

Crisis, Oligopolization, National Champions and Sustainability

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INTRODUCTION

The Corona-Crisis is shaking-up not only personal conduct but also business relationships and, at the end of the day, the economic system we used to be familiar with. This causes multiple challenges for law and law enforcement in many legal disciplines. One major concern is that one result of the crisis will be an acceleration of the oligo- or monopolization of certain industries. This in turn may have negative effects on sustainability goals. In particular, the formation and preservation of state-backed market-dominant undertakings, better known as “National Champions”, are a major issue of concern. National Champions, whether in the form of public corporations or private corporations, may harm the free movement of goods and services within econo-

mic areas like European Union (“EU”) or on the world market, constitute a barrier to free entry into markets and may impede innovation and sustainability.

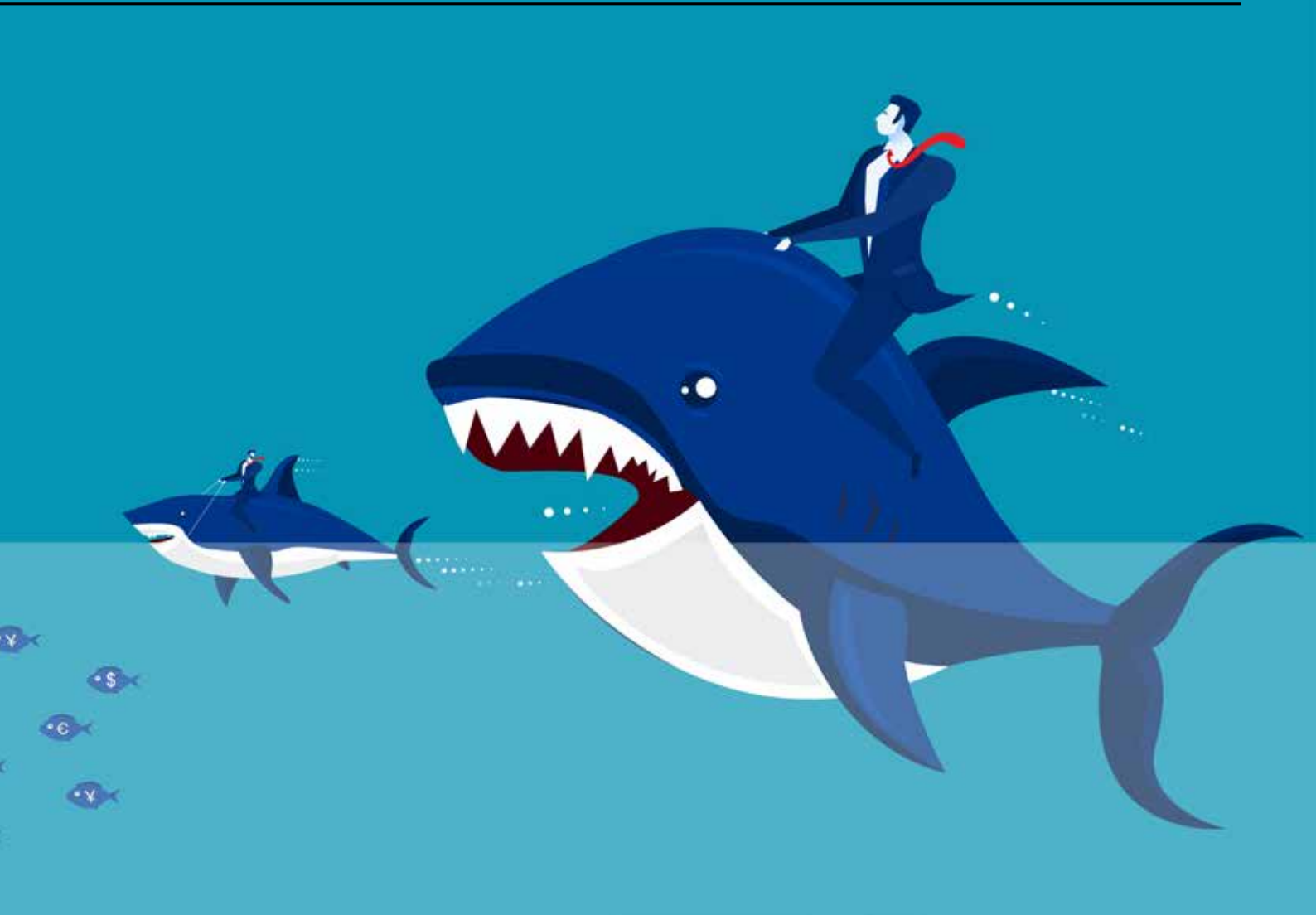
NATIONAL CHAMPIONS

National Champions can be described as large companies that, not least through political support, should promote the interests of a state or a political grouping by assuming a particularly favorable and competitive position in international markets.² In return, the government sets policies that favor these companies by giving certain unfair advantages which work against other market players – or more generally speaking: against competition itself. The creation of

National Champions that dominate national or regional markets, factually, may lead to state-backed monopolies.³

While such a policy that supports National Champions insofar contradicts principles of open and liberal economies, it fits perfectly into a concept of economic nationalism that strives for protected national markets and pre-eminence abroad – in contrast to open and free markets. The current crisis seems to advocate for such policies that were already increasingly pursued before.

The formation and preservation of National Champions is an important tool for industrial politics.⁴ It may be argued that political goals like workplace safety, worker participation,



environmental protection and the prevention of a sell-off of national intellectual property or “national crown-jewels” can be achieved.⁵ This is where populist policy and Sustainable Development Goals (“SDGs”)⁶ seem to unite, while free trade and free trade agreements and a free and global competitive economy are seen as obstructive to labor rights, environmental and democratic principles, governance and participation.

IMPACT OF NATIONAL CHAMPIONS ON SDGS

Sustainable development is seen as an objective of global and regional trade law and policy⁷ and can significantly be influenced by the creation, prevention and actions of National

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Champions. While dominant market positions and temporary monopolies can be harmless as long as they are vulnerable,⁸ stable monopolies may have significant negative effects on SDG's. This is particularly true in cases of National Champions that may leverage their strong position in domestic markets to expand to other markets with less competitive market players. This may apply to smaller countries and, foremost, to developing countries whose companies do not have the skills and capacities to compete worldwide, or even with powerful and state-backed foreign companies domestically. This may result in economic injustice, lower quality of goods for consumers and higher prices.⁹ So a monopoly leads to a loss of welfare for the entire society.

For reasons of political economy, the inherent danger for the economy itself is that the competitive conditions will be shaped by political influence and lobbying.¹⁰ In the first place, it may be accepted that politicians primarily create National Champions in order to support policies that are in line with SDGs, like decent work and economic growth, industry, innovation and infrastructure, affordable and clean energy. However, the creation of National Champions actually may be detrimental to these goals. This is particularly a concern if the concept of National Champions unifies the effects of economic nationalism and protectionism with the allegedly negative effects of monopolies on the economy, customers, innovation and governance.

With good reason, competition advocates propose that by improving economic governance, competition law, in itself, indirectly supports sustainable development.¹¹ There are several areas where enforcement of competition law has a positive effect on, for example, environmental goals.¹² One may also conclude that competition law seeks to support greater equality by facilitating economic growth while helping to eradicate poverty.¹³ This is because the economic and socio-political power of strong market players is limited and remains transparent if a functioning competition law regime is in place. In addition, mergers, abusive practices and co-operations of companies can be blocked if specific SDGs are under threat as a result of a given project, while SDG-compliant projects may be supported by antitrust laws.

This, relatively new, view on benefits of unimpeded competition by advocates of SDGs perfectly fits with the traditional reasoning of antitrust laws. In a free liberal economy, a high degree of market concentration and

especially monopolies are generally viewed critically. In fact, the monopolization of the oil market in the US by Standard Oil led to the “invention” of antitrust laws.¹⁴ Monopolistic markets eliminate competition, whilst competition is the key element of a functioning market economy.¹⁵ The thinking behind this is that competition has to fulfill economic and social functions in a free market economy.¹⁶

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Of particular importance here are control or regulatory functions, the market performance function, the innovation and efficiency function, the distribution function (reward for competitive success) and the selection function, as well as the socio-political function (the creation of a reasonably even distribution of power in the economy and society through “open” markets).¹⁷ The task of competition is to prevent the creation of final positions of power that threaten or eliminate the freedom of other market participants. Thus, it is assumed that functioning competition in an economy provides not only for an efficient and successful economy, but also serves

customers and acts as a shield against bad governance and the monopolization of socio-political power. Thus, the social cost of supporting specific industries can be significant.¹⁸ Not least, largely uncontested power also almost always has the potential to degenerate to cases of serious misuse of power and misallocation of resources.

However, the creation and preservation of National Champions may indeed also have positive effects on the economy, consumer, innovation and on socio-political goals, if interests and implications are carefully balanced out.¹⁹ Thus, it is obvious that the creation and preservation of National Champions requires diligent consideration and decision making prior to their implementation and careful supervision with regard to their market behavior once established. This means that a positive future projection should be a prerequisite for the creation of National Champions, which needs to be supported by diligent structuring, that ensures that the proposed undertaking will be compliant with laws, socio-political goals and SDGs and will not have initial or even significant negative impacts.

CONCLUSION

The creation or prevention of National Champions may or may not have negative or positive effects on trade, trade policy and SDGs. The recent past proves that the liberalization of the markets will bring down prices and create new jobs. Technological progress will be much faster in a competitive environment than under a sluggish monopolist. Effectively enforced competition rules can provide incentives for companies to improve their efficiency, avoiding wasteful practices and ensuring the sustainable use of natural resources.²⁰ If governments decide to take measures to fa-

vor individual companies, this should only be temporary. Such support has to be consistent with long-term goals and should not lay the basis for future structural problems.²¹ The principles of transparency and non-discrimination serve to depoliticize antitrust law and policy, removing the possibility of including industrial policy considerations within the competition framework and ensuring the independence of antitrust authorities.²² In general, rather than building up National Champions, it is more fruitful if government action is limited to setting the framework conditions for effective competition and socio-political goals, including environmental goals. Good competition law policy enforcement requires a high degree of accountability, openness and monitoring.²³ The best way to keep companies competitive is to ensure they operate in open and dynamic markets.²⁴ Only in markets that remain vulnerable, can consumers be protected from excessive prices and inappropriate terms, as well as benefit from quality products, new ideas and services.²⁵ Interventionist industrial policies that give preference to established undertakings should therefore be avoided.²⁶ There are also ways to integrate the concept of sustainable development into policy and antitrust law by accepting efficiencies and consumer benefits reflected in the SDGs through the substantive analysis of cases.

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version of this article on SSRN, see https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3333660.

² Whish & Bailey, *Competition Law*, 9th Ed., p. 834.

³ See, for a definition of “monopolies”, for example Art. 18 para. 1 (1) German Act Against Restrictions of Competition.

⁴ Mundt, IFO, magazine 20/2017, October 26, 2017, p. 14; see also the recent call by the German finance minister for a “revival” of industrial policy: FT, 30.8.2018, German finance minister calls for industrial policy revival, by Olaf Storbeck.

⁵ OECD Global Forum on Competition, *Competition Policy, Industrial Policy and National Champions*, 2009, p. 208.

⁶ Sustainability goals adopted by the UN General Assembly in the Global Agenda 2030 for Sustainable Development on 25.9.2015 as a resolution available at <https://sustainabledevelopment.un.org> (last accessed on 11.5.2020); See, for more information of UN SDGs, World Bank, *Atlas of Sustainable Development Goals 2017, From World Development Indicators*. World Bank Atlas, 2017; French/Kotzé, *Sustainable Development Goals, Law, Theory and Implementation*, 1st Ed., 2018; Campagnolo/Carraro/Eboli/Farina, *Assessing SDGs: A New Methodology to Measure Sustainability* (2016); FEEM Working Paper No. 89.2015, available at SSRN: <https://ssrn.com/abstract=2715991> or <http://dx.doi.org/10.2139/ssrn.2715991>; Kolk/Kourola/Pisani, *Multinational Enterprises and the Sustainable Development Goals: What Do We Know and How to Proceed?*, *Transnational Corporations*, 24(3), 9-32, 2017, available at SSRN: <https://ssrn.com/abstract=2988607>; Huck/Kurkin, *Die UN-Sustainable Development Goals (SDGs) im transnationalen Mehrebenensystem*, *ZaöRV* 2018, 375, 379 f.

⁷ Cordonier Segger, *Regional Trade Agreements and the WTO legal systems*, p. 336 with further references.

⁸ Körber, *Die Macht der Monopole [The Power of Monopolies]* NZKart, 2018, 105.

⁹ Jenny in: Gehring/Cordonier Segger, *Sustainable Development in World Trade Law*, p. 356.

¹⁰ Haucap, IFO, magazine 20/2017, October 26, 2017, p. 11.

¹¹ Karl M. Meessen, *Competition in the Doha Round of WTO Negotiations*, in N. Schrijver and F. Weiss, *International Law and Sustainable Development* at 217, 227.

¹² Gehring in Cordonier Segger/Khal-fan, *Sustainable Development Law, Principles, Practices and Prospects*, p. 292.

¹³ Jenny in: Gehring/Cordonier Segger, *Sustainable Development in World Trade Law*, p. 356.

¹⁴ Tucker, *Microeconomics for Today*, 6th edition, chapter 13, p. 333; Lamaj, *The Evolution of Antitrust Law in USA*, *European Scientific Journal* February 2017, Vol.13, p. 156; Foer/ Lande *The Evolution of United States Antitrust Law: The Past, Present, and (Possible) Future*, 16 *Nihon U. Comparative L.J.* 149 (1999); Schmidt/Haucap, *Wettbewerbspolitik und Kartellrecht [Competition policy and Antitrust law]*, 10th Ed. 2013, p. 277 et seqq.

¹⁵ Farah/Ötvös, *Competition Law and Trade in Energy vs. Sustainable Development: A Clash of Individualism and Cooperative Partnerships?*, *Arizona State Law Journal*, Volume 50, Issue 2, p. 511; OECD Global Forum on Competition, *Competition Policy, Industrial Policy and National Champions*, 2009, p. 11 et seq. Bellamy/Child, *European Union Law of Competition*, 7th Ed., recital 1.014.

¹⁶ Bunte/Stancke, *Kartellrecht [Antitrust Law]*, 3rd Ed. 2016, p. 8 et seqq.

¹⁷ Bunte/Stancke, *Kartellrecht [Antitrust Law]*, 3rd edition 2016, p. 8 et seq.; as well as in detail Schmidt/Haucap, *Wettbewerbspolitik und Kartellrecht [Competition policy and antitrust law]*, 10th edition, 2013, p. 35.

¹⁸ OECD Global Forum on Competition,

Competition Policy, Industrial Policy and National Champions, 2009, p. 14.

¹⁹ See for an econometrical calculation formula that considers several success factors and that may enable decisionmakers to anticipate the likelihood of future positive effects of the establishment of a National Champion: Jens Sedekum, National Champion versus Foreign Takeover, IZA Discussion Paper No. 2960, July 2007, <http://ssrn.com/abstract=1010595> (retrieved on 03.09.2018).

²⁰ Jenny in: Gehring/ Cordonier Segger, Sustainable Development in World Trade Law, p. 356; Farah/Ötvös, Competition Law and Trade in Energy vs. Sustainable Development: A Clash of Individualism and Cooperative Partnerships?, Arizona State Law Journal, Volume 50, Issue 2, p. 511.

²¹ OECD Global Forum on Competition, Competition Policy, Industrial Policy and National Champions, 2009, p. 15.

²² Galloway, The Pursuit of National Champions: The Intersection of Competition Law and Industrial Policy (February 23, 2007), ECLR 2007, Vol. 8, Issue 3, p. 180, available at SSRN: <https://ssrn.com/abstract=1767865>; Farah/Ötvös, Competition Law and Trade in Energy vs. Sustainable De-

velopment: A Clash of Individualism and Cooperative Partnerships?, Arizona State Law Journal, Volume 50, Issue 2, p. 502.

²³ Jenny in: Gehring/Cordonier Segger, Sustainable Development in World Trade Law, p. 356.

²⁴ Carles Esteva Mosso at the 7th China Competition Policy Forum, University of International Business and Economics Competition Law Center, Beijing July 31 August, 2018.

²⁵ Mundt, IFO magazine 20/2017, October 26, 2017, p. 14.

²⁶ To reduce the potential for conflict between competition policy and industrial policy one could adopt an industrial policy that promotes National Champions only in sectors where it is indispensable for improving the competitiveness of the economy in question. However, this would require that there actually be a market failure, that the aid is necessary and proportionate to eliminate it, and that these positive effects are not offset by the negative effects of the distortion of competition, see for OECD Global Forum on Competition, Competition Policy, Industrial Policy and National Champions, 2009, p. 14 et seq.

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