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Which competition and industrial policies for the new EU Commission after *Siemens/Alstom*?

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+ On-Topic

Which competition and industrial policies for the new EU Commission after *Siemens/Alstom*?

ABSTRACT

This series of articles presents different points of view about the priorities of the newly established Commission on competition policy in Europe in the aftermath of the decision prohibiting the Siemens/Alstom merger and of the manifesto published by French and German governments. These contributions participate in the debate on the interaction between merger control and international competition of European companies.

Cette série d'articles présente différents points de vue sur les priorités de la nouvelle Commission en matière de politique de concurrence en Europe à la suite de l'interdiction de la fusion Siemens/Alstom et au manifeste publié par les gouvernements français et allemand. Ces contributions participent au débat sur l'interaction entre contrôle des concentrations et compétitivité internationale des entreprises européennes.

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Competition policy in the aftermath of the *Siemens/Alstom* prohibition: An agenda for the new Commission

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I. Introduction

1. On February 6th 2019, the Commission prohibited the proposed acquisition of Alstom's transport equipment and service activities by Siemens.[1] According to the Commission,[2] the operation would have brought together the two largest suppliers of various types of railway and metro signaling systems, as well as rolling stocks in Europe. The proposed acquisition would have significantly reduced competition in some signaling markets in the EEA (and several Member States) and in the market for very high-speed trains in the EEA. As part of its assessment, the Commission took the view that the Chinese producer CRRC would not exercise a competitive constraint on the merging parties in the foreseeable future. The Commission's press release did not make reference to merger-specific efficiencies and it is often inferred[3] from this that the parties did not make substantial representation to that effect. The parties offered remedies which, however, failed to address the Commission's concern and "*would not have been sufficient to prevent higher prices and less choice for railway operators and infrastructure managers*."[4]

2. Even before its conclusion, the investigation into this transaction led to a debate. On December 18, 2018, nineteen EU governments made a call[5] for "*the identification of possible evolutions of the antitrust rules to better take into account international markets and competition in merger analysis*." The statement urged the incoming Commission to act quickly to maintain Europe's competitiveness and face"*fierce competition from other large economics with pro-active industrial strategies*" and particular foster the development of European champions. Shortly after the prohibition, France and Germany issued a Manifesto for a European Industrial Policy fit for the 21st Century.[6] This manifesto advocates an adaptation of EU's competition rules. In particular, France and Germany recommend first to "*take into greater consideration the state-control of and subsidies for undertakings with the framework of merger control.*" This recommendation can be understood as a subliminal reference to Chinese state-owned enterprises and CRRC in the context of the *Siemens/Alstom* transaction. Second, the manifesto recommends updating current merger guidelines to "*take greater account of competition at the global level, potential future competition and the time frame when it comes to looking ahead to the development of competition.*" Third, the manifesto recommends considering whether a right of appeal of the Council "*which could ultimately override Commission decisions could be appropriate in well-defined cases, subject to strict conditions.*"

1 *Siemens/Alstom* (COMP/M.8677), Commission decision of 6.2.2019.

2 Commission, Mergers: Commission prohibits Siemens' proposed acquisition of Alstom [2019] IP/19/881, available at: www.europa.eu/rapid/press-release_IP-19-881_en.htm.

3 *See*, for instance, the contribution by Wik and al. al. below.

4 The contributors do not, naturally, take a view on the merit of the decision, which has not yet been published. Some note, however, that both Alstom and Siemens are in some sense already "champions" and that in the absence of efficiencies, it is difficult to see how in this particular case there was a trade-off between competition and the emergence of a champion.

5 https://www.euractiv.com/section/economy-jobs/news/19-eu-countries-call-for-new-antitrust-rules-to-create-european-champions.

6 https://www.gouvernement.fr/en/a-franco-german-manifesto-for-a-european-industrial-policy-fit-for-the-21st-century.

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3. *Concurrences* asked ten contributors to provide their views on what could be the priorities of the incoming Commission with respect to competition policy in Europe. It turns out that all of them contributed to the debate on the interface between merger control and the international competitiveness of European firms, following the prohibition of the *Siemens/Alstom* transaction and the manifesto put forward by the French and German governments. Our summary will thus also focus on this issue. Specific recommendations on other matters can be found in individual contributions, in particular regarding vertical agreements (Funke), investigation techniques (Winckler), procedures and the allocation of the burden of proof in merger control (Motta & Peitz), remedies in mergers (Wik and al. and Winckler) and the motor vehicle block exemption (Funke).

4. Our discussion of the contributions can be naturally organized around the three dimensions of the Franco-German manifesto—namely, the consideration of state support for foreign competitors, the development of a more forward-looking and dynamic assessment of competition and the role of the Council in merger control. It is however useful at the outset to review the nature of the interaction between competition enforcement and industrial policy as discussed by the contributors.

II. Merger control and competitiveness

5. A number of dimensions of the interface between competition enforcement and competitiveness are highlighted by the contributors.[7] First, it is recognized that the current version of the merger regulation allows for a consideration of efficiencies (including efficiencies arising from scale) and from that perspective supports the development of more efficient (and possibly larger) firms. The fact that a proposed transaction improves the competitiveness of the merging parties is seen favorably and transactions that lead to merger specific and cognizable efficiencies are more likely to be allowed (see Motta & Peitz and Lianos). As emphasized by some contributions, this was not always the case in particular in the years that followed the adoption of the merger regulation, during which there was greater skepticism towards efficiencies (see Buhart & Henry for a historical overview).

6. Second, it is recognized that public interest considerations have a role to play in merger control. This is explicitly recognized by Art. 21(4) of the merger regulation that allows Member States to review mergers from the perspective of national security, prudential rules and the plurality of the press as well as other dimensions (subject to a review of the Commission). The framework recently adopted by the Council (March 5, 2019) for the screening of foreign direct investment by Member States[8] is also likely to encourage such additional screening. However, as pointed out by Motta and Peitz, these additional screens can be expected to impose additional remedies or lead to the prohibition of mergers that would otherwise be allowed but not to allow mergers that would otherwise be prohibited on competition grounds or lift some remedies. By contrast, what the Franco-German manifesto envisages is to allow mergers that would otherwise be prohibited on competition grounds (Papp, Buhart & Henry, and Levy et al.).

7. Third, there may be, in principle, a trade-off between competitive constraints and the development of competitiveness. Infant firms (or industries) or mature industries ("time to breathe") may need to be protected from competition in order to develop or regain their competitiveness (see Lianos and Heim & Midões). There is, however, no support for the view that these considerations should guide enforcement because of the evidence that rivalry tends to improve productivity growth (Lianos) and because of the concern that any policy involving temporary protection would be prone to capture (Heim & Midões).[9] These considerations also have little bearing on merger control.

8. Fourth, to the extent that efficiencies are properly taken into account (as mentioned above), there is only a trade-off between the development of efficient firms and the prevention of consumer harm when efficiencies are not large enough to prevent consumer harm (see Motta & Peitz and Lianos). This might arise in particular when (i) the merging firms interact in local relevant markets, (ii) develop efficiencies in a broader market and (iii) remedies are not available to address concern in the local market without jeopardizing the efficiencies overall. In those circumstances, efficiencies that arise outside the relevant market (out of market efficiencies) will be denied if the proposed merger is prohibited.

9. To illustrate, assume that two firms compete in a European market as well outside Europe (in different relevant markets). Their merger would lead to efficiencies deployed through the combination of their operation both in Europe and outside. As a result of the merger, they would obtain a dominant position in Europe and efficiencies (obtained through a global integration) are not sufficient to ensure that consumers in Europe would not be harmed. In those circumstances, if a remedy can be found in Europe, which does not affect the achievement of efficiencies, European customers can be better off and the merged entity can become more efficient and more competitive abroad. However, if there is no such remedy, the merger is prohibited and the merged entity is denied the opportunity to become more competitive in third markets.

7 The debate is often framed in terms of the development of "champions" (European or otherwise) and a number of the contributions refer to "champions." We feel, however, this term is ill-defined, as it might refer to more efficient firms as well firms that, for political economy reasons, are deemed to warrant a special protection. In what follows, we will thus refrain from using this term.

8 https://www.consilium.europa.eu/media/38347/pe00072-en18.pdf.

9 Lianos also discusses the appropriate public policy towards the development of industry in terms of other policies like support to R&D, intellectual property and infrastructure and how these policies interact with a competition policy.

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10. As observed by Wik and al. the trade-off between the development of more efficient firms and the prevention of consumer harm can be particularly problematic when there are two relevant markets within the EU. To illustrate, consider two relevant markets in the EU, instead of one market in the EU and one market outside (as in the previous case). The merger leads to a dominant position in one market, there are efficiencies across the two markets, there is a net consumer harm in one market and a net consumer benefit (because of the efficiencies) in the other market. In the absence of remedies to address concerns in the first market, the merger is either prohibited or allowed while recognizing that consumer harm is one market is compensated by consumer benefits in the other one. As discussed by Wik and al, one can argue that the *Volvo/Scania* merger fits with this description. It was prohibited because of a competition issue in Nordic markets but if allowed, would have brought benefits to European customers as a whole and would have allowed for the development of a more efficient firm.

11. Hence, as concluded by Wik and al., there is a conflict between competition enforcement and the development of champions only to the extent that there is a mismatch between the scope of the problem and the proposed remedies. Referring to recent cases like *SSAB/Rautaruukki* and *Konecranes/Terex*, they findthat in many instances, the conflict can be avoided by finding targeted remedies (see also Motta & Peitz, who refer to the possibility of creating a joint venture for operations outside the market in which competition problems arise).

12. Overall, the question still arises whether consumer harm in one market should necessarily always prevent the development of efficiencies in a broader market (out of market efficiencies), possibly at the expense of a consumer benefit in a broader market. The mandate given by the merger regulation is without ambiguity as it instructs the Commission to prevent consumer harm in any significant part of the common market. But, arguably, the review of the regulation advocated by the Franco-German manifesto could usefully focus on this set of circumstances.

13. Even if such a policy would be considered, enforcement may be fraught with difficulties. In particular, it would involve picking winners and there is considerable skepticism about the ability of public authorities to do so given the complexity of the exercise (Lianos) and concern about the scope for capture that it would necessarily involve (see Papp,Heim & Midões, and Osti).

III. Subsidies and state-owned enterprises abroad

14. Most contributors recognize that "unfair" competition from companies based outside the EU may be a cause for concern. In those circumstances, what is sought is merely to take into account that competition is distorted by various types of support abroad, including subsidies and barriers to market access (see Heim & Midões and Motta & Peitz).[10] Competition authorities should take these distortions into account in their analysis of the competitive dynamics before and after the merger (see Heim & Midões).

15. Two issues are, however, highlighted. First, it is not clear whether merger control is the appropriate instrument to address these distortions. Recourse to the multilateral system (in particular trade defense instruments in the context of the WTO), soft converge (in the context for instance of the ICN), the International Procurement Instruments put forward by the EU or bilateral investment treaties may be preferable. There is an acknowledgment, however, that some of these instruments could only have effects over a time frame such that they may be considered inadequate to respond to what is perceived to be an immediate threat.

16. Second, some of the alternative instruments might actually involve restrictions to the access to the EU market (in particular trade defense instruments or the International Procurement Instruments). There is a concern that these instruments could be captured to grant protection to European firms rather than addressing unfair practices abroad. In this context, strong competition (and vigorous merger control enforcement) is then essential to preserve competition among European firms (Motta & Peitz).

IV. Global markets and potential competition

17. A number of contributors recognize that the assessment of future competitive constraints could be improved. For instance, Wik and al. observethat the market definition notice is now more than twenty years old and that an update is long overdue (in light of the evolution of the practice and developments in other jurisdictions). Lianos and Motta and Peitz observe that the horizon taken into account for the assessment of competitive constraints may be unduly short. They

10 *See* for instance https://ec.europa.eu/epsc/sites/epsc/files/epsc_industrial-policy.pdf.

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emphasize the fact that potential competition needs to be assessed thoroughly. Reference is made to the digital markets in which large incumbents like Amazon, Google, Apple or Facebook have taken over dozens of small technology firms that could potentially have developed substitute products. They also refer to empirical evidence regarding the prevalence of "killer acquisition" in the pharmaceutical sectors involving the acquisition of technologies or molecules that would create future competition.

18. Admittedly (see Lianos and Motta & Peitz), the Commission has already extended the horizon over which it is assessing competitive constraints by explicitly considering the effect of proposed transactions on innovation. In a number of pharmaceutical (like *Novartis/GSK Oncology*, *Medtronics/Covidien*) and agrochemical (*Dow/DuPont*, *Bayer/Monsanto*) cases, the Commission has considered whether the merging parties could be expected to compete in the future, in the absence of the merger, by marketing products in the pipeline or by investments in the development of new products in specific lines of research. This assessment involves a time frame that goes much beyond the two years that is normally considered.

19. Overall, there is thus some support for the view that, in line with recent cases, the Commission should give greater emphasis to potential competition. This applies to merging parties in the absence of a proposed merger as well as potential entrants that might exercise a competitive constraint on the merging parties in the future (like CRRC).

V. Oversight by the Council

20. It is the third pillar of the Franco-German manifesto which has attracted most comments and those are uniformly critical (see in particular Levy et al. for a comprehensive critique). A number of arguments are put forward. First, there is a recognition that the current system of enforcement involving decisions by the college of commissioners has worked well in a number of important respects (predictability and legal certainty, competence of the assessment, relative independence from particular interests, neutrality over the nationality over the parties,effective judicial review), even if further improvements could be achieved (see Winckler, who argues for a greater involvement of the college of commissioners). These features should not be jeopardized by a change in decision-making. In this respect, there is a grave concern that decisions by the Council would involve greater capture by particular interests given the political nature of the decision-making process at the level of the Council. There is also a concern that the Council would lack the technical support to make a proper assessment. As argued by Lianos, if an arbitrage between consumer harm and efficiency is considered, it will involve a complex assessment that is best performed by an established civil service and not by a political body. There is also a concern about the scope of the judicial review of decisions taken by the Council (and accordingly the absence of discipline imposed on its decisions). Finally, there is a concern about the incentive by merging parties to propose remedies at the level of the review by the Commission when they anticipate that their transactions could be approved without remedies by the Council.

21. Second, a number of contributors are concerned about the imbalance in the exercise of power across Member States that this proposal would entail. There is an expectation that given their share of votes, larger Member States would have greater influence in the Council, relative to decisions taken by the college. Given that potential champions might come disproportionately from France and Germany, these Member States might also be the main beneficiaries, possibly at the expense of customers in other Member States.

22. Third, evidence in favor of the effectiveness of a system of political oversight on the basis of non-competition criteria is at best mixed. Some contributors (see Funke) argue that the German system, which involves a political oversight, has led to important conflicts and in some instances has failed to deliver the "champions" that it was meant to promote. According to Papp, a system like that of Hungary in which certain transactions are effectively taken out of the scope of merger control altogether may actually be preferable (see also Osti, for the Italian experience in which de facto some mergers have been taken out of the scope of merger control).

23. Overall, there is a sense of alarm among the contributors about the prospect that the Council could be involved in merger control.

VI. Conclusion

24. As emphasized by Heim and Midões, there is now a disconnect between what some Member States expect from competition enforcement and what the current framework can deliver. Competition enforcement is seen as an obstacle to growth. As they emphasize, it is incumbent on the competition enforcement community to engage with respect to these concerns. As outlined in this summary, an evolution of enforcement such that future competitive constraints are analyzed more fully in a dynamic perspective and such that out of market efficiencies are explicitly considered could be appropriate. In addition, a dialogue on the appropriate tools to address distortions of competition arising from support to foreign firms is required. ■

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Industrial policy to trump competition? The *Siemens/Alstom* railway merger and its aftermath

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ABSTRACT

The *Siemens/Alstom* decision is the latest in a long line of cases that bear testimony to the European Commission's ("EC") unswerving commitment to applying only competition principles in merger cases. The uniqueness of the Siemens/Alstom case, however, lies in the arguably unprecedented intensity of the political pressure placed on the EC by France, and, quite remarkably, Germany to relax the rules in favour of creating a European champion. Its immediate aftermath saw France and Germany table a series of proposals to amend the EU merger control rules so as to facilitate the emergence of European champions. For example, one option put forward is to allow the Council to override EC decisions. Another is to amend the EUMR. With respect to the latter, achieving outright consensus will likely be very difficult to secure amongst the Member States. This short paper examines the proposals made by France and Germany and seeks to offer some food for thought on how the EU merger control rules could be reformed so as to accommodate industrial policy considerations.

La décision Siemens/Alstom *est la dernière d'une longue série d'affaires qui témoignent de l'engagement indéfectible de la Commission européenne ("CE") à appliquer uniquement les principes de concurrence dans les affaires de concentration. La particularité de cette affaire réside cependant dans l'intensité sans précédent de la pression politique exercée sur la CE par la France et, ce qui est assez marquant, par l'Allemagne, en faveur d'un assouplissement des règles pour la création d'un champion européen. Immédiatement après, la France et l'Allemagne ont présenté une série de propositions visant à modifier les règles de l'UE en matière de contrôle des concentrations afin de faciliter l'émergence de champions européens. Par exemple, les deux Etats proposent de permettre au Conseil de passer outre les décisions de la CE. Une autre proposition consiste à modifier le règlement CE sur les concentrations. En ce qui concerne ce dernier point, il sera probablement très difficile de parvenir à un consensus total entre les États membres. Cet article examine les propositions faites par la France et l'Allemagne et cherche à offrir quelques pistes de réflexion sur la manière dont les règles de l'UE en matière de contrôle des concentrations pourraient être réformées afin de tenir compte des considérations de politique industrielle.*

I. Introduction

1. The EU Merger Regulation ("EUMR") has since its inception been exclusively competition based. Despite the competition-based terminology of the EUMR, this has not prevented regular calls over the years for the European Commission ("EC") to take into consideration industrial policy when applying the EUMR. All such calls have come to no avail, however. The EC has consistently shown steadfast resolve to abide by principles of law and economics, and not politics. This was reaffirmed by the EC's decision of 6 February 2019 in *Siemens/Alstom*. In a case marked by unusually intense industrial and political pressure to permit the creation of a European flagship enterprise, Competition Commissioner Vestager reiterated that effective competition in the EU cannot be sacrificed for the sake of allowing a "European champion" to compete on the world stage. Rather, strict application of the "significant impediment to effective competition" ("SIEC") test enshrined in the EUMR must prevail.

2. The EC's decision to prevent the emergence of a Franco-German train behemoth has irked the political elite in Paris and Berlin. Reflecting the view that the EUMR is at odds with modern-day geopolitical realities and that "size matters," on 19 February 2019 Paris and Berlin jointly published a manifesto calling for the EU merger control rules to be amended to facilitate the creation of European champions, particularly in light of increasing state capitalism in China. Berlin's position in this regard is quite remarkable given its traditional adherence to a "competition-only" credo since the birth of the EUMR and indeed during the period prior thereto. The stakes appear to be such that even the German Bundeskartellamt, a bastion of competition-only ideology, is asking itself whether the need to create European champions justifies monopolies/duopolies, and thus higher prices for the European consumer. Other Member States, such as Portugal, have expressed their doubts. With these developments, the stage is potentially set for the EU's decades-long adherence to a "competition-only" mantra to be unwound. An

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unconsidered move in such direction may give rise to highly infelicitous consequences, however. With the European elections looming and the installation of a new Commission on the horizon, this short paper seeks to contribute to what must be a very carefully considered debate.

II. Industrial policy and the EUMR – A long history of ideological division

3. The seeds of the EUMR were first sown in 1966.[1] A first draft of the EUMR emerged in 1973.[2] It took a further sixteen years, however, before the first iteration of the EUMR burst into fruition. This was an era of political wrangling between Member States in the competition camp (e.g., the United Kingdom ("UK"), Germany and Denmark) and Member States in support of a legal text allowing for political discretion (e.g., France and Italy and some southern Member States).[3] During this period of intense tussle, the European Court of Justice ("ECJ") rendered its seminal judgment in *British-American Company Ltd & R. J. Reynolds Industries Inc. v. Commission*[4] suggesting that Article 101 TFEU could be applicable to mergers and acquisitions. Leaving industry in an unacceptable state of uncertainty, the judgment's effect was to prompt an immediate acceleration of the negotiations on the EUMR. The EC remained adamant, however, that the EUMR should not be an instrument to shape industrial policy in Europe. In the words of the then-Competition Commissioner, Sir Leon Brittan: "*I was determined that the Merger Regulation should not be used as a way of imposing an industrial policy in Europe, although there were quite a number of participants in the debate who wanted to do just that. Whether it was because they wished to create European champions, or wanted to allow social considerations to have an important impact, they wanted the wording of the Regulation to be sufficiently broad for the Commission to be able to consider matters going well beyond the effects of the merger on competition in the relevant market. In the end, the supporters of an industrial policy were effectively beaten back, and the Regulation gives clear primacy to the competition criterion, with only the smallest nod in the direction of anything else*."[5]

4. From the beginning, therefore, the EC, along with several Member States such as Germany, the UK and Denmark at the time, was committed to ensuring that industrial policy considerations would have no role to play in the appraisal of a transaction's compatibility with the internal market.

1. EUMR (Mark I)

5. The first iteration of the EUMR entered into force on 21 September 1990.[6] The substantive test of the first EUMR was whether a concentration "*created or strengthened a dominant position as a result of which competition would be significantly impeded*" (Art. 2(2)). In making such appraisal, the extent to which a transaction led to the "*development of technical and economic progress*" was to be taken into account (Art. 2(1)(b)). Any hopes that these words left the door ajar for industrial policy were, however, quickly dashed. In the words of Sir Leon Brittan: "*The notion of technical and economic progress must be seen in the context of the competition policy thrust of the Regulation and in conjunction with the specific reference to the consumer interest and the requirement that no obstacle be placed in the way of competition which accompany the notion in the text*."[7]

6. Confirmation of the EC's strict adherence to a competition-based test came early on in *Aérospatiale-Alenialde Havilland* of 1991.[8] The EC's prohibition decision was at the time seen as an affront to France's belief in the legitimacy of taking a "dirigiste" approach towards industrial policy,[9] and considered as calling into question whether European firms could truly compete with U.S. and Japanese rivals. All attempts at putting political pressure were successfully repelled. Sir Leon Brittan later stated: "(…) *we had to resist those who simply wanted us to encourage the emergence of European champions, irrespective of the impact that that would have on competition.* (…). *What was proposed was a merger between European firms, which was going to create a monopolistic situation in the world market. Nonetheless, the most intense political pressure was placed on the members of the Commission in an effort to have the merger permitted. Indeed, the French and Italian Governments regarded it as almost inconceivable that the Commission would ban a merger between French and Italian firms* (…),

1 *See* Études : Le problème de la concentration dans le marché commun, série concurrence 3, Bruxelles (1966).

2 Proposal for a Regulation (EEC) of the Council on the control of concentrations between undertakings, [1973] OJ C 92/1.

3 This period saw a series of proposals for a regulation all of which were rejected—*see*, e.g., amended proposal for a Council Regulation on the control of concentrations between undertakings (merger control Regulation), [1982] OJ C 36/3; amendment to the proposal for a Council Regulation on the control of concentrations between undertakings, [1984] OJ C 51/8; amended proposal for a Council Regulation (EEC) on the control of concentrations between undertakings, [1988] OJ C 130/4.

4 Judgment of the ECJ of 17 November 1987 in Joined Cases 142 and 156/84, *British-American Tobacco Company Ltd and R. J. Reynolds Industries Inc. v. Commission*, ECLI:EU:C:1987:490.

5 *See* the Early Days of EC Merger Control in *EC Merger Control: Ten Years On*, International Bar Association, London, 2000, p. 3 as cited in N. Levy, EU Merger Control: From Birth to Adolescence, *World Competition* 26(2): 195–218 (2003) at p. 196.

6 *See* Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ [1989] L 395/1.

7 *See* speech of Sir L. Brittan, Commission press release (1990) available at: http://europa.eu/rapid/press-release_SPEECH-90-36_en.htm.

8 *See* Commission decision of 25 February 1991, *Aérospatiale-Alenialde Havilland*, [1991] OJ C 59/1.

9 *See* C. Jones, Aerospace, in *The European Union and Industrial Policy*, H. Kassim and A. Menon (eds.), Routledge (1992), at p. 92.

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and there is reason to believe that they were given high-level assurances that this would not happen. Fortunately, the Commission resisted these pressures and voted to ban the merger. What was important was not so much that the merger would have in fact been damaging, but rather that the Commission showed itself to be able to resist political pressure (…).”[10]

7. The EC’s steadfast resolve to abide by principles of law and economics, and not politics, was seriously tested again in the politically charged *Boeing/McDonnell Douglas* case of 1997.[11] At the outset of the EC’s review, and reacting to press reports that some members of the U.S.-Senate believed that the EC’s approach to the case was “politically motivated” and biased in favour of Airbus, Mr van Miert (then-competition commissioner) stated: “*Our analysis of this case is strictly conducted along the lines and criteria which have been spelled out in the legal framework of the European Merger Regulation, and nothing else. Our analysis is based on facts and figures, not on so-called ‘political issues.’*”[12]

8. The case turned out to be so politically explosive that, immediately prior to the (conditional) clearance of the *Boeing/McDonnell Douglas* transaction, President Clinton threatened to go to the WTO in the event that the EC prohibited the transaction, also hinting that the EU may face retaliatory sanctions.[13] Despite such pressure, the EC faithfully, and indeed bravely, applied the dictates of the EUMR: in the absence of adequate concessions on the part of Boeing the transaction would be prohibited. The EC’s position to extract concessions from Boeing, rather than prohibit the transaction outright as it did in *de Havilland*,[14] could possibly be seen as a move to appease Washington and avoid a trade conflict with the U.S. That being said, could the decision really be construed as one infected by a bias in favour of Airbus—the European champion designed to counter the might of America’s Boeing? On closer inspection, the answer was likely no. On the one hand, the EC could have prohibited the transaction as it did in *de Havilland*. On the other, and as one commentator put it, Boeing’s “*concessions on exclusive dealings and supplier and manufacturer discrimination appear*[ed] *illusory*” and that the “*concessions represented nothing more than a pyrrhic victory for Van Miert and the European Commission*.”[15] Indeed, did the EC ever closely monitor Boeing’s adherence to the behavioural commitments entered into or the practical effectiveness thereof?

10 *See supra* note 5, N. Levy, at p. 204.

11 *See* Commission decision of 30 July 1997, *Boeing/McDonnell Douglas*, [1997] OJ L 336/16.

12 *See* Commission press release IP/97/400 of 13 May 1997, “Our analysis of the Boeing-McDonnell Douglas file is conducted strictly on the basis of the European Merger Regulation, and nothing else” Mr Karel Van Miert says.

13 *See* B. Coleman, Clinton Hints at U.S. Retaliation If EU Blocks Boeing Merger, *Wall Street Journal*, 18 July 1997.

14 *See supra* note 8.

15 *See* J. A. Miller, The Boeing/McDonnell Douglas Merger: the European Commission’s Costly Failure to Properly Enforce the Merger Regulation, 22 Md. *J. Int’l L.* 359 (1998).

9. A number of further cases underscored the EC’s continued faithful adherence to the competition-based test of the EUMR. A good example of this is the *General Electric/Honeywell* decision of 2001.[16] Upholding the hallowed principle of regulatory independence, the then-Competition Commissioner Mr Monti declared, with an air of irritation, that he “*deplored attempts to misinform the public and to trigger political intervention. This is entirely out of place in an antitrust case and has no impact on the Commission whatsoever. This is a matter of law and economics and not politics. The nationality of the companies and political considerations have played and will play no role in the examination of mergers in this case as in all others*.”[17] The cases of *Schneider/Legrand*,[18] *Vodafone/Mannesmann*,[19] and *Volvo/Scania*[20] represent further examples of the EC’s uniformly intransigent posture of refusing to permit external, non-legal considerations to inform its decision-making.

10. On 11 December 2002, the EC announced that it had “*decided the most far-reaching reform of its merger control regime since the entry into force of the EU Merger Regulation in 1990*.”[21] Industrial policy did not provide impetus to these reforms. Rather, these reforms followed inter alia the scathing trio of judgments in *Airtours*,[22] *Schneider*[23] and *Tetra Laval*,[24] debate on the alleged enforcement gap under the dominance test of the then-EUMR and debate on the introduction of an alternative set of (lower) turnover thresholds (now Art. 1(3) EUMR) extending the “one-stop-shop” principle to a larger number of transactions.

11. On 1 May 2004 a new and recast EUMR therefore entered into force. As was the case with its progenitor, the revised EUMR left no room for anything other than competition considerations to be taken into account.

16 *See* Commission decision of 3 July 2001, *GE/Honeywell*, [2004] OJ L 48/1.

17 *See* Commission press release IP/01/855 of 18 June 2001, Commissioner Monti dismisses criticism of GE/Honeywell merger review and rejects politicisation of the case.

18 *See* Commission decision of 10 October 2001, *Schneider/Legrand*, [2004] OJ L 101/1.

19 *See* Commission decision of 12 April 2000, *Vodafone Airtouch/Mannesmann*, [2000] OJ C 141/19.

20 *See* Commission decision of 14 March 2000, *Volvo/Scania*, [2001] OJ L 143/74. Despite the unprecedented intervention by Sweden’s prime minister who argued that Volvo’s plan to buy Scania was of “vital importance” to the Swedish economy, the EC went on to prohibit the transaction.
See judgment of the Court of First Instance of 6 June 2002 in Case T-342/99, *Airtours plc v. Commission*, ECLI:EU:T:2002:146.

21 *See* Commission press release IP/02/1856 of 11 December 2002, Commission adopts comprehensive reform of EU merger control.

22 *See* judgment of the Court of First Instance of 6 June 2002 in Case T-342/99, *Airtours plc v. Commission*, ECLI:EU:T:2002:146.

23 *See* judgment of the Court of First Instance of 22 October 2002 in Case T-310/01, *Schneider Electric SA v. Commission*, ECLI:EU:T:2002:254.

24 *See* judgment of the Court of First Instance of 25 October 2002, *Tetra Laval BV v. Commission*, ECLI: EU:T:2002:264.

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2. The EUMR (Mark II)

12. The second iteration of the EUMR of 2004 is peppered throughout with references to "competition" and "competitive[ness]".[25] References to industrial policy are conspicuously absent therefrom. Moreover, the substantive test under the current EUMR is purely competition based. Specifically, the EC asks whether a concentration would "significantly impede effective competition," in particular as a result of the creation or strengthening of a dominant position (Art. 2(3)). Furthermore, and as was the case with the first EUMR, "*the development of technical and economic progress*" is to be factored into the appraisal of a concentration. In language typical of political compromise, however, this factor is only to be taken into account to the extent that it does not "*form an obstacle to competition*" (Art. 2(1)(b)).[26]

13. The highly legalistic terminology of the EUMR thus reflects competition principles. The EC could, of course, surreptitiously permit industrial policy to infiltrate its decision-making, by manipulating market definitions, for example. To do so, however, would not only be contrary to the spirit and letter of the law, but would give rise to a non-trivial risk that its decisions would be quashed before the EU courts. This is a risk that the EC would clearly not take.

14. Calls for the application of the EUMR to take into account industrial policy considerations continued. Already in August 2004, and in anticipation of Neelie Kroes' upcoming mandate as competition commissioner, then-French President Jacques Chirac called upon the EU to endorse a European competition policy that takes into account the realities of international competition and supports the creation of European champions.[27] Despite persistent calls thereafter to apply the EUMR on the basis of extraneous, non-legal, considerations such calls have without exception fallen on deaf ears. Testimony of this is borne by the EC's decisions in inter alia *Gaz de France/Suez* in 2006,[28] *Mittal/Arcelor* in 2006[29] *Olympic/Aegean Airlines*[30] in 2011 and *Deutsche Börse/NYSE Euronext*[31] in 2012. Commenting on the *Deutsche Börse* case, then-Competition Commissioner Almunia explicitly stated that "*the price of creating a European champion cannot be to let a de facto monopoly dictate its commercial conditions on thousands of European firms operating with European derivatives*."[32]

15. The EUMR has consistently shown loyalty to the dictates of the EUMR. The EUMR is not an island unto itself, however. "Competition-only" is common to many mature merger control regimes, such as that of the EU Member States and the U.S.[33] though interestingly not China where, while the rules draw heavily on the EUMR, industrial policy and other non-competition factors play an important role in the review process.

16. It was not long, however, before the EC, with its unwavering adherence to the competition credo, clashed once more with fervent proponents of the creation of European champions. This time the rumpus emerged in the midst of the proposed tie-up of Siemens' and Alstom's railway operations.

III. Industrial policy in the context of the *Siemens/Alstom* railway merger*

17. The *Siemens/Alstom* case prompted the French and German Governments to call for the relaxation of allegedly "obsolete" merger control rules to accommodate the creation of a European railway champion faced with (some say unfair) competition from Chinese state-owned enterprises—in this case, CRRC Corp. Ltd . In particular, in January 2019 the French Finance Minister Bruno Le Maire stated that the envisaged prohibition of the *Siemens/Alstom* merger demonstrated a need for a "*new model*" of competition rules that take into account "*new economic challenges*."[34] In a similar vein, German Economy Minister Peter Altmaier declared that "*we need international champions in Europe that are able to compete globally*."[35] These declarations were preceded by a statement signed by 19 EU Governments who proposed amending the EU's antitrust rules to facilitate the emergence of European industrial giants in the face of competition from the U.S. and China.[36]

18. Despite the unusually intense industrial and political pressure to get the *Siemens/Alstom* railway merger done, Competition Commissioner Vestager repeatedly

25 *See* Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), [2004] OJ L 24/1.

26 For an example of the EC's appraisal of this factor *see*, e.g., Commission decision of 9 November 1994, *MSG Media Service*, [1994] OJ L 364/1.

27 *See* H. Mahony, France and Germany in new push for industrial champions, *EUObserver* of 2 March 2005.

28 Commission decision of 14 November 2006, *Gaz de France/Suez*, [2007] OJ L 88/47.

29 *See* Commission decision of 2 June 2006, *Mittal/Arcelor*, [2006] OJ C 181/14.

30 *See* Commission decision of 26 January 2011, *Olympic/Aegean Airlines*, [2012] OJ C 195/11.

31 *See* Commission decision of 1 February 2012, *Deutsche Börse/NYSE Euronext*, [2014] OJ C 254/8.

32 *See* J. Almunia, SPEECH/12/131 of 28 February 2012.

33 See D. Sokol, Tensions between Antitrust and Competition Policy, 22 Geo. Mason L. Rev. 1247 (2015) at p. 1252: "Overt political antitrust considerations (i.e., those not based on antitrust economics) are no longer part of the current antitrust policy discourse within the case law or agency practices. In the United States, antitrust liability has narrowed due to a better understanding of economics, and antitrust analysis is now driven by economic analysis."

* *See* Commission decision of 6 February 2019, Case M.8677, not yet published.

34 *See* M. Acton, Siemens-Alstom merger shows need for competition-law update, Le Maire says, *MLex*, 21 January 2019.

35 Id.

36 Austria, Croatia, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, the Netherlands, Poland, Romania, Slovakia and Spain, *see* J. Valero, 19 EU countries call for new antitrust rules to create 'European champions' *Euractiv*, 19 December 2018.

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retorted that European champions cannot be built by undermining competition at home. Her sentiments echoed the words of Sir Leon Brittan back in 1990: "(…) *there can be no trade-off between competition in the Community and competitiveness elsewhere. This would be economic nonsense and bad law*."[37]

19. A quick dip into the yet to be published *Siemens/Alstom* merger decision demonstrates the EC's continued deference to the SIEC test. In September 2017, Siemens and Alstom agreed to merge their rail assets, hoping to create a European champion. In June 2018, the transaction was notified to the EC. The EC found that the transaction would lead to higher prices, reduced choice, and less innovation with respect to very high-speed rolling stock and signalling solutions. With respect to the former, the EC found that, whether seen from an EEA or worldwide perspective, the merged entity would be the undisputed market leader. The transaction would have reduced competition significantly and harmed European customers. With respect to the latter, the transaction would have removed a very strong competitor from several mainline and urban signalling markets. In particular, the merged entity would have become the undisputed market leader in several mainline signalling markets and, with respect to metro signalling, the merged entity would also have become the market leader in the latest Communication-Based Train Control metro signalling systems. Furthermore, the EC found that new entry, in particular with respect to Chinese suppliers, was unlikely given, inter alia, high safety and technical standards in the European Union—despite repeated arguments by the parties to the contrary.[38]

20. Adequate remedies were therefore needed as a quid pro quo for approval. Following multiple rounds of horse-trading between the EC and the parties, and with the national competition authorities of the UK, the Netherlands, Belgium and Spain (in a rare move) openly criticising the adequacy of the proposed remedies, the EC concluded that the proposed remedies were insufficient. Unfazed by the unrelenting political and industrial pressure placed on it, and in strict application of the SIEC test, on 6 February 2019 the EC prohibited the transaction.

21. Despite the criticism directed at the EC, its position is difficult to fault given that it is straitjacketed not only by the rigid dictates of the EUMR, but also by the guardians of the proper application of the law, that this, the European courts. There simply is no room for politics under the current EUMR. Furthermore, it bears note that the length and precision of the EC's decisions applying the SIEC test, and the full justifications for any conclusions reached therein, afford the business community much needed regulatory predictability and stability. This stands in sharp contrast to China, for example, where, in addition to the fact that industrial policy plays a role in merger control review, public announcements provide for relatively limited information and analysis. The same can be said with respect to the U.S. DOJ, especially when it decides not to challenge a merger, i.e., grant unconditional clearance.

IV. Industrial policy and the EUMR – Where do we stand?

22. The EC's decision to prohibit the *Siemens/Alstom* railway merger therefore signalled that it would not take into account industrial policy. Furthermore, it served as a reminder of the EC's belief that competition at home (viz. Europe) strengthens a firm's ability to compete abroad (viz. the world stage).[39]

23. The EC's decision caused a storm in Paris and Berlin. The political elite of France and Germany in its immediate aftermath published a Franco-German manifesto for a European industrial policy fit for the 21st Century ("Franco-German Manifesto").

24. The Franco-German Manifesto rests on three pillars the second one of which is entitled "Adapting the EU regulatory framework." Highlighting a concern that amongst the top 40 biggest companies in the world, only 5 are European, the Franco-German Manifesto states that "*existing rules need to be revised to be able to adequately take into account industrial policy considerations on the world stage*."[40] In this regard, France and Germany have suggested examining different options:

- Taking into greater consideration the state-control of and subsidies for undertakings within the framework of merger control.
- Updating the merger rules to take greater account of competition at the global level, potential future competition and the timeframe when it comes to looking ahead to the development of competition to give the EC more flexibility when assessing relevant markets.

25. Such reform could, according to the Franco-German Manifesto, entail adapting the EUMR and current merger guidelines. Any substantive change to the EUMR in this context would, however, require a unanimous decision of all Member States. This would likely be very difficult to secure in the absence of significant horse-trading

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37 *See* supra note 7. *See also* M. Vestager speech The values of competition policy: Keynote speech at CEPS Corporate breakfast "one year in office" of 13 October 2015 where she stated that "*We enforce the law and serve the common European interest. We are committed to the principles of fairness, good administration, transparency and due process. There is simply no room to spare for political interference.*"

38 *See* Commission press release IP/19/881 of 6 February 2019, Commission prohibits Siemens' proposed acquisition of Alstom.

39 *See* Communication from the Commission: a pro-active Competition Policy for a Competitive Europe, Brussels, 20 April 2004, COM(2004) 293 final, p. 4.

40 *See* the Franco-German manifesto for a European industrial policy fit for the 21st Century of 19 February, at p. 3.

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and serious political compromise amongst the Member States. An idea in this regard might nonetheless be to maintain the words "*the development of technical and economic progress*" in Art. 2(1)(b) EUMR but remove the caveat "*does not form an obstacle to competition*" therefrom, thus leaving us with a situation akin to Art. 101(3) TFEU whereby "*in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article* [101]*(3) of the Treaty*."[41] Again, such amendment allowing the EC to have an increased level of discretion would require unanimity in the Council,[42] and in any event would likely undermine the basic thrust of the EUMR, which is to ensure legal and business certainty. Alternatively, the EC could amend its current guidelines and indicate that it will give more weight to "*the development of technical and economic progress*" in future decisions, which may be a practical solution to circumvent the rule of unanimity.

– Consider whether a right of appeal of the Council, which could override an EC decision, is appropriate in well-defined cases, subject to strict conditions.

26. Such mechanism already exists in the EU. For example, the German merger regulation allows the German Economy Minister to clear a merger even after the Bundeskartellamt has rendered a prohibition decision (*Ministererlaubnis*).[43] This avenue of recourse is rare, however. In the last 45 years, there have been only 22 applications for a *Ministererlaubnis* of which only 9 have been successful.[44] France also operates an "evocation" power whereby the French Economy Minister has the possibility to rule on a transaction when it is of a strategic nature or on grounds of public interest. This power was invoked for the first time in June 2018 in *Financière Cofigeo/groupe Agripole*.[45] Outside the EU, political interference in the realm of merger control is also possible—witness U.S. President Trump's recent prohibition of Qualcomm Inc.'s takeover by Broadcom Limited in light of U.S. CFIUS concerns.

27. While a Council veto in EU merger control proceedings may reflect traditions common to some Member States, a right of this kind is likely unrealistic and raises fundamental questions: first, a question remains as to the level of consensus required in the Council to overrule an EC decision—would a veto operate on the basis of a qualified majority or would unanimity be required? If unanimity is required, it would most likely not be reached—witness the stance recently taken by the Portuguese prime minister who opposes a strategy of creating European champions at the expense of competition. Second, within which timeframe would a decision be taken? If too long, this would raise questions as to its compatibility with the principle of legal certainty enshrined in EU law.[46] Third, what happens if an EC decision is appealed to the European courts prior to the Council's decision on a veto? And besides, its blunt invocation risks failing to take into account the competitive situation in Europe.

28. While the Franco-German Manifesto is currently only a short list of ideas to potentially pursue, with the forthcoming European elections in May 2019 it will likely be subject to intense debate and lobbying in the months to come. More flesh on the Franco-German Manifesto's bones is to be expected. In the interim, the question arises as to what the merits, if any, there would be if non-legal considerations in favour of "European champions" were to either inform decision-making under the EUMR or ultimately trump competition considerations thereunder.

29. One principal argument in favour of the "creation" of "European champions," and one that appears to have been espoused by France and Germany in *Siemens/Alstom*, is the so-called "critical mass" or "scale economy" argument. Proponents of this argument criticise the EC's application of the EUMR on the basis that it prevents firms from reaching the necessary size to successfully remain on markets that require a firm to be of a particular scale to be competitive (globally, and as in *Siemens/Alstom*, against state-subsidised competitors).[47]

30. It must be emphasised, however, that EU antitrust policy is not such as to hinder the creation of large companies that are able to compete globally. On the contrary, the emergence of large players is welcomed to the extent that there is no distortion of competition to the disadvantage of consumers in the EU[48]—witness in this respect the EC's recent approval, subject to conditions, of BASF's acquisition of Solvay's nylon business.[49] Furthermore, an unconsidered policy move in support of the "critical mass" theory could have rather infelicitous consequences, to say the least. Permitting a trade-off between competition in the EU and the creation of a "European champion" that is able to compete globally risks leading to reduced choice, stifling innovation and higher prices in the EU. *Ex post* invocation of Article 102 TFEU to counter the latter concern, for example, is likely to be suboptimal and inefficient. Excessive pricing claims are not only notoriously difficult to sustain, but

41 *See*, e.g., judgment of the Court of First Instance of 11 July 1996 in Joined Cases, T-528/93, T-542/93, T-543/93 and T-546/93, *Metropole télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v. Commission*, ECLI:EU:T:1996:99, para. 118.

42 The EC already has a significant margin of discretion when it comes to defining the relevant market, for example.

43 *See* section 42(1) of the German Act against Restraints of Competition.

44 *See* Hogan Lovells alert, We are the champions – France and Germany unite to revive industrial policy at European level, 27 February 2019.

45 Decision No. 18-DCC-95 of 14 June 2018.

46 *See* judgment of the European Court of Justice of 15 September 2005 in Case C-199/03, *Ireland v. Commission*, ECLI:EU:C:2005:548, para. 69.

47 *See* E. Maincent and L. Navarro, A Policy for Industrial Champions: from picking winners to fostering excellence and the growth of firms, *Industrial Policy and Economic Reforms Papers*, April 2006, at p. 16.

48 *See* OECD: Competition Policy, Industrial Policy and National Champions, DAF/COMP/GF(2009)9, p. 144.

49 *See* Commission press release IP/19/522 of 18 January 2019, Commission approves BASF's acquisition of Solvay's nylon business, subject to conditions.

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intervention in the first place is questionable given that prices operate as a signal for markets to self-correct. *Ex ante* application of the current SIEC test in the EUMR is arguably therefore considerably more desirable.

31. As a more general observation allowing industrial policy, no matter its shape, form or intended objective, to play a role in the application of the EUMR risks undermining legal and business certainty, which the SIEC test of the EUMR currently affords and seeks to ensure.

V. Conclusion

32. The *Siemens/Alstom* decision is the latest in a long line of cases that bear testimony to the EC's unswerving commitment to applying only competition principles in merger cases. The uniqueness of the case, however, lies in the arguably unprecedented intensity of the political pressure placed on the EC by France, and, quite remarkably, Germany to relax the rules in favour of creating a "European champion." It bears note, however, that the EC is not opposed to the emergence of large companies per se. On the contrary, the creation of large companies that are able to compete effectively on the world stage is encouraged, but not at the expense of competition and consumer welfare in the EU. Indeed, to allow for a trade-off of this kind would be illogical, risking higher prices and reduced choice and innovation to the detriment of the EU consumer. With the recent publication of the Franco-German Manifesto, however, such trade-offs may be permitted. Very careful consideration of and debate on the options laid down by the Franco-German Manifesto is therefore necessary. This short paper hopes to make a contribution thereto. ■

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From the old world to the online world: Competition policy for the digital revolution

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ABSTRACT

As it reviews several key instruments of EU competition law the new Commission will shape antitrust policy for the digital age. Drawing on sector-specific precedent it should define data access rights. The reform of the horizontal and vertical guidelines should consider dual distribution and advances of the internet economy. Industrial policy should not be confused with political interference. Compensatory justice and private enforcement should play a larger role.

En examinant plusieurs outils-clé du droit de la concurrence UE, la nouvelle Commission donnera forme à la politique antitrust de l'ère digitale et elle devra définir les droits d'accès aux données en se basant sur la jurisprudence sectorielle. La réforme des lignes directrices horizontales et verticales doit prendre en considération la distribution double et les progrès de l'économie en ligne. Politique industrielle et interférence politique ne doivent pas être confondues. La justice compensatoire et l'application des règles par les particuliers doivent jouer un plus grand rôle.

Introduction

1. To this day Europe benefits from the innovative spirit of engineers and entrepreneurs during the Industrial Revolution. In those times governments had to encourage innovation while also addressing dangers that industrialization implied for workers and societal change. Similarly, the new Commission will need to address challenges of the digital revolution, balancing intervention with trust in market forces as it reviews several key instruments of EU competition law.

I. Data

2. The new Commission will have a part to play in ensuring that the digital revolution does not leave the "old world" behind. If data is the gold of the digital economy then Europe needs to allocate the mining rights. Keeping markets contestable while still allowing innovative entrepreneurs to reap legitimate fruits of their creativity will require competition enforcers to forecast a future which seems far from certain as long as disruptive forces continue to challenge market leaders.

3. The automotive sector shows how information is becoming an essential requirement for effective competition. Modern cars generate more data than a space shuttle. If automated systems predict maintentance needs or immediately inform the vehicle manufacturer of a crash, its franchised repairers will enjoy preferential access to repair or maintenance jobs over independent repairers. Motor insurers increasingly rely on bits and bytes from connected cars to calculate premiums. Where providers of charging infrastructure share data, efficiencies can be created that attract consumers to environmentally friendly vehicles, car sharing models or multimodal mobility. Since 2002 the block exemption regulations and guidelines for the motor vehicle sector have provided that independent aftermarket operators should have access to essential information.[1] The current framework for this sector is up for review during the term of the new Commission. It needs an update to reflect the realities of connected, electric and autonomous

* The author would like to thank Marc Barennes, Till Schreiber, Marc Shrimpling and Daniel Stein for contributing thoughts in the preparation of this article.

1 Art. 4(2) Regulation (EC) No. 1400/2002; Since 2010: Commission notice – Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles (Text with EEA relevance), OJ C 138, 28.5.2010, pp. 16–27, para. 62–68. Cf. T. Funke in: W. Berg and G. Mäsch, *Deutsches und Europäisches Kartellrecht*, Übersicht zur Verordnung 461/2010.

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mobility. The future rules on essential information in the automotive industry could then serve as a blueprint for general guidelines on data access or data portability.

4. Data can confer market power.[2] Absent a Commission initiative on data access and digital gatekeepers it would remain likely that decisions in the Member States lead to a fragmented landscape and cause uncertainties for businesses. Just as it increased the involvement of economists in recent years the Commission may need to increase the number of internal digital experts or even introduce the position of a Chief Digital Officer.

5. Blockchain technology can involve the combination of competitor data but the resulting efficiencies may be found to outweigh antitrust concerns. Increased transparency is a sign of the times in this information age. Enforcers may need to restrict their traditional scepticism of any increase in market transparency where such is necessary to create consumer benefits. In innovative markets in particular competition authorities should analyse effects rather than suspicion "by object" infringements all too quickly.

6. Investing in innovation requires legal certainty. The upcoming review of the Commission's guidelines on horizontal co-operation will provide an opportunity to encourage appropriate joint initiatives in digital markets and beyond.[3]

II. Verticals

7. The new Commission will also vote on the future rules for distribution. A new block exemption for certain vertical restraints would continue to offer a safe haven for suppliers and retailers. Compared to the reform of the distribution rules a decade ago there is a greater need to clarify the policy goals for the internet economy. E-commerce has come a long way since 2010. It continues to serve the realization of a Common Market, helping consumers to enjoy the fundamental freedom to source goods and services from different Member States. But the traditional concept that internet retailing mostly falls into the category of passive sales needs refinement given the modern means of targeted advertising. In the online world the distinction between active sales and passive sales seems increasingly artificial and may be starting to outlive its purpose.[4]

8. The guidelines on resale price maintenance (RPM) also require an update.[5] Companies seeking to justify RPM always need to demonstrate why the heavy presumption of anti-competitiveness should not apply in their specific case, with the Damoclean sword of large fines hanging over their heads. While individual exemptions for short-term initiatives are already available in theory, European enforcers have largely failed to recognize them in practice. In April 2016, a German court of appeals ruled that an act of RPM did not constitute a breach of antitrust law where it did not have any appreciable effect on competition.[6] In this case, dietary supplement maker Almased had offered each of its resellers a one-time discount on one order of 12–90 cans, which was conditional on the retailer's willingness to charge a minimum retail price. The court held that the one-time offer for such a limited quantity did not have any appreciable impact on competition. This might pave the way for a more refined approach. Competition authorities would then focus on more blatant RPM cases. Findings of the Bundeskartellamt, the Bundeswettbewerbsbehörde or the CMA in industries as diverse as bathroom fittings, beer, food or furniture—as well as the Commission's own E-commerce sector enquiry[7]—seem to indicate that compliance with current rules may be less than satisfactory.[8]

9. More fundamentally, economists have called into question the need to protect intra-brand competition. The CJEU may have allowed manufacturers to prevent third-party internet platform retailing in *Coty*—but failing to use modern sales channels implies the risk of not reaching customers and losing ground in inter-brand competition.[9]

10. The new framework should also address dual distribution in greater detail. The internet has made direct sales much more common in recent years. Where manufacturers and their retailers use the same routes to approach the same consumers, competition authorities need to decide whether the horizontal or vertical aspects of their relationship prevail. Guidelines could offer clarity on what Chinese walls might be needed. As the new Commission reviews both the Horizontal and Vertical guidelines it should design a balanced approach, including a comprehensive look at platform models and multi-sided markets.

11. The new Commission's policies on internet retailing will have a political impact. Some praise the availability of goods (and reviews) via the internet for citizens even in less populated areas. Others argue that where traditional

2 Addressing the 19th International Conference on Competition in Berlin in March 2019 in a personal capacity, Germany's judge at the CJEU Thomas von Danwitz voiced that where data collection led to market power, EU antitrust law was in play. Von Danwitz also claimed that a "*matter of great concern*" for antitrust enforcers was consumers' lack of knowledge when signing up to free services on how much data would be handed over in return. "*This lack of* [advance] *determination of the price is not only likely to entail a systemic distortion of consumer choice, but also seems to be precisely the reason why competition on digital markets does, up to now, not evolve as on other markets*."

3 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011/C 11/01.

4 Art. 6(2) of Regulation (EU) 2018/302 also refers specifically to passive sales, i.e., with view to unjustified geo-blocking.

5 For RPM in US federal law, cf. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

6 Celle Higher Regional Court, decision of 7 April 2016, Case 13 U 124/15 (Kart).

7 Report from the Commission to the Council and the Parliament, Final report on the E-commerce sector enquiry, COM(2017) 229 final.

8 Inter alia, Bundeskartellamt, decision of 8.4.2009, Case B7-190/08; *OGH*, decision of 8.10.2015, Case 16 ok 2/15b (16 Ok 8/15k). Cf. Funke and Hack, Enforcers Shift into High Gear: An Update on RPM in the European Union, ABA SAL DISTRIBUTION 6/2016, pp. 9–14.

9 CJEU, decision of 6 December 2017 in case C-230/16 – *Coty*.

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retailers suffer so do cities and communities. After all, the agora is not just where merchants and artisans congregated to sell or buy, but it also provided a platform for political and intellectual life. What is the impact on democratic societies when the traditional marketplace loses relevance as a forum not just for the exchange of goods but also of views?

III. Merger control

12. Politics may also assume a larger role in merger control. Calls from France and Germany for a reform of the EU Merger Regulation have met relatively little resistance so far. Enabling the Council to clear transactions that the Commission intends to block could be modelled after the German *Ministererlaubnis*, the exceptional ministerial clearance that already allows the German Minister of Economics to grant the go-ahead in German merger control.

13. But has the German model been a success story? In 2016 the socialist Minister of Economics Sigmar Gabriel felt under political pressure to save jobs at the target company and cleared *Edeka/Tengelmann* despite massive objections from the Bundeskartellamt. As party politics prevailed over competition concerns, the head of Germany's Monopolkommission resigned in protest. But when it became public that the minister had met with company representatives without having minutes produced or without allowing third-party interveners to comment on the topics discussed behind closed doors, the Court of Appeals in Düsseldorf shredded the ministerial clearance.[10]

14. The same Düsseldorf court might have voided the exceptional clearance granted for the combination of E.ON and Ruhrgas if the parties to that transaction had not succeeded in getting all third-party interveners to withdraw their complaints rather last minute. The ministerial clearance for *E.ON/Ruhrgas* had aimed at creating a German energy champion, but the changes in German and international energy policy over the past two decades have created a landscape rather different from what the government had envisioned in 2002.

15. Competition law may not capture all effects good or bad of any given transaction, and the history of Germany's *Ministererlaubnis* is not without encouraging chapters. Yet powers of politicians to change the findings of dedicated competition enforcers should be considered with care. After all, the recent ECN+ Directive highlights that competition enforcement should normally be independent of political intervention.

10 http://www.olg-duesseldorf.nrw.de/behoerde/presse/archiv/Pressemitteilungen_aus_2017/20170823_PM_Edeka/index.php.

IV. Procedure

16. The ECN+ Directive will strengthen the powers of competition authorities. Similar efforts are needed to more clearly shape appropriate rights of defence, especially in settlement cases.

17. In the wake of its *ARA* decision the Commission has recently clarified that co-operation may also be rewarded in dominance or vertical restraints cases.[11] This is to be welcomed. Now that it has tested the new approach in *Pioneer*, *Philips*, *Denon*, *Asus*, *Guess* and *Mastercard* the Commission should formalize it by updating the relevant Notices, and making the benefits of leniency available outside horizontal cases also.

V. Private enforcement

18. By the end of 2020 the new Commission will need to review the Damages Directive and submit a report to the European Parliament and the Council.[12] That report will likely find that the Directive has encouraged more cartel victims to assert their claims,[13] but that it has been less effective than many had expected.

19. While public enforcers generally seem eager to demand additional powers the new Commission should look to private enforcement not just with view to ensuring compensatory justice but also with regard to the effectiveness of the competition rules overall.[14] The gargantuan fines that benefit public budgets might make competition enforcers popular with their national ministries of finance. Fines may deter but do not right any wrongs. A shift is needed to ensure that monies paid serve to compensate those who suffered from an infringement.

20. Competition authorities should more regularly consider compensation payments as a mitigating factor when imposing a fine.[15] Such use of Art. 18(3) of the Damages Directive would incentivize early compensation

11 Commission Decision of 20 September 2016 in Case AT.39759 – *ARA Foreclosure*.

12 Art. 20 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, pp. 1–19.

13 Cf. J.-F. Laborde, Cartel damages actions in Europe: How courts have assessed cartel overcharges (2018 ed.), *Concurrences* No. 1-2019, pp. 1–11.

14 Against the backdrop of the decision of the CJEU in C-724/17 – *Vantaan v. Skansa* of 14 March 2019 it seems even more striking that Germany amended its Competition Act with very clear language regarding parental liability for fines but addressed liability for damages more hesitantly when implementing the Damages Directive.

15 This is already the case under French law. Pursuant to Art. 464-2 of the French Commercial Code, the French Competition Authority may decide to reduce the fine levied on a company if, during the course of the proceedings before the Authority, it compensates the victims pursuant to a settlement. Even long before the Damages Directive, the German Competition Authority was lenient on electric heating suppliers in 2010 when these agreed to pay their customers compensation amounting to a total of EUR 27.2 million, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2010/29_09_2010_Heizstrom.html?nn=3591568.

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of victims. Enabling cartelists to manage both the public and private consequences of their wrongdoing could even render leniency or co-operation more attractive. To make its leniency programme even more appealing the Commission should consider additional benefits in the context of civil liability. In most cases immunity recipients are already exempt from joint and several liability pursuant to Art. 11 (4) of the Damages Directive.[16]

21. Key provisions of the Directive do not yet apply to most of the pending follow-on claims. By way of example, according to a German court the new rules on disclosure[17] may be of a substantive rather than a procedural nature and should not apply to certain older claims. The adverse effect on cartel victims is worsened as the EU courts have allowed the Commission to rely on presumptions that limit access to the investigation files.[18] There is still an imbalance as regards access to relevant information. The Commission and the NCAs should ensure the timely publication of decisions which are sufficiently detailed to enable European citizens to assess (i) whether they were affected and harmed by the infringement, (ii) against whom an action for compensation may be directed, and (iii) which court(s) has/have competence to hear an action. In order to prevent futile litigation and promote efficiency, fining decisions under Art. 101 and 102 TFEU including settlement decisions should identify:

– the legal entities participating in the infringement (including parent companies);

– all affected products and geographic markets;

– the duration of the infringement for each participant;

– the dates and places where the breach was committed;

– the infringement, including individual cartel meetings, price agreements, quota arrangements, agreed capacity restrictions, etc.;

– where appropriate, an analysis of price developments in the affected markets.

22. A review of the current framework should also codify case law and address inconsistencies in application by the Member States. Member State courts have diverged on whether arbitration clauses in supply agreements can be enforced against cartel damage claimants; despite clear guidance from Advocate General Jääskinen in *Hydrogen Peroxide*.[19] National courts will benefit from the Commission guidelines on pass-on that will soon be available in their final form, but they also require the necessary resource to deal with large and complex claims, including access to economic expertise needed to estimate damages.

23. Drawing on the experience in different jurisdictions, the new Commission should take bold steps to better balance public and private enforcement. ■

16 Private enforcement may also be needed as the focus on the digital economy and the scarcity of resources imply that competition authorities cannot investigate each case, The disinterest of some enforcers in investigating certain industries or types of infringements are among potential reasons for any recent decline in the numbers of leniency applications, next to effective compliance programmes or cumbersome requirements for immunity applicants. In the United States, where damages litigation is a credible threat, the number of leniency applications has reportedly increased in recent years.

17 Cf. S. Ford, N. Frey, T. Funke, M. Sansom and M. van Maanen, ABA Antitrust Section Global Private Litigation Bulletin, Shielding the Ball or Equality of Arms? Recent developments on discovery and the treatment of confidential information in European antitrust litigation, pp. 2–14.

18 The unwillingness of competition authorities to release documents is in stark contrast with the Commission's own appetite for vast amounts of data in merger review.

19 Case C-352/13 – Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Evonik Degussa GmbH and Others.

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Protecting competition or protecting (some) competitors: A European debate

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ABSTRACT

Discussions on the future role of the EU's competition policy have drawn in the active participation of European Member States, leading to concerns about protectionist trends influencing policy. In this paper, we consider some classic protectionist arguments in order to dissect industrial policy motivations from protectionist, special interest motivations. As the discourse evolves, the competition community must understand and address concerns and political imperatives. Given global economic trends, it is only when industrial policy and competition policy work in concert that the EU can hope to achieve its economic growth ambitions.

Les discussions sur le futur rôle de la politique de concurrence de l'UE ont suscité la participation active des Etats membres européens, ce qui fait redouter des tendances protectionnistes en Europe. Dans cet article, nous prenons en considération quelques arguments protectionnistes classiques afin d'isoler les motivations dues à une politique industrielle de celles qui sont dues au protectionnisme et à un intérêt particulier. Au fur et à mesure que le discours se développe, la communauté de la compétition doit comprendre et lancer un débat sur les critiques, inquiétudes et impératifs politiques. Etant donné les tendances économiques globales, les ambitions de croissance économique de l'UE ne seront réalisables que le jour où la politique industrielle et la politique de concurrence travailleront de concert.

I. Introduction

1. The European Commission's prohibition of the merger between Siemens and Alstom on 6 February 2019[1] has resulted in a vigorous debate on the future of European competition policy, and notably on the interplay between industrial and competition policy. The prohibition of the merger, intended to create a European champion capable of competing globally, was quickly followed by a joint Franco-German industrial policy manifesto which included proposals to amend Europe's competition rules to ensure that these serve Europe's industrial policy priorities. The Franco-German Manifesto noted: "(…) *existing* [European competition] *rules need to be revised to be able to adequately take into account industrial policy considerations in order to enable European companies to successfully compete on the world stage.*"[2]

2. While calls for European competition law to promote particular political priorities or industrial policies occur cyclically, the current situation is unique. First, France and Germany, two countries central to Europe's economic health, have combined to defend specific competition rule changes. Second, they find support with a group of 20 European Member States who also called for the "*identification of possible evolutions of the antitrust rules to better take into account international markets and competition in merger analysis*" given the challenges of, inter alia, increasingly protectionist trade measures from third countries.[3] Third, these calls have come at a time when the European Parliament elections are to take place and when a new European Commission will be appointed. Notably candidates for the presidency of the European Commission will need to seriously consider such demands from Member States. Cynics might even say that the timing of the *Siemens/Alstom* prohibition was too good to be true for the supporters of a strong industrial policy.

[*] The views expressed are personal.

1 *See* European Commission Press Release, Mergers: Commission prohibits Siemens' proposed acquisition of Alstom, Brussels, 6 February 2019, available at: http://europa.eu/rapid/press-release_IP-19-881_en.htm.

2 A Franco-German Manifesto for a European industrial policy fit for the 21st Century, 19 February 2019, https://www.gouvernement.fr/sites/default/files/locale/piece-jointe/2019/02/1043_-_a_franco-german_manifesto_for_a_european_industrial_policy_fit_for_the_21st_century.pdf.

3 Joint statement by France, Austria, Bulgaria, Croatia, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Spain, 18 December 2018. *See* https://www.entreprises.gouv.fr/files/files/directions_services/secteurs-professionnels/industrie/amis-industrie/amis-industrie-final-declaration-2018.pdf.

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3. Current competition policy theory promotes allocative efficiency by applying a consumer welfare standard, avoiding short-run protection of special interests. Industrial policy considerations, however, might sometimes favour certain industries or certain firms over others in order to enable local players to compete more effectively. In considering what competition policy the European Union should follow, it is useful to scrutinise the traditional rationale behind protectionist measures to see how it might fit with European competition policy. In a paper entitled "Do we need protectionism?"[4] Block helpfully reviewed arguments made for special interest protection from foreign competition. Arguments include "infant industry"; "breathing room"; "job destruction" (which can be encompass wider labour protection); and "national defence" arguments; to which we add the "scale-up" and "unfair competition" arguments. While Block was not focusing directly on protectionism through competition enforcement, these arguments are instructive in contextualising the current competition policy debate.

II. Infant industry argument

4. One of the traditional protectionist arguments highlighted by Block was the "infant industry" argument, which calls for temporary protection from foreign competition in order to allow new industries to become mature. It is notable that part of the current European industrial policy debate focuses on identifying and promoting new industries with growth potential. Fostering infant industries is a legitimate industrial policy goal and can be achieved through a range of measures. Of course, the line between fostering and protecting an industry may well be subjective. This poses vexing questions for competition authorities; once an industrial policy is established, should the authority proactively support such a policy by, for example, prioritising cases in concert with the industrial policy, including preventing "foreign" competition from frustrating the policy? At what stage is a competition authority's objectivity or independence prejudiced? One solution would be to ensure that the industrial policy itself is grounded in sound economic theory, supported by a clear legal framework. This will ensure that the enforcement authority is not expected to take prejudicial decisions but rather continue to take decisions based on the application of competition law to the facts before it, informed by economic theory.

III. Breathing room argument

5. More relevant to the current competition policy debate is the "breathing room" argument. Under this argument a mature industry argues for temporary protection from competition in order to improve technologically and decrease costs, so as to compete more effectively at a later stage. However, as Block notes, "temporary" tends to turn into longer-term protection, baking such protection in the industry's structure and preventing those industries from growing efficiently. The result is that governments risk supporting sectors that become increasingly inefficient and a deadweight loss on the economy.[5]

6. The "breathing room" argument is the logical continuation of the "infant industry" argument and governments risk getting locked into special interest protection. As Block notes, "*the sugar industry in the United States has been an infant industry since 1816* (…) *which has allowed it to charge domestic consumers up to four times the world price for sugar*."

IV. Job destruction argument

7. A further argument which Block identifies is the "job destruction" argument, which calls on government intervention in a certain industry to prevent significant jobs losses. This may encompass broader arguments for labour protection, such as concerns over wage reductions. It is only natural that governments take a close interest industrial consolidation or competitive pressures where there are risks of major social disruption. The Strategic Guidelines for a German and European industrial policy[6] that were presented by the German government the day before the European Commission's *Siemens/Alstom* prohibition have employment at their core. These guidelines note that the high proportion of industrial jobs in Germany enables Germany to maintain its high-income levels and high levels of education, environmental protection, social security, health care and infrastructure. Yet the guidelines also note: "*Due to the disruptive nature of many changes, however, there is a danger that new, innovative and sustainable jobs will not necessarily be created in those countries and regions where existing jobs are eliminated through technological advances and productivity gains*." The guidelines are partly a reaction to the fact that technological advances are increasingly

4 W. E. Block, Do We Need Protectionism? (2011), available at SSRN: https://ssrn.com/abstract=1881052 or http://dx.doi.org/10.2139/ssrn.1881052.

5 China is also struggling to address inefficient "zombie" businesses that are a significant drag on the economy. *See* https://www.nytimes.com/2019/02/25/world/asia/china-xi-warnings.html.

6 *See* the German National Industrial Strategy 2030 (Nationale Industriestrategie 2030; Strategische Leitlinien für eine deutsche und europäische Industriepolitik) presented on 5 February 2019, available at: https://www.bmwi.de/Redaktion/DE/Pressemitteilungen/2019/20190205-altmaier-stellt-nationale-industriestrategie-2030-vor.html.

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coming from outside the European Union and that EU industry seems to be falling behind in digital sectors.[7] Ensuring Europe enhances its technological competences without engaging in protectionism is a delicate balance.

8. However, evidence shows that protectionism is not the best answer to address employment concerns. Experience shows that protectionism negatively impacts employment overall, by having significant negative knock-on effects on employment in those sectors dependent on the "protected" industry.[8] Importantly, a reallocation of labour (and capital) to more productive firms and sectors is an economic textbook prediction (with empirical support) of openness to foreign competition and an important source of indirect benefits from competition.[9] So sophisticated policies aimed at minimising economic and social disruption and refocusing economic activity can represent a better and more productive employment strategy than protectionism.

9. With that in mind, what competition authorities should actively do (or be called on to do) in relation to concerns about impact on employment is less clear. Suggestions that competition authorities go further than the consumer welfare standard and either include additional elements, such as a "employment welfare" standard, would run counter to the European Commission's mandate of considering effects on competition. In any event competition authorities are currently not resourced or experienced enough to assess labour markets, which would best be dealt with through other regulatory tools.[10]

V. National defence argument

10. Block identifies a "national defence" argument as yet another protectionist plea. However, in the competition field, as relates to the foreign acquisition of critical assets, this assessment has tended to include an additional filter mechanism standing outside competition assessment. European law distinguishes European or national security concerns from competition assessments. The EC Merger Regulation permits Member States to derogate from the merger rules to protect public security, media plurality and prudential rules. and, after approval by the European Commission, to protect other identified "legitimate interests".[11] Harker notes that the European Commission has been understandably keen to ensure that these derogations are not used as a fig leaf for protectionism, taking a narrow approach to the definition of "legitimate interest".[12] In addition, the new EU screening mechanism, under the proposed Regulation on Foreign Direct Investment,[13] provides a means to prevent critical European assets from being acquired by foreign interests on the ground of security or public order. The Regulation identifies a broad range of critical infrastructure and high-innovation technologies to which special attention should be paid. Some have warned that a broad use of these powers could be appropriated as a means to pursue industrial policy that would have deterrent effect on investment.[14]

VI. Scale-up argument

11. The "scale-up" argument calls for a more lenient approach to merger control rules in order to allow particular companies to grow to a scale where they are better able to compete globally. While the argument may be a subset of the "breathing room" argument, it deserves to be looked at given its prevalence. This argument is also notable because it highlights an industrial policy not focused on promoting particular sectors, but on promoting particular players.

12. During the *Siemens/Alstom* merger review the European Commission was asked to interpret the merger control rules favourably so as to permit the creation of a player capable of competing on the world stage. But calls for relaxing the merger control rules are not limited to ad hoc instances. The German industrial policy strategic guidelines also highlight that, given the emergence

7 The science and technology world is becoming more "multipolar." China has, for instance, overtaken the EU in production of scientific publications in the fields of engineering, chemical engineering and material sciences, where the EU used to lead (*see* Scimago (2019) SJR – Scimago Journal & Country Rank [Portal], available at: http://www.scimagojr.com, accessed on 11/01/2019). In the digital world, EU firms have become less present amongst top R&D spenders (*see* H. Hernández, N. Grassano, A. Tübke, L. Potters, P. Gkotsis, and A. Vezzani, (2018), The 2018 EU Industrial R&D Investment Scoreboard, EUR 29450 EN, Luxembourg: Publications Office of the European Union).

8 Block notes that voluntary restraints in the US steel industry in 1984 saved 16,900 steel jobs but destroyed 52,400 jobs in industries that use steel. A more recent study assesses that the current US tariffs might increase employment in the iron, steel and non-ferrous metals sector by 33,464 jobs, but would cost 179,334 jobs throughout the rest of the economy, i.e., that more than 5 jobs would be lost for every one gained. *See* J. Francois and L. M. Baughman, Does Import Protection Save Jobs? The Estimated Impacts of Proposed Tariffs on Imports of U.S. Steel and Aluminum, Policy Brief, The Trade Partnership, 5 March 2018, http://tradepartnership.com/wp-content/uploads/2018/03/232EmploymentPolicyBrief.pdf.

9 A. B. Bernard, J. B. Jensen, S. J. Redding and P. K. Schott (2012), The Empirics of Firm Heterogeneity and International Trade, *Annual Review of Economics* 4: 283–313.

10 It is worth noting, however, that conflicts can arise between the implementation of competition policy and other public authorities with different objectives. The 2002 International Competition Network's Advocacy and Competition Policy Report shows that out of 29 competition agencies, 10 considered a "*different point of view in Government*" as an obstacle to competition advocacy, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_AdvocacyReport2002.pdf.

11 Article 21 of the EC Merger Regulation (https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32004R0139).

12 *See* M. Harker (2007), Cross-Border Mergers in the EU: The Commission V. The Member States, *European Competition Journal*, 3:2, 503–535, available at: https://www.tandfonline.com/doi/abs/10.5235/ecj.v3n2.503?journalCode=recj20).

13 Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments in the European Union, COM/2017/0487 final – 2017/0224 (COD), available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:52017PC0487, and Position of the European Parliament adopted at first reading on the adoption of the Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments in the European Union, COM/2017/0487 final – 2017/0224 (COD), available at: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2019-0121&language=EN&ring=A8-2018-0198#BKMD-8.

14 *See Financial Times*, Portugal PM warns on EU protectionism over China investment screening, 4 March 2019.

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of global markets, industrial players need to be of a critical size to compete successfully—namely, for major procurement projects.

13. In a speech delivered shortly following the *Siemens/Alstom* decision, the European Commission's Director General for Competition, Johannes Laitenberger, posed a number of telling questions on the viability of having special rules or exemptions for industrial "champions."[15] Core to those questions was the inference that, when some companies benefit from a special regime, other companies will be disadvantaged, notably because the ecosystem in which the special interests are active will then face competition from an immunised player. In addition, Laitenberger also pointed out that, while benefits of protection may flow to the favoured company, this does not necessarily mean that any benefits necessarily flow to the EU more broadly. This logic is consistent with much of Block's criticism of special interest protectionism in trade matters, and the long-term regulatory capture that this creates.

14. In fact, in summarising discussions at an OECD workshop on national champions, the OECD secretariat noted that: "*The assertion that there is a positive correlation between firm size and competitive advantage is undermined by the mixed record of many mergers, a fact which calls into question the governments' ability to efficiently pick—let alone create—winners*."[16] Importantly, critical size can be achieved through many means without risking significant anti-competitive effects on the ecosystem. These include pro-competitive acquisitions, industrial consortia or large capital investments, which EU public investment policy can enable and promote[17] and which the recent French and German positions also promote.

VII. Unfair competition argument

15. In *Siemens/Alstom* the parties argued that the transaction should be approved (and in the eyes of the European Commission subject to a dispensation from the competition rules), in order to enable the merged entity to face future competition from Chinese players. Unlike other protectionist arguments, the "unfair competition" argument has more substance to it; rather than seeking special rules to mask inefficiency, European players argue that the competition they face is itself distorted. The European Commission has noted that Chinese enterprises competing with European firms often benefit from state support such as subsidies, protected local markets, low regulatory burdens and structured growth strategies, which non-Chinese firms cannot replicate.[18] The ultimate result of such an unlevel playing field is that efficient European firms risk being driven out of the market, which is an anathema to modern competition policy. Yet while the effect may be unfair competition coming from companies based in third countries, the root cause is state support in those countries. As such the solution is not likely to lie with competition enforcement, but rather with other instruments. As Director General Laitenberger implies in a recent speech,[19] it is the consistent application of all available legal instruments (whether trade defence instruments, foreign direct investment audit instruments or public procurement rules) that should help to address practices distorting competition originating from third countries. The European Commission's European Political Strategy (EPSC) report, following the *Siemens/Alstom* prohibition, highlighted a number of suggestions outside the competition field to help level the playing field, including the role of the International Procurement Instrument.[20] While the EPSC noted that "*relaxing merger control, antitrust or state aid rules presents no panacea to alleged weaknesses and competitiveness challenges of European industry*," this does not mean that European competition policy should be blind to the facts on the ground.

VIII. Competition and protectionism

16. It is now fair to ask what the role of competition authorities should be in the protectionist debate. We take protectionism to mean the promotion of special interests, on the basis of vague public interest notions, over the economic criterion of long-run allocative efficiency. Specifically, in the context of competition enforcement (rather than trade measures), we include political interference in the antitrust process within the definition

15 J. Laitenberger, Antitrust: comments on merger control decisions by the European Commission in the cases of Wieland/Aurubis and Siemens/Alstom, Brussels, 15 February 2019, http://ec.europa.eu/competition/speeches/text/sp2019_02_de.pdf.

16 OECD Global Forum on Competition, Roundtable on Competition Policy, Industrial Policy and National Champions, DAF/COMP/GF(2009)9 19-Oct-2009, https://www.oecd.org/daf/competition/44548025.pdf.

17 EU State Aid rules and the communication on Important Projects of Common European Interest (IPCEI Communication) already allow Member States to jointly fill the gap for investment in large-scale, highly innovative projects. *See*, for instance: http://europa.eu/rapid/press-release_IP-18-6862_en.htm.

18 See the European Commission's Joint Communication To The European Parliament, The European Council And The Council, EU-China – A strategic outlook, JOIN(2019) 5 final, 12.3.2019, https://ec.europa.eu/commission/sites/beta-political/files/communication-eu-china-a-strategic-outlook.pdf. According, to the policy brief The Scramble for Europe, from the European Council on Foreign Relations, as per a Chinese study, China's state enterprises and holdings would have made losses since 2001 if direct and hidden subsidies (for example, the true costs for land use and the massive underpricing of natural resources) were taken into account, and thus currently compete unfairly with European companies, https://www.ecfr.eu/page/-/ECFR37_Scramble_For_Europe_AW_v4.pdf.

19 Wolff and Petropoulos envision an additional EU instrument to deal with foreign companies that enjoy unfair advantages deriving from third country state support. *See* G. B. Wolff and G. Petropoulos, What can the EU do to keep its firms globally relevant?, Bruegel, 15 February 2019, available at: http://bruegel.org/2019/02/what-can-the-eu-do-to-keep-its-firms-globally-relevant.

20 EPSC, EU Industrial Policy After Siemens-Alstom: Finding a new balance between openness and protection, 18 March 2019, available at: https://ec.europa.eu/epsc/publications/other-publications/eu-industrial-policy-after-siemens-alstom_en.

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of protectionism.[21] This is clearly not merely an academic debate. Following the *Siemens/Alstom* prohibition, there have been suggestions for loosening merger analysis and the creation of a political review mechanism to enable the Member States, acting through the Council, to override a European Commission merger prohibition to protect European interests - for example, to promote European economic autonomy.

17. Within the broader competition policy community, the consumer welfare standard is recognised as focusing on objective, rather than predetermined, outcomes. The 2002 International Competition Network's Advocacy and Competition Policy Report notes that "*Competition agencies defending competition, not individual competitors, are less likely to fall in the trap* [of capture by outside interests]."[22] The standard therefore undermines the ability of special interests to use competition regulation to their benefit. As Dorsey et al. note, "*the consumer welfare standard hampers rent-seeking efforts—which, in turn, has brought more clarity and consistency to antitrust outcomes*."[23]

18. The EPSC likewise warns about the possible "*downward spiral of economic inefficiency and political arbitrariness*" from the incorporation of non-competition concerns in merger vetoing or through the Council overriding merger prohibitions. However, it is also true that not all competition jurisdictions around the world apply the consumer welfare standard or do so neutrally. If the European Commission's DG Competition becomes drawn into the subjective use of competition enforcement, there is a credible danger that Europe will be dragged into a global "race to the bottom" where competition authorities use their powers for protectionist purposes.[24] For these reasons, DG Competition should continue to base enforcement measures on the consumer welfare standard and, in addition, engage other competition authorities to promote this standard, as well as principles of objectivity, transparency and procedural fairness.

IX. Realpolitik of competition

19. What the post-*Siemens/Alstom* debate has shown is that taking a formulaic approach to competition law does not factor in the realpolitik of market dynamics. An econometric analysis of governmental interference in transactions across various European Member States appears to demonstrate that Member States are not neutral in their involvement in major corporate transactions; rather governments exercise clear strategies to affect transactions, notably if a foreign bidder is involved.[25] Sophisticated strategies include using "moral persuasion"; using "golden shares" in companies (which grant the government special rights and oversight privileges); finding "white knights" to put in rival bids; or financing domestic bidders. Whether a proposed transaction is ultimately agreed and consummated, putting aside regulatory scrutiny, is clearly affected by a national government's view of the deal. The EU Member States should be aware that if they call on the European Commission to address governmental measures from third countries that distort competition, the European Commission is unlikely to be limited to scrutinising actions by third-country governments, if only due to the principle of competitive neutrality.

X. Conclusion

20. Competition regimes are a product of the socio-economic conditions from which they are born. These conditions dictate the functions, structure and priorities of competition authorities; this should be uncontroversial. For example, South African merger rules expressly include a public interest filter that permits the competition authorities to consider the effect that the transaction will have on employment or small businesses owned by historically disadvantaged persons.[26] Whether this strays into protectionism is partly a matter of perspective. Another example is China where competition regulation is viewed in large measure as a government tool to promote a centrally controlled market order.[27] The European Commission's own structure and the tasks for which it is responsible are a direct result of its parentage, despite the Commission's high level of autonomy in competition enforcement.

21. However, there is now a disconnect between what certain Member States expect of European competition policy tools, what DG Competition can legitimately do and what competition policy should seek to achieve. What we are seeing is a political discussion that frames competition policy as an obstacle to European industrial policy, rather than seeing it as an enabler of economic growth. Political leaders who are responsible for industrial policy will only become respectful of competition policy if there is effective dialogue. It is therefore incumbent on the European Commission's DG Competition and the competition community at large to

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21 Borrowing loosely from D. D. Sokol (2015), Tensions between Antitrust and Industrial Policy, 22 *Geo. Mason L. Rev.* 1247, available at: http://scholarship.law.ufl.edu/facultypub/746.

22 International Competition Network, Advocacy and Competition Policy Report, ICN Conference, Naples, Italy, 2002, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_AdvocacyReport2002.pdf.

23 E. Dorsey, J. M. Rybnicek and J. D. Wright (2018), Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, And Rent Seeking, *CPI Antitrust Chronicle*, April 2018.

24 M. Heim (2018), Extraterritoriality: The effect of remedies on the international antitrust system, 31 May 2018, *e-Competitions Bulletin Extraterritoriality*, Art. No. 87101

25 I. S. Dinc and I. Erel (2013), Economic Nationalism in Mergers and Acquisitions, *Journal of Finance*, 68: 2471–2514.

26 *See* http://www.compcom.co.za/mergers-and-acquisitions.

27 T. J. Horton (2016), Antitrust or Industrial Protectionism? Emerging International Issues in China's Anti-Monopoly Law Enforcement Efforts, *Santa Clara Journal of International Law* 109.

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explain not only the benefits of the current competition system in promoting long-term growth, but also to also explore ways in which competition policy could become, within the boundaries of competition law, part of the broader solutions to what are often legitimate concerns expressed by Member States. There must be mutual understanding, on one hand, of the underlying principles and benefits of competition policy and, on the other, of the potentially negative short-term distributional and social effects. This will ensure that the appropriate tools are found, both inside and outside competition policy, to address challenges of global competition.

22. Competition policy cannot remain isolated from other relevant EU policies. Yet coordination between competition and industrial policy need not be a trade-off, but can be mutually reinforcing actions. Industrial policy targeted at highly competitive sectors or which promotes competition can engender vertical innovation as opposed to horizontal differentiation, forcing companies into higher added-value activities and thus promoting growth.[28] Having reviewed traditional arguments for protectionist measures it is clear these play no role in European competition policy. Enhanced engagement could therefore help place competition enforcement in the right context, enable competition authorities to better plot enforcement priorities and resource allocation to industrial policy priorities.

23. By understanding the evolving nature of market contestability and innovation dynamics, competition could be part of the solution to reinvigorate the European economy and prepare for forthcoming digital revolutions. In the long term, such an approach should help ensure that, in the conduct of individual cases, European competition enforcers have the tools and independence to take objective decisions free from political criticism. ■

28 P. Aghion, J. Cai, M. Dewatripont, L. Du, A. Harrison and P. Legros (2015), Industrial Policy and Competition, *American Economic Journal: Macroeconomics*, 7 (4): 1–32, available at: https://www.aeaweb.org/articles?id=10.1257/mac.20120103.

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European champions – Why politics should stay out of EU merger control

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ABSTRACT

On 19 February 2019, the French and German Ministers of the Economy published a Manifesto proposing far-reaching reforms to EU merger control rules that, among other things, would inject political oversight into decision-making in an effort to support the creation of European champions. This article examines the historical treatment of European champions under EU merger control rules and explains that the Manifesto's proposal risks upending the broad consensus that industrial policy considerations should remain outside the scope of EU merger control. The proposal would fundamentally change the architecture of European merger control, replacing expert analysis conducted within a well-defined legal framework with political decision-making. The EC's role would be subordinated and the transparency and consistency that has characterised EU merger control for 30 years would be diminished.

Le 19 février 2019, les ministres français et allemand de l'économie ont publié un Manifeste proposant des réformes majeures des règles européennes de contrôle des concentrations qui, entre autres choses, introduiraient une supervision politique dans la prise de décision afin de soutenir la création de champions européens. Cet article examine la façon dont le contrôle européen des concentrations a appréhendé les champions européens par le passé et explique que la proposition du Manifeste risque de bouleverser le large consensus selon lequel les considérations de politique industrielle devraient rester en dehors du champ d'application du contrôle européen des concentrations. La proposition modifierait fondamentalement l'architecture du contrôle des concentrations en Europe, en remplaçant les analyses d'experts effectuées dans un cadre juridique bien défini par un processus décisionnel politique. Le rôle de la Commission européenne deviendrait secondaire et la transparence et la cohérence qui ont caractérisé le contrôle européen des concentrations pendant 30 ans seraient atténuées.

Introduction

1. Almost 30 years ago, the EU Merger Regulation (the EUMR) came into force,[1] introducing a legal framework for the systematic review of mergers, acquisitions, and other forms of concentration. From its inception, the European Commission (the EC) viewed the EUMR as a "*vital additional instrument made available (…) to ensure a system of undistorted competition in the* [EU]."[2] Over time, the EUMR has evolved from "*one of the most dynamic domains in the competition portfolio*"[3] into a "*mature area of enforcement*,"[4] "*a well-oiled machine which draws on many years of experience*."[5]

2. The EC's application of the EUMR has been an extraordinary success in at least six important respects: (1) the EC has consistently applied the EUMR's "brightline" jurisdictional rules; (2) the EC has been flexible and open in applying the EUMR's procedural rules; (3) the EC has applied a consumer

[*] The opinions expressed in this article are the authors' own and are not attributable to their firm or clients, in particular those clients mentioned in this article whom the firm has represented and advised. The authors would like to thank Charlotte Ritchie for her invaluable help in researching this article.

1 Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings, 1990 OJ L 257/13.

2 EC, XXth Report on Competition Policy (1990), para. 20.

3 J. Almunia, former Competition Commissioner, The Past and the Future of Merger Control in the EU, Address at GCR Conference, Brussels, Commission Press Release SPEECH/10/486, 28 September 2010.

4 J. Almunia, Competition Policy: State of Play and Future Outlook, Address at European Competition Day, Brussels, Commission Press Release SPEECH/10/576, 21 October 2010.

5 J. Almunia, Policy Objectives in Merger Control, Fordham Competition Conference, New York, Commission Press Release SPEECH/11/561, 8 September 2011.

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welfare standard,[6] resisting calls to abandon that standard in favour of a public interest test; (4) the EC has developed a sound framework for its substantive assessment, rendering well-reasoned decisions that rely on quantitative evidence, hard data, and, more recently, business planning documents; (5) the EC has worked closely with Member State authorities, using the EUMR to develop a common appreciation of competition law and policy across the EU; and (6) the EC has withstood political pressure, consistently rejecting suggestions that its appraisal take account of industrial, social, or employment considerations,[7] and promoting the EUMR's "*fundamental objective of protecting consumers against the effects of monopoly power (higher prices, lower quality, lower production, less innovation)*."[8]

3. The EC's February 2019 decision to prohibit the *Siemens/Alstom* transaction,[9] which anticipated combining Europe's two major producers of high-speed trains, triggered calls to reform EU merger control.[10] These calls crystallised in a Franco-German Manifesto (the Manifesto) authored by the French Minister for the Economy and Finance, Bruno Le Maire, and his German counterpart, Peter Altmaier, to "*make our industry fit for tough global competition*."[11] The Manifesto's principal proposal—to inject political oversight into EU merger control in support of the creation of European champions—is characterised as a "*genuine European industrial policy*" intended to address a binary choice: "*unite our forces or allow our industrial base and capacity to gradually disappear*."[12] French officials have claimed that the Manifesto's proposals are necessary for "*economic survival*."[13]

4. Calls to inject political oversight into competition law enforcement are not new. Ever since the EUMR's adoption, debates have flared periodically about whether EU merger control should promote industrial policy or instead focus only on competition criteria.[14] The prospects for change have never, however, been higher.[15] Publication of the Manifesto takes place in a febrile political atmosphere: populism is rising;[16] the UK's expected exit from the EU threatens to remove a proponent of neo-liberal, free-market principles from European debate; and uncertainty about European industry's ability to withstand competition from Asia and elsewhere has provoked questions about whether "*it is high time for a fundamental overhaul of EU competition policy*."[17] European calls for reform have been echoed in the United States, where politicians[18] and academics have demanded "*more active competition policies, with new tools and presumptions*."[19]

5. The prevailing consensus to date has been that industrial policy should remain outside the scope of the EUMR, including because no sound economic case exists for protecting national or European firms from more efficient

6 *See*, e.g., N. Kroes, former Competition Commissioner, European Competition Policy – Delivering Better Markets and Better Choice, Speech in London, Commission Press Release SPEECH/05/51 of 14 September 2005 ("*Consumer welfare is now well established as the standard the Commission applies when assessing mergers (…). Our aim is simple: to protect competition in the market as a means of enhancing consumer welfare and ensuring an efficient allocation of resources*"); J. Almunia, Competition – what's in it for Consumers?, Speech in Poznan, Competition Press Release SPEECH/11/803 of 24 November 2011 ("*Consumer welfare is not just a catchy phrase. It is the cornerstone, the guiding principle of EU competition policy. What we want to know is to what extent the merger, agreement or practice in question can reduce choice, increase prices or stifle innovation*"); and M. Vestager, Statement on the proposed acquisition of Alstom by Siemens and the proposed acquisition of Aurubis Rolled Products and Schwermetall by Wieland, Commission Press Release STATEMENT/19/889 of 6 February 2019 ("*EU merger control allows companies to grow by acquiring other businesses while at the same time preserving choice, quality, innovation and competitive prices for European customers at all levels of the value chain, be that business customers or final consumers*").

7 Lord Brittan, former Competition Commissioner, The Early Days of EC Merger Control, EC Merger Control: Ten Years On, International Bar Association, London, 2000, p. 3 ("I was determined that the Merger Regulation should not be used as a way of imposing industrial policy on Europe, although there were quite a number of participants in the debate who wanted to do just that. Whether it was because they wished to create European champions, or wanted to allow social considerations to have an important impact, they wanted the wording of the Regulation to be sufficiently broad for the Commission to be able to consider matters going well beyond the effects of the merger on competition in the relevant market. In the end, the supports of an industrial policy were effectively beaten back, and the Regulation gives clear primacy to the competition criterion").

8 EC, XXXIst Report on Competition Policy (2001), para. 252.

9 EC, Mergers: Commission prohibits Siemens' proposed acquisition of Alstom, Commission Press Release IP/19/881, 6 February 2019.

10 See, e.g., M. Weber, tweet of 7:43 am, 30 January 2019 ("How can Europe compete with the rest of the world if we don't have European champions? If EU competition rules are not fit for today's challenges, then we need to change the rules"), https://twitter.com/ManfredWeber/status/1090636593935892480; and E. Phillipe, French Prime Minister, in comments on 5 March 2019 ("A [merger] decision's reasoning should take greater account of other public policies").

11 Federal Ministry for Economic Affairs and Energy, Altmaier and Le Maire adopt joint Franco-German Manifesto on Industrial Policy, 19 February 2019.

12 The Manifesto, p. 1.

13 *Financial Times*, France calls for biggest shake-up of EU merger rules in 30 years, 12 February 2019.

14 Former Competition Commissioner Kroes referred to this debate as conjuring up "*a great ideological divide (…) between Colbertian 'dirigistes' and economic libertarians.*" N. Kroes, Industrial Policy and Competition Law Policy, Fordham University School of Law, SPEECH/06/499, 14 September 2006.

15 See, e.g., The Economist, A giant problem, 17 September 2016 ("the world needs a healthy dose of competition to keep today's giants on their toes and to give others in their shadow a chance to grow"); and The New York Times, 12 July 2016 ("with competition in tatters, the rip of inequality widens").

16 BBC, Europe and nationalism: A country-by-country guide, 10 September 2018 ("Across Europe, nationalist and far-right parties have made significant electoral gains").

17 European Parliament, Annual Report on Competition Policy, 18 December 2018. *See also* P. Altmaier, German Economy Minister, 19 February 2019 ("*We need a European industrial strategy so that we can make our industry fit for harsh global competition*"); and President Macron's open letter to European citizens on 5 March 2019 ("*Our borders also need to guarantee fair competition (…) we need to reform our competition policy and reshape our trade policy*").

18 *See*, e.g., J. Stiglitz, Competition and Consumer Protection in the 21st Century, Keynote at New York University School of Law Event "Antitrust and Developing and Emerging Economies: Coping with Nationalism, Building Inclusive Growth," New York, NY, 26 October 2018 ("*there has been an increase in the market power and concentration of a few firms in industry after industry, leading to an increase in prices relative to costs (in mark-ups). This lowers the standard of living every bit as much as it lowers workers' wages*"). *See also* K. Medvedovsky, Hipster Antitrust – A Brief Fling or Something More?, *Competition Policy International*, April 2018; J. Stiglitz, America Has a Monopoly Problem – and It's Huge, *The Nation*, 23 October 2017; and C. Shapiro, Antitrust in a Time of Populism, *International Journal of Industrial Organization*, 24 October 2017.

19 *See*, e.g., E. Warren, Senator of the United States, Reigniting Competition in the American Economy, Keynote Remarks at New America's Open Markets Program Event, 29 June 2016 ("*competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy. Evidence of the problem is everywhere*"); and E. Warren, CAP Ideas Conference: Senator Elizabeth Warren, Keynote Remarks at Center for American Progress Ideas Conference, 16 May 2017 ("*It's time for us to do what Teddy Roosevelt did—and pick up the antitrust stick again. Sure, that stick has collected some dust, but the laws are still on the books*").

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foreign rivals.[20] As former Competition Commissioner Kroes explained a decade ago, "[w]*e aren't about to let EU Member States create inefficient national champions so they can patch up their pride*."[21] The Manifesto's proposals would upset this consensus. In particular, the suggestion that the EU Council (the Council) could override EC merger decisions would fundamentally change the architecture of European merger control, replacing expert analysis conducted within a well-defined legal framework with political decision-making. The EC's role would be subordinated and the transparency and consistency that has characterised EU merger control for 30 years would be upended.

6. This article examines the EC's historical treatment of national and European champions under EU merger control rules and considers the implications of the Manifesto's proposal that EU merger control be subject to political oversight by the Council.[22]

I. The EUMR – An administrative system free from political interference

7. The EC first proposed a text of a merger regulation in 1973.[23] Among other things, that draft envisaged the possibility to exempt concentrations that were deemed "*indispensable to the attainment of an objective which is given priority treatment in the common interest of the Community*." In the intervening 16 years before the EUMR's adoption in 1989, there continued to be support for requiring the EC to take account of non-competition criteria in its assessment of concentrations.[24] In the final negotiations during late 1988 and 1989 leading to the adoption of the EUMR, the principal debate at the time was between those favouring a competition-based test and those urging that explicit account be taken of social, industrial, and employment considerations, certain of whom envisaged the possibility of an exemption.

8. The EC, however, was determined that the EUMR should not be used to impose a European industrial policy.[25] To assuage those who had supported a test based on social, industrial, employment, and other such criteria, Recital 23 of the original version of the EUMR adopted in 1989 did, however, require the EC to "*place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty*,"[26] while Article 2(1)(b) of the EUMR refers to the "*development of technical and economic progress*."[27] The provision does not, however, allow industrial policy objectives to override competition criteria because it permits technical and economic progress to be taken into account "*provided that it is to the consumers' advantage and does not form an obstacle to competition*."[28]

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20 The IGM Chicago Forum recently polled a panel of European economists whether European consumers would be better from relaxing merger control to create European champions. The majority of economists disagreed or strongly disagreed. *See* IGM Forum, European Champions, 27 February 2019, http://www.igmchicago.org/surveys/european-champions.

21 N. Kroes, Competition, the crisis and the road to recovery, Address at Economic Club of Toronto, Speech/09/152, 30 March 2009.

22 The Council comprises the governments of EU countries, the EC president, and the High Representative for Foreign Affairs and Security Policy. It is a political body that guides the EU's overall direction and political priorities. It is not involved in the origination or enforcement of legislation, unlike the EC, which proposes legislation and, among other things, enforces competition policy.

23 Commission Proposal for a Regulation of the Council on the Control of Concentrations between Undertakings (1973 OJ C 92/1).

24 *See*, e.g., Opinion of the Economic and Social Committee on Community Competition Policy in the light of the Current Economic and Social Situation (1981 OJ C 322/3) ("[b] *usiness mergers should be vetted, though many cyclical and structural factors, including at the present time employment difficulties, militate in favour of policies free of legal and other rigidities*"). *See also* Opinion of the Economic and Social Committee on the Amended Proposal for a Council Regulation on the Control of Concentrations between Undertakings (1988 OJ C 208/11), which disclosed support for the application of non-economic criteria, stating that "*the problem of controlling concentrations must (…) be approached on a 'case-by-case' basis within the framework of general principles and having regard to the economic and social provisions of the Treaty.*" The authors proposed that the EC be required to consider "*the importance of competition in promoting healthy economic growth (and the) satisfaction of the economic, social and regional needs of the population of the Community.*"

25 Lord Brittan, The Early Days of EC Merger Control, EC Merger Control: Ten Years On, London: International Bar Association, 2000, p. 3 ("Most important of all, we had to resist the pressures that were bound to be applied, and which were applied, by those seeking to use the Merger Regulation as an instrument of industrial policy, notwithstanding the clear tenor of the Regulation itself. I was determined to resist this, not because I was against any form of industrial policy, but because I thought that the best industrial policy was to ensure that competition prevailed in the EU"); and The Development of Merger Control in EEC Competition Law, Speech of February 9, 1990 ("As I looked around the Member States and spoke to Ministers, I found very different approaches to merger policy; some tended to see it as a tool of industrial, regional and social policies, a way of shaping industrial structure and location, an opportunity to create European champions to compete overseas with American and Japanese giants. Others saw it as a pure expression of competition principles: monopolization and market domination should be stopped, everything else should be allowed to proceed").

26 See also EC, XIXth Report on Competition (1989), Annexes 265–268 ("The Commission states that among the factors to be taken into consideration for the purpose of establishing the compatibility or incompatibility of a concentration—factors as referred to in Article 2(1) and explained in Recital 13—account should be taken in particular of the competitiveness of undertakings located in regions which are greatly in need of restructuring owing inter alia to slow development").

27 *See* B. E. Hawk, The EEC Merger Regulation: The First Step Toward One-Stop Merger Control, 59 *Antitrust L.J.* 195 (1990) ("[Recital 13 and Article 2(1)(b)] *reflect the Council of Ministers' inability to resolve completely the differences between Member States favouring industrial, regional and social policy considerations (e.g., Spain, Portugal and France) and Member States favouring a competition-based analysis more akin to the U.S. model of antitrust review (e.g., Germany and the United Kingdom)*"). *See also* J. A. Venit, The "Merger" Control Regulation: Europe Comes of Age … or Caliban's Dinner, [1990] 5 *C.M.L.R.* 7 ("[Recital 13] *suggests that factors other than competition law may, to some extent, be taken into consideration in assessing concentrations*").

28 Case IV/M.469 *MSG Media Service GmbH* [1994] OJ L 364/1 (EC prohibited the creation of a joint venture between two German media companies that would have created a champion, specifically rejecting the contention that the transaction would contribute to technical and economic development, finding that Article 2(1)(b) "*is subject to the reservation that no obstacle is formed to competition*").

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9. Accordingly, from the outset, the EC's application of the EUMR was based solely on competition law criteria. Successive competition commissioners defended the "*certainty that mergers will be exclusively assessed for their impact on competition*"[29] and described EU competition law enforcement as "*a tool at the service of consumers*."[30] Over the past 30 years, Member States also implemented merger control rules to reflect the consensus view that politics and politicians should be removed from competition law enforcement. The UK, among others, replaced a public interest test and a merger regime in which ministers ultimately took merger decisions with an administrative system insulated from political interference.[31] The EU's defence of the consumer welfare standard and its resistance to a system vulnerable to political pressure mirrored the prevailing orthodoxy in the United States.[32]

1. Resisting pressure to approve the creation of European champions

10. The EC's commitment to taking decisions based on competition criteria alone has manifested itself in a steadfast determination to withstand political pressure to approve transactions that would, so their proponents claimed at the time, create European companies better able to compete with foreign rivals. Prominent examples include the following:

- In 1991, in *ATR/de Havilland,* Aerospatiale and Alenia endeavoured to acquire de Havilland from Boeing with a view to becoming a world leader in aircraft production.[33] Despite endorsement from the French and Italian governments , as well as support from then-Commissioner for Industry Martin Bangemann and then-Commission President Jacques Delors, the EC prohibited the transaction, with then-Commissioner Karel Van Miert predicting that "*the concept of national champions is dead.*"[34]
- In the early 2000s, the EC prohibited the *Schneider/Legrand*[35] and *Volvo/Scania*[36] mergers, both of which sought to create national champions. At the time, the EC contended that national champions "*cannot be authorised unless the conditions of effective competition, ensuring in particular fair prices for consumers, continue to apply or are rapidly restored.*"[37]
- In 2012, the EC prohibited the *Deutsche Börse/NYSE* merger, which would have combined Europe's two leading derivatives exchanges.[38] Deutsche Börse's then-Chief Executive Officer, Reto Francioni, called the EC's decision "*a black day for Europe and its global competitiveness on financial markets.*"[39] Reportedly, the EC's decision followed a fierce debate at the college of commissioners, with some commissioners pressing for approval of a transaction that would have created a European champion.[40]
- In 2019, in *Siemens/Alstom*, the merging parties argued (among other things) that the transaction was necessary to create a European high-speed rail champion capable of competing with China's CRRC Corporation, the largest supplier of rolling stock in the world. The EC ultimately determined that CRRC's international expansion was insufficient to offset competition concerns in the EU.

11. In short, the EC has consistently resisted political pressure to overlook competition concerns in approving the creation of European champions.

2. Resisting pressure to impede foreign acquisitions of European companies

12. The EC has sole competence over concentrations that meet the EUMR thresholds.[41] Member States may not therefore apply national merger control rules to such concentrations.[42] The EC has "*vigorously defend*[ed] *its*

29 M. Monti, former Competition Commissioner, Merger Control in the European Union: A Radical Reform, Speech at the European Commission/IBA Conference on EU Merger Control, Brussels, Commission Press Release SPEECH/02/545, 7 November 2002.

30 J. Almunia, Competition and consumers: the future of EU competition policy, Speech at European Competition Day, Madrid, 12 May 2010.

31 *See*, e.g., Baroness Thatcher, Rebuilding an Enterprise Society Through Privatisation, Reason Foundation's Annual Privatization Report, 1 January 2006 ("*All too often the state is tempted into activities to which it is either ill-suited or which are beyond its capabilities* (…) *It begins to believe that it knows how to manage business. But let me tell you, it doesn't*").

32 *See*, e.g., then-U.S. Assistant Attorney General of the Department of Justice, R. Hewitt Pate, Competition and Politics, delivered to the 12th International Conference on Competition in Bonn, Germany, 6 June 2005 ("*If we incorporate extraneous social and political values into our decision making* (…) *our competition-based analysis will be polluted by values that, while important, just do not belong in sound competition analysis*").

33 Case IV/M.053 *Aerospatiale-Alenia/de Havilland*, Commission decision of 2 October 1991.

34 Commissioner K. Van Miert, European competition policy, Speech at De Warande, Brussels, on 6 May 1998.

35 Case M.2283 *Schneider/Legrand*, Commission decision of 30 January 2002.

36 Case M.1672 *Volvo/Scania*, Commission decision of 15 March 2000.

37 EC, Commission prohibits acquisition of control of Legrand by Schneider Electric, 10 October 2001. Ultimately, the General Court overturned EC's decision in *Schneider/Legrand* because the EC, among other things, failed to take into account competition from vertically integrated players in assessing the competitive position of a non-integrated supplier, *see* Case T-310/01 *Schneider Electric*, EU:T:2002:254.

38 Case M.6166 *Deutsche Börse/NYSE Euronext*, Commission decision of 1 February 2012.

39 BBC News, NYSE Euronext merger with Deutsche Boerse blocked by EU, 1 February 2012.

40 *Financial Times*, Deutsche Börse-NYSE merger blocked, 1 February 2012.

41 Article 21(2), EUMR.

42 Article 21(3), EUMR.

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competence"[43] to avoid the Single Market "*descend*[ing] *into chaos*."[44] To that end, the EC has resisted pressure to protect national or European companies from being acquired by foreign companies and has challenged Member State measures that were designed to favour national champions.[45] Examples include the following:

- In 2006, India-headquartered Mittal Steel Company N.V. launched a hostile takeover bid for the European steel producer Arcelor. The proposed takeover attracted strong opposition from the Spanish, French and Luxembourg governments. Then-Prime Minister of Luxembourg Jean-Claude Juncker argued that "*this hostile bid calls for a reaction that is at least as hostile*" and then-French Prime Minister Dominique de Villepin called for "*economic patriotism*" to protect key industries from foreign predators.[46] The EC ultimately cleared the merger, however, subject to divestiture of a number of steel mills.[47]
- Also in 2006, the EC unconditionally cleared E.ON's takeover of Endesa[48] against the wishes of the Spanish government.[49] The Spanish government subsequently sought to frustrate that transaction by introducing measures under Spanish law that would have required E.ON to sell up to 30% of Endesa's generation capacity on security grounds.[50] The EC held that those measures were unlawful and referred the case to the Court of Justice, which held that Member States could not impose restrictions that would frustrate the EC's exclusive jurisdiction to approve mergers.[51]
- In 2014, the French government strongly resisted a possible acquisition of Alstom's gas turbine generation business by General Electric. Arnaud Montebourg, then-Minister for the Economy, issued a decree expanding the sectors where takeovers would require government authorisation for security reasons (potentially affecting the transaction), and tried to engineer a sale to Siemens (which would have kept the Alstom businesses in the hands of European owners).[52] The French government was subsequently persuaded to allow the transaction to proceed, subject to certain changes to protect security interests. The EC ultimately cleared the merger subject to divestments.[53]

13. In short, there is no evidence that the EC's implementation of the EUMR has disfavoured non-European companies. On the contrary, a 2017 study of EC over 5,000 merger decisions rendered between 1990 and 2014 found no evidence of bias against foreign acquisitions of European companies.[54]

II. The Manifesto's call for politicising EU merger control

14. The Manifesto proposes giving Member States greater scope to create or promote national or European champions. Most notably, the Manifesto proposes that, "*in well-defined cases*," merging parties should have a right to appeal to the Council, which should be empowered to "*ultimately override* [EC] *decisions*." Introducing a right of appeal to the Council would fundamentally change the architecture of the EUMR, replacing an independent, technical analysis with political decision-making. A merger regime subject to political influence would, in the views of the authors, raise significant issues that could jeopardise the EC's hard-won reputation for consistent, objective, and sound decision-making. We have ten principal concerns:

- First, the proposal anticipates that the Council could approve transactions that a lengthy, detailed, and careful review—extending over many months and involving the assessment of hard data, economic evidence, and business planning documents—had determined would harm consumers through higher prices, reduced output, or less innovation. (By way

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43 Commission Press Release IP/00/21 of 12 January 2000. *See also* N. Kroes, Industrial Policy and Competition Law & Policy, 2006 Fordham Corp. L. Inst. 201 (Barry E. Hawk, ed. 2007) ("[The] *European Commission has taken action when needed* [under] *a provision in the EC Merger Regulation which only allows national Governments to intervene against mergers approved by the European Commission if such intervention is compatible to Community Law. I can assure you that we will not hesitate to enforce these rules objectively wherever it is appropriate, under the control of our Community courts*"). *See also* P. Lowe, former Director General, Preserving and Promoting Competition: A European Response, [Summer 2006] *Competition Policy Newsletter*, pp. 1–5 ("[It is clear] *that any attempt by a national Government to create an additional barrier for a transaction cleared by the Commission will not be accepted*").

44 Commission Press Release IP/06/277 of 8 March 2006.

45 See, e.g., D. Gerard, Protectionist Threats Against Cross-Border Mergers: Unexplored Avenues to Strengthen the Effectiveness of Article 21 ECMR, [2008] 45 C.M.L.R. 987.

46 *Telegraph*, Mittal steels himself for a scrap, 5 February 2006.

47 Case COMP/M.4137 *Mittal/Arcelor*, Commission decision of 2 June 2006.

48 Case COMP/M.4110 *E.ON/Endesa*, Commission decision of 25 April 2006.

49 At the time, a Spanish government spokesperson stated that Spain would "*do everything in* [its] *power to ensure that Spain's energy companies remain Spanish.*" The Spanish government even argued that Endesa was "*unpatriotic*" and that Endesa "*went to Germany to sell itself*" when it became clear that Endesa favoured the E.ON bid, reported in *The Financial Times* on 1 March 2006 and 27 February 2006.

50 Case COMP/M.4197 *E.ON/Endesa*, Commission decision of 20 December 2006.

51 Case C-196/07 *Commission v. Spain* ECLI:EU:C:2008:146, decision of 6 March 2008.

52 At the time, M. Montebourg wrote on his official Twitter account: "We won't let Alstom sell this national champion behind the back of its shareholders, its employees and the French Government." See also The Financial Times, How Paris repelled General Electric from Alstom takeover, 16 June 2014.

53 Case M.728 *General Electric/Alstom*, Commission decision of 8 September 2015.

54 A. Bradford, R. J. Jackson Jr., and J. Zytnick, Is EU Merger Control Used for Protectionism? An Empirical Analysis, 23 June 2017. Other empirical studies reach similar findings, *see*, e.g., LSE Research, M. Thatcher, European Commission merger control: combining competition and the creation of larger European firms ("*There is no evidence of greater use of powers for mergers involving EU and non-EU firms than for cross-border EU ones*").

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of example, the EC's 2019 *Wieland/Aurubis* prohibition decision reflected concerns about "*a new dominant player, significantly reducing competition for rolled copper products and increasing prices for European manufacturers*";[55] and its 2017 *HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia* prohibition decision was based on "*clear evidence that this takeover would have led to price increases in Croatia, which could have adversely affected the construction sector*."[56]) It is difficult to see how European consumers would benefit from overriding these assessments and permitting the transactions in question to proceed.[57]

– Second, the proposal would reduce transparency, predictability, and legal certainty.[58] Over 30 years, the EC has rendered decisions in almost 7,000 cases, refining its analytical tools, objectively assessing the available evidence, and creating a substantial body of precedent. The existence of that precedent, together with consistency of the EC's analytical framework, has over time enabled companies and lawyers to predict with a reasonable degree of certainty the EC's approach to a range of issues, including market definition and substantive appraisal. That predictability and consistency has been a singular achievement of the EC.[59] By contrast, the Manifesto does not explain how or on what basis the Council would assess mergers. Introducing political approval powers would inevitably undermine the value of EC precedent and create uncertainty, deterring mergers that could benefit consumers and the broader economy.[60]

– Third, the proposal might well result in poorer decision-making and short-termism. Council ministers lack the specialised technical expertise of the EC's competition lawyers and economists.[61] They are not well placed to second-guess a specialist agency's evaluation of a transaction's implications for competition. Political news cycles and election cycles are shorter than the timeframe of a competition authority's analysis. Lacking the technical expertise of specialists, politicians are likely to promote short-term effects of a transaction—such as the immediate impact of a transaction on local employment[62]—at the expense of longer-term considerations. Yet long-term, competitive markets are generally acknowledged to be the most effective driver of economic growth, corporate efficiency, and consumer welfare.[63]

– Fourth, a politicised merger control process would be vulnerable to regulatory capture. The EC has historically operated the EUMR with considerable autonomy from Member State governments. By contrast, politicians are more susceptible to lobbying by constituencies wishing to promote their own—rather than consumers'—interests. Both target companies and acquirers should be wary of a merger review process susceptible to political pressure and that elevates the mastery of public lobbying above a technical assessment of a transaction's merits.[64] Among other things, the outcome of any such process would be highly uncertain and could be skewed, to the detriment of consumers, especially where protagonists' lobbying resources are mismatched.[65]

– Fifth, the proposal could deter merging parties from offering remedies to address substantive concerns. At present, companies involved in extended merger reviews typically engage in lengthy, without prejudice discussions with the EC on possible remedies. In circumstances

55 EC, Mergers: Commission prohibits Wieland's proposed acquisition of Aurubis Rolled Products and Schwermetall, 6 February 2019.

56 EC, Mergers: Commission prohibits HeidelbergCement and Schwenk's proposed takeover of Cemex Croatia, 5 April 2017.

57 *See*, e.g., A. Mundt, Head of the German Federal Cartel Office, International Conference on Competition, Berlin, 14–15 March 2019, who has expressed concern that a European champions policy would lead to "*higher prices, lessening of competition.*"

58 *See*, e.g., then-Secretary of State for Trade and Industry, Patricia Hewitt, during the second reading of the UK Enterprise Bill (which ultimately became the UK Enterprise Act 2002), who argued that formally replacing the UK's "public interest"-based test for mergers with a purely competition-based test would result in "*more transparent and predictable decision making*." HC Deb 10 April 2002 C46. *See also* then-Parliamentary-Under Secretary of State, Melanie Johnson, Standing Committee B, 25 April 2002 cc 293-4, discussing the introduction of a pure, competition-based merger control test in the UK ("*Focusing the legislation on competition will produce better merger regulation and improve the clarity of the framework for decisions and the predictability of decisions made under it. The wider the range of factors that can be taken into account, the less certain and predictable the outcome*").

59 *See*, e.g., C. Esteva-Mosso, then-Acting Deputy-Director General for Mergers, Mergers and the Regulatory Environment, Fordham Conference on Antitrust Law and Policy, New York, 11 September 2013 ("*we cannot choose market definitions as we please, any more than we can change the weather in Brussels*").

60 *See*, e.g., I. de Silva, head of the French Competition Authority, 5 March 2019, reported in *MLex*, underlining the "*need to maintain the impartial and dynamic nature of merger review*"; and A. Mundt, International Conference on Competition, Berlin, 14–15 March 2019, urging the European antitrust community to "*avoid politicizing of decision-making*."

61 *See*, e.g., J. Tirole and P. Rey, Project Syndicate, Keep Politics Out of Europe's Competition Decisions, 4 March 2019.

62 For example, in France, the French government can intervene at the second stage of a merger analysis and overrule the competition authority based on public interest factors, including maintaining employment. This power was first used last year, where, after the French competition authority had cleared the *Financière Cofigeo/Agripole* merger, the French Economy and Finance Minister intervened to secure a commitment by the merging parties to maintain employment.

63 See Standing Committee B, 25 April 2002 cc 293-4. ("We are introducing a competition test not only to increase the predictability of decisions or to align our regime with others, but because, in the vast majority of cases, the economy is best served if mergers are assessed solely on the basis of their effect on competition. Competition provides a spur for businesses to be more productive, innovative and efficient, and better able to provide long-term sustainable employment and better products and services for consumers. In some previous national champion cases, political attention has focused on the immediate impact of the transaction on local employment.")

64 J. Tirole and P. Rey, Project Syndicate, Keep Politics Out of Europe's Competition Decisions, 4 March 2019 ("politicians are subject to intense lobbying by large firms and industry organizations, which may be more interested in limiting competition than promoting it").

65 Alex Chisholm speaks about public interest and competition-based merger control, Speech, Fordham Antitrust Conference, 11 September 2014 (the UK government was unconvinced of the merits of a broad public interest test because "*a Government's judgment and intervention could be too exposed to political lobbying and short-term populist pressures*").

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where merging parties would have a right of appeal based on political considerations, there would be less incentive to volunteer divestments or other remedies. Paradoxically, political intervention might therefore aggravate the underlying competition issues created by a given merger. Chilling companies' readiness to advance remedies could also increase the EC's workload, since more mergers would be subject to in-depth Phase II investigation, rather than being resolved earlier through remedies.

– Sixth, a Council appeal right could send an undesirable signal about the openness of the EC to foreign investment and diminish the EC's standing abroad. Companies from third countries might be less likely to invest in Europe if EU politicians had the possibility to obstruct inward foreign investment. As Commissioner Vestager has maintained, the EC's "*legitimacy*, [its] *credibility and—ultimately—the impact of* [its] *action depend on* [maintaining a non-politicised regime]."[66] As noted, the EUMR's framework, together with the consistency with which it has been applied by the EC, has become a model for other jurisdictions. Were the Manifesto's proposals for political oversight to be adopted, other jurisdictions would likely follow. The outcome would be a series of parallel reviews in which politicians in each jurisdiction sought to use antitrust processes to advance their national interests to the detriment of competition and consumers.[67]

– Seventh, an appeal to the Council would cause delay in an already protracted merger review process. For transactions that involve significant overlaps or where scrutiny is otherwise anticipated, the EU merger control process already extends over at least a year,[68] creating uncertainty for the merging parties, their suppliers, customers, and employees. Any attenuation of an already protracted process through more Phase II reviews and a subsequent right of appeal to the Council would be undesirable and at odds with the EC's efforts to accelerate merger review.

– Eighth, once established, the Manifesto's proposal might be expanded over time to approval, as well as prohibition, decisions. The Manifesto refers to "*a right of appeal of the Council which could ultimately override Commission decisions*." On its face, it is unclear whether this refers to prohibition decisions, approval decisions (including conditional approvals), or both. One assumes, given the context of *Siemens/Alstom*, that Franco-German ministers had in mind appeals following prohibition decisions. There is a risk, though, particularly over time, that this proposal could extend to merger approvals, the outcome and terms of which third parties might seek to challenge on the ground that they risked harming European companies by creating a strengthened foreign rival. Giving third parties a right of appeal to the Council could further delay the realisation of transaction synergies, prolonging uncertainty for the merging parties' employees, customers, and suppliers.

– Ninth, the Manifesto proposal does not explain how a Council appeal right would impact the current system of judicial review by the EU courts. In particular, the Manifesto does not explain whether the Council appeal would replace or supplement the courts' review. Nor does it address whether the EU courts would review the legality of the Council decision or the preceding EC decision.[69] The EU courts have made a significant contribution to the quality and transparency of decision-making under the EUMR, and the availability of a full appeal on the merits to an independent judiciary is fundamental to upholding the integrity of the EC's administrative system.[70] Any proposal that eroded the EU courts' powers of oversight would raise serious concerns, all the more so if that independent and impartial scrutiny were replaced with a political appeal process.[71]

– Tenth, even from a political perspective, the proposal seems ill-advised. The reforms could encourage political factionalism and

66 M. Vestager, Independence is non-negotiable, Chatham House conference on Politicization of Competition Policy: Myth or Reality?, London, 18 June 2015. *See also* M. Vestager, Enforcing competition rules in the global village, NYU Law Address, New York, 20 April 2015 (political protectionism in merger control may trigger long-term adverse effects and "*poison the well*" of international antitrust cooperation).

67 In late 2018, U.S. companies and government officials expressed concern that China could use its merger control regime to delay, condition or prohibit mergers involving U.S. companies, in retaliation for U.S. trade sanctions. *See*, e.g., *The New York Times*, China Wants to Strike Back on Trade. Big U.S. Deals Could Suffer, 7 October 2018. U.S. antitrust officials have in the past strongly criticised China for using domestic antitrust laws as a tool of industrial policy. *See*, e.g., M. Ohlhausen (former Commissioner at the U.S. Federal Trade Commission), China Competition Policy Forum, Beijing, 31 July 2013 ("*Political decisions that favor certain competitors, as some have claimed about President Roosevelt's enforcement actions, or that are about industrial policy, national security, employment, and other issues have no place in an antitrust agency*").

68 *See* C. Cook, Real review timetables under the EU Merger Regulation, *Concurrences* No. 2-2017. The author cites, by way of illustration, Ball's acquisition of Rexam. The transaction was announced on 19 February 2015, at which time the parties forecast that regulatory clearances would be obtained during the first half of 2016. The transaction ultimately closed on 30 June 2016. *See also* Bayer's acquisition of Monsanto, which was announced on 14 September 2016 and approved on 21 March 2018. Case COMP/M.8084 *Bayer/Monsanto*, Commission decision of 21 March 2018.

69 Legal certainty requires that EU decisions must be clear and precise so that the affected companies may know without ambiguity what rights and obligations flow from them and may take steps accordingly. An assessment by the Council based on political considerations could be difficult to reconcile with this fundamental requirement. Case T- 138/07, *Schindler Holding Ltd. v. Commission*, EU:T:2011:362, para. 95, with references to case law.

70 *See*, e.g., European Court of Human Rights, *Menarini Diagnostics v. Italy*, No. 43509/08.

71 Among other things, a political appeal process could be hard to reconcile with the obligation on the Court to assess whether the evidence relied upon in EC merger decisions "*is factually accurate, reliable and consistent*" (Case T-342/07 *Ryanair Holdings plc v. Commission*, EU:T:2010:280, para. 30) and "*contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it*" (Case T-175/12 *Deutsche Börse AG v. Commission*, EU:T:2015:148, para. 66).

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horse-trading to the detriment of the European project. Even if Member States agreed generally about reforming EU merger control, they might disagree profoundly about a particular transaction, including because of deep-seated differences around the future direction of EU industrial and economic policy.[72] By way of example, a Council consensus might be reached around a transaction intended to protect or promote a European champion. By contrast, a consensus would be harder to reach with respect to a transaction that favoured a national champion from one Member State to the detriment of a champion from a different Member State, giving rise to disagreement between Member States. The Manifesto provides no further detail on how the Council appeal right might operate in practice. But even a well-designed procedural framework would likely result in greater horse-trading than today with the associated risks of inter-State friction and discord.

Conclusion

15. The EUMR has been a remarkable success. As Competition Commissioner Vestager, among others, has maintained, it has "*served us well*."[73] The Manifesto's proposal to introduce a right of appeal to the Council would upend the impartiality and objectivity of the EC's merger enforcement, undermining the transparent and consistent legal framework that has characterised decision-making for 30 years. It is difficult to see how this would lead to better decision-making or more competitive markets. ■

72 See, e.g., J. Brunsden and M. Kahn, Franco-German eurozone reform plan faces growing opposition, 22 June 2018 ("The Netherlands, Austria and Finland are among 12 Governments questioning the need for any joint eurozone 'fiscal capacity,' challenging a central tenet of French President Emmanuel Macron's vision for the eurozone that he has successfully pressed Berlin to endorse"); and S. Marks and J. Posaner, Macron's battle against European unity, 6 March 2019 ("Disagreements over the single market are flaring up all over the Continent. They pit France—and to a lesser extent Germany—against not just newer EU members like Romania, Poland and Hungary, but also against free-market champions like the Netherlands, Ireland and Sweden").

73 M. Vestager, Financial Times, Vestager warns against weakening merger rules, 4 March 2019 ("I think it is important to discuss that very fundamental choice because if we want to change it [in Europe] we should be very well aware of the consequences"). See also J. Tirole and P. Rey, Project Syndicate, Keep Politics Out of Europe's Competition Decisions, 4 March 2019 ("Political frustration at the rejection of a single—albeit high-profile—merger is not a good reason to undermine the EU's long-standing, independent competition authority").

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The future of competition policy in Europe: Some reflections on the interaction between industrial policy and competition law

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ABSTRACT

The article explores the interaction between industrial policy and competition law, in particular merger control in Europe. It reflects on the tensions, actual and perceived, between these two policies and critically assesses the substantive and institutional solutions that have been proposed, In particular in the recent Franco-German Manifesto for a European industrial policy fit for the 21st Century.

L'article analyse l'interaction de la politique industrielle et du droit de la concurrence, notamment au niveau du contrôle des concentrations en Europe, et propose une réflexion sur les tensions, réelles et ressenties, entre ces deux politiques. Il aborde en outre de manière critique les solutions de fond, ainsi que les solutions institutionnelles qui ont été proposées, en particulier dans le récent manifeste franco-allemand pour une politique industrielle européenne adaptée au 21ème siècle.

I. Introduction

1. On 19 February 2019, the French and German governments adopted a Manifesto for a European industrial policy fit for the 21st Century (hereinafter Franco-German Manifesto).[1] This joint initiative follows up the call from nineteen EU governments in December 2018 to update the EU antitrust rules in order to facilitate the emergence of European industrial giants able to face "*fierce competition*" from the United States and China.[2] The Franco-German Manifesto notes that "*amongst the top 40 biggest companies in the world, only 5 are European*," and that European companies are in difficulty to successfully compete on the world stage, in particular in view of the absence of a regulatory global level playing field. There are very few global digital platforms based in the EU, with most of the top platforms being US or China-based.[3] This came as a "Sputnik moment" for the EU with a number of EU governments envisaging drastic reforms that would affect various areas of EU competition law enforcement, in particular merger control. This debate coincided with that generated by the blocking by the European Commission of the acquisition of Alstom by Siemens in February 2019.[4] The Commission expressed concerns over the position this would give the merged entity in signalling systems and in very high-speed trains, as the merger transaction would have removed one of the two largest manufacturers of this type of trains in the EU, thus affecting European consumers. The Commission did not consider that future global competition from Chinese suppliers, in particular the largest player globally, the state-owned CRRC, which itself resulted from a merger between CNR and CSR, would have made a difference for European consumers. This led the French Minister of Economy and Finance, Bruno Le Maire, amongst others, to criticise the Commission's decision, observing that

1 *See* https://www.gouvernement.fr/en/a-franco-german-manifesto-for-a-european-industrial-policy-fit-for-the-21st-century. The author would like to thank Pierre Regibeau and Andrew McLean for helpful comments at an earlier version of this paper. The author is solely responsible for any errors.

2 *See* https://www.euractiv.com/section/economy-jobs/news/19-eu-countries-call-for-new-antitrust-rules-to-create-european-champions.

3 *See* P. C. Evans and A. Gawer, The Rise of the Platform Enterprise – A Platform Survey (The Center for Global Enterprise, 2016), available at https://www.thecge.net/app/uploads/2016/01/PDF-WEB-Platform-Survey_01_12.pdf.

4 *See* http://europa.eu/rapid/press-release_IP-19-881_en.htm.

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"*European competition law is obsolete, it was created in the twentieth century, it faces the emergence of industrial giants of the twenty-first century and which does not allow Europe to create its own industrial champions.*"[5]

2. This debate is not new but, as I will explain in the next section, it has been raging since the early days of merger control in the EU. I will then briefly explore the interaction between competition policy and industrial policy, before examining the roots of the problem, at least as this is perceived by the recent critics of EU competition law enforcement, in particular following the blocking of the *Alstom/Siemens* merger transaction. Two issues will be discussed: first, the difficulties of performing a balancing test that integrates allocative and productive efficiency concerns while taking an industrial policy perspective; second, the time scale of the analysis of potential competition that is usually considered by the Commission in EU merger control. The final section will take a critical perspective on the institutional setup put forward by the Franco-German Manifesto, and will explore the technocratic or political nature of the exercise, these two issues being intrinsically related.

II. Setting the scene – EU Merger control versus national champions and national industrial states

3. The European Coal and Steel (ECS) Treaty of Paris in 1951 had put in place an integrated merger control system for the six founding members of the ECS Community, providing the exclusive responsibility to conduct merger control to the High Authority of the ECS Community, and, after 1967, to the European Commission[6] ("one stop shop"), for merger activity in the two economic sectors targeted by the Treaty. This was remarkable, as at that time none of the six founding members of the ECSC had competition laws, let alone a merger control regime. Moreover, the Treaty of Rome establishing the European Economic Community in 1957 did not include any provision on merger control. This "gap" was duly noted in 1966, when the Commission published its memorandum on concentrations, which put forward the possible application of the antitrust provisions of the Treaty (now Articles 101 and 102 TFEU) to merger transactions (concentrations).[7]

5 *See* https://www.archyworldys.com/mayor-urges-european-commission-to-end-alstom-siemens-merger.

6 Art. 66 ECSC Treaty.

7 European Commission, Concentration, economic policy and competition in the EEC (1966).

4. The intellectual climate at the time was not in favour of pushing for merger control. In 1967, a year after the Commission's memorandum, French journalist Jean-Jacques Servan-Schreiber published his bestseller *Le Défi américain* (published in English as *The American Challenge*), in which he forcefully put forward the view that Europe should develop an industrial policy in order to establish large European corporate groups by allowing mega-mergers between European firms.[8] These would provide the necessary economies of scale to develop global champions based in Europe that could compete effectively with the US multinational behemoths that had emerged from the so-called "third merger wave" during the initial decades following the Second World War. This merger wave had first led to the horizontal consolidation of various sectors, before being followed by mergers leading to increasing vertical integration and then conglomerate merger activity. This "bigness mystique" was linked to the belief that larger companies were more "*likely to undertake the investment and research activities essential to successful competition*," pushing the firms into new areas of activity and thereby placing them in a position of leadership.[9] For Servan-Schreiber, European governments should aim to establish large industrial units "*which are able both in size and management to compete with the American giants*," and suggested that they will have to choose "*fifty to one hundred firms which, once they are large enough, would be the most likely to become world leaders of modern technology in their fields.*"[10]

5. By the time the third merger wave occurring in the US had reached its peak, it had led to the development of large conglomerates or vertically integrated firms, which operated according to what has been called the "multi-divisional form" of organisation, or "M form." The main feature of this form of corporation was the centralised control over strategic decision-making investment in new markets that could offer higher rates of return and less competition than the market(s) the company was already present on. A second characteristic was the delegation of operational decision-making to divisions (or strategic business units) that were closely monitored by the centre. This led to a decentralised profit planning relying on the discounted cash flow methodology in order to evaluate capital projects. The quest for higher rates of return became the essential driving force of expansion. This expansion has been justified by the need to diversify across product and or geographical markets, and was facilitated by investments in managerial hierarchy in order to co-ordinate production, sales and devise competitive strategies. The managerial structure was considered as the key mechanism for unlocking productivity (what Chandler later called "the visible hand hypothesis").[11]

8 J.-J. Servan-Schreiber, *The American Challenge* (Scribner, 1968) [an English translation of the original book published in 1967 in French as *Le Défi américain*].

9 *See* W. Adams, J. W. Brock, The Bigness Mystique and the Merger Policy Debate: An International Perspective, 9 *Nw. J. Int'l L. & Bus.* 1 (1988–1989).

10 J.-J. Servan-Schreiber, *The American Challenge* (Scribner, 1968): 159–160.

11 A. Chandler, Strategy and Structure: Chapters in the History of the Industrial Enterprise (MIT, 1962); A. Chandler, The Visible Hand: The Managerial Revolution in American Business (Belknap, 1977).

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Although the oil crisis in the mid-1970s and the economic recession that followed ended this movement, the importance of the "M form" of organisation and the efficiencies it brought may have influenced the debate in Europe.

6. The same year Servan-Schreiber published his *American Challenge*, well-known American economist John Kenneth Galbraith published his bestseller book *The New Industrial State*.[12] In this book Galbraith attacked the price system and competition as incompatible with the modern technology-based economic system that was emerging out of the second industrial revolution. In his view, this system relied on industrial planning, which was necessary in order to provide the stability that the significant commitment of capital and time for the development of more sophisticated technologies required. According to Galbraith, the more technically sophisticated the product is, the more important it is for the economic entities to plan their industrial production, but also "manage demand" (e.g., through advertising), in advance, and thus to replace the price system with some form of planning. This could take several forms, one being vertical integration and different forms of contractual restraints. Galbraith went as far as arguing that "[t]*he modern large Western corporation and the modern* [at the time of writing] *apparatus of socialist planning are variant accommodations to the same need*,"[13] the corporation serving as "*the prime planning instrument*."[14] Galbraith coined the term of "technostructure" to refer to the main source of authority in this more technologically sophisticated part of the economy. This term did not only make reference to the management of corporations but to a broader corporate technocracy, which controlled corporate savings that were quite significant during this period and represented more than three fifths of the total of savings supplied. Indeed, most of the earnings of a corporation were not paid as dividends to stockholders, but were instead retained by the corporation and reinvested or used for wage increases, in what has been qualified as the "retain and reinvest" model of the corporation.[15] The essence of the power held by the technostructure relied on the specialised knowledge that was necessary for the organisation of the production and sale of more sophisticated technologically products, capital and labour being relatively less important factors of production in this context. Galbraith noted a "*shift of power in the industrial enterprise* (…) *from capital to organized intelligence*."[16] Profit maximisation, which is for Galbraith, "*the only goal that is consistent with the rule of the market*," is not the goal of the technostructure, which exercises power in order to pursue other goals, and in particular the organisation's own survival.[17] Price stability serves one of the main objectives of industrial planning, growth, as it facilitates "*control and minimise*[s] *the risk of a price collapse that could jeopardize earnings and the autonomy of technostructure*."[18] Galbraith expressed a critical judgment with regard to competition law, noting that antitrust laws, "*in seeking to preserve the market, are an anachronism in the larger world of industrial planning*."[19] For him, "[t]*hey do not preserve the market*" but "*preserve rather the illusion of the market*," thus becoming a sort of "*charade*," "*an act that helps to conceal the reality of industrial planning and associated price control by the great corporation*."[20]

7. While the concept of a "technostructure" employed by Galbraith is quite vague, an important contribution of his work is that it shows how the emergence of the "industrial state" in the US is eminently related to the development of a model of private, rather than public, governance regime, concerning industrial planning. Although the issue of merger control was not touched upon specifically in the book, Galbraith noted how "unjustifiable" it is to provide some form of immunity (from regulation) "*to those who have achieved a strong market position as compared with those who, being much weaker, seek, by merger or collusion, to win a stronger position*."[21] This approach fits his general perspective on the role of countervailing powers in capitalism and his general indifference to concentrations of economic power, to the extent that government provides countervailing powers "*freedom to develop and to determine how it may best do so*."[22] It is noteworthy that both Servan-Schreiber and Galbraith highlighted the importance of size for industrial and technological development.

8. Notwithstanding these relatively critical perspectives on the role of competition law, and more specifically the role of merger control, in July 1973 the Commission initiated a proposed merger regulation before the Council, the text being endorsed by the European Parliament.[23] However, this failed at the Council in view of the opposition of some Member States to the evaluation of mergers solely on the basis of their effects on competition. A number of Member States, such as France, the UK, Italy and Ireland, advanced instead an assessment of the effects of mergers on industrial policy and other social and regional goals, while Germany and Denmark promoted the evaluation of mergers solely for their effect on competition.[24]

12 J. K. Galbraith, *The New Industrial State* (Princeton Univ. Press, 1967).

13 Ibid., 41.

14 Ibid., 46.

15 *See*, on this concept and its opposition to the maximising shareholder value approach, W. Lazonick and M. O. Sullivan, Maximizing shareholder value: a new ideology for corporate governance, 29 *Economy and Society* 13 (2000).

16 Ibid., 70.

17 Ibid., 140 and 208–209

18 Ibid., 241.

19 Ibid., 244.

20 Ibid.

21 Ibid.

22 J. K. Galbraith, American Capitalism: The Concept of Countervailing Power (Mifflin Co. 1952): 143.

23 Draft Regulation of the EC Council Concerning Control of Concentrations between Undertakings, COM (73) 1210 final, reprinted in 12 *C.M.L.R.* D205, D207 (1973).

24 On the history and politics of EU merger control, *see* E. Schwartz, Politics as Usual: The History of European Community Merger Control, 18 *Yale Journal of International Law Article* 4 (1993).

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The Commission proposed a new draft regulation in 1981,[25] which again failed before the Council because of divisions among the Member States, in particular because of the industrial policy versus solely competition law debate. All the national competition law regimes of the larger Member States, such as Germany, France and the UK, provided discretion to a political decision-making body, most often the minister or secretary of state to overrule the determination of the competition authority. Merger control in each of these jurisdictions was intrinsically linked to the need to protect and manage the national industrial state.

9. Yet, sentiment began to change during the 1980s. The ascendency of neo-liberal economics in the UK and some other EU Member States, as well as the reunification of Germany, may have changed the weight put on national industrial policy. The move towards a competition assessment in merger control was also helped by the changing views on the role of "bigness," in particular the criticisms to the M-form of business organisation, as a result of the growing financialisation, first of the US economy and then globally. A different conception of the firm emerged during the late 1970s, seen as a portfolio of activities, managed according to their financial performance (in terms of rate of return on investment), rather than defined in terms of productive capabilities. The fourth merger wave that emerged in the 1980s had therefore very different characteristics than the previous waves, in the sense that most of the acquisitions were hostile takeovers, investors going directly to the company's shareholders or fighting to replace management to get the acquisition approved, and "bust up" takeovers, the main objective being to break up diversified firms.[26] Most of this merger activity during this period was accomplished through the leveraged buyout (LBO) where a company is acquired mainly through large amount of outside debt borrowed from a traditional financial institution (Investment Bank) and large institutional investors (pension funds, mutual funds, hedge funds, insurance companies). This movement ended the period of the "managerial corporation" and corporations' diversification in sectors unrelated to the main activity of the corporation. It also led to the rise of the power of market finance and of debt as the main source of corporate finance.

10. At the time when this fourth merger wave gradually slowed after the market crash of 1987, the Court of Justice of the EU (hereinafter CJEU) provided further impetus for the adoption of an EU merger control system with the *Philip Morris* judgment in 1987, which applied what is now Article 101 TFEU to merger activity.[27] Following this judgment, there was a situation of uncertainty leading corporations to notify their merger activity to the Commission for formal or provisional clearance, under the notification and legal authorisation regime of Reg. 17/62 which applied at the time. On 21 December 1989, the Council eventually adopted a regulation requiring the pre-notification to the Commission of concentrations within its scope—those where the parties' turnover exceeded the thresholds—and providing for possible prohibition or other remedies by the Commission.[28] In assessing whether a merger is incompatible with the Common Market, Article 2(1) EUMR requires the Commission to take into account only competition concerns, such as, amongst others, the structure of the market, potential competition, 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, as well as "*the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition*." Justifications on non-competition grounds were removed in 1989 from an earlier draft of this Article and replaced by these provisions.

11. The limitation to competitive criteria was controversial. Some of the matters to be taken into account under Article 2(1)(b) EUMR could be interpreted to include non-competition related criteria. Nonetheless, considerations of industrial policy were firmly rejected by the Commission in *de Havilland*, the first case to be blocked by the Commission under the then Regulation 4064/89.[29] In this case, a consortium representing France-based Aerospatiale and Italy-based Alenia had attempted to take control of the de Havilland division of Boeing Canada, de Havilland being the two EU-based companies' direct competitor in the market for turbo pro-powered regional aircraft. The merger would have led to the EU-based consortium ATR controlling a dominant position in the forty to fifty-nine-seater commuter aircraft, the Commission refusing to consider the global market as the adequate relevant market for the assessment. By a vote of nine to four the European Commission decided to block the merger, leading to important reactions from the French business and political establishment at the time.[30] A number of proposals were put forward, in particular the need for some form of coordination for the merger assessment between DGIV (now DG Comp) and DGIII (now DG Enterprise and Industry) and a policy statement adopted in 1992 on the aerospace industry conceded somehow the point that "*a merger combining most of the* [EU's] *supply capacity in certain sectors of the aircraft industry does not necessarily imply the creation of a dominant position*."[31] It was also suggested that national security grounds on the basis of what is now Article 348 TFEU could also be put forward in some cases with regard to mergers in

25 Modification de la proposition de règlement du Conseil sur le contrôle de la concentration, COM(81) 773 (final).

26 Contemporaneous financial literature perceived this wave as destroying value. *See* A. Shleifer and R. W. Vishny, The Takeover Wave of the 1980s, 249 *Science* 745 (1990).

27 Joined cases 142 and 156/84, *BAT and Reynolds v. Commission* [1987] ECR 4487.

28 Council Regulation (EC) No. 4064/89 on the control of concentrations between undertakings [1989] OJ L 395/1. This regulation was amended in 1997; then repealed and replaced by Regulation 139/2004, which is the merger regulation still in force.

29 *Aerospatiale-Alenia/de Havilland* (Case No. IV/M053), Commission Decision [1991] OJ L 334/42.

30 *See* the discussion in C. Jones, Aerospace, in H. Kassim and A. Menon (eds.), *The European Union and National Industrial Policy* (Routledge, 1996): 88, esp. 91–93

31 Ibid., 92.

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the aerospace and defence sectors, although this was not expected to cover wider industrial policy concerns.

12. The debate is, of course, older and wider than just concerning the relation between merger control and industrial and technological development, and relates to some older literature on the "infant industry" argument to which I will now turn.

III. National champions and competition policy*

13. Industrialisation has always been at the heart of any discussion on economic development. According to the "infant industry" argument, a country should have productive power by first strengthening its infant industries to level the playing field before opening its doors to free trade and competition.[32] In his famous statement supporting the case for infant industry protection, John Stuart Mill[33] alluded to one of the main prerequisites for such industries: the presence of dynamic learning effects that are external to firms. However, protection should be temporary as long as the infant industry matures and becomes viable without protection. Subsequently, Charles Francis Bastable added another condition requiring that the cumulative net benefits provided by the protected industry exceed the cumulative costs of protection.[34] Together, these conditions are known as the Mill–Bastable Test.[35]

14. Almost all arguments for infant industries rest on the assumption that production costs for newly established industries within a country being likely to be initially higher than for well-established, more efficient foreign producers of the same product, who have greater experience, higher knowledge and higher skill levels. With protection, infant domestic producers would raise their productivity and, over time, be able to compete with foreign firms on an equal footing. One should note that this argument is for a temporary support of the domestic industry through the suppression of competition. Although one common mechanism for competition suppression is trade protection, the modern theory of "second best"[36] proffers that a producer subsidy is superior to a more distorting tariff, unless the government is constrained to raise revenue or taxes are also distorting.[37] Another possibility would be a reduction of competition, for instance through authorising some form of merger activity, to the extent that there are some barriers to entry or expansion preventing the rapid entry into the market that may be incentivised by higher prices and super-normal profits. Regardless of the means of suppression, there are various arguments advanced by the supporters of the "infant industry" argument for a more active state intervention.[38]

15. First, it is considered important to induce investment in the acquisition of technological knowledge such as learning-by-doing and on-the-job training. Learning effects are crucial in most industries, in particular at the early stages of their history.[39] To the extent that 'learning gives rise to a special kind of intertemporal externality in production'[40] as it implies dynamic scale economies in production, it has provided an argument for the protection of an infant industry[41]. Learning-by-doing is a form of sunk cost. Hence, unless this learning-by-doing spills over 'completely, instantaneously and costlessly among all rival production units, or unless at each date every unit faces strong diminishing returns to scale in production at some output levels, there are social wastes in having more than one production unit'[42]. Protecting the national champion from foreign competition would therefore enable it to go down its learning-by-doing curve faster, thus capturing more of the market, provided competition is in strategic substitutes. Such policy might be welfare enhancing if the domestic learning possibilities are strong and dependence on a foreign monopoly would mean that profits occurring in the domestic market are repatriated abroad.[43]

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* This section draws on I. Lianos, A. Mateus and A. Raslan, Development Economics and Competition. A Parallel Intellectual History, *CLES Research Paper Series* 1/2012, available at https://www.ucl.ac.uk/cles/sites/cles/files/cles_1_2012new.pdf.

32 *See* F. List, *National System of Political Economy* (1856): 72–73. List thought that free trade was suitable for industrialised countries and that industrialisation through free trade was possible only in case countries were on the same level of development. Alexander Hamilton encouraged "government activism" to promote industrialisation. *See also* M. Cowen and R. Shenton, *Doctrines of Development* (1996): 155. Cited in I. Lianos, A. Mateus and A. Raslan, Development Economics and Competition. A Parallel Intellectual History, *CLES Research Paper Series* 1/2012.

33 *See* J. S. Mill, *Principles of Political Economy with some of their Applications to Social Philosophy* (1848): 918–919, reprinted in M. C. Kemp, The Mill–Bastable Infant-Industry Dogma, 68 *J. Pol. Econ.* 65 (1960)

34 C. F. Bastable, *The Commerce of Nations* (10th ed. 1921) (1891), 140–143. Cited in I. Lianos, A. Mateus and A. Raslan, Development Economics and Competition. A Parallel Intellectual History, *CLES Research Paper Series* 1/2012.

35 For further discussion of the Mill-Bastable Test, *see* M. C. Kemp, The Mill–Bastable Infant-Industry Dogma, 68 *J. Pol. Econ.* 65 (1960); *see also* M. J. Melitz, When and How Should Infant Industries be Protected?, 66 *J. Int'l Econ.* 177 (2005). Cited in I. Lianos, A. Mateus and A. Raslan, Development Economics and Competition. A Parallel Intellectual History, *CLES Research Paper Series 1/2012.*

36 R. G. Lipsey and K. Lancaster, The General Theory of Second Best, 24 *Rev. Econ. Studies* 11 (1956). Cited in I. Lianos, A. Mateus and A. Raslan, Development Economics and Competition. A Parallel Intellectual History, *CLES Research Paper Series* 1/2012.

37 I. Lianos, A. Mateus and A. Raslan, Development Economics and Competition. A Parallel Intellectual History, *CLES Research Paper Series* 1/2012.

38 Ibid.

39 B. Zimmerman, Learning Effects and the Commercialization of New Energy Technologies: The Case of Nuclear Power, 13 *Bell J. Econ.* 297 (1982); M. B. Lieberman, The Learning Curve and Pricing in the Chemical Processing Industries, 15 *Rand J. Econ.* 213 (1983); M. Bell, B. Ross-Larson and L. Westphal, Assessing the Performance of Infant Industries, 16 *J. Dev. Econ.* 101 (1984). Cited in I. Lianos, A. Mateus and A. Raslan, Development Economics and Competition. A Parallel Intellectual History, *CLES Research Paper Series* 1/2012.

40 P. Dasgupta & J. Stiglitz, Learning-By-Doing, Market Structure and Industrial and Trade Policies, (1988) 40 Oxford Economic Papers 246.

41 See, the discussion in H.Y. Wan & S. Clemhout, Leaning by Doing and Infant Industry Protection, (1970) 37 Review of Economic Studies 33.

42 P. Dasgupta & J. Stiglitz, fn 40, 247.

43 Ibid.

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16. Second, state intervention may also produce externalities, exterior to the firm but interior to the industry. In this case, the effects of the activity of one firm benefit the others and cannot be appropriated completely by that firm. Externalities generated by the accumulation of knowledge due to R&D are of this type. When spillovers occur to other firms, it leads to a situation of under-provision of the external good. Spillovers may not be purely national and may also have an international impact. The case for government intervention through a subsidy in these cases is well established. A learning-by-doing effect with external impact to the firm is also a case for output subsidies provided by the state.[44] A tariff is again a second-best option because it introduces an unnecessary consumer distortion,[45] as would also have a restriction of the domestic competition to which the firm is faced, for instance by accepting a merger leading to the dominance of the domestic industry by the merged entity.

17. Third, there is ample empirical evidence in support of the assertion that R&D generates high rates of return and that the social rate is much larger than the private rate.[46] Problems of coordination and imperfect markets or lack of perfect information lead to the well-known case of underinvestment. Let us suppose that there are significant fixed costs and export demand is limited due to high transportation costs or barriers to trade abroad. Profitable entry by a producer may be precluded by the non-existence of a buyer downstream in the market. The same reasoning may apply to a firm that needs inputs upstream in the market to enter into production and may also apply to network externalities that arise due to either technological or pecuniary linkages. These coordination failures may be a reason to establish a tariff in order to temporarily raise profitability in the market. However, it is doubtful that a tariff will solve the coordination problem. A superior policy would be some form of centralised system of information, a role usually performed by financial institutions, or sector or regional planning.[47] One may envisage that such role could be played by a national champion dominating the specific domestic industry.

18. Fourth, an additional problem justifying intervention arises from imperfect capital markets that either do not finance the investments required or, due to problems of adverse selection and moral hazard, require collateral that would penalise small firms and market entry.[48] From this perspective, a larger domestic champion would face less difficulties to attract capital. Although this argument would make sense in the context of a developing economy, where access to capital might be more difficult, it appears of less concern in the EU, where access to capital for firms big enough to trigger merger review is excellent.

19. Fifth, a further case for government intervention is linked to the need to build a reputation in export markets. Consumers have imperfect information and it is costly for them to discover the quality of a new firm. As a result, it is costly to build a reputation, leading some economists to advance the need for an export subsidy to help in the penetration of new markets.[49] Another approach would be to constitute a national champion. However, there is a serious signalling problem with this approach: oftentimes quality is associated with the intrinsic characteristics of products, and some firms have higher quality products because they are better at producing those goods.[50] As explained by Grossman and Horn in order to get the subsidy, every firm will have to degrade the quality of its product.[51] The best policies are the ones that give an incentive for firms to produce differential improvements in the quality of their products, like minimum standards and enforcing warranties. We know that in perfect equilibrium markets, intervention is almost never an optimal policy.[52] In any case, creating a national trademark ('Japanese sake') and have the quality monitored by an export marketing board looks a superior option than establishing a national champion.

20. Theoretical and empirical evidence shows that the strongest case for government intervention may arise in the first stages of introduction of a new innovative product, both in developed and developing countries. For developed countries, it is in terms of R&D. For developing countries, it is in terms of learning-by-doing. In both cases, spillover effects are very important and it may be difficult for private firms to appropriate all the benefits of their actions. But it should be recognised that protection comes only as a second- or even a third-best policy option. Subsidies or tax benefits to R&D and the process of learning are more adequate. Models of endogenous growth based on the introduction of new varieties or new products are important to understand how diffusion of technological innovation takes place around the world. There remains a scarcity of rigorous studies on the relevance and effects of protection for infant industries, despite its wide use by developing countries. As noted, it is only generally a third-best policy and should always be temporary, but the difficulty in practice is to identify what industries to target as an industrial policy. Furthermore,

44 I. Lianos, A. Mateus and A. Raslan, Development Economics and Competition. A Parallel Intellectual History, *CLES Research Paper Series* 1/2012.

45 Ibid.

46 T. F. Bresnahan, Measuring the Spillovers from Technical Advance: Mainframe Computers in Financial Services, 76 *Am. Econ. Rev.* 742 (1986); M. Trajtenberg, The Welfare Analysis of Product Innovations, with an Application to Computed Tomography Scanners, 97 *J. Pol. Econ.* 444 (1989); J. I. Bernstein and M. Ishaq Nadiri, Interindustry R&D Spillovers, Rates of Return, and Production in High-Tech Industries (C.V. Starr Ctr. for Applied Econ., Econ. Research Reports, 1988), available at http://www.econ.nyu.edu/cvstarr/working/1988/RR88-04.pdf. cited in I. Lianos, A. Mateus and A. Raslan, Development Economics and Competition. A Parallel Intellectual History, *CLES Research Paper Series* 1/2012.

47 I. Lianos, A. Mateus and A. Raslan, Development Economics and Competition. A Parallel Intellectual History, *CLES Research Paper Series* 1/2012.

48 Ibid.

49 Ibid.

50 Ibid.

51 G. M. Grossman and H. Horn, Infant-Industry Protection Reconsidered: The Case of Informational Barriers to Entry, 103 *Q. J. Econ.* 767 (1988).

52 I. Lianos, A. Mateus and A. Raslan, Development Economics and Competition. A Parallel Intellectual History, *CLES Research Paper Series* 1/2012.

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to the extent that merger policy tends to be lenient at the early stage of industries' development, it is less likely that competition law would create a problem in cases where the justification for industrial policies would be more compelling. In any case, policies for human capital accumulation and building necessary infrastructure are unambiguously positive.[53]

21. Competition policies give the framework for markets and thus largely influence resource allocation required for economic development. In fact, a discussion of competition policies and other policies that are related to the functioning of the market should precede any discussion of competition law regimes. They are the context in which competition law and enforcement take place.[54]

22. The policies that are more directly related to the functioning of the market and that can promote more competitive outcomes are market infrastructure policies, external trade policies, entry and exit of firms' policies, intellectual property rights, privatisation, investment policies, procurement, regulation and innovation policies. There are a number of other important policies required for the functioning of efficient competitive markets. Policies related to entry and exit of firms and market mobility in general are also very important.[55] When there are costly regulations to set up business or to operate it, the phenomena of informality takes large chunks of the economy, with clear inefficiency.[56] And even fiscal and monetary policies can have important competitive market implications. When the law stipulates fiscal loopholes and tax evasion is tolerated, firms in dominant positions may acquire an unfair advantage vis-à-vis their smaller competitors.[57] Furthermore, there can be competition distortions when firms in a dominant position have access to credit or capital markets beyond what a proper risk analysis would dictate.[58]

23. These are all policies that have to be taken into account when defining a competition law regime. They constitute the foundation in which a competition law regime operates. Competition law is an important dimension of competition policy and should be conceived in a much broader perspective than simply antitrust rules, merger control or a system of competition law enforcement.[59]

24. There are important links between competition policy and economic development and growth. First, there are indications that more competition enhances the development potential of an economy.[60] Second, it is also widely accepted that competition promotes institutional innovation and the emergence of efficient institutions that support economic growth.[61] There is now empirical evidence that competition law enforcement is linked to economic growth in developed countries.[62] More generally, there is evidence that competition promotes productivity. Disney et al. conclude that competition increases productivity levels and the rate of growth of productivity.[63] Bloom and van Reenen show that good management practices are strongly associated with productivity and those are better when product market competition is higher.[64] Finally, an efficient market for corporate control with open rules for takeovers reinforces the impact of competition on productivity.[65] Other studies by Blundell et al.[66] and Aghion and Griffith[67] also confirm the above results. A study for Australia shows that competition-enhancing reforms in the 1990s contributed to an increase in GDP.[68] However, it has also been alleged that the appropriate level of competition may differ for different stages of economic development.[69] More importantly, recent research has highlighted the important links between industrial policy, in particular export oriented (not import-substitution oriented) Technology and Innovation policy, and competition law policy for economic development, showing that although the state should play an important role in steering labour and capital in activities that the private investors might not engage in, in particular in order to build sophisticated products and services for which learning-by-doing plays

53 Ibid.

54 *See*, generally, D. D. Sokol, T. K. Cheng and I Lianos, *Competition Law and Development* (Stanford University Press 2013).

55 On the instruments of competition policy, *see* S. J. Evenett, What is the Relationship between Competition Law and Policy and Economic Development? (2005), available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.536.7483&rep=rep1&type=pdf.

56 De Sotto has contributed to this analysis. *See* H. De Sotto, *The Other Path: The Economic Answer to Terrorism* (Basic Books, 2002).

57 On fiscal state aid, *see*, for example, P. Nicolaides, Fiscal State Aid in the EU: The Limits of Tax Autonomy, 27 *World Competition* 365 (2004).

58 Moreover, access to capital markets is crucial to immature, challenger firms that cannot rely on retained earnings. *See* J. Tirole, The Institutional Infrastructure of Competition Policy (1999), available at: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.201.7825&rep=rep1&type=pdf.

59 *See* OFT 1390, Competition and Growth (November 2011).

60 I. Lianos, A. Mateus and A. Raslan, Development Economics and Competition. A Parallel Intellectual History, *CLES Research Paper Series* 1/2012.

61 *See* D. Acemoglu and J. Robinson, The Role of Institutions in Growth and Development (2008), *World Bank Commission on Growth and Development Working Paper No. 10*, and D. Rodrik and A. Subramanian, The Primacy of Institutions, *Finance & Development* 31 (2003).

62 For overviews of the empirical evidence, *see* T. C. Ma, The Effect of Competition Law Enforcement on Economic Growth, 7 *Journal of Competition Law and Economics* 301 (2011); P. Buccirossi, L. Ciari, T. Duso, G. Spagnolo and C. Vitale, Competition Policy and Productivity Growth: An Empirical Assessment, 95 *The Review of Economics and Statistics* 1324 (2013).

63 R. Disney, J. Haskel and Y. Heden, Restructuring and productivity growth in UK manufacturing, 113 *Economic Journal* 666 (2003).

64 N. Bloom and J. van Reenen, Measuring and explaining management practices across firms and across countries, *CEP Discussion Paper* 716 (2006).

65 S. Nickell, D. Nicolitsas and N. Dryden, What makes firms perform well? 41 *European Economic Review* 783 (1997); S. Januszewski, J. Koke and J. Winter, Product market competition, corporate governance and firm performance: an empirical analysis for Germany, 56(3) *Research in Economics* 299 (2002).

66 R. Blundell, R. Griffith and J. van Reenen, Market Share, Market Value and Innovation in a Panel of British Manufacturing Sector, 66 *Review of Economic Studies* 529 (1999).

67 P. Aghion and R. Griffith, *Competition and Growth: Reconciling Theory and Evidence* (MIT press, 2005) (noting that the greatest rate of innovation is observed in industries where the two main firms are technologically neck and neck. In these instances the incentive to innovate and thus to escape competition is the greatest).

68 OECD, Sources of Economic Growth in OECD Countries (OECD, Paris, 2003).

69 *See*, for instance, A. Singh, Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions, *ESRC Center for Business Research. University of Cambridge Working Paper* No. 246 (2002). For a discussion, D. Sokol, T. Cheng and I. Lianos (eds.), *Competition Law and Development* (Stanford University Press, 2013).

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an important role[70], the pursuit of 'fierce competition both abroad and domestically' enhances accountability and constitutes an important complement to such industrial policy.[71]

25. In conclusion, evidence about the "infant industry" approach remains quite ambiguous, the hypothesis working only in very specific circumstances, while there is some evidence that competition policy and competition law enforcement may promote growth. However, the claim put forward by the French and German government may be much narrower, and not concern the relation between competition and growth/economic development, but the quite static perspective followed by modern competition law and the non-consideration of "real competition." There are two points to be made here. First, it may be alleged that the current structure of merger control focuses excessively on price effects and consumer welfare and does not take sufficiently into account the productive efficiency gains of mergers. Second, it is possible to argue that merger control may be biased towards a static analysis that does not take sufficiently into account the dynamic dimension of competition. I explore these two claims in turn.

IV. The Williamsonian welfare trade-off in competition law: Is this a problem?

26. If one takes an economic efficiency perspective, competition law is thought to focus on allocative efficiency. This is not linked to the transfer of wealth from consumers to producers over (infra-marginal) units of output still sold, but merely on the lost transactions which could have taken place under a more competitive scenario (i.e., the deadweight loss).[72] In any case, for operational purposes the focus is on consumer harm, as captured by the (likelihood of) higher prices and lower quantity; bearing in mind that in practice hardly anyone in the field of enforcement ever actually attempts to measure/estimate actual changes in either total or consumer welfare.[73]

27. Beside allocative efficiency, it is often argued that a competitive equilibrium will also maximise productive efficiency, where output is produced with the least amount of resources, given the current set of production technologies—i.e., demand is served by the most efficient firms. This is not always the case, though, in the sense that there are market configurations where a trade-off between allocative and productive efficiencies triggered by an increase in a position of substantial market power might emerge. The possibility of an efficiency trade-off between allocative inefficiency and productive efficiency has been put forward by Oliver Williamson, who came to the conclusion that small cost savings may offset relatively larger price increases, thus entailing a more permissive standard for antitrust enforcement.[74] However, his conclusions were reliant on strong assumptions, such as that the market configuration before the increase in market power was competitive; whereas if firms had already some degree of market power (so that prices were already above costs), total welfare would most likely be reduced, i.e., alongside consumer welfare.[75]

28. Furthermore, the Williamsonian trade-off between productive and allocative efficiency takes place within a static framework, which holds technology and the product space fixed. In reality, though, firms compete also through innovation, which could either be process oriented (i.e., increasing productive efficiency) or product oriented (improving the variety and/or quality of their offer). Under these circumstances, though, the trade-off is not as much between productive and allocative efficiency, but between dynamic and allocative efficiency. The former, more elusive, concept captures the idea that product innovation, where firms compete on quality (horizontal and vertical) attributes, as opposed to price/quantity in a static fashion, is equally, and some may argue more, important for the maximisation of social welfare in the long run.

29. At the extreme, competition can take place "for" the market, rather than "in" the market, in the sense that rivalry occurs through highly risky "races" to innovate with the aim of utterly displacing the incumbent in order to enjoy the financial reward of monopoly power. This competitive mode, made of sequential monopolies, is labelled Schumpeterian, after the economist Joseph Schumpeter who listed innovation as a central feature of modern economies.[76]

30. However, most competition law regimes have built a broader narrative for intervention, on the basis of some wider conception of "consumer welfare," or the avoidance of "consumer harm." One may indeed go

70 See, J. Stiglitz & B. Greenwald, *Creating a Learning Society* (Columbia Univ. Press, 2014); M. Mazzucato, *The Entrepreneurial State: Debanking Public vc Private Sector Myths* (Public Affairs, 2013).

71 R. Cherif & R. Chami, The Return of the Policy that Shall not be Named: Principles of Industrial Policy, IMF Working Paper (March 2019), 6, available at https://www.imf.org/en/Publications/WP/Issues/2019/03/26/The-Return-of-the-Policy-That-Shall-Not-Be-Named-Principles-of-Industrial-Policy-46710 .

72 The irrelevance of distributional concerns is normally justified with reference to the "compensation principle" (also labelled Kaldor-Hicks efficiency criterion, or potential Pareto improvement) which posits that, if gainers can compensate losers and still be better-off, the change observed in the partial equilibrium analysis is desirable. That is to say, even if the compensation never actually takes place, it is down to the political system to take care of the redistribution of the "pie" (the separability thesis).

73 There are some examples of competition authorities commissioning studies into the effects of their past decision, thus basically assessing whether their intervention (or lack thereof) has increased consumer surplus. For an overview, *see* OECD (2011), Impact Evaluation of Merger Decisions, available at http://www.oecd.org/daf/competition/Impactevaluationofmergerdecisions2011.pdf.

74 O. E. Williamson, Economies as an Antitrust Defense: Welfare Tradeoffs, 58 *American Economic Review* 18 (1968).

75 M. D. Whinston, Antitrust Policy Towards Horizontal Mergers, *Handbook of Industrial Organization*, Vol. 3, Ch. 36, 2371–2440, 2374 (North Holland, 2007).

76 J. Schumpeter, Capitalism, Socialism and Democracy (1942): 84 ("[C]ompetition from the new commodity, the new technology, the new source of supply, the new organization (…) competition which commands a decisive cost or quality advantage and which strikes not at the margins of the profits and outputs of the existing firms but at their very foundations and their very lives").

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beyond consumer surplus and include in the analysis the wealth transfer that consumers have incurred because of the overcharges following the restriction of competition. These may not only relate to higher prices but could cover any other parameter of competition, such as quality, variety, innovation. In this case, both the loss of consumer surplus and wealth transfers will be compared to the total efficiency gains pertaining to the supplier(s), thus enabling a cost benefit analysis of the effect of the conduct on the welfare of a specific group of market actors, direct and indirect consumers (not all market actors). The idea is that following the change from an equilibrium situation to another, the consumers of the specific product will benefit from a surplus and/or wealth transfer, in the sense that their ability to satisfy their preferences will increase. This is not typically an efficiency concern but a distributive justice concern, the aim of competition law assessment in this case being to protect the interests of the consumers in the specific relevant market(s) affected vis-à-vis of those of the producers. This also increases the likelihood that a merger transaction may face some difficulties from a competition law perspective.

31. Industrial policy concerns may be compatible with this emphasis on consumer welfare and consumer choice. For instance, blocking a merger that would raise barriers to entry and would therefore restrict the ability of an EU-based corporation to enter a global market would improve the global competitiveness of EU industry as well as consumer welfare and consumer choice. One may consider the promotion of European champions as not only related to assisting EU-based champions to maintain their global competitiveness, but also to entering new markets from which they may have been excluded had the merger gone through.

32. A merger between two EU-based undertakings that would have enabled them to compete more effectively with a dominant undertaking on the affected market(s), thus making the market(s) more contestable, would likely not raise competition concerns. However, one of the difficulties the parties may have in this case is that the positive effects of a merger on productive efficiency or the capacity of the merged entity to innovate may not neutralise the possible anticompetitive effects of the specific merger on the consumers of the affected relevant markets in the EU. This could result from the difficulty the parties may have in putting forward efficiency gains and substantiating them, but also from the fact that, out-of-market efficiencies are not considered in the merger assessment, to the extent that these efficiencies cannot outweigh price effects for the consumers of the specific relevant product and geographic market(s) that are affected by the merger. This focus on consumer welfare effects in the context of a defined relevant market may therefore "bias" the Williamsonian trade-off against a merger transaction that would have increased total welfare (e.g., consumers and producers) at the EU level, while reducing the welfare of some EU-based consumers, in particular if the relevant markets are defined narrowly, for instance at the level of a Member State.

33. This is a fair criticism, but there are specific normative reasons that have led EU competition law to adopt such a distributive justice perspective favouring consumers' interest, instead of a total welfare approach, a topic I have explored elsewhere.[77] It is also not clear that a total welfare approach would better accommodate industrial policy concerns than a consumer welfare standard. This would call for a different type of distributional impact analysis that probably weighs more productive efficiency concerns than price effects on consumers. If the purpose of industrial policy is narrowed down to protecting national or European champions, this more preferential regime for productive efficiency gains would presumably only apply for EU-based corporations. It is unclear how such an approach would comply with WTO rules.

34. Assuming that productive efficiencies would not be given more weight, in comparison to price effects affecting consumers, it is also unclear how this non-weighted total welfare-based assessment, which takes into account out-of-market efficiencies, could favour the competitiveness of European or national champions.

35. First, the merger may involve undertakings situated upstream at the value chain and the price effects of the merger may negatively affect not final consumers but undertakings that are operating in other segments of the value chain, thus affecting their ability to improve their efficiency and compete more effectively at a global level. How would one proceed to such a complex assessment of the effects of the merger across the global value chain? Should we take into account the percentage of the value of the sector's total market cap that each specific activity and/or undertaking represents before deciding which of the merging parties or the affected undertakings in other segments of the value chain "merits" to be protected as a national/European champion? If the focus is on the economic "upgrading" of the EU-based corporations, "*the dynamic movement within the value chain*" that would enable the EU-based champion(s) to shift to a different stage of the chain providing a higher added value for the investment, this will require a thorough analysis of inter-market effects and the way productive efficiencies would operate, along the whole value chain, something which is not currently performed as the analysis merely focuses on the productive efficiencies of the notifying parties. The informational requirements for performing such a value chain analysis in merger control would be extremely cumbersome for undertakings, eventually affecting their incentives to merge.

36. Second, would a total welfare approach focus on the costs and benefits to EU-based consumers (final and intermediary) and the costs and benefits of the merger to EU-based producers, or should the merger assessment open the black box of the undertakings and look for instance to the welfare effect of the merger to the EU-based versus foreign controlling shareholders,

77 I. Lianos, Some reflections on the objectives of EU competition law, in I. Lianos, and D. Geradin (eds.), *Handbook in EU Competition Law: Substantive Aspects* (Edward Elgar, 2013): 1.

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but also other business participants including non-owner managers and employees as well as other capital providers and financial owners? If the focus of merger control is no more on "consumer welfare" but on something much broader, such as "the well-being of the Union," if we refer to a goal of EU competition law put forward by the Court of Justice of the EU in *Telia/Sonera*,[78] the merger assessment should integrate in the analysis the income effects that the specific merger transaction will have for a broad category of EU-based "stakeholders," before deciding which of the companies affected by the merger would merit protection as a "European champion." In today's global integrated economy, organised in the context of complex global value chains, such assessment, although not theoretically impossible, would be particularly cumbersome in terms of resources and time, in particular within the limited timeframe of merger control. These are, of course, some of the many complications to which a trade-off approach in merger control would face if it explicitly integrates an industrial policy or "infant industry" perspective.

37. Third, even in competition law regimes where such broader public interest analysis integrating development and industrial policy concerns is performed, such as South Africa, industry-wide concerns were sometimes found not to be merger-specific and therefore not taken into account.[79] Furthermore, the South African Competition Tribunal has expressed its scepticism of "*arguments that insist that a precondition for successful international competition is domination of the domestic market*," noting that "*the most aggressive and successful international competitors are those who face robust competition at home*."[80] In other cases, the South African Competition Tribunal rejected the consideration of international competitiveness arguments if it is unclear that the productive efficiency gains (cost savings) provided by the merger would be passed on to consumers, in particular if the merged undertaking would not face sufficient local competition, the Tribunal mostly focusing on the effect of the merger on local consumers.[81]

38. However, the claim of the proponents of industrial policy considerations may be that the trade-off approach followed by EU merger control could dissuade, as such, many mergers that would enhance European industrial policy and the "well-being" of the Union. One may address this argument by looking to the figures. From a total of 7,289 merger transactions notified to the Commission between 1990 and 2019, only 29 of them were blocked following a Phase II assessment.[82] This represents less than 0.4% of notified cases. Of course, one may argue that many mergers may not have occurred because the parties were concerned about a possible negative decision from the Commission. However, this risk appears quite remote in view of these figures, in particular the very few withdrawals for cases that moved to Phase II, to be considered as a serious concern. It is also on the parties to put forward credible and well-substantiated efficiency gains, to the extent that they, and not the Commission, dispose of the relevant information about the strategic purpose of the merger transaction and the efficiencies this may generate. Inverting the order of the assessment, first exploring efficiency gains and then examining anticompetitive effects will not also, in my view, have any significant impact on the analysis. In reality, this is already informally happening, as merger notifications are usually preceded by pre-notification discussions between the notifying parties and the Commission, which assist the Commission to gather a better understanding of the possible competition concerns and the motivations of the parties to merge, including its possible efficiencies.

V. The time scale of potential competition in EU merger assessment – An issue to rethink?

39. Another argument that may be put forward in order to criticise the approach followed by EU competition law is the relatively static perspective of the competitive analysis performed, as there is significant emphasis put on the actual or potential (but within a short period of time) contestability of the markets affected. Actual competitors are considered in the operation of the definition of a relevant market that may be affected by the merger. A merger where the target firm is not competing in the same relevant market of the acquiring firm can still give rise to a significant impediment of effective competition (SIEC), whether non-coordinated or coordinated, if there is a realistic prospect that the former could decide to enter the market in the near future but for the merger in question.[83] The threat of entry is stronger where the target company already has, or is very likely to acquire, the availability of assets that could facilitate entry, such as a distribution network which overlaps with the one used by the acquiring firm.[84] Evidence of actual plans to enter at an advanced stage would point towards

78 Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB* [2011] ECR 527, para. 21–22. The court however made explicit in the next paragraph that the concept of "well-being" is narrowly meant as focusing on the impact of the conduct on competition to the direct or indirect detriment of consumers.

79 *See* Case No. 33/LM/Mar12, *Glencore International PLC and Xstrata PLC* in South Africa, cited by A. Raslan, Mixed Policy Objectives in Merger Control: What Can Developing Countries Learn from South Africa?, 39 *World Competition* 625 (2016).

80 Tongaat-Hulett Group Limited and Transvaal Suiker Beperk Middenen Ontwikkeling (Pty) Ltd/Senteeko (Edms) Bpk/New Komati Sugar Miller's Partnership TSB Bestuursdienste (83/LM/Jul00) [2000] ZACT 47 (27 November 2000), para. 115–116.

81 *ISCOR Limited and Saldanha Steel (Pty) Ltd* (67/LM/Dec01) [2002] ZACT 17 (4 April 2002), para. 152 and 154.

82 *See* http://ec.europa.eu/competition/mergers/statistics.pdf.

83 Horizontal Merger Guidelines [2004] OJ C 31/11, para. 58.

84 Ibid., 59.

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that conclusion.[85] However, the likelihood of a SIEC is reduced if there are a sufficient number of potential competitors left able to discipline actual competitors.[86]

40. Usually, EU competition authorities have taken a relatively narrow time scale for considering potential competition. To be an effective threat, potential competitors should be able to enter within two years and on a sufficient scale.[87] This can lead to ignore the possibility of potential entry into a market if the time scale of this entry may be longer than two years. The difficulty resides in finding evidence that the potential competitors may have such plans and that these are credible enough to influence the competitive strategies of the merging firms. Extending the time scale to a longer period than two years may lead to a high degree of uncertainty and increase the risk of arbitrary decision-making.

41. However, there can be circumstances where the threat of potential competition is less palpable but where a merger may be thought to give rise to a SIEC. It is often argued that the valuation of internet start-ups is very subjective due to the elusive nature of the key intangible asset underpinning their business model, that is, the acquisition of a large customer base. To this end, firms typically attract users by offering their services for free, thus incurring material operational losses for a number of years before the prospect of turning the venture into a profitable business. Furthermore, it is argued that once the customer base is in place, it is easier to launch new services thanks to the availability of a critical mass. Similar conclusions may be reached with regard to the possibility of a market becoming contestable in a medium term (e.g., five years), this assessment being based on the "idiosyncratic rent-earning resources" and capabilities, such as specific innovation and technological capabilities, that few other undertakings may have, that could provide them an advantage in entering a specific market, in particular if the structure of the industry is that of a global oligopoly. In this case, it is possible to argue that such resources and capabilities should be taken into account, even if there are no established plans or plans in the making to enter the specific market. But of course, such an approach will be subject to the criticism of considerably expanding the discretion of competition authorities to intervene, or not.

85 Ibid., 60.

86 Ibid.

87 Horizontal Merger Guidelines [2004] OJ C 31/13, para. 74 and 75.

42. There has nevertheless been some evolution in the way potential competition has been considered in the context of mergers, in particular with the recent turn of focusing on innovation effects. It has been alleged that many established companies proceed to "killer acquisitions" buying out smaller start-ups or small and medium undertakings with the aim to discontinue the development of the targets' innovation projects that may challenge their dominant position, thus pre-empting future competition[88] and this beyond the time period of two years usually considered. Indeed, if an additional investment in R&D by a potential entrant reduces the expected profits of a rival (and vice versa), because of its business stealing effect, then a merger between these two firms may internalise this negative externality, and reduce innovation. In this context, the European Commission has looked beyond the R&D pipeline to explore the dynamic resources and capabilities of the specific firms to innovate and the development of specific "lines of research."[89] It has looked, for instance, to investment in basic R&D that may with some degree of probability become eventually profitable, even if this probability remains limited, for instance 10%. This approach seems to expand both the locus and the time period that is usually considered in assessing actual or potential competition, as the Commission has examined the overlaps between the parties, not only at the level of innovation spaces, by looking to "early pipeline projects" and "lines of research," but also at the level of the industry. The Commission has indeed taken into account the global characteristics of R&D organisations, that is, the resources, personnel, facilities, and other tangible and intangible assets dedicated to research and development.[90] If such a broader analysis may be perfectly justifiable in order to assess the innovation effects of the merger transaction and reduce the likelihood of "killer acquisitions," it would also make sense to adopt a similarly flexible perspective when assessing potential entry when this could constrain the pricing strategies of the merged entity. Unless one is to consider that price effects would merit a different approach than innovation effects. This could make a difference in some cases, in particular if it is reasonable to expect that the future competitor may have the incentives and ability to enter the market in the medium term, on the basis of its tangible and intangible assets, idiosyncratic resources and capabilities, possibly in view of some history of previous expansion in other geographic markets.

88 Some analysis in the pharmaceutical sector argues that more than 6% of acquisitions every year are "killer acquisitions": *see* C. Cunningham, F. Ederer, and S. Ma, Killer Acquisitions (2018), available at: http://faculty.som.yale.edu/songma/files/cem_killeracquisitions.pdf.

89 A theory that has, for instance, influenced the approach of the European Commission in *Dow/DuPont*: European Commission, Case M.7932 *Dow/DuPont* (2017).

90 Ibid., para. 1957.

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VI. Merger control, industrial policy and competition policy: Political or technocratic balancing?

43. As previously discussed, the balancing of industrial policy benefits of the merger with its negative effects on consumer welfare raises similar issues to those raised by dealing with out-of-relevant market efficiencies, which under the current doctrine cannot outweigh the negative effects of a merger on the consumers of the relevant markets affected. Authorising or blocking the merger will produce distributional effects, to the extent that different categories of stakeholders will be affected in each case. Presently, these anticompetitive effects should be neutralised in the context of the specific relevant market. If the merger is authorised, despite its anticompetitive effects, for industrial policy reasons, it would eventually lead to higher prices for intermediary consumers, such as in a case like Alstom/Siemens railway operators, and depending on the possibilities of passing on, also indirect consumers, the final users of railway transport services. The industrial policy trade-off would put emphasis on the broader benefits that the authorisation of the merger would bring to the shareholders of the merging entities, and eventually to the European economy as a whole, should the merging entities invest in R&D and be active in Europe, thus maintaining employment. Such total welfare balancing analysis would be considerably difficult, if at all possible to be performed in practice, to the extent that only the interests of EU-based stakeholders should be taken into account, as only net European total welfare would count. For instance, assuming that some shareholders will be based outside Europe, and this is quite frequent in today's financialised economy where index funds and other institutional investors are present in various parts of the world, it would be quite complex, if not outright impossible, to distinguish between the beneficiaries of the policy of letting through a merger that would affect European consumers if it may, at the same time, enhance the international competitiveness of a Europe-based economic entity.

44. However, the Franco-German Manifesto may be understood as not being related to a more EU-centric trade-off assessment framework of the welfare effects of the merger, but to aim for some form of re-politicisation and re-nationalisation of EU merger control, to the extent that it is suggested that this assessment should be conducted by a political organ, probably at the level of the Council of the EU.[91] One may doubt on the capabilities of such a political organ to perform a detailed analysis of the possible social costs and benefits of the merger to the European economy and society, and it is unclear on what type of evidence this assessment would rely upon. As previously mentioned there are some examples of successful competition law regimes with an elaborate evidence-based analysis of a limited number of public interest concerns, such as economic and industrial development, South Africa constituting an example, although as I have explained international competitiveness considerations had little impact in practice. However, this assessment is not conducted by a political organ but by the competition authority, which balances these various concerns, the process being subject to judicial review. The aim is to preserve the rule of law, with organised procedures ensuring the participation of all interests affected, from the risk of arbitrary decision-making, as the operation of balancing is based on an adversarial process of collecting and comparing evidence of various impacts. In my view, such a balancing can only be performed by a technocratic institution on the basis of a technocratic evidence-based assessment. Such technocratic institution should be able to perform the complex distributional impact analysis that would be required in today's globalised economy. It will have to develop concepts and tools, for instance a value chain perspective, or agent-based modelling, as well as the computational capability, that would enable it to go beyond the effects of the merger on specific relevant markets and would also explore the inter-market and value-chain effects in the medium and long term. Of course, the computational costliness of such an approach would be considerable and should, at least as long as the computational technologies are underdeveloped, be performed for a very limited number of mergers that would be selected on the basis of strict criteria (e.g., growth potential and employment impact of the specific sector of economic activity). It is unlikely that the Council of the EU has the necessary capabilities to perform such a complex balancing analysis. The college of commissioners, which benefits from the important technocratic and analytical resources of the Commission, in particular various DGs, seems much better placed. Hence, I do not see any reason why we should move the centre of decision-making from the college of commissioners where it currently resides to the Council of the EU, for instance by introducing in the EUMR the possibility to justify an anticompetitive merger on the basis of industrial policy concerns.[92] This analysis would complement the competition assessment of the merger, both of them being publicly available (excluding confidential information), thus making the decision-making transparent and therefore subject to the scrutiny of the public. This will also enable some limited judicial review of the decisions for manifest error, taking

91 The proposal suggests a "right of appeal of the Council which could ultimately override Commission decisions" "subject to strict conditions."

92 Although Article 21(4) presently enables Member States to take into account some limited legitimate concerns, Member States can only invoke this provision to scrutinise the transaction and eventually prohibit the merger, rather than as a way to authorise a merger on public interest grounds.

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into account the complexity of the evidence relied upon and the weight provided to policy considerations.

45. However, this institutional proposal put forward by the Franco-German Manifesto can be explained by an implicit rejection of a balancing or trade-off evidence-based approach for one that would rely on the political collective "will" of the governments of the EU expressed through some form of qualified majority voting at the Council of the EU. Such an approach would not rely on a technocratic balancing but would prioritise industrial policy concerns in comparison to competition concerns on the basis of a political assessment performed by the Council. In my view, this is deeply unsatisfactory. First, it would open the door to the influence of private interests, the decision-making process being close to an EU political horse-trading we have witnessed on several occasions, with usually negative effects for the well-being of the Union. Second, this more political process would provide large Member States, which dispose of more votes at the Council, more influence in the final decision made, in comparison to the situation in which such decisions are made at the level of the college of commissioners. There is one commissioner per Member State and these should represent the EU collective interest, rather than the interests of the EU Member State that has appointed them. To the extent that the most important, in terms of number of votes at the Council, jurisdictions in the EU, Germany and France, are the first- and the second-largest economies of the EU, and where most of the largest corporations in Europe are based, the distributional impact of such an approach could be devastating for the smaller and poorer economies of the EU, in particular Southern and Eastern European Member States. The consumers based in these Member States would likely suffer from the anticompetitive practices and higher prices, without these negative welfare effects for these jurisdictions being outweighed by, for instance, higher corporate tax or shareholders' revenue income resulting from the increased international competitiveness of the European champions, as the shareholders of these European champions will likely be based in the richer EU Member States.[93] One may also expect that smaller and poorer Member States will not dispose of equal institutional resources and capabilities to proceed to a thorough analysis of the welfare effects of these mergers on their economy, in comparison to the larger and richer Member States, with the result that the decision-making process at the Council may be biased in favour of the latter.

46. It is theoretically possible that inter-EU wealth transfers may be organised in order to compensate the negative welfare effects for such jurisdictions, in the form of EU regional policy funds and other EU sponsored investments. However, although this may compensate some of the welfare effects, it cannot address the structural inequality in which these Member States will be placed at an almost permanent basis, to the extent that their economies will depend on continuous funds transfers or consumer credit from the richer industrialised Member States where these "European" champions will be situated.

47. In my view, a truly European industrial strategy should not aim to maintain the industrial States put in place by the EU Member States in the 19th and 20th centuries but to replace them with an EU-wide industrial and competition policy that takes advantage of the fourth industrial revolution in order to develop a more equitable industrial development across the Union. This should provide opportunities to start-ups and small and medium undertakings in poorer EU Member States, which are already confronted to challenging credit/investment and institutional environment conditions, to become more competitive at the international level. The solution to the European competitiveness problem does not come from enabling larger and richer EU Member States to more freely subsidise their national champions or to preserve them from competition with a lax merger policy, when this has negative effects on the consumers and the economies of other Member States. This does not mean that reforms should not be undertaken at the EU level. As I explained above, merger control needs to be less focused on the simple static economics of the relevant market and should embrace a more dynamic and complex economic perspective, taking into account learning effects, network effects, increasing returns to scale, path dependency, tipping and leveraging points that shape global competition between and within business ecosystems in the digital economy, while eventually integrating in the analysis out-of-market efficiencies and some industrial policy concerns.[94] These concerns should not only be narrowed down to international competitiveness but should also engage with other dimensions of the EU social market economy.[95] However, the institutional setting of the recent Franco-German Manifesto appears ill-suited for such an ambitious reform agenda. It focuses, excessively in my view, on the preservation of national industrial states rather than the establishment of a Europe-wide one. It also moves the centre of decision-making from the EU-minded and well-resourced—from a technocratic perspective—body of the college of commissioners to the more national politics-based and less well and more unequally resourced—from a technocratic perspective—body of the Council of the EU. Hence, the Memorandum may well ask the right questions but provides inadequate answers. ■

93 McDonnell and Farber note that powerful firms are not randomly distributed across Europe, and hence "producer surplus is likely to accrue primarily to the most powerful and wealthy EU members, increasing existing wealth disparities at the margins": B. McDonnell and D. A. Farber, Are Efficient Antitrust Rules Always Optimal?, Antitrust Bulletin 807 (Fall 2003): 825.

94 I. Lianos, Polycentric Competition Law, 71 *Current Legal Problems* 161 (2018).

95 Article 3(3) TEU provides that the Union shall establish an internal market with the goal of achieving "*a highly competitive social market economy*" aiming at full employment and social progress. Article 11 TFEU stipulates that "[e]*nvironmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities.*" Article 9 of the TFEU states that "[i]*n defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.*" To a certain extent these principles may provide broader guidance in the analysis performed, for instance, as to what would constitute a socially valuable direction for industrial competitiveness (e.g., Green New Deal).

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Challenges for EU merger control

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ABSTRACT

The proposal to relax EU merger control to allow for anti-competitive "European champions" may lead policy makers to update current merger control. While we see little merit in this specific proposal, we recommend a revision which goes into a different direction and that, in particular, addresses mergers of potential competitors and the burden of proof. Thus, our proposal aims at the EC addressing problems of under-enforcement and making better-informed decisions. However, we would find it sensible to introduce in the Merger Regulation a clause whereby in exceptional and well-defined cases a merger which would otherwise pass muster on competition grounds may be prohibited due to defence, strategic and security of supply considerations.

La proposition de l'UE de relâcher le contrôle des concentrations afin de permettre l'existence de "champions européens" anticoncurrentiels pourrait conduire les décideurs à actualiser le contrôle des concentrations actuellement en vigueur. Alors que nous voyons peu d'intérêt dans cette proposition spécifique, nous conseillons une révision orientée différemment qui, notamment, aborde les fusions de concurrents potentiels et la charge de la preuve. Notre proposition vise donc à aborder les problèmes relatifs à une mauvaise application des lois et à prendre des décisions plus avisées. Par ailleurs, il nous semble raisonnable d'introduire dans le Règlement sur les concentrations une clause selon laquelle, dans des cas exceptionnels et bien définis, une concentration qui autrement serait jugée acceptable, peut être interdite pour des raisons de défense, de stratégie et de sécurité des approvisionnements.

I. Introduction

1. Current EU merger control has been questioned by the German and French governments in the aftermath of the decision by the European Commission (henceforth, EC) to block the merger between Siemens and Alstom. Taking stock of established theory and recent empirical evidence, we also see the need to update European merger control regarding horizontal mergers. However, our suggestions go into different directions than the proposals by the French and German governments. While we see high degrees of concentration in some sectors[1] and identify the risk that certain types of anti-competitive mergers are not blocked under current practice, the adoption of the proposal by the French and German governments may lead to the approval of clearly anti-competitive mergers. Some proponents claim that conditions in some sectors require larger scale to be able to compete in international markets as a justification for weaker merger control. We argue that this claim has limited appeal. Rather, the support for anti-competitive "European champions" appears to be based on questionable industrial policy goals, putting at risk advances in European merger control over the last twenty years.

2. In this paper, we raise a number of concerns in EU merger control regarding horizontal mergers.[2] Our take on merger control is that there tends to be under-enforcement, as certain types of potentially anti-competitive mergers require closer scrutiny and the EC is in a disadvantaged position regarding the burden of proof. We point out that merger control should deal with the removal of potential competitors and that, to facilitate merger proceedings and allow for better-informed decisions, a reversal of the burden of proof is desirable. We also dispute the logic behind the proposal to relax merger control for large European firms.

II. Recent empirical evidence and well-established theory

3. According to the latest data made available by the EC,[3] out of the 3,457 mergers notified to it in the 2007–2017 period, only 8 of them have been prohibited. On average, the EC's intervention rate—that includes not only prohibitions, but also second phase withdrawals

1 Some empirical papers have found high and increasing concentration and rising market power in developed economies during the last decades. *See*, e.g., J. De Loecker, J. Eeckhout, and G. Unger, The Rise of Market Power and the Macroeconomic Implications, mimeo, November 2018. The existence and extent of such an increase is being actively debated, but several commentators have suggested that weak merger enforcement is one of the causes behind that increase.

2 Vertical mergers are not the focus of this paper, among other things because the effects of vertical mergers, traditionally seen as benign, are still the object of research and debate.

3 DG Competition Annual Activity Report, 2017.

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and mergers approved subject to remedies—has been around 7% (a similar percentage also applies to the period prior to 2007). These data signal that prohibitions are extremely rare events and that the EC believes that—if the merger is problematic—it can almost always fix it with appropriate remedies. Indeed, the EC has been resorting to increasingly sophisticated merger remedies over the years, with standard divestitures representing a minority of cases.[4] Being complex and untested, such remedies carry a considerable degree of uncertainty and therefore may not correct the anti-competitive effects of the merger, or only partially do so.[5]

4. A low intervention rate may be an indication of under-enforcement of merger control by the EC,[6] especially because theory tells us that horizontal mergers are anti-competitive unless they entail strong enough efficiency gains (and supposing that a large proportion of notified mergers contain horizontal elements). Admittedly, though, it would be desirable to have evidence that can speak more directly to the question of whether or not there is under-enforcement, and notably more *ex post* assessments of EU merger cases based on "difference-in-differences" methodology. For the US, the evidence collected so far does seem to point to under-enforcement.[7]

5. By using a different methodology—namely, event study techniques—Duso et al. (2013)[8] find that, after the 2003 reform, the EC has made errors of type II (unconditional clearance of anti-competitive mergers) for roughly two thirds of the cases, and errors of type I (intervention in pro-competitive mergers) for roughly one third of the cases,[9] which can be read as indication of some under-enforcement of merger policy in the EU.

6. If empirical evidence is only sketchy and suggestive, from the theoretical standpoint the effects of horizontal mergers on prices are well understood and not controversial: absent efficiency gains the merger between two firms lead them to "internalise" the harm that aggressive pricing imposes on each other, and hence gives them an incentive to increase prices. This in turn pushes competitors, whose residual demand increases, to also raise prices (although typically by a lower percentage). Since all prices increase, the merger will harm consumers.[10] It is also well-established that horizontal mergers can increase the risk of collusion.[11] Finally, absent efficiency gains, a merger is also likely to affect negatively investment and innovation, by the same mechanism which leads to price increases: the merging parties will "internalise" the harm that aggressive investment imposes on each other and, hence, gives them an incentive to reduce it.[12]

7. It is only if the merger entailed large enough efficiency gains that merging parties' prices may decrease after the merger, in turn leading to lower prices for outsiders and ultimately benefit consumers.[13] Note, however, that the higher the market power held by the insiders, the bigger must be the cost savings needed to outweigh the price effect.[14] Further, if a merger involves two companies holding important market positions, it is more likely—other things being equal—that such companies have already reached, or are close to, minimum efficient scale of their operations, which makes it more difficult that their merger would result in significant cost savings.

8. There are, of course, several considerations which may affect the magnitude of the upward pricing pressure created by the merger. These include the degree of concentration of the industry, lack of countervailing power of buyers, and the importance of barriers to entry.[15]

4 Over the period 2011–2017, standard divestitures represented 37% of the 116 merger remedies; complex divestitures including carve-outs, rebranding and IP divestitures account for 34% of cases; access remedies 16%; the remaining are other "non-divestiture" cases. *See* J. Brockhoff (2018), "The view from the Commission", Presentation at the EU Merger Control Conference, 24 May 2018.

5 For an analysis of the EC merger remedies in recent years, *see* G. Federico et al. (2015), Recent developments at DG Competition: 2014, *Review of Industrial Organization*, 47(4): 399–423.

6 An alternative interpretation might, of course, be that anti-competitive mergers are not even considered by the firms because they foresee that such mergers would be blocked. However, the observation there is a trend towards using sophisticated merger remedies raises doubt on the validity of such an interpretation.

7 *See*, e.g., J. E. Kwoka, Jr. (2013), Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes, *Antitrust Law Journal*, 78: 619–650, that collects "retrospective analyses" of 46 US mergers finding that the overall mean effect of these mergers—a significant part of them involving remedies—is to raise prices by about 7%.

8 T. Duso, K. Gugler, and F. Szücs (2013), An Empirical Assessment of the 2004 EU Merger Policy Reform, *Economic Journal*, 123(572): F596–F619.

9 *See* Duso et al. (2013), cited above, table on p. F609.

10 At first look less clear-cut, if firms primarily compete through capacities or quantities, absent efficiency gains, the merger between two firms lead them to "internalise" the harm that large installed capacity imposes on each other and, hence, gives them an incentive to cut capacity, which is anti-competitive. As a countervailing effect, competitors expand their capacity. However, this does not fully compensate for the lower capacity of the merged firms.

11 In this paper, we focus on unilateral effects and do not address coordinated effects. We note, however, that since the *Airtours* judgment, the EC has raised coordinated effects concerns very rarely, in cases where documentary evidence showed past (attempted or successful) episodes of collusion. This is another likely source of under-enforcement in our view.

12 *See* M. Motta and E. Tarantino, The Effect of Horizontal Mergers, When Firms Compete in Prices and Investments, CRC TR 224 Discussion Paper 056/2018, November 2018.

13 Similarly, only large enough efficiency gains entail the merging partners to expand their production after the merger.

14 If insiders have a tiny market share, their merger will likely affect prices only marginally, and consequently very small efficiency gains would neutralise the anti-competitive impact of the transaction; at the other extreme, a merger to monopoly would have a strong impact on prices; hence, very large efficiency gains would be needed to make the merger competitive-neutral.

15 Antitrust authorities may be too optimistic about entry being able to discipline incumbents after a merger. Often, imports or entry that should have prevented price increases do not materialise. For examples, *see* the report commissioned by the UK Competition and Markets Authority, Entry and expansion in UK merger cases. An ex-post evaluation, KPMG LLP, April 2017 (available at: https://www.gov.uk/government/publications/evaluation-of-entry-and-expansion-in-uk-merger-cases).

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III. Whose burden of proof?

9. These well-established theoretical results call for a policy approach whereby the approval of horizontal mergers should not be the default option. Currently, it is the antitrust authorities (AAs) which have the burden of proving that a merger is anti-competitive. Instead, it would be more in line with economic thinking if the burden of proof was on the merging parties, which should demonstrate that they will achieve sufficient efficiency gains to compensate the upward pricing pressure created by the internalisation effect of the merger (or that barriers to entry are so low, or countervailing power so strong, that it is unlikely the merger would raise prices).

10. The current situation where the burden of proof that the merger is anti-competitive falls upon AAs also has the drawback that in order to substantiate a theory of harm the AA needs data and information which the merged entity possesses. This may result in situations where the merging parties withhold information, or they transmit it partially and with delay.[16] Reversing the burden of proof would alleviate this asymmetric information problem, since the agent who possesses the information will have all the incentive to make use of it.

IV. Safe harbour

11. Sure enough, this policy rule could be accompanied with a safe harbour approach: if both parties are small enough in terms of sales and assets, their merger is unlikely to raise prices by a significant amount (and even small efficiency gains may render it competitive-neutral). It would make sense, then, to allow such a merger without scrutiny in order to save resources of both the firms involved (which would otherwise have to prove efficiency gains) and of the AAs (which would have to check them).

12. An approach whereby the safe harbour is based on small market overlaps—and whereby for instance a leading firm could take over a small one because the latter would not add much to the former market share—would not be desirable because, absent the merger, the insiders might well compete with each other more fiercely than indicated by current market positions. In what follows, we consider examples of cases where a merger may be anti-competitive despite current market share overlap being absent or minimal. This suggests that on top of structural presumptions based on market shares, additional concerns may need to be addressed.

16 This is notwithstanding the obligation of merging parties to provide accurate and non-misleading information (Article 14 of the Merger Regulation).

1. Potential competition

13. Two merging firms may operate in adjacent (geographic or product) markets, but may contemplate entering each other's market, and the right counterfactual to the merger would therefore be effective competition among them.[17]

14. Possible examples of mergers removing potential competitors come from the digital sector. In recent years, Amazon, Apple, Google, and Facebook have been taking over dozens of small technology firms which have not marketed their products yet or were at an initial phase of roll-out.[18] When one of these giants takes over a small start-up with a very promising technology, which may develop into a substitutable product/technology, there may be a possible pro-competitive effect from this transaction: it is possible that, say, Google may further develop the search technology of a start-up, using its financial, technological and marketing clout, and incorporate it into its own search engine, whereas the start-up may have never been able to hit the market. However, it is also possible that the start-up may have further developed the technology and become a competitive threat to Google. Note that the pro-competitive effect (a marginal improvement in Google search engine) would likely be quite small when compared with the expected gain if the new technology had grown to challenge Google search (that, however, is a low probability event, but one with a huge benefit for the market).[19]

15. Furthermore, after the takeover the acquiring firm may simply decide not to develop the technology at all, resulting in a "killer acquisition"—namely, an acquisition motivated by the objective to extinguish a technology which would otherwise create future competition and dissipate industry profits. Cunningham et al. (2018) have gathered empirical evidence that documents the widespread existence of "killer acquisitions" in the pharmaceutical industry.[20]

17 Unfortunately, it is very difficult for AAs to find internal evidence showing market entry intentions. If some key assets (e.g., intellectual property, market data) are proprietary, difficult to replicate, and valuable in a particular market and possessed by a firm in an adjacent market, this may be an indication that market entry is likely by this firm.

18 To be able to investigate such cases at the EU level (without relying on referrals from national authorities), a reform of the notification thresholds is needed that would allow to investigate mergers involving firms with low or nil turnover but large market capitalisation.

19 We are not suggesting that a small innovative company may not be taken over by any bigger company. The prospect of being bought by a more established firm is often an important driver of innovation. But a takeover by a large company which is the most likely to be impacted by the small firm's new technology—should it be successful and reach the market—should be avoided. (Note that it is likely that the firm that stands to lose more from the new technology will be prepared to bid more for it. If it were a monopolist, for instance, it would be the highest bidder as long as the monopolistic profits are higher than the sum of the duopoly profits. *See also* the remarks on "killer acquisitions" below.)

20 *See* C. Cunningham, F. Ederer, and S. Ma, Killer Acquisitions, Yale School of Management WP, 2018. By looking at the evolution of project development of thousands of drugs (their data cover about 25 years), they show that acquired drug projects are significantly more likely to be discontinued than those which have not been acquired. Likewise, a drug is significantly less likely to be continued in the development process in each year if it has been acquired.

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2. Potential entry via innovation

16. An insider is not active in the other merging party's product market yet, but it is likely to be in the close future if the innovation (or investment) is currently making it successful. Several mergers in the pharmaceutical industry share this feature.[21] For instance, in *Novartis/GSK oncology*, *Pfizer/Hospira* and *Medtronics/Covidien*, the EC found the merger would have suppressed drugs (or medical devices) which could have been approved. In each of these cases, one of the merging parties had already a drug in one (or more) particular market (s), while the other was in the process of passing the clinical trials.

17. More generally, in sectors such as pharmaceuticals (see above) and agrochemicals (see the recent *Dow/Dupont, Bayer/Monsanto,* and *Syngenta/ChemChina* mergers) firms heavily invest in R&D in a number of product categories. In some of them they may be successful today, in others tomorrow. So, the fact that they are currently not actively marketing one product (or one drug) does not mean that they will not be able to do so tomorrow.

3. Recent entry

18. Another instance where small market shares may not reflect the actual competitive constraints relates to cases where one of the insiders is a recent entrant in the market. Other things being equal, a firm with lower market share has more incentive to price aggressively: if the opportunities for price discrimination are limited, a marginal price decrease by a firm with large market size will determine a loss on the many infra-marginal units for any given extra unit sold, resulting in higher incentives to keep prices high; for a firm with small market size, the loss on only few infra-marginal units, giving it more incentive to behave aggressively.[22]

19. More generally, whenever one of the insiders is a recent entrant, looking at current market shares may underestimate the competitive constraint represented by it, since a firm with a small market share may impose an important competitive constraint on the other firms prior to the merger. In this case, using the standard market share filter may lead to type-II errors.

21 But examples go beyond the pharma industry. In *General Electric/Alstom* (General Electric/Alstom (thermal power – renewable power & grid business), Case M.7278, 8 September 2015), Alstom was active in the segment of large gas turbines, but not in the segment of very large gas turbines. However, the EC found that Alstom was at a very advanced stage with the development of a very large gas turbine (the so-called "GT36") and, therefore, looking forward, a likely competitor in the market.

22 The mobile telephony industry in Europe is a good example of these different incentives. Typically, switching costs push the companies with more established customer base to keep their prices higher than the recent entrants. This is often reflected in the market share of subscribers (a "stock" measure) differing significantly from the market share of "gross adds" (which reflects the "flows," since it considers the new subscribers).

V. Reforming merger control

20. As discussed so far, there are signals that merger control is currently under-enforced in the EU. However, as argued above, this does not mean that every merger should be prohibited. It is sensible to use a safe harbour approach whereby mergers of two companies both having small enough size should be allowed without any investigation. Since horizontal mergers involving at least on "large" firm may well be anti-competitive, everything else given, such mergers should not fall under the safe harbour. This includes situations in which the merging parties are deemed to be potential competitors.

21. The current situation where it is the AA which has to show that the merger is anti-competitive also requires the AA to rely on data and information which the merging parties possess and may not fully and promptly disclose. Allocating the burden of proof on the merging parties to show the merger is not anti-competitive would give them the incentive to make use of all the information they have.

22. This suggests that the policy approach should be different from the current one: Unless the merger falls within the safe harbour thresholds, the burden of proof should fall upon the merging parties to make their case that the merger is unlikely to raise prices or reduce quality.

23. Note that this proposal shares some similarities with the current US approach, which establishes a rebuttable presumption that the merger is unlawful if it goes beyond a certain level and increase in concentration indices.[23] The difference, however, resides in the fact that requiring a material change in concentration to trigger the presumption would not allow to deal with cases of potential competition or entry via innovation (see the above discussion). As such, our proposal is therefore closer to a recent law proposal by US Senator Amy Klobuchar whereby a merger is presumptively unlawful if merging parties' size (measured by assets, sales or market capitalisation) is above certain thresholds.[24]

24. We are well aware that the proposal of reversing the burden of proof (or establishing a presumption of illegality beyond certain thresholds) would need a change in policy, but we believe that this would be well worth the effort of reforming the Merger Regulation (Council Regulation (EC) No. 139/2004).[25]

23 *See* U.S. Horizontal Merger Guidelines, e.g., at p. 19. *See also* H. Hovenkamp and C. Shapiro (2018), Horizontal Mergers, Market Structure, and Burdens of Proof, *Yale Law Journal* 127(7): 1996–2025, for a recent discussion.

24 https://www.congress.gov/bill/115th-congress/senate-bill/1812 and www.congress.gov/bill/116th-congress/senate-bill/307/text.

25 There are other changes in the merger regulation that are worth considering, including introducing provisions to deal with minority shareholding (related to the issue of common- and cross-ownerships, which has raised a lot of interest recently), as has been proposed in the EC White Paper, Towards more effective EU merger control, COM(2014) 449 final, July 9, 2014. For another change, see Footnote 18 above.

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VI. Questioning merger control after *Siemens/Alstom* and the creation of "European champions"*

25. On February 6, 2019, the European Commission prohibited the merger between Siemens and Alstom, the leading European equipment providers in the rail industry (e.g., trains and signalling equipment). The German and French governments had lobbied for the merger (arguing it was necessary to create a European champion able to stand up to the powerful China's CRRC), and—after the prohibition decision—they have openly criticised the European Commission for it.

26. In the aftermath, calls to reform merger control have come from the French and German governments. In their joint manifesto,[26] they suggest updating "*current merger guidelines to take greater account of competition at the global level, potential future competition and the time frame when it comes to looking ahead to the development of competition to give the European Commission more flexibility when assessing relevant markets*." This is made more explicit by the report Nationale Industriestrategie 2030, released by the German Federal Ministry of Economic Affairs and Energy in which it calls for a rewriting of merger control and additional industrial policy measures aimed at making some large European companies even larger and more profitable. This campaign runs under the buzzword "European champion" and comes with the claim that approving anti-competitive mergers is in the public interest: "*Often German or European mergers, which are meaningful and necessary in view of the world market, fail because of the focus on national and regional markets under current law. European and German competition law must be reviewed and, if necessary, amended so that German and European companies can compete at international level on an equal footing*."[27]

27. There is nothing in European merger control that prevents the creation of European (or, for that matter, national) champions, provided that the merger brings about sufficiently strong synergies and complementarities to merit the name "champion." But in the *Siemens/Alstom* case, there is no public information that points to such synergies, and the European Commission stated that the parties have not substantiated any such efficiency claims.

28. Absent efficiencies from the merger, the elimination of competition between two firms has likely anti-competitive effects both in the short and in the long term. In the short term, because it would inevitably lead to higher prices and less choice for direct customers and ultimately final consumers; in the long term, because lower competitive pressure is likely to translate into lower incentives to innovate, invest, improve product offerings. Therefore, in cases like *Siemens/Alstom* where the merger does not entail efficiency gains, it is hard to see how it could have promoted a more competitive "European champion," whereas it is straightforward to see it would have harmed customers (which, unsurprisingly, strongly opposed to the merger).

29. Based on the findings of the European Commission, the Siemens-Alstom merger appears to be a clear-cut case of a merger that hurts final consumers in Europe. However, both firms also compete in international markets and the claim has been made that a merged company would be more competitive in those markets.

30. The only case where European merger control may conceivably be in contrast with the objective of creating a European champion who is more successful in international markets could be one where the merger entails some efficiency gains—thereby making the merged entity more competitive in world markets—but not sufficiently strong to outweigh harm for European consumers. In other words, due to the merger, prices of the products of the merged entity would increase in Europe, whereas more units would be sold in international markets (with positive effects on European profits and, possibly, employment).

31. It would be important to clarify in the policy debate that we are only concerned about such cases.[28] However, we fear that under the cover of enabling the forming of anti-competitive "European champions," short-term political goals that enjoy quick popular support would guide decision-making. Further, under European competition law, firms could also pursue less anti-competitive avenues to obtain efficiency gains without impacting negatively upon European consumers. For instance, European firms

* This section is taken largely verbatim from M. Motta and M. Peitz, Competition policy and European firms' competitiveness, February 20, 2019, Blog entry on Voxeu, https://voxeu.org/content/competition-policy-and-european-firms-competitiveness.

26 A Franco-German Manifesto for a European industrial policy fit for the 21st Century. *See* https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.html, last checked March 13, 2019.

27 German Federal Ministry of Economic Affairs and Energy, Nationale Industriestrategie 2030, February 2019, p. 12. In the original German version it says: "*Oft scheitern deutsche oder europäische Fusionen, die mit Blick auf den Weltmarkt sinnvoll und notwendig sind, an der Fokussierung auf nationale und regionale Märkte im geltenden Recht. Das europäische und deutsche Wettbewerbsrecht müssen überprüft und gegebenenfalls geändert werden, damit für deutsche und europäische Unternehmen ein internationaler Wettbewerb „auf Augenhöhe" möglich bleibt.*" *See* https://www.bmwi.de/Redaktion/DE/Downloads/M-O/nationale-industriestrategie.html, last checked March 13, 2019.

28 Based on the findings of the European Commission, *Siemens/Alstom* could definitely have not been one such case.

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may form a joint venture (or other agreement) allowing them to coordinate foreign production and sales, thereby attaining most of the efficiency gains that the merger could have achieved. Provided that the joint venture does not have an impact on the European market, it would be approved by the European Commission.[29]

32. Public policy considerations other than economic efficiency may be present in any competition law, and the EU is no exception.[30] The Merger Regulation itself (at Article 21) allows EU countries to invoke some specific policy considerations (public security, plurality of the media and prudential rules) in merger control. This would allow them to block mergers that the EC would otherwise allow.

33. We might also think of other situations where policy relying uniquely on efficiency criteria may lead to undesirable outcomes, such as cases affecting security of supply, or military, or otherwise strategic considerations: it might well be the right thing to do, in some situations, to prohibit particular non-European firms from taking over a European firm operating in the energy, defence, or other strategic sectors. However, these are reasons to prohibit mergers that may not be anti-competitive. We would find it much harder to make the opposite case, that is, to allow anti-competitive European mergers because of these policy goals.

34. Beyond mergers, competition policy may lack the possibility to intervene (or to intervene in a timely fashion) against unfair practices by non-EU firms. Suppose for instance that a non-EU firm (possibly, a state-controlled enterprise) is engaging in below-cost pricing in some EU market. If that firm is not dominant, abuse of dominance provisions (Article 102 of the Treaty) may not allow the European Commission to intervene. If it were dominant, the European Commission could intervene, but for various reasons it may take too long before the case is decided, and a long-lasting damage may have occurred if that practice has led to the exit or to underinvestment by affected European firms.

35. Competition rules may not be enough to deal with such cases, then. In some markets, this may leave us with either some preventive intervention, such as excluding from tenders non-EU firms suspected to engage in such behaviour, or to resort to anti-dumping provisions. But facilitating the use of such instruments carries the risk that they are used for protectionist aims rather than for dealing with unfair practices by non-EU countries. With a public policy intervention in place that eliminates non-EU competitors, strong competition among European firms becomes essential to avoid harm to European consumers and European competitiveness. Otherwise, firms operating in European markets would be insulated from competitive pressure, leading to higher prices in the short term and likely less innovation in the long term.

36. To sum up, there may well exist instances where public policy considerations beyond competition considerations could play a role in competition enforcement in general and in merger control in particular, but they should be exceptional, very precisely defined, and taken from a precise set of rules. Above all, they should obey to the principle of proportionality: namely, they should achieve the stated objectives and should not go beyond what is necessary to attain them. Allowing anti-competitive mergers is unlikely to pass the test. ■

29 Article 2.2 of the Merger Regulation says: "A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market." Moreover, the Commission Notice of 5 December 2013 on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No. 139/2004 explicitly states that a JV which will have no effects within the EU will be subject to the simplified procedures, as it is not likely to raise competition concerns.

30 After all, one of the pillars of the EU Treaty is the objective of "economic integration," which has been interpreted by the EU courts in such a way as to prevent firms from applying different trade conditions in different EU countries. The prohibition of price discrimination across countries would not otherwise be prohibited on standard competition policy or efficiency grounds.

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Scattered thoughts on “European” antitrust and its implications

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ABSTRACT

This article first comments on the prospective setting up of some form of political control on the European merger clearance process, as recently advocated by the French and German governments. The author is highly skeptical of the concept of industrial policy, as governments have traditionally not been very good at picking winners. He focuses on what he believes are the real shortcomings of the EU economy, i.e., the absence of an actual single market and the lack of a serious plan of investments in, e.g., infrastructure, education and basic research. Finally, the issue of future EU antitrust is tackled: Western economies suffer from growing inequality, which can at least in part be kept in check by effective antitrust enforcement, the relevant benefits being not limited to the economic dimension.

Cet article commente d’abord la mise en place éventuelle d’une forme de contrôle politique dans le processus d’autorisation de concentration en Europe, comme elle a été soutenue récemment par les gouvernements français et allemand. L’auteur est très sceptique quant au concept de politique industrielle, car les gouvernements n’ont pas été traditionnellement bons dans le choix des gagnants. Il met l’accent sur ce qu’il estime être les vraies défaillances économiques de l’UE, à savoir l’absence d’un vrai marché unique et l’insuffisance d’un plan d’investissements sérieux dans le domaine, par exemple, des infrastructures, de l’éducation et de la recherche de base. Enfin, il traite le problème du futur antitrust de l’UE : en occident les économies souffrent d’une inégalité croissante, qui pourrait être au moins partiellement tenue sous contrôle par une application effective des mesures antitrust, étant donné que les avantages ne sont pas limités à la dimension économique.

So, in essence, the governments of France and Germany believe that European merger control stands in the way of industrial policy: that it should be subject to the ultimate political intervention of the Council, in a way similar to what provided for in several Member States.[1] I disagree.

1. Let us start by saying that the political dimension is not at all unknown to EU competition law enforcement. The Commission is a political body of political appointees resorting from the Member States. Its decisions are the result of such framework, and the outcome of a complex political process based, in the end, on an elaborate sitting chart.

Besides, Brussels’s worst-kept secret is that, within DG COMP as well as in the whole of the Commission’s bureaucracy, national affiliations matter, and an elaborate code exists of which official resorting from which Member State occupies and should occupy which position within the institution, with particular regard to the most sensitive ones.[2] What would US citizens think if posts on the DOJ or FTC’s chart were attributed on the basis of the official in question being from, say, New York State or Arizona?

As a matter of fact, as recently as in the late nineties the German government heavily criticized European competition law enforcement for exactly the opposite reason, i.e., because of its lack of political independence, and advocated the setting up of a fully independent body which, with some nuances, would reproduce the situation existing in most Member States. Only as a compensation to such loss of political accountability, it is interesting to note, was at the same time suggested that an authorization mechanism, similar to the one existing in Germany and other Member States, should be set up at the Council level. And, in fact, criticism of such proposal pointed precisely to the fact that a Council authorization would rather increase than diminish political control of competition law enforcement, particularly in the area of merger control.[3] So, what was originally proposed as a compensation for the de-politicization of the

1 Bundesministerium für Wirtschaft und Energie, Ministère de l’Économie et des Finances, A Franco-German Manifesto for a European industrial policy fit for the 21st Century, https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf?__blob=publicationFile&v=2.

2 For a review, *see*, Bruegel, Measuring Political Muscle in European Union Institutions, http://bruegel.org/2015/04/measuring-political-muscle-in-european-union-institutions.

3 *See*, Statement of the German Federal Government on the Federal Cartel Office’s Reports for 1989-90, Bundestagsdrucksache 12/847, June 26, 1991; Statement of the German Federal Government, in 9 Hauptgutachten der Monopolkommission 1990/91, Bundestagsdrucksache 12/5249, June 24, 1993; Statement of the German Federal Government on the Federal Cartel Office’s Reports for 1990-91, Bundestagsdrucksache 12/5200, June 24, 1993. All cited by F. Montag, The Case for Reform of Regulation 17/62: Problems and Possible Solutions from a Practitioner’s point of view, *International Antitrust Law & Policy*, Fordham Corporate Law Institute (Barry Hawk, ed.), 1998, note 79.

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Commission, is now ventilated as a remedy to actually further accentuate such characteristic.

In any event, European competition law is sufficiently elastic to allow for some sort of political intervention in its enforcement: from Article 101(3) itself, and its consumer-oriented considerations, to such case law as provides for, essentially, specific exemptions when, e.g., trade unions[4] or professional associations[5] or resolutions of public bodies[6] are involved.

2. Also, while the documents and utterances in question make large use of the expression "European Industrial Policy," it is not clear whether this, in the mind of its creators, really should be taken literally or it rather means Franco-German control and Franco-German industrial policy. It is a fact that this unprecedented, aggressive stance originates from one of the rare occasions where the European Commission dared to get in the way of Franco-German industrial policy. As the Italian prime minister recently observed (for all the wrong reasons), it is unlikely that the same pressing calls for reform will ensue in case the Commission should take a negative position vis-à-vis the Fincantieri-CdA merger, a transaction backed by the Italian government but facing the deep skepticism of the French one. This is, of course, not only the question—though the question exists—whether it may make sense that competition law should be subject to the exercise of a sort of French and German veto power, made considerably easier by the untimely abandonment of the EU stage by the United Kingdom. It also extends to the broader issue of whether an overarching "European" political and economic interest, as such, exists at all.

3. The trouble with industrial policy is that, while it is splendid when it does works out, it in fact often fails spectacularly as, in essence, it is highly difficult to predict market outcomes. And even so, governments have traditionally not been very good at picking winners. For centuries, France and England have been crossing swords (at times literally) on a worldwide scale in their empire-building exercise waging, in so doing, two opposite models of economic growth: French Colbertism vis-à-vis some kind of pragmatic English free trade concept. A system where armies were hired by merchant companies and the state only very reluctantly followed if it really had to. We all know how it went, from St. Louis, Missouri, to Pondicherry.

In spite of its resistible success, French Colbertism essentially never died: the state, in some form, is everywhere in the economy, particularly where it counts. However, Polytechnique educated mandarins have for generations showed limited prowess in foretelling or dictating market outcomes. And this is France. Italy, to name one country where Colbertism has traditionally fared highly though not always led by the best-educated and most enlightened minds, has a legislation which, perhaps wisely, provides for a system of merger authorization so complex that it was actually never used. Once, when the Italian government really wanted a merger to pass, it had to adopt an ad hoc legislation, essentially freeing that specific merger from any competition law enforcement. And so did the merger-to-monopoly pass, the European Commission conveniently turning a blind eye on it. And so was the Italian flag carrier's lifeline extended for a few more years, at the taxpayers' expense. A situation which, not surprisingly, several years down the road, has worsened rather than improved. Colbertism needs a ruling class which can perform it. Which is easier said than done. Not to mention that, in the end, it does not work anyway.

The two angry ministers predictably brag about the Airbus case.[7] But entering a monopolistic industry characterized by spectacular sunk costs and on the basis of huge investments, where the shareholders of the new firm control a fair portion of the aggregate market demand, may not be a model applicable to every other circumstance. Also, the proponents themselves admit that several other interventions did not fare equally well.[8] Be it as it may, it is interesting that in this peroration for "European" champions, express mention is made of "*Apple, Amazon, Google, Microsoft and General Electric*," as examples of what this European Industrial Policy should produce.[9] Now these, with one possible exception, are situations which one would have wished to develop in Europe, and actually never did. Not by a large margin. And specimen of "garage" startups, progeny of a cluster of visionaries. All born and grown very far away from any government or state intervention: in a word, something which no industrial policy could ever produce.

4. One document at least expressly mentions China as the reason for setting up a political ultimate recourse in matters of merger control: this is not unique to Europe, as industrial policy concerns are being raised in the US as well, in response to a supposedly formidable Chinese model[10] And the Chinese high-speed train company CRRC is always there as the reason to allow the Siemens/Alstom merger.[11] Now, on the success of Chinese state planning, the jury is still out.[12] The main thrust of China's spectacular growth is represented, by all accounts, by

4 Judgment of the Court of 21 September 1999, C-67/96, *Albany* International BV v. Stichting Bedrijfspensioenfonds Textielindustrie.

5 Judgment of the Court of 19 February 2002, C-309/99, J. C. J. *Wouters*, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van Advocaten.

6 Judgment of the Court of 17 November 1993, C-185/91, Bundesanstalt für den Güterfernverkehr v. Gebrüder *Reiff* GmbH & Co. KG.

7 Nationale Industriestrategie 2030, Strategische Leitlinien für eine deutsche und europäische Industriepolitik, https://www.bmwi.de/Redaktion/DE/Publikationen/Industrie/nationale-industriestrategie-2030.html.

8 As admitted by Mr. Altmaier himself in his Nationale Industriestrategie 2030, *supra* note 7.

9 Nationale Industriestrategie 2030, *supra* note 7.

10 V. de Rugy, Why Are Republicans Embracing Economic State Planning?, https://www.nytimes.com/2019/03/05/opinion/china-marco-rubio-republicans-industrial-policy-.html?rref=collection% 2Ftimestopic%2FChina&action=click&contentCollection=world&region=stream&module=stream_unit&version=latest&contentPlacement=3&pgtype=collection.

11 Nationale Industriestrategie 2030, *supra* note 7.

12 *See*, e.g., G. Wang and J. Marcus-Delgado, Movers and Shakers of China's economy, https://archive.nytimes.com/www.nytimes.com/ref/college/coll-china-business.html.

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private initiative, the success of the state-controlled and state-planned part of the economy being more nuanced. In any event, a single market of 1,4 billion uniquely resourceful and incredibly hard-working people is definitely a good place to start, and one that reminds us of the huge difference, as we will consider, from the European situation. **5.** Speaking of China, mention should be made here of the recent "European Renaissance" manifesto of French President Emmanuel Macron.[13] M. Macron takes a position which I find actually hard to reconcile with the one sponsored by his own minister of the economy. While M. Le Maire, as said, finds in industrial policy and ultimate political control of competition law the panacea for Europe's ailing state, M. Macron takes a whole different attitude and, wanting to re-establish a "*juste concurrence*," sends a message that Europe should demand without hesitation that her trade partners play by the rules, such as in the matters of environment, data protection and tax compliance. It also invokes, more controversially, a "*European preference*" in public tenders. He never, however, even while raising the specter of a reform of "*our competition policy*," panders to the idea of political control of competition law. In so far as what he stands for is, essentially, a true and strictly enforced level playing field, it is hard either to object to it or to see any connections with the ideas vented by his minister.

6. The recurring references to the US (and, though perhaps less convincingly, China), actually lead us to focus on what really may be keeping Europe from becoming truly competitive with those light-bearing, permanently growing economies: a single market worth its name, a common infrastructure, both physical and otherwise, a joint effort in common goods such as education, basic R&D and defense.

Having said that, as a matter of fact, European countries still devote a tiny fraction of their budget (i.e., not over 1% of their aggregate GDP[14]) to the EU pool, a few items for reform—both more sensible and enormously more relevant than the setting up of a political control on mergers—come immediately to mind:

(a) The Single Market, announced and pursued with great fanfare in the early nineties, has stopped very short of its envisioned completion. Traveling from my Milan place to my apartment in Berlin, I have at first the fairly limited option of choosing between a German and an Italian airline, and will then invariably sit in German-made taxis or buses, draw money from a German bank account, watch German television, thanks to a Wi-Fi connection provided by a German telecoms company, in a house covered by German insurance. Even my fancy Italian kitchenware is distributed by a purely German company. Should I be looking for something to be quickly delivered to my door, I will probably find it on Amazon.de.[15] And, when the need arises, German doctors, German lawyers, and German architects are about my only option.

Now, to every European reader this sounds perfectly normal, sixty-something years from the creation of the "Common Market." But, in fact, it is not. We may wait for long for a European Bill Gates or Jeff Bezos, if he or she will have to become one in 27-odd states. The fact itself that we should have so many national Facebooks, Googles or Microsofts, and not just one sitting in Brussels or Frankfurt, is a good indication that, even from the outside, a single European market, de facto, does not exist. And this is the private economy: no need to extend the example to public tenders and government contracts.

(b) The spillover of education, particularly higher education, on the economy is a complex, controversial, strategic, and under-researched issue. In the US there are voices considering elite schools both overpriced and underperforming as a matter of fact.[16] Be it as it may, education is a likely candidate for state intervention: while the Erasmus program has been a hugely successful exercise on many levels, the purely academic one is not one of them. There is no real European market for education. Whenever European youngsters are really serious about top-notch education, they go and study elsewhere, opting for an ex-EU country or, the more daring ones, fly directly to the US. If this is not bad enough, even within Europe, students still learn a different history, a different philosophy, and different programs taught in completely different ways, from country to country. Elite schools, where they exist, select different ruling classes based on different values, with a view, with minor attenuations, to feeding national careers. The national academic environments themselves are most impenetrable, with an ease of entry into each one of them often very limited, perhaps in line with their underwhelming force of attraction.

(c) R&D is another obvious example. Critics often mention that the "free market" concept ostensibly governing the US economy is actually vastly attenuated by the pervasive federal and state interventions and subsidization in defense, intelligence, basic research of all kinds. Well, even assuming this is true—and, in any event, not greatly exaggerated—one wonders: what is wrong with Europe herself setting up a joint defense, joint intelligence, and joint basic research, and reap the relevant spillover effects? Except that this is not or only very timidly contemplated by any current national agenda.[17]

(d) Infrastructure, health, financial markets and professional services also come to mind as areas where public intervention may have a role and help in the creation of

13 https://dpt.en-marche.fr/drome-26/actualites/pour-une-renaissance-europeenne.

14 N.-J. Brehon, European Union Budget: which possible compromise is there between France and Germany?, Fondation Robert Schuman, *European Issue* No. 476. 12 June 2018.

15 The power supplier is Swedish, I admit.

16 Just one well-known example being: W. J. Bennett and D. Wilezol, Is College Worth It? A Former United States Secretary of Education and a Liberal Arts Graduate Expose the Broken Promise of Higher Education, Thomas Nelson, 2013.

17 Defense is expressly mentioned as one favorite area of European intervention in the "Manifesto" published by M. Macron, *supra* note 13.

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a European economy, which would not only be limited to episodic inroads.

Creating European champions, not to mention Franco-German ones, sounds like a pretty poor idea. If we are serious about competing with the US and China, we can do it by strengthening, rather than loosening, the bonds among Member States. Creating a level playing field and demanding that our trading partners play by the rules is essential. But agitating the Chinese scare, and protecting our markets from (often fictitious) unbeatable foreign competition, anesthetizing rather than buoying competition in Europe, is not going to do the trick, not by a long shot.

7. I have been asked by the editor to state what in my view should be the agenda for competition law enforcement in the new Commission's coming five years. I have tried and described elsewhere and more extensively than I could possibly do here, what I learned so far about antitrust goals.[18]

Let us say here that, as both a social and an economic phenomenon, today's single most acute economic and social problem may be represented by inequality and its unchecked progress.

Inequality may be the effect of globalization; of network effects; of too lenient a tax treatment in many areas and by many countries; of a dubious system of political funding; of the trade unions' loss of momentum; and of some more.

Coming closer to our turf, however, inequality is connected to rising concentration, which can generate market power and higher margins for fewer stakeholders. In addition, concentration may slow productivity, innovation and, in the end, growth.[19] Now, concentration is, of course, a significant parameter of antitrust enforcement.

Inequality breeds frustration. Frustration breeds discontent. Discontent breeds anger and resentment. And resentment is a very dangerous state of mind for democracies, particularly when it extends to large parts of the community, as it does now.

Collective moods swing in cycles. *Philadelphia Bank*[20] did reach an excess in antitrust enforcement, based on dubious economic expertise. But in the last decades, the pendulum of antitrust enforcement has swung in the opposite direction, leading it sometimes almost to a stall. A trend based often more on a priori, ideological assumptions, than empirical evidence. Ignoring the complications which economic research has been singling out through the years.

As a reaction to both this dismal record and staggering inequality, we may be entering the era of populist antitrust. Populism is not necessarily a bad thing: Theodore Roosevelt was a populist. But so was Benito Mussolini. Antitrust will not solve the problem on its own, and it obviously is not the only nor necessarily the most effective means to stimulate equality, innovation and growth. It is also a sharp lancet, which needs to be handled based on shared protocols if serious harm is to be avoided. But it is one possible means to control the problem, and not the most ineffective. Furthermore, it signals that the problem is being dealt with. Which, in times of anger and resentment, is an important element, and may protect us from more unbalanced, more politically motivated future interventions.

Effective antitrust enforcement, in a word, along further benefits, may help protect our democracies. Assuming, as I assume, it's not too late. ■

18 C. Osti, Antitrust: a Heimlich Manoeuvre, *European Competition Journal*, 2015, pp. 221–264.

19 You will have to take my word for this, for the moment. But economists have been investigating this and their work products are becoming common knowledge. I know some very respected economists who, with references, convinced me that this is the case. It is also before our eyes, which helps.

20 United States v. Philadelphia National Bank, 374 U.S. 321 (1963).

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One step forward or two steps back?

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ABSTRACT

Industrial policy considerations may easily be in conflict with the objectives enforced by the existing European merger control system. Therefore, the introduction of any of these considerations into the assessment parameters in respect of concentrations risks the emergence of a conflict of interests. Even if these potentially conflicting considerations can be reconciled, their simultaneous application may affect the predictability of the decisional practice. Similarly, a cautious approach to any revision of the existing state-aid rules is recommended. Changes in the rules to allow the development of innovative European industrial capacity imply the loosening of state subsidies. Nevertheless, loose rules of state aids outside of the European Union are often criticized by the European stakeholders as practices unfairly distorting the free trade.

Les considérations de politique industrielle peuvent être facilement en conflit avec les objectifs imposés par le système de contrôle des concentrations existant, par conséquent l'introduction de n'importe laquelle de ces considérations dans les paramètres d'évaluation en matière de concentrations risque de créer des conflits d'intérêt. Même si ces considérations potentiellement conflictuelles pouvaient être harmonisées, leur application en simultanée pourrait affecter la prévisibilité de la pratique décisionnelle. Egalement, il est recommandé d'approcher avec prudence toute révision de règles en matière d'aides d'Etat déjà existantes. Des changements dans les règles afin de permettre le développement d'une capacité industrielle européenne innovante impliquent le relâchement des subventions publiques. Toutefois des règles relâchées en matière d'aide d'Etat en dehors de l'UE sont souvent critiquées par les parties concernées en tant que pratiques déloyales qui pervertissent le marché libre.

I. The decision

1. The European Commission ("Commission"), according to its press release,[1] had no option other than prohibiting the *Siemens/Alstom* merger due to competition concerns.[2] In particular, the Commission was of the opinion that the proposed merger posed harm to competition in the markets of railway signaling systems and very high-speed trains that was not eliminated by the remedies offered by the parties.

2. While it is not frequent in the practice of the Commission to prohibit a merger, it is obviously not unprecedented either. What strikes a material difference, compared to past prohibitions, is the magnitude of the reactions that condemned in rare unanimity the existing regulatory framework of the European competition law.

1 *See*: http://europa.eu/rapid/press-release_IP-19-881_en.htm.

2 Case No. M.8677, *see*: http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8677.

II. In the aftermath

3. Alstom SA destined in its press release the Commission's decision as a "*clear set-back for the industry in Europe*."[3] Both Siemens AG and Alstom SA, in similarly worded press materials, expressed their regrets for banning "*the creation of a European player having the ability to cope with the growing competition from non-EU companies*."[4] Siemens AG's Chief Executive Joe Kaeser argued at the World Government Summit in Dubai that "*if the future of the world's mobility is being determined with law that is 30 years old, that may have to be revisited.*"[5]

4. The critical stance was taken up by politicians also. France's President, Mr. Emmanuel Macron, noted that he would favor a Europe which protects its citizens from the threat to European jobs from Chinese firms. Mr. Macron, furthermore, urged the European Union to allow the

3 *See*: https://www.alstom.com/press-releases-news/2019/2/alstom-regrets-european-commissions-prohibition-decision-merger-its.

4 *See*: https://www.alstom.com/press-releases-news/2019/2/alstom-regrets-european-commissions-prohibition-decision-merger-its and https://www.siemens.com/press/en/feature/2017/corporate/2017-09-pk.php.

5 *See:* https://www.cnbc.com/2019/02/10/le-maire-blasts-eu-decision-to-block-alstom-siemens-merger.html.

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creation of industrial giants like Airbus.[6] In the heat of the approaching European Parliamentary elections, the "*spitzenkandidaten*" of the European People's Party for President of the Commission, Mr. Manfred Weber, also expressed his desire to change the European competition laws so as to allow the rise of "*European champions*" to more effectively compete against "*the rest of the world.*"[7] This interpretation resonates with the idea articulated by the German Chancellor Ms. Angela Merkel already last October: "*I think that we will have mergers* (…). *If we want to keep up, we'll have to be able to develop 'global players.'*"[8]

5. The subject of this paper is the joint manifesto issued by the German and French economy ministers (the "Joint Manifesto")[9] in the aftermath of the Commission decision. The Joint Manifesto advocated that the "*existing rules need to be revised to be able to adequately take into account industrial policy considerations in order to enable European companies to successfully compete on the world stage.*"

6. The "*industrial policy considerations*" that need to be taken into account apparently intended to mean the increase of the European industrial potential, because—according to the Joint Manifesto—"*there is no regulatory global level playing field*" comparable to that of the EU, which places the European companies at a "*massive disadvantage*" on the global market.

7. In order to overcome this structural shortcoming, the Joint Manifesto in its Part 2 ("*Adapt our regulatory framework*") proposes the following options for further analysis: (i) greater consideration of the state control of, and state subsidies for the undertakings, (ii) the amendment of the existing merger guidelines to put more emphasis in the merger investigation on global competition considerations, (iv) empowering the Council with a "*right of appeal*" with which it would, in "*well-defined cases*" and "*subject to strict conditions*" be able to overturn the Commission's merger decisions, and (v) providing for state-aid guidelines that set clear framework with the view of "*develop*[ing] *innovative industrial capacity in Europe.*"

8. As it is apparent from foregoing responses, the *Siemens/Alstom* case marks a turning point in the history of the European competition law. The industry players and the political establishment claim that it is not the Commission, but rather the system itself (most importantly, the existing European merger control rules) that is insufficient to address the new challenges the European firms face on a global scale. In these narratives, the *Siemens/Alstom* decision provides textbook evidence to prove that something is materially wrong with the existing competition rules and they need to be amended in order to allow European industry related considerations when deciding about the compatibility of a concentration with the internal market.

III. "*If it ain't broke, don't fix it*"

9. However, I am not convinced that introducing industrial policy considerations into the existing competition rules of the European Union is a good idea. In the absence of any defect, there is no need for a fix.

10. The crux of the current European merger control rules, along the principles of Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the "Merger Regulation"), is to prevent "*concentrations*" which would "*significantly impede effective competition in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.*"[10]

11. The assumption underlying the carefully drafted rule is that concentrations tend to lessen competition, and less competition tends to deprive the consumers of important benefits. The supranational body entrusted with the *ex ante* monitoring task on the basis of the foregoing substantive rule is the Commission. In this exercise, the Commission has to "*take into account*" the "*need to maintain and develop effective competition*" in the European Union on the basis of the "*structure of all markets concerned, and the actual or potential competition from undertakings located either within or outwith the Community*" together with a number of parameters of the markets with the core objective of preventing mergers that are ultimately detrimental to the "*consumers.*"[11] (Note that the market position of the merging parties and the competitive pressure exerted by undertakings from inside or outside of the EU are already parts of the substantive elements along which the concentration is assessed by the Commission.)

12. In other words, the existing merger control rules aim to protect the interests of the consumers by way of protecting the competition on the market. For the effective protection of competition, the Commission—ultimately—has the right to block any merger that poses threats to these benefits of the consumers.

13. And that is exactly what happened in the *Siemens/Alstom* case. The Commission explicitly said in its press release that "*Since the parties were not willing to offer adequate remedies to address these concerns, the*

6 *See:* https://www.reuters.com/article/us-alstom-m-a-siemens-politics/explainer-why-siemens-alstom-rail-merger-is-creating-european-tensions-idUSKCN1PB216.

7 *See:* https://twitter.com/ManfredWeber/status/1090636593935892480.

8 *See:* https://www.bloomberg.com/news/articles/2018-10-08/merkel-urges-europe-mergers-to-develop-global-players-in-tech.

9 *See:* https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf?__blob=publicationFile&v=2.

10 Merger Regulation, Article(2) Section 2.

11 Merger Regulation, Article(2) Sections 1(a) and (b).

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Commission blocked the merger to protect competition in the European railway industry."

14. It is, obviously, another question whether the Commission's decision is consistent with the substantive rule or not. In the absence of detailed reasoning, it is probably too early to take a firm opinion on either side. In any case, the decision is subject to judicial review before the European courts, which have jurisdiction to re-examine the circumstances and even to annul the decision. It must be, however, borne in mind that the European courts are permitted to overturn the Commission's decision on the following clearly defined grounds: "*lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or any rule relating to its application, or misuse of powers*" by the Commission.[12]

15. Anybody, who claims that the Commission's prohibition is wrong on the merits may[13] initiate its court review with reference to the Commission's "*infringement of the Treaties or any rule relating to its application.*" However, the European courts will overturn the Commission's decision only if they find that the Commission erroneously applied the applicable substantive rule—i.e., the Merger Regulation—in the present case. In this exercise, it will bear no significance if the Commission failed to take into account any industrial policy considerations as the Commission was not required to do so.

16. Thus, in the context of the critical voices, it does not matter if the Commission is right or wrong. What matters, in this sense, is that the Commission is required to enforce the Merger Regulation; and the Merger Regulation is focused solely on the protection of competition within the Community for the benefit of the consumer welfare. These rules, by their very nature, have nothing to do with industrial policy considerations like the need to facilitate the emergence of European champions to withstand the competition from foreign players in the global arena.

17. And, in my opinion, there are good reasons for the Merger Regulation to be silent on these industrial policy considerations.

18. The most important reason is that the fundamental goal pursued by the Merger Regulation, i.e., preserving the economic competition for the benefit of the consumers, may easily be in conflict with any industrial policy considerations aimed at fostering the European companies to become stronger global players. The *Siemens/Alstom* case serves as an example of this conflict: should it be cleared along industrial policy considerations; it would inevitably result in the loss of (certain) consumer benefits stemming from the effective competition. In that case, we could only hope that in the long term these losses are somehow recovered.

19. On the basis of the foregoing, it is difficult to imagine—if possible, at all—how these potentially conflicting considerations could be reconciled into a consistent set of rules that can be applied with sufficient degree of predictability. If these considerations are in conflict, one of them inexorably will take precedence over the other.

20. Therefore, I see no realistic chance to amend either the Merger Regulation or its supplementary instruments (such as the existing merger guidelines) along the principles set forth in the Joint Manifesto. Any of that amendment, in my view, would give rise to contradictory practice and serious application problems.

IV. The veto right

21. I am concerned about the possible "veto right" with which the Council (or any other supreme body of the European Union) would be able to overturn the decisions of the Commission. While the Joint Manifesto contemplates that such veto would be available only in "*well-defined cases*" and under "*strict conditions*"; it is difficult to see what circumstances may warrant the simultaneous and effective application of the foregoing, potentially conflicting, considerations. In addition, the experiences in the Member States where similar veto mechanisms exist also need to be taken into account.

22. In Hungary, Section 24/A of the Hungarian Competition Act[14] permits the Government to qualify in a separate decree any concentration, if justified by "*public interest*," of "*strategic importance on national level.*" As a consequence, the merger, which otherwise falls under mandatory merger clearance in Hungary, does not need to be notified with the Hungarian Competition Office and can be implemented without merger clearance.[15] No court review is possible against the Government decree.

23. This solution is more effective than that proposed by the Joint Manifesto. The Hungarian rule allows the Government to preempt the competition authority from assessing the concentration, i.e. the law actually excludes the possibility of confronting with a negative decision that later needs to be overturned. Yet, the Joint Manifesto contemplates a subsequent veto that would override a prohibitive decision already adopted by the Commission.

24. The preemption is available if the exemption from the national merger control is justified by reasons of "*public interest.*" The Hungarian law gives two examples for the public interest: the protection of jobs and the security of supplies. As this is not a closed definition, there may be other reasons that constitute "*public interest.*" On the one hand, it is reasonable that the "*public interest*" is

12 Article 263 TFEU.

13 Provided that he is directly and personally affected by the decision.

14 *See* (in Hungarian): https://net.jogtar.hu/jogszabaly?docid=99600057.TV.

15 The rule does not apply to concentrations that have to be notified under the Merger Regulation.

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not defined by closed terms. In that case it would lose its flexibility. However, the vague definition makes this exemption easy to apply in a number of different circumstances. Nevertheless, this exemption was used by the Hungarian Government only in a few instances since its introduction in 2011. Lately,[16] the Government exempted with reference to this rule a concentration among a large number of independent media companies with the aggregate turnover of around – according to the reports[17] – HUF 60 billion (approximately EUR 200 million) from the mandatory Hungarian merger control. As a result, reportedly almost 500 media companies[18] came under common control without any review under competition law.[19] Some commentators claimed that there was no "*public interest*" justifying concentration. In addition, members of the Hungarian Parliament challenged the Government's decree that exempted the concentration from the merger control before the Constitutional Court. The Commission and the European Parliament also expressed their concerns.[20]

25. In addition to the foregoing, Hungarian competition law has another special rule providing for individual exemption with the view to special industry considerations. Under Section 93/A of the Hungarian Competition Act, no infringement of Section 11 (i.e., the Hungarian rule on the prohibition of cartels) can be established in respect of agricultural products if the restriction of the competition does not go beyond what is necessary to make a reasonable profit by the agricultural producers. The minister in charge of agricultural matters has the right to decide, in a separate ruling, whether a restriction meets the foregoing conditions. The Competition Office has to ask for this ruling in case it initiates an investigation in the potentially infringing practices in respect of agricultural products. The ruling of the minister is binding on the Competition Office. This exemption rule was introduced in the law in 2012 in response to the Competition Office's ongoing investigation against large retailers, the Hungarian Watermelon Association, and the Vegetable/Fruit Producers Association based on alleged price-fixing practices aimed at excluding foreign products from the Hungarian market. In that case, the Competition Office had to terminate its procedure as the agricultural minister, in its ruling, concluded that the investigated behavior did not constitute an infringement of Section 11.[21] The minister's ruling was criticized in the media as a measure that directly favored the Hungarian watermelon farmers against—potentially cheaper—foreign imports.[22] The Competition Office also mentioned in its press release on the case that the possible exemption in Section 93/A of the Hungarian Competition Act "*created a legal uncertainty in connection with the enforcement of competition law in the field of agricultural products.*"

26. In the absence of the knowledge of the particular circumstances, I would not condemn the decisions of the Government and the minister in the cases explained above. Nevertheless, the contradictory views show that it is difficult to define proper conditions that validly justify the exemption of concentrations and/or restrictive practices from the scope of the application of the competition law.

V. State-aid considerations

27. The Joint Manifesto expresses the need to "*taking into greater consideration the state-control of and subsidies for undertakings within the framework of merger control,*" and to have "*state-aid guidelines that provide a clear framework*" aimed at developing "*innovative industrial capacity in Europe.*"

28. However, the need to put more emphasis on "*the state-control of and subsidies for undertakings within the framework of merger control*" is not a clear principle. It is uncertain whether this consideration intends to treat "*the state ownership of, and/or the state subsidies for*" the (merging) undertakings as a favorable, or—just the opposite—as an adverse circumstance in the merger analysis.

29. The other objective—i.e., the need to have "*state-aid guidelines that provide a clear framework*" for the sake of developing "*innovative industrial capacity*"—suggests that the current state-aid rules are too restrictive and blocking important subsidies from the Member States to European undertakings in the field of innovation. This way, in my understanding, the Joint Manifesto calls for the loosening of the rules applicable to state aid requirements. However, the protection of innovation is already among the most important principles underpinning the European competition law.

30. In addition, it creates certain tension within the Joint Manifesto itself that in the last paragraph the Joint Manifesto firmly stands for "*more effectively fight against trade distorting practices including excessive subsidies to industry.*" While the two, apparently different considerations are not necessarily contradicting to each other, it does not require too much effort to find ourselves in an uncomfortable situation. Therefore, similarly to the foregoing instances, I would suggest a cautious approach to any revision of the existing state-aid rules.

16 In the end of 2018.

17 *See*, for example (in Hungarian): https://infostart.hu/gazdasag/2018/12/04/sajtotorteneti-nap-lehet-a-csutortoki

18 *See*, for example (in Hungarian): https://24.hu/kozelet/2018/11/29/media-fidesz-kormany-meszaros-lorinc-liszkay-gabor-alapitvany/

19 *See* the communication of the Hungarian Competition Office (In Hungarian): http://gvh.hu/sajtoszoba/sajtokozlemenyek/2018_as_sajtokozlemenyek/hataskor_hianyaban_lezarult_a_kozep_europai_sajto_.html.

20 *See* (in Hungarian): https://www.napi.hu/magyar_vallalatok/media-kesma-europai-parlament.679074.html.

21 *See* the communication of the Hungarian Competition Office (In Hungarian): http://gvh.hu/data/cms998184/sk_62_2012_lezárt_dinnye_kartell.pdf?query=dinnye.

22 *See*, for example (in Hungarian): https://index.hu/gazdasag/magyar/2012/07/21/dinnye/

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VI. Looking back

31. The Joint Manifesto correctly points it out that "*there is no regulatory global level playing field.*" I can easily imagine that the lack of "*regulatory global level playing*" is in many cases detrimental to the European firms competing on a global scale. Nevertheless, we should not forget that the European regulatory playing field, including the existing competition rules, is a result of gradual development. This process involved the introduction of the competition rules into a number of previously closed markets. All these steps were subject to contentious debates. However, it would be difficult to challenge today that this gradual development resulted in lower prices, wider choices, and better innovation in Europe. In view of this progress, the Joint Manifesto's proposals for the amendment of the existing regulatory framework in Europe appears to be an attempt to turn the time back with recourse to schemes that were already left behind. ■

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Which competition policy for the new EU Commission? – A Nordic perspective

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ABSTRACT

The ruckus triggered by the Commission's decision to block the *Siemens/Alstom* transaction has been immense. However, the calls for an overhaul of EU competition law are not unprecedented and similar arguments were heard in the Nordics already almost two decades ago. This article will consider whether the critique and reform proposals made by the French and German governments in the aftermath of *Siemens/Alstom* are justified or not. Finally, an argument will be put forward that future-oriented arguments should be given more weight in the Commission's merger assessment.

Le brouhaha déclenché par la décision de la Commission de bloquer la transaction Siemens/Alstom *a été remarquable. Par ailleurs, les appels à une révision du droit de la concurrence de l'UE ne sont pas sans précédents et des arguments similaires étaient déjà entendus dans les pays nordiques il y bientôt vingt ans. Cet article examine si les critiques et les projets de réforme proposés par les gouvernements français et allemand à la suite de l'affaire* Siemens/Alstom *sont justifiés ou pas. En conclusion, il offre l'étude d'un argument en faveur de débats prenant en considération le futur, auxquels il faudrait donner plus de poids dans les procédures d'évaluation des concentrations par la Commission.*

I. EU merger rules called into question after the planned merger between two leading European train manufacturers was blocked

1. The merger between two of Europe's largest train manufacturers, Siemens and Alstom, was blocked on the 6th of February after the European Commission's lengthy investigation concluded that the proposed transaction would have raised serious competition concerns in certain markets.[1] The merged company would have gained a dominant market position in the market for very high-speed trains and would have become an undisputed market leader in the market for signaling systems in the EEA. According to the Commission, the parties failed to prove any significant merger-specific efficiencies. The parties also failed to provide sufficient remedies which would have sufficiently addressed the Commission's concerns. The Commission found that the remedies proposed by the parties did not constitute stand-alone, future-proof solutions which would have incentivized others to compete effectively with the merged entity. Consequently, the Commission prohibited the proposed merger.[2]

1 *Siemens/Alstom* (COMP/M.8677), Commission decision of 6.2.2019.

2 Commission, Mergers: Commission prohibits Siemens' proposed acquisition of Alstom [2019] IP/19/881, available at: www.europa.eu/rapid/press-release_IP-19-881_en.htm (accessed 15 February 2019).

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2. The ruckus triggered by the Commission decision has been immense. The French and German governments, in particular, have been left fuming and they are now calling for an overhaul of EU competition rules. The French Minister of the Economy and Finances, Bruno Le Maire, has declared the Commission decision a political and economic mistake.[3] Le Maire has also accused the Commission for choosing to apply the wrong criteria in the merger assessment and that "*the pertinent market for analyzing competition is the world market and not the European market*."[4] Le Maire's German counterpart, Peter Altmaier, has been vocal about the need to create and foster "national and European champions" big enough to compete on the global market with Chinese and US competitors.[5] In Le Maire's and Altmaier's opinions, the current EU merger control regime is in a desperate need of updating to allow European companies to compete fairly with their overseas rivals, some of which are state-supported.

3. Similar sentiments demanding a reform of the European merger rules and competition policy objectives have also been heard from others, already prior to the *Siemens/Alstom* decision.[6] A group of 19 Member States called for an update of the EU competition rules in December, almost two months before the *Siemens/Alstom* deal was blocked.[7] The final statement by the 19 EU governments proposed, inter alia, "*the identification of possible evolutions of the antitrust rules to better take into account international markets and competition in merger analysis*."[8] According to the Member States, quick actions are required for Europe to remain competitive in the face of competition from other large economies.

4. The Commission has replied to the criticism by stating that the objective of EU merger control regime is, first and foremost, to prevent the creation of monopolies and dominant market players which injure effective competition on the Single Market and harm European customers and consumers.[9] In response to the claims made by the French and German governments, the Commission pointed out that the *Siemens/Alstom* deal was not blocked because of the manner in which the current EU merger control regime was applied or because the rules are possibly out-of-date.

5. Commissioner Vestager has defended the Commission decision by noting that both Siemens and Alstom are global players in the railway industry and, indeed, already among the strongest companies on the markets for very high-speed trains and signaling systems. In response to the critique regarding the Commission being blind to the threat the European industry is facing from China, the Commissioner asserted that the Commission had looked into the future and the possibility of the Chinese entering the European railway market. However, the Commission's assessment had concluded that the European railway industry was not facing any competitive pressure, either actual or potential, from the Chinese rail equipment suppliers.[10] Since the parties were unwilling to offer sufficient structural remedies which would have immediately addressed the Commission's concerns about the anticompetitive effects of the merger, the Commission, applying merger control rules to the verified facts of the case, had no choice but to block the proposed transaction.[11]

II. The calls for reform are not unprecedented

6. Arguments similar to those made in the context of the *Siemens/Alstom* case were heard in the Nordics already back in the early 2000s following the Commission's decision to block the *Volvo/Scania* merger.[12] The Commission's intervention in the merger between the two manufacturers of heavy trucks and buses generated a heated discussion on whether the EU merger

3 H. Agnew, EU blocks Siemens-Alstom rail merger, Le Maire says, *Financial Times* (Paris, 6 February 2019), www.ft.com/content/cd35e760-29f5-11e9-a5ab-ff8ef2b976c7 (accessed 18 February 2019).

4 Bruno Le Maire quoted in H. Agnew, EU blocks Siemens-Alstom rail merger, Le Maire says, *Financial Times* (Paris, 6 February 2019), www.ft.com/content/cd35e760-29f5-11e9-a5ab-ff8ef2b976c7 (accessed 18 February 2019).

5 Peter Altmaier quoted in Editorial, German industrial policy comes back to the fore, *Financial Times* (5 February 2019), www.ft.com/content/49a5920c-2954-11e9-88a4-c32129756dd8 (accessed 8 March 2019).

6 *See*, e.g., The CEO of Siemens, Joe Kaeser, quoted in R. Toplensky, EU blocks planned Siemens-Alstom rail deal in landmark decision, *Financial Times* (Brussels, 6 February 2019), www.ft.com/content/6e344f6a-29fd-11e9-88a4-c32129756dd8 (accessed 18 February 2019); The French Prime Minister, Édouard Philippe's comments in N. Hirst, EU merger reasoning should reflect industrial policy, French prime minister says, *MLex* (5 March 2019), www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1071138&siteid=190&rdir=1 (accessed 6 March 2019). The French President, Emmanuel Macron, has also added his voice to the debate by issuing an open letter to European citizens, in which he stated the need to reform EU competition policy, however, without providing any further details. E. Macron, For European renewal (4 March 2019), www.elysee.fr/emmanuel-macron/2019/03/04/for-european-renewal.en (accessed 12 March 2019).

7 J. Valero, 19 EU countries call for new antitrust rules to create 'European champions,' *Euractiv* (19 December 2018, updated 9 January 2019), www.euractiv.com/section/economy-jobs/news/19-eu-countries-call-for-new-antitrust-rules-to-create-european-champions (accessed 18 February 2019).

8 The final statement quoted in J. Valero, 19 EU countries call for new antitrust rules to create 'European champions,' *Euractiv* (19 December 2018, updated 9 January 2019), www.euractiv.com/section/economy-jobs/news/19-eu-countries-call-for-new-antitrust-rules-to-create-european-champions (accessed 18 February 2019).

9 M. Vestager, Statement by Commissioner Vestager on the proposed acquisition of Alstom by Siemens and the proposed acquisition of Aurubis Rolled Products and Schwermetall by Wieland (Brussels, 6 February 2019), www.europa.eu/rapid/press-release_STATEMENT-19-889_en.htm (accessed 18 February 2019).

10 The Commission concluded that the Chinese CRSC's signaling systems did not compete with the signaling systems of Siemens or Alstom as the Chinese have virtually no experience in projects comparable to those of the European companies. In addition, CRSC had never even attempted to participate in any tenders in Europe. The European market for very high-speed trains, on the other hand, is characterized by high barriers to entry as trains must comply with a number of national and European rules and the Chinese CRRC has not sold a single very high-speed train outside China. The company, therefore, has no experience of successfully implementing projects, which is a fundamental criterion in tenders in Europe. For further details, *see* J. Laitenberger, Recent developments and issues in EU antitrust law: Comments on the European Commission's merger decisions Wieland/Aurubis and Siemens/Alstom (Studienvereinigung Kartellrecht, Brussels working session, 15 February 2019) p. 8, www.ec.europa.eu/competition/speeches/text/sp2019_02_en.pdf (accessed 7 March 2019).

11 Ibid.

12 *Volvo/Scania* (COMP/M.1672), Commission decision of 15.3.2000.

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control rules potentially discriminate against smaller EU Member States by making the creation of "national champions" in smaller markets practically impossible.[13]

7. At the time, the critique centered on the manner in which relevant geographic markets were defined.[14] The concern was that where a national market is established in a small Member State, like Finland or Sweden, companies in that country would be effectively banned from growing by merging with other companies in the region. The critics argued that the new merged entities would easily reach dominance in a national market. This, in turn, would prevent companies from becoming strong enough to compete with rivals elsewhere in Europe and worldwide. The critics pointed out that such a problem would be less likely to occur in a larger Member State, where the relevant market, even if national in scope, would be larger and companies could more easily reach the necessary size without becoming dominant.

8. Already in the early 2000s, the Commission's message was loud and clear—the primary function of the European competition law rules is to protect effective competition and consumers in Europe.[15] The merger between Volvo and Scania would have strengthened the parties' already strong market positions on several markets, and made the new merged company dominant on certain markets, e.g., in Finland and Sweden.

9. Much like Commissioner Vestager, her predecessor, Mario Monti, pointed out almost twenty years earlier that companies in smaller markets, such as in the Nordics, are not prevented from reaching strong market positions. Neither is merging with other leading competitors from the same or a neighboring Member State the only way to reach necessary dimensions to compete efficiently with companies worldwide.[16] Even where the new entity would reach high market shares, the Commission will approve the transaction, as long as the parties offer sufficient, preferably structural remedies which are targeted to ensure that competition will function effectively even after the transaction has been concluded.

10. A good example of two leading competitors merging in a narrowly defined market is the merger between two large Nordic steelmakers, the Swedish SSAB and the Finnish Rautaruukki.[17] The Commission initially identified serious competition concerns in the market for stainless steel and profiled steel construction sheets in Finland, as well as in the markets for certain carbon steel products in the Nordic countries. The parties addressed the Commission's concerns by divesting a total of five businesses in Finland, Sweden and Norway. These remedies were directed at replacing competition which would otherwise have been lost due to the transaction in the affected, national markets, and subsequently, and the merger was cleared by the Commission.

11. Similarly, in *Konecranes/Terex*, the Commission's investigation discovered that the transaction would have had an adverse effect on effective competition in the markets for electric chain hoists and wire rope hoists in the EEA and especially in France and Germany.[18] However, the transaction was ultimately approved, as the remedies offered by the parties were sufficient to satisfy the Commission that the intensity of competition in the relevant European and national markets would be preserved.

12. The problem in horizontal mergers often is that the remedies proposed by the parties do not specifically address the issues raised by competition authorities. In other words, the problem and the proposed solution do not meet. The above-mentioned cases clearly demonstrate that EU merger rules, as they are currently applied, do allow horizontal mergers even between two leading competitors. In both cases, the Commission systematically concluded that the structural solutions proposed by the parties removed all serious doubts in the relevant, narrowly defined markets.[19]

III. Do EU merger rules need to be reformed?

13. The French and German governments published the Franco-German Manifesto for a European industrial policy fit for the 21st Century on the 19th of February, which sets out their proposal for a new European industrial strategy capable of meeting the challenges to which the constantly and rapidly changing industrial sector is subject.[20] The Franco-German Manifesto also includes alternative proposals for the reform of the

13 K. Boxberg, Pieniä ei syrjitä, *Kauppalehti* (Brussels, 10 February 2000); M. Katajamäki, Monti: Emme syrji pieniä maita, *Kauppalehti* (Helsinki, 8 October 2001); M. Monti, Market definition as a cornerstone of EU Competition Policy (Workshop on Market Definition, Helsinki, 5 October 2001), available at: www.europa.eu/rapid/press-release_SPEECH-01-439_en.htm?locale=en (accessed 27 February 2019).

14 H. Horn and J. Stennek, EU merger control and small member state interests, in Konkurrensverket, *The Pros and Cons of Merger Control* (Konkurrensverket, 2002), pp. 83–84, available at: www.konkurrensverket.se/en/publications-and-decisions/the-pros-and-cons-of-merger-control (accessed 27 February 2019).

15 M. Monti, Market definition as a cornerstone of EU Competition Policy (Workshop on Market Definition, Helsinki, 5 October 2001), available at: www.europa.eu/rapid/press-release_SPEECH-01-439_en.htm?locale=en (accessed 27 February 2019).

16 Ibid.

17 *SSAB/Rautaruukki* (COMP/M.7155), Commission decision of 14.7.2014.

18 *Konecranes/Terex MHPS* (COMP/M.7792), Commission decision of 8.8.2016.

19 *SSAB/Rautaruukki* (COMP/M.7155), Commission decision of 14.7.2014, para. 253, 257 & 258; *Konecranes/Terex MHPS* (COMP/M.7792), Commission decision of 8.8.2016, para. 120 & 127. These are examples of the types of remedies preferred by the Commission and national competition authorities. *See*, J. Laitenberger, Recent developments and issues in EU antitrust law: Comments on the European Commission's merger decisions Wieland/Aurubis and Siemens/Alstom (Studienvereinigung Kartellrecht, Brussels working session, 15 February 2019), pp. 6–7, available at: www.ec.europa.eu/competition/speeches/text/sp2019_02_en.pdf (accessed 7 March 2019).

20 Bundesministerium für Wirtschaft und Energie & Ministère de l'Économie et des Finances, The Franco-German Manifesto for a European industrial policy fit for the 21st Century, available at: www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf?__blob=publicationFile&v=2 (accessed 20 February 2019).

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EU competition rules, which would enable the creation of "European champions." These proposals include, inter alia, granting the Council the right to overturn Commission decisions under specific, strictly defined conditions and giving more weight to factors such as state control of and subsidies for companies within the merger control framework. The Manifesto also proposes updating the current merger guidelines so that more weight would be given to potential future competition by looking further into the future in assessing dynamics of competition in relevant markets.[21]

14. Others, competition law experts in particular, have been less swayed by the arguments made by the French and German governments.[22] The president of the Autorité de la concurrence, Isabelle de Silva has advocated for the importance of maintaining "*the impartial and dynamic nature of merger review*."[23] Nicholas Levy, a competition partner at Cleary Gottlieb Steen & Hamilton, has also criticized the reform proposals by saying that they would "*fundamentally change the architecture of European merger control, replacing expert analysis conducted within a well-defined legal framework with political decision-making*" and that "*the transparency and consistency that has characterised EU merger control for 30 years would be upended*."[24]

15. Indeed, certainty and predictability are fundamental values to businesses. Legal rules, in whatever area of law, need to be applied coherently and the process must be transparent for companies (and their lawyers) to be able to predict the outcome and feasibility of a case. Without taking a stance on the substantive facts of the case, the *Siemens/Alstom* decision is definitely to be welcomed in the sense that the Commission did not bend before the heavy political pressure it faced from various stakeholders.

16. Adding political discretion to the assessment would inevitably make merger analysis much less predictable. There is a political element in the Commission process already today, given that the ultimate decision-maker, the college of commissioners, is politically appointed. However, the political wiggle room is limited thanks to a strict legal framework, independent staff, heavy internal scrutiny by, e.g., the Commission's legal services, and ultimately, judicial scrutiny in Luxembourg. Increased room for political and industrial policy considerations in the decision-making process would invariably lead to less stringent decisions, less checks and balances, and decreased foreseeability.

17. However, one of the proposals put forward by the Franco-German Manifesto might be worth considering—namely, the more future-oriented manner of assessing relevant markets. Currently, the merger analysis conducted by competition authorities focuses heavily on current and historical market data. Arguably, this limits the competition authorities' possibility to seriously consider more future-oriented arguments.

18. Amending primary or even secondary legislation is a burdensome and time-consuming process. However, it might be worth considering whether some changes could be made through soft law instruments, such as guidelines. For instance, one option would be for the Commission to expressly state in its guidelines that in assessing the future effects of the proposed merger, it will consider the effects in a longer timeframe, thus giving more weight to future market developments.

19. Moreover, the Commission notice on the definition of the relevant market dates back to 1997. Competition law has evolved significantly since then and more updated guidelines could certainly help competition authorities to assess, for example, the expected future competitive pressure from manufacturers in different regions more accurately.

20. Additionally, the competition authorities could make more use of merger simulation models which are used to assess what is likely to happen on the market in the future if the proposed merger is concluded. Generally, the parties to the proposed concentration are required to provide the data used in merger simulations. While it is true that the rule of law requires competition authorities to make all their decisions based on verifiable facts, it should be considered whether, for instance, demonstrating a trend on the relevant market would satisfy the evidentiary threshold in this regard.

21. Lastly, as pointed out by Commissioner Vestager, out of the over 3,000 mergers investigated by the Commission over the past ten years, it has only blocked nine transactions.[25] It seems rather drastic to claim that the merger rules are broken simply because a merger, even one that is backed by the governments of the parties' home countries, is blocked. ■

21 The idea of looking further into the future has also been supported by the French Prime Minister, Édouard Philippe, who has suggested that instead of looking just two years ahead, competition authorities should look further, four or seven years into the future in assessing the competitive effects of the merger in relevant markets. *See*, N. Hirst, EU merger reasoning should reflect industrial policy, French prime minister says, *MLex* (5 March 2019), www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1071138&siteid=190&rdir=1 (accessed 6 March 2019).

22 For instance, Professor Ibáñez Colomo has stated that the proposals made by the French and the German governments are "*incredibly short-sighted and nothing sort of an own goal*." *See*, P. Ibáñez Colomo, Ahead of Siemens/Alstom, the competition law community should do more to defend the European Commission (and our law-based system) (*Chillin'Competition*, 10 January 2019), www.chillingcompetition.com/2019/01/10/ahead-of-siemens-alstom-the-competition-law-community-should-do-more-to-defend-the-european-commission-and-our-law-based-system (accessed 17 February 2019). *See also*, P. Ray and J. Tirole, Keep Politics Out of Europe's Competition Decisions, *Project Syndicate* (4 March 2019), www.project-syndicate.org/commentary/alstom-siemens-rejected-merger-european-competition-policy-by-patrick-rey-and-jean-tirole-2019-03 (accessed 11 March 2019).

23 Isabelle de Silva quoted in N. Hirst, "Impartial" EU merger rules don't keep champions down, says French antitrust chief, *MLex* (5 March 2019), www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1071025&siteid=190&rdir=1 (accessed 5 March 2019).

24 Nicholas Levy quoted in J. Brunsden and R. Toplensky, France calls for biggest shake-up of EU merger rules in 30 years, *Financial Times* (Brussels, 12 February 2019), www.ft.com/content/ad7a02f4-2ebd-11e9-8744-e7016697f225 (accessed 17 February 2019).

25 M. Vestager, Statement by Commissioner Vestager on the proposed acquisition of Alstom by Siemens and the proposed acquisition of Aurubis Rolled Products and Schwermetall by Wieland (Brussels, 6 February 2019), www.europa.eu/rapid/press-release_STATEMENT-19-889_en.htm (accessed 18 February 2019).

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A competition policy agenda for the next Commission

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ABSTRACT

Ahead of the European elections and of a new Commission, this article sets out thoughts on a possible competition policy agenda. The author considers that competition rules do not need fundamental changes but only amendments designed to improve specific procedural and substantive aspects. In particular, the author suggest both certain amendments to the investigation methodology, as well as a political discussion of key cases within the College of Commissioners.

A l'approche des élections européennes et d'une nouvelle Commission, cet article décrit des pistes possibles de politique de concurrence. L'auteur ne propose pas une refonte majeure des règles applicables mais plutôt des aménagements visant à améliorer certains aspects précis de procédure et de fond. En particulier en matière de contrôle des concentrations, l'auteur propose des aménagements des méthodologies d'enquête et une discussion de nature politique des principales affaires au sein du collège des commissaires.

1. Competition policy is one of the great successes of European integration. Included in the Paris and later the Rome Treaties not long after the Second World War, in a context of fragmented national European economies still in tatters, and economies in the thralls of central planning and price regulation, the antitrust articles written by the EU founding fathers were incredibly relevant and far-sighted. In fact, many would argue that in times of decreasing productivity gains, rising inequality, and huge rent creation going to a limited number of shareholders, partly as a result of increasingly concentrated markets, Europe needs more rather than less competition policy. The fact that the European competition set-up is now the "dominant" model for competition agencies around the world also is in itself a sign that European regulators must be doing something right.

2. So surely the first prescription for the next Commission should be "if it ain't broke, don't fix it." The overarching principle was, and should remain, that in order to create a "Common Market," the European regulator needs to get rid of market access barriers within the EU, whether public (e.g. tariffs, standards, public procurement) or private (e.g. dominance, cartels).

3. However, this basic tenet should not allow the Commission to be complacent and many aspects of its competition policy should, and can easily, be improved without needing any major constitutional change. My choice would be as follows.

I. Merger policy

4. Great progress was made as a result of the Commission's defeats before the European courts in the early 2000s (*Schneider/Legrand*[1], *Tetra Pak/Sidel*[2], or *GE/Honeywell*[3]). These defeats led the Commission to introduce better screening of its decision-making processes and above all a more consistent, quantitative/economic approach to merger control. This is hugely important because without a clear, facts / economics-based approach merger control would have remained a muddled, formalistic exercise applying unclear or ambiguous legal concepts. This is because in the absence of quantitative tests legal concepts such as for example "a dominant position," "competition on the merits," "harm to competition" do not lend themselves to simple definitions or easily workable enforcement tools. Unclear and ambiguous legal principles in turn facilitate "regulatory capture" by those who have the loudest voice/greatest lobbying power. Similarly, the greatest danger of certain ideas on industrial policy that resurfaced recently is not so much the promotion of a European industrial policy as such but rather the risk of muddying the objectives and transforming merger policy in a horse-trading exercise, and in creating exemptions for vested interests that would deliver neither protection of industry nor increased competitiveness.

* In this article, the author is writing purely in a personal capacity.

1 Case T-310/01, *Schneider Electric v Commission*.

2 Case C-12/03, *Commission v Tetra Laval*.

3 Case T-210/01, *General Electric v Commission*.

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5. So the objective must be to build on what has been achieved so far. Recent critics may, however, have a point when they say that competition policy may still lack legitimacy in a number of ways. First, critics may be right when they say that competition policy decisions are highly technocratic in Europe, in particular in the merger control area. A merger control policy will be seen as legitimate for as long as it is seen to be based on an objective and credible foundation, but also when decisions are ultimately made by a democratically appointed institution. This is why key merger control decisions were meant to be made on a collegiate basis by the entire European Commission, and not only by the civil servants in DG Comp. While for simple decisions it is understandable that the Commissioner in charge of competition can act on the basis of a full delegation, it is paradoxical that the most important and controversial (mostly negative) decisions are currently made on the basis of the so-called "written procedure," where DG Comp's draft is essentially rubberstamped by the Commissioners' staff (the so-called "cabinets"). While in some very rare cases, for example the *Siemens/Alstom*[4] case, an informal discussion does happen, all the key decisions are made not only behind closed doors but also with no formal vote of the Commission as a whole, and without a formal exchange between Commissioners. This is obviously wrong for three reasons: first, it gives the impression that a back-door technocratic decision-making process is taking place. Second, in the absence of a discussion by the college of Commissioners, it is difficult to see how the obligation under article 7 TFEU[5] to reconcile all the objectives of the Treaty (including non-competition related) is met. Finally, the recent proposal to give the European Council an ability to "evoke" merger control decisions, is a dangerous one that might affect the Commission's "constitutional" role: conversely this proposal would become unnecessary if the Commission fully played its role, as provided by the Treaty, of collective European political decision-maker.

6. While substantively the Commission's economic approach is sound, there is another aspect of its current procedural set-up that is lacking. The Monti reforms have led to a greater emphasis on a sound economic, effects-based, approach, and the creation of a chief-economist team is playing a salutary role. Paradoxically, however, most cases are decided on the basis of responses by market players to idiosyncratic "Requests for Information" (RFIs), *i.e.* lists of questions sent by the case team to market players. While great care goes into the discussion of microeconomic tools, the questionnaires themselves are drafted by the relevant case team in a completely informal way, with scant regard to the basic scientific rules that typically should go into statistical market investigations. As most social and quantitative scientists would agree, the order of questions, the way they are drafted, the size and the choice of the sample of respondents, the process rules, and the interpretation of results all have a fundamental impact on the robustness of the conclusions. Currently these rules are ignored or disregarded. This affects the due process rights of the parties, as well as the solidity of the conclusions. The problem is compounded by the fact that third-party informants or complainants cannot be properly deposed or even contradicted, and that the interpretation of the results of a "market test" is entirely in the hands of the case team in particular in respect of remedies. The impression is that political decision-makers, in particular the commissioner in charge of competition, only see the conclusions of market tests as interpreted by the case team and DG Comp and there is no possibility for notifying parties seriously to contest the investigatory process or the interpretation that is being given of the market responses collected by the case team.

7. Finally, DG Comp civil servants understandably are not industrial organization specialists and typically in particular when dealing with remedies do not rely on expert business consultants to assess the industrial divestment plans that are submitted by merging parties. This means that the discussion process with DG Comp is very impressionistic in nature, and often unnecessarily formalistic (with sometimes a very rigid interpretation of DG Comp's guidelines, for example in the assessment of the viability of carve-out remedies or when assessing the viability of buyers or acquisition offers). Paradoxically this results in smaller, more innovative, players being sidelined in favor of the established players. This approach is in contrast with the more practical discussions with the US agencies.

8. The Commission's competition reform agenda in the merger-control area should therefore include (i) an oral discussion within the Commission "college" of all important merger control decisions; (ii) a reform of the way market tests and market surveys are carried out: objective and neutral statistical procedures should be followed (the Commission should if necessary hire a good "chief statistician" to help DG Comp develop market test Best Practices, and cross-examination of third-party providers of information should be allowed in the context of second-phase investigations); (iii) a greater use of industry expert or independent consultants at the remedies stage; (iv) a greater use of *ex post* assessment of merger remedies.

4 Case Comp/M.8677, *Siemens/Alstom*.

5 TFEU, Article 7: "*The Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers*".

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II. Cartels and abuses of dominant positions

9. Right now the impression is, rightly or wrongly, that the "output" of DG Comp (*i.e.*, the number of cases, as opposed to the size of the fines) is small and decreasing, the cases are taking longer, the large amount of settlements leads to inconsistent results, and the leniency policy is becoming clearly less effective due to "collateral" effects (e.g. private damages, shareholder suits, disbarment, compliance/corruption investigations). This sorry state of affairs may be somewhat hidden behind the existence of a limited number of high-visibility and headline-grabbing fines and investigations in dominance cases against Google, or to a much lesser extent Amazon, Microsoft, Intel, or Apple.

10. It is, however, not obvious that the IT world and the GAFA platforms deserve the total concentration of the Commission's firepower, and whether this area is really characterized by the usual hallmarks of anticompetitive behavior. In fact, the software/IT world seems to have remained extremely innovative, and consumer complaints seem to be focusing on "bad actors," fake news, and malware, rather than price, quality or choice. Conversely, comparatively little attention has been given to other highly concentrated areas of the economy.

11. From a procedural standpoint, the cartel area is also clearly in need of some attention. Investigations typically take from three to ten years, remain very unstructured, with rotations within case teams resulting in increasing delays, and having an impact on the ability of (mostly cooperative) companies to obtain information or locating long-gone employees. Moreover, the Commission is now relying almost exclusively on leniency applicants and, to a lesser extent, whistle-blowers, before launching investigations. Given the huge collateral implications, companies have become much more careful in deciding whether and when to apply for leniency. It may be time for the Commission to return to its initial practice of being more proactive, based on market investigations and/or economics-based models, and to start investigations on its own initiative. It may also be useful to inject more structure, and in particular deadlines, into the investigation process (e.g. maximum "shelf-lives").

III. State aid

12. From a substantive viewpoint, the state aid area is in need of the same revolution that has happened in the merger control area: the Commission needs to apply a sound, consistent, all-encompassing, economics-based approach, grounded on the concept of market failure—*i.e.*, state aid should only be allowed when there is a documented case of market failure (including significant externalities, systemic implications in case of failure of the company, or the fact that the competitors are being supported by massive subsidies outside the EU). This overarching principle would allow DG Comp to have a more consistent policy rather than the current legal pigeonholing effort (e.g. R&D, Environment, Financial Institutions, Services of General Economic Interest, Restructuring). From a procedural point of view, beneficiaries of state aid are still not fully recognized parties based on the fiction that the Commission only will exchange with the relevant Member State. This means that non-EU parties in an anti-dumping procedure have more rights—e.g. access to file—than European companies caught in a state-aid investigation. ■

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