-market Economies in the Global Trading system, Cham 2018, pp. 237-257, 239; Van Vaerenbergh, Geneva Jean Monnet Working Papers 01/2019, p. 5.

184 European Commission, Commission staff working document on significant distortions in the economy of the People's Republic of China for the purposes of trade defence investigations, 20 December 2017, SWD(2017) 483 final/2, https://trade.ec.europa.eu/doclib/docs/2017/december/tradoc_156474.pdf, retrieved on 30 June 2020 .

185 For instance recital 3 of Regulation 2017/2321, as well as European Commission, The EU's new trade defence rules and first country report, Factsheet, 20 December 2017, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_5377, retrieved on 30 June 2020 .

186 Cf. by way of examples Commission Implementing Regulation (EU) 2019/915 of 4 June 2019 imposing a definitive anti-dumping duty on imports of certain aluminium foil in rolls originating in the People's Republic of China following an expiry review under Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council, OJ L 146 of 5 June 2019, p. 63; Commission Implementing Regulation (EU) 2019/687 of 2 May 2019 imposing a definitive anti-dumping duty on imports of certain organic coated steel products originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council, OJ L 116 of 3 May 2019, pp. 5-38; Commission Implementing Regulation (EU) 2019/1198 of 12 July 2019 imposing a definitive anti-dumping duty on imports of ceramic tableware and kitchenware originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EU) No 2016/1036, OJ L 189 of 15 July 2019, pp. 8 – 67; Commission Implementing Regulation (EU) 2019/1259 of 24 July 2019 imposing a definitive anti-dumping duty on imports of threaded tube or pipe cast fittings, of malleable cast iron and spheroidal graphite cast iron, originating in the People's Republic of China and Thailand, following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council, OJ EU L 197 of 25 July 2019, p. 2; Commission Implementing Regulation (EU) 2019/1267 of 26 July 2019 imposing a definitive anti-dumping duty on imports of tungsten electrodes originating in the People's Republic of China following an expiry review under Article 11(2) of Regulation (EU) 2016/1036, OJ EU L 200

662. The reforms are frequently criticised in the literature, and doubts have been cast as to the compatibility of the methods contained in Art. 2(6a) with the law of the WTO.[187] China had also already initiated a dispute settlement procedure at WTO level against the previous method, but in May 2019 called on the Panel that had already been established in accordance with Art. 12.12 of the Dispute Settlement Understanding (DSU) to discontinue the proceedings. This took place as per 14 June 2019.[188] The reasons for this are confidential.

Any extended reform proposals should be rejected

663. Regardless of whether or not the new provisions are in conformity with WTO law, this certainly exhausts the potential to adjust anti-dumping law in line with Chinese state capitalism. Whilst a number of further reforms have been proposed, they are to be rejected for a variety of reasons.

664. Some voices have called for anti-dumping law to be expanded to cover services.[189] This is however already difficult to achieve in practice due to the fact that anti-dumping law is dependent customs law.[190] Unlike with goods, services are not subject to customs clearance, which can be used to levy anti-dumping duties. Independently of the unclear permissibility of an expansion to services under WTO law, therefore, the introduction of a completely new control system would be necessary.

665. In addition, there have been calls for action to be taken against distortions on third markets.[191] European anti-dumping law however only covers goods which are intended for the EU internal market, and therefore does not directly apply to third markets.[192] For reasons of sovereignty, the EU cannot itself intervene on this basis vis-à-vis any price discriminations in China or a third country. The Directorate-General for Trade has by contrast already taken action against circumvention practices in accordance with the current anti-dumping law.[193]

of 29 July 2019, pp. 4-32; Commission Implementing Regulation (EU) 2019/1379 of 28 August 2019 imposing a definitive anti-dumping duty on imports of bicycles originating in the People's Republic of China as extended to imports of bicycles consigned from Indonesia, Malaysia, Sri Lanka, Tunisia, Cambodia, Pakistan and the Philippines, whether declared as originating in these countries or not, following an expiry review pursuant to Article 11(2) of Regulation (EU) No 2016/1036, OJ EU L 225 of 29 August 2019, pp. 1-52; Commission Implementing Regulation (EU) 2019/1662 of 1 October 2019 imposing a definitive anti-dumping duty on imports of ironing boards originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council, OJ L 252 of 2 October 2019, pp. 1-35; Commission Implementing Regulation (EU) 2019/1693 of 9 October 2019 imposing a provisional anti-dumping duty on imports of steel road wheels originating in the People's Republic of China, OJ L 259 of 10 October 2019, p. 15.

187 Examples amongst others Vermulst. E./Sud, D., in: Bungenberg, M./Hahn, M./Herrmann, C./Müller-Ibold, T., The Future of Trade Defence Instruments, European Yearbook of International Economic Law, Cham 2018, pp. 63-87; *ibid.*, in Nedumpara, J./Zhou, W., Non-market Economies in the Global Trading system, Singapore 2018, pp. 237-257; Van Vaerenbergh, P., EU Trade Defence Policy Against Unfair Trade From Chinese SOEs: Unilateral or Multilateral Approaches?, Geneva Jean Monnet Working Papers 01/2019, pp. 5 ff.

188 WTO, European Union — Measures Related to Price Comparison Methodologies, Communication of the Panels of 17 June 2019, WT/DS516/13.

189 See BDI, Grundsatzpapier China. Partner und systemischer Wettbewerber –Wie gehen wir mit Chinas staatlich gelenkter Volkswirt-schaft um?, Januar 2019, p. 14; BusinessEurope, The EU and China: Addressing the Systemic Challenge, January 2020, p. 61. See BDI-Papier, p. 14; BusinessEurope, p. 61.

190 Müller-Ibold, T., Der Einfluss Chinas auf die Wirtschaft –Konsequenzen für die europäische Wettbewerbs- und Außenhandelspolitik, ZEuS 2020, 239 (252).

191 BDI, Grundsatzpapier China. Partner und systemischer Wettbewerber –Wie gehen wir mit Chinas staatlich gelenkter Volkswirtschaft um?, Januar 2019, p. 14; BusinessEurope, The EU and China: Addressing the Systemic Challenge, January 2020, p. 61 BDI-Papier, p. 14; BusinessEurope, p. 61.

192 Müller-Ibold, T., Der Einfluss Chinas auf die Wirtschaft –Konsequenzen für die europäische Wettbewerbs- und Außenhandelspolitik, ZEuS 2020, 239 (252).

193 European Commission, Commission Implementing Regulation (EU) 2019/2131 of 28 November 2019 amending Implementing Regulation (EU) 2019/1198 imposing a definitive anti-dumping duty on imports of ceramic tableware and kitchenware originating

666. Due to the widespread concern about retaliatory measures within the European economy, it is finally proposed to no longer make the dumping procedure dependent solely on applications from individual market participants in future and instead to resort more frequently to an *ex officio* procedure.[194] It is also possible to favour an *ex officio* procedure for competitive reasons. For example, cooperation between the companies in a sector of the economy with regard to the initiation of dumping proceedings in principle entails competitive risks within the meaning of Art. 101 TFEU, as the Monopolies Commission has already pointed out in the past.[195] The European Commission however already has the possibility in Art. 5(6) of the Anti-Dumping Regulation to initiate dumping proceedings *ex officio* "in special circumstances". As yet it (almost) never makes use of this. It has however made it clear in the context of the most recent reform of the trade defence instruments via Regulation 2018/825 that the imminent danger of retaliation measures can be recognised as a special circumstance within the meaning of Art. 5(6) of the Anti-Dumping Regulation which could justify it acting *ex officio*.[196]

667. The initiation of proceedings by the Commission may be justified for political reasons in individual cases. Difficulties however emerge in this context given the requirements made as to the burden of proof stipulated by the WTO law (Art. 5.2 ADA). Art. 5(2) of the Anti-Dumping Regulation incorporates these stipulations, and hence requires a complaint to already contain sufficient proof of the existence of all prerequisites for an anti-dumping measure. Art. 5.6 ADA and Art. 5(6) of the Anti-Dumping Regulation also place the same high demands on proceedings initiated *ex officio* in special circumstances. As a result, the European Commission would have a much higher investigation effort if it could not rely on the application documents and further information submitted by the European industry. In addition, the European companies would have to grant the European Commission deeper insight into their accounts in order to enable an investigation in the above-mentioned sense at all. The Commission accordingly points out in recital 7 of Regulation 2018/825 that the companies involved in *ex officio* proceedings are requested to "provide the information necessary".

668. It is also questionable whether the initiation of *ex officio* proceedings constitutes a suitable means at all. Retaliatory measures are not ruled out by this as a matter of principle. Instead of initiating official *ex officio* proceedings, it appears to be more appropriate if companies themselves indicate their concerns in connection with the complaint, and where appropriate enter into an exchange with the European Commission prior to publishing the complaint (cf. Art. 5(5) of the Anti-Dumping Regulation). The procedure under the Trade Barriers Regulation is also available for unjustified restrictions in a third country.[197]

669. The risks under antitrust law in connection with a joint complaint can ultimately be addressed more effectively via antitrust law itself. The companies should remain able to coordinate in conformity with antitrust law for purposes of initiating anti-dumping proceedings. General compliance under antitrust law should be the standard applied here.

670. At least enhanced recourse by the European Commission to Art. 5(6) of the Anti-Dumping Regulation is furthermore also proposed to support small and medium-sized enterprises which may not have sufficient resources

in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council, OJ EU L 321 of 12 December 2019, pp. 139-167.

194 BusinessEurope, The EU and China: Addressing the Systemic Challenge, January 2020, p. 60.

195 Monopolies Commission, Biennial Report IX: Wettbewerbspolitik oder Industriepolitik (1990/1991), Baden-Baden 1992, para. 1163.

196 Regulation (EU) 2018/825 of the European Parliament and of the Council of 30 May 2018 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union, OJ 2018 L 143 of 7 June 2018, p. 1. See on this Müller-Ibold, T., Der Einfluss Chinas auf die Wirtschaft –Konsequenzen für die europäische Wettbewerbs- und Außenhandelspolitik, ZEuS 2020, 239 (249).

197 Cf. para. 625 - 627.

to initiate proceedings.[198] Regulation 825/2018 has however already created a Helpdesk for small and medium-sized enterprises in order to provide them with easier access to the trade defence instruments (Art. 5(1a) of the Anti-Dumping Regulation).

671. All in all, the Monopolies Commission therefore sees no need for further reforms of anti-dumping law, taking account of the doubtful effectiveness, as well as of the ambiguous compatibility with the stipulations of WTO law.

Doubts as to the suitability of anti-dumping law to precisely establish state interference in the market

672. Counter to repeated calls to tighten up anti-dumping law vis-à-vis Chinese imports, the real question is in fact whether the tool itself is at all suited to appropriately record the conduct identified in Section 1. In principle, anti-dumping law addresses companies' private pricing conduct. This also enables it to be used against price strategies that are harmful to competition. However, in comparison with Art. 102 TFEU, for example, anti-dumping law lacks the possibility to differentiate between anti-competitive and normal price competition. The market position of the exporters recorded does not play a decisive role in the observation. A rule has now been created in the form of Art. 2(6a) of the Anti-Dumping Regulation which takes the special market conditions within a state capitalist system into account insofar as they are replaced by "undistorted" market conditions. This takes account of the fact that price determination entails "special difficulties" in a state capitalist system. However, not enough differentiation is made, this time between the different types of state intervention. These are used, on an overall basis, only to justify a deviation from the actual normal value.

673. This makes anti-dumping law generally blind to any distinction between competition-distorting conduct and that which is permissible in terms of competition. This also applies to any distinction between natural and artificial competitive advantages. Asymmetric market conditions are however not problematic under all circumstances.

3.1.1.3 Closer alignment of the application of anti-dumping law with competition standards

674. Regardless of the reservations vis-à-vis anti-dumping law in general, the political interest in compensating for excessive external price competition against the background of the explicit mentioning of trade protection in Art. 207(1) TFEU is to be recognised as a matter of principle. Having said that, given its impact on the EU internal market, this protection collides with the functional guarantees of the internal market, which also include competition. The European Commission should therefore attach greater significance to competition-related considerations in anti-dumping proceedings instead of one-sidedly emphasising trade policy motives. This is also in line with the New Industrial Strategy 2020, which explicitly states as follows:

> "*Faced with these headwinds, Europe's response cannot be to erect more barriers, shield uncompetitive industries or mimic the protectionist or distortive policies of others. Being competitive requires competition – both at home and in the world*".[199]

675. Whilst the previous anti-dumping regime is recognised as a matter of principle, it would be desirable first and foremost to determine products in a manner similar to the product market definition in competition law.[200] This would serve to restrict the political scope available in case-related application of anti-dumping law in the interest of a more precise analysis of the competition relationships. This would enable the Directorate-General for Trade to systematically have recourse to the know-how built up within a large number of decisions of the Directorate-

198 BusinessEurope, The EU and China: Addressing the Systemic Challenge, January 2020, p. 60.

199 European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions – A New Industrial Strategy for Europe, COM(2020) 102 final, 10 March 2020, p. 3.

200 For instance also Hoekman, B. M./Mavroidis, P. C, Antitrust-Based Remedies and Dumping in International Trade, World Bank Policy Research Working Paper 1347, 1994, pp. 25 - 26.

General for Competition.[201] The products are currently principally delimitated on the basis of the complaint lodged by the respective industry on-the-spot verifications at companies' premises.[202] The European Commission explicitly points out that "an anti-dumping investigation does not define product and geographical markets".[203]

676. Over and above this, the term "Union interest" would be a suitable starting point in order to create greater scope for a more competition-based analysis.[204] Thereby, the determination of dumping as well as an injury would first formulate an interest of the Union industry to intervene, which would then have to be balanced with competition considerations on the basis of Art. 21 of the Anti-dumping Regulation.

677. In accordance with Art. 21(1), third sentence, of the Anti-Dumping Regulation "the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition shall be given special consideration". The fourth sentence furthermore imposes the condition that the European Commission must "clearly" conclude that it is not in the Union's interest to intervene. This points to the priority of protection of the Union industry. Apart from this, the first sentence ("A determination as to whether the Union's interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole") of the Anti-Dumping Regulation implies a certain openness in the consideration. Regulation 2018/825 furthermore enhanced the right to make comments (paragraphs 2 and 4).

678. In order to take greater account of competition considerations, it would be necessary to adjust Art. 21(1), third sentence, of the Anti-dumping Regulation such that it takes special account exclusively of the maintenance of effective competition. What is more, one might propose deleting the word "clearly" from Art. 21(1), fourth sentence, of the Anti-Dumping Regulation. This would lead to an open weighing up of conflicting interests.

679. The European Commission currently takes account of competition concerns within the context of the Union interest insofar as they are submitted by the exporters or other market players.[205] This is to be approved of. The European Commission however explicitly emphasises that it does not need to carry out a competition analysis in the strict sense of the word, as this is left to the competition authorities.[206] Instead, it explores on a merely case-by-case basis the statements as well as evidence made by the exporters, as well as by interested market players in the EU. This leads to the argumentation having little depth with regard to competition, whilst at the same time posing the danger of a selective choice of market players included in the competition analysis. It cannot be presumed that individual statements on the part of such market players will provide an overall picture of all relevant circumstances. On the one hand, small and medium-sized enterprises in particular may lack the capacity to do so. On the other hand, non-participation may also have strategic reasons.

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201 It already makes use of it in individual cases, cf. European Commission, Commission Implementing Regulation (EU) 2016/388 of 17 March 2016 imposing a definitive anti-dumping duty on imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron) originating in India, OJ L 73 of 18 March 2016, p. 53, para. 143.

202 Hoffmeister in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, AD-GVO 2016, , EL 12 (October 2018), Art. 1 para. 35.

203 European Commission, Commission Implementing Regulation (EU) 2017/336 of 27 February 2017 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain heavy plate of non-alloy or other alloy steel originating in the People's Republic of China, OJ L 50 of 28 February 2017, p. 18, para. 162.

204 For instance also Hoekman, B. M./Mavroidis, P. C, Antitrust-Based Remedies and Dumping in International Trade, World Bank Policy Research Working Paper 1347, 1994, pp. 22 ff.

205 European Commission, Commission Implementing Regulation (EU) 2016/388 of 17 March 2016 imposing a definitive anti-dumping duty on imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron) originating in India, OJ L 73 of 18 March 2016, pp. 53 ff., paras. 139 ff.; Commission Implementing Regulation (EU) 2017/336 of 27 February 2017 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain heavy plate of non-alloy or other alloy steel originating in the People's Republic of China, OJ L 50 of 28 February 2017, pp. 18 ff., paras. 158 et ff.

206 ibid., paras. 143 ff., as well as paras. 162 ff.

680. In the past, a more competitive orientation of anti-dumping law has been countered by the argument of the greater investigation effort not required by WTO anti-dumping law and the narrowing of the scope for industrial policy.[207] The effort involved in investigation is however reduced by the fact that competition considerations do not have an effect until one reaches the level of Union interests. This requires a market analysis for which the Directorate-General for Competition already has tried-and-tested tools at its disposal. The Monopolies Commission recommends in this context that a joint working unit of the Directorate-General for Trade, as well as of the Directorate-General for Competition, be established and provided with staff of its own. This unit should as a matter of principle coordinate a mutual exchange and ascertain the matters that are relevant for determining the Union interests. The analysis obtained from this provides a guarantee of a neutral observation which ignores companies' individual interests. The final weighing-up decision would remain with the Directorate-General for Trade.

681. Vis-à-vis the restriction of the industry policy scope, reference should be made to Art. 173(1) and (3) subpara. 2 TFEU in conjunction with Art. 3(3) TEU. It emerges from these that protection of competition should also be applied within the scope offered by industry policy.

682. Particularly also with regard to China, an analysis orientated more towards competition within anti-dumping proceedings is useful. It should be pointed out once more in this regard that consumers and users of products benefit from lower prices. It is irrelevant per se whether this is due to state subsidies, distorted production conditions or purely economic decisions..

683. To sum up, the Monopolies Commission recommends in terms of orientating anti-dumping law towards competition to adjust the determination of products to the market definitions of European competition law, as well as to take greater account, entrenched in legal norms, of effective competition at the level of Union interests. In the context of the adjustment proposed here, Art. 21(1) of the Anti-Dumping Regulation should therefore be worded as follows:

> *"A determination as to whether the Union's interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers. A determination pursuant to this Article shall only be made where all parties have been given the opportunity to make their views known pursuant to paragraph 2. In such an examination, the* ***preservation of effective competition*** *~~need to eliminate the trade distorting effects of injurious dumping and to restore effective competition~~ shall be given special consideration. Measures, as determined on the basis of the dumping and injury found, may not be applied where the authorities, on the basis of all the information submitted, can ~~clearly~~ conclude that it is not in the Union's interest to apply such measures."*

3.1.2 Competition law: prohibition of abuse and of cartels

684. The competition rules (Art. 101 and 102 TFEU) protect the EU's internal market against conduct within the internal market on the part of companies which is not in compliance with market conditions. They are not applicable to measures of a State for sovereign economic management or to other sovereign activities.[208] In cases in which Chinese companies participate in conducts that are not in compliance with market conditions, and which hence distort competition, the question however arises as to whether a third-country influence exerted by the Chinese State can or should be taken into account as a separate factor, in application of Art. 101 and Art. 102 TFEU (Section 3.1.2.1). In cases in which European companies react to market distortion by the influence of the Chinese

[207] Müller, W./Khan, N./Scharf, T., EC and WTO Antidumping Law, 2nd Edition, Oxford 2009, paras. I.18 ff.

[208] Cf. ECJ, Judgment of 4 May 1988, 30/87 – Bodson/Pompes funèbres des régions libérées, [1988] ECR 2479, ECLI:EU:C:1988:225, para. 18; Judgment of 1 July 2008, C-49/07 - MOTOE, [2008] ECR I-4863, ECLI:EU:C:2008:376, para. 24; restrictively with regard to the duties of sincere cooperation incumbent on the EU Member States ECJ, Order of 17 February 2005, C-250/03 - Mauri, [2005] ECR I-1267, ECLI:EU:C:2005:96, paras. 28 ff. with further references

State in the internal market by forming a cartel, the question arises as to whether such a cartel is justifiable to a greater degree than other cartels (Section 3.1.2.2).

3.1.2.1 Application of Art. 101 and 102 TFEU in reference to companies under third-country influence

685. Chinese companies operate in the EU internal market to which advantages are attributed vis-à-vis their European competitors on the basis of control or financing by the Chinese state, or of an unregulated dominant position in their domestic market. The question has arisen as to whether such Chinese companies are to be subject to a more stringent examination in accordance with the EU's competition rules, as contained in Art. 101 and 102 TFEU. One should particularly bear in mind state influence as a factor in determining market domination in the internal market.[209] Apart from this, the question arises as to whether incomplete transparency with regard to shareholdings and the influence of the State per se might justify a more critical evaluation of the market conduct of Chinese companies.

686. In the EU internal market, the principle applies at the starting point that an assessment of the conduct of market player does not depend on whether they are privately or state owned. In the relationship with the EU Member States, this follows from Art. 345 TFEU, in accordance with which the EU Treaties leave the ownership regime in the various Member States untouched.[210] It is not compatible with this, on principle, to subject companies in the Member States to special obligations in the internal market only because they are subject to Member State control. Neither Art. 345 TFEU, nor indeed Art. 101 ff. TFEU, says anything about third-country control. There are also no special arrangements in this regard.

687. Only "undertakings" can be addressees of the obligations of conduct in Art. 101 and 102 TFEU. The term undertaking is understood in an autonomous and functional sense in EU competition law, and refers to any unit exercising an economic activity, regardless of the legal status of the entity or the way in which it is financed.[211] Units which do not have any legal personality and are integrated into a public authority in organisational terms may hence also be regarded as undertakings.[212] There may furthermore be a need to regard several units which are subject to the same state control together because they are operating as a single undertaking.[213] This is conditional on a state-controlled unit being able to exert a decisive influence at a superior level on the sales and price policy of the other economically-active units, and having actually availed itself of this possibility. Here too, it is not the legal structure of the group that is decisive, but their actual *modus operandi* and organisation in an overall view.[214]

688. With regard to Chinese undertakings, it might be taken into consideration that these undertakings should be regarded together, as a whole, or related to an economic sector or a state level (central state, provinces, re-

[209] Bruegel, Policy Contribution No. 18, December 2019, Sec. 4.1.

[210] See on this for instance ECJ, Judgment of 29 October 1980, C-209/78 – van Landewyck, [1980] ECR 3125, ECLI:EU:C:1980:248, paras. 82-84 (on the predecessor provision Art. 155 EEC Treaty).

[211] ECJ, Judgment of 12 July 1984, 170/83 – Hydrotherm, [1984] ECR 2999, ECLI:EU:C:1984:271, para. 11; Judgment of 10 April 2014, C-231/11 P bis C-233/11 P – Siemens Österreich, ECLI:EU:C:2014:256, paras. 42-44; on this also Monopolies Commission, Special Report 72, Strafrechtliche Sanktionen bei Kartellverstößen, Baden-Baden 2015, paras. 27 ff.

[212] Cf. ECJ, Judgment of 1 July 2008, C-49/07 – MOTOE, 2008, I-4863, ECLI:EU:C:2008:376, para. 25; Judgment of 30 April 1974, 155/73 – Sacchi, [1974] ECR 409, paras. 12-14; Judgment of 28 June 2005, C-189/02 P and others – Dansk Rørindustri, [2005] ECR I-5425, ECLI:EU:C:2005:408, para. 113; furthermore ECJ, Judgment of 16 June 1987, 118/85 – Commission/Italy, [1987] 2599, ECLI:EU:C:1987:283, paras. 8, 11 (there on secondary EU law).

[213] Monopolies Commission, Special Report 72, Strafrechtliche Sanktionen bei Kartellverstößen, Baden-Baden 2015, para. 32.

[214] Monopolies Commission, Special Report 72, Strafrechtliche Sanktionen bei Kartellverstößen, Baden-Baden 2015, para. 31 with references.

gions/municipalities). It is difficult to obtain the necessary overall view of the actual circumstances in this regard, given the lack of complete information on the circumstances in China. Uniform state control can hence not always be ruled out. One should however bear in mind that the prohibition of cartels contained in Art. 101 TFEU does not apply within individual undertakings (economic units).[215] In cases of doubt, an overall view would hence lead to restricting the scope of Art. 101 TFEU without this possibly doing justice to the actual circumstances. Furthermore, even with a 100 % state holding, it is possible that Chinese undertakings compete with one another to a considerable degree, and that this is actually desired by the State.[216] It is hence likely to be more suitable in cases of doubt to observe the undertakings separately, subject to further information.

689. Where the focus is on the market position of the undertaking, as for instance within the prohibition of abuse in Art. 102 TFEU, greater financial resources resulting from economic privileges afforded by the State (advantages in financing) may also be taken into account.[217] The same applies to otherwise privileged access to resources or intertwinings with other undertakings which impact the market position.[218] By contrast, cost advantages that emerge on the basis of the general economic framework are irrelevant for evaluating the market position.[219] No particularities apply to Chinese undertakings in this regard. At most, one might consider that stricter standards should apply, given the lack of transparency in shareholdings in China and any state influence with regard to financing advantages.[220] A lack of transparency as such does not, however, influence the scope for conduct, which is characteristic of a dominant position within the meaning of Art. 102 TFEU.[221] Something else might only have to apply if it had a deterrent effect on other market players, so that they adjust their own conduct accordingly. The legal situation regarding Art. 102 TFEU is unclear in this regard, and needs to be clarified by the European Court of Justice.[222]

690. Art. 101 and 102 TFEU prohibit undertakings from engaging in conduct that restricts competition. This implies that self-determined conduct is required.[223] In particular with undertakings whose home markets are subject to a considerable state influence, it is conceivable that they may justify their conduct by saying that they are sub-

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[215] ECJ, Judgment of 24 October 1996, C-73/95 – Viho, [1996] ECR I-5457, ECLI:EU:C:1996:405, para. 51; Müller-Ibold, T., Der Einfluss Chinas auf die Wirtschaft – Konsequenzen für die europäische Wettbewerbs- und Außenhandelspolitik, ZEuS 2020, 239 (260).

[216] Müller-Ibold, T., Der Einfluss Chinas auf die Wirtschaft – Konsequenzen für die europäische Wettbewerbs- und Außenhandelspolitik, ZEuS 2020, 239 (260).

[217] On this ECJ, Judgment of 9 November 1983, 322/81 – Michelin, [1983] ECR 3461, ECLI:EU:C:1983:313, para. 55; Judgment of 4 May 1988, 30/87 – Bodson/Pompes Funèbres, [1988] ECR 2479, ECLI:EU:C:1988:225 para. 29. It should be taken into account here that financial power is not to be regarded in isolation, but in the context of the existing competition pressure and of any counterpower exerted by consumers.

[218] ECJ, Judgment of 17 July 2014, C-553/12 P – THE, ECLI:EU:C:2014:2083, paras. 45-47; Judgment of 4 May 1988, 30/87 – Bodson/Pompes Funèbres, [1988] ECR 2479, ECLI:EU:C:1988:225, paras. 28-29.

[219] This may however be different when it comes to cost advantages accruing in the EU internal market only to individual enterprises, and which competitors cannot countervail; cf. ECJ, Judgment of 14 February 1978, 27/76 – United Brands, [1978] ECR 207, ECLI:EU:C:1978:22, paras. 121/124 (cost advantages vis-à-vis market access petitioners).

[220] Cf. Müller-Ibold, T., Der Einfluss Chinas auf die Wirtschaft – Konsequenzen für die europäische Wettbewerbs- und Außenhandelspolitik, ZEuS 2020, 239 (262).

[221] Cf. ECJ, Judgment of 14 February 1978, 27/76 – United Brands, [1978] ECR 207, ECLI:EU:C:1978:22, para. 65: "The dominant position referred to in this Article relates to a position of economic strength enjoyed by an undertaking which enables it [...] to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."

[222] Art. 267 § 1 (a) TFEU; from the previous case-law see for instance ECJ, Judgment of 13 February 1979, 85/76 - Hoffmann-La Roche, [1979] ECR 461, ECLI:EU:C:1979:36, paras. 38-39; Judgment of 14 February 1978, 27/76 - United Brands, [1978] ECR 207, ECLI:EU:C:1978:22, para. 122 (there on the relevance of the deterrent "risks [incurred in penetrating the market] the costs of which are irrecoverable if the attempt fails").

[223] Cf. ECJ, Judgment of 9 June 1977, 90/76 – Van Ameyde, [1977] ECR 1091, ECLI:EU:C:1977:101, paras. 23-24.

ject to sovereign constraints, and hence are unable to conduct themselves in a self-determined manner.[224] A sovereign constraint that rules out self-determined conduct is however not yet established if the State merely creates incentives to engage in specific conduct.[225] In cases of doubt, it is to be presumed that they act in a self-determined manner where they engage in business activity.

691. The question as to whether an entrepreneur's conduct is in breach of Art. 101 or 102 TFEU is to be answered in other respects solely by the legal prerequisites of these provisions. It is not possible, adding to these prerequisites, to take account of the fact that the conduct can be traced back to the special conditions pertaining in a third country, or was even promoted by this. This can be shown by way of example by the prohibition of abuse of a market-dominating position in accordance with Art. 102 TFEU. Here, a distinction is to be made between several groups of cases:

- Without any necessity of modifying the applicable principles, it would give rise to abuse if a market-dominating Chinese undertaking is able, due to advantages in financing granted by the State, to finance below-cost cut-throat prices over an extended period of time in order to drive out its competitors.
- No abuse would exist if it were to be provable that Chinese undertakings were operating in the EU internal market at cut-throat prices on the basis of advantages in financing granted by the State without having a market-dominating position. This is because, in accordance with Art. 102 TFEU, cut-throat prices are only prohibited as predatory if they are used by market-dominating undertakings.[226] Other undertakings may use cut-throat prices in order to expand their market position (up to the boundary of market domination). It is, indeed, a competition problem if Chinese undertakings are able to exploit advantages accruing to them specifically on the basis of cost-reducing measures taken by the Chinese State from which undertakings in the EU do not benefit.[227] But it is nonetheless not an exploitation of a dominant position within the meaning of Art. 102 TFEU.
- Equally, Art. 102 TFEU does not prohibit any low-price strategies based on the fact that Chinese undertakings enjoy cost advantages ensuing from the economic conditions prevailing in China, which may even enable them to crowd out their competitors in the EU with above-cost prices. Such low-price strategies also do not constitute an abuse of a market-dominating position. Once more, only advantages are exploited on the basis of state measures which benefit Chinese undertakings regardless of their market position.

692. The anti-dumping proceedings pursued by the European Commission indicate that, because of state-granted advantages, Chinese undertakings are in fact operating in the internal market at prices that are not in compliance with market conditions, and are hence engaging in dumping. State-granted advantages are certainly a relevant factor where dumping occurs specifically with Chinese undertakings, and where it cannot be explained here by means of other factors. Art. 101 and 102 TFEU are unlikely to fully cover the cases at hand for the reasons described above. Specifically within Art. 102 TFEU, it does not appear to be justified either to make a cost adjustment as it is carried out by the European Commission in dumping proceedings vis-à-vis China on the basis of the new Art. 2(6a) of the Anti-dumping Regulation. This is because the law on abuse starts with a competition-related view

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224 See in US law: *Animal Science Products v. Hebei Welcome Pharmaceutical Co. Ltd., 585 U. S. __, 2018 WL 2973745 (2018)*; dazu Müller-Ibold, T., Der Einfluss Chinas auf die Wirtschaft – Konsequenzen für die europäische Wettbewerbs- und Außenhandelspolitik, ZEuS 2020, 239 (257).

225 Cf. ECJ, Judgment of 17 January 1984, C-43/82 – VBVB, [1984] ECR 19, ECLI:EU:C:1984:9, Ls. 8 and paras. 38-40.

226 For greater detail on the definition of "cut-throat prices" and their characteristics, see in terms of competition law European Commission, Communication from the Commission - Guidance on the Commission's Enforcement Priorities in Applying Article 82 EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, OJ C 45 of 24 February 2009, paras. 63 ff.

227 Cf. Bruegel, How can European competition law address market distortions caused by state-owned enterprises?, working paper, p. 5-6 (there on SOEs).

pure and simple.[228] If the European Commission does not pursue proceedings under the anti-dumping rules, European competitors are, however, also not protected in accordance with the competition rules.

693. With regard to possibly anti-competitive conduct within the meaning of Art. 101 and 102 TFEU, finally, the problem exists that, with a third-country influence on the economy, there may frequently be suspected breaches of competition, but it is difficult at the same time to confirm such suspicions. There have for instance been arrangements in the past in Europe in Chinese sectoral economic associations, which related to action on the market in Europe. Amongst other things, strategic information was exchanged in this framework on prices and market positions, also in conjunction with export statistics transparently showing the exports of individual undertakings.[229] Such coordination can breach not only the cartel ban of Art. 101 TFEU, but may also constitute a component of a strategy of expansion into new markets that is at least tolerated by the third country. European authorities, however, face difficulties in collecting information on the relevant agreements and their backgrounds where the relevant information is only available in the third country itself.[230]

694. The problems described regarding how third-country measures are to be taken into account and substantiated as a cause of distortions of competition is, however, are not restricted to specific behaviour, and are also not necessarily restricted to the scope of Art. 101 and 102 TFEU. Art. 106 and 107 ff. TFEU, and the competition rules on merger control, also only permit to a limited extent third-country state measures to be taken into account or relevant information to be obtained from third countries in order to evaluate cases. The Monopolies Commission considers that a uniform solution should be sought to the degree that gaps in protection can also be detected with regard to these rules (see Section 4.1 below).

3.1.2.2 Application of Art. 101 TFEU in relation to defensive cartels and export cartels

695. In the case of competition-distorting behaviour given rise to by the Chinese State (such as state-promoted cut-throat prices), it is possible that European undertakings may consider forming a defensive cartel within the EU internal market, or conversely an export cartel to coordinate their actions on the Chinese market. Such an export cartel might also work as a defensive measure if the undertakings participating in the cartel (at least amongst other things) were to use it to compensate for disadvantages that they have vis-à-vis undertakings on the Chinese market which are controlled or financed there by the State. In comparison to such cartels, it however appears preferable to further develop the regulatory set of tools.

Defensive cartels impermissible as a matter of principle

696. Defensive cartels established in the EU internal market as a reaction to competition-distorting conducts on the part of other market players are not acceptable under Union law as a matter of principle. This also applies in the context at hand, in particular where the competition-distorting conduct targeted by the defensive measures consists of dumping. There is a need to take into account that the existing EU legal framework opens up the possibility for the sectors in question to apply for anti-dumping measures which the EU institutions can take for their

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228 Criticism has already been raised as to their non-inclusion in connection with anti-dumping law; cf. section 3.1.1.3 in the present Biennial Report.

229 Müller-Ibold, T., Der Einfluss Chinas auf die Wirtschaft – Konsequenzen für die europäische Wettbewerbs- und Außenhandelspolitik, ZEuS 2020, 239 (258) regarding the evaluation under cartel law and referring to European Commission, Decision of 17 February 1992, IV/31.370 and 31.446 – UK Agricultural Tractor Registration Exchange, OJ L 68 of 13 March 1992, p. 19, paras. 35 ff.; most recently confirmed by ECJ, Judgment of 28 May 1998, C-7/95 P – John Deere, [1998] ECR I-3138, ECLI:EU:C:1998:256.

230 See paras 97 ff. in the present Biennial Report with regard to similar problems which may arise in investigations carried out into enterprises with data-related business models in the digital domain.

protection in the EU's external relations.[231] In accordance with the prohibition of cartels contained in Art. 101 TFEU, defensive cartels within the EU internal market can only be justified if concomitant overriding economic advantages can be proven that favour consumers (cf. Art. 101(3) TFEU). Cartels with which undertakings domiciled in the EU primarily defend themselves against competitors from third countries are, however, unlikely to constitute such advantages for consumers as a rule.

Export cartels theoretically possible, but usually problematic in practical terms

697. It is theoretically easier to justify export cartels than the defensive cartels dealt with above. Such cartels relate from the outset to a market activity outside the EU. This means that they cannot adversely affect the EU internal market protected by Art. 101 TFEU, at least if it is ensured that they do not impact the internal market at all.[232] The previous possibilities to approve export cartels were nonetheless removed from the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) in 1999, given that international trade agreements precluded the approval of competition-restricting agreements with effect on markets outside Germany.

698. It is in fact difficult to shape export cartels in a legally-unobjectionable (in particular legally-secure) manner making it possible to rule out any impact on the EU internal market. It is true that EU suppliers might theoretically agree to jointly set high prices for their products for a foreseeable period and exclusively on the Chinese market. Having said that, a (damaging) effect on consumers in the EU could only be ruled out in such cases if the cartel agreement did not provide for any minimum volumes to be exported and was exclusively related to products that were not reimported.[233] It would in fact be sufficient for domestic consumers to be affected if the cartel agreement related to a product which is used as input for other products which are then imported into the EU.[234] The intertwining of the international supply flows makes it more probable that products affected by cartels are used as input for products which are then imported into the EU.

699. Apart from this, it stands to reason that China would react to export cartels by taking countermeasures. An argument for this is certainly that export cartels with impacts that are harmful to consumers on the Chinese market are prohibited in accordance with Chinese cartel law, and might be regarded in terms of Chinese commercial policy as distortions of competition against which countermeasures are warranted. Any Chinese countermeasures would however be likely to run counter to the commercial policy goals of the EU.

700. In an overall view, at best very little scope exists for export cartels in the framework of European law as it stands. This however appears to be justified since the legal framework, thus, prevents a risk of injury to consumers, and averts conflicts between protection of competition and commercial policy in the EU.

Preferable to adjust the set of regulatory tools

701. It is unclear at present whether there are defensive or export cartels in the EU. Such cartels do not have to be disclosed. The high degree of probability that they are to be found to be impermissible also makes it unlikely that market players will disclose them voluntarily. Were there to be any defensive or export cartels with which the mar-

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[231] This applies at least to cartels relating to trade in goods. In services, anti-dumping measures are not possible; see above paragraphs 626, 664.

[232] ECJ, Judgment of 27 September 1988, 89/85 et al. – Ahlström Osakeyhtiö and others, [1988] ECR 5193, ECLI:EU:C:1988:447, paras. 16 ff.; negating injury to trade for an export cartel pure and simple: judgment of 18 February 1986, 174/84 – Bulk Oil/Sun International, [1986] ECR 559, ECLI:EU:C:1986:60, para. 44.

[233] Cf. Schroeder in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, Vol. II, EL 64 May 2018, Art. 101 TFEU paras. 699 ff. with further references

[234] European Commission, Decision of 8 December 2010, 39.309 – LCD (Liquid Crystal Displays), paras. 316 ff.

ket players in the EU react to distortions of competition created by the influence on the economy exerted by the Chinese State, this might, however, indicate the existence of a regulatory gap. As a matter of principle, the European foreign trade and competition rules are intended to effectively protect market players in the internal market against distortions of competition of the above kind. If such protection is missing, the responsibility for this should not be shifted to the market players, but the regulation should be adjusted accordingly. The Monopolies Commission considers that these considerations are another factor militating in favour of regulations for the problems of competition-distorting third-country influence where appropriate (see Section 4.1 below).

3.2 Instruments to protect competition in non-market-economy third-country measures

702. A politically particularly sensitive area is concerned where provisions link directly to non-market-economy third-country measures in order to neutralise the competition-distorting consequences of such measures. In the present context, the discussion concerns subsidy control under foreign trade law (Section 3.2.1), as well as State aid control under competition law (Section 3.2.1), and regulations relating to SOEs (Section 3.2.3). A special problem arises when it comes to taking account of third-country control and financing with Member State procurement procedures (Section 3.2.4). In the Monopolies Commission's view, the fact that, on closer examination of the existing regulatory framework, the EU internal market is only imperfectly protected against distortions of competition through third-country influence on the economy, argues in favour of supplementing the existing range of legal instruments (Section 3.2.5).

3.2.1 Subsidy control

703. The purpose of the EU's anti-subsidy law is to protect the European economy from subsidised imports of goods from third countries.[235] Services are not covered. The WTO's anti-subsidy law is primarily based on Art. VI and XVI of the GATT, as well as on the Agreement on Subsidies and Countervailing Measures (ASCM). The EU's anti-subsidy measures are based on the Anti-Subsidy Regulation[236]. It transfers large amounts of the provisions contained in the ASCM.[237]

704. Art. 1(1) of the Anti-Subsidy Regulation explains the principle of EU anti-subsidy law as follows: "A countervailing duty may be imposed to offset any subsidy granted, directly or indirectly, for the manufacture, production, export or transport of any product whose release for free circulation in the Union causes injury.". This is already in principle consistent with anti-dumping law with regard to a large number of conditions. For example, a finding of causal injury (Art. 8 and 9 Anti-Subsidy Regulation) is also required for the imposition of an anti-subsidy measure, and a possible conflicting Union interest (Art. 31 Anti-Subsidy Regulation) is taken into account. In principle, the common points of examination are treated equally, so that reference can be made to Section 3.1.1.1 in this regard.

705. In relation to each other, both types of import procedures can in principle be used in parallel, but not both anti-dumping and countervailing duties can be levied at the same time..[238] In general terms, recourse is much more frequently taken to anti-dumping measures than to anti-subsidy measures. For instance, 94 anti-dumping measures and 15 countervailing measures were in force at the end of 2019.[239] However, an increase in the initia-

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235 Lukas, in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, ASub-GVO, EL 2 (April 2013), Art. 1 para. 1.

236 Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, OJ L 176 of 30 June 2016, p. 55.

237 Regulation 1037/2016 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, OJ L 176 of 30 June 2016, recitals 2 and 3.

238 Lukas, in: Krenzler/Herrmann/Niestedt, EU-Außenwirtschafts- und Zollrecht, ASub-GVO, EL 2 (April 2013), Art. 1 para. 20.

239 European Commission, Report from the Commission to the European Parliament and the Council, 38th Annual Report from the Commission to the Council and the European Parliament on the EU's anti-dumping, Antisubsidy and Safeguard activities and the Use of trade defence instruments by Third Countries targeting the EU in 2019, 30 April 2020, COM(2020) 164 final, p. 2.

tion of anti-subsidy proceedings has been recorded in recent years – in particular against China –, which might indicate greater use in the future.[240]

706. The EU's anti-subsidy law represents autonomous action against subsidised goods imports. Additionally, the ASCM also contains provisions on the initiation of dispute settlement proceedings at the WTO with which the country in question can take action against the subsidy of another WTO Member (Art. 4 and 7 ASCM).

3.2.1.1 Conditions for a countervailable subsidy

707. The central prerequisite for a countervailing duty within the meaning of Article 1(1) of the ASCM is the existence of a countervailable subsidy, the conditions for which the EU takes almost verbatim from the ASCM as the consensus under WTO law.. Accordingly, there is a need first and foremost for a subsidy, as well as for benefit (Art. 1 ASCM and Art. 3 of the Anti-Subsidy Regulation). In addition, the respective subsidy must be specific to an enterprise or industry or group of enterprises or industries (Art. 2 ASCM and Art. 4 of the Anti-Subsidy Regulation).

708. In accordance with Art. 1 ASCM and Art. 3 of the Anti-Subsidy Regulation, a subsidy is deemed to exist if there is a financial contribution by a government or another public body, or if there is any form of income or price support within the meaning of Article XVI of the GATT, and a benefit is thereby conferred. What is to be understood as a financial contribution is exhaustively listed in Art. 1.1.(a)(1)(i)-(iv) ASCM and Art. 3(1) (a) (i)-(iv) of the Anti-Subsidy Regulation. Accordingly, a subsidy is defined as the direct or potential transfer of funds (i), the foregoing of charges that would normally be payable (ii) and the purchase or provision of goods or services other than general infrastructure (iii). All these practices are to be considered as subsidies even if they take the form of payments to a support mechanism or the involvement of a private entity (iv).

709. What is to be understood as advantage benefit is not explicitly determined by either the ASCM or the Anti-Subsidy Regulation, but the term was as a matter of principle interpreted in the case-law of the WTO in such a way that the recipients had to be placed in a better position as a result of the subsidy than under usual market conditions.[241] The Commission handed down early guidelines for calculating subsidies in countervailing duty proceedings in order to provide an overview of its calculation methods as are applied "under normal circumstances".[242]

710. A mandatory prerequisite for subsidies being countervailable is their actionability. Here, the Anti-Subsidy Regulation follows the "traffic light approach" of the ASCM, according to which a distinction is made between prohibited, actionable and non-actionable subsidies. What is prohibited in accordance with Art. 3 ASCM are all subsidies which link *de jure* or *de facto*, alone or at least as a condition, to export or the preferred consumption of domestic goods as against imported ones. They are automatically regarded as being specific (Art. 2.3 ASCM). All other subsidies are actionable insofar as their specificity can be determined (Art. 2 ASCM) and they cause an injury or threat of an injury (Art. 5 and 6 ASCM). In accordance with Art. 8 ASCM, subsidies are non-actionable if they are not specific, or if they meet the conditions provided for in Art. 8.2 ASCM. The provision was however time-limited to five years, and lapsed at the end of 1999.

711. Art. 4 of the Anti-Subsidy Regulation makes specificity the decisive prerequisite for actionability, export subsidies within the meaning of Art. 3 ASCM in accordance with Art. 4(4) of the Anti-Subsidy Regulation however being regarded as specific, whilst this is to be determined and substantiated for all other forms of subsidy in accordance with the principles contained in paragraph 2 and 3.

[240] Bungenberg, M./Van Vaerenbergh, P., Countervailing Measures und das Chinesische Beitrittsprotokoll zur WTO, ZEuS 2020, 267 (275 ff.).

[241] Müller, W., WTO Agreement on Subsidies and Countervailing Measures, A Commentary, Cambridge 2019, pp. 125 - 126.

[242] European Commission, Information from the Commission - Guidelines for the calculation of the amount of subsidy in countervailing duty investigations, OJ C 394 of 17 December 1998, pp. 6-19.

3.2.1.2 Economic versus legal justifications for EU anti-subsidy law

712. Viewed through an economic lens, the EU's anti-subsidy law may be criticised against the background of the fact that it fails to distinguish between welfare-increasing and welfare-decreasing subsidies. For instance, export subsidies are regarded with a particularly critical eye in legal terms, but are particularly harmful to the country of export itself, and ultimately benefit consumers in the import country.[243] If one focuses solely on European welfare, then in economic terms – as also with anti-dumping law – solely the possible establishment and expansion of market power at a later time causes problems which may cause prices to increase, and which may be accompanied by a loss of welfare in the EU.[244] By contrast, anti-subsidy law takes the allotment of types of subsidy from the consensus under WTO law, and links the imposition of a countervailing duty to the existence of an injury to the Union industry. This form of control might be considered dispensable in economic terms.[245]

713. Within the EU however there is a justification of subsidy control in normative terms by the self-commitment to the law on State aid in accordance with Art. 107 ff. TFEU. State grants from the Member States are subject to European State aid control. This means that European undertakings may not have unlimited recourse to the financial funds of their home countries, but only if they do not "distort[s] or threaten[s] to distort competition". The Union industry is therefore at a disadvantage in competition vis-à-vis undertakings from third countries which have no or no comparable State aid control insofar as those undertakings benefit from selective subsidies which do not fall within the exceptional scope of European State aid law. An exception only exists insofar as this disadvantage is countervailed in individual cases by Union State aid.[246]

714. In economic terms, European State aid law can certainly also be criticised with regard to concrete design.[247] From a legal perspective, however, State aid control constitutes a major part of the European competition system. Anti-subsidy law may be regarded as a interface mechanism against this background in order to restore equal opportunities in the internal market vis-à-vis goods imports from third countries.

3.2.1.3 Claims towards the anti-subsidy law for dealing with Chinese state capitalism

715. A large number of proposed reforms for dealing with Chinese state capitalism relate to the entire field of subsidies, whilst anti-subsidy law usually plays a role.[248] There have for instance been complaints that there is insufficient information regarding the existence of foreign subsidies, as well as of the concrete scope of the resulting injury, so that the Commission should enter into a more intensive exchange regarding Chinese subsidies and carry out more studies which lead to a further extension of the information basis.[249] European undertakings are

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[243] Cf. Sykes, A., in: Macrory, P. F./Appleton, A. E./Plummer, M. G., The World Trade Organization: Legal, Economic and Political Analysis, Boston 2005, pp. 84, and 90 ff.

[244] *Ibid.*, pp. 84 and 92.

[245] *Ibid.*, pp. 84 and 103 ff.

[246] re this starting position Weck, T./Reinhold, P., Europäische Beihilfenpolitik und völkerrechtliche Verträge, EuZW 2015, 376 (376 - 377).

[247] See for details of this discussion Schwalbe, in Münchner Kommentar Europäisches und Deutsches Wettbewerbsrecht, Vol. 5 Beihilfenrecht, 2nd ed. Munich 2018, Introduction, paras. 9 ff.

[248] Cf. below Rhodium/Merics/BertelsmannStiftung, Beyond investment screening, 2019; Matthes, J., Handelspolitische Schutzinstrumente zum Umgang mit Wettbewerbsverzerrungen durch China, IW-Report 12/19; BDI, Grundsatzpapier China. Partner und systemischer Wettbewerber – Wie gehen wir mit Chinas staatlich gelenkter Volkswirtschaft um?, January 2019; VDMA, Wettbewerber China – Handelspolitische Instrumente neu ausrichten, 2020; BusinessEurope, The EU and China, 2020; European Commission, A New Industrial Strategy for Europe, 2020.

[249] Matthes, J., Handelspolitische Schutzinstrumente zum Umgang mit Wettbewerbsverzerrungen durch China, IW-Report 12/19, pp. 18- 19; Rhodium/Merics/BertelsmannStiftung, Beyond investment screening, 2019, pp. 24 and 34; VDMA, Wettbewerber China – Handelspolitische Instrumente neu ausrichten, 2020, p. 5.

also said to be injured by subsidies on third markets, and the Commission should therefore take more action against them.[250]

716. Claims that are directly connected with a reform of the law of the WTO relate to the notification requirement under Art. 25 ASCM, the handling of industrial subsidies and the classification of SOEs as a public body and thus as subsidy providers.. With regard to the notification requirement, it is submitted that large numbers of members – including China – were currently not complying with it, so that its enforcement had to be improved.[251] There have been some calls in this context for automatically categorising subsidies that are not reported to the WTO in breach of Art. 25 ASCM as "market distorting"[252], or that other forms of sanctioning are permitted to be taken against them.[253] A further demand concerns the extension of prohibited subsidies within the meaning of Art. 3 ASCM to individual industrial aid, in particular to prevent overcapacity. [254] Finally, a new definition of the term "public body" is to be agreed at WTO level, since according to the current case law of the WTO Dispute Settlement Body SOEs are not to be included in this definition.[255]

717. A further demand which can be categorised in the overall context of international subsidy control is that China is to be bound by the OECD consensus on export credits[256].[257] The background of this is the allegation that China has made great use of export financing although this leads to disturbances in the balance of competition and is regarded as not being compatible with Art. 3 ASCM.

3.2.1.4 Anti-subsidy law already covers a large number of demands

718. As has already been found in connection with anti-dumping law, reforms of anti-subsidy law should only be pursued within the framework that is permissible in accordance with WTO law. In the course of the reforms of the trade defence instruments, the Anti-Subsidy Regulation has also been amended without including a provision on dealing with significant distortions comparable with Art. 2(6a) of the Anti-Dumping Regulation. The Monopolies Commission nonetheless does not currently consider there to be any further need for reform at EU level. At WTO level, by contrast, amendments are desirable in order to safeguard the Commission's practice and to make anti-subsidy law even more effective. It should however be pointed out that no progress has been made in recent decades when it comes to reforming WTO anti-subsidy law.

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250 Matthes, J., Handelspolitische Schutzinstrumente zum Umgang mit Wettbewerbsverzerrungen durch China, IW-Report 12/19, pp. 16 - 17.

251 Rhodium/Merics/BertelsmannStiftung, Beyond investment screening, 2019, pp. 24 and 35; VDMA, Wettbewerber China – Handelspolitische Instrumente neu ausrichten, 2020, p. 5; BusinessEurope, The EU and China, 2020, p. 48

252 Rhodium/Merics/BertelsmannStiftung, Beyond investment screening, 2019, pp. 24 and 35; VDMA, Wettbewerber China – Handelspolitische Instrumente neu ausrichten, 2020, p. 5. On notification also Matthes, J., Handelspolitische Schutzinstrumente zum Umgang mit Wettbewerbsverzerrungen durch China, IW-Report 12/19, pp. 19- 20; BDI, Grundsatzpapier China. Partner und systemischer Wettbewerber – Wie gehen wir mit Chinas staatlich gelenkter Volkswirtschaft um?, January 2019, p. 14.

253 BusinessEurope, The EU and China: Addressing the Systemic Challenge, January 2020, p. 49.

254 Rhodium/Merics/BertelsmannStiftung, Beyond investment screening, 2019, pp. 24 and 35-36; VDMA, Wettbewerber China – Handelspolitische Instrumente neu ausrichten, 2020, p. 5; BusinessEurope, The EU and China, 2020, pp. 48 - 49.

255 Rhodium/Merics/BertelsmannStiftung, Beyond investment screening, 2019, pp. 24 and 35-36; Matthes, J., Handelspolitische Schutzinstrumente zum Umgang mit Wettbewerbsverzerrungen durch China, IW-Report 12/19, p. 16; VDMA, Wettbewerber China – Handelspolitische Instrumente neu ausrichten, 2020, p. 5; BusinessEurope, The EU and China, 2020, p. 48 - 49.

256 OECD, Arrangement on Officially Supported Export Credits, January 2020, TAD/PG(2020)1 (http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?doclanguage=en&cote=tad/pg(2020)1), retrieved on 30 June 2020.

257 BDI, Grundsatzpapier China. Partner und systemischer Wettbewerber – Wie gehen wir mit Chinas staatlich gelenkter Volkswirtschaft um?, January 2019, p. 17; VDMA, Wettbewerber China – Handelspolitische Instrumente neu ausrichten, 2020, pp. 8 - 9.

Expansion of actionable subsidies in line with EU State aid law to be welcomed

719. Whilst the multilateral regulation of dumping in particular entails restrictions on national dumping proceedings, efforts were already made during the negotiations on the GATT 1947 to limit the use of subsidies themselves.[258] Both from an economic and a political point of view, the problem that arises here is one of delimitation.[259] Although on the one hand the contracting parties have assumed that subsidies have a negative impact on the efficient allocation of resources, on the other hand, states have always used subsidies in different ways, not only for purely economic but also for social purposes.[260] There was therefore never any pronounced political interest in a complete ban on subsidies, and this could also not be justified in macroeconomic terms.

720. The idea has ultimately caught on in multilateral trade policy that those subsidies should certainly be restricted which have a particularly negative impact on international trade, something which is particularly presumed to be the case when it comes to export subsidies. Annex I to the ASCM, to which reference is made in Art. 3.1(a) ASCM, contains a list of export subsidies building on the original OECD consensus of 1978. It is however possible that an export subsidy is banned in accordance with Art. 3 ASCM which goes beyond the OECD consensus.[261] The OECD consensus itself has been continually refined since 1978.[262]

721. The delimitation is even more difficult when it comes to domestic subsidies. If one presumes a broad economic understanding, it would be theoretically possible for almost any government action to contain elements of a subsidy.[263] Such an understanding would however not be practicable, and also not desirable, so that a list of types of subsidy, and the need for specificity, as well as for an injury, have ultimately developed as a type of corrective in the course of the political negotiations.[264] In the course of the negotiations on the ASCM, the EU argued for the introduction of exceptions, which also corresponds to the principle by which European State aid is granted.[265] In accordance with Art. 8.2(c) ASCM, this for instance included State aid for adjustments to environmental standards. The exceptions from Art. 8 ASCM however expired in 1999, and for instance make European support benefits favouring environmental protection a potential target of countervailing measures and/or of dispute resolution proceedings.

722. If one examines the types of subsidy listed within the ASCM and the Anti-Subsidy Regulation, it can be seen that they cover a wide range of support measures by the Chinese state. However, on the one hand, for some types of subsidies, action against them has not yet been declared compatible with WTO law. On the other hand, evidentiary difficulties are frequently referred to which arise in the implementation of anti-subsidy proceedings.[266] Both aspects speak in favour of endeavouring to bring about an adjustment of the ASCM in which concrete trade-distorting subsidies are explicitly listed and a reversal of the burden of proof is furthermore introduced with regard to particularly distorting subsidies. This is also the direction taken by Japan, the USA and the EU in their trilateral

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258 Irwin, D./Mavroidis, P./Sykes, A., The Genesis of the GATT, Cambridge 2008, pp. 156 ff.

259 Cf. para. 712.

260 Evans, J. W., Subsidies and Countervailing Duties in the GATT, The International Trade Law Journal 3 (Fall 1977), pp. 211 and 213.

261 Müller, W., WTO Agreement on Subsidies and Countervailing Measures, A Commentary, Cambridge 2019, p. 601.

262 OECD, Evolution of the Arrangement on Officially Supported Export Credits, 20 January 2020, TAD/PG(2020)2, http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=tad/pg(2020)2&doclanguage=en, retrieved on 30 June 2020.

263 Hufbauer, G. C./Shelton Erb, J., Subsidies in International Trade, Massachusetts/London 1987, pp. 9 - 10.

264 Hufbauer, G. C./Shelton Erb, J., Subsidies in International Trade, Massachusetts/London 1987, pp. 10 ff.

265 Müller, W., WTO Agreement on Subsidies and Countervailing Measures, A Commentary, Cambridge 2019, pp. 23 ff.

266 Cf. Bown, C. P./Hillmann, J. A., WTO'ing a Resolution to the China Subsidy problem, Journal of International Economic Law 22(4) 2019, 557 (569– 570).

dialogue format with regard to “industrial subsidies”.[267] Accordingly, a number of state measures are to be included in Art. 3.1 ASCM in future, and hence categorised as prohibited subsidies. A reversal of the burden of proof is furthermore proposed for a number of other trade-distorting types of subsidy.[268]

723. The Monopolies Commission welcomes a revision of or supplement to the ASCM in which an evaluation of individual types of subsidy is carried out on an economically-sound basis in a now closely-related global economy.[269] It should be taken into account here that the use of subsidies may also be economically efficient in individual cases, in particular when it comes to remedying a market failure. Furthermore, even the same types of subsidy may have different effects, depending on the market conditions. Accordingly, an analysis of the impact of subsidies should be carried out in all cases. In view of its own State aid system, the EU must moreover have an interest in maximum harmonisation and insist on the resumption of exceptions.[270] This explains the strategy of the EU to “export” its own state aid law as far as possible within free trade agreements, *i.e.*, to agree with third countries on a common understanding with regard to subsidies which corresponds to EU State aid law as far as possible.[271] This also means that the EU, when negotiating an extension of subsidies prohibited under Art. 3.1 ASCM, must take into account the fact that they are to be assumed to be selective in accordance with Art. 2.3 ASCM.. An expansion might hence cause European State aid which is permitted for a lack of selectivity to be prohibited in future by means of a reform of the ASCM.

724. In addition to expanding the range of actionable subsidies, it is also possible to achieve an acceleration as well as cost savings by determining a reversal of the burden of proof for individual elements of anti-subsidy proceedings within the law of the WTO. For reasons of proportionality, however, it should be restricted to cases of prohibited types of subsidy. The Directorate-General for Trade has now introduced a database on the subsidies it has dealt with so far in order to facilitate the filing of complaints.[272]

725. It would also be desirable to bind China to the OECD consensus. This is however not to be expected at present. In the meantime, the individual WTO states should be encouraged to take stronger action against prohibited Chinese export subsidies.

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[267] Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union, 14 January 2020, para. 1. The following are mentioned here: “unlimited guarantees; subsidies to an insolvent or ailing enterprise in the absence of a credible restructuring plan; subsidies to enterprises unable to obtain long-term financing or investment from independent commercial sources operating in sectors or industries in overcapacity; certain direct forgiveness of debt”.

[268] *Ibid.*, para. 2. This reads: “Certain other types of subsidies have such a harmful effect so as to justify a reversal of the burden of proof so that the subsidizing Member must demonstrate that there are no serious negative trade or capacity effects and that there is effective transparency about the subsidy in question. Subsidies having been discussed in this category include, but are not limited to: excessively large subsidies; subsidies that prop up uncompetitive firms and prevent their exit from the market; subsidies creating massive manufacturing capacity, without private commercial participation; and, subsidies that lower input prices domestically in comparison to prices of the same goods when destined for export. If such subsidy is found to exist and the absence of serious negative effect cannot be demonstrated, the subsidizing Member must withdraw the subsidy in question immediately”.

[269] Cf. on this also Hoekmann/Nelson, Spillovers, Subsidies and Multilateral Cooperation – Addressing Concerns Over Industrial Subsidies, Bertelsmann Stiftung Working Paper, 2020.

[270] Weck, T./Reinhold, P., Europäische Beihilfenpolitik und völkerrechtliche Verträge, EuZW 2015, 376 (376 ff.).

[271] Weck, T./Reinhold, P., Europäische Beihilfenpolitik und völkerrechtliche Verträge, EuZW 2015, 376 (376 ff.); Neumann, Export des europäischen Beihilfenrechts, Wiesbaden 2019.

[272] The database can be retrieved at https://ec.europa.eu/trade/policy/accessing-markets/trade-defence/actions-against-imports-into-the-eu/anti-subsidy/, retrieved on 30 June 2020.

Chinese SOEs are already covered by the Anti-Subsidy Regulation; adjustments WTO law are nonetheless desirable

726. There are frequent complaints that SOEs cannot be covered by the ASCM, and hence also not by the Anti-Subsidy Regulation.[273] In fact, the appellate body of the WTO Dispute Settlement Body has stated that public bodies within the meaning of Art. 1.1(a) ASCM are not solely defined by determining that they are subject to state control, but that they must also be vested with state authority, at least to a certain degree.[274] This does not however mean that SOEs *per se* cannot be regarded as a public body, but that the existence of a state function must also be determined by means of a comprehensive examination in addition to state control.[275]

727. The European Commission has followed a mixed approach in the past where it has not referred solely to the aspect of state control.[276] In the anti-subsidy ruling on *imports of electric bicycles originating in the People's Republic of China* of 17 January 2019, it examined the integration of Chinese banks into the entire system of Chinese state capitalism extensively and in detail.[277] Against this background, referring to the prerequisites imposed by the WTO's case-law, the Commission found that there had been state integration, thus determining that subsidies had been granted via a public body.[278] The Commission has also established the granting of subsidies by SOEs in respect of steel imports from China, in accordance with the conditions laid down by the Appellate Body.[279] This makes it possible as a matter of principle to already apply the Anti-Subsidy Regulation to SOEs at present.

728. Even though the inclusion of SOEs in the subsidy examination is already guaranteed, providing proof of state involvement requires a great deal of effort, and entails a risk that the State in question might adjust or attempt to conceal its system. If it fails to cooperate, Art. 12.7 ASCM and Art. 28(1) of the Anti-Subsidy Regulation do permit recourse to "facts available". This however does not help to resolve the lack of information in every situation. The Monopolies Commission therefore welcomes the EU's proposed reforms, also in the form of the trilateral dialogue with Japan and the USA, to revise the term "public body", as well as to create greater transparency when granting subsidies at WTO level.[280]

Transnational subsidies are also partly covered by the Anti-Subsidy Regulation

729. It is regarded as problematic that the market activity of subsidised Chinese undertakings in third countries distorts competition in relation to European undertakings (see para. 715). As a matter of principle, this affects

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[273] Van Vaerenbergh, P., EU Trade Defence Policy Against Unfair Trade From Chinese SOEs: Unilateral or Multilateral Approaches?, Geneva Jean Monnet Working Papers 01/2019, p. 10.

[274] WTO, US – Definitive Antidumping and Countervailing Duties on Certain Products from China, Appellate Body Report of 11 March 2011, paras. 310 and 317.

[275] See on this with further references Müller, W., WTO Agreement on Subsidies and Countervailing Measures, A Commentary, Cambridge 2019, pp. 66 ff.

[276] Van Bael & Bellis, EU Anti-Dumping and Other Trade Defence Instruments, Sixth Edition, Alphen aan den Rijn 2019, § 11.04[A]; Van Vaerenbergh, P., EU Trade Defence Policy Against Unfair Trade From Chinese SOEs: Unilateral or Multilateral Approaches?, Geneva Jean Monnet Working Papers 01/2019, p. 10.

[277] European Commission, Commission Implementing Regulation (EU) 2019/72 of 17 January 2019 imposing a definitive countervailing duty on imports of electric bicycles originating in the People's Republic of China, OJ L 16 of 18 January 2019, p. 5, paras. 96 ff.

[278] *Ibid.*, paras. 176 ff.

[279] European Commission, Commission Implementing Regulation (EU) 2019/688 of 2 May 2019 imposing a definitive countervailing duty on imports of certain organic coated steel products originating in the People's Republic of China following an expiry review pursuant to Article 18 of the Regulation (EU) 2016/1037 of the European Parliament and of the Council, OJ L 116 of 3 May 2019, pp. 39-74.

[280] European Commission, WTO Concept paper, p. 4; Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union, 14 January 2020, p. 2.

competition on third markets over which the EU is not able to exert any governmental authority (principle of territoriality).

730. If Chinese undertakings are subsidised in a third country exclusively by the Chinese State, the EU is unable to impose any countervailing measures of its own in this context. Having said that, the possibility at least exists to initiate dispute settlement proceedings at the WTO. The EU would need to prove in such cases that a "serious injury" has been caused by the Chinese subsidyfor example in the form of displacement or prevention of exports of European products "to a third country market" (Art. 5 (c), Art. 6.3 (b) ASCM). Another possibility to enforce subsidy-law standards consists in exporting State aid law through free trade agreements. This would however still require the agreed subsidy control actually also being enforced by the respective national law. Such enforcement by a third country can however not be enforced by the EU through legal channels.

731. The subsidisation of Chinese undertakings located in a third country can only be addressed by European anti-subsidy law if goods are imported to the EU from the third country in question. In order to do so, a financial benefit needs to be attributed to the third country itself. Thus, Art. 2 (a) of the Anti-Subsidy Regulation states: "For the purposes of this Regulationa product is considered to be subsidised if it benefits from a countervailable subsidy as defined in Articles 3 and 4. Such subsidy may be granted by the government of the country of origin of the imported product, or by the government of an intermediate country from which the product is exported to the Union, known for the purposes of this Regulation as 'the country of export'".

732. The European Commission has recently taken action against such "transnational subsidies":[281] For the first time, it has investigated the subsidisation of Chinese companies by a third country in the case of *imports of continuous filament glass fibre products originating in Egypt*.[282] The case concerned a manufacturer of continuous filament glass fibre products (GFR) located within the so-called "Suez Economic and Trade Cooperation Zone" (SETC Zone). The SETC Zone is an Egyptian-Chinese project of a special economic zone on Egyptian territory, which dates back to the 1990s and is being continuously developed as part of the "New Silk Road" ("Belt and Road initiative").[283] Companies within the SETC zone receive special tax incentives, land and other benefits from the Egyptian government, while China provides financial and physical resources to companies located in the zone.[284] Jushi Egypt, a GFR manufacturer based in the SETC Zone, was founded under Egyptian law by the Chinese parent company Jushi Group, which in turn is owned by SASAC.[285] Jushi Egypt produces GFR in Egypt, which are then exported to the EU. The EU has identified in the case that China is using such special economic zones abroad to strengthen its own companies in third markets and to circumvent trade defence measures against Chinese exports.[286] Against this background, the European Commission considered the special benefits that Jushi Egypt receives from the Egyptian government to be a subsidy in the sense of Art. 3 of the Anti-Subsidy Regulation, but also the benefits

[281] See also Crochet, V./Hegde, V., China's 'Going Global' Policy: Transnational Subsidies Under The WTO SCM Agreement, Working Paper No. 220 - February 2020.

[282] Commission Implementing Regulation (EU) 2020/379 of 5 March 2020 imposing a provisional countervailing duty on imports of continuous filament glass fibre products originating in Egypt, OJ L 69 of 6 March 2020, p. 14 and Commission Implementing Regulation (EU) 2020/870 of 24 June 2020 imposing a definitive countervailing duty and definitively collecting the provisional countervailing duty imposed on imports of continuous filament glass fibre products originating in Egypt, and levying the definitive countervailing duty on the registered imports of continuous filament glass fibre products originating in Egypt, OJ L 201 of 25 June 2020, p. 10.

[283] Commission Implementing Regulation (EU) 2020/870 of 24 June 2020 imposing a definitive countervailing duty and definitively collecting the provisional countervailing duty imposed on imports of continuous filament glass fibre products originating in Egypt, and levying the definitive countervailing duty on the registered imports of continuous filament glass fibre products originating in Egypt, OJ L 201 of 25 June 2020, p. 10, recitals. 35 – 48

[284] *Ibid.*

[285] *Ibid.*, recital 47.

[286] *Ibid.*, recitals 67 – 71.

received from the Chinese state, as they were "recognised" and "made its own" by the Egyptian state.[287] Accordingly, it imposed countervailing duties.

733. Accordingly, in the case *imports of certain woven and/or quilted glass fibre mats originating in the People's Republic of China and Egypt* the European Commission has imposed a definitive countervailing duty on exports from China and as well as on exports from Egypt.[288] The complainants in a pending case vis-à-vis *imports of certain hot rolled stainless steel sheets and coils originating in the People's Republic of China and Indonesia* are transferring this form of transnational subsidy to the relationship between China and Indonesia.[289]

734. All in all, transnational subsidies can at least be covered by EU anti-subsidy law if it can be determined that they are attributed to the third country. If one follows this understanding of the European Commission, according to which states that agree on comprehensive economic projects with China and on this basis tolerate the granting of subsidies by the Chinese state make these subsidies their own, anti-subsidy law can be applied to a large number of projects along the Silk Road Initiative. There are thus far-reaching consequences resulting from the above-mentioned decisions. They affect not only Chinese imports but also the third country concerned. The latter is regularly a developing country that is caught in a dilemma as a result of this case practice, as on the one hand it is dependent on investments from China, but on the other hand it must fear restricted access to the EU market as a result.[290] This should be taken into account when taking action against transnational subsidies.

735. It should also be emphasised at this point that the Commission's action against such transnational subsidies has so far not been examined by the European courts for its compatibility with the Anti-Subsidy Regulation, nor at WTO level for its compatibility with the ASCM. In the literature, the new form of application of EU anti-subsidy law has already caused critical comments.[291] Thereby, doubts have already been raised as to its compatibility with the Anti-Subsidy Regulation.[292] As far as WTO law is concerned, it is true that cross-border constellations have already played a role in past decisions of the WTO dispute settlement bodies. [293] However, the granting of subsidies to companies in a third country itself has not yet been the subject of WTO proceedings.

3.2.1.5 Amendments of WTO anti-subsidy law desirable; EU reform as "second best"

736. It becomes evident from the above that the EU's anti-subsidy law covers a large number of constellations, whilst at the same time also not being able to react comprehensively to the Chinese support measures. In addition to gaps in the scope of application, which has so far been limited to goods only, compensation for subsidies which support companies competing on a third country market remains possible only in exceptional cases (transnational subsidies). In general, a number of constellations of subsidised competition remain unconsidered by anti-subsidy

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287 *Ibid.*, recitals 72 – 87. For the individual types of subsidies, see sections 3.3.-3.5.

288 Commission Implementing Regulation (EU) 2020/776 of 12 June 2020 imposing definitive countervailing duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt and amending Commission Implementing Regulation (EU) 2020/492 imposing definitive anti-dumping duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt, OJ L 189 of 15 June 2020, p. 1.

289 European Commission Notice of initiation of an anti-subsidy proceeding concerning imports of certain hot rolled stainless steel sheets and coils originating in the People's Republic of China and Indonesia, OJ C 342 of 10 October 2019, p. 18.

290 Crochet, V./Hegde, V., China's 'Going Global' Policy: Transnational Subsidies Under The WTO SCM Agreement, Working Paper No. 220 – February 2020, p. 18 - 19.

291 Crochet, V./Hegde, V., China's 'Going Global' Policy: Transnational Subsidies Under The WTO SCM Agreement, Working Paper No. 220 – February 2020; Crochet, V., Guest Post: The European Commission attempts to rein in BRI subsidies, 16 June 2020, https://ielp.worldtradelaw.net/2020/06/guest-post-the-european-commission-attempts-to-rein-in-bri-subsidies.html, retrieved on 30. June 2020.

292 *Ibid.*

293 WTO, Brazil – Export Financing Programme for Aircraft, Panel Report of 14 April 1999, WT/DS46/R, as well as Appellate Body Report of 2 August 1999, WT/DS46/AB/R.

law due to the lack of border crossing into the internal market. This for instance also includes the subsidisation of undertakings in the internal market by the Chinese State. All in all, a uniform concept of international subsidy control on the basis of the ASCM would be desirable which comes as close as possible to EU State aid control.

737. In a first step, however, it would be desirable to safeguard the existing Commission practice via the law of the WTO. Finally, more stringent enforcement of existing obligations such as the notification of subsidies in accordance with Art. 25 ASCM would also be an important step in order to be able to identify and also legally address subsidies that are both prohibited and actionable. As to the notification requirement, it must however be taken into account that states will only notify those measures which they consider to constitute a subsidy.[294] It has been proposed to this end amongst other things that states should be able to report subsidies of other states.[295] This can be approved as a matter of principle, but it does not relieve the need for a common understanding of how a subsidy is to be defined.

738. At WTO level, the trilateral dialogue between the USA, Japan and the EU has pressed for reforms on subsidies.[296] At the same time, however, it is currently the USA in particular that are preventing effective enforcement of WTO law via the WTO Dispute Settlement Body by making the appellate body devoid of its function. Substantive reforms of the WTO with regard to subsidies are also rather unlikely to take place at present because of the resistance put up by countries such as China or India.

739. This leaves the possibilities of exporting State aid law or of agreeing on individual procedural adjustments via free trade agreements. The question however also arises here as to the enforcement. In some of its agreements, the EU has included provisions on subsidy regulations that go beyond the previous WTO consensus. .[297] However, not all of these agreements make subsidy regulations subject to the internal dispute settlement mechanism. As a matter of principle, there is still a lack of experience regarding whether the enforcement of obligations contained in a free trade agreement by means of examination by an arbitration tribunal is effective. It will be vital for the states to accept the decisions of the tribunal. The EU recently started to make use of the possibility of dispute resolution mechanisms within its free trade agreements in order to enforce obligations.[298] A final decision has however yet to be taken in any of the cases that have been initiated so far.

740. A practically effective reform of the Anti-Subsidy Regulation is only possible if it is based on an adjusted framework of WTO law. Future reforms of the Anti-Subsidy Regulation should in any case make use of the existing scope for adjustment in accordance with Sections 10 and 15(b) of the Chinese Protocol of Accession.[299] As far as can be seen, this scope does not currently play a role in the European Commission's anti-subsidy practice. Section 10 contains a repetition of China's obligation to notify subsidies within the meaning of Art. 1 ASCM, an obligation to terminate all subsidy programmes which are not in compliance with Art. 3.1 ASCM, as well as a presumption rule regarding the specificity of subsidies vis-à-vis SOEs where the latter either constitute the primary recipi-

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[294] Bown, C. P./Hillmann, J. A., WTO'ing a Resolution to the China Subsidy problem, Journal of International Economic Law 22(4), 2019, 557 (577).

[295] Bown, C. P./Hillmann, J. A., WTO'ing a Resolution to the China Subsidy problem, Journal of International Economic Law 22(4), 2019, 557 (577); Rhodium/Merics/BertelsmannStiftung, Beyond investment screening, 2019, pp. 24 and 35.

[296] See on this Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union, 14 January 2020, p. 2.

[297] Cf. Weck, T./Reinhold, P., Europäische Beihilfenpolitik und völkerrechtliche Verträge, EuZW 2015, 376 (376 ff.); Reinhold, P., CETA: „A good deal" für die europäische Beihilfenpolitik, EWS 2016, 136 (136 ff.); Neumann, F., Export des europäischen Beihilfenrechts, Wiesbaden 2019.

[298] Cf. the overview at https://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/bilateral-disputes/, retrieved on 30 June 2020.

[299] Bungenberg/, M./Van Vaerenbergh, P., Countervailing Measures und das Chinesische Beitrittsprotokoll zur WTO, ZEuS 2020, 267 (267 ff.).

ent, or where disproportionately large amounts are concerned. Section 15(b) of the Protocol of Accession furthermore permits adjustments to be carried out when calculating the benefit in the case of “special difficulties”. These may be presumed to exist with regard to a state capitalism system, so that this gives rise to a possibility of special treatment.[300]

741. The European Commission, by contrast, appears to favour the introduction of a new tool for dealing with foreign subsidies.[301] This is to be used to supplement the existing trade defence instruments.[302] The Monopolies Commission too favours the introduction of a new tool, which should be used to complement the Anti-Subsidy Regulation, and would hence make such a reform dispensable.[303] It should however be pointed out that this is only to be viewed as the second-best solution in comparison to a comprehensive WTO reform.

3.2.2 State aid control

742. Apart from Art. 106(1) TFEU[304], the obligations under Art. 101 and 102 TFEU to which undertakings are subject in terms of their economic activities, are supplemented by obligations incumbent on the EU Member States in accordance with Art. 107 ff. TFEU. In accordance with Art. 107(1) TFEU, aid granted by a state, or through state resources, which distorts or threatens to distort competition by favouring selected undertakings or the production of selected goods and services, insofar as it affects trade between Member States, is as a matter of principle incompatible with the internal market.[305] State aid must be notified to the European Commission, and may not be granted prior to its approval.

743. Art. 107 ff. TFEU aim to protect the EU internal market against fragmentation caused by promotional measures of the Member States that are used selectively, favouring certain undertakings or the production of certain goods and distorting competition.[306] This objective reaches further than that of protecting equal competition conditions in specific individual markets. The background to this is the obligation that, as parties to the EU Treaties, the Member States have undertaken as a superordinate goal to help establish an internal EU market (Art. 3(3), first sentence, TEU).

744. State aid law is hence not applicable to third countries. The funding of companies’ activities by the Chinese State can therefore not be covered by State aid law. This means that undertakings which have Chinese state support in their activities are in a better position in the internal market than undertakings receiving support from an EU Member State.

745. There is, however, a possibility to agree on regulations comparable with Art. 107 ff. TFEU in a free trade agreement. The European Union has already reached such agreements in its “new-generation” agreements with Canada, Singapore, South Korea and Vietnam, whilst it has endeavoured to bring about an expansion of the WTO’s

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300 *Ibid.*, 281 ff.

301 European Commission, White Paper on levelling the playing field as regards foreign subsidies, COM(2020) 253 final, 17 June 2020; see on this Section 4.1.1.

302 European Commission, White Paper on levelling the playing field as regards foreign subsidies, COM(2020) 253 final, 17 June 2020, p. 38.

303 See on this Section 4.1.3.

304 See on this Section 3.2.3 above.

305 On this already Monopolies Commission, Special Report 75, Stand und Perspektiven des Wettbewerbs im deutschen Krankenversicherungssystem, Baden-Baden 2017, paras. 470 ff.; on the delimitation of subsidies also already ECJ, Judgment of 23 February 1961, 30/59 – De Gezamenlijke Steenkolenmijnen In Limburg/High Authority of the ECSC, [1959] ECR 3 (42).

306 See specifically on Art. 107 ff. TFEU the references in Mederer in: von der Groeben/Schwarze/Hatje, Europäisches Unionsrecht, 7th ed. 2015, before Art. 107-109 TFEU para. 2.

anti-subsidy rules according to the model of EU State aid law.[307] At the time of drafting this report, the EU is negotiating with China on an Agreement on Investment, albeit it remains unclear whether its final version will contain regulations on State aid.

746. In the discussion regarding how to deal with Chinese state capitalism, by contrast, various advances have been made in order to allow for using specifically European Union's State aid law to supplement the anti-subsidy rules in a variety of ways. However, the scope within the existing framework of the EU Treaties is limited. In particular, according to the interpretation of Art. 107(1) TFEU by the European Court of Justice, it is unlikely to be possible to regard the decision of a Member State to open up its markets for funds from a third country as facts relevant to State aid (Section 3.2.2.1). A distinction needs to be made with regard to State aid of Member States, granted to counter the use of funds by the Chinese State. On the one hand, the Member States are enabled to provide State aid to close gaps in financing in the case of investments that are of common European interest (Section 3.2.2.2). On the other hand, it can be assumed that it will only be possible to justify State aid to counter competition-distorting third-country financing measures if they are coordinated by the European Commission (Section 3.2.2.3). In both cases, however, EU funding tools are available as an alternative. The State aid-funded creation of "European Champions" is certainly to be viewed critically (Section 3.2.2.4).

3.2.2.1 Third-country funding not to be attributed to Member States

747. The law on State aid covers the granting of any economic benefit, regardless of its structure, which an undertaking could not have obtained under normal market conditions, that is to say without state intervention.[308] This does not however include those privileges where the State acts like an economic operator in accordance with the market economy ("market investor test").[309] It is particularly important to distinguish cases in which a State grants benefits in pursuing strategic political goals, as is presumed in the case of China.

748. Investments have been made using Chinese state funds in various economic fields in the EU in the past. This included investments in critical infrastructures where the Member States reserve the right to make their own decisions on the compatibility of such investments with public security and order. Examples are investments in the Italian ports of Genoa and Trieste and the Greek port of Piraeus as part of the "Belt-and-Road" project (the Genoa-Rotterdam transport route is the most important transport route in the EU). The participation of the electricity network operator State Grid China in CDP Reti, and that of other Chinese undertakings in the Italian gas network, must be classified accordingly. Investments of other types that are made with Chinese state funds may likewise require Member State bodies to participate, for instance if infrastructure is to be built that requires approval, or if the business activity as such requires approval.

749. A possible question is whether investments from Chinese state funds can be imputed to the Member States which work towards such investments taking place in the EU for the purposes of examining them in terms of State aid. Under such circumstances, State aid control would supplement anti-subsidy law with regard to the impact of third-country financing on the EU internal market.

750. A method that could be used in this sense would be if all funds were to be regarded as state resources within the meaning of Art. 107(1) TFEU which public authorities in the Member States can actually access to support undertakings. The guidance and the practice of the European Commission to date suggest this. It is accordingly

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307 Cf. on this the comprehensive analysis in Neumann, F., Export des europäischen Beihilfenrechts, 2019.

308 Cf. European Commission, Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262 of 19 July 2016, p. 1, para. 66.

309 Cf. European Commission, Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262 of 19 July 2016, p. 1, paras. 73 ff.

not decisive whether the support is funded directly from the national budget, or the funds are of private origin.[310] Funds of the International Monetary Fund (IMF), or resources from EU Funds which are under shared management, are also regarded as state resources if the Member States have discretion of their own as to how the funding is used.[311]

751. The European Court of Justice, however, made it clear in 2019 that there additionally must be a reduction of an item of the State budget, or a sufficiently concrete economic risk of burdens on this item of the budget.[312] If funds come into the EU on the basis of a contract between a Member State and the third country, such a burden or such a risk is at best conceivable if the Member State has already undertaken to invest vis-à-vis individual recipients, and therefore would have to step in as an alternative. Otherwise, funds of a third country could be imputable only to the third country, and not (also) to a Member State.

752. Ultimately, therefore, it is unlikely to be possible as a rule to impute investments from Chinese state resources to the Member States for the purposes of an examination under State aid law in accordance with Art. 107(1) TFEU.

3.2.2.2 Possible justification for State aid closing funding gaps with investments of common European interest

753. There have been complaints in discussions on the relationship between the EU and China that unity between the Member States is placed in question by the Chinese 17+1 format. This format constitutes the framework in which extensive Chinese investments take place in Europe. On the one hand, there are Member States which are critical of this format and for instance take additional measures in investment control in order to rule out risks to interests of public security and order. On the other hand, Member States take part in the economic initiatives within this format in order to make investments possible that would not be carried out using budgetary funds of the EU or of the Member States.

754. Under Art. 107(3) (b) TFEU, State aid may be considered to be compatible with the EU's internal market where the Member States grant to promote important projects of common European interest or to remedy a serious disturbance in the economy of a Member State. Under Art. 107(3)(c) TFEU, the same applies to State aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. A common European interest can be affirmed where it is a matter of pursuing goals that can only be achieved jointly, such as protection of the EU's internal market against the development of non-uniform national policies.[313]

755. Aid for projects of common European interest within the meaning of Article 107(3)(b) TFEU is normally notified as financing measures which benefit undertakings in the financing Member States and which have an effect on the market there. They may, however, also as a matter of principle be measures which benefit undertakings in

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[310] European Commission, Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262 of 19 July 2016, p. 1, paras. 57 ff.; see also: ECJ, Judgment of 30 May 2013, C-677/11 – Doux Elevage SNC, ECLI:EU:C:2013:348, para. 34; Judgment of 19 March 2013, C-399/10 P u. C-401/10 P – Boygues Telecom, para. 100; GC, Judgment of 12 December 1996, T-358/94 – Air France, [1996] ECR II-2109, ECLI:EU:T:1996:194,, paras. 63-65; on this Monopolies Commission, Biennial Report XX, A competitive order for the financial markets, Baden-Baden 2014, para. 90.

[311] European Commission, Commission Staff Working Document, Guidance on State aid in European Structural and Investment (ESI) Funds Financial instruments in the 2014-2020 programming period 2014-2020, SWD(2017) 156 final, 2 May 2017, p. 6.

[312] ECJ, Judgment of 28 March 2019, C-405/16 P – Germany/Commission, ECLI:EU:C:2019:268, paras. 48 and 57-60.

[313] Cf. Bernd/Martenczuk, in: von der Groeben/Schwarze/Hatje, EU Recht, 7th ed. 2015, TFEU, Art. 107 para. 368. Art. 106 (2) TFEU should be considered in addition insofar as the measure only serves to create financial compensation for the provision of services of general economic interest; see on this for instance Kühling/Geilmann/Weck, ZHR 182 (2018), 539.

other Member States or which have an impact in other Member States. One example would be support for a German investor in order to reduce its burden of risk when investing in Southern European ports.

756. The European Commission has set criteria in a Communication in accordance with which the State aid of the Member States to fund important projects of common European interest is appraised for its compatibility with the internal market (IPCEI Communication).[314] The Communication is intended to help the Member States to promote above all large transnational projects which make a tangible contribution to economic growth, jobs and competitiveness in Europe.[315] Accordingly, the aided project must contribute to to one or more Union objectives and must have a significant impact on competitiveness of the Union, sustainable growth, addressing societal challenges or value creation across the Union.[316] It is sufficient if the project arises from concerted action between Member States to combat a common threat or to work towards achieving a common goal.[317] The Communication has so far only become relevant in a small number of cases for possible support measures of the Member States (manufacturing of battery cells, microelectronics).[318] No project has yet been based here on defence against a common threat, so that it has not yet been clarified what is meant to be understood here. A common goal may be regarded as consisting of the protection of the internal market against fragmentation by non-uniform national policies. This follows from the integrity of the internal market already worked out in Section 2.1, as emerges from the Treaties.[319] State aid is regarded as compatible with the internal market if the positive impact for the goal of common European interest outweighs the State aid-related distortions of competition and damage to trade between the Member States.

757. Accordingly, it may be possible via Art. 107(3)(c) TFEU to approve sectoral State aid intended to countervail the financing measures by third countries. Whilst State aid specifically to promote exports to Member States cannot be approved as a matter of principle, with State aid to promote exports to third countries, the State aid must be examined for its impact on the internal market.[320] At least to the degree that State aid only exerts a marginal impact on the internal market, approval would hence not be out of reach. When it comes to State aid for exports, however, it should be considered, in contrast, that such aid is banned under the law of the WTO (Art. 3 ASCM), and hence may lead to countervailing duties in China.

758. The approval of State aid in accordance with Art. 107(3)(a) TFEU for investments in economic areas which are developed to an under-average degree and where the standard of living is abnormally low or where there is serious underemployment may also be justifiable in order to counter investments of non-European undertakings which receive financial support from third countries. This might encourage European undertakings to make investments inside Europe, and they would not have to leave the market to state-supported companies from third countries.

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314 European Commission, Communication - Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest, OJ C 188 of 20 June 2014, p. 2. IPCEI = "Important Projects of Common European Interest".

315 European Commission, Press release of 13 June 2014, https://ec.europa.eu/commission/presscorner/detail/de/IP_14_673

316 European Commission, Communication - Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest OJ C 188 of 20 June 2014, p. 2, para. 14; furthermore para. 15 on the goals covered by the Communication.

317 Cf. ECJ, Judgment of 8 March 1988, C-62/87 – Exécutif régional wallon, [1988] ECR 1573, ECLI:EU:C:1988:132, para. 22.

318 See European Commission, Commission Staff Working Document Accompanying the Report on Competition Policy 2018, SWD(2019) 297 final, 14 October 2019, pp. 32-33.

319 See Section 4.2.2 below on the EU connectivity strategy for more details with regard to the harmonious shaping of external relations (Art. 206 TFEU).

320 Kühling/Rüchardt in: Streinz, EUV/AEUV, 3rd ed. 2018, Art. 107, para. 144.

759. Germany has a number of promotional instruments which could be used as a matter of principle for State aid in the abovementioned sense. A potential example is the Nuclear Waste Disposal Fund (*Fonds zur Finanzierung der kerntechnischen Entsorgung* – KENFO), which provides funds for decommissioning and demolishing nuclear plants, and which also carries out long-term investments in infrastructure projects as part of its asset management (as equity participations or loans of varying seniority).[321] Objections are raised against the use of German funding tools abroad, claiming that the German State should not take part in a "sell-out" of infrastructure in other Member States.[322] In the present context, however, it should be taken into consideration that the funding instruments are used for purposes which are covered by the IPCEI criteria and in which there is hence a Union interest.[323] Even a block exemption for the State aid in question could be considered in individual cases.[324] The background to this is the realisation that specific infrastructures are of extraordinary significance for the functionality of the European internal market. What is more, the European Parliament hoped that the provision in question would strengthen economic, social and territorial cohesion in the EU.[325] As an alternative to Member State aid, however, European funding instruments may also be used in order to finance projects or investments that would otherwise not be profitable.

3.2.2.3 Possible justification for State aid countervailing competition-distorting third-country financial measures (defensive measure)

760. In view of the discrimination against European companies resulting from third-party subsidies, an association has called for the possibility of so-called "matching clauses" to be anchored in EU state aid law. These are meant to allow for State aid where it is not a question of countervailing market intervention by the EU or the Member States, but where state support measures carried out by third countries are distorting competition.[326]

761. In that regard, it should be stressed from an economic point of view that aid can be justified particularly when it serves to remedy what is known as market failure. By contrast, there is no direct economic justification for reacting to third-country subsidies with own subsidies for individual undertakings or industries. True, third-country subsidies may lead to distortions of competition on the EU's internal market. However, instead of becoming involved in a subsidy race constituting a burden on the state budgets and on taxpayers, such subsidies should be addressed directly in order to prevent negative impacts on competition. In this regard, it is necessary to consider that subsidies that are not economically justified may lead to a misallocation of economic resources and to distortions of the market and of competition, both on the directly-affected markets, and on upstream and downstream markets. Specifically with regard to the EU, Competition between the Member States may be distorted also if the Member States support the undertakings or industries concerned to different degrees. Furthermore, undertakings from third countries would be placed at a disadvantage in the EU if they receive subsidies neither from their home country nor from an EU Member State. Finally, it should also be taken into account that third countries that are

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321 http://www.entsorgungsfonds.de/, retrieved on 30 June 2020.

322 See for instance Bundestag printed paper (18/8629), third sentence, or Deutschlandfunk report of 2 September 2017, Aufbauhilfe oder Ausverkauf? - Deutsche Investoren in Griechenland.

323 See section 3.2.2.3 below and in particular paragraph 765.

324 This can be considered for instance in the case of State aid to support ports; see Art. 56b of Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union, OJ L 187/1, p. 1; inserted by Commission Regulation (EU) 2017/1084 of 14 June 2017 amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure […], OJ L 156/1.

325 Commission Regulation (EU) 2017/1084 of 14 June 2017 amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure […], OJ L 156 of 20. Juni 2017, p. 1.

326 BDI, China: Partner und systemischer Wettbewerber – Wie gehen wir mit Chinas staatlich gelenkter Volkswirtschaft um?, Grundsatzpapier, January 2019, pp. 18-19; https://bdi.eu/media/publikationen/#/publikation/news/china-partner-und-systemischer-wettbewerber/, retrieved on 4 March 2020.

negatively affected by such subsidies may react in turn with commercial policy countermeasures, such as in the shape of countervailing duties, where the subsidised European undertakings export abroad. All in all, the idea of matching clauses should therefore be regarded critically.

762. The introduction of possible matching clauses must be distinguished from possible State support measures intended to compensate for national or European market interventions which are carried out for overriding political reasons and which may lead to competitive disadvantages for European undertakings. One example of this is stricter standards in the field of environmental protection in Europe, which lead to European undertakings being more heavily burdened than those from third countries. In this case, undertakings from third countries have cost and therefore competitive advantages not for instance on the basis of state subsidies, but due to less stringent requirements. To counter this, the Federal Ministry of Economics and Energy, for example, has defined the following "regulatory principle" in the National Industrial Strategy 2030:

> *"Insofar as the State compensates [its own] interventions, which are necessary for overriding political reasons, in their anti-competitive effects, this is not a subsidy, but the restoration of competitive comparability. This must be possible in accordance with EU law".*[327]

763. In the case of legitimate, superordinate objectives, it may, on principle, be justifiable for reasons of competition to countervail such cost and competition disadvantages for European undertakings in order to avoid these objectives being undermined by cheaper goods being imported which are manufactured in third countries under less stringent requirements. This particularly applies where internationally-agreed minimum standards are circumvented in third countries. It appears conceivable in this regard above all to impose border adjustment levies on imports, as well as tax refunds on exports. Having said that, such market intervention may be regarded as a protectionist act by third countries, and consequently lead to trade conflicts and provoke commercial-policy countermeasures. In this regard, it is preferable as a matter of principle to agree on internationally-uniform standards and regulations to achieve supraordinate goals.

764. The countervailing of competition-distorting measures by third countries has not been explicitly defined in the EU State aid rules as a measure of common European interest. Having said that, the IPCEI Communication already provides for an "external dimension" of State aid law:

> *"In order to address actual or potential direct or indirect distortions of international trade, the Commission may take account of the fact that, directly or indirectly, competitors located outside the Union have received (in the last three years) or are going to receive, aid of an equivalent intensity for similar projects. However, where distortions of international trade are likely to occur after more than three years, given the particular nature of the sector in question, the reference period may be extended accordingly. If at all possible, the Member State concerned will provide the Commission with sufficient information to enable it to assess the situation, in particular the need to take account of the competitive advantage enjoyed by a third country competitor. If the Commission does not have evidence concerning the awarded or proposed aid, it may also base its decision on circumstantial evidence."*[328]

765. In accordance with the IPCEI criteria, State aid primarily serves to facilitate those projects which the undertaking considers not to be profitable or financeable at all.[329] However, by targeting aid to companies in areas that require particular financial strength, it should in principle also be possible to grant aid under these criteria to offset competitive disadvantages. Further, if the political will is there, it may also be possible to use aid for the benefit of

[327] Federal Ministry for the Economy and Energy, Nationale Industriestrategie 2030, Stand: Februar 2019, p. 14 (informal translation).

[328] European Commission, Communication - Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest OJ C 188 of 20 June 2014, p. 2, para. 34.

[329] See Section 3.2.2.2 above.

European economic operators beyond this, provided that the aim is to prevent the transfer of know-how from the EU to non-European third countries. Safeguarding the innovativeness of the EU market players can be regarded as a legitimate European interest in this context.

766. It should, however, be taken into account restrictively that, with State aid measures which distort competition in the internal market and damage trade between the Member States, a weighing up should be carried out between the distortion of competition in the EU and the impact on trade between the Member States, on the one hand, and countervailing competitive disadvantages in relations with undertakings from third countries on the other. The law on State aid furthermore does not empower the Member States to define objectives themselves which relate to trade between the EU and third countries. In accordance with Art. 21(2) TEU and Art. 207(1) TFEU, the definition of objectives which relate to trade between the EU and third countries and the countervailing of competitive disadvantages in that trade must rather take place via the EU institutions.[330]

767. A further restriction for State aid to protect undertakings' competitiveness in accordance with the IPCEI criteria is to be made such that Member State aid should be more difficult to justify if it may trigger or encourage a subsidy race among the EU Member States, or between them and the Chinese State. Such a subsidy race would run counter to the goals of subsidy control as a matter of principle.

768. It is hence incumbent on the European Commission under all circumstances to lend concrete form to the potential significance of the IPCEI criteria for State aid to protect the competitiveness of undertakings with strategic competences. This has already taken place for instance with regard to key enabling technologies (KETs). This is a group of six technologies: micro/nano-electronics, nanotechnology, industrial biotechnology, advanced materials, photonics and advanced manufacturing technologies.[331]

769. European financing instruments such as the European Fund for Strategic Investments (EFSI) and the programmes of the European Structural and Investment Funds (ESIF) may also be used in accordance with the IPCEI criteria as an alternative to State aid provided by Member States in order to protect competitiveness between undertakings.[332] What is more, the European Investment Bank (EIB) makes funds available to support for instance infrastructure projects in the Member States.[333]

3.2.2.4 No scope for the State aid-funded creation of European Champions in the existing law (offensive measure)

770. The creation of European Champions plays a major role in the German political discussion on measures that may counter financial promotional measures of the Chinese State or Chinese state-controlled undertakings.

771. The active creation and promotion of national or European Champions by state measures is to be eyed critically. The concomitant restriction of competition within the EU, and the expansion of market power, would primarily pose a burden on European consumers, who would have to pay excessive prices. Over and above this, under-

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330 Cf. also European Commission, Decision of 18 December 2013, C(2013) 4424 final, Case SA.33995 (2013/C) – Germany (impermissibility of State aid to protect international competitiveness specifically for German undertakings); on this Monopolies Commission, Biennial Report XX, ibid., para. 106.

331 See: https://ec.europa.eu/growth/industry/policy/key-enabling-technologies_en. The significance of the definition as key technologies for examining State aid measures in accordance with the IPCEI criteria has already been stressed by the Austrian Council for Research and Technology Development; see https://www.ots.at/presseaussendung/OTS_20190322_OTS0126/effiziente-einbindung-oesterreichs-in-die europaeische-industriepolitik-von-hoher-dringlichkeit.

332 European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing the InvestEU Programme, 6 June 2018, COM(2018) 439 final, p. 1; furthermore https://www.eib.org/de/projects/regions/european-union/greece/index.htm#.

333 https://www.eib.org/de/projects/regions/european-union/greece/index.htm#.

takings would have less incentive to innovate and become cost efficient, so that it can at least be queried whether such undertakings that are protected against competition in their home markets could stand up to international competition in the long term. Instead of intervening in the market to reduce competition by actively promoting national and European Champions, policy-makers should therefore focus on setting attractive, general economic framework conditions.

772. The establishment of a European Champion in response to the initiative of an undertaking is to be accepted in the applicable legal framework if the undertaking's growth is due solely to better performance on the market (internal growth). By contrast, the formation of such a champion by concentration (external growth) is not possible as a matter of principle. This applies at least when such a European Champion would be characterised by high market power within the EU and a high degree of competitiveness on the non-EU markets. The concentration of several undertakings in order to form a new market-dominating undertaking in the EU internal market would be impermissible as a matter of principle in accordance with the applicable merger control rules. There is no provision for distinguishing as to whether the concentration leads to better chances in competition of the merged undertakings on the global markets.[334] Insofar as the participants establish an economically-autonomous joint venture or combine their activities in a joint venture that is not autonomous, coordinated conduct in the EU internal market on the part of those concerned would also have to be examined in accordance with the ban on cartels, and in this regard would be subject to the same restrictions as export cartels.[335]

773. The Member State promotion of European Champions by measures which contradict Art. 101 ff. TFEU is impermissible in accordance with Art. 106(1) TFEU. Given their duties of sincere cooperation, the Member States may also not take or maintain other measures which ultimately cancel the practical effectiveness of the competition rules that apply to undertakings, for instance by national support for export cartels with distortions of competition in the EU internal market (Art. 4(3) TEU in conjunction with Art. 101 ff. TFEU).[336]

774. It is also questionable whether Member State support for European Champions by means of State aid could be justified in accordance with Art. 107(3)(b) TFEU as a project of common European interest.[337] The European Commission's IPCEI Communication does not explicitly address improving the international competitiveness of European undertakings on markets outside the EU. That said, it has already been pointed out that the European Commission is able to define a European interest in protecting the competitiveness of European undertakings in the case of distortions of competition by third-country measures.[338] The Communication furthermore already provides for the possibility to take into account as part of the evaluation of State aid that competitors located outside the Union have received an equivalent intensity of direct or indirect State aid for similar projects.[339] Promoting a European champion through State aid would however not only countervail distortions of competition in international trade, but would in fact give the undertaking in question an advantage in international trade. This advantage could distort international competition, and in this regard would be added to the distortion of competition within the EU caused by State aid and the damage to trade between the Member States. The EU's foreign relations have however not previously been orientated towards creating special advantages for European under-

334 Art. 2(2) and (3) and recitals 5 and 23 of Regulation 139/2004.

335 Art. 2(4) of the merger control regulation; on this also Reidlinger in Streinz, EUV/AEUV, 3rd ed. 2018, of the merger control regulation in accordance with Art. 103 TFEU paras. 19-20.

336 ECJ, Judgment of 21 September 1988, 267/86 – Van Eycke/ASPA, [1988] ECR 4769, ECLI:EU:C:1988:427, para. 16.

337 See on the relevant interests Kühling/Rüchardt in Streinz, EUV/AEUV, 3rd ed. 2018, Art. 107 para. 133.

338 See para. 768 above.

339 European Commission, Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest OJ C 188 of 20 June 2014, p. 2, para. 34.

takings in global competition, but rather towards protecting or restoring equal competition opportunities for European undertakings on the world market.[340]

775. The industry policy objectives of the EU are correspondingly limited. In accordance with Art. 173(1) TFEU, the Union and the Member States are to ensure that the conditions necessary for the competitiveness of the Union's industry are guaranteed. The remaining provisions of this Article do not however provide a basis for the Union introducing any measure which could lead to a distortion of competition (Art. 173(3) subparagraph 2 TFEU).[341] State aid-based promotion of European champions over and above countervailing third-country-induced distortions of competition, and hence at the same time injuring the internal market structurally as "collateral damage", is hence likely not to be compatible with this.

776. At any rate, even in this connection, responsibility for determining the criteria for promoting European Champions to increase their competitiveness in international competition would lie with the EU institutions in accordance with Art. 21(2) TEU and Art. 207(1) TFEU.

3.2.3 Management of the economy by the State via SOEs

777. The measures with which the Chinese State manages the economy via SOEs constitute a major aspect in the discussion of Chinese state capitalism. Foreign trade law does not contain any provisions which – apart from subsidy control – link to market interference in connection with SOEs and stipulate a responsibility for this on the part of the State in question.[342] This constitutes a potential regulatory loophole, given that states can certainly exert an influence also on undertakings that they control (industry and trade undertakings, but also for instance banks)[343], outside the cases covered by subsidy control, and thus ensure, for example, that dumping takes place (*e.g.*, by shaping the regulation or the practice of authorities). Because of their structure, as well as of their regulatory environment, SOEs furthermore already assume a market position which is able to prevent a relationship with private undertakings that is neutral in terms of competition.[344] It is however difficult to take defensive measures directly vis-à-vis a third country.

778. EU law by contrast contains provisions which close the gap that has been described directly with regard to the EU Member States. Art. 106(1) TFEU prohibits measures on the part of the EU Member States favouring public undertakings and undertakings with special or exclusive rights if this does away with equal opportunities in competition in the market in a manner not compatible with the EU Treaties.[345] Added to this is the Union-law principle of sincere cooperation, under which the Member States may not introduce or maintain in force any measures with regard to public or any other undertakings, also not in the form of laws or ordinances which may render practically ineffective the competition rules applicable to the undertakings (Art. 101 and 102 TFEU in conjunction with Art. 4(3) TEU). In accordance with the European case-law, such a case exists, for example, if a Member State requires or favours cartel agreements that are in violation of Art. 101 TFEU, or increases their impact, or deprives its

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340 See para. 598 and [...] above.

341 See on this Lurger, in Streinz, EUV/AEUV, 3rd ed. 2018, Art. 173 para. 36 (strict standard).

342 This is not precluded by the fact that state control as such and independently of market interventions associated with its exercise may be relevant under foreign trade law; see, *e.g.*, Art. 4 para. 2 lit. a of the Regulation 452/2019.

343 See on this European Commission, Commission Staff Working Document on significant distortions in the economy of the People's Republic of China for the purposes of trade defence investigations, 20 December 2017, SWD(2017) 483 final/2, in particular Sec. 5 and 6, as well as 14 ff.

344 Capobianco, A./Christiansen, H., Competitive Neutrality and State-Owned Enterprises: Challenges and Policy Options, 2012.

345 ECJ, Judgment of 10 February 2000, C-147/97 – Deutsche Post, 2000, I-825, ECLI:EU:C:2000:74, paras. 49 ff.; Judgment of 17 May 2001, C-340/99 – TNT Traco, 2001 p. I-4109) ECLI:EU:C:2001:281.

own legislation of its official character by delegating to private economic operators responsibility for taking decisions effecting the economic sphere.[346]

779. The abovementioned obligations incumbent on the Member States take on independent significance where distortion of competition is not attributable to autonomous conduct on the part of the undertakings in question, or cannot be covered by Art. 101 and 102 TFEU for other reasons. This would be the case for instance if a Member State uses sovereign acts – for instance via price regulation measures – to cause a dominant public undertaking or a dominant undertaking to which it has granted special or exclusive rights to offer its products on markets in another Member State at cut-throat prices. Another relevant case would exist if a Member State – for instance via administrative practice managed via a political strategy – makes it easier for cartels within the meaning of Art. 101 TFEU where this only or primarily injures market players in other Member States.

780. It should be queried whether – in the framework of what is permissible under WTO law – there is a need for comparable rules in order to address competition-distorting activities on the part of Chinese SOEs, and where appropriate even also of other Chinese undertakings. Examples could be taken in this regard from the SOE clause of the EU-Singapore Free Trade Agreement.[347] It can, however, be assumed that it is possible to circumvent liability provisions specifically for third-country SOEs by using private undertakings. The introduction of liability provisions especially for third-country SOEs might moreover backfire on the EU. Particularly Art. 106(1) TFEU is leading a shadowy existence in enforcement practice. At least since roughly the turn of the millennium, only very few decisions of the European Commission, and none of other cartel authorities, have been announced with regard to public undertakings and undertakings with special or exclusive rights in the EU Member States where the provision played a major role.[348] The introduction of such a provision for third countries could therefore be regarded with some justification by the states in question – including China – as a means for adverse treatment.

781. Another assessment could be justified insofar as provisions are concerned with which shortcomings in transparency are to be countered. In particular, the transparency requirements for financial relations between Member States and public undertakings in relation to third countries are not applicable.[349] It is relevant in this regard that European authorities are unable to easily assess whether Chinese SOEs are being deployed in the EU internal market in order to pursue a political strategy because the relevant information on this is frequently only available in China. Similar problems may however also emerge with regard to other Chinese undertakings, albeit in a weaker form, for example with regard to the abovementioned problem of state-facilitated cartels. The Monopolies Commission considers that this problem should be countered with special transparency obligations (see Section 4.1 below).

3.2.4 Special problem: taking account of third-country control and funding in Member States' procurement procedures

782. Just as the stipulations contained in Art. 106 and 107 ff. TFEU, the law on procurement links to actions on the part of the Member States, and creates a regulatory framework which can also apply in addition to the above provisions. The law on procurement serves to prevent state preference to domestic suppliers (privileged suppliers). In this respect, the law on procurement counters, firstly, a state fragmentation of the EU internal market and,

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[346] ECJ, Judgment of 21 September 1988, 267/86 – Van Eycke/ASPA, [1988] ECR 4769, ECLI:EU:C:1988:427, para. 16.

[347] Free Trade Agreement between the European Union and the Republic of Singapore, ST/7972/2018/ADD/5, OJ L 294 of 14 November 2019, p. 3, Articles 11.3 and 11.4.

[348] But nonetheless see European Commission, Decision of 5 March 2008, AT.38700 – Licences for the extraction of lignite for Public Power Corporation S.A. by the Hellenic Republic; decision of 7 October 2008, 39.562 Slovak Postal Act; decision of 20 October 2004, 38.745 – BdKEP - Restrictions on mail preparation; decision of 23 October 2001, 37.133 – Snelpd/France.

[349] See Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ L 318 of 17. November 2006, p. 17.

secondly, distortions of competition. With regard to protection of the internal market, it may amongst other things be in the Union interest for the EU Member States to also use their procurement in such a manner that market access by third-country-controlled or -financed undertakings is restricted. The law on procurement may also benefit foreign trade goals in this respect by being used in order to bring about reciprocity in relations with China.

783. Participation in Member States' procurement in the EU internal market is possible specifically for Chinese undertakings without their needing to comply with stipulations of the WTO's foreign trade law (Section 3.2.4.1). The EU law on procurement so far only contains rudimentary provisions in order to guarantee competitive equality to European and third-country bidders in procurement in the EU internal market (Section 3.2.4.2).

3.2.4.1 No procurement regulations in foreign trade law in relations with China

784. The existing law on procurement in the EU has a general structure, which was generally designed in such a way that it meets obligations under international law in the legal framework of the World Trade Organization (WTO). An agreement on the law on procurement, the "Government Procurement Agreement" (GPA) exists within the WTO (most recently amended in 2012). This Agreement aims to open the procurement markets of the respective Member States.[350] In the course of China's accession to the WTO, the other Members called on China to accede to the GPA, whereupon China undertook to aspire to accession. This has not yet taken place.[351] The paragraphs of the Report of the Working Party on the Accession of China, which have now become binding, read as follows:

> "*The representative of China stated that China intended to become a Party to the GPA and that until such time, all government entities at the central and sub-national level, as well as any of its public entities other than those engaged in exclusively commercial activities, would conduct their procurement in a transparent manner, and provide all foreign suppliers with equal opportunity to participate in that procurement pursuant to the principle of MFN treatment, i.e., if a procurement was opened to foreign suppliers, all foreign suppliers would be provided with equal opportunity to participate in that procurement (e.g., through the bidding process). […] The representative of China responded that China would become an observer to the GPA upon accession to the WTO Agreement and initiate negotiations for membership in the GPA by tabling an Appendix 1 offer as soon as possible.*"[352]

785. Despite their content being in conformity with EU law, the WTO rules do not apply directly in the EU. Therefore, the GPA is also not a benchmark for lawfulness for the EU's law on procurement.[353] Instead, it has a purely indirect effect by virtue of the need to interpret the EU procurement rules in conformity with the GPA. This becomes relevant in cases of undefined legal terms, or where latitude is left in the national implementation of EU law.[354] Interpretation and application of the law in conformity with WTO law is particularly desirable when it comes to enforcing general legal principles. At the same time, the law of the WTO, European primary and procurement-specific secondary law, as well as national procedural law, are determined accordingly in line with the

350 Seidel/Mertens, in: Dauses/Ludwigs, Handbuch des EU-Wirtschaftsrechts Vol. 2, H.IV para. 450.

351 Different rules apply to Hong Kong; on this Seidel/Mertens, in: Dauses/Ludwigs, Handbuch des EU-Wirtschaftsrechts Vol. 2, H.IV para. 449.

352 This is contained in paras. 339 and 341 WPRC, which became part of China's obligations under WTO law via para. 342 in conjunction with Section 1.2 CBP.

353 Weiß, NZBau 2016, 198 (199).

354 Weiß, NZBau 2016, 198 (200).

principles of transparency and equal treatment. In realisation of the principle of competition, furthermore, as large a group of potential bidders as possible should be permitted to take part in the procurement procedure.[355]

3.2.4.2 EU law on procurement is to be supplemented by an independent set of tools in order to create equal opportunities in competition in the EU internal market

786. The existing legal framework in the EU so far only contains a limited number of provisions on bids directly concerning products[356] from third countries. The European Commission published a Communication containing guidance on dealing with bidders and goods from third countries within the EU's internal market in July 2019.[357] This guidance does not attempt to reach a new interpretation of the EU procurement law. Rather, the current rules are to be enforced more effectively with the aid of contracting authorities that are informed and more confident when it comes to their application of the law within the directives in force.

787. The guidance serves a two-fold goal in this regard:

- Firstly, distortions are to be addressed "in European procurement markets created by third country subsidies, or other forms of state-backed financing" (protection of equal rights in competition);
- Secondly, the guidance is to make a contribution towards ensuring "reciprocity in access to foreign procurement markets".[358]

788. The guidance makes it clear that only undertakings from third countries with which the EU has signed binding international agreements or bilateral free trade agreements covering public procurement have guaranteed access to the EU procurement market. Furthermore, reference is made to the possibility already existing to be able to reject bids which appear to be abnormally low. The guidance also contains a list of questions which the contracting authorities can submit to bidders in order to clarify prices. It is explained in general terms how social, environmental and labour standards can be established in the procurement procedure. The guidance furthermore describes suitable action to be taken with abnormally low bids, for purposes of strategic procurement, in defence and security, and when applying special sector-specific rules regarding goods from third countries.

789. In accordance with the law as it stands, an abnormally low bid exists when the price or costs of a bid appear to be abnormally low in relation to the services to be provided.[359] In such cases, the contracting authority is to request information and examine the constituent elements of the tender, the documents transmitted also needing to be taken into consideration. The examination may in particular relate to the economic efficiency of the production procedure of a goods delivery or the provision of the service. Furthermore, the technical solutions that are

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355 The basis for this is formed by Art. 49 and 56 TFEU, on this Jaeger, in: Münchener Kommentar Europäisches und Deutsches Wettbewerbsrecht, Vol. 3, 2nd ed. 2018, Einl. VergabeR, paras. 188-189; see also ECJ, Judgment of 29 March 2012 – C-599/10,[2011] ECR I-10873, ECLI:EU:C:2012:191. The provisions have been transposed into German law in section 97 subsection (1), first sentence, & subsection (2) of the Act Against Restraints of Competition; on this Burgi, NZBau 2008, 29 (29 ff.), as well as Höfler, NZBau 2010, 73 (73 ff.).

356 Products that have a monetary value and may be the object of trade transactions, and hence of supply contracts, unlike works and services contracts; cf. Niestedt in: Münchener Kommentar Europäisches und Deutsches Wettbewerbsrecht, Vol. 3, 2nd ed. 2018, § 55 SektVO Rz. 3 f. (there on German law).

357 European Commission, Guidance on the participation of third country bidders and goods in the EU procurement market (C(2019) 5494 final).

358 European Commission, Guidance on the participation of third country bidders and goods in the EU procurement market (C(2019) 5494 final), p. 4.

359 Art. 49 of Directive 2009/81/EC; Art. 69 of Directive 2014/24/EU; Art. 84 of Directive 2014/25/EU; transposed in section 33 of the Defence and Security Contract Award Ordinance (VSVgV); section 60 of the Contract Award Ordinance (VgV); section 55 of the German Ordinance on Sectors (SektVO) and section 44 of the Sub-threshold Contract Award Ordinance (UVgO). See also Art. 18 § 2 of Directive 2014/24/EU specifically on the statutory obligations.

selected, or the exceptionally favourable conditions available to the undertaking when delivering the goods or providing the service; particularities of the delivery or service offered; compliance with statutory obligations, in particular as to environmental, social and labour law provisions; finally, also any state State aid granted to the undertaking may be concerned.

790. If the contracting authority is unable to adequately clarify the low price or costs offered, it may reject the bid. The contracting authority must reject the bid if it has found that the price or the costs of the bid are abnormally low because statutory obligations are not complied with, or because the bidder has received unlawful State aid. If a dumping bid is suspected, the contracting authorities may first of all request additional information from the bidders, and if adequate justification for the low price is not provided, may reject the bid.[360]

791. The applicable law on procurement furthermore permits strategic procurement in the sense that "criteria not related to procurement" can be taken into consideration in the procurement procedure. This possibility has existed at each level since the reform of EU procurement law in 2014. For instance, in particular concrete requirements may be made as to the quality of the bid and the provision of the service, such as reaction times, requirements as to availability on the spot, added-value arrangements, or compliance with specific social standards (Most Economically Advantageous Tender – "MEAT").[361] A distortion of competition by third countries could already be calculated and taken into account in this test.[362] These criteria could hence also help create equal competition conditions for bidders within the internal market and those outside as part of procurement procedures. In practice, however, contracts are still preferentially awarded according to the criterion of the lowest price (55 %).[363]

792. With regard to defence and security, the guidance needs to take account of the fact that the EU Member States still have competence to decide independently whether their contracting authority may permit economic operators from third countries to take part in procurement procedures.[364] The guidance does not contain any final stipulations in this regard, but only designates options for action.[365] Germany has not introduced an across-the board ban on participation for bidders from third countries. Having said that, section 7 subsection (7) of the Defence and Security Contract Award Ordinance (*Vergabeverordnung Verteidigung und Sicherheit* – VSVgV) makes it possible to exclude bidders for lack of aptitude with documents classified as for official use only ("*VS-Vertraulich*") or higher. In this context, and in accordance with German law, only security clearances and authorisations from other European Member States are to be recognised, it being an additional precondition that the security clearances and authorisations are equivalent to the German provisions. There is no obligation over and above this to recognise security clearances and authorisations from a third country as equivalent.

793. Sectoral procurement law regulates the award of contracts by contracting authorities in the sectors of water, energy and transport as well as postal services. The Guidance refers in this regard to the existing arrangements on dealing with bidders and goods from third countries. Particular mention should be made in this context of Art. 85

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360 Art. 69(1) of Directive 2014/24/EU and Art. 84 of Directive 2014/25/EU.

361 Art. 67(2) of Directive 2014/24/EU.

362 Cf. on this also Amended proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries (in the following: Amended Proposal for an IPI Regulation), p. 11 and 24 (Art. 2 No. 1 (f)).

363 European Commission, Communication – Making Public Procurement work in and for Europe, COM(2017) 572 final, p. 5; see also: European Commission, Guidance on the participation of third country bidders and goods in the EU procurement market, OJ C 271 of 13 August 2019, p. 43 (54).

364 Cf. recital 18 subparagraph 2, first sentence, of Directive 2009/81/EC. Where essential interests of security are affected, procurement in accordance with the EU Treaties may in any case be granted without applying the directive (Art. 346 TFEU).

365 European Commission, Guidance on the participation of third country bidders and goods in the EU procurement market (C(2019) 5494 final), p. 11.

of Directive 2014/25/EU, which was transposed into German law by section 55 of the Ordinance on Sectors (*Sektorenverordnung* – SektVO).[366] According to the this provision, the contracting authority of a supply contract in the sectors of water, energy and transport may reject bids where more than 50 % of the total value of the proportion of goods comes from countries which are not signatories to the Agreement on the European Economic Area and with which also no other agreements exist regarding reciprocal market access. This only does not apply if preferential treatment of a remaining bidder would lead to equipment being acquired that had different technical characteristics than that already used by the contracting authority, thus causing incompatibility or technical difficulties in operation and maintenance or disproportionate costs.

794. Independently of the Guidance, despite the possibilities that it offers to reject bids from third-country bidders, the EU procurement directives are regarded as requiring supplementation. In particular, they do not explicitly address the control or state financing of a bidder by third countries. With regard to the most recently mentioned 50 percent rule to cover goods and services, it must be taken into account that it becomes all the more unlikely for this 50 percent limit to be reached with regard to a single third country such as China the more market access agreements exist with third countries as a whole. Products from individual third countries therefore benefit indirectly from market access agreements, even if those states themselves do not wish to conclude such a market access agreement.[367] This may favour copycat conduct. A further problem arises from the increasing internationalisation of supply chains. In order to avoid excessive application of the price adjustment mechanism, and to make efficient use of official capacities, there is a need to clarify how the links between undertakings and third countries are to be determined, and how far they are to reach.

795. While the guidelines can answer questions of substance, they cannot remedy shortcomings in procedural law. The law on procurement is so far enforced by state bodies only. According to the model of the EU anti-dumping studies in goods trade, it is proposed that undertakings in the field of public procurement should also be given an effective tool in order to insist on effective examination of abnormally low bid prices.[368] With regard to the decision on whether such a decentralised approach is to be facilitated, it would however be necessary first of all to calculate the additional administrative effort and cost that it would be likely to involve.[369]

796. The Monopolies Commission considers that the existing law on procurement is in need of reform and needs to be supplemented. The existing legal framework appears to be overburdened. This certainly applies when it comes to protecting competitive equality of opportunities for European undertakings in relation to undertakings from third countries. The fact that a bidder is subject to state control and/or financing, and therefore might submit its bids according to criteria other than market economic ones, cannot be uniformly taken into account in procurement procedures as a separate criterion. Instead, one finds a large number of individual regulations which also serve other objectives, apart from protection of equality of competitive opportunities. This creates a complex situation in which it remains questionable whether it can really guarantee effective protection of competitive equality of opportunities. One should, however, bear in mind that novel instruments are being discussed for the activity of undertakings in the EU internal market which are subject to third-country control and/or financing, which are to be applied in advance of any participation in public calls for tender, and by means of which any com-

366 Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94 of 28 March 2014, pp. 243 ff.

367 Stehmann, in: Grabitz/Hilf, Recht der EU, 40th ed. 2009, para. 129.

368 BDI, Grundsatzpapier China. Partner und systemischer Wettbewerber – Wie gehen wir mit Chinas staatlich gelenkter Volkswirtschaft um?, January 2019, p. 16.

369 According to an estimate of the European Commission, the centralised procedure in accordance with the IPI Regulation that is looked at in greater detail in Section 4.2.1 would save up to EUR 3.5 million, see European Commission, Amended proposal for an IPI Regulation), COM(2016) 34 final, p. 9.

petitive advantages in the EU internal market accruing to undertakings from third countries could be neutralised (cf. Section 4.1).

3.2.5 Recommendation to close remaining regulatory loopholes

797. If third countries take non-market-economy measures, only restricted protection of competition is possible directly vis-à-vis these state measures. With regard to the regulatory framework under foreign trade law, a gap was found to exist insofar as services or investments are implicated, and the same is also true where the Chinese State supports undertakings in the EU, and hence grants them competitive advantages, without however any Chinese goods crossing the border.[370] This gap cannot be closed in terms of competition law via the existing Art. 106 and 107 ff. TFEU because these provisions do not cover measures taken by third countries. It is also not easy to attribute competition-distorting economic benefits of a third country to an EU Member State in such a way that the scope of State aid control would be opened up in accordance with Art. 107(1) TFEU.[371] Control of European SOEs via Art. 106(1) TFEU has likewise proven to be somewhat impracticable.

798. A limited possibility to react to measures of third countries that otherwise cannot be covered nonetheless emerges as part of Art. 107 ff. TFEU from the fact that the EU Member States are able to protect domestic market players with State aid against a competition-distorting third-country influence on the economy.[372] It is therefore possible to counter competition-distorting measures of third countries with financial measures of the Member States which admittedly serve in turn to distort competition, at least in the case of selective application. That being said, such measures can only be justified if they are used defensively. Using them offensively in order to create European (or even national) champions would go beyond the scope of what is permissible under State aid law.[373]

799. A special problem then emerges relating to the consideration of third-country control and financing as part of Member States' procurement. The fact that a bidder is subject to third-country control and/or financing, and therefore might submit its bids according to criteria other than market economic ones, cannot be uniformly taken into account in procurement procedures as a separate criterion.

800. The Monopolies Commission considers the fact that the EU internal market is not comprehensively protected against distortions of competition in terms of influence on the economy exerted by a third-country to suggest that there is a regulatory gap to be filled in. The instruments under foreign trade law and the possibility of countermeasures that are permissible under State aid law cannot close this gap in a manner that is satisfactory in terms of competition policy. Instead, an instrument is needed which links as directly as possible to the distortion of competition that is triggered by the third-country measures. This instrument could also be placed upstream from Member State procurement. Apart from this, it has also become apparent in the present context that special provisions may be expedient in order to counter shortcomings in transparency with third-country measures (see Section 4.1 below).

3.3 Tools for market intervention by means of changes in the market structure

801. The market activity of undertakings which are controlled or financed by the Chinese State cannot only have an effect in terms of market conduct in the EU internal market. It can also influence the market structure, for instance when the undertakings in question take over European competitors. In these cases, in addition to the EU's

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370 See paras 636, 664, 736 above.

371 See Section 3.2.2.1 above.

372 See Section 3.2.2.2-3.2.2.3 above.

373 See Section 3.2.2.4 above.

interest in protecting its internal market, interests of the EU and of the Member States in protecting public security and order may also be affected.

802. Protection of the internal market is the task of merger control. Merger control at EU level provides a uniform preventive procedure in order to examine concentrations for their compatibility with the common market. Merger control is to prevent structural harm to competition and fragmentation of the internal market because of a non-uniform evaluation of concentrations by the Member States' competition authorities. This is added to by merger control at Member State level which protects competition within the Member States.

803. Investment control is so far only provided for at Member State level. There are no independent EU investment control procedures. Regulation 2019/452 only creates a framework in which the Member States verify foreign direct investment.[374] Investment control in Germany is also not restricted to concentrations. Rather, it permits in general intervention in the goods, services, capital, payment and other economic transactions with other countries where this is necessary to protect public security and the international interests of the German State.[375] This intervention however also includes the verification, and where appropriate the prohibition, of company takeovers.

804. It will first of all be examined below to what degree investment control can be used as a tool under the law on foreign trade in order to counter politically-strategically-managed corporate takeovers by Chinese investors (Section 3.3.1). We will go on to examine whether the provisions of competition law under merger control are adequate in this regard, or whether they are in need of reform (Section 3.3.1).

3.3.1 Investment control

805. As Chinese investment within the EU increased, concern was already expressed years ago with regard to state-controlled and -financed undertakings gaining access to critical infrastructures in Europe.[376] There has been public discussion of this topic in Germany at the latest since the acquisition of the German robot manufacturer Kuka by the Chinese undertaking Midea.[377] In 2018, the Federal Government then actively prevented the acquisition of a 20-percent holding by the Chinese electricity network operator State Grid Corporation of China (SGCC) in the German transmission network operator 50Hertz through an ordered acquisition of the shares by KfW.[378]

3.3.1.1 The functioning of German investment control

806. The legal framework for German investment control[379] has been adjusted three times in the past in the course of these developments, and hence tightened up.[380] German investment control examines whether the

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374 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79 I of 21 March 2019, p. 1. The priority application of the EU merger control regulation also does not preclude such Member State investment control; cf. Art. 21(4) of Regulation 139/2004.

375 See section 1 in conjunction with section 4 of the Foreign Trade Act (*Außenwirtschaftsgesetz* – AWG).

376 See on this Bungenberg, M./Hazarika, A., Chinese Foreign Investments in the European Union Energy Sector: The Regulation of Security Concerns, Journal of World Investment & Trade 20(2-3), 2019, 375 (378 ff.); Schuelken, T., Der Schutz kritischer Infrastrukturen vor ausländischen Direktinvestitionen in der Europäischen Union. Zum Vorschlag der EU-Kommission für eine Verordnung zur Schaffung eines Rahmens für die Überprüfung ausländischer Direktinvestitionen – KOM(2017) 487 endg. EUR 2018, 577 (578 ff.).

377 Lee, The Chinese Chance, Zeit Online of 6 June 2016, https://www.zeit.de/wirtschaft/unternehmen/2016-06/kuka-uebernahme-china-midea-roboter, retrieved on 30 June 2020.

378 "Aus sicherheitspolitical Erwägungen" – Bund kauft Anteile an 50Hertz, Die Welt on 27 July 2018.

379 The legal framework is formed by sections 4 subsection (1) Nos. 4 and 5 subsection (2) of the Foreign Trade and Payments Act, as well as by sections 55 ff. of the Foreign Trade Ordinance (AWV) based on the Act.

380 See the overview of the first and second adjustment in Herrmann, C., Europarechtliche Fragen der deutschen Investitionskontrolle, ZEuS 2019, 429 (432 ff.). On April 8, 2020, the Federal Government adopted the draft amendment to the Foreign Trade Ordinance, cf. draft bill of the Federal Government, First Act to Amend the Foreign Trade Act and Other Acts of April 8,

direct or indirect acquisition of company holdings endangers the public security and order of the Federal Republic of Germany, whilst it takes as a basis the European definition of public security and order via section 4(1) No. 4 of the Foreign Trade Act and incorporates it into German law, as it is interpreted by the European Court of Justice.[381] Contrary to the broad German concept of police law, the European Court of Justice prefers a narrow interpretation.[382] It requires a "genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society" here.[383] The protective aim must be first and foremost a suitable fundamental interest of the Union, and it depends on whether a "genuine and sufficiently serious threat" can be presumed in this regard.[384] The European Court of Justice has already made it clear with regard to a suitable fundamental interest that this may also lie in the field of services of general interest, whilst purely economic or financial objectives or the protection or strengthening of a specific competitive structure are not covered.[385] However, it cannot automatically be inferred from this that the defence against takeovers motivated by industrial policy in a third country context cannot be included under this term. [386] So far the term seems to be open in this respect..

807. German investment control distinguishes between sector-specific and cross-sectoral control (sections 55(1) and 60(1) of the Foreign Trade Ordinance). Sector-specific control relates to the military field, and is also applicable to citizens of other EU States. Cross-sectoral control generally intervenes with each acquisition of shares amounting to 25 percent and in the case of critical infrastructures in accordance with section 55(1) sentence 2 AWV as soon as 10 percent is reached (Section 56(1) AWV). In addition, since the last reform it has been clarified by the insertion of a new para. 1a that an acquisition transaction may also relate to a delimitable operating part of a domestic enterprise, as well as to all essential operating resources of a domestic enterprise or a delimitable operating part of a domestic enterprise which are necessary to maintain the operation of the enterprise or a delimitable operating part. The control is directed solely at non-EU acquirers, except in cases where there is a risk of abuse or circumvention of the control (section 55(2) AWV). Control is solely directed at non-EU acquirers, except in cases in which the danger of abusive design or circumvention of the examination is to be feared (section 55(2) of the Foreign Trade Ordinance).

808. The Federal Ministry of Economics and Energy can only exercise the right to review under subsection 1 if it notifies the direct acquirer and the domestic company affected by an acquisition under subsection 1 of the opening of the review procedure within three months of becoming aware of the conclusion of the contract of acquisition under the law of obligations.. In the case of acquisitions of shares in companies within the meaning of section 55 subsection 1 sentence 2 AWV, subsection 4 stipulates that the conclusion of a contract must be reported to the Federal Ministry in writing. In accordance with section 57 of the Foreign Trade Ordinance, the direct acquirer must make accessible to the Federal Ministry a number of documents for the purpose of examination, the Federal Ministry being able to demand the submission of other documents that might be necessary for the examination in

2020, https://www.bmwi.de/Redaktion/DE/Downloads/E/erstes-gesetz-zur-aenderung-des-aussenwirtschaftsgesetzes-gesetzentwurf.pdf?__blob=publicationFile&v=4, retrieved on 30 June 2020. On 20 May 2020, the Federal Cabinet adopted a reform of the Foreign Trade Ordinance (AWV) by the Fifteenth Ordinance of the Federal Government amending the Foreign Trade Ordinance of 25 May 2020, BAnz AT 02.06.2020 V1. General information on the reform cif. Bundesministerium für Wirtschaft und Energie, Änderungen im Außenwirtschaftsrecht, https://www.bmwi.de/Redaktion/DE/Artikel/Service/Gesetzesvorhaben/erstes-gesetz-aenderung-aussenwirtschaftsgesetz.html, retrieved on 30 June 2020.

[381] On this Herrmann, C., Europarechtliche Fragen der deutschen Investitionskontrolle, ZEuS 2019, 429 (445 ff.).

[382] Herrmann, C., Europarechtliche Fragen der deutschen Investitionskontrolle, ZEuS 2019, 429 (445).

[383] ECJ, Judgment of 27 October 1977, 30/77 – Bouchereau, [1977] ECR 1999, ECLI:EU:C:1977:172, para. 35; Judgment of 28 October 1975, 36/75 – Rutili, [1975] ECR 1219, ECLI:EU:C:1975:137, para. 28; Judgment of 14 March 2000, C-54/99 - Association Église de scientologie de Paris, 2000, I-1335, ECLI:EU:C:2000 :124, para. 17.

[384] Herrmann, C., Europarechtliche Fragen der deutschen Investitionskontrolle, ZEuS 2019, 429 (445).

[385] On this Herrmann, C., Europarechtliche Fragen der deutschen Investitionskontrolle, ZEuS 2019, 429 (445 ff.).

[386] Herrmann, C., Europarechtliche Fragen der deutschen Investitionskontrolle, ZEuS 2019, 429 (445).

individual cases. Prior to a review, there is the possibility to apply for a clearance certificate pursuant to section 58 AWV, which is deemed to have been granted after two months after receipt of the application..

3.3.1.2 European Framework Regulation leads to further expansion and tightening of investment control

809. In addition to the tightening of German investment control, a Framework Regulation has been issued at EU level to screen foreign direct investments.[387] This regulation establishes a new role and competence of the Commission to screen foreign direct investment and for the submission of statements.[388] On the one hand, it serves as a response to the growing concerns that have been voiced vis-à-vis the impact of foreign investments in critical infrastructures, in particular through state-owned enterprises, and on the other hand is to strengthen the EU's negotiating position with regard to market access on third markets.[389] Art. 3 of the Regulation states vis-à-vis the Member States the possibility to "maintain, amend or adopt mechanisms to screen foreign direct investments in their territory on the grounds of security or public order". The Regulation does not however oblige them to introduce national investment control.

810. Major elements of the Regulation are, firstly, the factors listed in Art. 4 that may be taken into consideration by the Member States or the Commission in determining whether foreign direct investment is "likely to affect" public security or order. Paragraph 1 specifies in this context potential effects on "critical infrastructure, whether physical or virtual", including "energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate" that are relevant for the use of such areas. Further aspects mentioned are the supply of energy, raw materials and food (lit. c) or the freedom and pluralism of the media (lit. e). Paragraph 2 lists characteristics relating to investors which may be taken into account, in particular "whether the foreign investor is directly or indirectly controlled by the government, including state bodies or armed forces, of a third country, including through ownership structure or significant funding" (lit. a).

811. Art. 6 and 7 of the Regulation, furthermore, contain cooperation mechanisms for foreign direct investment that are subject to review, as well as for those not undergoing screening. They essentially provide that the Member States are to notify one another, as well as the Commission, of screening procedures, and all notified parties are given the opportunity to comment. Art. 7 focuses on a situation in which no screening is carried out in a Member State, whilst another Member State takes the view that the direct investment is likely to affect its public security and order. The Member State in which the investment is carried out must "give due consideration" to the comments submitted, but is to carry out the final screening decision (Art. 6(9), as well as Art. 7(7) of Regulation 2019/452).

812. A new perspective on investment control, finally, is opened up by Art. 8 of Regulation 2019/452. This Article provides for a cooperation mechanism by means of which the anticipated impact on projects or programmes of "Union interest" can be articulated for reasons of public security and order. In accordance with Art. 8(2)©, the Member State addressed must "take utmost account" of the Commission's opinion and provide an explanation if the opinion is not complied with. Projects and programmes of Union interest include those projects and programmes which involve Union funding, or which are covered by Union law regarding critical infrastructure, critical technologies or critical inputs which are to be regarded as being essential for public security or order (para-

[387] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79 I of 21 March 2019, pp. 1–14. On this Herrmann, C., Europarechtliche Fragen der deutschen Investitionskontrolle, ZEuS 2019, 429 (452 ff.).

[388] Bungenberg, M./Hazarika, A., Chinese Foreign Investments in the European Union Energy Sector: The Regulation of Security Concerns, Journal of World Investment & Trade 20(2-3), (2019), 375 (388).

[389] Herrmann, C., Europarechtliche Fragen der deutschen Investitionskontrolle, ZEuS 2019, 429 (459 – 460).

graph 3). Annual reporting (Art. 5), as well as a contact point (Art. 11) as part of a general exchange are added to the special cooperation mechanisms of Art. 6 ff. of Regulation 2019/452.

813. As a result of the latest amendment to the AWV and the planned reform of its Foreign Trade Act, the EU framework regulation will be transposed into German law..[390] In addition to implementing the cooperation mechanisms, this means in particular a transfer of Art. 4 of the Regulation, and hence also of the European terminology of "likely to affect", as well as of the possibility to take account of state shareholdings. This further tightens up screening as a whole in substantive terms.

3.3.1.3 Moderate use of investment control and limitation to security policy purposes

814. In its reports, the Monopolies Commission primarily considers competition-related issues. Protection of public security and order, by contrast, is carried out using an assessment in terms of security policy. There is no doubt that protecting competition must take a back seat to other legitimate political goals in individual cases. The Monopolies Commission has repeatedly stressed this in the past.[391] Protection of public security and order may hence take precedence over effective competition in individual cases. The individual measures then correspond to the legislature's prerogative to assess security policy. Against this background, stricter investment control with regard to the acquisition of company shares from a state capitalist system is justified from a security policy point of view. It should however be linked to unambiguous, transparent screening criteria.[392] The abuse of investment screening it in order to arbitrarily and intransparently restrict the freedom of movement of capital is to be rejected as a matter of principle.[393]

815. If the State opts to intervene against a foreign direct investment out of security policy considerations, a state acquisition is conceivable as well. In the case of 50Hertz, the Federal Government instructed the KfW to acquire 20 percent of the shares on the basis of section 2 subsection 4 of the Act on the Kreditanstalt für Wiederaufbau (KfW Act)[394].[395] Referring to section 2 subsection 1 No. 4 of the KfW Act, it is quite conceivable that the KfW could also be deployed to make acquisitions in the European area, albeit close coordination with the Member State in question would be needed for the specific acquisition. As an alternative to the deployment of the KfW to prevent third-country takeovers, it would also be possible to make use of a State fund, which might be newly established. In its Industrial Strategy 2030, the Federal Ministry for Economic Affairs and Energy proposes a "national recourse option" as a last resort, as well as the establishment of a "Standing Committee for a National Recourse Option" of the Federal Government at State Secretary level.[396]

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390 Bundesministerium für Wirtschaft und Energie, Änderungen im Außenwirtschaftsrecht, https://www.bmwi.de/Redaktion/DE/Artikel/Service/Gesetzesvorhaben/erstes-gesetz-aenderung-aussenwirtschaftsgesetz.html, retrieved on 30. Juni 2020.

391 Cf. most recently Monopolies Commission, Special Report 75: Conditions and perspectives in the German health insurance system, 2017, para. 490, as well as Special Report 80: Fixed Book Prices in a Changing Market Environment, 2018, para. 146.

392 EFI, Report 2020, p. 71; Commission of Experts, Dealing with Structural Change, annual report 2019/2020, p. 172.

393 See also Commission of Experts, Dealing with Structural Change, annual report 2019/2020, p. 172.

394 Act on the Kreditanstalt für Wiederaufbau (*Gesetz über die Kreditanstalt für Wiederaufbau*) of 5 November 1948 (Law Gazette of the Administration of the Bizone [WiGBl.] p. 123) in the version of the reinstatement of 23 June 1969 (Federal Law Gazette [BGBl.] Part I p. 573), most recently amended by the Tenth Competence Adjustment Ordinance of 31 August 2015 (Federal Law Gazette Part I p. 1474).

395 Response by the Federal Government to the minor interpellation by the MPs Reinhard Houben, Michael Theurer, Thomas L. Kemmerich, by further MPs and by the FDP group – printed paper 19/3796 – Einstieg der KfW beim Stromnetzbetreiber 50Hertz, Bundestag printed paper 19/4195, questions 16 and 17.

396 Federal Ministry for Economic Affairs and Energy, Industrial Strategy 2030, February 2019, p. 28.

816. As a matter of principle, a critical view is to be taken of state shareholdings in private undertakings from a regulatory policy point of view. It may therefore only be the last resort. In any case, there is a need to clarify question as to the conditions under which state investments are carried out. It should be taken into account in this regard that the State may be willing amongst other things to pay non-market-economy prices. The acquisition conditions for the State should therefore in principle be orientated in line with the market investor test under State aid law. Over and above this, the resale of the shareholding is a major factor. This requires a concrete exit strategy, without which there is a risk that state shareholdings might pile up.

No industry policy on the basis of investment control

817. As has already been stated, the case-law of the European Court of Justice on the definition of public security and order is not to be understood such that industry-policy-motivated action vis-à-vis acquisitions from abroad is ruled out as a matter of principle.[397] Conversely, the goal of genuine competition has been recognised as a compelling reason related to the public interest.[398] The particular significance under primary law attaching to competition for the European internal market has already been revealed.[399] It would be conceivable in this regard for investment control to intervene for reasons of protection of competition.[400]

818. A purely industrial policy use of investment control, which is not based on security policy considerations and is not guided by the yardstick of undistorted competition, is thus already precluded in legal terms.. This is also in compliance with Art. 173(1) subparagraph 2, as well as with (3) subparagraph 2 TFEU. Competition control of company takeovers is carried out by European and German merger control. Investment control should, by contrast, remain restricted to security policy considerations. In comparison with merger control, it lacks any form of effect-related analysis. In this regard, the European Commission and the Federal Cartel Office furthermore have the necessary expertise for competition screening, which would first have to be created on the part of the bodies responsible for investment control. For structural changes, therefore, merger control is preferable - also in relation to Chinese state capitalism - which deals with the effects on competition in the domestic market.. Inadequacies in the handling of foreign investment should accordingly be countered by reforms of merger control.

819. Over and above this, when tightening up investment control, it should be taken into account that the screening itself leads to delays in transactions and to legal uncertainty among the undertakings concerned, which in turn affects investment activity in general. This applies regardless of whether, ultimately, there is a ban or not. All in all, the general disadvantageous effect on the inflow of investment from abroad also needs to be taken into consideration. Particularly strict investment control may therefore deter foreign investors and lead them to invest in other countries with less stringent investment restrictions instead of in the EU.

820. The danger of a potential outflow of technology may both affect competition, and constitute a suitable common interest. However, so far there has been no unambiguous definition of what constitutes essential technologies. In addition, such control would go very far beyond the investment control existing today.

821. It can certainly be stated that the economic associations in Germany and Europe have not expressed any reservations vis-à-vis an outflow of know-how, but in fact criticise the lack of reciprocity in investments.[401] This too speaks in favour of moderate use of investment control. By contrast, the transparency of control in the market

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397 See para. 806.

398 Herrmann, C., Europarechtliche Fragen der deutschen Investitionskontrolle, ZEuS 2019, 429 (447).

399 Cf. Section 2.1.

400 See also Herrmann, C., Europarechtliche Fragen der deutschen Investitionskontrolle, ZEuS 2019, 429 (448).

401 BDI, Grundsatzpapier China. Partner und systemischer Wettbewerber – Wie gehen wir mit Chinas staatlich gelenkter Volkswirtschaft um?, January 2019, pp. 14-15; VDMA, third sentence, *et seq*.; BusinessEurope, pp. 68-69.

appears to be regarded as much more important.[402] In this context, it may be worth considering whether, in contrast to isolated technologies, it would be better to resort to stricter export controls rather than investment. This would apply to a narrow range of technologies to be defined and could restrict the scope of investment control. Strict export controls would continue to allow investment but would protect essential public interests, provided that effective enforcement is ensured. However, it would have to be designed in accordance with the requirements of WTO law. It should also be noted that restrictions on the acquisition of technology may have a negative impact on investment in the EU and its Member States.

Endeavouring to further harmonise investment control within Europe

822. Apart from strictly limiting the subject-matter, the Monopolies Commission is in favour of bringing investment control even more closely into line at European level.[403] This would prevent the potential fragmentation of the internal market caused by different handling of investment control by national authorities. There is a danger that different countries in the EU might create different investment conditions which would interfere with the free movement of capital. Greater harmonisation, by contrast, would give undertakings legal certainty and enhance the EU as an investment location. At the same time, however, it should also be pointed out for harmonised investment control that a mix of industry-policy and security-policy considerations should be avoided. Against this background, the multiple reference to investment control which the European Commission includes in its White Paper introducing a new instrument for dealing with foreign subsidies, published shortly prior to the presentation of the present report, does not appear to be without problems.[404] It should also be noted in this context that the European Commission's proposed repressive measures include the possibility of a ban on investment.[405]

Greater detail and further harmonisation of investment control also in the Corona crisis

823. The European Commission has published a Communication on Regulation 2019/452 in response to the economic development caused by the coronavirus outbreak.[406] In this Communication, the Commission points out, firstly, that the crisis poses an increased risk of attempts to acquire healthcare capacities and related industries and research facilities.[407] A need is said to exist to prevent a harmful impact on the capacity to provide sufficient healthcare. It goes on to warn that the crisis and the accompanying undervaluation on the European stock markets might lead to critical shares and infrastructures being acquired from abroad.[408] The Member States are called upon to either make use of the national investment control that has already been established to protect medical and other strategic sectors, or to implement investment control.[409] The Communication is to be seen in the context of a series of different measures which are to help deal with the crisis, including for instance export re-

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[402] BDI, Grundsatzpapier China. Partner und systemischer Wettbewerber – Wie gehen wir mit Chinas staatlich gelenkter Volkswirtschaft um?, January 2019, pp. 14-15; BusinessEurope, pp. 68 ff.

[403] With regard to closer European coordination also EFI, Report 2020, p. 71. On the steps towards harmonisation taken to date, in particular Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79 I of 21 March 2019, see paras. 809 ff. above

[404] European Commission, White Paper on levelling the playing field as regards foreign subsidies, COM(2020) 253 final, 17 June 2020, pp. 8, 13 and 38 - 39. see on this Section 4.1.1.

[405] European Commission, White Paper on levelling the playing field as regards foreign subsidies, COM(2020) 253 final, 17 June 2020, p. 23; see on this Section 4.1.1.

[406] European Commission, Communication from the Commission, Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation), 25 March 2020, C(2020) 1981 final.

[407] *Ibid.*, p. 1.

[408] *Ibid.*

[409] *Ibid.*, p. 2, as well as Annex.

strictions on medical supplies.[410] The reform of the AWV takes up the special interest in controlling investments in the health care sector and adds further categories such as medical devices within the meaning of medical device law (No. 10) to the catalogue of Section 55(1) sentence 2 AWV.[411]

824. According to the case-law of the European Court of Justice, restrictions that are issued for reasons of healthcare can be covered by the definition of public security and order as a compelling public interest.[412] This is a different legitimate policy goal than the protection of effective competition.[413] The security-policy analysis may justify taking more stringent action in a crisis. The fundamental separation between security and economic policy however applies, regardless of a crisis situation. In the event that the acquisition of shares justify special control for security policy reasons, this also applies in a crisis situation, and possibly all the more so. Conversely, economic-policy circumstances pure and simple are not suddenly included in the sphere of security policy because of a health or economic crisis.

825. The separation between security and economic policy should also be maintained in investment control in light of the Corona crisis. Apart from this, a uniform approach by the Member States may be particularly called for at present.

3.3.2 Merger control

826. By its preventive effect, EU merger control protects the competitive market structures in the EU internal market.[414] Cases are interesting in this context where an undertaking controlled by the Chinese State, or a private undertaking, receives targeted financial support from the Chinese State and acquires a private undertaking which has considerable market activities in the EU. Another relevant scenario consists of concentrations of private undertakings where the decision on the concentration and its evaluation is influenced by activities on the part of competitors which are controlled by the Chinese State.

827. Given the decision of the European Commission in the case of *Siemens/Alstom*[415], some discussion has arisen on whether EU merger control needs to be modified in order to better reflect the influence of state-controlled undertakings or financial support from China in worldwide competition. For example, France has championed this idea, supported by Germany and other Member States.[416] The Federation of German Industries (BDI) has also called for the merger control rules to be amended.[417] Despite having called for changes in merger control, the German Federal Ministry for Economic Affairs and Energy has underlined that its existing market economic orientation should be maintained as a matter of principle.

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410 https://trade.ec.europa.eu/doclib/press/index.cfm?id=2131, retrieved on 30 June 2020.

411 Cf. Federal Government, Fifteenth Regulation of the Federal Government amending the Foreign Trade Ordinance of 25 May 2020, BAnz AT 02.06.2020 V1.

412 ECJ, Judgment of 19 May 2009, C-531/06 - Commission/Italy, ECLI:EU:C:2009:315, para. 51.

413 See para. 264 above.

414 Recitals 2-6 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ EC 2004 L 42/1.

415 See European Commission, Decision of 6 February 2019, M.8677 – *Siemens/Alstom*.

416 See letter of Ministers Altmaier, Patuanelli, Le Maire, Emilewicz to European Commissions Vice President Vestager of 4 February 2020, item 1; Federal Ministry for Economic Affairs and Energy/Ministère de l'économie et des finances/Ministerstwo Przedsiębiorczości i Technologii, Modernising EU competition policy, https://www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf?__blob=publicationFile&v=4, retrieved on 5 March 2020.

417 BDI, Grundsatzpapier China. Partner und systemischer Wettbewerber – Wie gehen wir mit Chinas staatlich gelenkter Volkswirtschaft um?, January 2019, pp. 14-15.

828. The discussion covers several individual questions on which a statement suggests itself in terms of competition policy. Firstly, the question arises whether merger control needs to take into account any control or financial support by the Chinese State already in the context of the turnover-related notification criteria (Section 3.3.2.1). Secondly, the question arises whether the assessment of the market position of the undertakings concerned – and there specifically when assessing the competitive relevance of any potential competition – needs to take into consideration whether market entry is dependent on political and not only economic decisions (Section 3.3.2.2). Thirdly, the question is relevant whether, in addition to the market position of those who are involved in a concentration, the financial support that they receive from the Chinese State must be taken into account as well when the compatibility of the concentration with the common market is being assessed (Section 3.3.2.3). Fourthly, the question should be explored whether EU merger control procedure needs to be supplemented in order to guarantee that commercial policy interests are accounted for where required in individual cases (Section 3.3.2.4). Fifthly, and finally, it needs to be examined whether merger and investment control should be more interlinked in terms of procedure, and how this can be done (Section 3.3.2.5).

3.3.2.1 No changes in turnover-related action criteria recommended

829. EU merger control supplements the cartel-related rules of conduct that are contained in the European treaties (Art. 101 and 102 TFEU) for cases in which it must be examined in preventive terms whether a concentration, in case it is consummated, may significantly impede effective competition, in particular by creating or strengthening a market-dominating position (market structure control).[418] The Merger Control Regulation (Regulation 139/2004) is, hence, based on Art. 83 and 308 EC (= Art. 103 and 352 TFEU).

830. This is to say that merger control, fundamentally, relates to the conduct of undertakings within the meaning of Art. 101 and 102 TFEU.[419] In this context, private and state market players, as undertakings, are also treated as on an equal footing as a matter of principle.[420] An important condition is that the market players in question exercise an economic activity.[421] Individuals not economically active in sub-areas are regarded as undertakings, and hence as possible acquirers within a concentration, if they "carry out further economic activities on their own account or if they control at least one other undertaking."[422] Since the Chinese State engages in other economic activities, state control would, as a matter of principle, have to be regarded as (at least indirect) control exercised by an undertaking, analogously to the regulations applying to individuals.

831. The obligation to register in merger control is dependent on the turnover of those who are involved in a merger exceeding specific thresholds.[423] It is particularly difficult to calculate the turnover in those cases in which the actual economic circumstances can only be accurately shown if several units are considered as a single economic unit (undertaking). The EU Merger Control Regulation provides for screening that is simplified in this respect vis-à-vis Art. 101 and 102 TFEU.[424] Art. 5(4) of Regulation 139/2004 contains a specific provision on calculating the turnover of groups of undertakings. In this context, in order to rule out state acquirers being placed at a disad-

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[418] Cf. recitals 7-8 of Regulation 139/2004 and ECJ, Judgment of 21 February 1973, 6/72 – Europemballage Corporation and Continental Can Company, [1973] ECR 215, ECLI:EU:C:1973:22; Judgment of 17 November 1987, 142 and 156/84 – BAT and Reynolds, [1987] ECR 4487, ECLI:EU:C:1987:490 ("Philipp Morris").

[419] Körber in: Immenga/Mestmäcker Wettbewerbsrecht, Vol. 3, 6th ed. 2020, Art. 1 of the merger control regulation para. 27.

[420] Recital 22 of Regulation 139/2004 (therein on the equal treatment of Member States and private entities).

[421] See likewise ("an […] economic unit").

[422] European Commission, Commission Consolidated Jurisdictional Notice, OJ C 43 of 21 February 2009, p. 10, para. 12.

[423] Art. 1(2) and (3) of Regulation 139/2004.

[424] See European Commission, Commission Consolidated Jurisdictional Notice, OJ C 43 of 21 February 2009, p. 10, paras. 129 ff.; Körber in: Immenga/Mestmäcker Wettbewerbsrecht, Vol. 3, 6th ed. 2020, Art. 1 of the merger control regulation paras. 25-26, Art. 5 para. 7 (on the definition of the "undertakings concerned" in this context).

vantage vis-à-vis private acquirers, "calculation of the turnover of an undertaking concerned in a concentration needs, to take account of undertakings making up an economic unit with an independent power of decision, irrespective of the way in which their capital is held or of the rules of administrative supervision applicable to them".[425] Whether this is the case depends on whether the respective units "have an independent power of decision".[426] This requires a facts-based analysis of the individual case which, where appropriate, may also impact the assessment of the concentration on the merits.

832. In practice, the European Commission and the German Federal Cartel Office proceed on the principles summarised in paras. 830 and 831.[427] With regard to Chinese acquirers, the evaluation of the question of what turnovers are to be added up according to the principles described depends on a large number of factors, in particular on whether the state holds shares in the acquirer, which state level this shareholding is to be attributed to (central state, provinces, municipalities), and how it is shaped in the respective case. In a case of 2016, the European Commission decided that the Chinese central state was able, in the transaction at hand, to manage via its own administrative institutions – namely the State-Owned Assets Supervision and Administration Commission (SASAC) – the coordination of large Chinese companies that were active in the energy industry.[428] The relationship between the control mechanisms at central level and at lower levels (provinces, regions/municipalities) have also already been the subject-matter of the EU's decision practice.[429] In these cases, the control mechanisms were determined individually on the basis of Chinese legislative regulations/administrative rules, as well as of publications of sectoral associations. Covering only indirect, informal opportunities to exert an influence must be based on circumstantial evidence – on a case-by-case basis – and remains very difficult in practical terms.

833. Irrespective of the above, the Ministers of Economics of several Member States, including Germany, have called for merger control to take "stringent" account of the fact that State financial support in a non-market economy may distort the meaningfulness of the turnover of third-country purchasers.[430] This demand might suggest a change in the rules on the aggregation of turnover.. Should such an amendment, however, lead to a larger number of units needing to be taken into account in place of one economic unit, it would be questionable whether the regulations would still be covered by Art. 103 TFEU. This is because Art. 103 TFEU serves to achieve the purposes of Art. 101 and 102 TFEU, which relate to the activity of undertakings within the meaning of economic units.[431] It is moreover not clear how a broader criterion could be designed in an appropriate manner. No detailed proposals have so far been made for this.

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425 Recital 22 of Regulation 139/2004; European Commission, Commission Consolidated Jurisdictional Notice, OJ C 43 of 21 February 2009, p. 10, para. 192.

426 European Commission, Commission Consolidated Jurisdictional Notice, OJ C 43 of 21 February 2009, p. 10, para. 52, see also paras. 153, 193. As a matter of principle, this must also apply to transactions in which not a Member State but a third country is involved.

427 See for instance European Commission, Decision of 5 April 2017, M.7962 – ChemChina/Syngenta, para. 7 with footnote 6 (but without detailed information); Decision of 6 December 2017, M.8687 – Prisko/OKD Nástupnická, paras. 5 ff.; Decision of 19 May 2011, M.6113 – DSM/Sinochem/JV, paras. 8 ff.; FCO, Decision of 27 April 2020, B4-115/19 – Vossloh Locomotives GmbH/CRRC Zhuzhou Locomotives Co. (cf. case report of 27 April 2020), and the rulings quoted below.

428 European Commission, Decision of 10 March 2016, M.7850 – EDF/CGN/NNB Group of companies, paras. 29 ff. (esp. paras. 37 ff.); FCO, Decision of 27 April 2020, B4-115/19 – Vossloh Locomotives GmbH/CRRC Zhuzhou Locomotives Co. (cf. Case report of 27 April 2020).

429 European Commission, Decision of 15 March 2016, M.7911 – CNCE/KM GROUP, paras. 6 ff.; Decision of 14 September 2015, M.7709 – Bright Food Group/Invermik, paras. 8 ff.

430 Federal Ministry for Economic Affairs and Energy/Ministère de l'économie et des finances/Ministerstwo Przedsiębiorczości i Technologii, Modernising EU competition policy, item 1, https://www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf?__blob=publicationFile&v=4, retrieved on 5 March 2020.

431 For details on this see Monopolies Commission, Special Report 72, Strafrechtliche Sanktionen bei Kartellverstößen, Baden-Baden 2015, paras. 27 ff.

834. The Monopolies Commission considers that no regulation that is restricted to merger control should be recommended to take a third-country influence into account in calculating the relevant turnovers. The difficulties encountered in detecting the third-country influence are similar to those that may occur when assessing the market position within Art. 102 TFEU.[432] The problem arises in both cases that, from a European point of view, it may be impossible to obtain accurate information on the actual circumstances pertaining in China. The problem should be solved in a uniform manner.[433]

3.3.2.2 Expanding the criteria for potential competition to be recommended

835. When it comes to determining whether the concentration leads to an injury of the market structure in the sense of a significant impediment of effective competition, it is sufficient for the transaction to establish or strengthen a dominant position of the undertakings concerned.[434]

836. The finding of a dominating position is contingent on a determination of the relevant markets on which the concentration has an effect. Potential competition is to be placed outside these markets.[435] Potential competition is taken into account when assessing the market position of the undertakings concerned according to the relevant Commission guidelines, if any

> *"entry [to the market] is likely to constrain the behaviour of incumbents post-merger. For entry to be likely, it must be sufficiently profitable taking into account the price effects of injecting additional output into the market and the potential responses of the incumbents."*[436]

This provision does not take account of the fact that market entry may also depend on strategic policy decisions causing the undertaking in question to not act in compliance with the market conditions.[437] These strategic policy decisions may then also have the effect that undertakings decide to enter a market, which would refrain from doing so based on purely economic criteria. It might therefore be necessary to expand the guidelines accordingly.

837. According to the guidelines, the period for which the European Commission examines market entry depends

> *"on the characteristics and dynamics of the market, as well as on the specific capabilities of potential entrants. However, entry is normally only considered timely if it occurs within two years."*[438]

In particular, the regular two-year observation period appears to be too short if one takes into account that the Chinese State pursues longer-term strategies with its economic policy. Given that it is the concrete market circumstances that are important, the guidelines however appear to be sufficiently flexible as a matter of principle.

838. Following on from the proceedings in the case of *Siemens/Alstom*, the European Commission's assessment of potential competition has been criticised.[439] The parties to that case submitted that the potential entry of Asian

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432 See para.639 above.

433 See section 4.1.3.3 below.

434 Esp. in oligopoly cases with coordinated effects, a serious disturbance of effective competition may also be presumed to exist below the threshold to market domination. This does not however apply in the present context.

435 On this European Commission, Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372 of 9 December 1997, p. 5, para. 24.

436 European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 031 of 5 February 2004, p. 5, para. 69.

437 See paras. 608 ff. above.

438 European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 031 of 5 February 2004, p. 5, para. 74.

439 European Commission, Decision of 6 February 2019, M.8677 – Siemens/Alstom, paras. 488 ff.; see on this for instance Zedler (EU-Kommission), Neuere Entwicklungen in der europäischen Fusionskontrolle, 47. Brüsseler Informationstagung, FiW, 14. November 2019, Folien 26 f., http://www.fiw-online.de/files/bi_19_-_handout_zedler.pdf, Abruf am 30. Juni 2020.

suppliers should be assessed over a 5-to 10-year period given the dynamics of the high and very high-speed rolling stock market. The existing barriers to entry were said to be surmountable. The European Commission however countered the submission that the prospects of entry were extremely uncertain in the timeframe for entry proposed by the parties, and that the parties had not provided concrete evidence for their submission.[440] What is more, the parties themselves had excluded China, Korea and Japan in their notification due to insuperable barriers to entry into those territories from the relevant market, whilst the European Commission's subsequent market analysis revealed similar barriers in the EU.[441]

839. The European Commission's position is not objectionable according to the information available. In any event, the decisive question in this specific case was probably not the period of time during which Chinese companies could be expected to enter the market according to economic criteria.. The case rather proves that, with regard to the assessment of potential competition, it may be appropriate to explore the question of whether a strategic political interest of the Chinese State is relevant for the assessment of the probability of market entry by Chinese undertakings. This question was not examined in detail in the proceedings – in this respect in line with the guidelines –, albeit it cannot be ruled out as a matter of principle that a strategic political interest of the Chinese State may also be relevant for market entry, quite apart from its economic efficiency.

840. The Monopolies Commission recommends examining whether the Commission's Guidelines on the assessment of horizontal mergers (there: para. 69) should be supplemented to include criteria also permitting account to be taken of whether a market entry can be anticipated in a specific period for strategic political reasons, or whether a market entry steered by strategic policy may be likely for other reasons to restrict the margin of appreciation available to the undertakings concerned after the concentration. If it is difficult to prove that a third country is exercising influence in order to steer market entry, special arrangements may be needed in order to modify the requirements of proof where appropriate.[442]

3.3.2.3 No examination of the financial support independently of the market position as part of EU merger control

841. When examining whether a concentration is compatible with the common market, in accordance with Art. 2(1)(b) of Regulation 139/2004, the European Commission must take into consideration amongst other things the "economic and financial power", in addition to the market position, of the undertakings concerned. These criteria have played virtually no independent role in the decisional practice so far. They may, however, form the basis for consideration of state control or of state financial support suggesting a more stringent assessment of the market position of Chinese undertakings involved in the concentration. In this respect, merger control permits a tendentially broader view to be taken than does Art. 102 TFEU for abuse control vis-à-vis market-dominating undertakings.

842. In addition to the market position as the basis for economic power within the meaning of Art. 2(1)(b) of Regulation 139/2004, privileged access to resources or intertwinings with other undertakings may become relevant.[443] This should also make it possible to consider investment relationships in other Chinese undertakings or state bodies taking economic strategic decisions. This is likely not to be restricted solely to cases of a decisive in-

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[440] European Commission, Decision of 6 February 2019, M.8677 – Siemens/Alstom, paras. 498 and 500 ff.

[441] European Commission, Decision of 6 February 2019, M.8677 – Siemens/Alstom, paras. 108, 462 ff., esp. paras. 470 ff., paras. 501 ff.

[442] Cf. on this para.945 and section 4.1.3.3 below.

[443] Körber in: Immenga/Mestmäcker Wettbewerbsrecht Vol 1. EU/Part 2, 5th ed. 2012, Art. 2 of the merger control regulation paras. 261-263.

fluence within the meaning of Art. 3(1) of Regulation 139/2004 since other investment relationships may also impact the market in individual cases.

843. Financial strength can also exert an influence on the market position of an undertaking. In this regard, the Guidelines on horizontal mergers provide that the European Commission should examine the ability of the merged undertaking to hinder competitors' growth.[444] The Guidelines do not separately address state funds to which the undertaking may have access, even if the European Commission already also takes them into account in its examination.[445]

844. However, taking economic and financial power into account changes nothing as to the fact that, pursuant to Art. 2(3) of Regulation 139/2004, a concentration is only declared incompatible with the common market if it would significantly impede effective competition. As a matter of principle, this requires proof that the concentration creates or strengthens a dominant position. This position may be enhanced by the economic or financial power of the merged undertaking or the other factors designated in Art. 2(1)(b) of Regulation 139/2004. Banning the concentration of the undertakings concerned completely independently from their market position would, however, not be in line with the practice of the European Commission to date. It would also collide with the preventive function of merger control that can be derived from Art. 101 and 102 TFEU to prevent concentrations which would lead to market positions that harbour a risk of abuse that could only be sanctioned *ex post facto*. In this sense, merger control only protects the market structure. It is by contrast neutral with regard to the question of which means are employed to bring about changes in the market structure (for instance foreign subsidies).

845. Intervention in the case of subsidies can therefore only be examined in separate proceedings. If state funds which strengthen the financial power of an undertaking, and hence influence its market position, constitute Member State aid, the law as it stands requires it to be assessed in State aid proceedings whether the Member State may make the funds available to the undertaking.[446] If this is not the case, then the legal consequence is that the Member State is prohibited from granting the State aid, and/or that it is obliged to ask for it to be refunded. Such a procedure is not possible, by contrast, with regard to subsidies of a third country.

846. The European Commission now favours an arrangement permitting it to intervene in the case of third-country subsidies.[447] Such an arrangement might also be justifiable in the context of concentrations where a third country uses subsidies to increase the chances of specific bidders to the detriment of others, in the strategic political interest. It would take account of the fact that states may subsidise corporate takeovers in order to obtain control of individual markets or entire economic sectors in accordance with strategic political criteria. Having said that, any harmful competitive impact might only be incurred as the result of a large number of transactions and outside the prognosis period under the law on merger control for the individual transaction. It is also not merely a matter of preventing a market position that would cause problems in terms of merger control which could be abused following on from the concentration. Instead, as in the cases addressed in cartel and abuse control, as well as in State aid control (Sections 3.1.2.1 and 3.2.2.1), it is a question of the third-country support being able to have a competition-distorting effect *per se*. This problem should therefore be regulated in a uniform manner for the abovementioned constellations of problems, and separately from merger control (see Section 4.1 below).

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[444] European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 031 of 5 February 2004, p. 5, para. 36.

[445] European Commission, Decision of 21 October 2002, M.2908 – Deutsche Post/DHL (II), paras. 29 ff.

[446] See EGC, Judgment of 31 January 2001, T-156/98 – RJB Mining, 2001, II-337, ECLI:EU:T:2001:29, para. 125: No separate investigation of conformity with State aid law in the merger control procedure.

[447] European Commission/High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament, the European Council and the Council, EU-China – A strategic outlook, JOIN(2019) 5 final, 12 March 2019, p. 9.

847. The particularity exists in merger control proceedings that they are preventive proceedings. This is why strict assessment deadlines are applied to protect the undertakings involved. This could militate in favour of making the review of mergers financed by third-country subsidies also subject to deadlines. It should, however, be taken into consideration that, for instance, the acquisition of critical infrastructure, technologies or resources is, in any case, subject to investment control. This control is itself subject to deadlines. It should therefore be initially observed to what extent there is a practical need for procedural provisions over and above this.[448]

3.3.2.4 No "European authorisation to be granted by the Minister" and no other political participatory rights in EU merger control

848. The proposals that have been put forward by France, Germany and other Member States to modernise EU merger control initially called for far-reaching political participatory rights on the part of the Member States, which were however reduced later, in order to discuss the application of merger control with regard to the competitiveness of the EU's industrial sectors. At technical level, the Advisory Committee on Concentrations, a body established in accordance with Art. 19 of Regulation 139/2004 to coordinate with the cartel authorities of the Member States, should be open to feed input from the Member States into decision-making based on competitiveness considerations.[449] There were furthermore calls for the European Commission to draw upon the expertise of sector specialists from other Directorates-General in order to develop comprehensive approaches for markets affected by mergers.[450]

849. German law already provides for an authorisation to be granted by the Minister by means of which concentrations may be permitted in individual cases as a political measure after they have been banned, if the restriction of competition is outweighed by macroeconomic advantages of the concentration, or the concentration is justified by an overriding public interest (cf. section 42 of the Act Against Restraints of Competition [*Gesetz gegen Wettbewerbsbeschränkungen* – GWB]). There is currently no provision at EU level for such a political decision-making mechanism that could be influenced by the Member States. There, the European Commission decides on the compatibility of concentrations with the common market. Unlike decisions of the Federal Cartel Office in Germany, this decision is taken not solely according to competition law criteria, but, within the law as it stands, also in accordance with political criteria.[451] The European Commission is however exclusively bound by the interests of the EU in taking its decision.

850. In the present context, the proposals are to be assessed with regard to concentrations where the undertakings involved in a concentration are competing with market players from third countries which are benefiting from competition-distorting third-country measures, and thus have increased economic power (defensive mechanism).

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448 The subsidiary instrument proposed by the Monopolies Commission in Section 4.1 could then be supplemented to include procedural provisions in the case of practically-relevant loopholes according to which it would be applicable in concentration cases prior to the conclusion of the obligations to carry out an assessment under merger control law. The Monopolies Commission is however also in favour of stringent assessment deadlines outside merger control; see Section 4.1.3.1 and Section 4.1.4 for more detail.

449 Federal Ministry for Economic Affairs and Energy/Ministère de l'économie et des finances/Ministerstwo Przedsiębiorczości i Technologii, Modernising EU competition policy, No. 5, https://www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf?__blob=publicationFile&v=4, retrieved on 5 March 2020.

450 Letter of 4 February 2020 by Ministers Altmaier, Patuanelli, Le Maire, Emilewicz to European Commission Vice-President Vestager, Nos. 4-5; Federal Ministry for Economic Affairs and Energy/Ministère de l'économie et des finan-ces/Ministerstwo Przedsiębiorczości i Technologii, Modernising EU competition policy, No. 5, https://www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf?__blob=publicationFile&v=4, retrieved on 5 March 2020. The request contained in the second paper (item 6) to enhance the role played by the Council in the European Commission's decision-making was not maintained in the letter of 4 February 2020.

451 On this Montag in Monopolies Commission, Politischer Einfluss auf Wettbewerbsentscheidungen, Tagungsband zum Wissenschaftlichen Symposium anlässlich des 40-jährigen Bestehens der Monopolkommission, Baden-Baden 2015, p. .43 (44-45).

The proposals being discussed at present go much further than this in some cases. Amongst other things, they also relate to the establishment of a counterweight to US digital corporations, up to enabling the establishment of European or national champions (offensive mechanism). These aspects need not to be explored further here. With regard to the problem of concentrations to defend against third-country market players with increased economic power mentioned at the outset, it should be borne in mind that approval of such "defensive mergers" would entail a similar problem as facilitating defensive or export cartels or defensive State aid. It would counter potential third-country-induced distortions of competition with transactions, which in turn would significantly impede effective competition.

851. The proposals quoted at the outset in any case appear to be too far-reaching. Greater involvement on the part of Member State authorities and Ministries in EU merger control would be likely to constitute a substantial burden on the merger control proceedings, bound as they are to deadlines, by imposing additional coordination requirements, and the related uncertainty. The involvement of national bodies in the proceedings would also not be expedient, as they could not add anything material to the decision with regard to such questions, given the exclusive EU competences for internal market-related competition policy, as well as for commercial policy questions. The only consequence of this would be the risk that the decision of the European Commission, orientated towards the Union interest as it is, would be watered down by the Member States' political interests. The expertise of sector specialists from the Directorate-General for Competition is also not in need of expansion.

852. Nor can any further benefit from the involvement of the interests of the Member States be justified by arguing that individual Member States seek to maintain and increase the competitiveness of their domestic industry. Involving Member State interests could, in particular, lead to the interests of large Member States prevailing in the event of a conflict. Hence, involving Member State interests could encourage the fragmentation of the EU internal market, and thus run counter to the Union's interest in protecting this internal market.

853. The Monopolies Commission acknowledges that the undertakings concerned have a legitimate interest in being protected against competition-distorting third-country measures in competition with market players from third countries. However, it disfavours provisions aiming to expand for this reason possibilities to approve concentrations which in turn significantly impede effective competition. Instead, it would appear preferable to develop a set of instruments making it possible to neutralise the competition-distorting impact of third-country measures in the EU internal market (see Section 4.1).

3.3.2.5 Closer interlocking of merger and investment control recommended

854. Merger and investment control have been regulated in separation from one another to date. This also relates to the procedures, this being the case both at EU and at national level. In accordance with Art. 21(4) of Regulation 139/2004, Member States may take appropriate measures to protect interests of public security insofar as these are compatible with the general principles and other provisions of Community law. These interests are hence not separately accommodated in EU merger control procedure. At national level, merger control is carried out by the Federal Cartel Office in the case of corporate takeovers, and investment control is effected by the Federal Ministry for Economic Affairs and Energy. For the purposes of coordination, it is only provided in section 50c of the Act Against Restraints of Competition that the Federal Cartel Office may pass information on from merger control registrations.

855. The fact that the merger and the investment control procedures are carried out independently of one another means for the undertakings in question that the period up to the conclusion of the proceedings is uncertain. These uncertainties are partly caused by the differentiated distribution of competences in merger and investment control, and partly by the different designs of the procedures. The latter needs to take account of the nature of the respectively relevant legal issues, and of the respectively relevant facts. Having said that, the uncertainties are amplified by the fact that the deadlines for prohibition are decision periods which each only start to run on the basis of a complete registration (merger control) and of a notification accompanied by complete documentation (investment control).[452] The decision periods can be strategically extended by requesting additional documents. This harms the function of the deadlines, namely of protecting undertakings against the proceedings being extended in a manner that they are unable to foresee. This problem already leads to questionable burdens for the undertakings concerned in EU merger control. The problem is doubled in the event of a parallel examination for the purposes of investment control. The German merger control procedure does offer further possibilities to extend the deadlines than is the case in EU merger control, but they are normally not exhausted in practice.[453]

856. Greater intertwining of merger and investment control in procedural law appears to be desirable, both at EU and at national level. At least the decision deadline for the Federal Ministry for Economic Affairs and Energy should be such that applicants are also given clarity when the EU merger control proceedings have been concluded as to whether the transaction is prohibited in accordance with the national investment control provisions. This would at least reduce the level of uncertainty for the undertakings concerned.

4 Introducing new instruments

857. The information contained in the previous Section 3 has shown that the existing regulatory framework does not contain any specific provisions for neutralising competitive advantages for specific undertakings because of interference in the economy on the part of the Chinese State. Having said that, economic operators in the EU internal market are nonetheless protected by the law on competition, and – in the event of cross-border goods imports – by the anti-dumping and anti-subsidy rules. There is hence also no need for a comprehensive new set of tools, but rather the existing rules need supplementation.

858. The Monopolies Commission, however, opines that closing the regulatory gaps that have been identified cannot be a matter of defending against general threats to European interests posed by the Chinese State. This special chapter exclusively pursues the interest in ensuring effective, non-discriminatory protection of competition within the meaning of the EU Treaties. There is a need to clarify, firstly, that questions of security policy are to be separated from questions related to concerns of competition policy. Secondly, Chinese measures and those of other third countries in the EU internal market may have a similarly competition-distorting effect. It can therefore only be a matter of developing tools to create equal competition conditions in relations with third countries in general, and not with China in particular. Thirdly, it would also run counter to the EU's partnership-based economic-policy approach in relations with China for the EU to take particularities of Chinese state capitalism as a reason for enacting special burdensome rules.

859. This having been said, firstly instruments will be looked at below which protect the competitive equal opportunities of market operators in the EU internal market in the event of a third-country influence on the economy (Defensive instruments; Section 4.1). Secondly, a statement will be made on instruments which serve to actively enforce the European competition principles in relations with third countries – and with China in particular (Offensive instruments; Section 4.2).

4.1 Tools for creating equal competition conditions in the EU internal market

860. According to the above, a third-country influence on the economy may lead to competition problems of its own. This also applies to Chinese state capitalism, in two ways:

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452 See Art. 4(1) and Art. 10(1), second sentence, of Regulation 139/2004 in conjunction with Art. 4(1), second sentence and (2) of Implementing Regulation 802/2004 and section 39(1) and (3) of the Act Against Restraints on Competition (in merger control); section 59(1) of the Foreign Trade Ordinance (in investment control).

453 See section 40(1) and (2) of the Act Against Restraints on Competition.

- Firstly, there are no rules linking to interference by the Chinese State in the economy as such and preventing any competition-distorting effects of such interference in the EU internal market;
- Secondly, interference in the economy on the part of the Chinese State may therefore not be recognisable as such according to the information that is available in the EU.

Competition-distorting interference may on principle take place in the form of an obligation incumbent on Chinese undertakings (in China/in the EU), or in the shape of an advantage granted to Chinese undertakings (in China/in the EU). Admittedly, measures are focussed in practice on benefitting Chinese undertakings, so that they are able for instance to operate in the EU internal market at low and cut-throat prices. In addition, the existing rules within the EU which address measures related to state commitments specifically with regard to SOEs are only enforced to a very limited degree. The added value of similar rules therefore appears questionable with regard to third-country measures, even though they suggest themselves particularly for SOEs managed by the State in state capitalist systems. However, this may justify a facilitation of proof or a shift in the burden of proof.

861. As a matter of principle, a benefit ensuing from state measures (subsidies) contradicts the approach taken by EU law in accordance with which advantages granted by the State posing a burden on the state budget and damaging equal opportunities on the European internal market are regarded as a competition-distorting interference in the market (cf. Art. 107(1) TFEU).[454] This position, which originates in the image of equal competition conditions, can be justified within the EU if one considers that subsidy races should be avoided that pose a burden on the taxpayer and lead to inefficiencies in the internal market. State-subsidised undertakings may be able to apply their financial power in a manner similar to that of dominant undertakings in order to build up market power in the long term and drive out competitors. What is more, subsidies may damage productive and dynamic efficiency on a market if inefficient undertakings are artificially kept alive or the undertakings' incentives to invest in research and development are reduced.[455] These aspects may in economic terms justify taking preventive action to protect competitive equal opportunities in the EU. It is furthermore possible to deduce from this an interest that is acknowledged under European law that third countries too may only use subsidies in the EU internal market to the minimum extent possible, at least where such measures may have damaging effects on the EU internal market. Apart from harm caused to equal opportunities, this may also be justified with the danger of a subsidy race, at least if the EU in turn reacts to Chinese or third-country subsidies by providing Union State aid. Specifically in the case of Chinese subsidies, the danger is furthermore recognised that economic cooperation with individual EU Member States may also be transformed into political influence which might be disadvantageous to the uniform protection of the EU's interests.[456]

862. Two approaches are generally conceivable with regard to the arrangements to be made. According to one approach, a situation should be avoided in which subsidised undertakings from third countries squeeze out their European competitors and occupy markets by means of practices that are in principle are only a problem for dominant undertakings (*e.g.*, cut-throat prices) ("market domination approach"). According to another approach, the advantage is to be eliminated that benefits subsidised undertakings from third countries because the subsidy is subject to less far-reaching control than State aid that is granted by an EU Member State ("State aid equivalence approach"). Both approaches may also be combined as a matter of principle.

863. In a White Paper published in June 2020, shortly prior to the presentation of the present report, the European Commission developed a combined approach that is nevertheless orientated above all towards the State aid

[454] ECJ, Judgment of 2 July 1974, 173/73 – Italy/Commission, [1974] ECR 709, ECLI:EU:C:1974:71, paras. 26/28; on this again Behrens, in: Birnstiel/Bungenberg/Heinrich, Europäisches Beihilferecht, Baden-Baden 2013, introduction para. 158.

[455] Cf. in this regard already Monopolies Commission, Biennial Report XVII, Baden-Baden 2008, paras. 894 ff.

[456] See, *e.g.*, Federal Academy for Security Policy, Arbeitspapier Sicherheitspolitik, No. 6/2019, Chinas 16+1-Kooperation mit Osteuropa: Trojanisches Pferd ohne volle Besatzung, p. 4.

equivalence principle, and that in some instances provides for far-reaching powers of intervention (Section 4.1.1). The White Paper was preceded by various considerations which can each be assigned more clearly to one of the two approaches mentioned above (Section 4.1.2). For its part, the Monopolies Commission favours an arrangement that is restricted in terms of its scope, making it possible to neutralise the advantage ensuing from the subsidy in case of gaps in the existing legal framework unless there is a particular Union interest (Section 4.1.3).[457] It then goes on to submit its own regulatory proposal (Section 4.1.4).

4.1.1 EU White Paper on levelling the playing field as regards third-country subsidies

864. The European Commission published a White Paper on 17 June 2020 which contains preliminary considerations for a planned legislative proposal on "levelling the playing field as regards foreign subsidies".[458] Following a brief introduction, the White Paper goes on to present the problem, analyse the legal gaps and present three Modules. The first Module is designed as a general tool, the second relates to corporate acquisitions, and the third to cases related to public procurement.[459] Apart from this, the White Paper explores the special problem – which the present report does not go into in detail – of cases in which third-country-subsidised undertakings become involved in EU-funded measures.[460]

865. The legal basis and the nature of the legal act that is being considered are left open. The European Commission however presumes that the act could be designed in compliance with the EU's international obligations (*e.g.*, at WTO level and in free trade agreements), and with higher-ranking European law (*e.g.*, the fundamental freedoms).[461] The European Commission considers that the new set of tools could be applied in parallel to the existing rules on merger control, as well as to those of the law on competition and State aid, since these rules do not relate specifically to third-country subsidies. It would also complement the existing trade defence and investment control instruments.[462] The European Commission however favours an exception for the cases of air and maritime transport, which are regulated on a sector-specific basis.[463]

866. Comments on the considerations contained in the White Paper are to be called for in a consultation procedure.[464] The consultation is to run until 23 September 2020, and relates both to the considerations on the individual Modules, and to the question of whether the Modules should be introduced individually or in combination. The Monopolies Commission would like to submit its comments here on the considerations as part of its statutory reporting mandate. To this end, the Modules under consideration will be set out in detail below (Section 4.1.1.1). Building on this, the Monopolies Commission will appraise the considerations with regard to the specific problems posed by Chinese state capitalism (Section 4.1.1.2).

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457 See paras 652-653 and 675 ff. above on the Union interest.

458 European Commission, White Paper: On levelling the playing field as regards foreign subsidies, COM(2020) 253 final, 17 June 2020 (hereinafter: White Paper).

459 European Commission, White Paper, Section 4; specifically regarding Module 1 (general) pp. 13 ff., Module 2 (Company acqusitions) pp. 22 ff. and on Module 3 (Award of contract) pp. 30 ff.

460 European Commission, White Paper, Section 5.

461 European Commission, White Paper, pp. 40 and 41 ff.

462 European Commission, White Paper, Section 6.

463 European Commission, White Paper, pp. 44-45.

464 European Commission, White Paper, Section 7.

4.1.1.1 Major characteristics of the new set of tools under consideration

867. The Commission bases its considerations on the definition of "subsidy" contained in anti-subsidy law and in sectoral competition law.[465] The first Module is provided as a general tool to examine third-country subsidies with regard to their effects on competition. This includes a case in which subsidies granted are used as part of shareholdings in undertakings. The second Module should be a preventive tool which is to only apply in shareholdings in undertakings if these are targetedly subsidised (direct facilitation), or where the bidders generally benefit from third-country subsidies (indirect facilitation). The third Module would be placed as an interim stage in Member State procurement proceedings, and could lead to bidders who have received subsidies from third countries being excluded from procurement proceedings.

First Module (general screening of subsidies)

868. The first Module would permit an analysis of third-country subsidies that are granted to undertakings established in the EU and cause "distortions in the internal market".[466] Option 1 entails undertakings in the EU being considered as any undertaking established in the EU. It should however be considered to expand this to undertakings active in the EU (*e.g*., an undertaking established outside the EU acquiring an EU target undertaking) (Option 2).

869. A third-country subsidy award should only be conditional on the recipient being entitled to the subsidy.[467] Regardless of this, however, the tool would not be linked to the grant of the subsidy as such, but to the use of the subsidy by the recipient undertakings "in all market situations" (*i.e*., production of goods, provision of services or investments). It should exclude subsidies being used for goods and agricultural products imported into the EU from third countries falling within the scope of the commercial policy protection instruments of the EU (esp. the EU Anti-subsidy Regulation).[468]

870. Central importance attaches to the question of when a subsidy constitutes a "distortion in the internal market" (damage theory). As a matter of principle, this refers to distortions of competition since the White Paper aims to guarantee fair competition conditions. The European Commission proposes a two-pronged procedure in order to ascertain the actual or potential distorting impact:[469]

- Firstly, a list of categories of foreign subsidies should be defined that are considered likely to distort the internal market. These would concern subsidies that are prohibited as a matter of principle by international law or by EU State aid law. Examples might be export subsidies; furthermore, subsidies to ailing undertakings taking place independently of a serious disturbance to the national or global economy, and which are granted without the need for restructuring; and operational subsidies in the shape of selective tax relief; or subsidies to indirectly facilitate acquisitions.

- Secondly, a detailed case-by-case analysis should be carried out with regard to other subsidies. Given the general lack of transparency with regard to third-country subsidies, a number of indicators should be taken as a basis in order to ascertain the impact of the subsidy in the internal market; *e.g.*, the amount of the

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[465] European Commission, White Paper, Annex I reference in footnotes 66 -67 to Regulation 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union, OJ L 176 of 30 June 2016, p. 55 and to Regulation 2019/712 of the European Parliament and of the Council of 17 April 2019 on safeguarding competition in air transport, and repealing Regulation (EC) No 868/2004, OJ L 123 of 10 May 2019, p. 4.

[466] European Commission, White Paper, pp. 13 ff.; on the term "undertakings established in the EU" specifically footnote 25.

[467] European Commission, White Paper, p. 15.

[468] European Commission, White Paper, pp. 13-14 footnotes 24 and 25.

[469] European Commission, White Paper, pp. 15-17.

subsidy, the market position of the recipient, the market situation, market conduct or the scope of the economic activities. The European Commission furthermore proposes that the degree of openness of the market in the third country granting the subsidy might be taken into consideration.

871. The examination should, however, definitely be restricted to subsidies from a specific threshold upwards (*e.g.*, EUR 200,000). Were it to be found that a third-country subsidy is likely to distort the internal market, and were evidence to be available that the subsidised economic activity or the subsidised investment has a positive effect within the EU or on public interests that are recognised by the EU (*e.g.*, job creation, environmental protection), then the negative and positive effects would have to be weighed up against one another in order to ascertain the Union's interest.[470]

872. The procedure should be carried out in two stages:[471]

- The first stage of the procedure (preliminary review) should be initiated *ex officio* by the body that is respectively competent. In cases of the subsidised acquisition of an EU target undertaking, the acquisition would therefore as a rule not be examined until subsequent to its implementation. Furthermore, the European Commission stresses that, due to the fact that initiation would be carried out by the authority, the information received from the market operators would be crucial. The competent bodies should be able to request information from the undertakings concerned. Should a competent body conclude that there was potential for a harmful subsidy, it would initiate an in-depth investigation.

- The in-depth investigation is said to also entail comprehensive powers to require information and obligations to provide information. Were the supervisory authority to conclude that there is a distortion in the internal market, it should be empowered to impose redressive measures or to issue a decision with commitments, in response to commitments that have been offered by the undertakings. Otherwise it would close the case.[472] A redressive measure might include the reimbursement to the third country of the financial advantage ensuing from the subsidy. Given potential difficulties when it comes to proving and monitoring such reimbursement, however, alternative redressive measures should be permitted. These would be redressive measures targeting the exploitation of the subsidy by the beneficiary undertakings; *e.g.*, obligations to sell assets or to reduce the market presence, investment and acquisition bans, obligatory access to mobility applications or licences, prohibition of a specific conduct, the obligation to publish specific research and development results, or also redressive payments to the EU or its Member States. Obligations of transparency and reporting should certainly be imposed on the undertakings with regard to the future.[473]

873. The competences for the first Module should be broken down between the European Commission and the Member State authorities. Here, purely national cases should be examined by the Member State authorities, and cross-border cases centrally by the European Commission. Cooperation mechanisms would also have to be introduced. The White Paper is orientated towards the procedural rules of EU law on competition in this regard.[474]

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[470] European Commission, White Paper, p. 17.

[471] European Commission, White Paper, pp. 17-19.

[472] European Commission, White Paper, pp. 17-19.

[473] European Commission, White Paper, pp. 19-20.

[474] European Commission, White Paper, pp. 21-22.

Second Module (shareholdings in undertakings)

874. The second Module is intended for possibly subsidised acquisitions with regard to undertakings established in the EU, and has visibly been designed on the basis of merger control in accordance with Regulation 139/2004. The procedure should be initiated through notification. Acquisitions to be notified should include the acquisition of control as defined under the law on merger control, of shares or voting rights above a threshold that would have to be defined, or of other "material influence".[475]

875. A "potentially subsidised acquisition" would be defined as a planned acquisition of an EU target undertaking where a shareholding undertaking has received a financial contribution from any third-country government within a specific period (*e.g.*, three years prior to the notification or up until one year following the closing of the acquisition). The examination could therefore be made to depend on the EU target undertaking's activity in the EU overstepping specific qualitative or quantitative thresholds, or the acquisition being facilitated by a specific amount of financial contributions.[476]

876. The concentration would be assessed for the potential distortion of the competition conditions with regard to investment opportunities in the internal market. With targeted subsidies (direct facilitation), it should be presumed as a rule that they cause a distortion of the internal market. An analysis would otherwise have to be carried out on a case-by-case basis in other instances (*de facto* facilitation). Also in this context, the lack of transparency with regard to third-country subsidies should be taken into account by considering specific indicators (including reciprocity considerations). There is also to be a weighing up against subsidy-related advantages with regard to the application of the second Module.[477]

877. The procedure would be orientated towards the procedure in the Merger Control Regulation (two phases). The notification should initially be submitted as a short information notice. This short information notice would, however, already trigger a standstill period. It should also be possible to initiate the procedure *ex officio* should the notification obligation be circumvented. As a decision, clearance with and without conditions should be considered, as well as the prohibition of the concentration. The conditions could be set at a corresponding offer of commitments on the part of the acquirer, and could take as an orientation the redressive measures of the first Module.[478] According to the assessment of the European Commission, reimbursements or redressive payments and transparency obligations might be less well suited as redressive measures within the second Module. The commitments would therefore probably be focussed on redressive structural measures.[479]

878. In terms of competences, the European Commission prefers a centralised system in order to save costs and prevent problems in coordination between the authorities. Were Modules 1 and 2 to be combined, the Member States could also examine acquisitions *ex officio* below the thresholds set for Module 2. Although the European Commission does not make a specific recommendation, such a combination would, firstly, guarantee the central examination of major acquisitions and, secondly, ensure the examination of other transactions that are relevant to the internal market.[480]

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[475] European Commission, White Paper, p. 23.

[476] European Commission, White Paper, p. 25.

[477] European Commission, White Paper, pp. 26-27.

[478] European Commission, White Paper, pp. 27-29.

[479] European Commission, White Paper, p. 29.

[480] European Commission, White Paper, p. 29.

Third Module (public procurement)

879. The third Module should supplement State aid control, which prevents distortions of competition caused by State aid of the Member States also within public procurement, with a suitable tool with regard to third-country subsidies.[481] The third Module would target subsidies that make it easier to take part in Member State procurement proceedings by enabling the beneficiary bidder to participate in the respective procurement procedure to the disadvantage of non-subsidised undertakings.[482]

880. A two-stage examination would also be carried out in this context. It would be assessed first of all whether the bidder concerned is benefiting from a third-country subsidy. It would then be assessed with regard to a concrete procurement procedure whether the third-country subsidy enables the beneficiary bidder to take part in the procedure to the disadvantage of non-subsidised undertakings. It would be possible here too to distinguish between targeted subsidies with regard to individual sets of procurement proceedings (direct subsidy), and subsidies granted independently of these (*de facto* subsidy), but it would certainly be relevant whether the bid would be more viable in economic terms as a result of the subsidy than without the subsidy, for instance because the prices being offered are below the costs. In other cases, the distortion could be detected according to principles and criteria applicable to the first Module where the subsidy from a third country made it easier to take part in the procurement procedure.[483]

881. The procedure would be initiated by bidders having to notify the contracting authority, when submitting their bid, whether they themselves or members of their consortium, sub-contractors or suppliers have received a financial contribution in the past three years prior to taking part in the procedure, or whether they expect to receive such a financial contribution during the implementation of the contract.[484] The notification obligation could be restricted to cases in which the financial contribution reaches a specific value within a particular period (*e.g.*, three years prior to the notification or up until one year following the anticipated completion of the contract); a threshold could be imposed above the thresholds of EU procurement directives. The notifications should be published. In order to minimise difficulties encountered in enforcement resulting from errors in self-assessment, third parties and competitors should be entitled to inform the contracting authority that a notification should have been carried out as part of the procedure.[485]

882. Once any notification has been examined for its completeness, the contracting authority would forward it to the supervisory authority competent under competition law. The supervisory authorities could be coordinated in a similar manner as in the cartel procedure in accordance with Regulation 1/2003. As in the first Module, the European Commission and Member State authorities could act as competent supervisory authorities.[486] The European Commission should be the supervisory authority with exclusive competence in procurement pursuant to intergovernmental agreements, especially for large infrastructure projects.[487]

883. The examination should also take place in a two-stage procedure in this Module, the preliminary review being restricted to the possible existence of a third-country subsidy, and the in-depth investigation being restricted to a finding that such a subsidy had been provided. The European Commission, the contracting authority and – at least in the preliminary review – all competent national supervisory authorities of the other Member States would

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481 European Commission, White Paper, pp. 30 ff.

482 European Commission, White Paper, p. 30.

483 European Commission, White Paper, pp. 8, 30-31.

484 European Commission, White Paper, p. 31.

485 European Commission, White Paper, pp. 31-32.

486 European Commission, White Paper, pp. 32-33.

487 European Commission, White Paper, pp. 34-35.

have to be informed at the end of the respective stage of the procedure. The European Commission should however be informed of the outcome of the in-depth investigation before the contracting authority so that the decisions to be taken could be coordinated. The procedure should in each case be subject to strict deadlines, *e.g.*, fifteen working days for the preliminary review, and no more than three months for an in-depth investigation.[488] The contracting authority would have to investigate once a subsidy had been detected whether the latter had distorted the procurement proceedings.[489]

884. It would not be possible to award a contract to the possibly subsidised bidder during the investigation proceedings. It would, however, be possible to award it to other bidders. The procedure would have to be suspended until the end of the investigation before awarding the contract to the possibly subsidised bidder. If this is the case, the bidder concerned would be excluded from the concrete procurement procedure, and where appropriate from other contract awards for a period of for instance up to three years. The exclusion would not be necessary were the bidder to prove that it was no longer benefiting from third-country subsidies.[490]

4.1.1.2 Comments by the Monopolies Commission

885. Despite its concise nature, the White Paper is convincing in terms of its analysis of the problem, and in the Monopolies Commission's view adopts the correct approach towards a solution with the State aid equivalence approach. This notwithstanding, the design of the instruments under consideration requires discussion in detail. The starting point of the White Paper can be concurred with, namely that there may be a need of regulation where (private or state) undertakings benefit from particular competitive advantages on the basis of state support. EU State aid law already provides a regulatory framework for Member State support. The regulatory framework under European law currently has gaps in this regard in terms of third-country subsidies.

886. Along with the problem of state funding, it would have been possible to take account of the fact that third countries may also intervene in the economy in a manner that may cause problems with regard to competition by exerting control rights vis-à-vis individual undertakings (esp. SOEs).[491] The latter problem could be relevant particularly with regard to a state capitalist system such as the Chinese system.[492] What is more, there may be shortcomings when it comes to transparency with regard to the nature and exercise of state control rights in third-country-controlled undertakings.[493]

Basis of authorisation

887. The Monopolies Commission considers that the legislative act under consideration should be based on Art. 103 and 109 in conjunction with Art. 352 TFEU. The proposal foresees provisions which would be based on the equal treatment of all undertakings in relation to state funding. These would be third-country measures, which is why Art. 352 TFEU would have to be applied in addition to Art. 103, 109 TFEU. With regard to provisions related to competition based on Art. 103 and 352 TFEU, it is also recognised that they may refer to behaviour by undertakings from third countries operating in the EU internal market where there are competition-distorting effects in the internal market (*e.g.*, within cartels or concentrations).[494] By contrast, it would not be a legislative act targeting

488 European Commission, White Paper, pp. 32-33.

489 European Commission, White Paper, pp. 33-34.

490 European Commission, White Paper, pp. 32-33.

491 Cf. in European law once more Art. 106(1) TFEU; in addition however also para. 780 (The provision leads a shadowy existence in the EU; corresponding arrangements in relations with third countries could hence backfire on the EU).

492 See para. 860 above at the end.

493 See para.781 above.

494 See paras. 934-936 below.

the relationship with third countries under international law (within the meaning of Art. 207(2) TFEU). A provision under the law on competition would furthermore also be compatible with the case-law of the European Court of Justice. The Court likewise locates the legal basis for rules on competition within free trade agreements in the competition rules contained in the Treaties.[495]

Orientating the definition of subsidy towards EU State aid law

888. The envisaged linking of the definition of "subsidy" to that contained in the Anti-subsidy Regulation and in sectoral competition law is questionable because of the associated deviation from state aid principles. The Monopolies Commission considers that the parallels to EU State aid law should be maintained. True, the definition of subsidy under anti-subsidy law may appear to third countries to be more acceptable as an international standard. In fact, however, it is a matter of including measures under competition law which should be regarded as Member State aid in accordance with Art. 107 ff. TFEU (the purpose: equal treatment in order to close gaps). Furthermore, linking to the definition of State aid under EU law would entail greater legal certainty since this term has already largely been given concrete form in the European case-law and in the practice of the Commission.

Orientating the set of intervention tools towards EU State aid law

889. In the same vein, the sub-division of the proposed set of tools into three separate Modules with different scopes should be questioned. According to the proposals contained in the White Paper, with regard to the recipient of the subsidy, the first Module is principally to be restricted to undertakings established in the EU, whilst the second and third Modules relate to undertakings from third countries. In this respect, it should be borne in mind that the uniform link to undertakings operating in the EU would be most likely to meet the standard of EU law on competition. However, the restriction to undertakings established in the EU contained in the first Module would lead to exclusive application of the anti-dumping and abuse of dominance rules in cases relating to the cross-border movement of goods. By contrast, cross-border services would not be covered by the first Module, and also not by the trade-policy defence instruments. This design apparently intends to prevent conflicts with the law of the WTO. Still, the Monopolies Commission does not find this approach to be convincing. It opines that the feared conflicts do not exist if only equal treatment of all undertakings in the EU internal market is created under competition law.[496] What is more, the approach selected in the White Paper is not applied consistently in that the second Module covers cross-border investments and the third Module covers procured services.

890. However, the Monopolies Commission also considers a different approach to be preferable in the event of any conflicts with the law of the WTO, and where appropriate other law. In place of the White Paper's approach with several tools, a uniform instrument should be provided for in respect of all third-country subsidies, which is strictly subordinate (subsidiary) vis-à-vis the existing provisions. Accordingly, third-country subsidies should be centrally notified in the same way as EU State aid. A design parallel to EU State aid law would also not rule out thresholds being introduced or specific subsidies being cleared by a block exemption regulation. Other than in State aid law, however, there should only be intervention against third-country subsidies if no other foreign trade or competition law mechanism is available, and if intervention appears to be necessary in the interest of the Union. It should be borne in mind with regard to potential anti-dumping or anti-subsidy measures that such measures are normally only taken in response to a complaint from the industries affected. A block exemption would therefore appear to be expedient (except for the notification obligation). Also in cases in which the protection of the internal market is adequately guaranteed via the existing competition rules (*e.g.*, in the case of cut-

495 ECJ, Opinion 1/92 of 10 April 1992, Opinion 1/92 – EWR II, [1992] ECR I-2821, ECLI:EU:C:1992:189, para. 40 (EWR-II); Judgment of 9 August 1994, C-327/91 – France/Commission, [1994] ECR I-3641, ECLI:EU:C:1994:305. See on this para. 934 below.

496 See paras 930 ff. below.

throat prices in violation of Art. 102 TFEU), it can be assumed that an intervention on the basis of the new instrument could be dispensed with as a matter of principle.

891. The breakdown of the instrument into three different Modules, and the design of the individual Modules, is additionally not convincing in terms of the legal consequences. Referring to Art. 107 ff. TFEU, the Monopolies Commission considers that it would be preferable, as uniform legal consequence, to siphon off unjustified competitive advantages related to third-country subsidies. That legal consequence could also be provided for in the context of concentrations within the meaning of Regulation 139/2004, and in procurement proceedings, in the same way as it is possible to require the reimbursement of EU State aid in the context of investigations under merger control law and under the law on procurement. True, the assessment of third-country subsidies may deviate from the assessment of Member State aid. Such aid is funded by European taxation, and may trigger a subsidy race between the EU Member States, whilst third-country subsidies in the EU are funded by taxpayers in the third countries concerned.[497] It is however likely that this aspect can be adequately done justice to via appropriately generous exception arrangements or in the consideration, provided for in the new set of tools, to ascertain the Union's interest. Alternatively, the right to intervene could be exercised in such a way that the competent authority only intervenes against subsidies where there are special indications of a overriding prejudice to the EU internal market, after weighing up against any subsidy-related advantages.[498]

892. The Monopolies Commission furthermore also considers there to be no need to distinguish as to whether a reimbursement of subsidies to the granting third country can be proved by the undertaking or be monitored by the EU authorities. It would be possible to solve any problems arising in this regard by providing for an obligation to effect redressive payments to the EU or to the Member States as an alternative to a reimbursement to the third country. This would reduce the incentive to operate in the EU internal market using subsidies contributed by third countries, and hence by foreign taxpayers. However, siphoning off would again correspond more closely to State aid law than would the alternative redressive measures intended. State aid law only permits other measures than a reimbursement of the financial advantage where the reimbursement is not suited or possible in order to restore equal competition conditions.[499] In this regard, it is narrower than the instruments for third-country subsidies, which have been proposed. Other types of redressive measure, as being considered in the White Paper, furthermore carry a high level of risk that they may be used covertly for industry-policy purposes, and not solely to redress competition-related problems.

893. The redressive measures that have been proposed can also not be seamlessly traced back to a uniform theory of harm. It is generally possible to distinguish in this regard whether all subsidy-related competitive advantages are to be neutralised, or whether the investigation targets specifically the harmful effects of the subsidy on competition. In the second case, however, an unambiguous theory of harm would have to be present as to which harmful effects were to be remedied (*e.g.*, establishing market power). The European Commission is primarily pursuing the first approach since redressive measures are only to be considered in place of a reimbursement of the financial advantage if the reimbursement is not suitable, or is impossible. at the same time, however, the redressive measures that have been proposed as part of the first Module aim to prevent the expansion of market power (sale of assets, reduction of market presence, obligations to grant access). In some cases, it is difficult to interpret these as a mirror image of subsidy-related distortion of competition (prohibition of specific market conduct), or at least they do not allow for any delimitation between the contribution by means of the subsidy and the own contribution towards the product made by the undertaking concerned which is targeted by the redressive

[497] See para. 586 above.

[498] The Monopolies Commission considers even a design in the latter sense to be preferable; see para. 939 below for more details.

[499] ECJ, Judgment of 26 June 2003, C-404/00 – Commission/Spain, 2003, I-6695, ECLI:EU:C:2003:373, paras. 45 ff.; cf. in this regard also European Commission, White Paper, p. 19 ("not suitable or feasible".

measure (*e.g.*, with an obligation to grant licences or to publish research results). In any case, they would require constant supervision, so that they would tie up administrative resources to a greater or lesser degree.

894. Apart from this, it is true that the upstream application of the new set of tools in acquisitions of undertakings (second Module) or prior to a decision on awarding a public contract (third Module) each constitute a special case. For example, in the case of company acquisitions, the original recipient of a subsidy may pass on the advantage accrued by virtue of the subsidy to the seller by having him or her pay the price of the acquisition. In the context of the law on public procurement, there are incentives for the contracting authority to benefit from the advantage accrued by virtue of the subsidy by means of the award decision favouring the recipient of the subsidy. Having said that, the first scenario is accommodated in EU State aid law by the seller also being regarded as an (indirect) recipient of State aid, and it is consequently possible to oblige him or her to effect a reimbursement in addition to the acquirer.[500] The second scenario is particularly taken into account by virtue of the fact that the investigation of State aid is carried out by an uninvolved body (the European Commission), and the award of the contract may have to be refused for abnormally low tenders due to binding specifications.[501] By contrast, the prohibition of acquisition (second Module), and exclusion from procurement proceedings (in fact for several years where appropriate) (third Module), appear highly burdensome as conceivable measures for those concerned in each case (also apart from the recipient of the subsidy), so that the question arises as to proportionality.

895. The fact that redressive measures may be selected in place of a reimbursement of the financial advantage and of the following constant regulation means in any case uncertainty related to placing third-country-subsidised undertakings in a poorer position vis-à-vis European recipients of State aid. Taking account of reciprocity considerations, and the envisioned weighing-up decision (also permitting for instance to simply benefit from third-country subsidies), also go beyond the creation of equal treatment in competition law (level playing field) as aspired to in EU State aid law.[502]

Offers of commitments not to be treated as voluntary

896. The Monopolies Commission considers that an instrument that provides for redressive measures in place of a reimbursement should certainly only permit such measures in response to an offer of commitments on the part of the undertakings concerned. Here, however, it should be taken into account not only that the offer of commitments fundamentally does not take place voluntarily if the undertakings concerned are otherwise at risk of burdensome obligations to reimburse the subsidy-related financial advantage. It would furthermore need to be taken into account that the redressive measures might go beyond neutralising the intervention in the market linked to the third-country subsidy, thus interfering with interests of the subsidising third country, which may be protected by international or European law. The Monopolies Commission considers that redressive measures should hence not be regarded as voluntary, even in the case of an offer of commitments, so that a comprehensive judicial review remains possible.

Transparency-related problems to be regulated particularly with regard to SOEs

897. In order to remedy the transparency-related problems mentioned with regard to third-country subsidies, the White Paper essentially relies on three tools, that is presumptions with regard to the distorting effect of specific subsidies, the empowerment – taken from the trade policy toolkit – to use the available facts, and procedural and

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500 European Commission, Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262 of 19. July 2016, p. 1.

501 See again the evidence referred to in fn. 909.

502 Esp. in the context of the first State aid instrument, it is unclear in the event of it being restricted to undertakings established in the EU which home market should be taken into account in this regard; cf. in this respect European Commission, White Paper, pp. 15 and 17.

regulatory obligations of information and transparency. The Monopolies Commission regards this approach as justifiable as long as the undertakings concerned are able to provide contrary evidence with regard to presumed facts. It should be pointed out once again, however, that problems with regard to transparency in a state capitalist system such as China appear to pose particular problems when it comes to the exercise of control available to the State.[503]

Procedural and competence aspects to be reconsidered

898. In addition to the pertinent questions that have been addressed, the procedural and competence arrangements that have been proposed should also be reconsidered. As to the procedure, the Monopolies Commission considers it to be questionable why a two-stage procedure is always regarded as being necessary. Furthermore, the combination of the first and second Modules under consideration means a particular burden for the undertakings concerned caused by two subsidy-related procedures. In the event that a corporate acquisition might also need to be investigated under the rules on merger and investment control, there would actually be three parallel sets of investigations upstream of each acquisition. For such cases, the proceedings would have to be closely coordinated in order to keep the level of uncertainty acceptable for the undertakings concerned. In connection with investment control, more precise content criteria would also have to be developed in order to distinguish between third-country subsidy control under European law and investment control, which remains primarily designed by the Member States in order to rule out a hidden and possibly gradual "zoning up" of aspects of investment control to EU level.

899. Regardless of this, the Monopolies Commission considers that the competence to investigate the compatibility of third-country subsidies with the EU internal market should rest solely with the European Commission. In accordance with the EU Treaties, the Commission is exclusively competent for State aid policy and, where relevant here, for the common commercial policy.[504] The Member State authorities lack experience when it comes to assessing EU State aid in competition law and in any type of assessment of third-country subsidies. What is more, conflicts of interest may arise at Member State level where the latter would benefit from the third-country subsidies (*e.g.*, via a contracting authority).[505] Apart from this, a uniform competence would also reduce the burden on the undertakings concerned caused by a complex, novel procedure.

Recommendation to use commercial-policy mechanisms to "export" the EU State aid framework

900. The Monopolies Commission considers it to be regrettable that the White Paper does not make greater use of the opportunities to coordinate the new set of tools with the common commercial policy. The envisioned link to dispute resolution in free trade agreements is to be regarded positively. There is, however, no possibility to recognise third-country State aid control systems. The inclusion of an arrangement providing for such recognition would make it possible to dynamically adjust the scope of the new set of tools so that it remained continually restricted to the gaps in regulation actually existing. Apart from that, the recognition of third-country State aid control systems could go hand in hand with incentives for third countries to also introduce a regulatory framework corresponding to EU State aid law. This would help bring about competitive equal treatment beyond the EU internal market.

[503] See para. 886 above and the further references there.

[504] Art. 3(1)(b) and (e) TFEU.

[505] This risk exists in particular insofar as the contracting authority itself is to be responsible for assessing a possible distortion of the award decision; see again European Commission, White Paper, pp. 33-34.

Proportionality to be respected as a whole

901. The White Paper sets many important impulses. The introduction of a new mechanism for third-country subsidies closes regulatory gaps increasingly posing problems in the interest of uniform protection of competitive equal opportunities in the EU. It is nonetheless revealed that individual aspects still need to be discussed. What is more, the set of tools under consideration is one-sidedly orientated towards creating official powers of investigation and intervention. The burdens posed by the new tools, in particular for the undertakings concerned, should however not be lost sight of. The burdens follow from the possibility to combine several Modules with one another and with other investigations (esp. national investment control), as well as from the uncertainty associated with the procedure.[506] This uncertainty is increased by the envisioned multiannual period of observation and the ten-year limitation period for taking up cases under the first Module.[507] Additionally, some of the redressive measures under consideration go much further than would be required for a parallel to EU State aid law. This is in addition to the burden caused, albeit probably unavoidably, by the standstill obligations in the second and third Modules. Over and above this, it should be borne in mind that the investigation and redressive measures may also impact those indirectly benefiting from subsidies.[508] This may deter the latter from accepting any bids at all from potentially subsidised undertakings, regardless of whether or not an internal market-distorting subsidy has actually been provided. The set of tools under consideration in the White Paper appears not to be without its problems in its envisioned version from a point of view of proportionality.

4.1.2 Previous proposals for dealing with third-country subsidies

902. The approaches to supplement the existing legal framework developed prior to the Commission's White Paper cannot be comprehensively appraised here for reasons of space. The approaches largely concur in terms of their analysis of the problem, where they have carried out such an analysis, with the statement in sections 1-3. They favour different instruments, depending on the *foci* applied when analysing the problems. The Monopolies Commission prefers to give its opinion below regarding the approaches which it found to be relevant when drawing up its own recommendations.

4.1.2.1 Dutch proposal: obligation for undertakings to conduct themselves in compliance with the market economy

903. According to a proposal from the Permanent Representation of the Netherlands for a "level playing field instrument" submitted at the end of 2019, undertakings from third countries should be subject to more stringent rules if they receive government support or have an unregulated dominant position in their home country, which enables them to make excess profits. Such undertakings should be subject to stricter supervision. Additionally, they should be prohibited from engaging in specific behaviour where appropriate.[509]

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506 See para. 898 above.

507 European Commission, White Paper, pp. 15, 24 and 31 on the observation period (receipt of a financial contribution over a period of three calendar years prior to the investigation; up until one year following the closing of the acquisition/performance of the contract within the second and third Modules); p. 20 (on the limitation period).

508 See European Commission, Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262 of 19 July 2016, p. 1, para. 115 on indirect advantages in EU State aid law.

509 The proposal is available to the Monopolies Commission. The information below refers to publicly-available information on the proposal, *i.e.*: Netherlands, Non-Paper strengthening the level playing field on the internal market, undated; retrievable: https://www.permanentrepresentations.nl/binaries/nlatio/documents/publications/2019/12/09/non-paper-on-level-playing-field/Dutch+nonpaper+on+Level+playing+field.pdf ; Tweede Kamer der Staten-Generaal, Vergaderjaar 2019-2020, 21 501-30, Raad voor Concurrentievermogen, No. 470 Brief van de Staatssecretaris van Economische Zaken en Klimaat.

Substantive characteristics of the proposal

904. In detail, the Dutch proposal is intended to serve the European law objective of protecting genuine competition in the EU internal market.[510] The proposed arrangement should be applied in addition to the existing relevant provisions (Art. 101 ff. TFEU, anti-dumping/anti-subsidy rules, merger and investment control provisions) without supplanting them. The proposal primarily aims to close gaps in the protection of competition in relations with third countries.

905. The proposed new provision is only meant to apply if, because of state measures, undertakings conduct themselves differently than non-influenced market operators. The market investor test which is known from EU State aid law should therefore be modified so as to refer directly to changes in the undertakings' conduct caused by state measures. The question is to be key as to how the undertakings concerned would conduct themselves in the absence of the state measures in comparison with other market operators. An unregulated dominant position in the home country would be treated as a state subsidy given the concomitant economic advantages. Differences in the general market conditions would however not be relevant here any in other respect.

906. Undertakings would be prohibited from engaging in specific conduct if they did not conduct themselves in conformity with the market (supply constraints, price and product differentiation, tied selling, wholesale/retail pricing that does not reflect market prices, or investments in assets with no apparent business case, *i.e.*, that are insufficiently profitable in the foreseeable future). This would be behaviour in which dominant undertakings would be prohibited from engaging in the internal market because they might harm competitors or consumers.

907. The proposed instrument is intended to be applied preventively in the sense that it would not require proof that state measures lead to a dominant position. It would be possible to impose separate bookkeeping obligations as well as behavioural and structural redressive measures on the undertakings concerned within an official procedure.

Comments by the Monopolies Commission

908. The Monopolies Commission considers the Dutch proposal to contain a great deal of elements that are worthy of consideration. It is, however, not fully convincing in the final analysis, given that it is not meant to counter harmful competitive effects of state interference in the economy, but isolatedly targets specific company behaviour. It nonetheless appears expedient at the starting point to presume the principle of genuine competition within the meaning of Protocol No. 27, and to introduce a new instrument for state measures which lead to undertakings conducting themselves in a manner in conformity with the market.

909. Having said that, it does not appear to be necessary, and also not automatically compatible with the approach taken by the EU Treaties restricted to specific groups of cases, for the scope of the tool to cover all possible instances of potential distorted conduct on the part of the relevant undertakings. In view of the rules already in place, it seems more appropriate to limit the instrument to practices where third country measures influence company behaviour without ensuring that any resulting distortions of competition in the EU internal market can be adequately addressed through anti-dumping and anti-subsidy measures, cartel and abuse control and merger and investment control. With regard to the relevant state measures, it seems reasonable to address the exercise of control rights and subsidies by third countries equally. Having said that, measures other than third-country subsidies have not been discussed in practice so far. Apart from closing the remaining regulatory gaps, furthermore, it remains important to consistently apply the existing rules (esp. with regard to anti-subsidy measures).

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[510] Protocol (No 27) on the internal market and competition, OJ C 202 of 7 June 2016, p. 201 (308).

910. The modification of the market investor test to determine potentially relevant distortion of competition must be questioned as well. The market investor test traditionally relates to the award of state advantages as part of an investment activity which takes place according to other than market-economic criteria. In this regard, the test is based on the presumption that the advantages influence the conduct of undertakings receiving them, and hence can lead to market conduct which deviates from that of non-beneficiary market operators. If, for instance, the State regulates dominant positions or foregoes such regulation, it does not a priori make use of instruments available to a private investor where the question of market-conform behaviour may arise. Rather, it applies sovereign tools in order to steer the conduct of market operators from the outside. Using sovereign instruments can at most be disproportionate.[511] Conversely, foregoing sovereign regulation does not lead to a situation in which the unregulated undertakings would demonstrate conduct on the market which derogates from the conduct of other market operators due to state influence. Rather, no state measure exists at all, which could influence the conduct of the undertakings concerned.[512] For this reason, the proposed modification of the market investor test would lead to the test becoming less informative for assessing the conduct of the undertakings concerned.

911. In fact, the Dutch proposal also does not define the market investor test as a test for evaluating state measures, but as a novel test in order to isolatedly cover the conduct of undertakings where it derogates from such conduct in comparison with the conduct of an undertaking under "normal market conditions". If one presumes the model of genuine competition with regard to normal market conditions, according to the test, therefore, any conduct on the part of undertakings should be looked at in greater detail which might potentially involve distortions of competition.[513] Since unlike in EU State aid law, the conduct of undertakings is to be regarded independently from state advantages granted beforehand, however, it remains unclear by means of which particularities the relevant conduct of the undertakings derogating from normal conduct is to be determined.

912. It constitutes a further break with the market investor test that the design of the proposed instrument then follows the market domination approach in other respects. It does not provide for any neutralisation of state-caused derogation from normal market conditions (*e.g.*, by means of a compensatory charge for subsidy-related advantages). Instead, it prohibits the undertakings concerned from engaging in specific conduct which may occur with dominant undertakings in particular, and is regarded there as being fundamentally abusive (see para. 906 above).

913. Such conduct is prohibited under applicable law with good reason only by dominant companies. One may presume that the behaviour of undertakings which have a dominant market position is "such as to influence the structure of a market where, as a result of the very presence of the undertaking concerned, the degree of competition is weakened and which has the effect of [additionally] hindering the maintenance of the degree of competition still existing in the market or the growth of that competition".[514] However, risks of this kind do not exist if the undertakings concerned are not dominant (even if they benefit from state subsidies for instance). Non-dominant undertakings are subject to competition pressure which does not permit them to one-sidedly hinder competition. Such conduct is, hence, also regarded in the case of non-dominant undertakings as generally being in conformity with competition.

914. By contrast, state measures, in particular those connected with selective advantages in favour of individual undertakings or the production of certain goods are, as a matter of principle, regarded as distorting competition,

511 See para. 612 above.

512 This does not mean that the use of sovereign tools also outside the market investor test may not entail selective advantages within the meaning of Art. 107(1) TFEU.

513 See again Protocol 27 on the EU Treaties.

514 ECJ, Judgment of 13 February 1979, 85/76 – Hoffmann-La Roche, [1979] ECR 461, ECLI:EU:C:1979:36, para. 91.

and are prohibited, subject to justification.[515] One reason for this is that undertakings which depend on state subsidies align their behaviour to the objectives stipulated by the State, but do not – as is supposed by the model of undistorted competition – act as independent undertakings.[516] An instrument targeting specific behaviour normally only regarded as problematic with dominant undertakings would not do justice to this aspect of competition.

915. Finally, it is questionable with regard to the proposed behavioural and structural redressive measures as to whether they can be effectively implemented at all with undertakings domiciled in a third country. The proposed separate bookkeeping obligation can at least reduce information problems which may occur in the EU with regard to third-country subsidies.

4.1.2.2 Association proposal: presumption of subsidy-related distortions of competition

916. At the beginning of 2020, the Brussels-based association BusinessEurope proposed the introduction of a separate regulatory principle, the state-owned enterprise principle, to tackle third-country-induced distortions of competition.[517] Accordingly, a competition by SOEs could be presumed to be distorted based solely on the fact that these undertakings are third-country financed. The focus of the proposal on SOEs is due to the assumption that Chinese SOEs particularly benefit from the granting of advantages by the Chinese State. The SOEs with regard to which the presumption is to apply are undertakings where the state has at least a 20-percent ownership.[518] The presumption could for instance be applied with regard to subsidy and investment control, as well as in the law on public procurement. The undertakings would have to prove that they are acting in conformity with competition (reversal of the burden of proof).[519] When it comes to subsidy control, hence, the undertakings would have to prove, for instance, that they are not benefiting from subsidies on their home market, thus overcoming existing issues of transparency. There would be a certain parallel to State aid law in this regard (Art. 107 ff. TFEU), in which the Member States can dispel the *prima facie* presumption of an advantage relevant State aid rules by proving that an economic benefit is granted in accordance with the market economy operator principle.[520] Additional requirements could be set out in investment control for SOEs and special stipulations incorporated into the law on public procurement in the rules on abnormally low tenders for bids by SOEs.

917. The proposal put forward by BusinessEurope can be associated with the State aid equivalence approach. This proposal targets situations in which state subsidies in the EU internal market as such can lead to competition problems. In this context, the proposal specifically tackles the problem that interference in the economy on the part of the Chinese State may not be recognisable as such according to the information available in the EU. In this regard, it is true that may be more difficult to take action against undertakings in case of breaches of competition precisely because less information is available in the EU than in the third country itself as to whether a third-country subsidy facilitates competition-distorting conduct on the part of the undertaking concerned. State undertakings, which benefit from subsidies to a greater degree than the private industry does, are likely to be able to make use of opaque structures in order to hinder the investigation and sanctioning of breaches of competition.

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515 Art. 107 TFEU.

516 Cf. already paras 608, 609 ff. (on the market investor test) above.

517 BusinessEurope, The EU and China: Addressing The systemic Challenge, January 2020, p. 12 as well as pp. 40, 44, 103, 105 and 109; retrievable: https://www.businesseurope.eu/sites/buseur/files/media/reports_and_studies/the_eu_and_china_-full_february_2020_version_for_screen.pdf.

518 BusinessEurope, The EU and China: Addressing The systemic Challenge, January 2020, p. 97 with footnote 128.

519 BusinessEurope, The EU and China: Addressing the systematic Challenge, January 2020, p. 103; cf. on this also the proposals on reforming the subsidy rules at WTO level in: Joint Statement of the Trilateral Meeting of the Trade Ministers of Japan, the United States and the European Union, January 2020, No. 2.

520 See once more European Commission, Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262 of 19 July 2016, p. 1, paras. 73 ff.

918. That said, the proposal itself entails uncertainties, as there are no unambiguous criteria as to which undertakings should be regarded as SOEs. Additionally, a third country may also support private undertakings in order to targetedly circumvent any regulations applying to SOEs. The Monopolies Commission considers that the proposed presumption rule hence only appears to be expedient as a supplementary tool insofar as the presumption were to apply in cases where the European investigation authorities do not have sufficient information.[521]

4.1.2.3 The Federal Cartel Office: assessment of third-country subsidies within the existing legal framework

919. In its decision on the *CRRC/Vossloh* merger, the German Federal Cartel Office (FCO) explored, by way of example, the degree to which an influence of third-country bodies and the effects of subsidies on competition can be taken into account in the context of existing merger control.[522] This approach is likely to already largely implement the cited demands of Germany, France and other Member States that merger control should take greater account of the fact that State financial support granted in a non-market economy may distort the meaningfulness of turnover and the financial strength of third-party purchasers.[523]

920. The FCO took account of the subsidies from which the acquiring undertaking CRRC benefits when it examined the question of whether the concentration significantly impedes effective competition, in particular by creating or strengthening a dominant position. It has already been described in this regard that subsidies can influence the market position because they strengthen the financial power of the subsidised undertaking.[524] Additionally, the fact that subsidies have previously influenced the market conduct of a participating undertaking permits conclusions as to the market conduct that can be anticipated from the merged undertaking.[525] The FCO took these aspects into account, and accordingly examined whether the market position of the merged undertaking might be strengthened.[526]

921. Apart from questions regarding the market position, however, it has been pointed out that the State may also use subsidies in order to bring individual markets or entire sectors of the economy under state control according to strategic political criteria. This is not an issue of creating or strengthening a dominant market position, but of additional harm to competition, which is specifically related to subsidies. According to the FCO's reasoning, such harmful effects on competition independently of the market position can indeed not be covered by merger control law. The FCO stressed that the influence of third-country bodies might favour the ability and the willingness to engage in low-price strategies. It stated, in this regard, that "low prices which are not fully substantiated with comparative cost advantages pose a danger in the medium term of damaging the competition structure."[527] The

[521] See Section 4.1.3.3 below for more detail.

[522] FCO, Decision of 27 April 2020, B4-115/19 – CRRC/Vossloh (not yet published); on this case report of 27 April 2020. The ruling itself is more reticent than the case report; see there para. 564.

[523] Letter from Ministers Altmaier, Patuanelli, Le Maire, Emilewicz to Vice-President Vestager of the European Commission dated 4 February 2020, point 1; Federal Ministry of Economics and Energy/Ministère de l'économie et des finan-ces/Ministerstwo Przedsiębiorczości i Technologii, Modernising EU competition policy, point 1, https://www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf?__blob=publicationFile&v=4, retrieved on 9 March 2020; see 3.3.2.1, esp. insb. para. 833.

[524] See Section 3.3.2.3 above.

[525] European Commission, Decision 94/449/EC of 14 December 1993, IV/M.308 - Kali + Salz/MdK/Treuhand, OJ L 186 of 21 July /1994 p. 38, para. 47.

[526] FCO, Decision of 27 April 2020, B4-115/19 – CRRC/Vossloh; on this case report of 27 April 2020, p. 4 – "first particularity".

[527] FCO, Decision of 27 April 2020, B4-115/19 – CRRC/Vossloh; on this case report of 27 April 2020, p. 5 – "second particularity".

FCO however also emphasised in its decision that special regulations such as State aid law or the antidumping rules were created and take priority for the distortions of competition resulting from subsidies[528]

922. The approach adopted by the FCO would, hence, not constitute a basis for taking action against harmful effects on competition caused by State aid which would have to be investigated at EU level in State aid proceedings implemented in parallel to merger control. At the same time, however, the Office's approach would likewise not be a basis for action against third-country subsidies which are not covered by State aid control or by the anti-dumping and anti-subsidy regulations, and for which the European Commission favours a separate intervention instrument.

923. A more extensive interpretation of the merger control provisions which permits the competition authorities to carry out a comprehensive investigation of the effects of subsidies as part of merger control would be conceivable in theory, but in practice would be in conflict with the exclusive competence of the European Commission for questions related to State aid control and the common commercial policy.[529]

4.1.3 Proposal from the Monopolies Commission – a third-country State aid instrument

924. The Monopolies Commission advocates the introduction of a uniform legal instrument with which the gaps that have been identified in the existing regulatory framework could be closed as to (selective) third-country subsidies. The instrument should ensure that third-country subsidies by means of which competition in the EU internal market is distorted and which cannot be countered with anti-dumping or anti-subsidy instruments are subject to control, similar to Member State aid (State aid equivalence approach). This should also apply to cases in which third-country subsidies are used in the EU in connection with corporate acquisitions or with procurement. Depending on the structure of the instrument, further measures may be dispensable in order to counter individual behaviour on the part of undertakings with which the latter may use financial power increased by subsidies, for instance in strategies to squeeze competitors out of the market (market domination approach) (Section 4.1.3.1).

925. The instrument proposed here should be applied subsidiarily to the EU's law on competition (Section 4.1.3.2). In order to simplify its application, the instrument should additionally be designed in such a way that a competition-distorting subsidy is presumed to exist in specific cases (*e.g.*, with SOEs). The undertakings concerned should however be able to refute the presumption by disclosing information on their financing structure that is not available in the EU (Section 4.1.3.3).

926. The Monopolies Commission furthermore has reservations with regard to measures by means of which the EU Member States or European undertakings would be equipped with defensive tools going beyond the law as it stands. To a greater degree than in accordance with the existing law, it considers that no sound justification exists for measures with which any distortions of competition by third-country subsidies are countered by means of own competition-distorting measures (Section 4.1.3.4).

4.1.3.1 Recommendation to introduce an instrument to compensate for third-country State aid in the EU internal market

927. The instrument proposed here focuses on economic activity in the internal market, which is fuelled by subsidies of a third country ("third-country State aid"). In this regard, it is key to reduce to the greatest possible extent the self-discrimination caused by European State aid law. The European ban on State aid shapes competition as an expression of equal opportunities in the EU internal market.[530] It has already been pointed out that Art. 107 TFEU

[528] FCO, Decision of 27 April 2020, B4-115/19 – CRRC/Vossloh, para. 564 (not yet published).

[529] Art. 2(1), Art. 3(1)(b) and (e) TFEU.

[530] See the references in footnote 454.

cannot be applied to third countries.[531] In order to maintain competitive equal opportunities on the internal market, it is thus necessary to provide for equal treatment, which is crucial particularly in those cases in which no alternative compensatory instruments are available.

928. A need for regulation exists primarily in those cases which are not covered by anti-subsidy law.[532] These are for instance cases in which undertakings are economically active in the EU internal market, and benefit from third-country subsidies in terms of the movement of goods (production/trade), but without the goods being imported into the EU. One example of such a situation would be that undertakings from third countries move their production into the EU in order to circumvent or as a reaction to anti-dumping/anti-subsidy measures. Another example would be subsidised corporate purchases which cannot be comprehensively investigated as to the impact of the subsidy on competition also in investment and merger control. There are furthermore gaps in protection when it comes to trade in services. The proposed instrument would of necessity be “blind” to the nationality of the recipient of the subsidy. In exactly the same manner, it would be initially applicable to all third-country State aid, regardless of its specific origin. Chinese subsidies would hence be covered in exactly the same way as US or, in future, possibly also British subsidies. Differences would only be justified by the existence of comparative subsidy control in the third country, given that only then the unequal treatment could be reduced.[533]

929. European law is open with regard to third-country intervention in the economy. Art. 106 and 107 ff. TFEU are not applicable to measures taken by third countries.[534] The scope of these Articles can also not be expanded without amending the Treaty on the Functioning of the European Union. Against this background, demands that have been variously expressed to apply State aid control to third countries are not expedient. By contrast, it appears to be possible and expedient to introduce a new control instrument which would not amend the provisions contained in Art. 106 and 107 ff. TFEU with regard to subsidies granted by third-countries, but merely would add additional (lower-ranking) provisions to these rules. A third-country State aid instrument could be introduced for this purpose in order to place selectively-granted third-country subsidies on the same footing as Member State aid where a comparable distorting effect on competition can be detected in the internal market. Referring to the approach taken in EU State aid law, the instrument should be designed as a preventive tool in order to preclude, where possible, third-country subsidies being able to have any distorting effects on competition in the EU internal market at all.

930. Despite its broad scope, the third-country State aid instrument proposed here would likely be compliant with the law of the WTO. This is due, on the one hand, to its competitive nature and, on the other, to the fact that it aims to ensure equal treatment between EU and third-country aid. Regardless of this consideration, it is still the case that harmonisation of WTO and EU subsidy control regimes would be desirable.[535] The new instrument should therefore include a clause that is able to react to the dynamic development in the law of the WTO, in trade agreements, as well as in the national law of third countries. Should the EU, for instance, conclude free trade agreements with third countries leading to the harmonisation of the respective subsidy control regimes, or which lead to equivalent subsidy control on the part of the contracting partner, the European Commission should be able to restrict the scope of the instrument by means of a recognition decision.[536] An example of the formation of a common understanding on the control of subsidies can be found, for example, within the EU-Singapore Free Trade

[531] Cf. para. 744.

[532] Cf. Section 3.2.1 above.

[533] Cf. para. 349 below.

[534] Cf. Section 3.2.1 below (esp. para. 744 as well as Section 3.2.2.1) and Section 3.2.3.

[535] Cf. para. 723.

[536] See on this Art. [10(1)] below in the draft provision in Section 4.1.4.

Agreement.[537] This "Singapore" clause would be applicable to harmonisation taking place outside the EU, and would react dynamically to an improvement in the less favourable position of the EU (self-discrimination). A first case of application could be the withdrawal of Great Britain from the EU, provided that an equivalent national state aid control is established in this context.

931. The compatibility of the proposed third-country State aid instrument under international law results, on the one hand, from its linkage to a domestic situation independent of border crossing and, on the other hand, from its focus on state aid or its blindness to the nationality of the economic subject. Art. III GATT and XVII GATS require the equality of competitive conditions to be created within their scope of application.[538] This is indeed what the concrete proposal is about: Competitors in the internal market would be placed on an equal footing wherever possible as to recourse to state funds. Potential allegations of *de facto* discrimination could be countered by the fact that in this context, in principle, a lower standard of treatment compared to EU aid already prevents this. To this end, however, it would be necessary for the European Commission to take account of any compensation through Union aid in its compatibility assessment in individual cases. In addition, it is precisely the relocation of production facilities and the establishment of subsidiaries in the EU that makes it difficult to clearly locate beneficiaries of third-country State aid. It should also already be pointed out at this juncture that third-country State aid would not be prohibited *per se*, but would only be subject to a notification obligation as well as a case-by-case intervention right on the part of the European Commission. The intervention would have to be based on objective criteria. It would cover all EU undertakings in the same manner. Third-country State aid would therefore still be placed in a better position in relation to EU State aid.

932. Not only would there be no discrimination between European and foreign companies, but there would also be no discrimination whatsoever between third countries or companies from third countries, so that there would also be no conflict with regard to the Most-Favoured Nation principle of Art. I GATT and Art. II:1 GATS. In the *EC – Seal Products* decision, the Appellate Body found that the Most-Favoured Nation principle of Art. I:1 GATT protects expectations of equal competitive opportunities.[539] This is consistent with the importance of state aid law for competition in the internal market (establishment of equal opportunities). This equality of opportunity would not be impaired by the new instrument, but would only be established to full extent. The Singapore clause described above would, in particular, make it possible to consider the elimination of unequal treatment between EU and third-country State aid in a recognition decision. The clause would react to any WTO reform, to any arrangements in free trade agreements, as well as to unilateral conduct. It should moreover be pointed out for free trade agreements that these may explicitly constitute an exception to the Most-Favoured Nation principle via Art. XXIV GATT/Art. V GATS.

933. The existence of the subsidy-related provisions contained in the GATT, ASCM and the GATS would probably also not be an obstacle. Firstly, the rules on the imposition of countervailing duties are based on a border being crossed. Secondly, no provision exists which prohibits any further handling of subsidies by national law other than

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[537] Cf. fn. 109.

[538] For instance, the Appellate Body for Art. III GATT found in Japan – Alcoholic Beverages II, Appellate Body Report of 4 October 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 16: "The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III is to ensure that internal measures not be applied to imported or domestic products so as to afford protection to domestic production. Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products."

[539] WTO, European Communities — Measures Prohibiting the Importation and Marketing of Seal Products, Appellate Body Report vom 22. Mai 2014, WT/DS400/AB/R und WT/DS401/AB/R, Rz. 5.88. There it says: "(…) as Article I:1 is concerned, fundamentally, with protecting expectations of equal competitive opportunities for like imported products from all Members, it does not follow that Article I:1 prohibits a Member from attaching any conditions to the granting of an 'advantage' within the meaning of Article I:1. Instead, it prohibits those conditions that have a detrimental impact on the competitive opportunities for like imported products from any Member. Conversely, Article I:1 permits regulatory distinctions to be drawn between like imported products, provided that such distinctions do not result in a detrimental impact on the competitive opportunities for like imported products from any Member."

anti-subsidy law. As has already been discussed, economic reasons can be found for regulating the use of subsidies.[540] The new instrument, hence, would link to additional, competitive considerations. For the service sector, Art. XV GATS even only provides for the possibility of consultations, which does not place any restrictions on the handling of subsidies. Should any incompatibility however emerge at a later date between the new tool and the law of the WTO, it would be no problem to adapt the instrument using the Singapore clause described above.

934. The new third-country State aid instrument should be linked to the entrepreneurial activity of the subsidised undertaking in the EU internal market. Having said that, the instrument could probably not be be based on Art. 103 TFEU. In EU competition law, Art. 103 TFEU is a basis for provisions targeting (joint or unilateral) entrepreneurial conduct (cf. Art. 101 and 102 TFEU). Conduct within the meaning of this provision must, however, be assessed in view of its compatibility with competition, independently of the nature of the owners of the undertakings concerned.[541] In accordance with Art. 103 TFEU, the conduct may therefore not be subject to more stringent rules solely because an undertaking has an owner in a third-country, even if the undertaking is subsidised by this owner. By contrast, it is not possible to base legal acts relating to entrepreneurial conduct on Art. 106(3) and 109 TFEU. These provisions only relate to measures taken by EU Member States.

935. Borrowing from the legal basis of the amended proposal for an International Procurement Instrument, Art. 207(2) TFEU could furthermore be taken into consideration as a basis of authorisation. The International Procurement Instrument aims to address the unequal conditions of entry into public procurement markets resulting from the fact that third countries reserve their procurement markets for the companies concerned, whereas EU procurement markets are open to all companies. That being said, the International Procurement Instrument is intended to enforce reciprocity in foreign trade, which is not the priority in the third-country State aid instrument proposed here. Conversely, the European Court of Justice and the Council locate the legal basis for competition law rules within free trade agreements in the competition rules that are contained in the Treaties.[542]

936. Given that the competences referred to above are unlikely to be sufficient, supplementary recourse to the flexibility clause of Art. 352 TFEU may be considered. According to the case-law of the European Court of Justice, this provision is "designed to fill the gap where no specific provisions of the Treaty confer on the [Union] institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty."[543] A third-country State aid instrument would fill gaps in European law on competition with regard to third-country market interference, and in doing so would be within the exclusive area of competence of the EU for the law on competition. The Merger Control Regulation was based on Art. 352 TFEU, as well as on Art. 103 TFEU, in order to cover all concentrations which might prove to be incompatible with the system of the genuine competition required by the Treaty.[544] The third-country State aid instrument proposed here would in a similar way aim to intervene where Art. 107 TFEU cannot fully cover State aid that is harmful to competition in the internal market. The instrument should therefore be based on Art. 103 and 109 in conjunction with Art. 352 TFEU.

937. The personal scope of the instrument would cover all undertakings (economic units) in the internal market, regardless of their domicile and nationality. This is not only required in terms of WTO law, but is also expedient

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540 See para. 861 above.

541 See para. 686 above.

542 ECJ, Opinion 1/92, [1992] ECR I-2821, para. 40 (EWR-II); Judgment of 9 August 1994, C-327/91 – France /Commission, [1994] ECR I-3641. concurring Hahn, in: Callies/Ruffert, EUV/TFEU/GrCh, 5th ed. 2016, Art. 207, para. 47.

543 ECJ, Opinion 2/94 – Accession to the ECHR, [1996] ECR I-1759, ECLI:EU:C:1996:140, para. 29 (on the predecessor provision of Art. 235 of the EC Treaty).

544 Recital 7 of Regulation 139/2004.

against the background that it prevents a situation arising in which, for instance, a German undertaking circumvents State aid control, as provided for in Art. 107 and 108 TFEU, by having recourse to third-country loans. In terms of substance, only those subsidies would be acceptable which are to be regarded as being in conformity with the market according to the market investor test. By contrast, measures of a third country that would be in violation of Art. 107(1) TFEU, were they to be a Member State measure, would have to be considered incompatible with the European internal market, subject to justifications.[545] In order to simplify the procedure, a breach could be presumed with specific categories of third-country subsidy, which are regarded as particularly harmful under the existing rules on State aid and anti-subsidy law.[546] That being said, company acquisitions have not been considered a particular problem in the case of aid financing. For this reason, an individual case analysis should be retained.[547]

938. Justifications could include grounds recognised within the meaning of the law of the WTO, or could be designed after the exceptions contained, for instance, in Annex 11-A of the EU-Singapore Free Trade Agreement.[548] The Monopolies Commission favours inclusion of exceptions such as those contained in Annex 11-A since these correspond to the objective of mutually harmonising the subsidy control regimes. At any rate, the exceptions would have to be held open and considered from the point of view of the location of the undertaking.

939. The instrument could, as a matter of principle, be designed in two ways, namely as a prohibition with an authorisation option (as Art. 107 TFEU), or as an official right of intervention (in line with the European Commission's proposal on subsidised concentrations). A prohibition with an authorisation option would constitute a strict arrangement which might motivate third countries to introduce their own State aid control in order to counter the EU's third-country State aid instrument. Given the inefficiencies frequently associated with state subsidies, a spread of State aid control outside the borders of the EU may be regarded as desirable. The incentive connected to the tool proposed here would, however, be weak, given that its application would be restricted to the gaps in the existing regulatory framework. The argument in favour of a right to intervene, in contrast, is that some market operators in the EU may in turn benefit from state support measures (including Union State aid), which may have a distorting effect on competition in relations with third countries. Furthermore, it is beneficial to the EU that third-country subsidies do not need to be funded by European taxpayers.[549] A right of intervention could be handled flexibly in order to proceed against such subsidies by determining the compatibility of the subsidy with the EU internal market only where intervention is required for reasons lying in the interest of the Union, having weighed up subsidy-related distortion of competition against any subsidy-related advantages. However, the relevant criteria should be specified for reasons of legal certainty. For instance, a market failure or meeting the political objectives of the EU might need to be weighed particularly in favour of the recipient of the subsidy.[550] Aspects related to public security and order should, by contrast, not be used as criteria for assessing a subsidy since investment control constitutes a sufficient, exhaustive set of tools for this purpose.[551]

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545 Provision could be made for an expansion to other cases (*e.g.*, economic advantages on the basis of an unregulated market-dominant position) in the event of delimitable case groups that were also recognised outside the EU. This is likely to be contingent on corresponding agreements being reached with the third countries concerned; see also Section 4.2.3 below (with regard to China).

546 Cf., *e.g.*, Art. 1(4)-(5) of Regulation 651/2014; Art. 4(4) of Regulation 2016/1037; furthermore European Commission, White Paper, p. 15.

547 Different: European Commission, White Paper, p. 16.

548 These might also be grounds within the meaning of Art. 107(2) and (3) TFEU where these are transferable to the relationship with China.

549 See para. 586 above.

550 Cf. Art. 31(1) of Regulation 2016/1037.

551 Different: European Commission, White Paper, p. 17.

940. The legal consequence in the case of an intervention would be a compensatory charge in the amount of the advantage granted by the third country, which is not in conformity with the market. This solution would adopt the approach of State aid and of anti-subsidy law according to which the competition-distorting advantage is to be reimbursed in order thus to restore equal competition conditions between the recipients of the subsidy and other market operators. The amount of the charge would have to be calculated according to the principles applying to the countervailing of subsidies in cases of cross-border movement of goods. There would be a need to take account here, amongst other things, of the degree to which the third-country subsidy is applied within and outside the EU. The European Commission should issue guidelines on the calculation of the amount of the compensatory charge, which could build on the principles of the State aid and anti-subsidy law to the extent that they are relevant in this regard. In particular, provision should be made for a situation in which full repayment would be inappropriate or disproportionate. In principle, the levy would have to be paid to the EU budget.[552] In order to avoid discriminatory treatment vis-à-vis State aid granted by Member States, the payment obligation may also be satisfied by proving a reimbursement to the subsidising state. The possibility of such proof should, however, be limited in time in order to prevent abuse.

941. The European Commission should be responsible for the implementation of the instrument. A centralised system would be in line with the approach of EU State aid law and would likely ensure a more effective enforcement of the instrument than a decentralised system. In this respect, it has already been pointed out that the European Commission can already build on experience that Member State authorities would first need to build up.[553] A decentralised system would also entail high coordination requirements in relation to the European Commission (because of its responsibility for the common commercial policy) and between Member States themselves, and requirements to prevent conflicts of interest (when Member States benefit from third country subsidies). Apart from this, the European Commission can gather the necessary capacities to deal with very complex cases more quickly than national authorities, which often reach the limits of their capacity already when enforcing the existing public procurement and competition rules (especially the involvement of local authorities can pose problems in this respect).

942. The instrument should be designed in terms of procedural law in such a way that the undertakings have to notify the receipt of subsidies when taking up an economic activity in the EU internal market, or when receiving subsidies at any later stage. The notification obligation could also be understood as a political signal that the EU is willing to protect the EU internal market against third-country interference in the economy where necessary. The notification should generally not trigger a standstill obligation. Thus, the third country subsidy could in principle be used directly within the EU. An exception should only be made where the subsidy is passed on to a third party, *i.e.*, to the seller in cases of company acquisitions or to the awarding authority in cases of Member State procurement. In these cases, a standstill obligation pending a decision on intervention would prevent a situation in which a compensatory charge would have to be imposed on the indirect beneficiary.

943. In cases where subsidies are used to fund company acquisitions in the EU, it would have to be decided whether the same types of acquisitions as in merger or investment control should be covered or whether the instrument should intervene in the case of independently defined acquisition types (*e.g.*, as defined in the White

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[552] Cf. Art. 311(2) TFEU; Art. 107 f. Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the Financial Regulation applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014 and Decision No 541/2014/EU, and repealing Regulation (EU, Euratom) No 966/2012, OJ L 217 of 30. December 2016, p. 1. Member State aid, on the other hand, is to be returned to the budget of the EU Member State concerned, which may be more difficult to ensure; cf. Case C-188/92 TWD v Federal Republic of Germany [1994] ECR I-833, ECLI:EU:C:1994:90, paras 15-16; Case C-24/95 Land Rheinland-Pfalz/Alcan Deutschland [1997] ECR I-1591, ECLI:EU:C:1997:163, paras 44-45.

[553] See para. 899 above.

Paper).[554] In the cases in question, a standstill obligation in the sense of the “standstill period” also envisaged in the White Paper would in any case have to be observed, as explained above. In addition, it would have to be decided whether the examination of whether the instrument is to be applied in the case of an acquisition should be carried out in parallel to any merger or investment control proceedings (parallel deadlines). This could be recommended at least in cases in which generous investigation deadlines were provided for outside merger control, derogating in this regard from the proposal advocated here.

944. It would be possible to make provision in cases of Member States’ procurement procedures that undertakings interested in participating in procurement proceedings in the EU on the basis of third-country subsidies would have to notify the planned participation to the European Commission or to the contracting authority. The contracting authority would then have to temporarily suspend the procurement proceedings, possibly following a communication from the European Commission. The European Commission could examine during the period when the procurement proceedings are suspended whether an intervention, and where appropriate the imposition of a compensatory charge, is necessary in the Union’s interest. In this case, intervention could be made additionally dependent on how the interest in protecting competition is to be weighted against the interest in mutual market access. As an alternative to a compensatory levy especially in procurement procedures, an exclusion of unusually low offers based on regulations such as Art. 49 of Directive 2009/81/EC could be considered,.[555]

945. The European Commission should have the right to request the necessary information from the undertakings concerned during the procedure. If such information is not provided, it should be empowered, as in the State aid and anti-subsidy procedure, to rely instead on facts available.[556] This could relate to accounting records, the cost of goods and services or the volume or value of third country financing. Apart from this, the EU would depend on the cooperation of the Member States in enforcing the duty of compensatory payment and/or reimbursement.[557] The fact that the classical sanctions that are available under the law on State aid are not applicable here militates in favour of imposing fines on undertakings that benefit from third-country subsidies in case of any violations. The principles of the existing competition law could be used as a reference in this area.

946. In order to rule out a conflict with anti-subsidy law from the outset, instances in which goods cross borders could be exempted from the investigation by means of a statutory exception from the scope of the new tool, or by means of a block exemption. Such cases would then not need to be notified (or no fine would be imposed for non-notification). Also over and above this, it would be possible to provide that third-country measures were exempt from investigation in advance, provided that they satisfied specific preconditions and that they did not then trigger a notification obligation.

947. In order to use the new tool in terms of commercial policy, to reduce the burden on the European Commission, and to maintain compatibility with the law of the WTO on an ongoing basis, the option should furthermore be considered to hand down a recognition decision vis-à-vis third countries. Such a decision might be designed in accordance with the provisions on recognition in the law on financial supervision.[558] The impact of a recognition decision would be for third-country State aid to be regarded as compatible with the internal market without further investigation. The notification obligation should be withdrawn in such instances. It should be possible to withdraw such a recognition decision in justified cases. A trade policy advantage could also be expected from the

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554 European Commission, White Paper, p. 23.

555 See here again footnote 909 and on German law also Federal Court of Justice, Order of 31 February 2017, X ZB 10/16, para. 13 ff.

556 Art. 15(1) sentence 3 of Regulation 2015/1589; Art. 28(1) of Regulation 2016/1037; see also paragraph 728 above.

557 Cf. Art. 299 TFEU.

558 See, *e.g.*, Art. 25 ff. of Regulation 648/2012 in the version of Regulation (EU) 2019/2099 of the European Parliament and of the Council of 23 October 2019 amending Regulation (EU) No 648/2012 as regards the procedures and authorities involved for the authorisation of CCPs and requirements for the recognition of third-country CCPs, OJ L 322 of 12 December 2019, p. 1.

inclusion of justification grounds along the lines of Annex 11-A of the EU's Free Trade Agreement with Singapore, as this could create an incentive for corresponding arrangements in future agreements.

948. The question as to detecting support for SOEs could be solved, as in EU State aid law, in such a way that SOEs, firstly, could themselves be recipients of State aid and that, secondly, funding through SOEs (*e.g.*, state-controlled banks) could be attributed to the third country as third-country State aid. For the purposes of practical control of third-country State aid, a provision could be considered similar to the Chinese Protocol of Accession for anti-subsidy law. The Protocol is worded as follows when it comes to calculating a countervailable subsidy:

> "*if there are special difficulties in that application, the importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks"*.

4.1.3.2 Subsidiary design of the proposed instrument

949. The instrument proposed here should be designed in a subsidiary manner in order to only fill the regulatory gaps emerging from the fact that foreign trade law does not provide for provisions on third-country measures leading to distortions of competition in the EU internal market. The competition provisions contained in the Treaties (Art. 101 and 102 TFEU) and European merger control, however, already permit comprehensive protection of competition, and should remain applicable as a priority in their respective scope. Third-country subsidies should therefore be notified, but the conduct of subsidised undertakings within the scope of Art. 101 and 102 TFEU should be examined in accordance with these provisions alone. In concentration cases, by contrast, third-country subsidies should be subject to a separate investigation which – just as with Member State aid – may have to take place alongside traditional merger control. Notification would perform a preventive function in such cases.

950. That Art. 101 and 102 TFEU are to take priority results in detail from the following considerations: Insofar as the existing provisions are conditional on the determination of a specific market position (Art. 102 TFEU, merger control), it can already be taken into consideration that this position may be strengthened through third-country measures distorting competition (*e.g*., third-country State aid).[559] Furthermore, the German FCO rightly stressed in the concentration case *CRRC/Vossloh* that it may also be necessary to take previous conduct into account in this investigation which the combined undertaking may continue in future (*e.g.*, cut-throat price strategies).[560] Therefore, no need exists for additional provisions in this regard.

951. Insofar as Art. 101 and Art. 102 TFEU provide that conduct on the part of an undertaking is to be assessed with regard to the likelihood of it causing distortion of competition, it is not possible without amending the EU Treaties to affirm the existence of a competition violation only because market conduct which would otherwise be permissible is influenced by third-country measures.[561] According to case experience so far, this would in practice particularly affect low or predatory prices (dumping) induced by third countries. In this respect, however, hardly any recognisable regulatory gaps would remain, at least if the third-country State aid instrument proposed in Section 4.1.3.1 above were to be introduced. Predatory pricing of dominant undertakings is already prohibited as an abuse under Art. 102 TFEU according to the law as it stands; furthermore, it is possible to take action in anti-dumping proceedings against cut-throat prices for goods in the case of a border crossing. The third-country State aid instrument would apply in the remaining cases, and would ensure that third-country measures that encourage dumping are neutralised.

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[559] See Section 3.1.2.1 above (esp. para. 689) and Section 882 (esp. paras. 841 ff.).

[560] FCO, Decision of 27 April 2020, B4-115/19 – CRRC/Vossloh; on the consideration of pre-concentration conduct cf. also, *e.g.*, European Commission, Decision 94/449/EC of 14 December 1993, IV/M.308 - Kali + Salz/MdK/Treuhand, OJ L 186 of 21 July /1994 p. 38, para. 47; see on this already para. 920.

[561] See Section 3.1.2.1 above (esp. para. 691).

952. Over and above this, it is indeed, as a matter of principle, possible to go farther in prohibiting behaviour under secondary law (Regulation/Directive). Thus, the Dutch proposal[562] recommends providing for a list of specific prohibited conducts for undertakings which are promoted by third countries or with an unregulated dominant position in the third country (supply conditions, price discrimination, tied selling, investments not in conformity with the market). However, the Monopolies Commission does not see a need for that if third-country subsidies can be effectively neutralised by the instrument proposed here.

953. Finally, with regard to assessing the market position, it should be pointed out once again that in cases where undertakings merge and where these undertakings may be exposed to potential competition from third-country undertakings, greater consideration should be given in future to the fact that the market entry of such third-country undertakings may depend on strategic political considerations, and not only on economic ones. The criteria for the determination of potential competition in the relevant Commission guidelines should be expanded in this regard.[563]

4.1.3.3 Introducing a presumption rule to make it easier to prove third-country subsidies

954. The Monopolies Commission shares the view that investigations by EU authorities into third-country subsidies are made more difficult by the fact that relevant information is available mostly in the third countries themselves and not in the EU.[564] The undertakings which are affected by the proceedings in the EU are however likely to be able, as a rule, to obtain and disclose the requisite information. In the view of the Monopolies Commission, a presumption rule should therefore be considered as far as information is concerned regarding the question of whether third country subsidies are granted at market conditions or at - potentially distorting - different conditions.

955. For reasons of practicability, the presumption rule should be restricted to clearly-defined cases where it is suspected that a subsidy is not in conformity with the market. One example would be a rule according to which, with undertakings with government ownership of for instance at least 20 percent[565], it is presumed that such undertakings do benefit from state subsidies that do not conform to normal market conditions. The presumption rule could be used in order to subject the undertakings concerned to specific disclosure obligations under procedural law where indications exist that competition is being distorted. In order to rebut the presumption, the undertakings concerned could therefore, for instance, be obliged to present accounts providing information regarding the state funding that they have received.[566] They could furthermore be obliged to explain the nature and scope of state influence on their business decisions.

956. Apart from this, the presumption rule should not relate to any other information problems which may exist in investigations vis-à-vis third-country undertakings (*e.g.*, with regard to secret cartel agreements). Such problems

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562 Non-paper strengthening the level playing field on the internal market, p. 2, Section “level playing field proposal”, Bullets 2 and 4; retrievable: https://www.permanentrepresentations.nl/binaries/nlatio/documents/publications/2019/12/09/non-paper-on-level-playing-field/Dutch+nonpaper+on+Level+playing+field.pdf .

563 European Commission, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 031 of 5 February 2004, p. 5, para. 69; see on this Section 3.3.2.2 above.

564 Cf. already para. 781 above

565 Cf. Business Europe, The EU and China - Addressing the systemic challenge, January 2020, p. 97 with footnote 128; retrievable: https://www.businesseurope.eu/sites/buseur/files/media/reports_and_studies/the_eu_and_china_full_february_2020_version_for_screen.pdf. Alternative (but narrower) SOE definition of the OECD: “state exercises legal ownership”; see OECD, Competitive Neutrality, Report, 2012, p. 17; OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition, p. 15.

566 Cf. Netherlands, Non-paper - Strengthening the level playing field on the internal market, 9 December 2019, https://www.permanentrepresentations.nl/documents/publications/2019/12/09/non-paper-on-level-playing-field, retrieved on 16 June 2020, p. 2 on the introduction of transparency obligations.

may be serious, but they are not unique to third-country influence on the economy. They are therefore not dealt with in detail here.

957. It should be possible to subject SOEs from third countries to specific transparency obligations, along the lines of the provisions of Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings. This should apply at least when the European Commission adopts a decision on the economic benefits notified by the undertakings concerned.[567]

4.1.3.4 No further-reaching European defensive measures to be facilitated

958. If the third-country aid instrument proposed by the Monopolies Commission were introduced, there would be no need for provisions permitting the Member States or the undertakings there to react to a farther-reaching degree to third-country subsidies distorting competition with their own defensive measures ("matching clauses"). It should be borne in mind that measures applied defensively are possible under the law as it stands to a degree that this is justifiable in terms of competition (*e.g.*, State aid in the European interest).[568] Such measures, however, interfere with competition in the EU internal market – in addition to the third-country measures that have to be fended off.

959. Measures which actively strengthen the competition position of European undertakings (*e.g.*, creating national or European Champions) also distort competition.[569] This is aggravated by the fact that these measures cannot be based on recognised justifications in merger control law or in the law on State aid. Such measures generally appear problematic in terms of competition policy.[570]

4.1.4 The Monopolies Commission's own draft proposal

960. The Monopolies Commission would like to present below an example draft proposal in order to illustrate how the third-country State aid instrument advocated in this special chapter might be implemented. The instrument could take the form of a Regulation (Article 288(2) TFEU) and be structured as follows:

"Art. 1 : Subject-matter and scope

(1) The purpose of this Regulation is to ensure equal treatment between aid granted under Article 107 TFEU and equivalent support measures granted by third countries. The purpose of this equal treatment is to create a level playing field within the common market for undertakings operating in the common market.

(2) The present Regulation shall apply without distinction to each undertaking operating within the EU.

(3) This Regulation shall not apply in cases where the Commission initiates proceedings on the basis of a regulation implementing trade defence measures adopted pursuant to Article 207 paragraph 2 TFEU.

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567 Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (codified version), OJ L 318 of 17 November 2006, p. 17.

568 See Section 3.2.2.2 above and 3.2.2.3.

569 see Section 3.2.2.4 above and 3.3.2.4.

570 See on defensive and export cartels also (differentiating) Section 3.1.2.2 (differentiating). the Monopolies Commission's view is that the German ministerial authorisation should be assessed differently; see Monopolies Commission, Special Report 3, Merger projects of Kaiser Aluminium & Chemical Corporation, Preussag AG and Vereinigte Industrie-Unternehmungen AG, Baden-Baden 1975, paras 41-42; Special Report 63, The 8th Amendment to the ARC from a Competition Policy Perspective, Baden-Baden 2012, paras. 32, 35-38; XX Main Report, A Competition Policy for the Financial Markets, Baden-Baden 2014, paras. 559, 572.

(4) The present Regulation shall not apply in cases in which the Commission, or competition authorities of the Member States, initiate proceedings within their responsibility in accordance with Articles 4 and 5 of Regulation 1/2003[571]*.*

(5) The present Regulation shall only be applicable to undertakings which have a turnover of […] within the common market.

[…]

Art. 2: Definitions

[…]

Art. 3: Prohibition of third-country State aid

(1) If an undertaking receives an economic advantage from a third country, such measure shall not be deemed compatible with the common market where it would constitute a violation of Articles 107 paragraph 1 TFEU as a Member State measure.

(2) It shall be presumed with regard to undertakings in which a third country has a capital holding of [20 %] or more that measures within the meaning of paragraph 1 are taken with regard to them.

(3) The following subsidies are presumed to be contrary to Article 107 paragraph 1 TFEU as a Member State measure:[572]

(a) subsidies which are contingent in law or in fact upon export performance, whether solely or as one of several other conditions, or which are contingent solely or solely as one of several other conditions upon the use of domestic over imported goods;

(b) subsidies to enterprises in difficulty, except where a restructuring plan is submitted which will ensure the long-term viability of the beneficiary and which provides for a significant own contribution by the beneficiary;

(c) subsidies whereby a government grants guarantees for debts or liabilities of certain enterprises without any limitation on the amount of these debts or liabilities or the duration of the guarantee;

(d) operating subsidies in the form of tax benefits which are not granted through general measures.

(4) The following subsidies may be granted if they are necessary in order to achieve goals of the public interest, or if the amounts of the subsidies concerned are limited to the minimum necessary to achieve such goals, and their impact is restricted to the common market:

(a) subsidies of a social nature to individual consumers, provided that such subsidies are granted without discrimination as to the origin of the goods concerned,

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[571] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1 of 4 January 2003, p. 1.

[572] See Art. 1(4)-(5) of the Regulation 651/2014; Art. 4 para. 4 of the Regulation 2016/1037; European Commission, White Paper, pp. 15-16.

(b) subsidies to make good the damage caused by natural disasters or other exceptional occurences,

(c) subsidies to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment,

(d) subsidies to remedy a serious disturbance of economic life,

(e) subsidies to promote the development of specific industries or certain economic areas insofar as they are likely to be harmful to trade between Member States or distort competition in the common market,

(f) subsidies to undertakings which are tasked with precisely-defined services of common economic interest, insofar as such subsidies are restricted to the costs for the provision of such services,

(g) subsidies to promote culture and conserve cultural heritage insofar as they are likely to harm trade between Member States or distort competition in the common market, and

(h) subsidies to promote important projects of regional or bilateral interest which have been established on the basis of an international agreement.

(5) Subsidies within the meaning of paragraph 3 (e) may include the following subsidies, amongst others: subsidies for precisely-defined research, development and innovation purposes, subsidies for training activities or job-creation, subsidies for environmental purposes, as well as subsidies benefiting small and medium-sized enterprises, which by definition have fewer than 250 employees. Undertakings in which 25 % or more of the shares or voting rights are controlled by a public body shall not be regarded as undertakings within the meaning of the first sentence.[573]

(6) A measure shall also be regarded as compatible with the common market within the meaning of the present provision if the State aid system existing in the third country concerned has been recognised by the Commission in accordance with Article [10].

Art. 4: Verification

(1) Each undertaking within the EU must notify receipt of economic advantages within the meaning of Article [2] in writing to the Commission's Directorate-General for Competition. In cases of reports in accordance with Article 4 paragraph 1 of Regulation 139/2004[574]*, the notification must be effected together with the report*[575]*.*

(2) In cases referred to in the second sentence of paragraph 1, the concentration may not be put into effect either before notification or until the notified economic advantage has been declared compatible with the common market by a decision pursuant to Article [5] paragraph 2 or by expiry of the period for examination pursuant to Article [5] paragraph 6.

(3) The decision on a contract award or a concession may not be taken before notification in cases involving a procedure pursuant to Directive 2014/23/EU, Directive 2014/24/EU, Directive 2014/25/EU or Directive 2009/81/EC, nor may it be taken until such time as the economic advantage notified

573 Cf. European Commission, Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (Text with EEA relevance) (notified under document number C(2003), p. 36, recital 13 and Art. 3(4).

has been declared compatible with the common market following a decision pursuant to Article [5](2).

(4) The requisite documents shall be listed in a Commission implementing regulation.

(5) The third country which has granted the economic advantage and which is to be notified in accordance with paragraph 1 shall be afforded the opportunity to make a statement.

Art. 5: Investigation of the notification and Commission decisions

(1) The Commission shall verify the notification immediately upon receiving it, and shall decide whether to initiate investigation proceedings. The initiation of inspection proceedings shall be communicated to the notifying undertaking.

(2) Should the Commission conclude in the investigation proceedings, taking account of the Union interest, that the economic advantage that has been notified is based on a measure which is compatible with the common market, it shall adopt a decision to that effect.

(3) Should the Commission conclude in the investigation proceedings, taking account of the Union interest, that the economic advantage that has been notified is based on a measure which is not compatible with the common market, it shall adopt a decision to that effect.

(4) In its assessment of the Union interest within the meaning of paragraphs 2 and 3, a market failure or the fulfilment of political objectives of the EU shall be particularly taken into account in favour of the recipient of the subsidy. In cases referred to in Article [4] paragraph 3, additional consideration shall be given to the balance between the interest in protecting competition and the interest in reciprocal market access. Aspects of public security and order shall not be taken into account when adopting a decision under this Article.

(5) If the Commission finds that one or more competitors of the notifying party in the internal market receive Union aid of a comparable amount, it shall adopt a decision in accordance with paragraph 2.

(6) The decisions in accordance with paragraphs 2 and 3 of the present Article shall be handed down within [two] months. This period shall start to run on the day after receipt of the complete notification. The notification shall be deemed to be complete if the Commission does not request any further information within [two] months after receipt of the notification, or after receipt of any additional information which it may have requested. The period may be extended with the consent of the Commission and of the undertaking concerned.

(7) If the Commission has not adopted a decision in accordance with paragraphs 2 or 3 within the period referred to in paragraph 5, the notified economic advantage shall be deemed to be compatible with the common market.

[574] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ L 24 of 29 January 2004, p. 1.

[575] If acquisitions were to be recorded beyond the scope of Regulation 139/2004, a legal definition of the additional acquisitions covered would be necessary.

Art. 6: Request for information

(1) The Commission may request undertakings to provide all necessary information in order to carry out the tasks assigned to it by the present Regulation.

(2) When transmitting a request for information to an undertaking or an association of undertakings, the Commission shall state the legal basis, the purpose of the request for information, and the information required, shall set the deadline for the provision of the information, and shall refer to the sanctions provided for in Article [11] in the event of incorrect or misleading information being provided.

(3) The owner of the undertaking, or his or her deputy, or – in the case of legal entities, companies and associations with no legal personality – the persons appointed to serve as representatives in accordance with the law or articles of incorporation, shall provide the requested information in the name of the undertaking or association of undertakings concerned.

(4) Should an undertaking refuse to grant access to the necessary information, or in the event of it not providing it within the deadlines set by the present Regulation, or should it significantly hinder the investigation, then preliminary or final positive or negative findings may be handed down on the basis of the available information.

In the event of a finding that the undertaking has submitted untrue or misleading information, such information shall not be considered, and the available information may be taken as a basis.

The undertaking shall be informed of the consequences of insufficient willingness to cooperate.

(5) In cases falling under Article 3 paragraph 2, the Commission additionally points to the presumption of a measure within the meaning of Article 3 paragraph 1. It may oblige the undertakings to submit all accounts to avert the presumption providing information on economic advantages received within the meaning of Art. [2].

Art. 7: Compensatory charge and transparency obligations

(1) Should the Commission conclude that economic advantages which an undertaking has received within the meaning of Art. [2] are not compatible with the European internal market in accordance with Article [5 paragraph 3], it shall impose a compensatory charge.

(2) The Commission shall issue guidance on calculating the amount of the compensatory charge. The compensatory charge may not be higher than the amount of the economic advantage received.

(3) With regard to undertakings in which a third country has a capital holding of 20 % or more, the Commission may apply methods to investigate and measure the economic advantage which take account of the possibility that the conditions prevalent in the third country are not to be regarded as suitable benchmarks.

(4) The obligation to pay a compensatory charge may also be satisfied by virtue of the addressee of the payment obligation providing sufficient proof that the economic advantage received was repaid to the awarding body in full.

(5) Undertakings referred to in Article [3] paragraph 2 in respect of which the Commission adopts a decision pursuant to Article [5] may be required by that decision to comply with transparency obliga-

tions in accordance with Directive 2006/111/EC.[576] The Commission shall lay down the details in an implementing act by [...].

Art. 8: Reimbursement

(1) The reimbursement shall only be deemed to satisfy the payment obligation in accordance with Article [7] if sufficient proof thereof has been provided within [three] months of the publication of the Commission's decision.

(2) The Commission may extend the deadline on request insofar as sufficient grounds exist therefor.

Art. 9: Prerequisites for an exemption

Measures within the meaning of Article [3] paragraph 1 shall be deemed compatible with the internal market and exempt from the notification obligation in accordance with Article [4] paragraph 1 insofar as such measures satisfy prerequisites [to be defined in detail][577].

Art. 10: Recognition decision

(1) A recognition in accordance with the present provision may be issued if the European Union has concluded an international agreement which leads to State aid control in the third country concerned, or if a third country has introduced such State aid control which at least satisfies the following conditions:

(a) […]

(2) A recognition decision is a binding statement by the European Union that a third country or a geographical association of countries has a legal framework that is at least comparable to that of European State aid law. The obligation to notify in accordance with Article [4] paragraph 1 shall remain unaffected thereby.

(3) A recognition decision may be withdrawn if the legal framework conditions in a third country have changed considerably.

(4) The third country concerned shall be afforded the opportunity to submit comments in cases falling under paragraph 3.

[576] Commission Directive 2006/111/EC of 16 November 2006 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings (codified version), OJ L 318 of 17 November 2006, p. 17.

[577] See Article 3 Commission Regulation 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union, OJ L 187 of 26 June 2014, p. 1.

Art. 11: Fines

(1) The Commission may impose fines on undertakings and associations of undertakings by means of a decision if they intentionally or negligently act in violation of an obligation in accordance with the present Regulation.

The fine for each undertaking involved in the infringement, or for each association of undertakings involved in the infringement, may not exceed 10 % of its respective total turnover made in the previous business year.

In the event that the infringement by an association of undertakings is connected with the activity of its members, the fine may not exceed 10 % of the sum of the total turnover of those members which were active in the market that was impacted by the infringement on the part of the association.

(2) The undertaking concerned shall be afforded the opportunity to submit comments prior to the imposition of a fine in accordance with paragraph 1.

(3) In the event of the imposition of a fine in accordance with paragraph 1, the Commission shall inform the Member State in which the undertaking concerned is domiciled.

(4) The decisions adopted in accordance with paragraph 1 shall not be relevant under criminal law.

Art. 12: Revision

(1) The Commission shall submit an annual report on the application and implementation of the present Regulation to the European Parliament and the Council, appropriate consideration being given thereby to the protection of confidential information within the meaning of Article [2].

(2) The report shall contain information concerning the amount and origin of third-country State aid in the internal market, the number of sets of proceedings initiated and completed, and the number of fines imposed.

Art. 13: Final provisions

(1) The case-law of the Court of Justice of the European Union on Article 107 TFEU shall apply mutatis mutandis to measures within the meaning of Article 3.

[…]"

4.2 Tools for enforcing European competition principles in relations with third countries

961. In addition to the abovementioned instruments, which largely aim to bring about equal competition conditions in the EU internal market, tools are being discussed which can be used in order to actively implement European competition principles in relations with third countries, and with China in particular. The discussion especially relates to the introduction of an international procurement instrument for application in procurement in the EU internal market (Section 4.2.1), the EU connectivity strategy which is intended to connect third countries to the EU internal market and to provide an alternative to the Chinese "Belt-and-Road Initiative" (Section 4.2.2), as well as the planned investment agreement directly between the EU and China (Section 4.2.3).

4.2.1 The International Procurement Instrument – IPI

962. Apart from bringing about equal competitive opportunities in the EU internal market, it is regarded as a problem that market access conditions for European undertakings in third countries, and for undertakings from third countries, are not uniform in calls for tender in the EU. Under Art. 206 TFEU, the EU's foreign trade is meant to contribute to the harmonious development of world trade.[578] The EU internal market is therefore also largely open to bidders from third countries in terms of state procurement. This openness is however not reciprocated.[579] In fact, the procurement markets in third countries remain largely closed to European undertakings, through both legal and purely de facto disadvantages.[580]

963. The public procurement markets take on major economic significance worldwide. Their global volume is estimated at about EUR 8 trillion.[581] At the same time, access to the public procurement markets for foreign undertakings is frequently highly restricted. For instance, according to the European Commission, EU undertakings may only submit bids on contracts valued at approximately half of the worldwide public procurement volume. European undertakings have so far only generated roughly EUR 10 billion per year on worldwide procurement markets (as successful bidders). According to information from the European Commission, European bidders could certainly potentially generate a further EUR 12 billion per year without the existing restrictions.[582] This would more than double the volume achieved so far by European undertakings on public procurement markets outside the EU. This is however a minor amount all in all, in comparison to the EU's total goods and services exports, as well as to the volume of worldwide procurement markets.

964. Preference of domestic undertakings takes place even in large industrialised countries with which the EU has had well-established trade relations for quite some time.[583] Also with regard to China, no satisfactory opening of the markets for the award of public contracts can currently be recognised for undertakings established in the EU.[584] This is reflected, amongst other things, in China's industry policy strategy "Made in China 2025". This strategy is meant to make China less dependent on foreign technology, and instead to improve the position of Chinese undertakings (worldwide).[585] The Government Procurement Law of the People's Republic of China also plays a role in this context.[586] Market access by foreign undertakings is made more difficult particularly by the "Buy Chinese" clause in Art. 10 of the Law. This clause provides that, in principle, national companies should be given preference for government procurement..[587] Exceptions apply above all when goods or services are not available within the

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[578] Frenz, Handbuch Europarecht, para. 5020.

[579] European Commission, Amended proposal for an IPI Regulation, COM(2016) 34 final, p. 2; Communication to the European Parliament, the European Council and the Council, EU-China – A strategic outlook, JOIN(2019) 5 final, p. 8.

[580] European Commission, Amended proposal for an IPI Regulation, COM(2016) 34 final, p. 2.

[581] European Commission, Fact Sheet: International procurement instrument, March 2019, https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157728.pdf, retrieved on 22 June 2020.

[582] European Commission, Amended proposal for an IPI Regulation, COM(2016) 34 final, p. 2.

[583] See esp. at US Federal level the Buy American Act (41 U.S.C. §§ 8301–8305), which obliges US companies to give preference to domestic products in procurement (41 U.S. Code § 8303); for procurement in the mass transit infrastructure also 49 U.S.C., § 5323(j), 49 CFR Part 661 ("Buy American").

[584] European Commission, Amended proposal for an IPI Regulation, COM(2016) 34 final, p. 2; Commission Communication: EU-China – A strategic outlook; Decision of the European Parliament of 23 May 2012 on the topic "EU and China: unbalanced trade?", 2010/2301(INI); BDI, Grundsatzpapier China. Partner und systemischer Wettbewerber – Wie gehen wir mit Chinas staatlich gelenkter Volkswirtschaft um?, January 2019, p. 3.

[585] Zenglein/Holzmann, Mercator Institute for China Studies, Evolving Made in China 2025, pp. 9 ff.

[586] The Government Procurement Law of the People's Republic of China (Order of the President No. 68).

[587] This reads as follows: "domestic goods, construction and services shall be procured for government procurement"; On the state of the standards in China under the law on public procurement: European Camber of Commerce in China, European Business in China Position Paper 2018/2019.

territory of China, or at least cannot be acquired on reasonable commercial terms. A further statutory exception may apply if goods or services are expected to be used outside the territory of the People's Republic of China.[588] Apart from this, absolute investment bans or an obligation to join domestic joint ventures may exist in individual economic sectors.

965. The International Procurement Instrument aims to remedy the unequal conditions of entry to the public procurement market in relation to third countries, and to bring about reciprocity.[589] Ideally, reciprocal market access should be created with comparable conditions, particularly in relations with China, and at least it should be possible to use market access as a lever in the negotiations on an EU-China investment agreement.[590] The current European procurement directives are not meant to be replaced by the instrument. The IPI Regulation proposed by the European Commission is only an additional set of rules that is exclusive solely in terms of restrictions to the European procurement market for undertakings from third countries.[591] The IPI is, however, intended to pursue "strategic objectives" more energetically with the aid of public procurement law.[592] For instance, it should be possible in future to demand compliance with European Standards in labour and environmental law, as well as in terms of security-relevant aspects, in relations with third countries.[593] With regard to participation by Chinese bidders in European procurement proceedings, sectoral associations consider there to be a need to combat the circumvention of social and environmental standards more effectively than is presently the case.[594]

966. The European Commission submitted an amended proposal for a Regulation for the IPI in 2016, after an initial proposal from 2012 had failed in the Council.[595] The amended proposal continues to be based on Art. 207 TFEU, but is worded more reticently vis-à-vis the original proposal.[596] Accordingly, investigative powers would be granted to the European Commission in order to examine, in the Union's interest, measures of third countries which placed EU undertakings at a disadvantage in public procurement in those countries. These measures would be combined under the term restrictive and/or discriminatory measure, and would have to result in a serious and

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588 Cf. Art. 10 of the Government Procurement Law: "The government shall procure domestic goods, construction and services, except in one of the following situations: (1) where the goods, construction or services needed are not available within the territory of the People's Republic of China or, though available, cannot be acquired on reasonable commercial terms; (2) where the items to be procured are for use abroad; and (3) where otherwise provided for by other laws and administrative regulations."

589 European Commission, Amended proposal for an IPI Regulation, COM(2016) 34 final, recital 12 ("The objectives of improving the access of Union EU economic operators to the public procurement and concessions markets of certain third countries protected by restrictive and discriminatory procurement measures or practices and of preserving equal conditions of competition within the European Single internal market"); see also Neun/Otting, EuZW 2012, 566 (566 ff.).

590 See European Commission, Fact Sheet: International procurement instrument, March 2019, https://trade.ec.europa.eu/doclib/docs/2019/march/tradoc_157728.pdf, retrieved on 12 June 2020, where the "case of China" is particularly emphasised (p. 4); Blenkinskop, Brussels pushes EU leaders to play public tender card against China, Reuters of 20 March 2019.

591 European Commission, Amended proposal for an IPI Regulation, COM(2016) 34 final, recital 18.

592 Neun/Otting, EuZW 2012, 566 (566 ff.).

593 European Commission/High Representative for Foreign Affairs & Security Policy, Joint Communication to the European Parliament, the European Council and the Council, EU-China – A strategic outlook, JOIN(2019) 5 final, 12 March 2019 final, p. 9; European Commission, Communication – Guidance on the participation of third country bidders and goods in the EU procurement market, C(2019) 5494 final.

594 BDI, Grundsatzpapier China. Partner und systemischer Wettbewerber – Wie gehen wir mit Chinas staatlich gelenkter Volkswirtschaft um?, January 2019, p. 17; BusinessEurope, The EU and China – Addressing the Systemic Challenge, p. 17, 120.

595 See again footnote 369 on the amended proposal; furthermore on the original proposal: European Commission, Proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries, COM(2012) 124 final, 21 March 2012; European Economic and Social Committee, comment, REX/465, 27 April 2016, p. 14.

596 European Commission, Amended proposal for an IPI Regulation, COM(2016) 34 final (footnote 369).

recurrent impairment of access of Union goods, services and/or economic operators to the market of the third country.[597] Were such measures to be ascertained, negotiations could initially be entered into with the third country concerned aiming to eliminate the measures (consultation phase). Once the consultation deadline has expired or the negotiations have failed for other reasons, the European Commission would be empowered to apply "price adjustment measures" to contracts in the EU, making the bids of undertakings from the third country concerned more expensive. The prerequisite for this would be that at least 50 per cent of the total value of the goods or services offered must be attributable to the third country in accordance with legally defined criteria.[598]

967. The possible "price adjustment measures" could then be applied to contracts with an estimated value equal to or above EUR 5 million, on condition that the third country concerned adopts or maintains restrictive and/or discriminatory procurement measures or practices.[599] A penalty of up to 20 percent could be added to the bid price in this case. The price adjustment measures would, however, only be applied for the purpose of the evaluation and ranking of the price component in the tenders, and would not affect the price due to be paid under the contract concluded with the successful bidder.[600] Unlike the original proposal, the amended proposal for an IPI Regulation no longer provides for the across-the-board exclusion of bidders from the third countries concerned. According to the proposal of the European Commission, the current provisions permitting bidders to be excluded from tenders in the sectors of water, energy and transport services, would be deleted (Art. 85 Directive 2014/25/EU and in German law from section 55 of the Ordinance on Sectors). In this respect, there would be a relaxation.

968. If competent national bodies act in violation of the IPI Regulation, these violations should render the procurement decision ineffective directly.[601] The amended proposal for a Regulation furthermore contains (as did the original proposal) a correction mechanism according to which the European Commission could correct the practice of the Member State bodies in accordance with the rules contained in Art. 3 of Directive 89/665/EEC.[602] This means that the European Commission could call on a contracting authority to suspend the procedure and substantiate its legal view. The contracting authority would then have 21 days in which to react to this, either in a positive or negative way.

969. The amended proposal for a Regulation has again met with reservations. Doubts have arisen in general terms as to whether this proposal for a Regulation is really able to reach the goal of reciprocally opening the markets.[603] There is particular criticism of the fact that penalties are only foreseen for contracts valued at EUR 5 million or more, given that only roughly 7 percent of all public contracts are above this threshold.[604] It is therefore proposed to declare the price adjustment measures applicable from a contract value of EUR 2.5 million.[605] In order to determine the requisite connection between undertakings and third countries, the current proposal for a Regulation furthermore provides that the origin of a good is to be determined in accordance with the Community Customs Code, whilst with regard to services, the origin of the economic operator is to be determined on the basis of crite-

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597 European Commission, Amended proposal for an IPI Regulation, COM(2016) 34 final, Art. 2 (f)

598 European Commission, Amended proposal for an IPI Regulation, COM(2016) 34 final, Art. 8 § 1 and 3.

599 European Commission, Amended proposal for an IPI Regulation, COM(2016) 34 final, Art. 8 and pp. 4 and 32 ff.

600 European Commission, Amended proposal for an IPI Regulation, COM(2016) 34 final, Art. 11 § 1.

601 The determination of the competent national bodies is to be left to the Member States in coordination with the European Commission; see European Commission, Amended proposal for an IPI Regulation, COM(2016) 34 final, recital 26.

602 European Commission, Amended proposal for an IPI Regulation, COM(2016) 34 final, Art. 13 and recital 28.

603 See, *e.g.*, European Economic and Social Committee, comment, REX/465, 27 April 2016.

604 European Economic and Social Committee, comment, REX/465, 27 April 2016, p. 3.

605 European Economic and Social Committee, comment, REX/465, 27 April 2016, p. 10.

ria listed in the proposal itself.[606] This does justice to the complexity of global connections between undertakings and supply chains, but it remains unclear when a sufficiently direct connection with a Member State exists that would justify attributing the activities of legal persons to this Member State.

970. The European Commission had called on the European Parliament and the Council to accept the IPI by the end of 2019, but this has yet to take place.[607] The Federal Government has signalled openness. It however takes the view that the proposal should be amended in the sense that any potential discriminatory effects for undertakings established in the EU and European contracting authorities should be avoided.[608] These reservations are likely to be justified insofar as undertakings from third countries themselves are not necessarily able to influence how their home countries regulate market access. The causers of reciprocity conflicts (= third countries) do not therefore ultimately coincide with those affected by the countermeasures of the IPI (= undertakings from third countries). Apart from this, there is a risk that other countries might also regard the IPI in the amended version as protectionist and take countermeasures in such cases (possibly also outside of procurement).

971. Specific consideration should be given in relations between the EU and China to the fact that considerable deficits of reciprocity exist when it comes to access to the respective procurement markets. European undertakings find it very difficult to take part in public calls for tender in China, whilst the EU procurement market is largely open to Chinese undertakings. Against this background, the possibility of price adjustments might create incentives for the Chinese State to dispense with a policy favouring Chinese undertakings and making it more difficult for European bidders to take part in Chinese procurement proceedings. It also appears to be acceptable that the Chinese State might subsequently introduce an identical instrument. In any case, the risk of countermeasures outside procurement can never be ruled out, regardless of the measures taken.

972. owever, on balance, in view of the problem of Chinese state capitalism, the creation of a competitive level playing field in the EU internal market appears to be a priority, while questions of mutual market access in the EU's relationship with China take second place. The Monopolies Commission is therefore refraining from making any further comments on the IPI at this juncture.

4.2.2 The EU’s connectivity strategy

973. The European Commission and the High Representative of the Union for Foreign Affairs and Security Policy have developed a “connectivity strategy” in order to connect Europe and Asia, including via transport connections and digital networks.[609] This EU connectivity strategy acts as an alternative to Chinas “17+1” strategy and the “Belt-and-Road Initiative”. It can be used in order to gradually approach the third countries involved to the market economy system in the EU internal market. This would however take place at the expense of subsidies possibly interfering with competition in the third countries concerned, something which would be regarded as problematic within the EU under EU law.

974. In their proposal for an EU connectivity strategy, the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy designate concrete EU financing instruments to be used for investments in third countries.[610] In this regard, they refer to the Neighbourhood Investment Facility (NIF), the In-

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[606] European Commission, Amended proposal for an IPI Regulation, COM(2016) 34 final, Art. 3.

[607] European Commission, Representation in Germany, press release of 12 March 2019, “Commission evaluates relations with China and proposes ten measures”.

[608] Bundestag printed paper 19/8137, p. 35.

[609] European Commission, Connecting Europe and Asia – Building blocks for an EU Strategy, 19 September 2018, JOIN(2018) 31 final, p. 1.

[610] It is also mentioned that resources should be mobilised in the third countries; European Commission, Connecting Europe and Asia – Building blocks for an EU Strategy, 19 September 2018, JOIN(2018) 31 final, pp. 7 and 11 (“mobilisation of domestic resources”).

vestment Facility for Central Asia (IFCA) and the Asia Investment Facility (AIF), the two latter having provided more than EUR 4.2 billion of investments between 2010 and mid-2018 through blending of grants and loans. Additionally, the European Fund for Sustainable Development (EFSD) is designated to be used in the Multiannual Financial Framework for 2021-2027 in order to catalyse the provision of additional public and private capital.[611] This support will focus on Africa and the countries in the EU neighbourhood. Having said that, parts of the funds are also to be used for other geographical areas. Apart from this, the European Commission supports all efforts towards international cooperation in order to develop an effective combination of funding sources. In this context, it promotes cooperation between European banks, including public banks, and other banks from non-EU countries. According to the proposal for an EU connectivity strategy, the EU should moreover support the processes in the G7, the G20 and the OECD in order to align lending practices of public finance institutions with the principles of sustainable connectivity.[612]

975. The funds described can be used in a similar way as promotional measures within the EU in countries neighbouring the EU and in other third countries, including those which are involved in the Chinese "Belt-and-Road Initiative".[613] They may therefore help countervail funding shortfalls in investments in the common interest and serve as defensive measures to countervail Chinese financial measures that distort competition. Unlike promotional measures within the EU, however, the legitimate interests of the third countries concerned are furthermore to be taken into consideration here. The relevant interests are hence expanded.

976. In terms of competition policy, the proposed financing measures are unproblematic as a matter of principle, at least as far as the protection of competition in the EU internal market is concerned. The measures primarily impact in the third countries concerned. They can have a mere indirect impact in the EU internal market at most. This is the case, for instance, if they maintain the opportunities open to European bidders to compete in procurement in the relevant third countries against bidders subsidised by the Chinese State.[614] In addition, the interests of European exporters are protected where they need to assert themselves in the relevant third countries against subsidised Chinese competitors. The relevance of the EU connectivity strategy is, however, limited from the point of view related solely to protection against competition in the EU internal market.

977. Greater significance attaches to the EU connectivity strategy if one additionally takes into account the fact that it also aims to serve trade policy goals. In an ideal case, the connectivity strategy can help approach the markets of the third countries concerned to the EU internal market, and possibly even expand it in the long term. However, there may be obstacles in the pursuit of such objectives. It must be presumed that China is willing to deploy considerable subsidies as part of the "Belt-and-Road Initiative" where these help assert Chinese interests. This might, however, also cause the EU to go beyond pursuing common interests with the third countries if this benefits European undertakings vis-à-vis their Chinese competitors. Such offensive use of funding, protecting European interests beyond creating equal competition conditions, could hinder the development of the markets in the third countries concerned, and hence also their approachment to the EU internal market.

978. Apart from this, the success of the EU connectivity strategy is likely to depend on whether it is at all possible to incorporate the markets in the third countries concerned more closely into the EU's market economy system

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611 On this tool see Regulation (EU) 2017/1601 of the European Parliament and of the Council of 26 September 2017 establishing the European Fund for Sustainable Development (EFSD), the EFSD Guarantee and the EFSD Guarantee Fund, OJ L 249 of 27 September 2017, p. 1.

612 European Commission, Connecting Europe and Asia – Building blocks for an EU Strategy, 19 September 2018, JOIN(2018) 31 final, pp. 10-11.

613 See on this Section 3.2.2.2 above and 3.2.2.3.

614 Cf. on this European Commission, Connecting Europe and Asia – Building blocks for an EU Strategy, 19 September 2018, JOIN(2018) 31 final, p. 12.

than into China's state capitalist system. On the one hand, it can be presumed that the third countries concerned are certainly likely to be interested in finding an alternative to China when it comes to investments, namely the EU. China frequently offers loans to the countries on the New Silk Road without getting directly involved in projects.[615] According to the Center for Global Development, precisely eight of the third countries concerned are at risk of defaulting on their payments.[616] The increase in debt brings risks running counter to the own interests of the third countries concerned and which at the same time may have a harmful effect on trade between Asia and Europe.

979. On the other hand, it remains uncertain whether the third countries concerned will be willing to cooperate with the EU as part of the EU connectivity strategy. The third countries concerned will ensure that the aid is used to finance investments which they themselves consider necessary. In the longer term, they will also take into account with regard to European funding offers the fact that promotion of their economy by the EU, whilst it is likely to open up opportunities for relatively free development, does not always offer planning security over and above the concrete projects, and that the long-term benefit is also likely to depend on the level of commitment on the part of their own undertakings. Cooperation with China may entail much closer interlocking with established Chinese structures in substantive terms, but it may provide greater prospects to have planning security and to receive follow-up investments as part of the further development of the "Belt-and-Road Initiative".

980. For the above reasons, it will be very much a question of how the financial support is designed as part of the EU connectivity strategy. Particular significance is likely to attach here to what the support measures refer to. Sustainable aid is likely to be contingent on the EU endeavouring to bring about a stable, durable connection between the economic structures in the third countries and the EU internal market, to the advantage of both, over and above the financing of individual projects. To this end, the EU should focus its investments in those sectors which are important for establishing a competitive economy in the countries concerned. The aid element that is not in conformity with the market within the meaning of the market investor test should be kept as small as possible. Apart from this, a long-term orientation of the promotion (*e.g.*, to enhance research & development) appears to be preferable.

4.2.3 The EU-China agreement

981. An investment agreement between the EU and China on economic relations is regularly expected to improve market access for European companies in China and thus increase reciprocity. There have already been plans for several years to conclude an investment protection agreement between the EU and China.[617] Both the EU and China have already expressed a common interest in concluding such an agreement in connection with the EU-China summit held on 14 February 2012. On 13 October 2013, the Council issued a mandate for negotiations on the basis of which the Commission was empowered to negotiate such an agreement for the EU with China. This agreement is meant to replace the bilateral agreements between China and the Member States of the EU, such as Germany, and create market access for European undertakings.[618] However, the negotiations have not yet been completed.

982. European business hopes that the agreement will enable it to obtain comprehensive market access in China. The bilateral investment protection agreement between Germany and China, concluded in 2003, contains invest-

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615 Gaens, B., in: Konrad Adenauer Stiftung, Panorama – Trade and Economic Connectivity in the Age of Uncertainty, Singapur 2019, S. 19 – 28, 21.

616 Hurley, J., Morris, S., & Portelance, G. (2019). Examining the debt implications of the Belt and Road Initiative from a policy perspective. Journal of Infrastructure, Policy and Development, 3(1), 139-175.

617 On developments relating to a joint investment protection agreement: Bungenberg, in: Müller-Graff, Die Beziehungen zwischen der Europäischen Union und China, Baden-Baden 2017, pp. 81-112.

618 *Ibid.*, 89-90.

ment protection standards, but no market access rules.[619] The latter appear to constitute potential subject-matter for an EU-China agreement.[620] Conversely, however, the level of investor protection within the German-Chinese agreement can be regarded as very high, whilst it is restricted in the EU's recent agreements, such as that with Canada.[621] This could reduce the risk of the European side violating agreements under investment protection law, but at the same time would also mean restricted protection for investors within China. A further interest of the EU consists in substituting the arbitration proceedings that are in place by establishing a permanent investment arbitral tribunal.[622] The EU has already been able to implement bilateral models of a permanent dispute resolution mechanism in more recent agreements.[623] Whether these reforms of investor-country dispute resolution prove to be effective is however still open. No experience has yet been gathered in this regard.

983. It cannot currently be predicted which concrete provisions will form the subject-matter of a future investment agreement. The introduction of the provisions on transparency for state funds and SOEs called for by the European Parliament in line with the principles drawn up by the *International Working Group of Sovereign Wealth Funds* (*Santiago Principles*), which are meant to ensure that investor protection is only granted for commercial activities, would certainly be expedient.[624] The enforcement of such provisions may serve to make it easier to handle state capitalist economic structures, for instance within anti-subsidy proceedings, over and above investment protection.[625]

984. Trade-related provisions traditionally do not form the subject-matter of investment agreements. The latter are restricted to investor protection. Therefore, one would also not anticipate agreements on the award of subsidies or environmental and social standards within such an agreement as a matter of principle. Consequently, the EU and China would have to enter into negotiations on a free trade agreement or expand the agenda for an investment agreement accordingly. The EU and China have in fact already engaged in an exchange on State aid control.[626] The agreement currently being negotiated could therefore also be used to specify the conditions for the application of the proposed third-country State aid instrument proposed here, in relation to China. This particularly applies if more cases than in the case of Member State aid within the meaning of Article 107(1) TFEU should be covered (*e.g.*, economic advantages ensuing from an unregulated market-dominant position). Furthermore, an agreement could serve as a tool to engender greater competition on the Chinese market, , as a consequence, to address the possible dominant positions of Chinese companies in China and related competitive advantages.

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619 On the following Bungenberg, M., in: Müller-Graff, Die Beziehungen zwischen der Europäischen Union und China, Baden-Baden 2017, pp. 81-112, 92 ff.

620 European Commission, Directorate-General for Trade, EU and China agree on scope of the future investment deal, 15 January 2016, https://trade.ec.europa.eu/doclib/press/index.cfm?id=1435, retrieved on 19 May 2020.

621 Bungenberg, M., in: Müller-Graff, Die Beziehungen zwischen der Europäischen Union und China, Baden-Baden 2017, pp. 81-112, 96 ff.

622 Cf. on this the comprehensive proposal in Bungenberg, M./Reinisch, A., From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court, Second Edition (Open Access), Berlin/Heidelberg 2020, https://link.springer.com/content/pdf/10.1007%2F978-3-662-59732-3.pdf, retrieved on 19 May 2020. Comparatively on this also IILCC Study Group on ISDS Reform, IILCC Comparative Report on the Creation and Implementation of a Multilateral Investment Court, Research Paper Series of the International Investment Law Centre Cologne 01-2020, https://iilcc.uni-koeln.de/sites/iilcc/reports/IILCC_Study_Group_on_ISDS_Reform_-_MIC_Report_-01-2020.pdf, retrieved on 19 May 2020.

623 Bungenberg, M./Reinisch, A., From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court, Second Edition (Open Access), Berlin/Heidelberg 2020, paras. 41 ff.

624 European Parliament, European Parliament resolution of 9 October 2013 on the EU-China negotiations for a bilateral investment agreement (2013/2674(RSP)), OJ 2016 C 181/45, para. 32.

625 So also Bungenberg, M., in: Müller-Graff, Die Beziehungen zwischen der Europäischen Union und China, Baden-Baden 2017, pp. 81 -112, 94.

626 Cf. EU Council, EU-China Summit Joint statement, 9 April 2019, No. 7 (dialogue in the area of the state aid control regime and the Fair Competition Review System); https://www.consilium.europa.eu/media/39020/euchina-joint-statement-9april2019.pdf, retrieved on 14 May 2020; on this also para. 745 above.

985. The Monopolies Commission would welcome it if the EU and China were to conclude an investment and free trade agreement which particularly covered state subsidies. Nevertheless, in negotiations on investment protection it must be avoided that possible adjustments to the European legal framework as a result of a possible agreement collide with investment protection standards. Specific unequal treatment of Chinese investors on the basis of new legal tools or concomitant expropriation-like interference could mean a violation of investment protection provisions and trigger obligations for compensation.[627] Such a risk particularly exists with market closures in the EU internal market (*e.g.*, by means of restrictions to the free movement of capital), and if the law on competition is designed in a discriminatory manner.[628] Finally, and conversely, effective implementation of agreed standards should be ensured vis-à-vis China. The prospects for this are unclear based on experience to date. In any case, it should be avoided that the new joint agreement entails a deterioration compared to the already existing German-Chinese investment protection agreement.

5 Summary of the recommendations

986. The European Commission's White Paper published in June 2020 on ensuring fair competition with regard to subsidies from third countries is to be welcomed. It provides important impetus for dealing with third-country subsidies and the resulting distortions in the EU internal market. In the view of the Monopolies Commission, however, the envisaged set of three sub-instruments is too one-sidedly oriented towards the creation of official powers of review and intervention. The burdens associated with the new instruments, particularly for the companies concerned, must not be overlooked. Moreover, the theory of harm underlying the planned behavioural and structural remedies remains unclear.

987. The Monopolies Commission advocates a uniform instrument of third country aid, with which third country subsidies and Member State aid would be equated in substance. The third-country aid instrument should intervene in the case of all third-country subsidies which, as a Member State measure, would violate Article 107(1) TFEU. Only the European Commission should be responsible for enforcement. The third-country aid instrument should authorise the European Commission to absorb the advantage associated with the measure by imposing a compensatory levy. Alternatively, however, companies should be allowed to neutralise the advantage by repaying it to the granting third country.

988. The instrument should be procedurally structured as an intervention right Intervention should be possible in all cases which are not covered by the existing anti-dumping and anti-subsidy rules. At the same time, the instrument should be applied in a subsidiary manner to the existing competition rules. In particular in cases of acquisitions of undertakings or Member States' procurement procedures, a procedural standstill obligation should be provided for in order to ensure a review under the third country aid instrument before any exploitation of subsidy related economic benefits and the transfer of such benefits to the seller of the undertaking or to the body responsible for the tendering procedure. Developments should be monitored in order to be able to readjust in case of a possible need for further regulation.

989. There should be a presumption with undertakings where the state has capital ownership above a specific threshold (for instance 20 percent) that measures are taken with regard to them which would violate Art. 107(1) TFEU as a Member State measure. The undertakings should be able to rebut the presumption by revealing their accounts and providing other proof regarding the financial relationships between the undertakings and the relevant third country. It should also be possible to subject the undertakings concerned to additional transparency

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[627] For an overview of the individual investment protection standards cf. Bungenberg, M./Griebel, J./Hobe, S./Reinisch, A., International Investment Law, Munich 2015, Chapter 8.

[628] Specifically in investment control, furthermore, close coordination should be ensured between the competent bodies of the EU and the Member States; see para. 618 and Section 3.3.1 above on the distribution of competences.

obligations. In order to deal with information problems relating to transactions in third countries that are relevant for assessment, the competent authority should be able to rely generally on facts available where the undertakings concerned do not provide the requested information in a timely manner, completely and without distortion.

990. The Monopolies Commission furthermore points out that the contribution made by third-country subsidies to the market position of the recipient undertakings can already be covered under the existing law on competition. However, where undertakings merge which might be subject to potential competition from third-country undertakings, merger control should give greater consideration in future to the fact that market entry of such third-country undertakings may potentially depend on strategic political considerations, and not only on economic ones.

991. The anti-dumping instrument should be reformed in line with competition. Moreover, the existing possibilities with regard to anti-subsidy measures should be properly exhausted as a necessary addition to the right of intervention favoured here. The Monopolies Commission acknowledges that the current enforcement makes full use of the possibilities permissible under WTO law. Investment control should continue to only be used to protect public security and order, and not be enriched with industry-policy considerations. Apart from this, even greater European harmonisation of investment control appears to be desirable. The current Corona crisis also changes nothing as to this assessment.

992. The Monopolies Commission considers the introduction of an International Procurement Instrument (IPI) to be sensible insofar as it can counteract the existing inequalities in access to the respective procurement markets in the EU and China. However, it has to be pointed out that in dealing with Chinese state capitalism, the creation of a competitive level playing field in the EU internal market appears to be a priority, while questions of mutual market access in EU-China relations take second place.

993. The EU should take care in its connectivity strategy not to go beyond pursuing common interests with the third countries in order to pursue a one-sided interest in promoting European undertakings vis-à-vis their Chinese competitors. Such an offensive use of subsidies could hinder the development of the markets in the third countries concerned and thus also their rapprochement to the EU internal market. Sustainable aid, by contrast, would generally require the EU to work to create a stable, lasting connection between the economic structures in the third countries and the EU internal market, thus creating a mutual advantage.

994. Finally, it would be desirable for the EU and China to conclude an investment and free trade agreement particularly covering state subsidies. Nevertheless, it must be avoided in negotiations on investment protection that possible adjustments to the European legal framework as a result of a possible agreement collide with investment protection standards. Finally, effective enforcement of the agreed standards should be ensured.