LL.M. Thesis

The call for European champions:

Reforming the EU merger control regime to level the playing field?

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1. Introduction

1.1. The role of big corporations in today's economy

The role played by big corporations in today's global economy is of paramount importance. According to the *Fortune 500 Global* list, in 2019 the first company in the world by revenue was Walmart with more than 514 billion dollars[1], while Saudi Aramco was the first one by profit with more than 110 billion dollars[2]. As regards market capitalisation, in summer 2019 Microsoft was in the lead with a value of almost one trillion dollars[3], a figure that has been reached by a handful of other companies during the second half of the year and the very beginning of 2020. Although a comparison does not have any real significance due to the radical differences existing among these concepts, it is interesting to compare these figures with the gross domestic product of States. For instance, the nominal GDP of Norway reached 434 billion dollars in 2018, while it hit a total of 204 billion dollars in New Zealand and 46 billion dollars in Azerbaijan[4]. Even if not significant from a scientific point of view, it is evident at a first glance that the economic impact of corporations over the global economy is enormous.

As regards the *Fortune 500 Global*, it is interesting to note that the top ten list of the biggest companies by revenue is composed of three Chinese companies, two US and one from the Netherlands, Saudi Arabia, Japan, Germany and the United Kingdom respectively. In total, the *Fortune 500 Global* includes 121 US and 119 Chinese companies, while the other countries reach a much lower figure: Japan 52, France 31 and Germany 29. The prevalence of the US and Chinese companies is even more evident in the *Forbes Global 2000* list[5], which ranks companies using a more sophisticated criterion that weights revenues, profits, assets and market value. In the top ten, apart from Royal Dutch Shell, all the companies are from the US or China. In total, *Forbes Global 2000* lists 535 US, 315 Chinese and 225 Japanese enterprises. The UK and Germany reach only 95 companies each, and France 90.

The fields where the distance between Europe and the rest of the world, specifically the US, China, Japan and South Korea, becomes even more striking are the technological and digital ones. Scrolling the *Fortune 500 Global* list of the relevant industry, the first European company to appear (20th) is

[1] Fortune, 'Global 500', 2019 <https://fortune.com/global500/2019/search/?revenues=desc > accessed 13 March 2020.
[2] Ibid <https://fortune.com/global500/2019/search/?profits=desc> accessed 13 March 2020.
[3] Ibid <https://fortune.com/fortune500/search/?mktval=desc> accessed 13 March 2020.
[4] The World Bank <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?most_recent_value_desc=true&view=map> accessed 13 March 2020.
[5] Forbes, 'Global 2000' <www.forbes.com/global2000/list/> accessed 13 March 2020.

Accenture. Following that, only two other European companies are enlisted, in much lower positions. The gap between Europe and the other global players in this field is evident.

1.2. The challenges of the global economy: China, technology and protectionism

At the time of writing, the coronavirus crisis is unfolding and neither its effect on the global economy and the international value chains nor the reactions of the affected countries can be thoroughly assessed yet. These events may completely overturn the pre-existing political and economic trends, which can be nonetheless summarised as follows.

The relations between the US and China have been characterised by a growing economic tension for more than a decade. After the accession of China to the World Trade Organization in 2001, the partial liberalisation of its markets and its foreign direct investments policy[6], as well as the opening of overseas markets to Chinese goods, have unleashed an astonishing level of economic growth in China during the last decades. In the US, however, the rise of China as an economic giant has been increasingly perceived as a threat, due to the challenges posed to the US economic, technological and geopolitical leadership. With the election of Donald J. Trump in 2016, these underlying tensions erupted in a more confrontational relation, that has led to the imposition of tariffs and other trade barriers to Chinese export in the USA and to reciprocal Chinese retaliatory measures. The USA seems to be particularly concerned by the technological challenge posed by China, which has reached an impressive technological level. According to many, however, this fast development has been characterised also by unfair practices and strategies carried out by the Chinese government. This is why some of the steps taken by President Trump are aimed at protecting US tech companies against Chinese competitors and at hampering or even blocking Chinese enterprises from making business in the US and in other countries.

During the Trump Presidency, political and economic relations have become more confrontational with the EU as well. The US administration has imposed tariffs to several EU products and threatened to extend them to other goods in the future. According to Trump, the decisions have been adopted as a countermeasure for already existing European trade barriers and, once again, in order to protect US tech companies operating in the EU from an alleged unfair treatment. [7]

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[6] Chunlai Chen, 'The liberalisation of FDI policies and the impacts of FDI on China's economic development' in Garnaut, Ross; Song, Ligang; Fang, Cai (Eds) *China's 40 years of reform and development: 1978-2018* (China Update Book Series, ANU Press, Acton, 2018).

[7] Sergei Klebnikov, 'U.S. Threatens New Tariffs On Cars In Response To France's Digital Tax' *Forbes* (22 January 2020) <www.forbes.com/sites/sergeiklebnikov/2020/01/22/us-threatens-auto-tariffs-in-response-to-frances-digital-tax/#2cacf0fe11a1> accessed 15 March 2020.

Considering also other recent events such as Brexit and the political success of nationalists in almost every country, it is evident that the leitmotiv of the past few years in the global economy has been the strong resurgence of protectionism and economic nationalism.

1.3. The EU competition regime, a success story

The bases of the EU competition regime were established in the Treaty of Rome in 1957. The founding fathers of the Community aimed at creating an effective single market that could eventually foster a real political union. In order to achieve that, it was fundamental to ensure a fair and competitive environment for the companies operating in the common market. After establishing the main rules in the Treaty, the Member States and the European Institutions began working on the implementation of the provisions contained in Articles 85 and 86, by approving the first Regulation in 1962 (Council Regulation 17/62). Two years later, the first major decision of the Commission was issued on the *Consten & Grundig* case, which led in 1966 to the first landmark ruling of the European Court of Justice in this area of European law.

This framework of European Competition law evolved gradually until the beginning of the new century when a major reform saw the light with Competition Commissioner Mario Monti in 2002. Council Regulation 1/2003 modernised the European Competition system, by partially decentralising the implementation of competition rules to national authorities, by creating the European Competition Network and by streamlining the procedures. In the wake of the reform, also new substantive pieces of legislation were enacted, such as a specific set of rules for merger control (Council Regulation 139/2004). In the last decades, this legislative framework has proved its value. In fact, the EU competition regime is currently considered one of the most – if not the most - effective regimes in the world[8].

1.4. The Alstom-Siemens decision and the call for European champions

Today, after a contested decision by the European Commission on the Alstom-Siemens merger, several EU Member States, policymakers and observers have called for a reform of the EU competition and merger control system, which has been accused of preventing the creation of European industrial champions. The specific reasons for each reform proposition will be discussed at a later stage, but the strategic reasons behind this call appear already quite evident. As briefly discussed above, big enterprises are playing an increasingly stronger role in the global economy and

[8] See Section 6.1

their importance is growing over small and medium enterprises, thanks to their capacity to innovate. In the last few years, European companies have not proven themselves capable of keeping up with the innovation pace held by US and Chinese companies, and for this reason, many fear a negative effect on the competitivity of European economies. In addition, the turbulent current political situation and the protectionist approach many countries have adopted have generated concerns over the so-called level playing field for European and third countries' enterprises.

All together, these reasons have led many to consider the current European competition and merger control regime obsolete and not appropriate for the economic and political situation. Specifically, the reform propositions aim at enabling the creation of European industrial champions, capable of competing on a fairer level with US, Chinese and other third countries' big corporations. However, as demonstrated in the following pages, the consequences of such a reform on the efficiency and stability of the internal market render the suggested review not recommendable.

In this paper, the reform of the European merger control regime will be discussed. The paper will not focus on the questions arising from the digital transformation, but it will instead focus on the reform propositions based on reasons of European economic public interest, namely the need to tackle the challenges posed by third countries' big corporations and their anti-competitive practices. Firstly, the Alstom-Siemens merger and the relevant ban of the European Commission will be briefly presented. Secondly, the Franco-German Manifesto for a European Industrial Policy and the following joint statements on merger review will be analysed. Thirdly, the call to reform the Commission's market definition practice and the reasons why it should be declined will be explained. Fourthly, the suggested review of the competitive assessment in merger control and the reasons why it is not recommendable will be discussed. Lastly, several considerations on the fragility of the EU competition regime and the possibility of using other tools for tackling current economic and geopolitical challenges will conclude the paper.

2. The Alstom-Siemens case

2.1. The Chinese competitor

In 2015 the Chinese train maker companies CSR and CNR merged into CRRC Corporation Limited, a publicly traded company listed on the Shanghai and Hong Kong stock exchanges and controlled by the State-owned CRRC Group. The merger between CSR and CNR created the largest rolling stock manufacturer in the world, active in designing, manufacturing, repairing, distributing and leasing railway locomotives, electric multiple units, rapid transit vehicles, engineering machinery, mechanical and electrical equipment, electronic devices and components, electronics and environmental protection equipment[9].

Thanks to the merger, CRRC has become the global leader in the rail industry, with a virtual monopoly in China and a leading position also in several foreign markets. In 2018 CRRC generated over 20 billion euros of revenue, outnumbering the closest competitors, namely Alstom and Siemens.[10] The two European companies generated 'only' 8.1 and 7.9 billion euros of revenue from rail activities in the same year.

In order to respond to the pressure posed by the CRRC, on the 26 September 2017 Alstom announced that it was joining forces with Siemens to create a European Champion in Mobility.[11]

2.2. Alstom-Siemens: the details of the deal

Siemens is a corporation based in Germany, active worldwide in several industrial areas. As regards its mobility division, Siemens manufactures '*rolling stock, rail automation and signalling solutions, rail electrification systems, road traffic technology, IT solutions, as well as other products and services concerning the transportation of people and goods by rail and road*'.[12]

Alstom instead is a corporation based in France, also active worldwide in the rail transport industry. It offers '*a wide range of transport solutions (from high-speed trains to metros, trams and e-buses),*

[9] Reuters <www.reuters.com/companies/601766.SS> accessed 16 March 2020.
[10] Statista <www.statista.com/statistics/617847/new-vehicle-revenue-rolling-stock-manufacturers/> accessed 16 March 2020.
[11] Alstom, 'Siemens and Alstom join forces to create a European Champion in Mobility' (27 September 2017) <www.alstom.com/press-releases-news/2017/9/siemens-and-alstom-join-forces-to-create-a-european-champion-in-mobility> accessed 16 March 2020.
[12] *SIEMENS/ALSTOM* (Case M.8677) Commission Decision C/2019/921 [2019] OJ C 300 para 3.

personalised services (maintenance and modernisation) as well as products dedicated to passengers and infrastructure, signalling solutions, rail electrification systems and digital mobility'.[13]

After signing a Memorandum of Understanding and revealing the merger plan to the public in 2017, the two companies entered into a final Business Combination Agreement on 23 March 2018, which defined the details of the acquisition of sole control of Alstom by Siemens. The transaction would have involved the combination of Alstom and Siemens' mobility business, including its rail traction drives business and related activities. The merged entity would have been named Siemens Alstom, it would have been listed on the Euronext Paris Stock Exchange and it would have had its main headquarters based in Paris and Berlin. Siemens would have acquired the majority of the shares (50,67%).[14]

From a competition law standpoint, the acquisition of Alstom by Siemens constituted a concentration pursuant to Article 3(1)(b) of the Merger Regulation.[15] What is more, at the time of the transaction, the two companies had a combined aggregate worldwide turnover of more than 5'000 million euros and an EU-wide turnover in excess of 250 million euros; neither of them achieved more than two-thirds of their EU-wide turnover within one and the same Member State. Therefore, the transaction had a Union dimension, as defined in Article 1 (2) of the Merger Regulation.[16]

Since it constituted a concentration with a Union dimension, the transaction was duly notified to the Commission on 8 June 2018 under Article 4 of the Merger Regulation.[17]

2.3. The Commission's decision

After a preliminary evaluation, on 13 July 2018, the Commission announced the opening of an in-depth investigation to assess the acquisition of Alstom by Siemens, pursuant to Article 6 (1) (c) of the Merger Regulation.[18] The decision was justified by the fact that Alstom and Siemens manufacture, and hence compete over, (i) high-speed trains (above 250 km/h), mainline (intercity and regional trains) and urban rolling stock (metros and trams), as well as (ii) mainline and urban signalling solutions (*e.g.*, safety controls). The proposed transaction would have combined the two largest

[13] Ibid para 4.
[14] Ibid.
[15] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L24/1.
[16] Ibid.
[17] Ibid.
[18] EU Commission Press Release, IP/18/4527 (18 July 2018) <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4527> accessed 18 March 2020.

suppliers of rolling stock and signalling solutions in the European Economic Area (EEA) and, in the eyes of the Commission, that could have removed a very strong competitor from the market and eventually lead to higher prices, less choice and less innovation. In the words of Competition Commissioner Margrethe Vestager, the transaction *'could ultimately harm the millions of Europeans who use rail transportation every day for work or leisure.'*[19]

After extensive investigations and despite the position of both the German and the French governments in favour of the transaction[20], on 6 February 2019, the Commission declared the acquisition of Alstom by Siemens incompatible with the internal market and therefore prohibited it. In particular, the Commission found that the transaction would have produced a significant impediment to effective competition in the markets for (i) high-speed and very high-speed trains and (ii) a number of mainline signalling systems.

The analysis started with the market definition. As regards the relevant product market[21] for rolling stock, the Commission identified markets for high-speed and very high-speed trains (capable of maximum speed equal to or higher than 250 km/h), excluding lower speed trains. As for the relevant geographic market[22], the parties contended that it should have been considered worldwide, '*being characterised by large and infrequent orders which attract a group of suppliers active globally*, *and with most future demand emanating from countries outside of the EEA*'. The Commission only partially agreed with this view. After extensive market investigations, the Commission concluded that the relevant geographical markets for high and very high-speed trains are at least EEA-wide, including Switzerland. Nevertheless, it could not be ignored that the relevant markets may be broader and cover the rest of the world, excluding however China, South Korea and Japan due to the 'insurmountable barriers' to enter into these territories.[23]

After identifying the relevant markets, the Commission carried out the competitive assessment of the proposed transaction. As for the markets for rolling stock, it firstly rejected the claim of the parties,

[19] Ibid.
[20] R Toplensky, V Mallet and T Buck, 'France and Germany rally support for Siemens-Alstom merger' *Financial Times* (London 21 January 2019) <https://www.ft.com/content/4bcd2b78-1d9a-11e9-b126-46fc3ad87c65> accessed 18 March 2020.
[21] '*A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use*', Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03) [1997] OJ C 372/5 para 7.
[22] '*The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and Remand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area*', Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03) [1997] OJ C 372/5 para 8.
[23] *SIEMENS/ALSTOM* (Case M.8677) Commission Decision C/2019/921 [2019] OJ C 300 paras 20-34.

according to which the competition is very intense. Secondly, the Commission did not even agree on the possibility of CRRC becoming a relevant player in the EEA market in the next 3-5 years[24]. What is more, the Commission considered the parties as leading innovators and close competitors for very high-speed rolling stock; at the same time, it deemed insufficient the pressure arising from other competitors.[25] Due to these considerations and the parties' very high market shares, the Commission found that the merger of the two main suppliers out of China would have generated significant horizontal unilateral effects in the market for both high-speed and very high-speed rolling stock and in the potentially narrower market for very high-speed trains, in the EEA and on a worldwide basis (excluding China, Japan and South Korea).[26]

After the analysis of the transaction on the markets for rolling stock, the Commission focused on the signalling solutions. In order to identify the relevant product market, the Commission differentiated between signalling systems for mainline trains and urban trains; then it pinpointed narrower markets for specific projects and products.[27] As for the geographic dimension of these sub-segment markets, the Commission found them to be national or EEA-wide.

As regards the competitive assessment of the transaction on the markets for signalling solutions, the Commission abandoned its objections on the urban train systems because of the remedies offered by the parties. On the contrary, it found that the transaction would have produced significant impediment to effective competition in several markets for signalling solutions for mainline trains. In particular, the Commission reached the conclusion that Alstom and Siemens are close competitors, with very high combined market shares, and main innovators in many of these markets. As for rolling stock, the Commission considered insufficient the competitive pressure coming from the remaining companies. For all these reasons, the Commission concluded that in the concerned markets the transaction would have generated horizontal non-coordinated effects[28]. In addition, in the specific

[24] *'The majority of respondents to the market investigation therefore consider that CRRC is not currently a credible bidder in high and very high-speed rolling stock tenders. Rolling stock manufacturers (including CRRC itself) unanimously consider that it will take CRRC more than 5 years to become a credible bidder in the EEA. Obtaining certification alone is a lengthy multi-year process.'* *SIEMENS/ALSTOM* (Case M.8677) Commission Decision C/2019/921 [2019] OJ C 300 para 100.
[25] *SIEMENS/ALSTOM* (Case M.8677) Commission Decision C/2019/921 [2019] OJ C 300 paras 55-90.
[26] Ibid para 106.
[27] *'For the purpose of the assessment of the Transaction, the Commission's view is that mainline signalling and urban signalling are separate markets. Within mainline signalling, signalling projects and products constitute separate markets. In addition, mainline signalling projects should be further segmented, with the following separate relevant product markets defined: – Legacy OBU projects; – ETCS OBU projects; – Legacy ATP wayside projects; – Standalone ETCS ATP wayside (so-called overlay) projects; – Standalone interlocking projects; – ETCS ATP wayside re-signalling projects (bundle of ETCS ATP wayside and interlockings).'* *SIEMENS/ALSTOM* (Case M.8677) Commission Decision C/2019/921 [2019] OJ C 300 para 137.
[28] Ibid para 252.

market for interlocking projects in the UK, the transaction would have also raised concerns of vertical non-coordinated effects.[29]

The parties tried to defend the transaction, by claiming a series of possible efficiencies. These referred mainly to cost savings in different areas, such as procurement, R&D and industrial synergies, and with product portfolio improvements. Although the parties argued that they would have resulted in lower prices, more choice and innovation for customers, the Commission concluded that these alleged efficiencies were neither verifiable nor capable of counterbalancing the negative effects of the transaction.[30] The parties offered also a set of remedies, in order to address the concerns of the Commission. Specifically, the parties committed to divest significant parts of their overlapping businesses or license out the relevant technologies. Despite the interest of several companies to acquire these assets, the Commission found the commitments neither suitable nor effective enough to overcome the negative effects of the transaction.[31]

For all these reasons, the Commission concluded that the acquisition of Alstom by Siemens is incompatible with the internal market and the functioning of the EEA Agreement, and therefore decided to block it.

3. The call to reform the EU competition and merger control regime

3.1. The reaction to the Alstom-Siemens ban: the Franco-German Manifesto

Few weeks before the publication of the final decision on the Alstom-Siemens transaction, a group of 19 Member States signed a statement in which they called for '*a new political impetus in favour of industry at European level*'.[32] The document warned that '*European industry is at a crossroads'* and thus suggested to *'act quickly to maintain its competitiveness*' vis-à-vis the other global players. Specifically, the 19 countries called on the Commission for a comprehensive industrial strategy to tackle the major challenges ahead and to ensure an effective transition to a digital and sustainable

[29] Ibid para 251.
[30] Ibid paras 252-255.
[31] Ibid paras 246-341.
[32] Friends of Industry, 'Joint statement by France, Austria, Croatia, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, Netherlands, Poland, Romania, Slovakia, Spain,' (6th Ministerial Meeting, Paris, 18 December 2018) 1.

economy. Among the other recommendations, the signatory parties suggested the '*identification of possible evolutions of the antitrust rules to better take into account international markets and competition in merger analysis*'.[33] In the Annex of the joint statement, the parties affirmed that '*competition policy must foster the emergence of strategic value chains*' and '*the creation of major economic players capable of facing global competition on equal terms while protecting European consumers*'. In order to do that, the parties called for '*a comparative assessment of competition policies and State aids control mechanisms of third countries*' to '*explore the adaptations to be made to European competition policy so that it allows European players of international scale to emerge*'.[34] The publication of the joint statement was accompanied by the words of the French Minister of Economic Affairs Bruno Le Maire, who said: '*If we want to be able to face competition with Chinese giants, we have to bring European forces together*'.[35]

A few weeks later, the definitive prohibition of the acquisition of Alstom by Siemens gave rise to a significant argument. Firstly, it resulted in the immediate reaction of the German and French governments, which defined the decision as a political and economic mistake[36]. Secondly, it fuelled the debate on the reform of European merger control rules. On 19 February 2019 the German and French governments issued a joint statement, *A Franco-German Manifesto for a European industrial policy fit for the 21st Century.*[37]

In the introduction of the document, the signatory parties state that the industrial sector of the 21st century is radically changing due to digitalisation and other global challenges. Brand new industrial sectors are appearing while others are changing. For this reason, the parties urge for an ambitious European industrial strategy with clear objectives for 2030, which would make the European industry capable of coping with existing and future challenges. In their Manifesto Germany and France identify three main goals. They call for massive investments in innovation, effective measures to protect European companies from third countries' 'unfair' practices and the adaptation of the European regulatory framework. As far as the latter is concerned, the two governments start from the assumption that '*there is no regulatory global level playing field*' since several countries have different standards or even adopt 'unfair practices', such as heavy subsidies to national companies.

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[33] Ibid 2.
[34] Ibid 5.
[35] J Valero, '19 EU countries call for new antitrust rules to create 'European champions'', *EurActiv* (19 December 2018) < https://www.euractiv.com/section/economy-jobs/news/19-eu-countries-call-for-new-antitrust-rules-to-create-european-champions/> accessed 22 March 2020.
[36] H Agnew, 'EU blocks Siemens-Alstom rail merger, Le Maire says', *Financial Times* (London, 6 February 2019) <https://www.ft.com/content/cd35e760-29f5-11e9-a5ab-ff8ef2b976c7> accessed 22 March 2020.
[37] The governments of France and Germany, 'A Franco-German Manifesto for a European industrial policy fit for the 21st Century' [2019].

This situation '*puts European companies at a massive disadvantage*' and it is identified as one of the reasons because '*today, amongst the top 40 biggest companies in the world, only 5 are European*'. Germany and France insist on the fact that existing competition rules need to be revised to '*enable European companies to successfully compete on the world stage*' and to allow the creation of European champions. For this purpose, they suggest three main reforms:

- Taking into greater consideration the state control and support of undertakings within the framework of merger control.
- Updating current merger guidelines to take greater account of competition at the global level and potential future competition, in order to adopt a more global, dynamic and long-term approach in competition assessment.
- Consider 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.[38]

3.2. The reactions to the Franco-German Manifesto

During the months following the release of the Franco-German Manifesto, many policymakers, institutions and observers reacted and expressed their opinions on the proposed reform of EU competition and merger control regime. Some governments took a position in favour of the review, others expressed a more nuanced position. Among the first ones, Austria made public its favour for the reform[39], while Poland, in July 2019, signed together with France and Germany a new statement, in order to call again for the reform of competition and merger control rules. Their suggestions reflected those of the Franco-German Manifesto but outlined also more specific requests, such as the proposal to take into greater consideration the efficiencies of the merger and the behavioural remedies offered by the merging companies.[40] Conversely, the Dutch Ministry of Economic Affairs and Climate policy published a non-paper on competition law reform, where it warned of the negative effects of relaxing merger control rules; nevertheless, at the same time, it called on the Commission

[38] Ibid.
[39] Cleary Gottlieb, 'Proposals For Reform Of Competition Law Policy: Proposed Revision Of The Commission's Market Definition Guidance' in N. Maydell (Ed), *EU Competition Newsletter* December/January 2020, <https://www.clearygottlieb.com/-/media/files/eu-competition-newsletters/european-competition-newsletter-december-january-2020-pdf.pdf> accessed 22 March 2020.
[40] The governments of France, Germany and Poland, 'Modernising EU Competition Policy' (4 July 2019) <https://www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf?__blob=publicationFile&v=4> accessed 22 March 2020.

to adopt a '*level playing field approach*' and to take into account in future competition assessments the distortions arising from foreign countries' practices, such as subsidies or state aids to local champions.[41]

On 1 December 2019, the new European Commission led by President Ursula von der Leyen took office. The former Commissioner for Competition Margrethe Vestager was confirmed for another term on the same position and was also appointed as Executive Vice President for 'A Europe Fit for the Digital Age'. A few days later, during a speech at a conference in Brussels, Vestager talked about the ongoing revision of competition rules and opened to the possibility of reviewing the market definition assessment[42] in light of globalization and digitisation[43]. After months of diplomatic and political pressure on the Commission, the speech Vestager gave in December 2019 was perceived as an unexpected step forward towards the Franco-German requests and was thus welcomed with favour by the supporters of the reform.[44] The Commissioner, however, did not offer any timetable for the possible review of the Notice of market definition and this led to another political and diplomatic push a few weeks later.

On 4 February 2020, France, Germany, Italy and Poland sent a strong-worded letter to Vestager to push again their reform agenda. Firstly, the quartet stressed once more the fact that the nature of competition has changed due to globalization and digitization. Then, they called for an evaluation of the current Commission's Guidelines on the assessment of horizontal mergers and the Relevant Market Notice, '*in order to ensure fair and undistorted competition and introduce more justified and reasonable flexibility, to take better account of third countries' state intervention as well as potential competition*'. The quartet asked also the Commission to consider, on a case by case approach, the effectiveness and viability of behavioural remedies and the efficiencies brought about by the merger. Among the other proposals of industrial policy, the quartet suggested the adoption of specific measures to avoid distortions in digital markets and guidelines on the creation of joint ventures to foster cross-border European participation in global value chains. The quartet concluded the letter with an unusual call for the adoption of a work plan in the forthcoming weeks and the expression of

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[41] The government of the Netherlands, 'Non-paper - Strengthening the level playing field on the internal market' (9 December 2019) <https://www.permanentrepresentations.nl/documents/publications/2019/12/09/non-paper-on-level-playing-field> accessed 22 March 2020.
[42] Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03) [1997] OJ C 372/5.
[43] Margrethe Vestager, 'Defining the markets in a new age', (Chillin' Competition Conference, Brussels, 9 December 2019) <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defining-markets-new-age_en> accessed 22 March 2020.
[44] G Leali and T Larger, 'France claims big win against Vestager in battle for champions', *Politico* (Brussels 12 Decembre 2019) <https://www.politico.eu/article/europe-competition-france-claims-big-win-against-margrethe-vestager-in-battle-for-champions-alstom-siemens/> accessed 20 March 2020.

their strong wish of '*greater collegiality in the assessment of the EU's long-term industrial challenges in the evaluation of competition rules, merger control and state aid rules*'.[45]

3.3. The Commission's New Industrial Strategy for Europe

On 25 February 2020, also the European Parliament took position on the matter. In its annual report on competition policy, the Parliament welcomed the Commission's commitment to review competition rules and called on the Commission '*to adopt a more favourable approach for strong EU industrial policy to ensure and maintain high competitiveness in global markets*'; it stressed that the Commission and the Member States should '*remove barriers and obstacles to enable the emergence of innovative EU leaders in specific priority sectors for the EU, while respecting the independent application of competition rules that safeguard a level playing field*'; and it clarified however that '*this approach should not be to the detriment of SMEs and consumers interests.*'[46]

A few days later, on 10 March 2020, the Commission revealed the new strategy for the European industry for the next years[47]. In the document, it starts identifying the threats and the hurdles:

> '*New and ever-changing geopolitical realities are having a profound effect on Europe's industry. Global competition, protectionism, market distortions, trade tensions and challenges to the rules-based system are all on the rise. New powers and competitors are emerging. More established partners are choosing new paths. Coupled with a period of global economic uncertainty on the horizon, these trends pose new challenges for Europe's industry as it sets off on the twin ecological and digital transitions.*'

Nevertheless, the Commission stresses that '*Europe's response cannot be to erect more barriers, shield uncompetitive industries or mimic the protectionist or distortive policies of others.*' In what can be considered an answer to those who advocate a more politicised approach on competition, the Commission reminds the importance of an '*independent EU competition policy*', which '*has served Europe well by helping to level the playing field, driving innovation and giving consumers more choice.*' However, in order to face the changes of globalisation and digitisation, the Commission takes on the responsibility to '*ensure that competition rules remain fit for today's world*'.

[45] The governments of France, Germany, Poland and Italy (4 February 2020) <https://g8fip1kplyr33r3krz5b97d1-wpengine.netdna-ssl.com/wp-content/uploads/2020/02/Letter-to-Vestager.pdf> accessed 20 March 2020.
[46] European Parliament (INI) 2019/ 2131 Report on competition policy – annual report 2019.
[47] European Commission, 'A New Industrial Strategy for Europe' COM (2020) 102 final.

After generally introducing the subject, the Commission outlines its reform agenda for competition policy. Firstly, it reminds that the review process of the EU competition framework is currently ongoing. In particular, the review entails '*looking at how current competition rules are applied, notably in relation to anti-trust remedies, and whether rules governing horizontal and vertical agreements and the market definition notice are still fit for purpose. It will also look at how to improve case detection and speed up investigations.*' The Commission reminds that also the '*evaluation of merger control and the "fitness" check of various State aid guidelines*' are currently ongoing. As for the latter, the Commission '*will ensure revised State aid rules are in place in 2021 in a number of priority areas, including energy and environmental aid.*' For the rest, the Commission sets out a different schedule. It will '*evaluate, review and, if necessary, adapt EU competition rules as of 2021, including the ongoing evaluation of merger control and fitness check of State aid guidelines.*'[48]

4. The reform of the market definition practice

The Franco-German Manifesto and the documents signed by the other Member States during 2019 and the beginning of 2020 contain a set of recurrent suggestions. Each of them will be discussed in detail below.

Besides the concerns related to third countries' control or support to local companies, the most recurrent issue is the reform of the rules governing the definition of the relevant market. This does not come as a surprise since the relevant market is normally the base on which the substantive competitive assessment is carried out at a later stage.

The definition of the markets is governed by the 1997 Relevant Market Notice[49]. According to Paragraph 2 of this Notice, the main purpose of market definition is to identify in a systematic way the competitive constraints that the concerned undertakings face. The Relevant Market Notice provides guidance for the definition of a market in both its product and geographic dimension and takes into account both the demand and supply considerations. The analysis entails identifying '*those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure.*'[50] In other words, it is a complex and multi-layered analysis of product characteristics, customers and

[48] Ibid 6.
[49] Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03) [1997] OJ C 372/5.
[50] Ibid para 2.

suppliers behaviour, firms' substitution decisions and regulation, which tries to answer to the question: 'can customers turn to someone else if prices go up, quality down or innovation stops?'.[51]

As seen in Chapter 3, some Member States and policymakers are very concerned by the fact that the Relevant Market Notice is outdated and no more fit for purpose. They believe that, in the definition of the relevant market, the Commission does not take into account all the possible elements that eventually could result in competitive constraints for the companies involved. In particular, due to changes brought by globalisation, they suggest taking greater account of:

- Competition at the global level.
- Potential future competitors.
- A longer-term framework.

In a nutshell, the concerned Member States ask for a more dynamic and global-based analysis, which could reflect better the fast-paced development of several markets around the world. This view is shared also by the Confederation of European Business (BusinessEurope), which in a recent paper suggested that '*the Commission should identify on the basis of objective and transparent criteria, whether there are situations where it should put more weight on the global market environment.*' The paper contains also an example: '*in cases where the merging parties compete outside the EU and where third-country competitors do not (yet) have business activities or revenues in the EU, enough consideration should be given to the global market environment.*'[52] Thus, also this paper stresses the importance of taking into greater account the global dimension of markets, potential competitors and longer timeframes.

4.1. Widening the market

The first argument concerns the width of the geographic market. The concerned governments stress that the Commission has often identified too narrow relevant markets, which have resulted in much higher market shares and thus competitive concerns.

Nevertheless, it is important to acknowledge the Commission's trend of considering increasingly broader markets, which reflects the changes of European and global economy. In the above-mentioned speech of December 2019, Vestager said that in 2002 and 2003 the Commission '*found geographic markets that could be as wide as the single market – or wider – in about half of […]*

[51] Vestager (n 43).
[52] BusinessEurope, 'The EU and China: Addressing the Systemic Challenge', (Brussels, January 2020), ch. 4.4 <https://www.businesseurope.eu/publications/eu-and-china-addressing-systemic-challenge> accessed 24 March 2020.

merger decisions. By 2017 and 2018, that figure was close to two-thirds'.[53] Vestager recalled the decision on Tata-ThyssenKrupp case, where the Commission analysed steel imports from non-EU countries, or the early Nineties Telcom cases, in which relevant geographic markets went from national to European, to global in a very short time. In addition, it cannot be denied that also in the Alstom-Siemens analysis the Commission did not exclude that the market could be broader than the EEA plus Switzerland. As a matter of fact, also BusinessEurope, in general, assess positively the Commission's approach: '*Regarding the definition of markets, overall the Commission defines geographic markets correctly, setting the right framework to assess competitive constraints from outside the EU.*'[54]

4.1.1. Defining the market in the EU: demand substitutability and supply substitutability

To understand and assess the propositions of Germany, France and the other like-minded governments, it is fundamental to understand what 'identifying a wider market' means. Generally, it can be defined as identifying broader areas in which undertakings and customers are involved in the supply and demand of substitutable products or services. However, according to Paragraph 8 of the Relevant Market Notice, the concerned areas shall have sufficiently homogeneous conditions of competition in order to form a relevant geographic market.

The Notice describes also what should be considered demand-side and supply-side substitution. As regards the former, Paragraph 15 states that '*the assessment of demand substitution entails a determination of the range of products which are viewed as substitutes by the consumer*'. As for the latter, Paragraph 20 states as follows:

> '*Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. This means that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices.*'

According to Paragraph 23, supply-side substitution will not be considered at the stage of market definition when it would entail additional investments, strategic decisions or time delays (see Section 4.2.1.). In those cases, the effects of supply-side substitution will be analysed at a later stage, during

[53] Vestager (n 43).
[54] BusinessEurope (n 52).

the competitive assessment. According to the Relevant Market Notice, supply-side substitutability will be taken into account only '*when companies market a wide range of qualities or grades of one product*'[55], which, even if not considered substitutable by consumers, can be provided by suppliers immediately and without significant costs increases. An example of this kind of product is paper[56].

In light of this brief analysis of possible competitive constraints, it appears evident that in the EEA it is the demand substitutability to play a pivotal role in the definition of the market.

4.1.2. Defining the market in different jurisdictions: demand and supply substitutability in the US and the UK

From a comparative point of view, the EU Relevant Market Notice is in line with the market definition practices in the United States and the United Kingdom, as noted by Amelia Fletcher and Bruce Lyons in *Geographic Market Definition in European Commission Merger Control* [57].

The US 2010 Horizontal Merger Guidelines, in Section 4, state that '*market definition focuses solely on demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service*'. In the US, it is therefore clear that it is the demand substitutability that defines the market. '*The responsive actions of suppliers are also important in competitive analysis*', but they are taken into consideration at a later stage. '*They are considered in these Guidelines in the sections addressing the identification of market participants, the measurement of market shares, the analysis of competitive effects, and entry.*' In Footnote 8, page 16, the US Guidelines recognise however an exception to this rule: '*If this type of supply side substitution is nearly universal among the firms selling one or more of a group of products, the Agencies may use an aggregate description of markets for those products as a matter of convenience.*' This exception seems to be very similar to the position of the EU Relevant Market Notice. According to Fletcher and

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[55] Relevant Market Notice (n 49), para 21.

[56] '*A practical example of the approach to supply-side substitutability when defining product markets is to be found in the case of paper. Paper is usually supplied in a range of different qualities, from standard writing paper to high quality papers to be used, for instance, to publish art books. From a demand point of view, different qualities of paper cannot be used for any given use, i.e. an art book or a high quality publication cannot be based on lower quality papers. However, paper plants are prepared to manufacture the different qualities, and production can be adjusted with negligible costs and in a short time-frame. In the absence of particular difficulties in distribution, paper manufacturers are able therefore, to compete for orders of the various qualities, in particular if orders are placed with sufficient lead time to allow for modification of production plans. Under such circumstances, the Commission would not define a separate market for each quality of paper and its respective use.*' Ibid 22.

[57] A Fletcher and B Lyons, *Geographic Market Definition in European Commission Merger Control* (2016) Centre for Competition Policy, University of East Anglia, 11 <https://ec.europa.eu/competition/publications/reports/study_gmd.pdf> accessed 23 March 2020.

Lyons, the expression '*as a matter of convenience*' entails that the aggregate description of the markets '*will only be done where it makes no substantive difference to the competitive analysis*'.[58]

As regards the United Kingdom, the UK Merger Assessment Guidelines seem to have adopted a very similar approach to the US Guidelines:

> '*The boundaries of the relevant product market are generally determined by reference to demand-side substitution alone. However, there are circumstances where the Authorities may aggregate several narrow relevant markets into one broader one on the basis of considerations about the response of suppliers to changes in prices. They may do so when:*
>
> - *production assets can be used by firms to supply a range of different products that are not demand-side substitutes, and the firms have the ability and incentive quickly (generally within a year) to shift capacity between these different products depending on demand for each; and*
> - *the same firms compete to supply these different products and the conditions of competition between the firms are the same for each product; in this case aggregating the supply of these products and analysing them as one market does not affect the Authorities' decision on the competitive effect of the merger.*'[59]

The UK Merger Assessment Guidelines refer also to bidding markets as an example: "*Aggregating a range of contracts where the same set of firms would have been credible bidders can provide more useful information about the competitive constraints on each firm than is available from focusing on just one bespoke product*'.[60]

In conclusion, the guidelines of the EU Relevant Market Notice are very similar to the practices adopted in both the UK and the US.[61]

4.1.3. Critical analysis of the proposal

Germany, France and the other like-minded governments ask the Commission to consider the markets on more a global basis. This request can be read as a call to identify wider markets based on the supply substitution, and specifically through imports in the EEA.

[58] Ibid.
[59] UK Merger Assessment Guidelines [2010] para 5.2.17.
[60] Ibid para 5.2.18.
[61] Fletcher (n 57).

As explained in Section 4.1.1., this is a controversial situation, generally not admitted by the EU Relevant Market Notice. However, Fletcher and Lyons found that the Commission seemed to take these arguments seriously in many of the merger decisions analysed, even if it always rejected them. In the Arsenal/DSP case, the Commission referred to the link between imports and the prices of the concerned product in the EEA.[62] In Fletcher and Lyons' opinion, '*this sort of wording and use of evidence suggests that, if imports were sufficient to keep EEA prices down, the Commission would be open to defining a global market.*' The two scholars, therefore, called for clarification on this question, because (until 2016) the Commission never ruled completely out the possibility of widening the market on grounds of supply substitution by imports.

Fletcher and Lyons express their opposition to the possibility of adopting this new method of market definition. The reasons are well explained in the following example. '*Suppose that there are two large EEA firms and one major Chinese competitor, all selling to European customers on an equal footing. Suppose also that the Chinese firm sells to Chinese customers, where it faces a different set of local rival producers and different competitive conditions.*' In this situation, including China in the relevant market would certainly reduce the market shares of the EEA companies, but it would not provide '*a true view of the competitive situation faced by the EEA customers, because it would combine customers who purchase from largely different firms, and firms, most of which do not compete with each other.*'[63]

In order to clarify this example, it is important to define more in detail what demand-side and supply-side substitution mean. At a first glance, these concepts seem quite clear and straightforward (see Section 4.1.1.), but there is a subtle distinction that must be made between demand substitution by domestic customers to foreign suppliers and supply substitution to domestic customers by foreign suppliers. '*The former occurs where customers actively and successfully seek out new supplies from outside their core area*'. Instead, the latter '*occurs where customers effectively stay put but imports are sold into the domestic market by foreign suppliers which take a strategic decision to export into that market*'.[64]

In the case of demand substitution by domestic customers to foreign suppliers, Fletcher and Lyons argue that if customers '*can easily and cost-efficiently source product from suppliers in an alternative*

[62] '*While it is accepted large international trade flows of benzoic acid are consistent with a hypothesis that there may be a global market for benzoic acid, the key question is whether these trade flows can discipline the EEA producers in the event of price increases.*' *ARSENAL/ DSP* (Case No COMP/M.5153) Commission Decision C/2008/8439 [2009] OJ C227/11 10, para 49 <https://ec.europa.eu/competition/mergers/cases/decisions/m5153_20090109_20600_en.pdf> accessed 25 March 2020.
[63] Fletcher (n57) 14.
[64] Ibid 14, footnote 14.

geographic area in the face of a local price, then the geographic market might reasonably be widened'. This is justified by the fact that '*we would not expect to see any difference between the various Chinese suppliers in terms of the competitive constraint they play within the EEA*'. In other words, the conditions of competition are sufficiently homogeneous and, hence, the two geographic areas can be considered as part of the same relevant market. In this case, '*market shares in the wider market would indeed be meaningful indicators of competition*'. It is important to recall once again that this situation is on a demand substitution basis.

As for supply-side substitution, the situation is exactly the opposite. If the other Chinese suppliers do not share the same export strategy with the Chinese company selling its products in the EEA, it is clear that extending the relevant market to China would be mistaken because it would combine companies which do not face the same competitive constraints, as well as geographic areas where the conditions of competition might be radically different. Therefore, in this case '*the market shares in the wider market will be misleading as a measure of competition*'.[65]

In conclusion, widening the relevant market on grounds of supply substitution by imports would be incorrect from an analytical point of view and would lead to a mistaken definition of the market.

4.2. Potential competition

The identification of the relevant market seems to be deeply linked also with the issue of potential competitors. As seen above, the Member States calling for a reform of merger control rules suggest taking also greater account of potential competition, when defining the relevant market.

According to Paragraph 13 of the Relevant Market Notice, '*firms are subject to three main sources of competitive constraints: demand substitutability, supply substitutability and potential competition.*' However, in Paragraph 24 it is stated that:

> *'The third source of competitive constraint, potential competition, is not taken into account when defining markets, since the conditions under which potential competition will actually represent an effective competitive constraint depend on the analysis of specific factors and circumstances related to the conditions of entry. If required, this analysis is only carried out at a subsequent stage, in general once the position of the companies involved in the relevant*

[65] Ibid.

market has already been ascertained, and when such position gives rise to concerns from a competition point of view'.

The Relevant Market Notice seems clear on this point. No potential competitors shall be taken into account when defining markets. However, this does not mean that the Commission ignores potential competitors. On the one hand, the Relevant Market Notice stresses that the impact of potential competition is taken into consideration at a later stage, during the competitive assessment of the merger. On the other hand, it is noteworthy that a certain grade of potential competition is already taken into account in the Commission's current market definition process. In order to explain the latter, demand and supply substitutability must be analysed in more details.

Both the demand and supply substitution assessments rely on the SNIPP test, which has been first introduced in the 1982 US Merger Guidelines as the "hypothetical monopolist" test and has become a standard test in market definition practices around the world. In practice, the SNIPP test implies an analysis of the reaction of customer and suppliers to a small but significant non-transitory increase in price (SNIPP). As regards the demand-side, the market is well defined when a company can profitably raise its prices in a small but significant and non-transitory way. This reflects the situation in which, after the increase of the prices, customers cannot turn to competitors for substitutable products and the concerned companies can profitably monopolise that market. Conversely, the market should be widened when a company cannot raise profitably its prices. This happens when, after a small increase in prices, customers buy substitutable goods or services from other companies and hence cause a loss of profit to the company that raised its prices. In this case, it is clear that the companies that provide the substitutable product shall be included in the relevant market because the competitive constraints the two companies face are similar.

As for the supply-side, the SNIPP test is focused on the competitors of the concerned companies, rather than the customers. In particular, the market is well defined when a company can profitably raise its prices and no company would be able or willing to supply substitutable products. Conversely, if other companies could and would be willing to supply substitutable products, the relevant market might include them as well. This consideration is however restricted by a series of strict conditions.

As already mentioned, the Relevant Market Notice states in Paragraph 20 that suppliers have to be able to switch production to the relevant products and market them in the short term and without incurring in significant additional costs, risks, investments or strategic decision (see also Section 4.2.1.). Only when these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved[66]. Only in these cases, the Commission will consider the impact of supply-side substitution equivalent to the demand substitution in terms of effectiveness and immediacy and may consider widening the relevant market.

The reason why the SNIPP test was discussed here is that the market analysis carried out by the Commission may be based also on the analysis of potential competition. As a matter of fact, the Relevant Market Notice defines it as a 'speculative experiment'[67], because it entails taking into account direct competitors and, to some extent, potential competitors. Specifically, as long as the potential competition constraints meet the condition presented above, they may have a direct and significant impact on the market definition.

As discussed before, several countries ask for greater consideration of potential competition. In the opinion of some of those who suggest the reform of the 1997 Relevant Market Notice, competitive constraints deriving from potential competitors should be taken into account during market definition in order to define more "realistic" global markets.

In particular, the main concerns are related to foreign companies (mainly Chinese or Asian) which are not competing yet with European companies, but which may enter the markets in the medium term. For instance, BusinessEurope called on the Commission to give enough consideration to the global market environment '*where third-country competitors do not (yet) have business activities or revenues in the EU*'. Otherwise, by '*not properly taking the global market environment and dynamics into account and by focusing too much on immediate effects in the EU, or on narrow geographical markets, the Commission may put EU companies at a disadvantage*'[68].

This call can be read as a request of greater consideration of potential competition in the Commission's market definition practice, through the expansion or elimination of the limits and conditions outlined by the Relevant Market Notice for the identification of markets on grounds of supply substitution by imports.

4.2.1. A longer-term framework

The third revision request related to market definition concerns the timeframe in which the potential competition may be taken into account. The request consists of considering longer-term frameworks when assessing potential competition, in order to include in the relevant market the products that

[66] Relevant Market Notice (n 49), para 20.
[67] Ibid para 15.
[68] BusinessEurope (n 52) ch 4.4.

potential competitors might start suppling in a more distant future. As already mentioned, the Relevant Market Notice states that supply-side substitution may be taken into account when '*suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices*'[69]. The footnote 4 of Paragraph 20 defines '*short term*' as '*a period that does not entail a significant adjustment of existing tangible and intangible assets*'. In addition, the definition expressly recalls Paragraph 23, which states that '*when supply-side substitutability would entail the need to adjust significantly existing tangible and intangible assets, additional investments, strategic decisions or time delays, it will not be considered at the stage of market definition.*' Paragraph 23 gives an example regarding branded beverages to clarify the point. It explains that '*although bottling plants may in principle bottle different beverages, there are costs and lead times involved (in terms of advertising, product testing and distribution) before the products can actually be sold*'. In these cases, the effects of supply-side substitutability will be examined during the competitive assessment.

The Relevant Market Notice is hence clear on the timeframe in which potential competition may be material for market definition. In order to create potential competitive constraints that may be taken into consideration for market definition purposes, the companies have to be able and willing to offer and sell the substitutable products immediately and without significant costs, investments, strategic decisions or any other delay. As for potential competition, the request to consider 'a longer-term framework' in market definition can be read as an attempt to reduce these limits, by including in the relevant market substitutable products that might be produced and put in the market after a longer period of time.

4.2.2. Potential competition in other jurisdictions: rapid entrants and swing capacity

The 2010 US Horizontal Merger Guidelines stress that market definition '*focuses solely on demand substitution factors*' and that supply substitution factors are considered only '*in the identification of the firms that participate in the relevant market and the analysis of entry.*'[70] This rule has an exception in Footnote 8 of page 16 of the Guidelines, which allows the Agencies to use an aggregate description of markets when supply-side substitution is found to be nearly universal among the firms selling one or more of a group of products. This possibility is however quite unusual, as the provision might be

[69] Relevant Market Notice (n 49), para 20.
[70] US Horizontal Merger Guidelines [2010], s 4.

applied '*as a matter of convenience*'. As described in discussed in Section 4.1.2., the US practice of market definition is very similar to the one contained in the UK Merger Assessment Guidelines.

Overall, the EU Relevant Market Notice is consistent with the US Horizontal Merger Guidelines and the UK Merger Assessment Guidelines, which impose even stricter conditions and limits to market identification on grounds of potential supply substitution and the relevant timeframe.

Nevertheless, as Fletcher and Lyons note, '*while neither the US nor UK guidelines allow for the widening of geographic markets on the basis of imports, both do allow for the additional inclusion within the market of 'rapid entrants' who would supply into the market if there was a small price incentive*'.[71] In particular, the US Guidelines consider market participants also those '*firms that are not current producers in a relevant market, but that would very likely provide rapid supply responses with direct competitive impact in the event of a SSNIP, without incurring significant sunk costs'*. In the UK Guidelines rapid entrants are defined as the '*firms with the capacity to make the product in question within a short period of time (normally within a year), but which currently do not do so'*.[72]

In these jurisdictions, once a relevant market has been defined, potential supply substitution is taken into account to measure the market in terms of its participants and concentration. '*Participants include both current producers of the products within the relevant market as well as firms producing other goods but which, nonetheless, would enter the relevant market rapidly*'.[73]

In the analysis of a series of decisions, Fletcher and Lyons found that, even if the analysis of rapid entrants, and more generally the analysis of swing capacity, is more relevant for the competitive assessment rather than market definition, their impact has been very limited in the Commission's merger decisions. Therefore, the scholars suggest taking in greater account the possibility of incorporating capacity shares, especially from outside the geographic market, in the form of rapid entrants or swing capacity, within the competitive assessment.[74]

4.2.3. Critical analysis of the potential competition and longer time-framework proposals

In a nutshell, the reform suggestions concerning the potential competition and a longer-term framework within the market definition can be read as a request to widen the relevant market, by

[71] Fletcher (n 57) 16.
[72] UK Merger Assessment Guidelines [2010], 5.3.6.
[73] A J Padilla, *The Role of supply-side substitution in the definition of the relevant market in merger control*, Madrid, 2001, 61.
[74] Fletcher (n 57).

including substitutable products (and the relevant geographic areas) that may be supplied by potential competitors after a certain period of time and after incurring in additional costs, investments or strategic decisions.

As already discussed in Section 4.1.2., this would not be consistent with the practices in other jurisdictions, such as the US. What is more, including medium and long-term potential competitors to the market identification would result in wrong market definitions and a great deal of uncertainty.

In their study, Fletcher and Lyons analyse this possible market definition practice and describe it as '*where it is clear that competition effectively occurs within a particular geographic area, but where there is potential for suppliers outside of that area to sell into that area, in the form of imports, and so constrain prices*'.[75] Although this is a very controversial situation, Fletcher and Lyons found in their study that the Commission seemed to take seriously the arguments for wider markets on grounds of potential imports in many of the merger decisions analysed. In addition, even if the Commission always rejected them, it never ruled out the possibility of widening the market on grounds of potential supply substitution by import. In several cases, such as Arsenal/DSP, INEOS/Solvay and Glencore/Xstrata, the Commission analysed the link between imports and the prices of the concerned products in the EEA.[76] The two scholars found that the wording and use of evidence seem to suggest that '*if imports were sufficient to keep EEA prices down, the Commission would be open to defining a global market. This would in turn mean that all global suppliers would be included as competitors, even if most of these global suppliers were in fact unwilling to supply EEA customers.*'

This consideration makes clear that taking into account potential competition in market definition could lead to extreme and analytically incorrect conclusions. In particular, it would be very difficult to set clear limits to who and what should be considered a relevant potential competitor. In this situation, relevant markets would not reflect the economic reality and might be defined in a more discretionary approach, which in the end may cause a high grade of uncertainty.

For all these reasons, a reform of the Relevant Market Notice aimed at giving more room for medium and long-term potential competition in the EU market definition practice should be dismissed.

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[75] Ibid 14.

[76] '*While it is accepted large international trade flows of benzoic acid are consistent with a hypothesis that there may be a global market for benzoic acid, the key question is whether these trade flows can discipline the EEA producers in the event of price increases.' ARSENAL/ DSP* (Case No COMP/M.5153) Commission Decision [2009] para 49.

4.3. The relevant market of the digital sector

There is a growing consensus among observers that traditional microeconomic bases do not work properly when applied to digital goods and services. This seems to have an impact also on traditional competition rules, which are based on those economic principles. Therefore, the conclusions of the previous Sections may not be entirely applicable to the digital economy.

For these reasons, Germany, France and the other like-minded governments call for a review of EU competition law that should take into account the substantial differences of the digital economy compared to more traditional economic sectors. The Commission, together with many observers, seems to share the doubts raised by these countries on this subject. As a matter of fact, in 2019 Commissioner Vestager commissioned a report on competition law in the digital era[77] and then made public some of the Commission's concerns during her speech in December 2019[78]. As declared in the document of the new EU industrial strategy, the Commission will evaluate whether current EU competition rules are fit for this new economic reality. [79]

Discussing in details all the competition issues related to the digital economy would be outside the scope of this paper; however, there are a series of questions concerning market definition that will probably be addressed in the Commission's evaluation and potential revision of the Relevant Market Notice, and therefore they should be addressed also here.

In the digital sector, identifying well-defined markets with the "traditional" tools may be very difficult, and sometimes almost impossible. One of the most problematic questions is related to the prices of digital goods and services. In many cases, the digital markets feature zero prices. In these cases, the company does not charge any price to the consumer for the product and sometimes the use of the product is even subsidised by the company, in the form of the provision of additional free services. Of course, as it is well known, this business strategy implies other kinds of benefits, for instance, advertising and personal data collection. However, this situation may have a direct impact on market definition practices. The reason is that zero-price and subsidy strategies seem to move away from the basic microeconomic logics of prices, which are the principles and bases on which the SNIPP test relies. As a matter of fact, it is not possible to evaluate the reaction of consumers in case of a small but significant non-transitory increase in price, when prices are not the real or main form of consideration and the economics of the other non-monetary forms of considerations are different

[77] J Crémer, Y de Montjoye, H Schweitzer, *Competition Policy For the Digital Era* (Publications Office of the European Union, Luxembourg, 2019) <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 28 March 2020.

[78] Vestager (n 43).

[79] 'A New Industrial Strategy for Europe' (n 47) s 3.1.

from those of prices. Some have proposed to move to alternative tests, such as the "small but significant non-transitory decrease in quality" (SSNDQ) test. However, this test has not proved to be flawless. In particular, it appears very difficult to measure precisely quality and quality shifts in digital products[80]. Therefore, no suitable alternatives have been identified yet.

Other controversial questions regard the boundaries of markets, in case of multisided platforms or providers of similar and at the same time different digital products, as well as competition between and inside digital ecosystems. Even if not comprehensive, this brief overview is meant to make the reader realise the complicated task of the Commission (and the other competition agencies) in defining the relevant market in the digital economy. In order to address the issue, some suggest '*to put less emphasis on analysis of market definition, and more emphasis on theories of harm and identification of anti-competitive strategies.*'[81]

4.4. Conclusions on the call to reform the Relevant Market Notice

As discussed in the previous Sections, reviewing the Relevant Market Notice in the sense of allowing wider market definitions may lead to difficulties and wrong assumptions. The identification of global markets on grounds of supply-side substitution by imports, in some cases even potential, could complicate the whole market definition process and it would give room to a high grade of uncertainty. What is more, this approach would not be consistent with other countries' practices, primarily the US. For all these reasons, the suggestion of Germany, France and the other like-minded countries to take greater account of competition at the global level, potential future competitors and a longer-term framework in the Commission's market definition practice should be dismissed.

Nevertheless, not allowing supply-side substitution by imports into market definition does not mean that the Commission '*ignores competition that might come from outside the market*'[82]. These competitive restraints should be taken into account when it comes to constructing market shares, after the definition of the market. For instance, in the example already mentioned in Section 4.1.3. concerning big European firms competing in the EEA and a single Chinese company importing substitutable products in the area, it would be more correct to define a European market and then to include the competitive constraints of the Chinese company in terms of market shares. This is the approach that the Commission is currently carrying out and it is consistent with other countries'

[80] Crémer (n 77) 44-45.
[81] Ibid 3-4.
[82] Vestager (n 43).

practices and the opinions of many competition experts. Although the Commission's approach should be considered generally correct, and apart from the complications arising from the digital economy which will need a much more in-depth analysis, there are several questions that the Commission could consider when it will assess the effectiveness of its market definition practice.

First, many scholars insist on the fact that, even if the market definition is important, it does not play a decisive role in the competitive assessment. The Relevant Market Notice could state clearly that market definition, as well as the measurement of market shares and market concentration, is not an end in itself, as stated also in the US Horizontal Merger Guidelines.[83]

Second, many observers complain about the lack of clarity in the Commission's approach to market definition on grounds of supply-substitution and ask for a clearer position on this matter. There are two options available. The first and the most straightforward would consist in clarifying that market definition focuses solely on demand substitution factors, as in the US. The other would consist instead of identifying objective and transparent criteria for market definition on grounds of supply substitution, in order to provide greater legal certainty. At the same time, the Commission could introduce in the EU system the concepts of 'rapid entrants' and 'swing capacities', by defining their meaning and the conditions to be considered market participants.

Third, clarifying the whole processes of market definition and measurement of market shares would have also the effect of avoiding duplication of evidence between market definition and competitive assessment, and thus reducing the burden of notifying parties, which has been a recurrent request of observers and practitioners.

5. The reform of the competitive assessment

The Commission's decision to prohibit the acquisition of Alstom by Siemens heated an already lively debate. In the last few years, European policymakers and observers have become increasingly concerned by the asymmetric competitive pressure and distortive effects that foreign state-owned or state-supported companies may produce in European and global markets. The decision to stop the Alstom-Siemens deal has ignited the debate over the defence of European businesses and economic system and it has given momentum to the idea of levelling the playing field and addressing '*the*

[83] US Horizontal Merger Guidelines [2010], s 4.

*distortive effects of foreign state ownership and subsidies in the internal marke*t *(Von der Leyen, 2019)*'.[84]

As discussed above, in the aftermath of the Commission's decision, a group of EU Member States, led by France and Germany, have intensively lobbied in order to review the European regulatory framework, adopt a set of measures to protect European industrial capacity and foster innovation. Among the numerous proposals, some concerned the reform of EU competition law, and some, more specifically, the reform of merger control rules. In particular, the abovementioned governments, together with several industrial groups and practitioners, have called for the evaluation and modernization of the EU Merger Regulation[85] and the current European Commission's Guidelines on the Assessment of Horizontal Mergers (Guidelines on Horizontal Mergers).[86]

How the theories of harm could be related to the concerns raised by Germany, France and other like-minded governments are not detailed with accuracy in the Franco-German Manifesto[87], the Franco-German-Polish joint statement[88] and the letter sent by "the quartet" to Commissioner Vestager[89]. However, in a nutshell, they call on the Commission:

- To take into account competition at a global level, in both long-term market outlook and the future strength of competitors from third countries;
- Take into greater consideration state-control of and subsidies for undertakings;
- To assume a more flexible approach in merger review, in particular concerning merger efficiencies and the remedies offered by the merging parties.

In the next pages, a set of specific proposals concerning the reform of the EU Merger Regulation and the Commission's Guidelines on Horizontal Mergers will be discussed.

5.1. Taking into greater account global competition

One of the most recurrent requests of those calling for a reform of merger control rules is to take greater account of global competition when assessing the effects of a merger. Many observers argue that the Commission focus excessively on the effects that a merger may have in the EEA and do not

[84] Ursula Von der Leyen, 'Mission letter to Margrethe Vestager' (Brussels, 10 September 2019).
[85] Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EU Merger Regulation) [2004] OJ L 24/1.
[86] Guidelines 2004/C 31/03 on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (the EU Horizontal Mergers Guidelines) [2004] OJ C 31/5.
[87] 'A Franco-German Manifesto for a European industrial policy fit for the 21st Century' (n 37).
[88] 'Modernising EU Competition Policy' (n 40).
[89] The governments of France, Germany, Poland and Italy (n 45).

consider with the appropriate attention the competitive restraints coming from third countries' companies. This is why many have called on the Commission to review its practice of market definition, measurement of market shares and concentration level, and entry analysis. As for the market definition, the proposal to adopt a practice that would allow the identification of wider markets has already been discussed in the previous Chapter. Except for a series of secondary adjustments, the reform of the core provisions of the Relevant Market Notice is however not recommendable.

5.1.1. Potential competitors in the competitive assessment

The Commission's decision on the Alstom-Siemens deal has been particularly criticised for not having declared CRRC and other Asian companies credible competitors in the EEA in the near future. Many observers have therefore suggested to reform the Guidelines on Horizontal Mergers so as to take into greater consideration third countries' potential competitors. Apart from market definition, the subject of potential competition could have an impact on two different phases of the competitive assessment. First, the potential competitive constraints deriving from supply substitution could be taken into account in the identification of market participants. As already discussed in Section 4.2.2, a clearer approach on the issue seems to be desirable; defining concepts, limits and conditions of potential market participants in the Guidelines could avoid the uncertainties and misrepresentations that seem to characterise the matter. Besides, the US and UK concepts of 'rapid entrants' may be good models from which starting a more in-depth analysis.

Secondly, potential competition shall be taken into account during entry analysis (Paragraph 68-75 of the Guidelines). The entry analysis constitutes an important element of the overall competitive assessment, which may "offset" the concerns of the merger. In particular, '*for entry to be considered a sufficient competitive constraint on the merging parties, it must be shown to be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger.*'[90] According to Paragraph 74 of the Guidelines, '*entry is normally only considered timely if it occurs within two years.*' In the Alstom-Siemens case, the Commission found this condition not fulfilled by CRRC and other Asian companies, by deeming not credible their entry in the EEA markets before 3-5 years. This finding has been one of the most criticised points of the Commission's decision and it has fostered the proposal to extend the two-year limit. It is to be said though that the Guidelines allow exceptions to this rule. As outlined in Paragraph 74, what '*constitutes an appropriate time period depends on the characteristics and dynamics of the market, as well as on the specific capabilities of*

[90] The EU Horizontal Mergers Guidelines (n 86) VI, Para 68.

potential entrants.' It is noteworthy that the Commission applies often this exception in the entry analysis. For instance, also in the Alstom-Siemens case, it assessed the likelihood and effects of the entry of CRRC in EEA markets in the next 5, and even 10, years.[91] The complaints regarding the excessive rigidity of this timeframe are therefore ill-grounded. What is more, economists agree that it is extremely difficult to predict the evolution of a market 3-5 years ahead. Beyond a certain number of years, the prediction would amount to divination.[92] This is why a *de jure* extension of the timeframe for an entry to be swift would not be beneficial.

5.2. Unfair competition: facing State-backed companies

The other main concern regards the distortive effects that foreign state-owned or state-supported companies may produce in both European and global markets. The fear is that without both defensive and proactive measures Chinese companies will drive out of markets European companies, and they will do it not because of their better products, better business capabilities or faster innovation, but mainly because of the support of the Chinese government. This analysis has been gaining momentum and has led to a wide consensus for reforming the EU regulatory framework to respond adequately to the challenges posed by the Chinese economic and industrial strategy. As regards the EU Merger Regulation and Commission's Guidelines, a series of reform proposition has been made to tackle this threat.

The first set of proposals concerns the conditions that trigger the obligation to notify concentrations with a European dimension to the Commission. In particular, as regards the turnover thresholds of Article 1 of the EU Merger Regulation, France, Germany and Poland have called to take stringently into account the state control of undertakings when calculating turnover, in coherence with the European Commission's practice regarding public undertakings. Another interesting question that could be addressed in the revision concern the definition of concentration, when dealing with state-controlled companies: '*if transactions involve the consolidation between state-controlled enterprises, rather than the acquisition of a third party, such a transaction may well escape scrutiny as there would, technically, not be a change of control that requires notification.*'[93]

[91] *SIEMENS/ALSTOM* (Case M.8677) Commission Decision C/2019/921 [2019] OJ C 300, para 498, 99.
[92] B Deffains, O d'Ormesson, T Perroud, *Competition Policy and Industrial Policy: for a reform of European Law* (Fondation Robert Schuman, January 2020) s 3.1.1.1., 23.
[93] M Heim, 'Modernising European Competition Policy: A Brief Review of Member States' Proposals' (Bruegel, 24 July 2019) <https://www.bruegel.org/2019/07/modernising-european-competition-policy-a-brief-review-of-member-states-proposals/> accessed 2 March 2020.

As regards the competitive assessment, it has been argued that the European Commission should be given the power, on the one hand, to enable the creation of European champions in those industrial areas where the potential entry of a major Chinese player may disrupt the competitive balance and, on the other, to screen foreign transactions more aggressively when they involve state-controlled companies. The basic idea is to consider an ‘"increased" competitive pressure if the new merged entity's competitors are third-country companies financially supported by their State.[94]

In order to offset this “increased” competitive pressure, European companies could be granted a certain grade of “compensation”. For instance, one possible measure could be similar to the "Matching Clause" applicable to State aid. The ‘*Matching Clause mechanism allows, in theory, for larger amounts of aid to be paid to companies above the authorised thresholds, when it is proven that a competing company outside the Union is receiving aid from a third State.*’[95] Even if not used since 2014, this clause is contained in the Communication on "State aid for research, development and innovation" and in the Communication on "Important Projects of Common European Interest" (IPCEI).

Another reform proposition concerns the entry of a potential competitor and its conditions. Under Paragraph 69 of the Horizontal Merger Guidelines, ‘*for entry to be likely, it must be sufficiently profitable taking into account the price effects of injecting additional output into the market and the potential responses of the incumbents.*’ In few words, if the profitability of the market is low, the likelihood of entry should be low as well. Nevertheless, France, Germany and Poland called on the Commission to reconsider the question: ‘*low profitability of market entry may not be a significant barrier to entry for directly or indirectly subsidised third-country companies.*’ The underlying idea is that state-backed companies can financially withstand low prices pressure far better than completely private companies. The idea recalls the concept of predatory prices and suggests not considering low profitability as a high barrier to entry *per se.*[96]

In its Non-paper of 4 December 2019, the Dutch government considers a range of options in order to strengthen the level playing field on the internal market. Among the others, it suggests the creation of a ‘sixth branch’ of competition law. Specifically, it calls for stricter controls against any acquisition, merger or behaviour by groups that are subsidised by a third country or enjoy a dominant

[94] Deffains (n 92) s 3.1.3., 27.
[95] Ibid.
[96] Heim (n 93).

position in that third country. These groups would face tighter transparency obligations and would be prohibited from abusive behaviour.[97]

Other related propositions address the difficulties that sometimes the Commission faces in detecting and demonstrating the state support enjoyed by Chinese companies. Some have called for the creation of a '*real "economic intelligence service" in order to provide a better information base when [the Commission] takes merger or State aid decisions in markets where Chinese groups are, currently or potentially, active*'[98]. Others have suggested shifting the burden of proof. The onus of proving State aid or support would not fall on the Commission, but it would fall instead on the company to prove it is not state-backed.[99]

Overall, some of these proposals offer valid arguments for more in-depth consideration. Some, such as the proposals concerning the turnover threshold, the notification of consolidation between state-controlled enterprises or the low profitability market entry barrier, appear to be reasonable adaptations of the EU merger control rules to the new economic reality of global competition; what is more, they seem also easier to achieve, since the first and the third ones, at least, would only involve a reform of the Guidelines. Others, such as the 'Matching Clause' or the creation of the 'economic intelligence service', would entail a much more complex and lengthy reform of Merger Regulation and would imply a more flexible and politicised approach of the Commission to merger reviews. This approach will be discussed in more details in Section 5.5.3.

5.3. A more flexible merger control regime

The third more recurrent argument concerns the request for a more flexible approach of the Commission to mergers between European companies. In this Section, the following specific issues can be included: merger's efficiencies, behavioural remedies, a more politicised merger control regime and joint ventures.

[97] 'Strengthening the level playing field on the internal market' (n 41).
[98] Deffains (n 92) s 3.1.3., 28.
[99] E. Braun, T. Larger, S. Van Dorpe, 'EU big four press Vestager to clear path for champions' *Politico* (Brussels, 2 February 2020) < https://www.politico.eu/article/eu-big-four-france-germany-italy-poland-press-executive-vice-president-margrethe-vestager-to-clear-path-for-champions/> accessed 2 April 2020.

5.3.1. Efficiencies

By the Franco-German-Polish joint statement and the letter sent by the same three governments plus Italy in February 2020, the signatory parties call for a review of the efficiency argument in merger control.

The EU merger control rules accept the idea that a merger or an acquisition transaction may enhance the competitiveness of the industry, thereby improving the conditions of growth and raising the standard of living in the Community. According to Recital 29 of the EU Merger Regulation, '*it is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition*'. The Guidelines (Paragraph 76-88) specify the limits and conditions of the Commission's appraisal of the efficiency gains. In particular, for the Commission to reach the conclusion that '*there are no grounds for declaring the merger to be incompatible with the common market, the efficiencies have to benefit consumers, be merger-specific and be verifiable. These conditions are cumulative.*'[100]

Many commentators consider the Commission's approach on efficiencies too restrictive. In particular, the Commission rejects often this argument claiming that the efficiency gains have not been demonstrated or more rarely that they exist but are not enough to counterbalance the negative effects on competition.[101] For instance, also in the Alstom-Siemens decision, the Commission regarded as not verifiable the merger's claimed synergies, which, according to the parties, would have resulted in lower prices and a broader portfolio of products.

For these reasons, the reform propositions suggest ensuring greater clarity on what efficiency arguments may be deemed credible, ensuring greater acceptance by the Commission of efficiency defences and enabling greater Member State scrutiny of efficiency arguments.[102]

As regards the first two points, France, Germany and Poland called on the Commission to '*provide greater clarity to the stakeholders on the efficiencies brought about by a merger and on the evaluation of the competitiveness of industry in the appraisal of mergers. Specific guidelines could develop the range of efficiencies that could be taken into account in the competitive analysis.*' [103] The overall aim of the reform would be ensuring greater acceptance of efficiency gains argument by the Commission, '*in order to strengthen the competitiveness of EU industry and European value chains without*

[100] The EU Horizontal Mergers Guidelines (n 86) para 78.
[101] Deffains (n 92) s 3.1.4., 28.
[102] Heim (n 93).
[103] 'Modernising EU Competition Policy' (n 40) Proposal n 3.

distorting competition on relevant European markets that would allow negative effects to arise for consumers and enterprises.' Some commentators suggest going even further, by '*accepting a "trade-off" between the positive and negative aspects of concentration*'. '*Sometimes a merger can be positive in one market, for example by increasing competition against a dominant company, and create competition problems in another.*' According to the proponents, in this case, the Commission should take a more '*global view where the positive aspect in one market may outweigh the negative aspect in another.*'[104] They suggest reforming the Guidelines according to the Swiss Merger Regulation, Article 10(2)b, which outlines a similar compensatory approach[105].

As regards the third suggestion, the Member States propose reinforcing the role of the Advisory Committee so that '*it could conduct independent assessments of efficiency gains linked to mergers and of the economic relevance of remedies in order to strengthen the Commission's decision in this field.*'[106] Since the Advisory Committee consists of representatives of the competent authorities of the Member States[107], this proposal can be read as an attempt of diminishing the independence of the European Commission, by conversely enhancing the power of Member States in the appraisal of efficiency gains.

There is no doubt that a request for greater clarity is legitimate and that it should be addressed in order to make the merger control process more transparent and intelligible. Nevertheless, a general reform of the Commission's approach does not seem recommendable, because the proponents are calling for a more flexible and politicised approach, which, as explained in Section 5.5.3., could jeopardize the goal of safeguarding a competitive and efficient internal market.

5.3.2. Behavioural remedies

Where a concentration raises competition concerns, the merging parties may seek to modify the concentration in order to resolve the competition concerns and thereby gain clearance of their merger.[108] Such modifications are more commonly described as '*remedies*'. The Commission Notice on Remedies states that a general distinction can be made between structural remedies – divestitures and other structural remedies, such as granting access to key infrastructure or inputs - and

[104] Deffains (N 92) s 3.1.5., 29.
[105] *"The Competition Commission may prohibit the concentration or authorise it subject to conditions and obligations where it appears from the examination that the concentration [...] (b) does not lead to an improvement in the conditions of competition on another market which outweighs the disadvantages of the dominant position"*, Ibid.
[106] 'Modernising EU Competition Policy' (n 40) proposal 5.
[107] The EU Merger Regulation, art 19 (4).
[108] Commission Notice 2008/C 267/01 on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (Notice on Remedies) [2008] OJ C 267/1, para 9.

commitments relating to the future behaviour of the merged entity[109]. Even if the Commission stresses that the question has to be examined on a case-by-case basis, divestiture commitments are generally considered the best way to eliminate competition concerns resulting from horizontal overlaps, but also vertical or conglomerate relations. [110]

As for the structural remedies, the Commission should be able to conclude with the requisite degree of certainty that it will be possible to implement them and that the new commercial structures resulting from them will be sufficiently workable and lasting to ensure that the significant impediment to effective competition will not materialise.[111] In order for the commitments to comply with these principles, their implementation has to be certain and the Commission has to be able to monitor them. Therefore, proposals that are excessively extensive and complex cannot be accepted.[112]

As for behavioural remedies, Paragraph 17 of the Commission Notice on Remedies states that they may be acceptable only exceptionally in very specific circumstances. '*In particular, commitments in the form of undertakings not to raise prices, to reduce product ranges or to remove brands, etc., will generally not eliminate competition concerns resulting from horizontal overlaps.*' The Notice specifies that '*those types of remedies can only exceptionally be accepted if their workability is fully ensured by effective implementation and monitoring*' and if they do not risk leading to distorting effects on competition. Consistently, behavioural remedies are usually rejected by the Commission.

In their list of reform suggestions, the governments of Germany, France and Poland (plus Italy in the letter of February 2020) called on the European Commission to '*pay more attention to the relevance of behavioural remedies (e.g. commitments regarding price, quality or choice of contractual partners)*'. More attention to behavioural remedies should be paid '*especially if competition conditions may change in the short run, since such remedies are more flexible than structural ones (including sales of assets and other one-off irreversible measures modifying the companies structure).*'[113]

On behavioural remedies, a debate is currently taking place. On the one hand, many suggest that the Commission should recognise behavioural commitments more often[114]; on the other hand, some economists argue the Commission blocks too few mergers, imposes remedial conditions that are frequently not effective in safeguarding competition after the merger and therefore, suggest a stricter

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[109] Ibid para 17.
[110] Ibid paras 16-17.
[111] Ibid paras 10-12.
[112] Ibid paras 13-14.
[113] 'Modernising EU Competition Policy' (n 40) proposal 7.
[114] Deffains (n 92) s 3.1.2., 26.

approach to remedies in general[115]. From a comparative perspective, a general and traditional preference for divestiture is clear in every jurisdiction, especially in countries like Germany and the UK. Researches have shown that behavioural commitments have accounted only for 16% of the total decisions with commitment in those countries, between 2008 and 2018[116]. Conversely, in other jurisdictions, behavioural remedies are admitted more often. For example, in France, 36% of the decisions approving mergers with remedies included behavioural commitments. The same study shows that behavioural remedies represented less than 20% of the cases in the Commission's practice. Overall, the question of competition remedies, and especially their effectiveness, does not appear completely clear and therefore, some researchers call for new studies on their effects.[117]

Apart from the debate on the effectiveness of behavioural remedies, the biggest concern related to these commitments remains in place. The Commission, like other competition authorities, is especially worried by the monitoring phase, which could be extremely time and resource-consuming. France, Germany and Poland seem to be aware of the problem because in their joint statement they stress that '*such behavioural remedies should be subject to proper monitoring*'. This is the reason why, at the moment, it appears quite unlikely that the Commission will change its approach and begin accepting behavioural remedies more often. This conclusion may not, however, be valid for the digital sector. As a matter of fact, Commissioner Vestager opened in July 2019 to the possibility of allowing behavioural remedies for transaction in the digital sector.[118]

Lastly, it is noteworthy that France, Germany and Poland suggested strengthening the role of the Advisory Committee also for the assessment of behavioural remedies. They propose giving the Advisory Committee the power to independently assess '*the economic relevance of remedies in order to strengthen the Commission's decision in this field*'.[119] As for the merger's efficiencies, the proponents are calling for a less independent and more politicised appraisal of the merging parties' commitments; and as explained in Section 5.5.3., this reform could jeopardize the goal of ensuring a competitive internal market.

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115 M Szczepański, *EU Competition Policy: Key to a Fair Single Market* (European Parliamentary Research Service, October 2019) s 6.4, 25.
116 Deffains (n 92) s 3.1.2., 26, fn 103.
117 Szczepański (n 115) s 6.4, 25.
118 T Wilson, 'Merger remedies – is it time to go more behavioural?' (Kulwer Competition Law Blog, 21 February 2020) <http://competitionlawblog.kluwercompetitionlaw.com/2020/02/21/merger-remedies-is-it-time-to-go-more-behavioural/#_ftn22> accessed 4 April 2020.
119 'Modernising EU Competition Policy' (n 40) proposal 7.

5.3.3. A stronger role for the Member States

Another set of suggestions calls for a stronger role for the Member States in both competition policy definition and specific merger case decisions.

In the aftermath of the Alstom-Siemens decision, France and Germany proposed in their Manifesto to consider an appeal mechanism to the Council, in order to override Commission decisions[120]. The suggestion was blatantly unrealistic, because, apart from the evident and dangerous politicisation of merger control, it would have entailed the modifications of the Treaties, which currently cannot be taken into consideration.

Several months later, in the joint statement with Poland, France and Germany readjusted the proposal on a more realistic basis. At a political level, they suggest that the Competitiveness Council should '*have the opportunity to discuss merger policy with regard to the competitiveness of EU industrial sectors in order to provide input into the European Commission's strategy and policy.*'[121] As some commentators have noted there should be no issue with the Member States giving inputs for strategy or policy, '*but there could well be tensions if the Council were to use the opportunity to flag to the Commission which sectors should undergo consolidation or which mergers respond to the Council's notion of industrial competitiveness.*'[122] In this way, political consideration would vigorously enter the domain of merger control.

At a lower, technical level, the Member States suggested that '*the Advisory Committee in merger control should make use of the potential it has to feed input from the Member States into decision-making based on competitiveness considerations.*' The Advisory Committee's role is currently considered a kind of formality, so the idea of revitalising its role has been received favourably by some observers. However, basing the input on '*competitiveness considerations*' would probably mean basing them on industrial policy arguments, which in turn would entail, again, a greater role for political considerations.[123]

In the letter sent by the quartet to Margrethe Vestager in February 2020, the four governments declare as follows: '*we are confident that your involvement in the long-term strategy for the future of European industry will lead to greater collegiality in the assessment of the EU's long-term industrial challenges in the evaluation of competition rules, merger control and state aid rules.*'[124]

[120] 'A Franco-German Manifesto for a European industrial policy fit for the 21st Century' (n 37).
[121] 'Modernising EU Competition Policy (n40) proposal 6.
[122] Heim (n 93).
[123] Ibid.
[124] The governments of France, Germany, Poland and Italy (n 45).

In conclusion, all these proposals are aimed at seeking greater involvement of the Member States, their governments and, ultimately, politicians, in the competition and merger control process, both on the level of policy definition and specific merger case decisions.

5.3.4. Joint ventures

One of the lasts suggestions concerns joint ventures. In order to provide greater clarity on the subject, France, Germany, Poland and Italy called on the Commission to draft guidelines (i) on the creation of European joint ventures which aim to strengthen their position or enter into foreign markets, as well as (ii) on cooperation to reinforce cross-border European value chains[125]. The proponents suggest taking as an example the Important Project of Common European Interest (IPCEI)[126], an instrument that allows a certain grade of flexibility and permits considering public financial support for strategic projects compatible with state aid rules and the internal market.

The detailed analysis of these instruments falls outside the scope of this paper. However, joint ventures created by European companies for competing exclusively outside the EEA may be a good compromise to balance industrial policy considerations and the need of ensuring an independent and well-functioning competition and merger control system in the EEA. Together with innovative solutions such as the "matching clause" and behavioural remedies for EEA markets, joint ventures may become flexible instruments that would allow European companies to join forces in the global market, while not jeopardising the equilibrium of the internal market.

5.4. The competitive assessment in the age of the digital economy

The last series of proposals concerning the reform of merger control rules regards the challenges posed by the digital economy. These questions fall outside the scope of this paper and they would need an in-depth analysis to be properly addressed. However, for the sake of completeness, the most important proposals in the joint statements of Germany, France, Poland and Italy will be outlined.

'*The emergence of large players of the digital economy relying on the accumulation of data and unparalleled network effects resulting in very strong market footprint and excessive market power in neighbouring or emerging markets constitutes another challenge for competition policy.*' For this

[125] 'Modernising EU Competition Policy' (n40) proposal 4; the Government of France, Germany, Poland and Italy (n45).
[126] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/49, art 107(3)

reason, the proponents suggest that the Commission should '*identify systemic actors against objective criteria taking into account specificities of digital markets, such as emergence of digital platforms with paramount importance for competition, that should be subject to specific scrutiny*'.

The concerned Member States warn also that '*some large companies in the digital economy pursue a policy of predatory acquisitions of young companies, with the aim of eliminating potential competition and preserving their dominant position*'. These predatory acquisitions seem to be possible because usually the entities do not meet the turnover threshold that defines the European dimension of a concentration and triggers the obligation of notification to the Commission[127]. Therefore, the opportunity to rethink those thresholds and '*to control those mergers ex post should be explored and be subject to an impact assessment*'.

5.5. Critical analysis of the suggested reforms of the Merger Regulation and the Guidelines

The critical analysis of each specific proposal has already been discussed briefly in the previous pages. In this Section, the appropriateness of a reform that aims at rendering merger control rules more flexible and lenient towards industrial policy considerations will be discussed.

Overall, the answer to this question is not straightforward. Many policymakers[128], observers and industrial groups stress the need to allow the creation of European champions, while others warn of the risky consequences of relaxing merger control rules. What is more, each side seems to have convincing arguments. The reasons why the European Union should enable the creation of European industrial leaders have been extensively discussed above, and they include the challenges posed by the Chinese industrial and economic strategy, as well as the radical transformation of the digital economy. Below, instead, the reasons why the European Union should not change its approach to competition law and merger control will be presented.

[127] The EU Merger Regulation art 1.

[128] Guy Verhofstadt, 'Europe's Missing Champions' *Project Syndicate* (1 March 2019) <www.project-syndicate.org/onpoint/europe-s-missing-champions-by-guy-verhofstadt-2019-03?barrier=accesspaylog> accessed 6 April 2020.

5.5.1. What is a European champion?

The first critical element in the call for European champions can be found in its very definition. As Heim and Midões (2019) have shown, neither "champion" nor "European" are easy to define[129]. Firstly, it is very difficult to determine what is a "champion". Strange (1990) defines "*champion*" as '*firms given favourable treatment by the state to help them maintain a dominant presence in the home market and a competitive share in the world market*'[130]. However, there is no consensus on what constitutes a "champion" and what are the criteria to classify a company as a "champion". If it seems obvious from a political point of view, it is not from a scientific standpoint. As Heim and Midões (2019) have demonstrated, there is no clear answer. By taking into consideration EU-domiciled companies and some classic indicators of economic footprint such as market capitalisation, total revenues, fixed assets, employee numbers and R&D expenditure, some divergence in the ranks per category becomes apparent. For instance, Royal Dutch Shell qualifies 1st in market capitalisation, but only 81st in number of employees or 44th in R&D expenditure. It appears clear from the data that '*not all 'leading' companies qualify equally in each category*', and this complicates greatly the identification of "champions". In addition, in some cases, such as R&D, even small or medium companies could be considered "champions", if they are leaders in small niche markets. The matter is complicated also by the fact that criteria for classifying a "champion" may also be different from traditional economic indicators. In the digital economy, for example, market value corresponds to intangible assets such as data or online user-bases. For all these reasons, it seems very difficult to define what a "champion" is. Without clear criteria, the determination of "champions" would lead to political and arbitrary decisions.

Secondly, the other difficulty concerns the definition of "European". In this case, also, the identification of which companies could be considered European is not straightforward. Usually, the criterion to define the nationality of a company is the place of incorporation; however, several European countries adopt other criteria - such as the real seat theory - which could lead to inconsistent conclusions. Another conceptual difficulty in determining the nationality of a company or a group of companies is caused by global value chains, which are spread across numerous countries. Specifically, a company may market goods that have been assembled and produced by a plethora of companies, subsidies or branches based in many different countries. Another element that could be taken into consideration when assessing the nationality of a company is the ownership of the company

[129] M Heim, C Midões, 'European champion-ships: industrial champions and competition policy' (Bruegel, 26 July 2019) <https://www.bruegel.org/2019/07/european-champion-ships-industrial-champions-and-competition-policy/> accessed 6 April 2020.

[130] Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge University Press 1996).

itself, and specifically the nationality of shareholders. It is not a surprise that a great share of companies domiciled in Europe is significantly owned by institutional investors from outside Europe, in particular the US. '*Only 46% of institutional ownership of the top 100 companies domiciled in the EU28 sits in EU28 institutions.*' All these considerations render complicated the definition of "European".

In conclusion, '*establishing a robust, consistent criteria or threshold to enshrine a 'European Champions' policy, that would permit derogation from competition law, is plagued with difficulties.*'[131]

5.5.2. Competition law does not prevent the creation of European champions

The second argument against the proposed reform of merger control rules lies in the fact that competition law does not prevent the creation of champions. From a general perspective, competition rules do not impede the growth of a company and they do not stop competitive companies from becoming regional or even global leaders. What competition and merger control rules hinder, instead, are abusive behaviours that could lead to less competitive markets and, ultimately, harm consumers and the society in general.

From a factual and specific point of view, the European Commission does not prevent the creation of European champions. As shown by Heim and Midões (2019), out of 4680 transactions notified to the Commission under the EU Merger Control Regulation, only 11 notifications were prohibited (out of 106 reviewed in Phase 2). Therefore, the ban on Alstom-Siemens transaction should be considered an exception and not the rule.

These considerations show clearly that '*the accusation that the Commission is actively preventing 'European Champions' from consolidating or targeting specific companies is not supported by evidence.*'[132]

5.5.3. The risks of politicising EU competition law

As discussed in the previous Sections, many of the proposals suggested by Germany, France, Poland and Italy imply a more central role of politics in EU competition and merger review regime. From

[131] Ibid.
[132] Ibid.

the request of greater collegiality to the proposal of enhancing the competences of the Advisor Committee, these Member States called for a more active role of national governments both at the policy definition and case decision level. Correspondingly, these reforms would have the primary effect of reducing the independence of the European Commission.

Policymakers and observers are divided on this question. On the one side, many calls for a more "political" competition law. For instance, Manfred Weber, German MEP and 'lead candidate' for the European People's Party in the European elections in May 2019, stated that '*we have to behave more politically because China is behaving more politically*'[133]. On the other side, many more take a clear position against the politicisation of EU competition and merger control rules.

In particular, '*most competition law experts appear highly skeptical of these proposals that would politicize the rules-based, and generally considered world-leading, merger review system that the Commission has established over the course of the past 30 years.*' For instance, economist Patrick Ray and Nobel laureate Jean Tirole commented that '*Europe would be wise not to leave competition policy enforcement in the hands of its politicians*'[134], while former Competition Commissioner Mario Monti defined '*suicidal*' undermining the bloc's competition rules[135]. The main concern is that the politicisation of competition and merger control practices could lead to arbitrary decisions and political compromise, in which the most powerful countries, as well as economic and political groups, prevail over others. If, on the one hand, a more politicised merger review system would enable the creation *in vitro* of industrial giants domiciled in Europe, on the other hand, this kind of approach may endanger the efficiency and stability of the internal market. In fact, favouring several companies for political reasons will put at disadvantage their competitors, especially if they are small and medium enterprises (which represent 99% of businesses in the European Union[136]).

In Northern and Eastern Europe these considerations have turned into fear that France and Germany intend to transform the EU into a vehicle for protecting their biggest corporations to the detriment of smaller enterprises and open markets[137]. For this reason, a group of smaller and traditionally more

[133] M Khan, 'EU commission hopeful calls for 'political' competition rules' *Financial Times* (London, 9 April 2019) <www.ft.com/content/1a8ec2c4-5adf-11e9-939a-341f5ada9d40> accessed 5 April 2020.
[134] Cleary Gottlieb, 'Prohibition Of Siemens/Alstom Triggers Debate About Far-Reaching Changes To EU Merger Control' in N Maydell (Ed), *EU Competition Newsletter* (February 2020), 3 <www.clearygottlieb.com/-/media/files/eu-competition-newsletters/european-competition-law--newsletter-february-2019-pdf.pdf > accessed 5 April 2020.
[135] G Leali, 'Don't blame Brussels: Mario Monti weighs into clash over EU champions' *Politico* (Brussels, 11 February 2020) < www.politico.eu/article/mario-monti-dont-blame-brussels-mario-monti-weighs-into-clash-over-eu-champions/> accessed 5 April 2020.
[136] European Commission, 'What is an SME?' <https://ec.europa.eu/growth/smes/business-friendly-environment/sme-definition_en> accessed 5 April 2020.
[137] C Oliver, S van Dorpe, G Leali, 'Europe under siege — from within' *Politico* (Brussels, 12 February 2020) <www.politico.eu/article/europe-under-siege-from-within/> accessed 5 April 2020

liberal EU Member States, led by Sweden, have taken a position against the reform and are rallying to counterbalance the reformist push coming from the 'quartet'.[138]

In conclusion, the risk of undermining the rule-based merger review system, as well as the economic efficiency and stability of the internal market, seems to be very high and is therefore not acceptable.

6. Final considerations

6.1. The fragile balance of the EU competition regime

Few EU policies have been so successful as competition. The EU competition regime is currently considered one of the strongest and most effective regimes around the world[139]. The results can be assessed in the Global Competitiveness Report, where the World Economic Forum ranks the countries in terms of competitiveness, by comparing a set of indicators. As regards antitrust policy, in the 2017-2018 report, twelve of the EU Member States are in the first 21 places in the global ranking and a further six are in the first 49 places. In terms of market dominance, 20 Member States are in the 44 highest ranked.[140] The effectiveness of the EU competition policy is also supported by comparative analysis. A recent empirical research found that US markets were more competitive than European markets until the Nineties. Today, the latter have lower concentration, lower excess profits, and lower regulatory barriers to entry[141].

Nevertheless, not everybody agrees with this optimistic view. European markets are not as open to competition as it is claimed. A 2019 analysis demonstrates that market competition in most European countries has not increased but declined since 2008. In particular, the study finds that the reason can be found in the increase of market concentration and market power in most of the EU Member States. Therefore, the study warns from weakening competition policy, because it '*will lead to further market concentration, squeezing consumers and firms, and crippling the economy*.'[142]

[138] J H Vela, 'Free-trading Stockholm six counter French protectionism' *Politico* (Brussels, 11 February 2020) <www.politico.eu/article/free-trading-stockholm-six-counter-french-protectionism/> accessed 5 April 2020.
[139] K Hylton, F Deng, 'Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effects' (2007) 74 Antitrust Law Journal 271.
[140] M Szczepański (n 115) s 7.1, 27.
[141] G Gutiérrez, T Philippon, 'How EU Markets Became More Competitive Than US Markets: A Study of Institutional Drift' (2018) NBER Working Paper No. 24700.
[142] O Guinea, F Erixon, 'Standing up for Competition: Market Concentration, Regulation, and Europe's Quest for a New Industrial' (Policy ECIPE Occasional paper, 2019).

6.2. The right instrument for each challenge

It is undoubtful that the economic and geopolitical challenges posed by the rise of China and the digital economy are real and could threaten the very existence of European industrial and economic structure and, ultimately, hinder progress and prosperity in Europe. Nevertheless, competition rules are not the right tools to level the playing field. As discussed in this paper, a comprehensive and radical reform of the EU merger control system in the terms suggested by the governments of France, Germany, Poland and Italy is not recommendable. This is because such a reform entails excessive risks for the efficiency and stability of the internal market, and it would not be capable of addressing appropriately the current and future challenges of the European economy. In order to tackle these questions, the Member States and EU Institutions should instead define and implement a set of both defensive and proactive tools, capable of levelling the playing field between European and third countries' companies. Some of these measures have already been set up, such as the EU foreign investment screening Regulation[143], while others have still to be discussed. In its Communication on the New Industrial Strategy for Europe, the Commission outlines a series of possible relevant instruments. In particular, by mid-2020 the Commission will explore how to strengthen anti-subsidies mechanisms and will issue a White Paper on an Instrument on Foreign Subsidies, which will address distortive effects caused by foreign subsidies within the single market. The White Paper will address also the lack of reciprocal access for European firms to the home country markets of foreign, state-owned companies. In this regard, the Commission calls for a swift agreement on the proposed International Procurement Instrument, which should address the lack of reciprocity and give the EU further leverage in negotiations.

As regards the cooperation of European companies, if the creation of European champions through mergers and acquisitions seems complicated from a competition perspective, it does not mean that no cooperation at all should take place between enterprises. As the Commission's in-house think-tank noted in 2019, '*there is nothing that requires a European 'champion' to be a single company. A champion could very well be a temporary collaboration, or a consortium of companies that complement each other's services and can therefore provide a more complete offer.*' One option could be to undertake joint technology development, for instance in the context of a Joint Undertaking or an Important Project of Common European Interest. For more proactive cooperation, another option could be allowing the creation of joint ventures designed only for foreign markets. Together with innovative solutions such as the "matching clauses"[144] and strict behavioural commitments for EEA

[143] Regulation (EU) 2019/452 of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union [2019] OJ L79 I/1.
[144] See Section 5.2.

markets, joint ventures may become flexible instruments that could allow European companies to join forces in the global market, while not jeopardising the equilibrium of the internal market.

6.3. Conclusions

Currently, the European Commission is engaged in the evaluation of its merger control regime. According to the relevant timeline[145], the evaluation results will be issued by the end of 2020. Before the publication, however, an intensification of the debate is likely to take place, because the Commission is expected to decide on high-profile mergers between French and Italian companies, such as Fincantieri-Chantiers de l'Atlantique and GrandVision-EssilorLuxottica, and it might be also called to assess the huge potential Deutsche Telekom-Orange merger[146]. The debate will probably reach the peak in late summer and autumn 2020, when Germany will take up the six-month rotating presidency of the Council of the EU in July.

In the discussion, the parties should take into account the following considerations:

- Reviewing the Relevant Market Notice in the sense of allowing wider market definitions may lead to difficulties and misrepresentations. The identification of global markets on grounds of supply-side substitution by imports, in some cases even potential, could complicate the whole market definition process and it would give room to a high grade of uncertainty.
- Reforming the competitive assessment in order to render it more flexible would have the primary effect of reducing the independence of the European Commission. The politicisation of merger control could lead to arbitrary decisions and political compromise, in which the most powerful countries, as well as economic and political groups, prevail over others. In turn, this could undermine the efficiency and stability of the internal market.
- Most competition experts agree that the mounting empirical evidence on increased market power and concentration call for more, not less, competition. '*Europe needs more efficient, competitive, and innovative firms. Sponsoring mergers which remove competition would achieve the opposite.*'[147] For this reason, other tools, different from the reform of the EU

[145] DG Competition, Reform Timetable <https://ec.europa.eu/competition/mergers/legislation/timeline_table_M_AT_final.pdf> accessed 6 April 2020.
[146] C Oliver, S van Dorpe, G Leali, 'Europe under siege — from within' *Politico* (Brussels, 12 February 2020) <https://www.politico.eu/article/europe-under-siege-from-within/> accessed 5 April 2020.
[147] Massimo Motta, Martin Peitz, 'More, not less, competition is needed in Europe' (2019) <https://www.barcelonagse.eu/microupdates/open-letter-massimo-motta-european-industrial-economists> accessed 6 April 2020.

competition regime, should be defined and implemented in order to tackle the current economic and geopolitical challenges.

Appendix

On 28 May 2020, a few days before finishing this paper, the EU's General Court rendered a landmark decision[148] by annulling the Commission decision prohibiting the acquisition of Telefónica UK's "O2" by Hutchison UK's "Three"[149].

The transaction would have created a leading but not dominant player in the UK mobile telephony market. In particular, the new entity would have reached a 40% market share and would have faced the competition of the other two remaining players, Everything Everywhere and Vodafone. The Commission blocked the proposed acquisition because, in its opinion, it would have caused an increase in prices and a restriction of choice for consumers, hampered the development of the mobile network infrastructure in the UK and it would have had a negative impact on virtual operators on the UK mobile telephony retail market.

In its judgement, the EU's General Court ruled for the first time on the test the Commission needs to apply in assessing mergers, the 'significant impediment to effective competition' test of Article 2(3) of the Merger Regulation. The Court also clarified the standard of proof imposed on the Commission when carrying out this test.

The Court held that oligopolistic market concentrations lead to 'significant impediment to effective competition' when they generate effects equivalent to the creation or strengthening of a dominant position.[150] The Court specified that two cumulative conditions (outlined in Recital 25 of the Merger Regulation) must be met in order that '*non-coordinated effects arising from a concentration may, under certain circumstances, result in a significant impediment to effective competition.'* In particular, '*the concentration must involve (i) 'the elimination of important competitive constraints that the merging parties had exerted upon each other' and (ii) 'a reduction of competitive pressure on the remaining competitors*'.[151]

In addition, the Court raised the standard of proof imposed on the Commission when assessing competition concerns arising from concentrations. Specifically, the Court held that the Commission is required to produce sufficient evidence to demonstrate with a '*strong probability'* the existence of

[148] T-399/16 *CK Telecoms UK Investments v Commission* [2017] ECLI:EU:T:2020:217.
[149] *Hutchison 3G UK/Telefonica UK* (Case M.7612) Commission Decision C/2016/2796 [2016] OJ C 357/08.
[150] *CK Telecoms UK Investments v Commission* (n 148) s 90.
[151] Ibid s 96.

significant impediments following the concentration[152] and that the theories of harm '*must appear sufficiently realistic and plausible*' and cannot be based on purely theoretical bases.[153]

In conclusion, this decision limits the discretion of the Commission to prohibit concentrations that does not create or strengthen a dominant position, even where the market is relatively concentrated. Due to its substantial nature, this judgment has led many observers to compare it to the landmark 2002 *Airtours* case, which paved the way to the reform of the EU Merger Regulation.[154] Although the Commission will probably appeal it, this decision is likely to have a significant impact on the future Commission's merger control practice, it may foster a reform of the merger control rules and, hence, have an direct effect on the topic discussed in this paper.

[152] Ibid s 118.
[153] Ibid s 117.
[154] Allen & Overy, 'The General Court annuls the European Commission's prohibition of the Three/O2 merger – a reset for EU merger control?' (2 June 2020) < https://www.allenovery.com/en-gb/global/news-and-insights/publications/the-general-court-annuls-the-european-commissions-prohibition-of-the-three-o2-merger> accessed 11 June 2020; Anne Wachsmann, Nicolas Zacharie, Nick Peristerakis, 'The EU Court annuls the prohibition of Three UK / O2: towards a new era for EU merger control?' (Linklaters, 5 June 2020) <https://www.linklaters.com/en/insights/publications/2020/june/the-eu-court-annuls-the-prohibition-of-three-uk-o2-towards-a-new-era-for-eu-merger-control> accessed 11 June 2020.

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