THE BATTLE FOR EU ANTITRUST LAW IN GLOBAL SEABORNE TRADE

by

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There are no facts
only interpretations
(Nietzsche)

Halcyon days are gone. Global peace and general principles of international law have become relics of the past. Nobody knows what China or the USA intends to do in the immediate future, or what are the limits, if there are any, to their pursuit of global dominance.

What is clear, however, is that democratic norms and values are under attack. These norms and values have brought law-based predictability and prosperity, thus forming the bedrock of Western societies and the European Union.

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The current precarious and volatile situation on the world stage implies that textual and restrictive interpretation of laws no longer suffices to ensure domestic stability in EU Member States. Surrounding geopolitical circumstances have become absolutely key issues, particularly as ruthless proxies of the above two world powers accelerate a durable remake of world order in a for the EU unfavourable direction. Within that context, technology plays an important role. Evermore sophisticated technological developments in both weaponry and communication systems indicate that man builds higher than he can climb.This has turned struggle for political power into struggle for survival.

One of the legal tools that must be protected in the ensuing pandemonium is EU antitrust law. A full and unabridged application of this law plays a vital role in seaborne trade between China and the EU and therefore in the economy of EU Member States. The battle between China-origin and EU-origin products provides a reliable benchmark for evaluating and discussing the surrounding geopolitical circumstances.

EU antitrust law

Main hallmarks

Prohibition

EU antitrust law prohibits restrictive arrangements between two or more independent market operators. The prohibition covers restrictive horizontal arrangements between actual or potential competitors operating at the same level of the business chain as well as vertical arrangements between undertakings operating at different levels. Pursuit of profit is not essential. The most flagrant example of prohibited conduct is an arrangement between competitors which involves price-fixing and/or market allocation.

Settled case-law of the European Courts of Justice provides that economic and legal surroundings must be used for interpreting the wording of restrictive arrangements for unclear areas. Such surroundings are of overriding importance in cases where Hot or Cold Wars are involved.

Arrangements not aiming at restrictions of competition may be caught by the antitrust prohibition because they have such restrictions as their effect. This effect does not need to have actually occurred. It is sufficient for it to appear likely to occur in the near future.

An undertaking is liable for distortion of competition it brings on the market in question. In the EU, liability includes public fines up to 10 per cent of the annual turnover of the undertaking concerned, multiplied by the number of years and months the infringement lasted. If the parent company exercised a decisive influence over the undertaking's operations during the infringement period, fines may be increased up to 10 per cent of the annual turnover of the group of undertakings to which the infringer belongs. Apart from public fines, undertakings may start private legal action to sue for recovery of damages resulting from infringements. Claims may well be in excess of public fines.

Arrangements that fall within the EU antitrust prohibition are not binding nor can they be asserted in relation to third parties. By the same token, they cannot be asserted before the courts either. Nullity for the purpose of EU antitrust law means complete invalidity. It is absolute in nature, especially as anyone can invoke it, and unlimited in time. It catches all the past and future effects of the arrangement at issue.

Exemption

Restrictive arrangements caught by the prohibition of Article 101(1) TFEU are exempted when they satisfy the criteria of Article 101(3) TFEU, no prior decision to that effect being required. These criteria provide that the arrangement must (i) contribute to improving the production or distribution of goods or to promoting technical or economic progress; (ii) provide consumers with a fair share of the resulting benefits; (iii) confine restrictions to those essential for achieving these objectives; and (iv) not give the parties any possibility of eliminating competition in respect of substantial elements of the products or services in question. The arrangements are valid and enforceable from the moment these criteria are satisfied and for as long as this remains the case.

The EU Commission has adopted so-called block exemption regulations for different contract types. Such regulations include a list of contract-permitted and a list of hard-core restrictions usually also identified as such in Commission guidelines and notices.

Extraterritoriality

The framework for assessing distortions of competition under EU antitrust law, is called the relevant market. This is the market where undertakings capable of constraining their actual or potential competitors' behaviour and preventing them from behaving independently of effective competitive pressure, must be identified and on which their conduct must be assessed. In other words, it must be determined whether adoption of a certain course of conduct by an undertaking or group of undertakings on the relevant market, has the object or effect of preventing, restricting or distorting fair competition to a degree that patterns of trade between EU Member States are substantially affected.

On September 6, 2017, the European Court of Justice (ECJ) confirmed that the above definition of the relevant market implies that EU antitrust law applies to areas outside the geographic scope of the EU. Conduct of entities that are neither nationals of an EU Member State nor physically or legally present in the Union, may produce an effect in the EU that is caught by EU antitrust law if it has immediate, substantial and foreseeable effects on patterns of trade between Member States. The situs of the anti-competitive conduct is therefore irrelevant; it is the object or effect that must be accounted for. It is also irrelevant whether the conduct at issue is permitted by foreign jurisdictions. In cases where such conduct has the object of infringing EU antitrust law in the way referred to above, this law prevails.

It is important to note that the ECJ and the European General Court only deal with questions relating to real circumstances. Hypothetical issues are rejected as inadmissible.

Independence

EU antitrust law provides that each economic operator must determine independently the commercial policy which it intends to adopt on a relevant market. This requirement of independence precludes any direct or indirect contact between economic operators by which an undertaking influences the conduct on the market of its real or potential competitors or discloses to them its decisions or deliberations concerning its own conduct on the market, if as a result conditions of competition apply which do not match normal conditions on the relevant market at issue.

Implementation

The EU Commission and the national judiciary are obliged to implement EU antitrust law out of their own accord. Complaints are not required. In particular in regard to extraterritorial implementation of this law, refusal, or clear failure, to meet this obligation may have (extreme) severe financial and economic consequences for lines, seaports and other interested parties. Therefore, it is perfectly possible - and indeed probable - that sometime soon an interested party submits a request to the Commission for extraterritorial implementation of EU antitrust law with regard to a specific case relating to global seaborne trade and involving anti-competitive conduct outside the EU that significantly affects patterns of trade between EU Member States.

Damages

Apart from private action against other companies, parties may hold the Commission and the national judiciary against whose sentences there is no right of appeal, liable for damages resulting from refusal, or clear failure, to apply EU antitrust law in a case underlying respectively a request or complaint, or the lawsuit at issue. In cases related to EU antitrust law claims for damages usually concern amounts related to economic loss and loss of profit. Refunds must cover the entire sum related to the period from the date of occurrence of the damage until the date of refund. Furthermore, refunds must include compound interest over the amounts due as well as over the costs of legal aid. The Commission has adopted various guidelines on quantifying antitrust harm in damage actions.

As a rule, damages are awarded only following a full lawsuit in main proceedings. Although gaining ground, award of provisional damages is still in its infancy. Refusal, or clear failure, by the Commission or by the national judiciary against whose sentences there is no right of appeal, to meet the obligation of extraterritorial implementation of EU antitrust law, may cause severe damages which have a direct and immediate and lasting impact. I take the view that in such cases both in main and injunction proceedings provisional damages must be awarded if there is no doubt about the causal link between refusal, or clear failure, to apply EU antitrust law and the alleged damages, nor about the assessment thereof, or at least part of it, being certain, uncontested and quantifiable.

Conclusion

In global seaborne trade developments are so swift and drastic that extraterritorial infringements of EU antitrust law may well turn out to be not only irreversible but also not punishable. Therefore, a full and unabridged application of this law by the Commission and by the national judiciary, and award of provisional damages for harm suffered or likely to be suffered in the near future resulting from infringements, is essential. Particularly in global seaborne trade, the unifying force of EU antitrust law must not lose out against the fragmenting force of surrounding geopolitical circumstances.

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Surrounding geopolitical circumstances

Political

Ideology

World order is in the process of being drastically remade. To defend dominance at the global stage and propel its own economy, the USA relies on its National Security Strategy (NSS), on manufacturing sophisticated weaponry and on necessities of life produced in the USA.

China focuses on taking-over US dominance. It propels its economy by manufacturing sophisticated weaponry, by pursuing support of politically like-minded countries and by exporting necessities of life produced in China.

The battle for global dominance has mutated into a Cold War. In this Cold War, the USA and China determine strategy and tactics in accordance with their respective ideologies.

The strategy which the USA adheres to in order to preserve dominance, relies on politics aimed at creative, individual objectives suited for producing instant results. The judiciary safeguards the functional and emotional integrity of the manner in which the executive implements laws that have been created by the legislature.

The strategy which China adheres to in order to achieve dominance relies on politics aimed at pre-structured, collective objectives suited for producing gradual progress. The legislature is prohibited to provide the judiciary with legal means suitable for protecting the governed against the manner in which governors exercise power.

Strategy and tactics are increasingly based on sophisticated technology. This raises the question of the actual impact of such technology in global seaborne trade.

Technology

Digital communication systems have created new forms of global trade. Sophisticated technology is their Mammon. It demands absolutely rigorous coordination of organisational decision-making processes in the logistics chain of an arrangement. Coordination must be achieved by semantic interoperability of business intelligence and analytics systems and related computer programs amongst all actors engaged in the arrangement. Strict observance to conditions pertaining to the following parameters is crucial: (i) common IT standards, (ii) engagement, (iii) implementation, (iv) confidentiality and (v) trust.

ad (i) Common IT standards enable actors engaged in the implementation of a stage of a cooperative arrangement, to exchange data among each other and with actors engaged in other stages so as to be able to interconnect services. The main advantages are efficiency, cost reduction and the possibility for the ultimately responsible coordinator to monitor the entire logistics chain.

ad (ii) Requirements put on actors must be identified in the phase where they solicit for engagement in a stage of the arrangement. These requirements must be written from the perspective of the object code which lies at the heart of the business intelligence and analytics system that governs the entire logistics chain.

ad (iii) It is essential for actors who wish to implement a stage of the arrangement that elements of the object code underlying the overall business intelligence and analytics system and are related to that stage, are human-readable, also if these elements are confidential and protected by Industrial Property (IP) rights. Only then will actors be in a position to verify whether the object or effect of practical cooperation is knowingly substituted for the risks of competition, without having reached the stage where an agreement properly so-called has been concluded. Should such be the case, EU antitrust law catches the cluster of technological arrangements underlying the entire logistics chain, both in terms of horizontal and vertical aspects. The reason is that the cluster constitutes an indivisible unity. Malfunction of one component causes malfunction of the cluster. Therefore, all actors engaged are in the crosshairs of EU antitrust law.

ad (iv) Actors engaged need to share data related to the operation of their stage. Such data must be exchanged at the start and during the validity of the arrangement. It is clear that the willingness to share data, particularly if it is of a confidential nature and protected by IP rights, is measured on the basis of the confidence that each actor disposes of the technological infrastructure required to properly implement the data, and is not just prepared but also financially and otherwise capable of continuously updating this technology so as to ensure that it meets the latest developments in business intelligence and analytics systems.

ad (v) Semantic interoperability of business intelligence and analytics systems and related computer programs, is based on trust. All actors engaged must have full confidence that data which is being exchanged will not be used for other purposes but the implementation of the arrangement, both during its validity and after expiry. This holds all the more true since most data is confidential and protected by IP rights.

Compliance by all actors engaged with the technological parameters referred to above, is a prerequisite for proper and smooth execution of an arrangement on the market for global seaborne trade. I take the view that, as a result, services on this market are not interchangeable or substitutable with other services on account of their characteristics, prices and intended use. This implies that the market for global seaborne trade is an autonomous market which can be distinguished from neighbouring areas because conditions of competition are appreciably different in those areas. Therefore, the market for global seaborne trade qualifies as a relevant market in the sense of EU antitrust law.

Legal

EU

As explained above, EU antitrust law applies out of its own accord. *Per se* applicability implies that this law decides *sua sponte* whether or not it applies. To all actors engaged self-assessment of possible anti-competitive conduct emerging from the aforementioned technological aspects of their arrangement, is therefore imperative.

It takes years before the ECJ or the European General Court render judgement on appeals against the way in which the EU Commission handled requests or complaints related to EU antitrust law. Particularly in regard to extraterritorial application in global seaborne trade, damages suffered in the interim tend to be immediate, irreversible and irreparable. Provisional damages are a tool to avoid permanent harm and may incite the Commission and the national judiciary to take an active approach in crucial matters.

China

In China, the situation is substantially different. China awards equivalent weight to legal provisions which govern the way according to which economic operators determine their commercial policy on a relevant market. The Chinese Communist Party (CCP) decides which role executive bodies play in the pursuit and achievement of economic and social prosperity in the desired pre-structured form. Decisions are made on a case-by-case basis.

The CCP takes its decisions on the basis of the topical facts and surroundings of the case at hand. Such decisions do not affect the foundations of China's collectivistic policy as they are made in accordance with the following two guiding principles: "social public interest" and "promoting a healthy development of the socialist market economy".

The CCP has exclusive right of interpretation of these principles. Executive bodies are obliged to implement this interpretation. Decisions of the CCP are not appealable and final. The CCP therefore determines the role Chinese antitrust law plays in pursuing and achieving the objectives of its ideology. Fair competition is only one of the tools.

The above demonstrates that China's framework for general economic politics is sufficiently contextualised and flexible to offer the CCP leeway to tone down or even exclude achievement of fair competition by interpreting "social public interest" and "promoting a healthy development of the socialist market economy" in relation to topical facts and surrounding geopolitical circumstances of the case at hand.

Article 7 of China's Anti-Monopoly Law (AML) adds even more political scope in cases where the lifeblood of China's national economy is concerned.

Conclusion

EU antitrust law does not provide flexibility and adaptability. It applies *per se* and regulatory authorities and the judiciary are prohibited from relying on political considerations.
The CCP has the right to include political considerations in assessing the anti-competitive conduct at issue. This implies that implementation of China's antitrust law is flexible and adaptable to changing surrounding circumstances.
As a result, apart from deviating and probably controversial assessment of anti-competitive conduct, the dates on which legal measures related to such conduct take effect, differ substantially. This implies that also impact and extent of damages differ substantially.

The different approach of China and the EU in antitrust matters causes uncertainties in the area of technology-based conduct on the market for global seaborne trade. Therefore, it is of vital importance that the EU creates and guarantees a level playing field at all stages of this market for all operators. Immediate, irreversible and irreparable damages caused by extraterritorial anti-competitive conduct that is prohibited under EU antitrust law, must be prevented. Inclusion of political considerations in the decision-making processes of the kind of, or similar to those in China is a bridge too far. However, a first step in the right direction would be the right of injured or soon to be injured operators to claim provisional damages. Furthermore, the Commission should increasingly use its right to intervene in situations where infringements of EU antitrust law and ensuing damages have not yet occurred but are very likely to occur in the near future. Prevention is better than cure.

Remake of world order

USA

Defence

President Trump's National Security Strategy of November 2025 divides the world into zones of dominance. The USA will have the lead in the Western Hemisphere, China will have a large say in Asia’s future so long as it doesn’t go too far and Russia and the EU are left to sort it out in Europe. According to Trump, such remake of world order is the best if not the only way to achieve sustainable global peace.

In this new world order, Trump intends to defend the USA and secure dominance in the Western Hemisphere by means of the Golden Dome for America. This project mobilises and brings together the best and the brightest of America's defence and commercial industries. Their common objective is " to innovate and rapidly develop game-changing technology, like space-based interceptors and hypersonic defences that will ensure America’s Golden Dome stays well ahead of adversary threats." Estimated costs of developing and operating the project range from USD 252 billion to USD 3.6 trillion, depending on how expansive the system is.

Golden Dome pursues a vast military-industrial defence complex and targeted and effective methods of communication and coordination related to common strategies. It sets out to create a trinity of digitalisation, globalisation and monopolisation. Close cooperation between engaged actors is crucial. Business intelligence and analytics systems and computer programs of all those actors must be semantically interoperable amongst each other and with those of the ultimately responsible conductor of the entire logistics chain.

In support of US control over global affairs Trump created the Board of Peace. On January 22, 2026, the charter of this organisation was signed by 11 countries whilst 4 expressed their intention to join. Particular attention should be paid to two issues:
(i) As Commander in Chief the President of the USA must provide security. In this capacity and for a period of 60 days he is not bound by checks and balances emanating from Congress. During this period he has the power to unilaterally decide on matters pertaining to conventional and nuclear war, as well as to intelligence services, and
(ii) Trump has appointed himself as President for life.

The Board of Peace has all the hallmarks of Trump's intention
(i) to continue current foreign politics should the Republican Party loose its majority in the House of Representatives and/or the Senate pursuant to the Midterm elections on November 3, 2026, and
(i) to create a shadow-government for foreign politics which springs to life once Trump's Presidency comes to an end.

Trade

The USA and the EU maintain the world's largest bilateral trade and trade investment relationship, with trade in goods and services exceeding € 1.68 trillion in 2024, representing roughly 30% of global trade. Discord about Greenland has put the pact the USA and the EU have prepared for the purpose of avoiding hefty US tariffs on European exports, at risk. This pact sets US tariffs on imports from the EU at 15 percent in exchange for the EU not applying levies on American exports. However, the European Parliament refused to pass the pact in light of President Trump's threats to Greenland. For the following reasons this refusal may have serious consequences for European NATO Allies.

Trump considers the National Security Strategy and defence of the USA by the Golden Dome to be crucial to America's security and economy. Although his remake of world order leaves Russia and the EU to sort it out in Europe, he argues that, due to its location and its reserves of rare earth minerals, inclusion of Greenland in the National Security Strategy and in the Golden Dome project, is imperative. Trump takes the view that this can only be achieved by way of US annexation of Greenland.

Through Denmark, Greenland is a European NATO Ally. Article 4 of the Declaration of the The Hague NATO Summit of June 24 and 25, 2025, stipulates: "We reaffirm our shared commitment to rapidly expand transatlantic defence industrial cooperation and to harness emerging technology and the spirit of innovation to advance our collective security." This commitment implies that the USA and

European NATO Allies must join forces and cooperate in the operation of Golden Dome in as far as necessary according to a topical interpretation of Article 5 of the NATO Treaty.

It is an illusion to assume that within that context the best and the brightest of America's defence and commercial industries are willing or can be forced to pursue and achieve cooperation, however small, with European industries. Apart from political discord within NATO, the gap in expertise and technological know-how is simply too great to share data for the purpose of creating semantic interoperability between business intelligence and analytics systems and computer programs associated with the Golden Dome project. Operation of Golden Dome within the framework of Article 4 of the Declaration of the The Hague NATO Summit is therefore an illusion.

Refusal by European NATO Allies to yield to Trump's pressure on US annexation of Greenland raises the question whether the deal Trump and NATO Secretary-General Rutte struck on January 21, 2026, at the World Economic Forum in Davos, ended the discussions on Greenland. I take the view that this question must be answered in the negative and that the reverse is true. My arguments are as follows.

The Arctic Deal

The Arctic Deal expands the defence shield of NATO against armed attacks in the sense of Article 5 of the NATO Treaty, to targets in the entire Arctic region. Absence of cooperation between US and European NATO Allies within the Golden Dome project requires the USA and European NATO Allies to play an independent and autonomous role in implementing Article 5 in respect of defence of the entire Arctic region.

There can be no doubt that attacks will take place by air. It is hard to imagine that whilst deploying space-based interceptors aiming to destroy in mid-flight armed air attacks on targets in the Arctic, Golden Dome is able to distinguish between targets in Greenland and in the rest of the Arctic. Repel of such attacks by Golden Dome will therefore cover the best part of, if not the entire Arctic region. This implies that air defence of this region by European NATO Allies is more or less superfluous.

Trump's response to this conundrum will be that the USA limits the geographic scope of Golden Dome to the defence of Greenland and leaves defence of the rest of the Arctic, and particularly of navigable shipping routes used for Asia-EU trade, to European NATO Allies.

Arctic shipping routes are becoming increasingly important to trade between China and the EU. These routes are already navigable from July to October/November. Russia is heavily investing in developing the routes and is using powerful nuclear icebreakers to expand navigability. Predictions for large-scale navigability in summer range from 2030-2050 to (in extreme scenarios) an ice-free status in late summer starting from 2027.

The Bering Strait is the gateway between the Arctic and Pacific Ocean. Russia controls the Western part and the USA controls the Eastern part of the Strait. This implies that Russia controls the Northern Sea Route. Although the

Eastern part of the Strait may also be used for shipping traffic between Asia and Europe, the route through the Western part is much shorter. Also geographic complexity, much more ice and small passages make the Eastern route far less attractive than its Western counterpart. Last but not least, the route from Asia to Europe via the North is 8000 km shorter than via the Suez Canal. This accounts for time savings of 10 to 15 days.

Carriers making their way from China to the EU via the Northern Sea Route and the Western part of the Bering Strait must comply with Russian regulations. Putin therefore has the power to decide which carriers are and which are not allowed passage. Thus, the Western part of the Bering Strait is the spitting image of the Strait of Hormuz.

Political consequences

Rare Earth Elements (REEs) are essential components of weaponry prominent in global warfare. Examples are radar and sonar systems, aircraft and combat vehicles, defence technologies and nuclear weapon systems.

The EU is desperately short of REEs. It relies heavily on China with nearly 50% of its imports coming from there. In 2024, EU imports amounted to 12,900 tonnes.

China exports REEs and related products primarily by sea. Should China decide to transport those products to the EU via the Northern Sea Route, control of the Western part of the Bering Strait provides Putin with the possibility of frustrating attempts of European NATO Allies to build an effective military-industrial defence complex against his own politics.

In the interim, China's tightening of export controls causes critical supply risks of REEs. European NATO Allies must use their shrinking availability of REEs in support of the military-industrial defence complex. Trump's aforementioned implementation of the Arctic Deal makes defence of the Arctic region by European NATO Allies, therefore an illusion.

Economic consequences

China Ocean Shipping (Group) Company (COSCO) is a Chinese state company (SOE). As a centrally managed company, it has an internal CCP Central Committee, which discusses and establishes business strategies. COSCO has its headquarters in Shanghai. With a total fleet of more than 1,400 ships, it is one of the largest container shipping companies in the world. Together with China's SOE China Merchants, COSCO holds significant proportions of shares in 23 seaports in the EU. Hong Kong's privately owned Hutchison Ports has majority control over another 8 of such EU seaports.

In implementing its business strategies, COSCO relies on preferential access to credit provided by Chinese financial institutions. In 2016, this enabled it to gain majority control over the container facilities of the Greek Port of Piraeus. It also enabled establishment and improvement of intermodal sea-rail services from Piraeus to Central and South East Europe. To that end, COSCO concluded a separate contract with Greece's state-owned rail firm Trainose.

COSCO converted the Port of Piraeus into the most important container hub port in Southern Europe for supply of China-origin goods to Central and South East Europe, including EU Member States. As a result, it was not only Chinese multinationals like Huwai and ZTE who established major distribution centres in Piraeus. Non- Chinese multinationals such as Hewlett-Packard, Siemens, Deli and IKEA - to name just a few - followed suit.

On June 19, 2023, COSCO acquired 24,99 percent shareholding in the portion of the Port of Hamburg where freight flows between China and Europe are concentrated. For China-origin goods imported in Hamburg, Duisburg and Vienna are the main logistics hubs for rail transport to Central and North East Europe. COSCO is actively enhancing its rail transport capabilities to this area. Key improvements include strengthening partnerships with rail operators like METRANS to boost cargo handling and plans to acquire logistics firms to expand its intermodal reach beyond the port terminal.

COSCO will optimise China-Europe transport organisation and effectively commercialise the Northern Sea Route. Thus, transport of China-origin goods from China to the EU via the Northern Sea Route and the Western part of the Bering Strait will become increasingly important, in particular in the field of time-sensitive commodities like fashion apparel, electronics, medical devices, power banks and lithium-ion batteries.

China has a socialist market economy. Its economy is the second-largest in the world by nominal GDP and the largest when measured by purchasing power. China is widely regarded as the "powerhouse of manufacturing" and "the factory of the world".Its production exceeds that of the nine next largest manufacturers combined. This makes China the world's largest exporter of goods. Exports as a percentage of GDP are around 20%. As a result, China is the largest trading nation in the world and a prominent player in international trade.

The EU is China's second-largest trading partner, with bilateral trade reaching USD 762 billion in 2024. The manufacturing sector contributed 36.5% of GDP to China's economy in 2024. Key exports included electrical machinery (USD 928 billion in 2024), furniture (USD 126 billion in 2024), and textiles/apparel (USD 301 billion in 2024). All over the world, those goods are regarded as essential consumer goods. Despite significant drops in exports to the USA, China reported a record trade surplus of nearly USD 1.2 trillion in 2025, driven by surging exports to ASEAN, EU and emerging markets, mitigating a significant 20% drop in exports to the US.

Recent sky-high US import tariffs on China-origin goods and diversion of those goods to other markets, play an increasing important role in the economies of Member States. EU import of primary and secondary necessities of life provides a shining example. Import of China-origin apparel for instance, amounted to USD 30.9 billion in 2023. Diversion of these goods from the US to the EU market as a result of high US import tariffs and a sharp drop of Chinese prices, caused EU imports to surge by 20% in value and volume during the first half of 2025.

On China's home front, production and export of cheap goods to the EU is of crucial importance, particularly as sky-high import tariffs reduced if not ended exports to the USA. Therefore, China has an overriding interest in keeping trade and other commercial relations with the EU as extensive and profitable as possible. Thus far, the EU has adopted a wait-and-see attitude in regard to the impact of Trump's politics on seaborne trade with China. Continuation of this attitude degrades the EU to a bystander who resigned awaits his fate. In its own interest, the EU must therefore take the initiative. For the following reasons: the sooner the better.

Piraeus is the primary port-of-call for container ships carrying goods of China-origin to the EU via the Strait of Hormuz. Hamburg serves as the primary port-of-call for such traffic via the Western part of the Bering Strait.

The economic and therefore political embrace of Central and East Europe for China-origin goods imported in the Ports of Piraeus and Hamburg and the Triangular Alliance between China, Russia and Iran aimed at breaking the military and commercial dominance of the US, imply that Iran and Russia coordinate their politics regarding navigation through the Strait of Hormuz and the Western part of the Bering Strait, with China. This implies that the EU has fallen prey to two warriors and a trader. Therefore, the question arises of what are the opportunities for escaping this death trap. Regardless of the measures chosen, a political solution requires amendment of the demarcation lines of the Trias Politica. This raises the question whether in the EU and in its Member States political support may be acquired for such a bold and far-reaching move.

The Trias Politica

Societies are chaos structured and controlled by ever-alternating political ideals. They rest on three pillars: trade, governance and defence. These pillars are interconnected through a network of rules and laws. In order to maintain in this network a balance between the freedom of the governed and the power of governors, democracies maintain a strict segregation between the legislative, executive and judiciary.

I take the view that the Arctic Deal and the ensuing political and economic consequences force the EU and its Member States to amend the current demarcation lines of this Trias Politica for the purpose of increasing the manoeuvring space of the national executive and the EU Commission to the extent that there is sufficient room to take action out of their own accord. However, the present shows that political support is virtually impossible to get. Wait-and-see is the stopgap used by politicians to camouflage their inertia.

The legislative

EU law and national law of EU Member States stipulate that the EU Commission and the national executive may only take action if supported by prior consent by all Member States and by national Parliaments, respectively. The past shows that under previous conditions unanimity was very difficult to achieve. Current surrounding geopolitical circumstances make unanimity virtually, if not fully impossible. Amendment of the demarcation lines of Trias Politica by law is an illusion.

The executive

The speed and volatility of current events and Hot and Cold wars waged all over the globe, show that democracy is in dire need of protection. Belief that democracy and democratic norms and values are the alma mater of current prosperity and wellbeing in Western societies has fallen to a level not seen in recent history. Amendment of the demarcation lines of Trias Politica in favour of the EU Commission and/or the national executive for the purpose of rehabilitation of said norms and values is economically necessary but politically an illusion.

The judiciary

The judiciary is the only component of Trias Politica who's manoeuvring space cannot be extended by an amendment of the demarcation lines of the Trias Politica. This raises the question whether the scope of its current competences within the framework of EU antitrust law, allow the judiciary to meet the political and economic consequences of President Trump's above-mentioned implementation of the Arctic Deal.

So far the judiciary has always had sufficient scope for respecting the demarcation lines with the legislative and the executive. However, the question indeed remains whether these days this would still be possible in respect of extraterritorial application of EU antitrust law on disputes concerning the market for seaborne trade between China and the EU.

This is on account of the ever-increasing difficulty for the Commission and the national judiciary to comply on this market with their obligation of extraterritorial application of the instantly effective prohibition of said law out of their own account, whether in full or on the basis of a request or complaint, without thus inflicting harm on citizens and/or companies.

This problem may be illustrated by way of purely hypothetic proceedings before the EU Commission and the national judiciary between companies involved in the production and/or sale of EU-origin time-sensitive commodities of the kind referred to above and companies involved in import and/or sale of competitive China-origin products. The case is discussed from the perspective of Asia-Europe transportation taking place via the Northern Sea Route and the Western part of the Bering Strait to the Port of Hamburg. However, the same approach and arguments prevail for a discussion of the case from the perspective of Asia-Europe transportation taking place via Singapore and the Strait of Hormuz to the Port of Piraeus. This implies that sustainable navigability of the route via the north with time savings of 10 to 15 days and a dominant position in the relevant portion of the Port of Hamburg and in the Port of Piraeus allow COSCO to coordinate export of goods destined for the EU in a way that suits political, economic and military objectives of China as well as of its proxies Russia and Iran.

Parties

Plaintiff

(i) Syndicate, composed of several of the largest EU companies involved in the production and/or sales of EU-origin time-sensitive commodities in the EU.
(ii) Mithras, legal representative of a group of EU lines, seaports and other stakeholders in the maritime industry.

Defendant

(i) Consortium, composed of several of the largest EU companies involved in the import and/or sale of China-origin time-sensitive commodities in the EU (Consortium).
(ii) COSCOP, an alliance consisting of COSCO and four other lines.

Facts

COSCOP has concluded an end-to-end agreement with the Consortium at an all-in price on seaborne transport of China-origin time-sensitive commodities from Shanghai via the Northern Sea Route and the Western part of the Bering Strait to Hamburg, subsequent terminal handling and processing in the the portion of Port of Hamburg dominated by COSCO and transport to land-hubs where the goods are delivered to members of the Consortium (the Agreement).

The Agreement is a try-out for a permanent trade channel between China and the EU intended for coordinated export of the above and other goods of China-origin to the Ports of Hamburg and Piraeus. In this permanent trade channel, the portion of the Port of Hamburg dominated by COSCO and the Port of Piraeus will be the only ports-of-call in the EU. This implies that it must be assessed whether COSCOP and the Agreement have for their object or effect disruption of fair competition within the EU which significantly affects patterns of trade between Member States. Should such be the case, the EU antitrust prohibition applies to both COSCOP and the Agreement.

The effects of the Agreement are acute and permanent. Loss of production and/or sales on the part of members of the Syndicate of EU-origin goods which are competitive to imported China-origin goods, increase their financial burden to an extent in excess of their capacity and may result in bankruptcy.

Bankruptcies affect the financial power required by Member States that are European NATO Allies, for the build up of a NATO military-industrial defence complex against Putin's expansionist politics. Deficiencies require compensation. The most obvious way for Member States to achieve this is by increasing citizens' income taxes in excess of the annual percentage of the GDP already collected by inland revenue and subsequently used to build up this complex. The effects of such tax increases will differ per individual Member State.

Unity in the Union will be at stake. Damage control in accordance with EU antitrust law is of the essence.

The dispute

The Syndicate and Mithras have lodged a joint complaint with the EU Commission and have brought main and injunction proceedings with the national court against both the Consortium and COSCOP. Provisional damages are claimed in both proceedings.

The Commission and the national judiciary must comply with their obligation of full application of EU antitrust law out of their own accord. Intra-EU application will not do. It prohibits a Member State from encouraging its citizens to acquire within their own borders goods produced or sold by fellow-national companies. Neither will the subsidising of national production and/or sale in the hope of approval by the Commission do. Commission decision-making practice and case law of the European Courts of Justice demonstrate that no approval can be given in cases like these.

The only way of settling the record straight within the sense of EU antitrust law therefore is extraterritorial application of this law on the part of the Commission and/or the national judiciary in accordance with case law of the European Courts of Justice and regulations and decisions of the Commission.

Proceedings

Surrounding geopolitical circumstances and imminent, irreversible and irreparable damages resulting from the impact of those circumstances on global seaborne trade, should encourage the national judiciary to submit the following preliminary questions to the ECJ:

1. Do national courts sitting in injunction proceedings have the obligation — either because of the direct effect of Article 101 TFEU, or at least of Article 53 EEA, or on the basis of the direct effect of Article 6 of Regulation 1/2003 — to fully apply Article 101 TFEU, or at least Article 53 EEA, with regard to agreements/concerted practices of shipping lines in respect of freight services operated in light of end-to-end Asia-Europe sea- land agreements, between ports outside the EEA and land-based destinations within the EU?

2. Is the national court sitting in injunction proceedings entitled to grant provisional damages in a case in which the Commission has not yet ruled in a complaint, but where the national court holds the view of sufficient evidence having been supplied regarding there being no doubt about the causal relationship between the violation of EU antitrust law constituting the basis of the complaint and the damage, nor any doubt about the damage, or at least part thereof, being certain, uncontested and quantifiable.

In attendance of the binding opinion of the Commission on the complaint and of the judgement of the ECJ on the preliminary questions, the national court sitting in injunction proceedings should nevertheless decide on the request for provisional damages since imminent, irreversible and irreparable damages are being or are likely to be inflicted. Judgements should rely on the following parameters: (i) the conduct is or is likely to be in conflict with EU antitrust law; (ii) there is substantial likelihood that the allegations will be sustained in the binding opinion of the Commission on the complaint; (iii) irreversible harm will result if injunctive relief is denied; and (iv) the harm that is likely to result if injunctive relief is denied outweighs the harm if it is granted.

Surrounding geopolitical circumstances

The ever-growing sophistication of logistics solutions and business intelligence and analytics systems has not deprived lines and alliances that operate on Asia-Europe seaborne traffic from their appetite of exchanging strategically sensitive information. They continue to look for foreign jurisdictions that allow for reduction of uncertainty, even where it concerns arrangements caught by prohibitions within EU antitrust law. The most important jurisdiction that explicitly allows for exchange of strategically sensitive information, is the jurisdiction of Singapore. Pursuant to the block exemption of Singapore Competition Law, cooperation is allowed for: (i) technical, operational or commercial arrangements; (ii) price; and (iii) remuneration terms. The Singapore Ministry of Trade and Industry has prolonged this block exemption time and time again. The current exemption is valid until January 1, 2030.

The Singapore block exemption is of crucial importance in regard to global seaborne trade between

Asia and Europe. Singapore has the world’s second busiest port after Shanghai. Intra-Asia trade is growing exponentially. When heading for Europe, mega-carriers are taking up an ever-larger part of this trade. Business arrangements underlying the intra-Asia routes of the trade are agreed upon in light of the block exemption of Singapore Competition Law.

For mega-carriers en route to Europe, the Port of Singapore (PSA) is the best port-of-call by far for unloading intra-Asia cargo. Its location along the Strait of Malacca in the centre of the Asia-Europe shipping routes makes it the main hub in the Far East, with some 200 of the world’s shipping lines calling at PSA terminals. These lines offer connections to 600 ports in 123 countries, largely in the Southeast Asia region. The container-handling capacity of the PSA amounts to 820,000 TEU per week.

The global context within which lines operate is that of alliances. Together, such alliances move roughly 90 per cent of ocean freight. All members partake in conference and/or discussion agreements where, in accordance with the Singapore block exemption, strategically sensitive information is being exchanged and freight rates are being fixed for intra-Asia traffic.

Russian antitrust law is heavily influenced in practice by current surrounding geopolitical circumstances. Russia therefore does not pose legal obstacles to exchange of strategically sensitive information between members of alliances that carry China-origin goods to the EU, particularly if China's SOE COSCO is one of those members and transport to the EU is of importance to China's economy. Also in those alliances, arrangements on technical, operational or commercial matters, price and remuneration terms are therefore commonplace.

The above demonstrates that the jurisdictions of both Singapore and Russia allow restrictive arrangements in regard to seaborne Asia-Europe transport of China-origin goods to the Ports of Piraeus and Hamburg.

The EU Commission has indicated that in horizontal agreements the following arrangements meet the prohibition criterion of EU antitrust law:
a. discussing or fixing prices, surcharges, discounts and rebates;
b. agreeing on levels of capacity and utilisation;
c. rationalisation of capacity;
d. allocating customers or regions;
e. discussing relations with particular customers or suppliers;
f. planned service launches and service characteristics;
g. exchanging confidential information that might affect the competition positions of the participants or third parties.

In its Commitment Decision, the EU Commission indicates which key parameters of freight rates are important within the framework of the prohibition of EU antitrust law:
(i) base rate, bunker and security charges, terminal-handling and peak season charges;
(ii) possible other charges;
(iii) the services to which they apply; and

(iv) the period to which the charges relate, which can be expressed as either a fixed or an open-ended period, in which latter case prices are valid until further notice.

The above guidelines of the EU Commission are crucial for assessing the question whether admissibility under Russian antitrust law of anti-competitive arrangements between the members of COSCOP pertaining to the extra-EU leg of the Asia-Europe route has an impact on the intra- EU leg of that route to the extent that patterns of trade between EU Member States are significantly affected. If so, COSCOP falls within the scope of extraterritorial implementation of EU antitrust law, and is prohibited in its entirety pursuant to Article 101(1) TFEU.

The above demonstrates that it must be assessed whether anti-competitive conduct on the extra-EU leg of the route qualifies as evidence of *active and direct* alignment of conduct on the intra-EU leg of the route. Assessment of whether it concerns *active* and *direct* alignment must be on a case-by-case basis. The ECJ has ruled that in proceedings emerging from collisions between EU antitrust law and foreign legislation, implementation of EU antitrust law only prevails if the conduct at issue indeed has an anti-competitive object or effect caught by the EU cartel prohibition.

The above implies that evidence must be adduced that rigorous coordination of the organisational decision-making processes in the logistics chain of the entire route through semantic interoperability of business intelligence and analytics systems and related computer programmes amongst all actors engaged in the execution of the Agreement, does not imply *active and direct* alignment of conduct on the EU-leg of the route which prevents COSCO and its partners in COSCOP from (i) maintaining a separate identity, (ii) having separate sales, pricing and marketing functions, and (iii) having the sole object of promoting internal and external competition. In other words, evidence must be adduced that the cluster of technological arrangements underlying the entire logistics chain of seaborne Asia-Europe traffic does not constitute an indivisible entity.

Even in the unlikely event of such evidence being adduced, the supplementary question arises whether, by its very nature, exchange of strategically sensitive information pertaining to the entire route, leads to *indirect* alignment on the EU-leg in the sense referred to above. This question must be assessed having regard to the subject matter of the information exchanged, the objective of the exchange, and the economic and legal context in which that exchange takes place. While defining this context, consideration must be taken of the nature of the goods or services affected, as well as of the real conditions of the functioning and structure of the market or markets in question.

Last but not least, evidence must be adduced that the economic and financial conditions offered by COSCO for terminal handling and subsequent processing of the goods in the portion of the Port of Hamburg it dominates are not caught by the prohibition of EU antitrust law. Failure to adduce such evidence, especially conclusive evidence, implies in my view in itself already that both COSCOP and the Agreement, either by object or by effect, are caught by the prohibition of EU antitrust law in their entirety.

Summa summarum, one of the hard cores of this assessment is whether in executing the Agreement on the EU-leg of the route, each member of COSCOP has an independent strategy that precludes any direct or indirect interaction by which the market is influenced or decisions or deliberations concerning their conduct on the market are disclosed. An affirmative response implies that regardless of restrictive arrangements pertaining to the extra-EU leg of the route COSCOP qualifies as a vessel sharing agreement (VSA) once the EU-leg continues.

A VSA is an agreement concluded between lines, whereby parties to the agreement discuss and agree on operational arrangements relating to the provision of liner shipping services. Such arrangements include the coordination or joint operation of vessel services and the exchange or chartering of vessel space. VSAs ensure reliable schedules and higher frequencies of service. The required cooperation is only for operational objects. Each party must retain its own market identity and pursue its own market strategy. This implies that from a commercial point of view parties to a VSA must operate entirely separate from one another. Competition among them must remain fully unaffected.

No proper theory exists that indicates when an anticompetitive arrangement arises from tacit collusion and identifies which role is played by information exchange. The question whether such arrangements are caught by the scope of Article 101 (1) TFEU, must therefore be assessed on a case-by-case basis.

Arrangements with the object or effect of exchanging information are a form of coordination between undertakings by which, without a formal agreement having been concluded, the risks implied by competition are knowingly excluded. It must be assumed that undertakings take account of the information exchanged with their competitors in determining their conduct on the market. That is all the more the case when the undertakings concert together on a regular basis over a long period.

The ECJ held that, subject to proof to the contrary which the economic operators must adduce, agreements or factual concerted practices with the object of such exchange of information, are caught by Article 101(1) TFEU, even in the absence of anticompetitive effects on the EU market.

Exchanges of information that are most likely to be caught by Article 101(1) TFEU relate to strategically sensitive information concerning commercial policy that reduces strategic uncertainty as to the future operation of the market for all the competitors involved and constitutes the risk of limiting competition. Merely attending a meeting where a company discloses its pricing plan to its competitors is already caught by Article 101(1) TFEU, even in the absence of an explicit agreement to raise prices.

A company that receives strategic data from a competitor (be it in a meeting, by mail or electronically) will be presumed to accept the information and adapt its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data. In the absence of such a statement, the anticompetitive effect does not need to have actually occurred but is likely to occur in the near future.

In the case currently under assessment the core question is therefore whether exchanging strategically sensitive information related to the entire Asia-Europe route justifies qualification of COSCOP as a VSA on the European leg of the route. Account being taken of surrounding geopolitical circumstances, this question must also be examined in light of the definitions for the concepts of concentration and control provided by the EU Concentration Regulation.

Definition of concentration

In so far as relevant for the present case, the regulation provides that a concentration - within the framework of this Regulation also known as merger - has a community dimension where the combined aggregate worldwide turnover of all the undertakings involved exceeds EUR 500 million.

Such being the case, it must be assessed in the appraisal whether the following is being complied with and accounted for

(a) the need to maintain and develop effective competition within the EU in view of, amongst other things, the structure of all the markets concerned and the actual or potential competition originating from undertakings located either within or outside the Union; and
(b) the market position of the undertakings involved and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress, provided that it is to consumers' advantage and does not obstruct competition.

Definition of control

Control is constituted by rights, contracts or any other means which, either separately or in combination, and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of this undertaking.

Conclusion

My conclusion is based on the following mutually and closely interconnected considerations:

- The relevant market in which COSCOP operates is the market for end-to-end transport services of China-origin goods from seaports outside the EEA to land-based destinations within the EU.
- The Agreement forms an indivisible entity that malfunctions once one of its components related to the sea-leg and/or land-leg of the route malfunctions or no longer functions;
- The cluster of technological arrangements underlying the entire Asia-Europe route and the exchange of strategically sensitive information related to that route justifies qualification of COSCOP as a concentration in the sense of the EU Concentration Regulation on the entire route;
- The COSCO-share in seaborne transport related to the Agreement and its dominant position in the relevant portion of the port-of-call of Hamburg implies that COSCO exercises decisive influence, and thus has control, in the execution of the Agreement by COSCOP.
- The condition COSCO imposes on other members of COSCOP and the Consortium that under the Agreement the Port of Hamburg serves as the single authorised EU port-of-call demonstrates that COSCOP has distortions of competition which significantly affect patterns of trade between EU Member States, for object and effect.
- COSCO's preferential access to China's credit facilities is used for forcing down to a non-commercial level the aggregate amount paid by the Consortium under the Agreement by lowering the price of seaborne transport and/or of terminal handling and subsequent processing in the Port of Hamburg and/or of transport of the goods to their arranged final land destination, and

- The Agreement is a try-out for establishing a permanent concerted and coordinated trade channel between China and Hamburg and Piraeus.

Considering the above, I take the view that COSCOP and the Agreement, together and in close harmony, have the object of creating reasonably foreseeable long-term market distortions and significant changes of trade patterns between EU Member States.
In concert nor individually COSCOP and the Agreement meet the criteria Article 101(3) sets for exemption from the prohibition of Article 101(1) TFEU.

Competence

Prohibition of COSCOP and the Agreement on the basis of extraterritorial implementation of EU antitrust law impacts regular supply and prices of China-origin products in the EU. Members of the Consortium will face serious loss of profit, if not bankruptcy.

Refusal, or clear failure, on the part of the Commission or the national judiciary to prohibit COSCOP and the Agreement on the basis of extraterritorial implementation of EU antitrust law, has a similar impact on members of the Syndicate. In addition, legal proceedings on restoration of damages resulting from such infringement by the Commission or the national judiciary of EU antitrust law, are due to follow. Damages may be claimed from the respective authorities but also from competitors who benefit from the regulatory inertia and reap the fruits of conduct which distorts fair competition and significantly affects patterns of trade amongst Member States.

This is the dilemma that would arise in times of peace. We are, however, living in times of war. Although hypothetical the case under assessment requires serious attention. The political connotations that emerge once an arrangement of the kind of, or similar to one under assessment becomes real are very serious indeed. It must therefore be examined whether the case is justiciable or must remain within the exclusive remit of political institutions.

The joint Statement that the European Competition Network (ECN) has issued on the way EU antitrust law must be applied in the context of the war in Ukraine, demonstrates that in cases of the kind of, or similar to the one under assessment legal proceedings are in order. In this respect, and in so far as relevant, this Statement is as follows:

• The ECN understands that this extraordinary situation may trigger the need for companies to address severe disruptions caused by the impact of the war and/or of sanctions in the Internal Market. This may include for example cooperation in order to (i) ensure the purchase, supply and fair distribution of scarce products and inputs; or (ii) mitigate severe economic consequences including those arising from compliance with sanctions.

• Considering the current circumstances, cooperation measures to mitigate the effect of severe disruptions would likely amount to a restriction of competition under Article 101 TFEU/53 EEA but generate efficiencies that would most likely outweigh any such restriction. In any event, in the current circumstances, the ECN will not actively intervene against strictly necessary and temporary measures specifically targeted at avoiding the aforementioned severe disruptions caused by the impact of the war and/or of sanctions in the Internal Market.

• If, on the basis of their self-assessment, companies have doubts about the compatibility of such cooperation initiatives with EU/EEA antitrust law, they can reach out to the Commission, the EFTA Surveillance Authority or the national competition authority concerned any time for informal guidance.

• At the same time it is of utmost importance to ensure that essential products (for example energy, food, raw materials) remain available at competitive prices and that the current crisis is not used to undermine a competitive level playing field between companies. The ECN will therefore not hesitate to take action against companies taking advantage of the current situation by entering into cartels or abusing their dominant position.

The Statement indicates that EU antitrust law in wartime is not suspended but rather *adapted* - it shifts toward enabling necessary cooperation to secure supply chains while remaining vigilant against abuse of market power, ensuring that crisis responses do not lead to long-term market distortions.

The Commission's and the national court’s competence and ensuing obligation to apply the prohibition of EU antitrust law in the case at issue is secured by the territoriality principle as universally recognised in public international law. In so far as it is of consequence, it prescribes that the decisive factor is *where* the agreement or conduct is *implemented*, not where it is *agreed*. In this respect it is irrelevant whether or not members of COSCOP had recourse to agents, subsidiaries, sub-agents or other representatives established in the EU.

According to Nietzsche there are no facts, just interpretations. However, prior to becoming true to their name, interpretations need facts. The evidence that must be adduced must be sufficient to properly assess and decide on the issues referred to above. Evidence may take the form of statements, consultations, opinions by witnesses, expert opinions or may be gathered by investigative methods.

The present case concerns the interests of both the EU and China. Therefore, account must be taken of the fact that according to EU antitrust law the evidence adduced may only be assessed in light of the surrounding geopolitical circumstances and the intentions of the parties underlying COSCOP and the Agreement.

The CCP assesses evidence by interpreting "social public interest" and "promoting a healthy development of the socialist market economy" in the context of the surrounding geopolitical circumstances. This assessment leaves room for a political standpoint which, either fully or in part, does not account for considerations under antitrust law. Article 7 of China's antitrust law adds even more scope for political considerations if the CCP is of the opinion that the case concerns sectors that are the lifeblood of China's economy.

As COSCOP and the Agreement are meant as a try-out for a permanent concerted and coordinated trade channel between China and the EU intended for import of China-origin goods into the Ports of Hamburg and Piraeus and as the initiative was taken by COSCO, it is doubtless that such is the case.

The approach and assessment of the CCP and the economic and political consequences emanating from a prohibition of COSCOP and the Agreement pursuant to Article 101(1) TFEU, however, is not a consideration the ECJ, the Commission or the national judiciary may take account of. In a scenario of the kind referred to above, only EU antitrust law is relevant and applies.

Conclusion

If politicians ride the Trojan horse for camouflaging inertia, the market must wreck the stirrups.

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Rotterdam, 12-5-2026