European champions: what now for EU merger control after Siemens/Alstom?

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In prohibiting the proposed tie-up of Siemens and Alstom,[1] the European Commission unleashed a maelstrom of political discontent, which, arguably, is more the manifestation of longstanding frustration with certain underlying asymmetries within the Merger Regulation[2] impeding the ascendency of European industry on the world stage, than with the Commission's decision itself. After all, *Siemens/Alstom* raised substantive competition concerns.[3] Rather, there is a structural disconnect between the powers afforded to Member States by the Merger Regulation to protect public interests, including industrial policy, at the national level and the absence of equivalent powers at the EU level.

Were it not, in large part, for the shortcomings of the World Trade Organisation ("WTO") rules and the painfully slow progress of their reforms, the obstacles to economic growth arising from these asymmetries would be largely tolerable. But the facts on the ground and the assumptions that have guided the formulation of the Merger Regulation in its current form no longer reflect the economic reality facing many European undertakings which must now tackle unprecedented obstacles to growth, including, among others, unfair and market-distorting competition from state-owned entities, the absence of state funding available to competitors in third countries, and non-reciprocal market access regimes—each, and together, making for a tilted global playing field. Under this shadow, idealist commitment to competition law principles can be seen to act against the best interests of European industry. It would be irresponsible were Member States and the Commission to remain indifferent observers as European industry battles against unfair odds.

Against this backdrop it is worth considering, as a complement to DG Trade's powers to enforce trade agreements and WTO rules, the merits of a modified version of the Franco-German proposal for a Council appeal mechanism[4] that could afford Member States the necessary tool to address competitive imbalances persisting between the EU and third countries. This would not involve the wholesale review of EU competition law, a move that is neither warranted nor advisable. After all, the Merger Regulation and its accompanying jurisprudence is a lodestar in the world of competition law and the Commission has only prohibited nine concentrations in the past 10 years and 12 since 2004.[5] Rather, a limited number of corrective measures at critical junctures might restore the mechanics of global trade to a state more in sync with certain background assumptions key to the Merger Regulation. Sentiments to this effect are already evident in Ursula von der Leyen's mission letter to Margrethe Vestager on the latter's reappointment as Competition Commissioner and in recent public statements by Commissioner Vestager herself.

Changing geopolitics and the growing costs of idealism to European industry

Successive Competition Commissioners have been wedded to the notion that rigorous competition on the Single Market, not industrial policy or protectionism, is the appropriate accelerant for European economic growth. Notable expressions of such views include:

Leon Brittan (1989–1992):

> "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 … [T]he Regulation gives clear primacy to the

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[1] See Commission Decision of 6.2.2019 declaring a concentration to be incompatible with the internal market and the functioning of the EEA Agreement (M.8677—*Siemens/Alstom*) and European Commission Press Release IP/19/881, Mergers: "Commission prohibits Siemens' proposed acquisition of Alstom", Brussels, 6 February 2019.

[2] Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the "Merger Regulation").

[3] Opinion of the Advisory Committee on mergers at its meeting of 31 January 2019 concerning a preliminary draft decision relating to Case M.8677-Siemens/Alstom [2019] OJ C300/5, pp.10–11; Commission Decision of 6.2.2019 declaring a concentration to be incompatible with the internal market and the functioning of the EEA Agreement (M.8677—*Siemens/Alstom*), ss.5 and 6. The remedies offered by the parties did not adequately address the competition concerns identified by the Commission in the very high-speed rolling stock and train signalling markets.

[4] *A Franco-German Manifesto for a European industrial policy fit for the 21st Century*, 19 February 2019, available at *https://www.gouvernement.fr/en/a-franco-german-manifesto-for-a-european-industrial-policy-fit-for-the-21st-century* [Accessed 24 January 2020]. This call was reinforced on 4 July 2019 with the publication by France, Germany and Poland of their joint common paper "Modernising EU Competition Policy" (*https://www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf?__blob=publicationFile&v=4* [Accessed 24 December 2019]) and by a joint statement on 19 September 2019 by the French and German governments reinforcing their joint commitment to the overhaul of European competition law (*https://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Topics/Europe/Articles/2019-09-19-D-F-ECOFIN.html* [Accessed 24 December 2019]).

[5] Out of the 7,289 merger transactions notified to the Commission since 1990, 29 have been blocked following a Phase II review, a meagre 0.4 per cent of cases (see *http://ec.europa.eu/competition/mergers/statistics/pdf* [Accessed 24 January 2020]). For a recent empirical study of the Commission's decisions, see Anu Bradford, Robert J. Jackson, Jr and Jonathan Zytnick, "Is EU Merger Control Used for Protectionism? An Empirical Analysis" (2017) 14(4) *Journal for Empirical Legal Studies*. The figure is not materially higher if transactions that would have been prohibited but for their abandonment prior to the Commission's final decision (e.g. M.7477—*Halliburton/Baker Hughes*) are included.

> competition criterion with only the smallest nod in the direction of anything else … [W]e 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."[6]

Margrethe Vestager (2014–2019):

> "And we can't build those champions by undermining competition. We can't build them with mergers that harm competition, or by looking the other way when Europe's businesses break our rules … Our competition rules are in place to ensure that European companies can compete on their merits … As you well know, businesses do best when they can compete on a level playing field."[7,8]

The ability of European firms to compete internationally at scale is not supported by the empirical data, however. In a marketplace dominated by persistent technological disruption and a geopolitical shift of power to the East, many European companies are struggling to keep pace with their foreign competitors. While the EU was home to 42 Fortune 100 businesses in 2007, it boasted only 28 in 2017.[9] Today, European companies, comprising only five of the world's top 100 unicorns (with the first being in 56th place), are lagging behind in several key sectors earmarked by the Commission as vital for future economic growth.[10] European companies continue to lose ground to state-owned entities with their deep pockets and the Commission has acknowledged that "there is a palpable feeling that Europe risks being left behind unless urgent action is taken".[11]

Evolutionary progress is not foreign to European competition law. Under the leadership of Commissioner Mario Monti, the office of the Chief Economist at the Directorate-General of Competition was introduced in September 2003 to force a shift toward a more economics-based approach to competition law. This development was motivated by the need for checks and balances on the Commission's merger analyses, to ensure they were based on sound economic analysis grounded in empirical data. In *Airtours v Commission*,[12] for example, the Court of Justice of the EU ("CJEU") pointed out that the Commission's analysis of collective dominance did not reflect appropriate economic modelling.

In his final speech in office, former Commissioner Monti reflected on this development: "a major trend of this mandate has been to ensure that competition policy is fully compatible with economic learning".[13] A slight pivot toward the guiding principles of industrial policy might constitute another example of a progressive step for competition law, albeit as a rare measure to address fundamental imbalances in trading conditions and as a complement to DG Trade's enforcement regime.

Nonetheless, the Commission continues to resist calls for rethinking its current approach. In its report on industrial policy after *Siemens/Alstom*, the Commission stated that,

> "relaxing merger control, antitrust or State aid rules presents no panacea to alleged weakness and competitiveness challenges of European industry and carries significant risk—notably if this translates into authorizing anti-competitive transactions."[14]

This declaration is consistent with the Commission's past conduct where it has intervened to prevent the creation of what would have been national or European champions, e.g. *Aerospatiale-Alenia/de Havilland* (1991), *Airtours/First Choice* (1999), *Volvo/Scania* (2000), *Tetra Laval/Sidel* (2001), *Schneider/Legrand* (2002), *Ryanair/Aer Lingus I* (2007), and *Deutsche Börse/London Stock Exchange Group* (2017). But in the same breath, and in a nod to the difficult predicament of European industry, the Commission advocates for a Single Market renaissance through various means, including State aid. But the suggestions put forward in the Commission's report provide no concrete explanation for how it intends to square the circle of promoting European industry under difficult international trade conditions while strictly adhering to the principles of competition law. This theoretical lacuna merits a closer look at the suggestion, albeit in a modified form, of a Council override mechanism put forward in the Franco-German manifesto that, under rare circumstances, could pave the way to an amenable approach to the creation of European champions or at least as a potential counterweight to unfair competition from jurisdictions that do not ascribe to such purist views.

[6] "The Early Days of Merger Control, EC Merger Control: Ten Years On", International Bar Association Conference, London, 2000.
[7] "The champions Europe needs", WELT Economic Summit, Berlin, 9 January 2019. Commissioner Vestager has not changed tack during her tenure as Competition Commissioner as evidenced by the following speech shortly before she commenced her tenure as Competition Commissioner: "We can compete better in big markets if companies have competed and succeeded in smaller markets as well" ("Relaxed rules for EU 'champions' carry cost, Vestager says", *Mlex* (2 October 2014)).
[8] Similar sentiments have also been expressed by Neelie Kroes (2004–2009) and Joaquín Almunia (2009–2014). For Kroes, see SPEECH/07/301, "European Competition Policy Facing a Renaissance of Protectionism – Which Strategy for the Future?", speech to the St Gallen International Competition Law Forum, 11 May 2007. For Almunia, see SPEECH 11/561, "Policy Objectives in Merger Control", Fordham Competition Conference, New York, 8 September 2011.
[9] See CB Insights, "List of Top 100 Unicorn Companies" (March 2019) and the European Political Strategy Centre report entitled "EU Industrial Policy After Siemens-Alstom: Finding a New Balance Between Openness and Protection" (18 March 2019), p.7.
[10] European Political Strategy Centre, "EU Industrial Policy After Siemens-Alstom: Finding a New Balance Between Openness and Protection", p.7.
[11] European Political Strategy Centre, "EU Industrial Policy After Siemens-Alstom: Finding a New Balance Between Openness and Protection", p.1.
[12] *Airtours Plc v Commission of the European Communities* (T-342/99) EU:T:2002:146.
[13] Speech by Commissioner Mario Monti: "A reformed competition policy: achievements and challenges for the future, Centre for European Reform", Brussels, 28 October 2004.
[14] European Political Strategy Centre, "EU Industrial Policy After Siemens-Alstom: Finding a New Balance Between Openness and Protection", p.4.

No axis of symmetry within the merger regime for Member States' powers

Before taking a closer look at the Franco-German proposal, it is important to appreciate the etymology of Member State frustration with the restrictive boundaries imposed by the Merger Regulation on their powers to act to the benefit of the Single Market economy.

Article 21(4) exemption and the two-thirds rule

Article 21 of the Merger Regulation presents the first of these power asymmetries. Pursuant to art.21(3) no Member State can apply its national legislation on competition to any concentration that has an EU dimension. In derogation of art.21(3), art.21(4) provides that Member States may take appropriate measures to protect legitimate interests, *viz*. public security, plurality of the media and prudential rules. In so doing, Member States may act in a manner that ultimately lowers consumer welfare by blocking a concentration cleared by the Commission which may have been beneficial to consumers, e.g. in the form of lower prices. As an exception to the Commission's exclusive competence over concentrations with an EU dimension, art.21(4) is to be interpreted narrowly, and measures invoked by Member States must be proportionate and compatible with EU law.

In some instances, however, the art.21(4) powers have arguably been misused by Member States to protect national champions. In *BSCH/Champalimaud*,[15] for example, the Portuguese Minister of Finance, in an effort to block the acquisition by BSCH—a Spanish bank, adopted a decision to freeze Champalimaud's shares on the grounds that the transaction did not comply with Portuguese prudential rules. The Portuguese authorities had not communicated to the Commission the public interests they wished to protect in accordance with art.21(4). Ultimately the Commission adopted an infringement decision against Portugal on 20 October 1999, declaring that Portugal had infringed art.21 TFEU.[16]

But the powers afforded to Member States under art.21(4) are merely defensive in nature; that is, they only permit a Member State to intercede to block a proposed concentration—they do not provide Member States with the opposite and symmetrical offensive power to authorise a concentration with an EU dimension on the same public interest grounds. It is a peculiar feature of the Merger Regulation that it does not afford Member States the powers to proactively engage to protect public interests, one of which could be industrial policy, on the Single Market with a similar and corresponding overall reduction in consumer welfare to that resulting from the reactive power to block, on public interest grounds, a concentration with an EU dimension.

Another consideration in the wake of *Siemens/Alstom*, which would go some way to addressing the imbalance of powers afforded to Member States under the Merger Regulation to effect industrial policy, is the interplay between the art.21(4) exception and direct foreign investment controls. Pursuant to the newly implemented European framework for the screening of foreign investment (the "FDI Regulation"), Member States may adopt restrictive measures relating to foreign direct investment on the grounds of security and public order.[17] For instance, art.4 of the FDI Regulation provides a non-exhaustive list of factors that Member States may take into consideration in their determinations, e.g. the impact of such investment on critical infrastructure (e.g. transport) or whether the foreign investor is directly or indirectly controlled by a foreign government.

It would be interesting to speculate whether these powers could be invoked by a Member State in an effort to promote or protect national champions on art.21(4) grounds.[18] *Siemens/Alstom* was intended to create a European champion but the Commission concluded that the Chinese manufacturer, CRRC, exercised no competitive constraint in the EEA on a standalone basis and its entry into the EEA market did not appear likely, timely, or sufficient to deter or defeat any anti-competitive effects of the proposed tie-up of Siemens and Alstom.[19] The Commission's position as to CRRC's entry into the European market has subsequently been somewhat undermined by CRRC's acquisition of Germany's locomotive manufacturer Vossloh AG on 26 August 2019.[20] The deal, if approved by the German authorities, will see CRRC gain control over one-quarter of the European diesel-locomotive market. As a hypothetical test case, it would be interesting to consider whether the Commission would countenance an attempt by Germany (or France) to block the acquisition of Siemens's train business (or Alstom) by CRRC to protect its legitimate interests on the grounds that CRRC poses a threat to

[15] Commission Decision of 20 July 1999 relating to a proceeding pursuant to Article 21 of Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings (IV/M.1616—*BSCH/A.Champalimaud*).

[16] Other notable examples of "economic patriotism" aimed at the creation or protection of national champions include Holderbel's bid for Cimpor (Commission Decision of 22 November 2000 relating to a proceeding pursuant to Article 21 of Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings (COMP/M.2054—*Secil/Holderbank/Cimpor*), Commission press release IP/00/38 of 22 November 2000); Abertis's bid for Autostrade (Commission Decision of 22/09/2006 declaring a concentration to be compatible with the common market (COMP/M.4249—*Abertis/Autostrade*) according to Council Regulation (EC) No 139/2004); and UniCredit's takeover of German bank HVB (Commission decision of 18 October 2005 (COMP/M.3894—*Unicredito/HVB*)). The ultimately unsuccessful tie-ups in the pharmaceutical sector of Pfizer and AstraZeneca in addition to Abbvie and Shire are other notable exemplars of state intervention in cross-border deal making.

[17] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, Recital 3 and art.4.

[18] Recital 36 of the FDI Regulation provides that the FDI Regulation and art.21(4) of the Merger Regulation are to be applied in a consistent manner.

[19] Commission Decision of 6.2.2019 declaring a concentration to be incompatible with the internal market and the functioning of the EEA Agreement (M.8677—*Siemens/Alstom*) at [522], [536].

[20] In an unusual step, but as a sign of the times, the Bundeskartellamt referred the acquisition to a Phase II review. The German Federal Minister for Economic Affairs and Energy is also vetting the deal.

German (or French) transport infrastructure.[21] Would such an intervention be compatible with reference to art.21(4)?[22]

A second, and by far more vexing asymmetry, is the scope provided by the two-thirds rule in art.1 of the Merger Regulation for Member States to effectively sanction the emergence of national champions despite some negative impact on competition in the Single Market. Prime examples of this phenomenon include *Gas Natural/Endesa*[23] and *E.On/Ruhrgas*.[24] Endesa, the Spanish electricity group, was the target of takeover bids from both its Spanish rival Gas Natural and the German energy Group E.On, the latter's bid receiving unconditional clearance from the Commission. In an attempt to thwart the deal, the Spanish National Energy Commission imposed, as a condition on clearance of the merger, the sale by E.On of 30 per cent of Endesa's electricity generation capacity on security grounds, thereby making the deal unattractive. Absent the Commission's jurisdiction to review mergers between domestic market participants, the Spanish authorities subsequently approved the merger of Endesa with its Spanish rival Gas Natural.[25]

Yet the Merger Regulation denies a corresponding and symmetrical power to Member States to act in unison on public interest grounds with respect to a concentration with an EU dimension between two European companies where each party achieves at least two-thirds of its global turnover in the EU. Critiquing such a power by pointing to the negative impact on consumer welfare in some pockets of the Single Market may be considered by some as inconsistent with the corresponding potential for a decrease in consumer welfare pursuant to the two-thirds rule in art.1 of the Merger Regulation. On one level Member States can, with the blessing of the Merger Regulation, proactively engage in measures designed to promote national champions and economic development within their borders yet are denied the same power to unanimously protect and promote European industry as a whole. It is little wonder that some Member States feel hamstrung by the Merger Regulation in their efforts to act in a unified manner in the best interests of European industry.

A more robust role for public interests within the Merger Regime?

Notwithstanding the art.21(4) exemption, the Merger Regulation is devoid of any provisions which allow for public interest considerations to be taken into account at an EU level, which is in stark contrast to the position at Member State level.

First, some Member States do not consider political intervention in the merger process anathematic.[26] The German Federal Minister for Economic Affairs and Energy may overturn a prohibition decision by the Bundeskartellamt if warranted by an overriding public interest. Cases of ministerial authorisation are rare and are subject to rigorous oversight. Since the introduction of merger control in 1973, a ministerial authorisation has only been granted in three cases without conditions and in six cases with conditions.[27]

In the UK the Secretary of State for Business, Energy and Industrial Strategy (BEIS) may intervene in a merger situation on public interest grounds. The Secretary of State's discretion extends to public interests beyond national security, plurality of the media and the stability of the financial system.[28] Moreover, the Secretary of State may prohibit a change of control of an important manufacturing undertaking if it would be contrary to the interests of the UK or a substantial part thereof.[29]

Secondly, an empirical study of 75 merger control regimes reveals that the scope afforded to public interests by merger regimes is a parameter along a continuous spectrum.[30] The merger regimes in Belgium and Denmark make no such accommodation, whereas most Member States occupy points along the spectrum with Bulgaria, Estonia, Germany, Hungary, Italy, Spain, Greece and Poland according the widest scope to public interests.[31]

On the international front, Canada, for example, operates a parallel sector-specific assessment that affords consideration to a number of public interest factors and in some cases the outcome of this parallel assessment

> "has the potential to usurp the findings of the merger control assessment and thereby block, permit or seek remedies to address public interest concerns".[32]

Article 21 of the Investment Canada Act 1985 provides that the Minister of Innovation, Science and Economic Development may permit qualifying transactions only insofar as they are likely to be of net benefit to Canada.

[21] The parent company of CRRC Corp Ltd is CRRC Group, a state-owned enterprise. The counterfactual assumes that such intervention would not be in contravention of art.63 TFEU (free movement of capital).
[22] This scenario would be akin, in some important respects, to Germany's prohibition of a 20 per cent acquisition in 50Hertz by State Grid Corporation of China on national security grounds in 2018.
[23] Commission Decision of 15.11.2005 declaring the lack of Community dimension (COMP/M.3986—*Gas Natural/Endesa*).
[24] Bundeskartellamt (Bonn), E.ON/Gelsenberg, B8-109-01, 17 January 2002 (prohibition decision subsequently overturned by the German Government).
[25] Neelie Kroes, the Competition Commissioner at the time, subsequently called for the abolition of the two-thirds rule and other wide-ranging reforms to the Merger Regime (Tobias Buck, "Kroes calls for more powers over mergers" (November 2016, 2005) *Financial Times*).
[26] See, for example, PostNL's acquisition of national competitor Sandd, where the Dutch government invoked a public interest clause in the national competition laws to overrule the country's competition authority ("PostNL's bid for Sandd approved by Dutch government, overruling antitrust veto" (27 September 2019), *Mlex*).
[27] In 2016, Sigmar Gabriel, the German Minister of Economic Affairs, issued a ministerial authorisation conditionally clearing the acquisition of supermarket chain Kaiser's Tengelmann by EDEKA, effectively overturning the FCO's prior prohibition of the acquisition.
[28] Enterprise Act 2002 s.42.
[29] Industry Act 1975 s.13. This power has never been invoked.
[30] David Reader, "Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights", *CCP Working Paper 16-3*, 18 February 2016.
[31] Reader, "Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights", *CCP Working Paper 16-3*, 18 February 2016, p.63.
[32] Reader, "Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights", *CCP Working Paper 16-3*, 18 February 2016, p.5.

The factors in this assessment include, among others, the impact on employment, industrial efficiency, compatibility of the investment with national industrial policies, and the contribution of the investment to Canada's ability to compete in world markets. In 2010, for example, BHP Billiton's proposed US$38.6 billion bid for PotashCorp was prohibited as the deal was not to Canada's net benefit.

The Chinese merger control regime includes the objective of "promoting the healthy development of a socialist market economy"[33] and the emergence of Chinese firms to compete more effectively with foreign multinationals.[34] Indeed, the State Administration for Market Regulation (SAMR) may sanction a merger with serious anti-competitive issues if there is evidence that it will be in the public interest.[35] The consolidation of Chinese state-owned entities is one example of this phenomenon.[36] Indeed, CRRC itself, which arose from the merger of CSR and CNR in 2015, was cleared by MOFCOM on the basis, among other things, so that the

> "new company will increase its global market share and accelerate its internationalisation … improve the efficiency of investment, create a united strategy in overseas expansion and focus on gaining a more advantageous position in the international competition".[37]

Finally, public interest criteria including employment and the economic empowerment of the country's previously disadvantaged communities form part of the substantive merger control assessment in South Africa. In *Wal-Mart/Massmart Holdings Ltd*, commitments were required ensuring employment protections and contributions to a programme developing local suppliers.

The empirical data suggests that public interest considerations do not reside on the periphery of international merger control—88 per cent of the canvassed domestic merger regimes incorporate some form of public interest consideration within their merger control laws.[38] Against this backdrop the Merger Regulation's nod toward public interests appears somewhat limited and unduly defensive in nature, thereby acting as a frustrating impediment to Member States seeking to harness competition to promote European industry at home and abroad to the benefit of the Single Market.

Recast Franco-German veto proposal

Much of the debate arising from the Commission's decision in *Siemens/Alstom* gravitates around the public statements by the French and German governments and their joint manifesto.[39] The French Finance Minister Bruno Le Maire called for a "new model" of competition rules which takes account of "new economic challenges".[40] On a more pointed note, Le Maire commented that,

> "One can always take the 'ostrich approach' and close one's eyes to the realities of the world. But as a general rule one pays dearly some years later".[41]

The German Economy Minister Peter Altmaier was equally outspoken in declaring that, "We need international champions in Europe that are able to compete globally".[42] Sentiments such as these were evident prior to the Commission's decision in *Siemens/Alstom* in the call by 19 EU governments for the new European Commission to adopt a comprehensive industrial strategy that will ensure Europe's competitiveness in the face of fierce competition from major economic blocks.[43]

The Franco-German Manifesto itself is relatively terse and its recommendations nebulous and underdeveloped. However, by far the most controversial proposal, and the one that has received most attention, is the suggestion that the next Commission

> "consider whether a right of appeal of the Council which would ultimately override Commission decisions could be appropriate in well-defined cases, subject to strict conditions".

Taken at face value, this proposal would permit the Council to override a prohibition decision by the Commission in an effort to push industrial policy to the detriment of effective competition in the EU. When considered in this light there is little to recommend such a proposal. Indeed, many have rightfully questioned the wisdom of a "Council veto" considering some of the fundamental questions it raises. For instance, would the veto operate on the basis of a qualified majority in the Council or would a unanimous decision be required? What timeframe would be put in place within which the Council must arrive at a decision? And, what legislative procedures ought to be followed in instances where a

[33] Article 1 of the Anti-Monopoly Law of the People's Republic of China ("AML"). Article 4 of the AML provides that "The State shall formulate and implement competition rules which are compatible with the socialist market economy".
[34] Article 5 of the AML is widely understood to reflect the state policy of encouraging Chinese competitiveness on global markets through the consolidation of domestic Chinese companies.
[35] Article 28 of the AML provides that "if the undertakings concerned can prove that the advantages of such concentration … is in the public interest, the authority for enforcement of the Anti-monopoly Law under the State Council may decide not to prohibit their concentration".
[36] For example, the world's largest cement producer was created in 2017 by MOFCOM's unconditional clearance of the merger Chinese state-owned China National Building Material (CNBM) with rival China National Materials (Sinoma).
[37] "CNR and CSR agree merger terms" (31 December 2014), *Railway Gazette International*.
[38] Reader, "Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights", *CCP Working Paper 16-3*, 18 February 2016.
[39] "A Franco-German Manifesto for a European industrial policy fit for the 21st Century" (19 February 2019). Subsequent proposals for modernising European competition policy were jointly put forward by France, Germany, and Poland on 4 July 2019 (*https://www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf?__blob=publicationFile&v=4* [Accessed 28 December 2019]). A further call for adapting European competition law in the face of global industrial challenges was released by a French parliamentary committee on European Affairs on 27 November 2019.
[40] "Siemens-Alstom merger shows need for competition-law update, Le Maire says" (21 January 2019), *MLex*.
[41] "Siemens-Alstom merger shows need for competition-law update, Le Maire says" (21 January 2019), *MLex*.
[42] "German economy minister: Must do everything to support Siemens, Alstom train merger" (21 January 2019), *Reuters*.
[43] "Joint statement by France, Austria, Croatia, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, Netherlands, Poland, Romania, Slovakia, Spain", Friends of Industry, 6th Ministerial Meeting, 18 December 2018.

Commission decision is appealed to the European courts prior to the Council's decision as to a veto?[44] Would the insertion of a political element into the merger control process create uncertainty that would ultimately act as a deterrent to merger activity in the Union?[45]

On closer inspection, however, a right of appeal to the Council in an albeit slightly different, yet far more sophisticated form, might not be as foreign to EU law as some may think and has operated sufficiently effectively in the area of State aid to warrant reconsideration of a veto right in the context of a merger review. Article 108(2) subpara.3 TFEU provides that on application by a Member State, and in exceptional circumstances only, the Council, acting unanimously, can declare compatible (but not incompatible) with the internal market aid which a Member State is granting or intends to grant in derogation of art.107 TFEU pursuant to which competence to assess the compatibility of State aid with the internal market lies solely with the Commission.[46] As one commentator has put it, this "procedure represents a sort of 'safety valve' … with the object of allowing Member States to override the Commission's point of view, *for political reasons*" (emphasis added).[47]

Importantly for our context, whereas the proposed Franco-German veto would seemingly occur *after* the Commission has issued a decision to prohibit a concentration, the override procedure in art.108(2) subpara.3 TFEU can only be initiated by a Member State in the interim period *between* the commencement and conclusion of the formal investigation by the Commission into the relevant aid. Similar to an appeal to the Council in the context of State aid, an application to the Council pursuant to the recast Franco-German proposal would initiate a three-month stay of the Commission's formal investigation procedure, after which the competence reverts to the Commission absent a declaration by the Council. The right of appeal to the Council expires once the Commission has concluded its investigation and an incompatibility decision delivered, thus preventing the Council undermining the merger control process once the Commission has issued its decision.[48]

Restructuring the sequence of events in the Franco-German veto procedure transforms the proposal from a veto right into a procedural right; stated otherwise, in exceptional circumstances the parties to a concentration under review by the Commission have the right to request a shift of competence from the Commission to the Council (inasmuch as a Member State has a similar right in the context of State aid). This modification retains an adequate degree of legal certainty in the merger review process and sufficiently dispels the view that "Europe could find itself in a downward spiral of economic inefficiency and political arbitrariness, ushering in mistrust and internal divisions".[49]

A substantive condition for Council authorisation of the State aid in question is the presence of extraordinary or exceptional circumstances.[50] While the Council is afforded broad discretion as to what constitutes "extraordinary circumstances",[51] it has been recognised that such circumstances involve "the idea of something extraordinary and unforeseen or at least something not permanent or continuous and of course something other than normal".[52] As the notion of "exceptional" is sufficiently nebulous it is unsurprising that while initially confined to addressing difficult circumstances within the agricultural sector,[53] the art.108(2) subpara.3 TFEU Council override mechanism has been employed in other sectors thus evidencing its flexibility as a mechanism by which Member States can call on the Council to address unusual problems arising across a broad spectrum of industries.[54]

For the purposes of merger control, sufficient jurisprudence as to the necessary and jointly sufficient conditions constituting exceptional circumstances will develop over time, but in the interim the Council can draw on its State aid experience to determine whether clearing a concentration will address the exceptional circumstances at hand. There is room to argue that absent adequate progress at the WTO level, the unfair competitive environment in which many European companies must now trade may constitute exceptional circumstances. That a privately held entity in Europe should lose a competitive tender process to a corporate extension of a third-country

[44] Jacques Buhart and David Henry, "Industrial policy to trump competition? The Siemens/Alstom railway merger and its aftermath" (2019) 2 *Concurrences* 11.
[45] Nicholas Levy, David Little and Henry Mostyn, "European Champions – Why politics should stay out of EU merger control" (2019) 2 *Concurrences* 28. These concerns have been echoed recently by Austria's Bundeswettbewerbsbehörde in its "Position paper on national and European Champions in Merger Control" (November 2019), pp.3–4 and 20–23.
[46] The Council cannot declare the aid incompatible.
[47] Ortiz Blanco, *EU Competition Procedure*, 3rd edn (Oxford University Press, 2000), para.21.97.
[48] *Commission of the European Communities v Council of the European Union* (C-110/02) EU:C:2004:395 at [31].
[49] European Political Strategy Centre, "EU Industrial Policy After Siemens-Alstom: Finding a New Balance Between Openness and Protection", p.4.
[50] Action brought on 21 December 1977 by *Commission of the European Communities v Belgium* (156/77) EU:C:1978:180 at [16]; *Commission of the European Communities v Council of the European Union* (C-110/02) EU:C:2004:395 at [31]; *Commission of the European Communities v Council of the European Union* (C-399/03) EU:C:2006:417 at [24] and Blanco, *EU Competition Procedure*, 3rd edn (Oxford University Press, 2000), para.21.102.
[51] *Commission of the European Communities v Council of the European Union* (C-122/94) EU:C:1996:68 at [18]–[19].
[52] Opinion of Advocate General Cosmas in *Commission of the European Communities v Council of the European Union* (C-122/94) EU:C:1995:395 at [83], [85]; *Commission of the European Communities v of the European Union* (C-122/94) EU:C:1996:68 at [21].
[53] For example, aid to: Italian milk producers (Council Decision of 16 July 2003 on the compatibility with the common market of an aid that the Italian Republic intends to grant to its milk producers (2003/530/EC—*Italian aid to milk producers*) [2003] OJ L184/15); Cypriot famers (Council Decision of 23 January 2006 on the approval of exceptional national aid by the Republic of Cyprus to Cypriot farmers for the purpose of repaying part of agricultural debts created long before accession of Cyprus to the European Union (2006/39/EC—*Cypriot farmers*) [2006] OJ L23/78; and Portuguese pig farmers (*Commission of the European Communities v Council of the European Union* (Case C-110/02) EU:C:2004:395).
[54] Cf. the decisions of 3 May 2002 on the exemption from and/or a reduction of the mineral oil tax for road transport undertakings in the Netherlands (Council Decision of 3 May 2002 on the granting of a national aid by the authorities of the Kingdom of the Netherlands in favour of road transport undertakings (2002/361/EC) [2002] OJ L131), in Italy (Council Decision of 3 May 2002 on the granting of a national aid by the authorities of the Italian Republic in favour of road transport undertakings (2002/362/EC) [2002] OJ L131) and France (Council Decision of 3 May 2002 on the granting of aid by the French Government for road transport undertakings (2002/363/EC) [2002] OJ L131/12, 14, 15).

government is not within the "normal" confines of authentic competition. Nor are non-reciprocal market access regimes.

Importantly, art.108(2) subpara.3 TFEU does not provide the Council with unfettered powers. Rather, the Council's declaration is subject to a threefold layer of oversight. First, each instance of the Council's authorisation is reviewable by the CJEU,[55] though given the Council's wide discretion as to what counts as "exceptional circumstances", the court's role is largely limited to examining whether the Council's decision contains a manifest error, constitutes an abuse of power, or exceeds the bounds of its discretion.[56]

Secondly, and in the long term, aid authorised by the Council is subject to ongoing review by the Commission[57] such that were the original circumstances warranting a decision by the Council to change sufficiently, the competence of the Commission is revived[58] and it may subsequently declare the aid incompatible with the internal market after a formal investigation pursuant to art.108(2) TFEU. The proposed model would require an adjustment to cater for instances in which the exceptional circumstances subside and the Commission decides to "roll-back" the Council's clearance of the merger. The power to unwind a concentration cleared by the Council would by itself act as a fetter on businesses' willingness to use the recast mechanism. That deals can retrospectively be unwound by authorities is not as novel a concept as some might expect. In the US, for example, a transaction may be unwound under s.7 of the Clayton Act despite the statutory waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 having expired. The acquisition of CLARCOR Inc by the Parker Hannifin Corp (2017) is one example of this phenomenon. The Department of Justice has even ordered a divestment four years after the completion of an acquisition (see *Steves & Sons, Inc v JELD-WEN, Inc* (2012)). Despite international precedent, unwinding a transaction is nevertheless a radical step. Perhaps, as a restraint on the Commission's power to unwind a transaction in the recast German-Franco model, the Commission's powers could be limited to the imposition of behavioural remedies and only within a sufficiently narrow timeframe.

Finally, and as a further degree of restraint on the Council's power, those with locus standi under art.263 TFEU can contest the Council's decision. An appeal to the competence of the Council as part of the merger control process could similarly be subject to this threefold layer of oversight.[59]

When remodelled on the art.108(2) subpara.3 TFEU mechanics and jurisprudence, the Franco-German proposal as to a Council "veto" takes on a different light and certain arguments raised against this proposal begin to fade. First, and most importantly, the Council may only receive an application from the relevant Member State(s) under extraordinary or exceptional circumstances and only during the period between the parties' submission of notice of the concentration to the Commission and publication of the Commission's decision. Consideration by the Council would suspend the Commission's competence and stop the clock on its review (e.g. up to three months), following which competence reverts to the Commission. Any declaration by the Council clearing the proposed concentration would require unanimity at the Council level. Finally, the Council's declaration would be subject to robust oversight.

Incorporating within the Merger Regulation a mechanism appropriately modelled on the established art.108(2) subpara.3 TFEU mechanism could address the asymmetry of powers in the Merger Regulation by affording Member States the proactive power to clear, in exceptional circumstances, a path toward the development of a European champion.

Views from the business community

A recent and notable development in the *Siemens/Alstom* debate has been the opposition from the business community toward political interference in the merger control process. Wary of the uncertainty associated with such interference, a growing number of voices are rather seeking innovative ways to modernise the current regime without sacrificing its political independence. This wedge between the business community and certain Member States reinforces the cool reception of the Franco-German Manifesto among the legal, economist and academic community.[60]

In a nod to *Siemens/Alstom*, BusinessEurope, for example, calls upon the Commission to engage in enforcement which does not

> "prevent individual EU companies, alone or together, from achieving greater scale … enabling them to compete at global level. At the same time, it should safeguard the effective functioning of the internal market".[61]

One suggestion for how the Commission can adapt EU competition to developments on global markets is by considering whether there may be

[55] *Commission of the European Communities v Council of the European Union* (C-122/94) EU:C:1995:395 at [21]; and Blanco, *EU Competition Procedure*, 3rd edn (Oxford University Press, 2000), para.21.105.
[56] *Roquette Frères v Council* (C-138/79) EU:C:1980:249 at [32]–[33].
[57] Blanco, *EU Competition Procedure*, 3rd edn (Oxford University Press, 2000) para.21.110.
[58] Blanco, *EU Competition Procedure*, 3rd edn (Oxford University Press, 2000) para.21.110.
[59] In a more progressive form of the Franco-German Council override proposal, the Council would have the discretion to adopt market definitions that would be broader than Commission precedent in an effort to place additional emphasis on worldwide markets and the ability of the parties to effectively compete on those markets. Sentiments to this effect were recently expressed by Ursula von der Leyen to German EPP MEPs (*https://www.politico.eu/newsletter/brussels-playbook/politico-brussels-playbook-presented-by-etno-british-chaos-european-champions-italian-experiment/* [Accessed 28 December 2019] (4 September 2019) *Politico Brussels Playbook*).
[60] See, e.g. Levy, Little and Mostyn, "European Champions – Why politics should stay out of EU merger control" (2019) 2 *Concurrences* 27.
[61] "Improving EU Competition and State Aid Policy" (4 September 2019), *BusinessEurope*, Position Paper, p.3.

> "situations where it should put more weight on the global market environment when assessing certain concentrations bearing in mind overall market developments as well as competition within the internal market. EU competition policy can adapt to developments on global markets and where necessary change relevant notices and guidelines."

This is particularly relevant to cases like *Siemens/Alstom* where

> "merging parties compete outside the EU and where third country competitors do not (yet) have business activities or revenues in the EU" (e.g. China's CRRC) and

> "the non-European business of the merging companies is vital to support their European activities, in times when EU demand is low and technical development is mainly driven by demand from outside the EU".[62]

Additionally, BusinessEurope advocates for a methodological change to the assessment of mergers which offsets any immediate negative effects with long-term benefits accruing to consumers.[63] Reforming the assessment timeframe is another suggestion that has similarly received support from various corners in both the scholarly and business community.[64]

BusinessEurope turns to State aid as one means of levelling the international playing field:

> "EU State aid rules have usually arranged for a level playing field within the EU, without also ensuring a level playing field for EU companies competing worldwide, apart from a few exceptions".[65]

More explicitly, "[State aid rules should] address market-distorting subsidies".[66] Interestingly, the European Round Table of Industrialists ("ERT"), another mouthpiece for the business community, has put forward a position paper in which they call on "policymakers to create the required framework conditions for European companies to compete successfully and at scale globally",[67] singling out State aid as one means of achieving this end. While agreeing that there should not "be greater political involvement in merger control decisions", State aid schemes, rules and guidelines should be crafted to address competitive disadvantages created by foreign companies supported or owned by foreign states.

While the recast Franco-German veto proposal considered above is merely a suggested blueprint for those seeking to address the competitive challenges facing European industries, particularly in those rare circumstances where traditional measures have met with limited success, it does open the door to political involvement in the merger process, albeit in extraordinary or exceptional instances and with robust oversight. For those seeking solutions absent political interference, the proposals outlined above by representatives of the business community merit further consideration and development. That said, it is apparent from the above discussion on art.108(2) subpara.3 TFEU, that the State aid process is theoretically open to political manipulation should the relevant Member State(s) be inclined to bypass the Commission with an application to the Council.

Resolute yet flexible—a way forward for competition law

That there is change afoot is evident from a cursory comparison of the mission statements received by Commissioner Vestager from Presidents Juncker and von der Leyen. President Juncker's only reference to industrial policy was in the context of "mobilizing competition *policy tools* and *market expertise*" (emphasis added), whereas President von der Leyen has expressly instructed Commissioner Vestager to

> "*evaluate and review* Europe's *competition rules*. This will cover the antitrust regulations that will expire in the course of the mandate, the ongoing *evaluation of merger control* and the review of State aid rules and guidance" (emphasis added).

President von der Leyen anticipates that in the next chapter of the development of the Union competition rulebook, competition law will "contribute to a strong European industry at home *and in the world*" (emphasis added). Even more explicit is her instruction that,

> "competition will have an important role in our industrial strategy. The competitiveness of our industry depends on a level playing field that provides business with the incentive to invest, innovate and grow … As part of the industrial strategy, you should develop tools and policies to better tackle the distortive effects of foreign state ownership and subsidies in the internal market."[68]

On the eve of her second tenure as Competition Commissioner, Vestager herself has signalled a visible shift in position by indicating that she would seek to

[62] "Improving EU Competition and State Aid Policy" (4 September 2019), *BusinessEurope*, Position Paper, p.4.
[63] "Improving EU Competition and State Aid Policy" (4 September 2019), *BusinessEurope*, Position Paper, p.4.
[64] See, e.g. Ioannis Lianos, "The future of competition policy in Europe: Some reflections on the interaction between industrial policy and competition law" (2019) 2 *Concurrences* 40; and "Competing at Scale: EU Competition Policy fit for the Global Stage", European Round Table of Industrialists (October 2019), p.11.
[65] "Improving EU Competition and State Aid Policy" (4 September 2019), *BusinessEurope*, Position Paper, p.3.
[66] "Legal Affairs Strategy for the Next Political Cycle" (October 2019), *BusinessEurope*, Position Paper, p.4.
[67] "Competing at Scale: EU Competition Policy fit for the Global Stage", European Round Table of Industrialists (October 2019), p.2.
[68] The significance of this instruction lies, in part, with the recognition that combatting distortions caused by, e.g. third-country subsidies and unfair procurement is usually a role reserved for DG Trade, which is responsible for EU enforcement of WTO rules (e.g. imposing tariffs under anti-dumping rules and the agreement on subsidies and countervailing measures). That a Competition Commissioner is being asked to address these is significant, but it remains unclear what measures under EU competition rules von der Leyen has in mind.

balance French and German views with those of others,[69] and protect European champions from unfair trade from outside Europe,[70] which is in contrast to the tenure of her speech prior to her first term as Competition Commissioner.[71] And the pressure on Commissioner Vestager to act against unfair and market-distorting competition from foreign state-owned entities is growing, with the Dutch Government now adding its voice to the debate with its position paper calling for stricter supervision of such entities and considering the development of EU champions as competitive counterweights to such entities to ensure the fairness and integrity of the single market.[72]

While it is unlikely that we will witness wholesale or even substantive amendments to the Merger Regulation and its accompanying instruments during the course of the next Commission,[73] it would not be surprising were some steps taken to protect and promote the competitive capabilities of European industry in the absence of progress at the WTO level, including indirectly through the imposition of anti-dumping and anti-subsidy measures against foreign companies operating within the EU.[74]

The new Commission's response to China Shipbuilding Group Corporation (CSGC), the $141.5 billion mega-merger of Chinese SOE's China Shipbuilding Industry Corporation (CSIC) and China State Shipbuilding Corporation (CSSC), will be its first real test in this regard. Will the Commission permit the emergence of a European ship building champion as a counterweight to CSGC by clearing the proposed tie-up of Italy's Fincantieri's and France's Chantiers de l'Atlantique? Or will it persist with the view it took on the threat from Chinese competition in *Siemens/Alstom*? The next few months have the potential to be a defining moment in European competition law.

[69] "Vestager will 'balance' Franco-German merger demands against 'other voices'" (10 September 2019), *MLex*. However, some lawmakers have recently expressed concerns at Commissioner Vestager's lack of clarity on such proposals: "Doubts about Vestager over conflicts, industrial policy linger in lawmakers' confirmation letter" (10 October 2019), *MLex*.
[70] "European champions need balance of competition and fair trade, Vestager says" (8 October 2019), *MLex*.
[71] Quoted above in the first section of this article.
[72] "Distortion risk from state-backed companies calls for broader EU competition law, Dutch government says" (4 December 2019), *MLex*.
[73] Commissioner Vestager has, however, announced that the Commission will review its notice on market definition, "to explore ways to update and improve the way we deal with geographic market definition" ("Defining markets in a new age", Chillin' Competition Conference, Brussels, 9 December 2019).
[74] The Commission's policy paper "Instrument on Foreign Subsidies" (scheduled for publication on 4 March 2020) represents an initial step forwards in addressing market-distorting activities by state-owned entities.