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Systems Competition – China's Challenge to the Competition Order: Do we need new rules to protect a level playing field for competition with firms from non-EU countries?

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I. Introduction: A Systemic Challenge to the Competition Order

The European Union, and Germany in particular, have prospered from the openness for trade and investment as part of the common commercial policy since the entry into force of the Treaty of Rome in 1958. While there have been dry spells in international trade policy since the Second World War, there has been a long trajectory towards ever more trade and globalization, which culminated in the accession of China to the WTO in 2001. While there was an expectation that China's industry would move up along the value chain, commentators did not foresee the speed with which China would catch up and even overtake Western firms in certain high tech and innovative sectors. What is more important, the working assumption that China's economic and social model would converge towards Western models has not materialized. China's model of state capitalism today raises serious challenges to the European Union's order based on economic and personal freedoms, competition, and individual privacy.

The cornerstones of the EU's economic order include (i) the four freedoms, which secure the internal movement of people, goods, services, and capital, (ii) the common commercial policy including adherence to WTO rules and international law, and (iii) competition and State aid policy, including restrictions on public undertakings. Three elements of China's model stand out as particularly at odds with the EU's competition-based order: (1) extensive state ownership, (2) extensive state financing (in various forms) and (3) regulation which shields Chinese economic actors against foreign competition in Chinese markets. While these elements are not confined to China, the dimension of their strategic use is unique. Combined with the ever-growing economic clout of the Chinese economy this has become a significant systemic challenge.

II. Distortive Strategies and Effects

One might argue that the current situation of relatively restricted access to the Chinese market for EU firms and relatively unrestricted access for Chinese firms to the Internal Market may be preferable from a (short-term) economic welfare perspective, even for the EU, to a situation where access to both markets is relatively restricted. However, even leaving aside the human rights perspective, one cannot put aside the fact that (i) the Chinese model is at risk of distorting the legitimacy of the game through 'financial doping', (ii) it may lead to the inefficient loss of European players and inefficiency, and (iii) the EU is at risk of losing its sovereignty in certain sectors of the economy. Therefore, Chinese state capitalism raises a systemic challenge.

In its 2019 EU-China strategic outlook, the European Commission has identified a long list of distortive strategies applied by China, including "selective market opening, licensing and other investment restrictions, subsidies to both state-owned and private sector companies, closure of its procurement market, localization requirements, including for data, the favoring of domestic operators in the protection and enforcement of intellectual property rights and other domestic laws, limiting access to government-funded programs for foreign companies, and onerous requirements to access the Chinese market." One may add monopoly positions for Chinese firms in their

home market and the resulting scale advantages, a preference for Chinese companies across the whole value chain, as well as predatory pricing strategies.

As evident as these points might seem on a theoretical level, on a separate note it would be worthwhile to obtain empirical evidence, or at least estimations, on the relative size of the distortions on competition and trade due to state-owned enterprises ("SOEs") and subsidies as compared to other strategies mentioned. However, this might lead to the core problem: while Article 25 of the WTO Agreement on subsidies and countervailing measures (SCM Agreement, ASCM) requires WTO Members to notify of any subsidies in order to ensure transparency and allow other Members to review each other's actions in this regard, the level of compliance by WTO Members with this requirement has deteriorated significantly.[2] So the lack of evidence could be part of the systemic problem.

Nevertheless, the ways through which such measures may distort competition in the internal market are qualitatively well known – not only can they shield inefficiency, but they may also divert demand away or discourage entry from more efficient suppliers, lead to inefficient resource allocation and market power problems, allow the acquisition of assets and shares at inflated prices, shift value creation to third States, and lead to long-term disadvantages in R&D and innovation for future technologies.

III. COVID-19 and the Level Playing Field

The COVID-19 crisis has aggravated fears of a more uneven level playing field in several regards: First, firms with a digital business model have increased their market share at the expense of firms which have not digitized their business. This substitution in demand, however, does not qualify as a level playing field challenge from an economic point of view and should instead be seen as a driver for more efficient and future-proof business models.

Second, the different fiscal position of Member States in the European Union has allowed some Governments to step in through various instruments, ranging from taking control or stakes to giving credit and guarantees, to a very different extent. While the prospective of having such policy leeway in times of crisis is a beneficial incentive to improve one's fiscal position in non-crisis times, the playing field for firms inside the Internal Market nevertheless should not be distorted – both in normal times and even more in times of crisis, when firms are at the margin, the game should be decided by efficiency, not by the relative strength of Member States granting aid. Therefore, EU State aid rules including the European Commission's Temporary Framework play a central role in keeping up a level playing field in the Internal Market.

Third, and most important in this context, the fear of strategic takeovers of weakened EU firms in particular by Chinese SOEs or firms which benefit significantly from government funding has increased the willingness of EU policy-makers to consider stricter control of takeovers of EU firms by non-EU players. This fear has been based to some extent on the increase in acquisitions by Chinese firms after the financial crisis. While the US has limited Chinese investment on the basis of national security concerns, in 2018 Chinese investment into the EU27 (excluding the UK) saw the largest growth

and reached 70% of China's total foreign M&A in value.[3] Aggregate data show that, so far, the fear of more foreign M&A activity in the wake of the COVID-19 pandemic in terms of overall investment has not materialized. However, it would be valuable to also have qualitative data in the sense of (i) which (strategic) sectors and assets Chinese and other non-EU economic operators invest in, (ii) whether they are willing to pay a mark-up over the market price and (iii) most importantly, whether they benefit from State aid.

IV. Gaps in the EU's Defense of Its Level Playing Field

To achieve market access and reciprocity for EU companies, the European Commission's China Communication vows to reform the WTO – particularly on subsidies and forced technology transfers – conclude bilateral agreements on investment, and adopt the International Procurement Instrument. The main action point, however, singles out foreign state ownership and state financing of foreign companies and promises to assess how the EU could appropriately deal with their distortive effects on the EU internal market.

The EU's current economic toolbox does not cover the above-mentioned distortive effects:

First, EU competition rules apply without discrimination. In principle, they are not, and should not be, asymmetrical industrial or trade policy leveraging tools. EU merger control does not allow the Commission to intervene against the acquisition of a European firm solely on the grounds that the buyer benefitted from foreign subsidies. It should be mentioned here that there are ways to interpret and enforce existing rules in a more robust way against distortions due to SOEs and subsidies. A German-French-Polish paper has called for taking into account the level of state control of undertakings when calculating turnover, as well as the financial power of state-controlled and subsidized undertakings when deciding in substance on mergers. Academics have gone further and suggested treating all Chinese acquirers as part of a single broad syndicate in merger review and assuming an underlying coordination scheme in antitrust investigations.[4] Nevertheless, past and current reviews of mergers with Chinese acquirers show that it is extremely hard to obtain reliable information on state ownership and corporate control structures. As long as sufficient transparency is lacking, an assumption of single control at least for the question of notification might be an option. However, even such an interpretation would leave a significant gap in the toolbox.

Second, EU State aid instruments only cover aid granted by Member States. In contrast, subsidies granted by non-EU authorities fall outside EU State aid control, even where such foreign subsidies distort competition in the Internal market.

Third, on a multilateral level, the existing instruments do not fully reflect European standards for State aid. For example, the SCM Agreement is limited in its scope, e.g. it only applies to goods, not services or investments. Therefore, double standards exist with regard to foreign and European subsidies, and in many cases the EU cannot bring

litigation against a WTO Member even when a certain foreign subsidy would not meet European standards.

Therefore, EU trade defense instruments ("TDIs" - i.e. safeguard and countervailing measures, such as anti-dumping and anti-subsidy measures) have a significant blind spot. These instruments do not cover all potential effects of unfair subsidies or support measures by non-EU countries, as they are limited to those subsidies that are captured under the SCM Agreement. Additionally, they only apply in situations of subsidized or dumped imports of goods in the internal market. Also, anti-subsidy policy only captures public financial contributions, which are confined to a specific firm, industry, or group of firms or industries producing or exporting goods; it does not cover state ownership.

Fourth, the existing EU public procurement framework does not specifically address distortions to the European procurement markets caused by foreign subsidies, and it does not allow, in principle, for the exclusion of a bidder solely on the ground that he might have benefited from distortive foreign subsidies.

V. Potential Goals and Instruments

Closing the above gaps is not an end in itself. A new instrument may serve several principal goals: gaining leverage or setting incentives in the systems' competition to achieve (i) a change in China's strategy on SOEs and subsidies, or (ii) a general WTO solution, or (iii) bilateral trade negotiations for reciprocal access to Chinese markets, or (iv) obtaining a more level playing field inside the Internal Market.

Ideally, the new instrument would serve all purposes cumulatively. The most important one, however, is the fourth. While there are several (existing or potential) instruments for tackling specific aspects of the systemic challenge of state capitalism, the goal of levelling distortive effects in the Internal Market has notably not been the focus of attention so far, and other instruments are not designed to serve this objective. The goal of the International Procurement Instrument ("IPI"), for example, is to set incentives in trade negotiations in order to open procurement markets outside the EU for EU economic operators. In its current form it would not tackle distortions of procurement processes in the Internal Market which arise from foreign subsidies granted to firms participating in EU procurement markets.

Closely interrelated with the question of what goal a new instrument can and should serve is the question of whether the EU is willing to "extend" its rules to scrutinize aid granted by non-EU governments to companies operating on the EU market. The EU has bound itself beyond WTO rules through its State aid rules and through the application of competition and State aid rules to public undertakings (Article 106(1) TFEU). Defending and leveraging its economic order could mean that the EU has to put in place instruments and rules beyond what has been agreed on at the international level as a minimum standard in order to achieve its goals – potentially similar to a carbon border tax.

On a theoretical level, there are four possible options for a more even level playing field in the Internal Market: (i) reaching consensus with China about its economic operations in the Internal Market, either on multilateral, plurilateral, or bilateral

levels, (ii) lowering the material standards of the EU's economic policy, notably in competition law, (iii) extending the EU's toolbox in order to be able to tackle distortions where they arise, and (iv) raising public investments for EU companies.

Looking back at the gaps and goals, from an economics textbook perspective, but also in the view of adherents to traditional trade policy and diplomats who fear retaliation, the first-best solution would be a reform and stricter implementation of WTO rules, in particular of the SCM Agreement. To this end, the EU joined the U.S. and Japan to form a so-called "trilateral cooperation." While they were able to agree at the beginning of this year that, for example, new types of unconditionally prohibited subsidies should be added to the SCM Agreement, there was no further progress reported since. Looking at the current state of the negotiating function of the WTO, it is hardly realistic that - despite continued EU efforts - all 164 WTO members, including China, will agree on a modernized SCM Agreement to discipline subsidies in an effective way any time soon.

Second, changing existing instruments under EU law is not desirable. This applies both to trade instruments and competition policy. With regard to the control of external trade, as has been pointed above, the focus is on the distortion of trade flows, and the remedies are confined to border measures such as import duties. Targeting distortive state ownership and subsidies at the source or at the border would be difficult to implement. With regard to investment screening, one might think about extending it to include anti-subsidy or, even broader, "strategic" EU interests. The focus of the existing framework, however, is on technology and security issues which are very different from distortions on pricing. Of course, it may even be a typical scenario where industrial strategy leads to the use of subsidies to acquire a technologically sensitive asset. Such a purchase may even lead to competition issues. From an analytical and institutional perspective, however, there are good reasons to keep those three perspectives for the assessment of the acquisition separate.

Similarly, changing competition rules or their interpretation would only be feasible on the basis of non-discrimination. Taking state ownership within turnover calculations and subsidies within a market power assessment into account can and should be done – but as a matter of principle, also with regard to EU firms. There is no asymmetric option in the sense of a laxer control of mergers for EU firms or a stricter control for non-EU firms. A general relaxation of EU competition policy to allow for the creation of "European champions" would come at a high price in several forms: higher prices for European downstream firms and consumers, lower competitiveness, and the loss of the ability to intervene in non-EU cases.

The third option – extending the EU's regulatory toolbox – is one the EU Commission has recently proposed; it will be the focus of the remaining section.

The fourth option would be the creation of an EU sovereign wealth fund. Indeed, the European Commission has also recently sketched out plans for a "European Future Fund." Such an instrument would amount, to some extent, to copying China's playbook. Its legitimacy and efficiency would hinge to a large extent on the definition of its goals and functions (and their enforcement through its governance). As an instrument of last resort to counter an inflated takeover, it might be a strategic *ad hoc* complement to other tools. A better defensive instrument, however, would be the power to check

publicly subsidized bids and restore normal conditions on the market instead of using taxpayers' money. As a forward-looking instrument to invest in future growth sectors, a sovereign wealth fund may be used in those instances where control by the EU, or at least a residual degree of control through a minority investment, for a specified time period, serves a specific strategic interest. It would be imperative to apply EU rules on State aid "by analogy" to such instruments to keep them on a sound level playing field. An EU fund may be preferable or at least a good complement to investment instruments of the Member States in order to have a common EU strategy and ensure a level playing field within the EU.

As pointed out, except for the third, the above-mentioned options do not go into the heart of the challenge, which are the distortions that arise in the Internal Market through financial advantages from state resources for undertakings from non-EU Member States that operate inside the Internal Market. Therefore, from a conceptual point of view, there is reasonable economic policy space for the European Commission's proposals, which it has put forward in its White Paper on Foreign Subsidies. The significant advantage of this option is that it would allow, if designed properly, for addressing distortions to competition in the Internal Market without watering down the principles of the EU's economic order, while at the same time preserving the neutrality of its existing core instruments.

The proposals may come at a critical time in two regards: First, the current saga in the US surrounding social media app TikTok shows that a strong, but rule-based approach to foreign economic operators' activities that clearly separates competition, security, and subsidy aspects may be preferable in the long-run to *ad hoc* discretionary intervention. The EU's debate will certainly be followed from this perspective in other parts of the world, since the rise of China and the ensuing tensions will probably increase in the future.

Second, follow-up legislation to the European Commission's proposal may also provide a regulatory back-stop for the EU in case the on-going negotiations with the UK do not result in a commitment by the UK to keep respecting EU State aid rules when granting subsidies to UK firms which will be active in the Internal Market.

VI. The European Commission's White Paper

The "White Paper on foreign subsidies in the Single Market" adopted by the European Commission on June 17, 2020 attempts to address the distortive effects caused by foreign subsidies in the Internal Market in particular by putting forward three modules. The Commission regards these modules as complementary to each other, rather than as substitutes. One main question for further debate will indeed be whether the legislative proposal by the Commission should build on all three modules.

Module 1 – the broadest instrument – suggests a general market scrutiny instrument to capture all potential market situations in which foreign subsidies may have distortive effects in the Internal Market. It would be enforced by the Commission or a national authority, which could act *ex officio* in case a firm in the EU benefits from a foreign subsidy. The supervisory authority would assess the distortive effect of the subsidized

activity or investment as well as the potential positive impact, which may outweigh the distortion ("EU interest test"). If the authority establishes a net negative impact, it may impose measures to remedy the likely negative effect, for example redressive payments and structural or behavioral remedies. The White Paper proposes a two-step procedure, first a preliminary review, then an in-depth investigation.

Several main questions arise: First, how to define subsidies? If the objective is to achieve a level playing field in the Internal Market, the concept should be close to the definition of State aid under current EU law addressed to Member States. Another argument for a close alignment to the already existing concept of State aid is WTO compatibility (see point VII below.).

Second, how to assess and establish a distortive effect? The White Paper suggests to assume that certain categories of foreign subsidies are likely to create distortions in the internal market because of their nature and form. These categories of foreign subsidies, e.g. export financing or debt forgiveness to ailing enterprises, should be found to create distortions in the internal market. Further, the White Paper suggests taking into account several indicators, such as the relative size of the subsidy and the situation in the market concerned. While the White Paper also mentions market conduct, it does not appear to endorse a Dutch proposal[5] which suggested adopting an abuse-of-dominance-like test. In that regard, the White Paper adopts more of a State aid test than a competition law test (such as a test under the abuse of dominance law).

Third, should the positive effects of a subsidy be taken into account, and if so, how? The White Paper suggests "where there is evidence of a possible positive impact that the supported economic activity or investment might have within the EU or on public policy interests recognised by the EU, the distortion should be weighed up against such possible positive impact." According to the White Paper, the possible positive impact may consist of the EU's public policy objectives. Such a balancing test would be highly problematic for two main reasons: First, its openness would make the instrument very complex to handle and open to political influence from every direction. Second, and even more important, such broad balancing has no precedent in EU competition and State aid law. While State aid law acknowledges public policy interests, it does so in a limited way. Under the balancing test as envisaged in the White Paper, a Chinese SOE subsidized by the Chinese State would be allowed to use its subsidy to outcompete firms in the Internal Market or acquire a European firm if the distortion of competition were outweighed by, for example, job gains. Such a test would not only be hard to implement. It would predictably lead to bickering among Member States if, for example, Member State A benefits from the subsidy, while the disadvantaged competitor is located in Member State B. While this is similar under the current State aid regime, the open-endedness of the White Paper's approach would give this challenge a new dimension.

Fourth, how to limit such a far-reaching instrument in practice? While it may be beneficial both from a strategic leveraging perspective as from a substantive point of view to have an open test which could capture all potential subsidies and their distortive effects, enforcement resources will and should be a limiting factor. How enforcement priorities are designed will be key under such a test. One option for

limitation could be to preclude actions for failure to act and to rely entirely on an *ex officio* enforcement system.

The question of resources is intertwined with the fifth question: which institution should enforce the instrument? From a political economy perspective, there are many good arguments that hold it should ultimately be the Commission, which is best placed to enforce the instrument in a consistent manner. It can be less easily played off by non-EU jurisdictions and firms than can individual Member States. On the other hand, the Commission may be well advised to draw on Member States' information and resources. The White Paper envisages a system similar to the current European Competition Network's regime for antitrust cases, with two add-ons: first, the option for several national authorities to investigate jointly, and second, that the Commission has the right to decide on the EU interest test. Another approach would be to leave the decision-making in the hands of the Commission, while giving Member States' authorities the right to consult and intervene.

Module 2 focuses on foreign subsidies which facilitate the acquisition of EU firms. It is intended to ensure that foreign subsidies do not give an unfair advantage to their recipients when they acquire stakes in EU firms. Under this Module, the White Paper proposes two different threshold concepts. Under one approach, firms which benefit from financial support by a non-EU state would need to notify their acquisitions of EU undertakings above the threshold of 100 million EUR of EU-wide turnover to the Commission. If the Commission finds that the acquisition is facilitated by the foreign subsidy and distorts the Internal Market, it may either accept commitments by the notifying party which effectively remedy the distortion or, as a last resort, prohibit the acquisition. Under this Module, the Commission would also apply the EU Interest Test.

The proposal for this module raises similar questions as module 1. However, there are also specific issues to be discussed further in the legislative procedure: First, the turnover threshold as proposed in the White Paper appears to be too low, and might be over-inclusive, also when considering resources and red tape. Therefore, it may be necessary to transfer the higher threshold from the EU Merger Regulation of 250 million EUR of EU-wide turnover for the target. Second, with regard to procedure, the White Paper for module 1 suggests it should "copy" the current distinction of phase 1 and phase 2, such as in merger control. While this appears reasonable, the Commission should ensure that the investigations under the new instrument would indeed run in parallel as much as possible to a potential merger review and an investment screening investigation. Third, under the White Paper's test the Commission would have to verify whether a (potentially) subsidized buyer acquires an EU target and whether this acquisition would lead to distortions in the Internal Market. While it appears sound to require a causality between the planned acquisition and the distortive effect, it would be very difficult for the Commission to verify the link between the subsidy and the planned acquisition.

Module 3 addresses non-EU subsidies which enable bidders to gain an unfair advantage, for example by submitting bids below market price or even below cost, which allow them to win public procurement contracts they would otherwise not have won. The White Paper suggests a mechanism under which bidders would have to notify the

contracting authority of financial contributions received from non-EU countries. The contracting and supervisory authorities would then investigate whether there is a foreign subsidy and whether it made the procurement procedure unfair. If these conditions are met, the bidder would be excluded from the procedure.

Even though Module 3 has to be clearly distinguished from the proposal for an International Procurement Instrument due to its different goal and methods (see above), Module 3 poses similar legal and practical difficulties with regard to implementation. This applies in particular to possible significant delays in the award procedure (possibly even suspension of the procedure pending a decision by the supervisory authorities), aspects of legal security, as well as the administrative costs incurred by awarding authorities and undertakings. Practical solutions and high threshold values that adequately take the above-mentioned issues into account are needed to ensure that such a module is fit for its purpose. Alternatively, it is suggested to examine the extent to which distortions in the award procedure could be addresses via Module 1. The Commission will table a legislative proposal in the second quarter of 2021.

VII. WTO Compatibility

Irrespective of the current WTO crisis, the European Commission has committed itself to the multilateral trading system. Accordingly, the new instrument has to be in line with the EU's existing obligations under international public law. The White Paper makes it clear that it is the European Commission's understanding that its proposals are compatible with, and complementary to, WTO law and the EU's bilateral free trade agreements.

While a definite answer on the question of WTO compatibility will surely depend on the details of any legislative proposal, one cornerstone already defined in the White Paper should be highlighted: According to Annex 1, the White Paper's term "foreign subsidy" refers to "a financial contribution by a government or any public body of a non-EU State, which confers a benefit to a recipient and which is limited, in law or in fact, to an individual undertaking or industry or group of undertakings or industries." As the European Commission rightly points out, this notion relies on the definition for subsidies set out in the relevant WTO rules, in particular in the SCM Agreement, while acknowledging that a subsidy can be granted directly or indirectly to an undertaking active in the EU.

This definition will play a critical role when looking at the two main concerns regarding the WTO compatibility of the proposed modules: First, with regard to foreign production subsidies, the proposal may run afoul of Article 32.1 ASCM, which limits WTO members' ability to discipline subsidization practices. More specifically, it prohibits WTO Members from taking any specific action against a subsidy by another Member that is not provided for under the SCM Agreement and the GATT. While the text of Article 1.1 ASCM gives no definite answer to the question of whether the Agreement also covers a situation in which a subsidy is granted by a government to a production entity outside of its own territory, this will be decisive when considering a possible infringement of

Article 32.1 ASCM. The European Commission appears to suggest that the entire SCM Agreement rulebook does not apply to these kinds of foreign subsidies, since no goods are crossing a border.

Second, with regard to foreign subsidies granted for the provision of services and for participation in public procurement procedures, the proposal would especially have to be in line with the national treatment obligations under the General Agreement on Trade in Services ("GATS") and the Agreement on Government Procurement ("GPA"). National treatment implies the absence of all discriminatory measures that may modify the conditions of competition to the detriment of foreign services or service suppliers vis-à-vis national services or service suppliers. As pointed out, the European Commission's proposal is limited to foreign subsidies that are subsidies granted by foreign governments. Therefore, the key question will be if the rules on "foreign subsidies" will be similar to the EU State aid rules.

VIII. Conclusion

In sports, several rules such as anti-doping and financial fair play have long been deemed the necessary basis for legitimate and fair competition. To restore legitimacy and fairness in global business competition, the EU is right to rethink how it can lever its State aid regime to achieve a more even playing field. To use a football analogy: It would be alright for Manchester City or Paris Saint Germain to buy a certain star play. It would even be fine from a level playing field perspective if they see higher added value in the acquisition for their respective teams than other clubs and "over-pay." If, however, certain actors can outspend their competitors in the long-run through a deep pocket financed by the state, this would ultimately de-legitimize competition.

The Commission's White Paper is in many ways a fascinating conceptual project worth supporting. Commentators may be right that, on a communication level, "hearts don't beat faster for 'the rules-based international order.'"[6] But on a substantive level, the current saga around TikTok shows that there is room for rules-based approaches to competition, state support, and public policy considerations such as security. The Commission's White Paper is an excellent starting point to come up with additional pieces of a European model.

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[1] Authors' note: The authors write in their personal capacity. Dr. Thorsten Käseberg heads the unit in charge of negotiating the LPF instrument on the EU level on behalf of the German Federal Government, Dr. Sophie Gappa is a member of this team.

[2] Therefore, the EU proposal on the modernisation of the WTO did include a proposal to enhance transparency.

[3] Garcia Herrero, A (2019), "Europe in the midst of China-US strategic competition: What are the European Union's options?," Bruegel Working Paper.

[4] Petit, N. (2016), "Chinese State Capitalism and Western Antitrust Policy," American Security Project Paper.

[5] Dutch Permanent Representation, "Strengthening the Level Playing Field on the Internal Market," report, December.

[6] Timothy Garton Ash, Financial Times, September 12/13, 2020.