LIBERA UNIVERSITÀ INTERNAZIONALE DEGLI STUDI SOCIALI

Department of Political Science

Master's Degree in International Relations

Major: European Studies

Chair of International Economics

EU Industrial Policy and European Champions after the Siemens-Alstom case

Prof. Paolo Garonna

SUPERVISOR

Prof. Giovanni Rizzoni

CO-SUPERVISOR

ID 639262 Giulio Sindaco

CANDIDATE

Academic Year 2019/2020

Table of Contents

List of abbreviations

A.D.: Antitrust Division

AES: Adult Education Surveys

AI: Artificial Intelligence

CCGT: Combined Cycle Gas Turbine

CEO: Chief Executive Officer

CFSP: Common Foreign and Security Policy

CSIC: China Shipbuilding Industry Corporation

CSSC: China State Shipbuilding Corporation

DARPA: Defense Advanced Research Projects Agency

DG COMP: Directorate-General for Competition

ECJ: European Court of Justice

ECMR: European Community Merger Regulation

EIC: European Innovation Council

EIF: European Innovation Fund

EMU: Economic and Monetary Union

EP: European Parliament

eTEN: Trans-European Telecommunications Network

EU: European Union

FTC: Federal Trade Commission

GAI: Global Attractiveness Index

GDP: Gross Domestic Product

GII: Global Innovation Index

GSP: Generalised System of Preferences

INEA: Innovation and Networks Executive Agency

IPCEI: Important Project of Common European interest

LDCs: Least Develop Countries

M&A: Mergers and Acquisitions

MEP: Member of the European Parliament

MOFCOM: Chinese Ministry of Commerce

MS: Member States

R&D: Research and Development

RCI: Regional Competitiveness Index

RE: Renew Europe

RIS: Regional Innovation Scoreboard

RoW: Rest of the world

S&D: Special and differential treatment

S2R JU: Shift2Rail Joint Undertaking

SASAC: State-owned Assets Supervision and Administration Commission

SE: Societates Europaeae

SME: Small and medium enterprise

TEC: Treaty establishing the European Community

TENs: Trans-European Networks

TEN-T: Trans-European Transport Network

TEU: Treaty on European Union

TFEU: Treaty on the Functioning of the European Union

TOP: Take-or-pay

USA: United States of America

WEF: World Economic Forum

WTO: World Trade Organisation

Introduction

In a time of unprecedented economic and financial uncertainties, European Union Member States are struggling to lay down a coherent framework for the development of an EU-based industrial policy. After a decision taken by the European Commission on 6 February 2019 to prohibit a merger between two of the region's leading railway vehicle manufacturing companies (the French Alstom SA and the German Siemens AG), various national governments began to show frustration and discontent with the choice. The assessment caused extreme dissatisfaction due to the presumably "aggressive" stance taken by the Directorate-General for Competition. Such an unexpected verdict was coldly received by the Franco-Germans, but it also gave rise to an extremely prolific and constructive debate over forward-looking proposals on Europe's strategic interests and its internal market regulations. The present research analysis aims to thoroughly examine whether and to what extent the Commission is hindering the process of building European Champions. Additionally, several possible scenarios will be carefully laid out and plausible hypotheses shall be formulated concerning the integration of national industrial policies at the EU level. Different methodologies are used so as to respond to the research question. Qualitative (Chapters 1 and 3) and quantitative techniques (Chapters 2 and 3) are combined to ensure an accurate and fair assessment of theoretical information and actual data on concentrations.

The first chapter addresses the issue of globalisation, focusing specifically on general working definitions of national and European champions and emphasising the need for setting up an environment which shall be conducive to the attainment of major EU industrial policy goals. In order to reshape EU industrial policy, a list of the most promising economic sectors is provided. A number of mergers in the transport and energy industries will be examined. The issue of excessive fragmentation in these areas shall also be discussed (see: Single European Rail Area, Single European Railway Directive 2012/34/EU and European energy union). The last part of the chapter revolves around subjects dealing with innovation and the importance of building powerful European superstar firms capable of operating in strategic sectors. European champions would substantially enhance transnational collaboration and encourage participation in EU-wide projects, while fostering the development of strong eurodistricts.

Chapter 2 analyses our main case study (Siemens-Alstom) and it provides the reader with an exhaustive compendium of rules dealing with competition and the appraisal of concentrations, in order to better comprehend what ought to be changed in the present legislative framework. After an extensive scrutiny of the 2-stage merger assessment process, the Siemens-Alstom prohibition is carefully examined taking account of existing norms (Article 6 and 8 of Council Regulation (EC) No 139/2004).

The final part of the chapter carries out a comparison with US competition rules (in fact, numerous major “strategic” sectors in the United States are not subject to the application of multiple merger provisions), and it also explores China’s unrestrained use of state support to exporting companies. Subsequently, an in-depth analysis of non-structural commitments (i.e. behavioural corrections) is carried out. A higher degree of flexibility in the implementation of relevant rules seems to characterise the action of the French competition authority with regard to domestic concentrations. EU competition legislation appears to lack a thorough evaluation of “compensations” between advantages and disadvantages originating from a merger as opposed to the Swiss model (see: Article 10(2)b Swiss Merger Regulation).

Chapter 3 addresses the issue of “protectionism” vis-à-vis “protectiveness”, with Europe focusing on the latter so as to tackle numerous challenges stemming from unfair trade practices, cyberattacks, vulnerability to external interference, military interventionism and the growing political influence of the Eastern world. A two-stage examination of the Commission’s approach towards mergers is provided, answering to our main question (i.e. *Is the DG COMP hindering the establishment of European champions?*). The first stage of this study will use a quantitative method to address the issue, while the second (qualitative) phase will bring forwards practical policy proposals so as to facilitate the establishment of larger European firms. Legislative issues concerning Societates Europaeae (SEs) and Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) will also be analysed.

Going back to the core subject of this introduction, a few months prior to the Siemens-Alstom merger’s rejection, in December 2018, Member States had promoted the setting up of a challenging programme, which would have had at its core the concept of “industry”, considered as “a key driver for growth”. In view of the aforementioned elements, it is crucial to look into current legislative provisions on concentrations. Secondly, MS' objectives and the scope of action of the EU in regard to the subject are crucial elements which shall be taken into account. In the third place, we ought to ask ourselves whether the enforcement of existing competition norms may actively hamper the creation of EU champions. Lastly, ideologies will increasingly play a fundamental role in shaping policymaking, as the integration process slowly advances and unfolds: in this respect, we will introduce a relatively straightforward distinction amongst social liberal Pan-European nationalism (which centres around the concepts of *souveraineté européenne* and *Europe qui protège*, evoked by the French President Emmanuel Macron during the speech "Initiative for Europe" held at Sorbonne University in Paris, on 26 September 2017) and classical liberalism (i.e. Chicago School theories, which categorically rule out whatever form of economic interventionism). Globalisation has gradually become a multi-faceted phenomenon, with numerous opportunities and challenges. As it has been empirically observed, European countries on their own would be virtually incapable of achieving any major results and, thus, they need a political "umbrella" which can provide them with tangible tools and a strong bargaining power, whereby they are able to foster long-lasting relationships and negotiate new commercial agreements across the planet. Furthermore, world companies dimension has increased over time and this might pose a significant threat to EU businesses' growth. Hence, the establishment of large European superstar firms would probably put an end to this eternal problem and said companies might be able to compete with their powerful Chinese and American counterparts, breaking down market barriers. Coping with global hi-tech giants requires substantial amounts of capital; EU champions would certainly have access to larger quantities of monetary resources and generate multiple efficiencies. In order to better comprehend these dynamics, we ought to wade through an intricate web of public and private actors, regulations and institutional competences so as to keep track of current advancements and future accomplishments within the sector. The legal basis for the harmonious development of an EU industrial policy is provided by Articles 166 (ex Article 150 TEC), 173 (ex Article 157 TEC), 174 (ex Article 158 TEC), 176 (ex Article 160 TEC) and 189 of the Treaty on the Functioning of the European Union (TFEU), encompassing a wide variety of subjects, including vocational training, crucial prerequisites for industrial competitiveness, coordination of economic policies, industrial transition, redressing regional imbalances and promoting structural adjustments, scientific and technical progress. Over the decades, the Commission has also been entrusted the power to take initiatives aimed at facilitating coordination and the exchange of best practices. Moreover, it shall be responsible for monitoring the enactment of any measure deemed to be necessary. The EP has to be provided with regular updates on said developments. However, the TFEU does not envisage specific provisions regarding the adoption of a single EU legislation dealing with industrial policy nor does it pre-empt MS' competences. The European Competitiveness report, published annually, investigates several strengths and vulnerabilities of European industries and encourages the implementation of ground-breaking future-oriented cross-sectoral policies. Numerous rules on transnational mergers, Community-relevant concentrations and significantly large turnovers will be analysed. Plans concerning an overhaul of EU trade defence instruments and policies needed to counter China's unrestrained use of offensive State-aid tools ought to be examined as well. After the DG COMP's decision to block Siemens' acquisition of the French multinational rail transport company Alstom SA on 6 February 2019, a heated debate has emerged revolving around the key factors behind the verdict. Member States have increasingly pushed for a reform of EU competition law taking account of industrial policy considerations. A few questions have arisen regarding the Commission's *modus operandi* with respect to concentration appraisals. Is the Commission effectively hindering the creation of European champions? In order to address the issue, we shall collect and interpret available data on merger prohibitions and Phase I and II of evaluation proceedings. Freiburg School theories will help us respond to some of the queries previously raised. Post-Chicago and ordoliberal doctrines can be reconciled in view of a wide number of commonalities and similar traits which they share. As we will see in due course, Chicago and interventionist integrationist stances by MS might produce overlapping results, for they represent two alternative ways to get to the same solution, i.e. the establishment of larger European firms. In point of fact, non-interference and interventionist principles can lead to either the "passive" or "active" establishment of European champions, whereas a slightly restrictive competition policy by the Commission could result in some rejections and more constraints. Looking at the data, claims concerning an excessively strict application of competition rules shall be dismissed. Ideological explanations also appear to be unconvincing and wide of the mark.

Conversely, arguments regarding possible flaws and deficiencies in legislation seem more accurate. Several solutions have been brought forward which would tackle said emerging problems in a structured and streamlined manner. The subject of behavioural remedies as an alternative to structural measures will be explored and a possible combination of different types of corrections shall also be discussed. After debating various outstanding problems, we will dive into future developments in competition law providing broader long-term industrial policy perspectives. Harmonised rules would enable European companies to develop EU-wide business strategies and increase their dimensions. Removing flaws in legislation, resulting from the 2001 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), will be crucial. Providing a uniform and unambiguous legal environment and furthering the creation of Societates Europaeae (SEs) is pivotal and will pave the way for future economic growth, increasing competitiveness, attractiveness and corporate mobility, making it easier to do business across the Union.

Chapter 1- European Industrial Integration and European Champions

1.1 Globalisation and the need for EU Champions

1.1.1 A general definition of national and European Champions

With a population of 446,834,600 people and a nominal GDP of 16,930 trillion euros (2020 estimates), the EU's economy is the second largest in the world after that of the US. Therefore, the Union's contribution to the global economy represents about 22% of the planet's Gross Domestic Product. Albeit it is undoubtedly the most successful among single markets throughout the world, Europe still lacks a remarkable amount of big firms on the global stage; for this reason, Member States are pushing for the creation of worldwide prosperous and renowned EU superstar companies which may cope with their American and Asian competitors. The primary objective of this thesis is to determine to what extent the European Commission is blocking or hindering the creation of EU Champions in light of the Siemens-Alstom merger's prohibition (which will be thoroughly explored in Chapter 2). Moreover, I will explain and circumscribe future perspectives of European Industrial Policy. Chapter 1 is introductory and defines the main trends in globalisation as well as the growth of public and private companies on the world stage. It also examines a number of promising sectors for European superstar firms so as to counter the increasing aggressiveness of foreign multinational giants and thrive in the digital era. Part 1 describes a range of phenomena linked to globalisation and provides some insights into the role of EU industrial policy. Part 2 explains the Franco-German approach towards EU industrial integration; an in-depth analysis of mergers in the sectors of energy and transport is provided at the end of this second part. Part 3 deals with a range of practical commitments and policy tools which will be used to improve European competitiveness and attractiveness while investigating the possible repercussions of the Treaty of Aachen on European industrial integration. In the beginning of Part 1, some definitions will be introduced to debate the issue of European champions, after having built a preliminary working framework, so that distinctions can be drawn between the national and the European dimension of a firm. *National champions* can be regarded as leading players of the «international Champions League»[1]; they can be identified

[1]Elisabeth Bublitz, Michael Leisinger and Nele Yang, *Europe's Search for Superstar Firms: The Puzzle of European Champions* (Kiel: Intereconomics, ZBW – Leibniz Information Centre for Economics, 2019), 5.

according to the diverse contexts in which they operate or based upon a specific economic sector. *European champions*, on the other hand, should have their «subsidiaries, headquarters and business operations»[2] located across several of the Union's Member States and must also contribute to an appreciable and worthwhile part of the value chain. The «dispersion of business operations» should be looked at, so as to provide an irrefutable distinction between national and European champions. More recently, further elements have been added to the debate, and the theoretical knowledge at our disposal has been enriched by new definitions, such as *European green champions* (which adopt environment-friendly growth strategies) and *hidden European champions* (which are active in niche markets, but might not be present in rankings due the more limited dimension of the production sectors which they serve). Additionally, the European Policy Strategy Centre (EPSC), a particular Directorate-General of the European Commission delivering reports and analyses to the President, has embraced a very flexible definition, stating that European champions do not have to be single companies, but might also be constituted by more «loose collaborations, consortiums»[3] and so forth, thereby giving more room for interpretation. In practical terms, the notion of "European champions" often hides ideas which are rarely consistent with the precepts of a broad and consolidated Common Market. In fact, some of the largest and most influential Member States could promote these seemingly noble concepts while trying to merely accelerate the expansion of their own national champions within the context of European integration, at the expense of smaller States[4]. Furthermore, public involvement with the intention of establishing powerful global players is frequently viewed as being incongruous with the fundamental tenets of international trade. Mergers and acquisitions, instead, are driven by a perfectly pragmatic world-view, as they can visibly enhance the placement of companies on global markets with regard to market segments and competitiveness, and the idea is not necessarily consistent with political motives. Encouraging these forms of "European champions" as opposed to EU-wide national champions appears to be more sensible and, of course, it would bring a variety of benefits, especially in state-of-the-art

[2]Ibid.
[3]Franco Mosconi, EU Policy-Making, *The Single Market And European Champions: Towards A Taxonomy* (Parma: Routledge, 2015), 62-63.
[4]Jean-Marc Trouille, *Re-inventing industrial policy in the EU: A Franco-German approach* (Brussels: Routledge, West European Politics, 2007), 5-6.

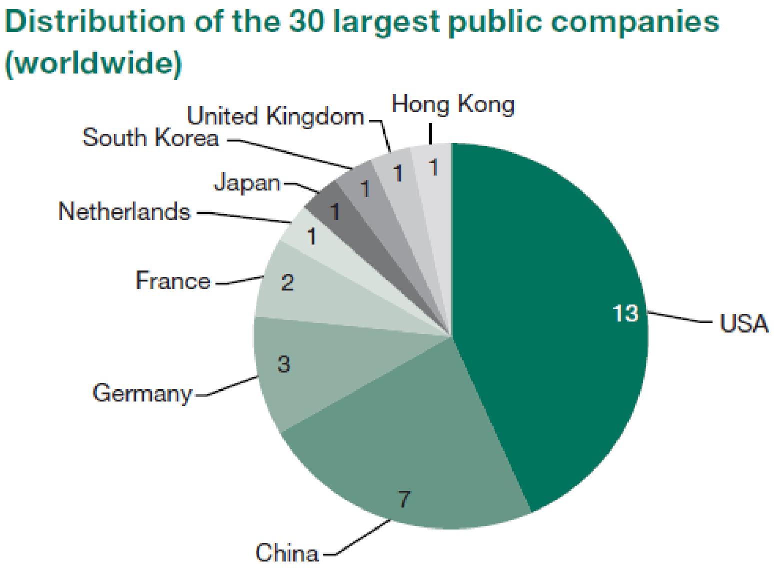
technology sectors, which can profit from an increasingly integrated EU economy. EU champions will strengthen the vulnerable side of the industrial policy "Triangle"[5], which is represented by technology, without jeopardising the chapters on competition and trade policies of the acquis communautaire[6]. Germany and France, despite several points of disagreement, by 2004 laid out various documents listing their ideas for the formulation of «a joint industrial policy aimed at creating a framework for mergers and joint ventures between major German and French corporations» (The Economist, 22 May 2004); mergers and acquisitions will ultimately lead to the development of «the industrial champions of tomorrow's Europe, of which France and Germany could build a certain number» (Financial Times, 19 May 2004). Deepening the process of incorporation of businesses which are part of a certain sector shall prevent small- and medium- sized companies from being purchased by international competitors. EU superstar firms are occasionally presented as the «Airbuses of tomorrow», namely they will play in the same league as their powerful American and Asian counterparts. Nevertheless, such publicly relevant discourse has not been accompanied by any significant step in this direction. Declarations have not been followed by decisive preparatory action for the creation of an «Airbus of the Rail» or a "maritime" version of it[7]. Franco-German parity in management and stockholding inevitably raises a number of concerns about intra-EU M&A. A double-headed directorship would only exacerbate internal conflicts and increase the number of vulnerabilities which, in turn, would limit companies' global responsiveness. In the absence of a European federation, industrial cooperation amongst different countries will represent a delicate matter, as States shall be involved in the firm's governance, thereby undermining business dynamics to the advantage of their own political interests. Industrial nationalism is still a divisive issue for both France and Germany. In general, the need for public intervention in the establishment of national or supra-national

[5]Franco Mosconi, EU Policy-Making, The Single Market And European Champions: Towards A Taxonomy (Parma: Routledge, 2015), 39-40.
[6]Élie Cohen, Jean-Hervé Lorenzi, *Politiques industrielles pour l'Europe* (Paris: Conseil d'Analyse économique, Rapport 26, La documentation Française, 2000).
Franco Mosconi, *The Age of European Champions – A New Chance for EU Industrial Policy* (Brussels: The European Union Review, Vol. 11, No 1, March 2006), pp. 29-59.
[7]Peter Becker, Sebastian Marx, *Europäische Champions – Aufgabe europäischer Industriepolitik? Fallbeispiel maritime Industrie* (Berlin: Diskussionspapier, Forschungsgruppe EU-Integration, Stiftung Wissenschaft und Politik, Deutsches Institut für Internationale Politik und Sicherheit, 2005).

champions can be justified according to three main elements, listed and simplified by Gerosky[8]:

(a) Globalisation in commerce pushes countries and regional organisations to create powerful actors in order for their strategic industries to survive.
(b) The need to limit inefficiencies and benefit from economies of scale, particularly in the R&D department.
(c) There exist several areas in which the State must defend its champions to protect its own strategic priorities, for the nation's or the regional organisation's (e.g. the European Union) greater good.

Globalisation is exerting pressure on players, in that regions which once were referred to as areas of minor importance are entering international markets rapidly and aggressively and the Union must be prepared to challenge these actors and have a voice on major worldwide issues.



Source: Forbes Global 2000. The World's Largest Public Companies, 2018, available at https://www.forbes.com/global2000/list/ analysed by Elisabeth Bublitz, Michael Leisinger and Nele Yang, Europe's Search for Superstar Firms: The Puzzle of European Champions.

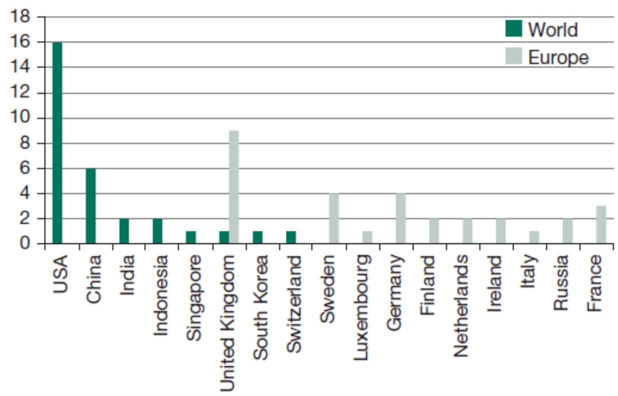
Global firm rankings are mainly based upon market value and/or business growth. By looking at the data, national public companies coming from the European Union which

[8]Paul Geroski, *Competition Policy and National Champions* (London: UK Competition Commission, 2006).

enjoy a first-class position are only 6 (3 situated in Germany, 2 in France, 1 in the Netherlands). Comparing these figures, we can see that the United States has 13 companies while China has 7 within the same rankings. Secondly, it is necessary to observe the distribution of the 15 largest public companies in high tech industries: the US had 10 companies in the 2017 rankings, and 9 in 2018; South Korea had 1 in 2017 and 2 in 2018; China and Germany both had 1 in 2017 and 2018; Taiwan had 2 during both years.

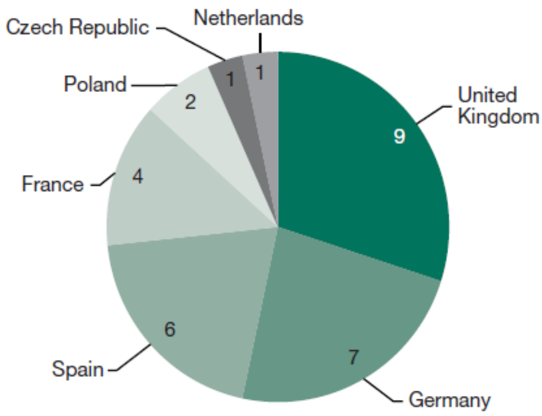
When talking about superstar firms, we ought to take account of so-called "*unicorn*" businesses, start-up companies which have a value of at least 1 billion US dollars (*decacorn* are valued more than 10 billion US dollars, whereas *hectocorn* companies are worth over 100 billion US dollars). Only 1 EU MS' public company appears in unicorn rankings amongst the 30 most important across the planet. The US has 16 firms, while China has 6. Meanwhile, India and Indonesia both have 2. However, the situation seems to be much more positive when looking at fastest-growing companies. In the EU 28 (*N.B.: Brexit took place after 2017), the UK has 9, Germany has 7 and Spain has 6 (from 2013 to 2016); this means that these countries hold record numbers of promising businesses.

Distribution of unicorns (top 30)



Sources: CB Insights The Global Unicorn Club, January 2019, available at https://www.cbinsights.com/research-unicorn-companies , analysed by Elisabeth Bublitz, Michael Leisinger and Nele Yang, Europe's Search for Superstar Firms: The Puzzle of European Champions.

Distribution of the 30 fastest-growing companies (in Europe)



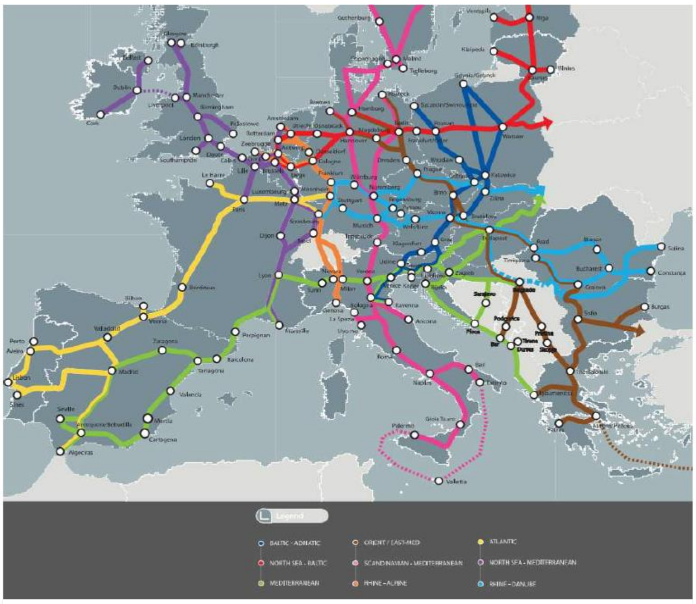
Source: Financial Times FT 1000. Europe's Fastest Growing Companies, 2017, available at https://ig.ft.com/ft-1000/ analysed by Elisabeth Bublitz, Michael Leisinger and Nele Yang, Europe's Search for Superstar Firms: The Puzzle of European Champions.

1.1.2 Designing EU Industrial Policy Fragmentation and the need for Integration

By merging, companies limit transaction costs of bilateral negotiations and they can also benefit from advantageous economies of scale. Market access is subsequently improved and expanded, providing the newly-formed businesses with growing bargaining power. Clearly, this may also lead to several negative consequences, among which we can mention obstacles to competition, consumption and distribution. Oligopolies or monopolies may also arise as a result of increased concentrations, and prices could be affected in an unfavourable way (for consumers), impacting the general populace. Needless to say, alleged and actual positive aspects must outweigh all disadvantages derived from a merger. In light of the Siemens-Alstom case, we will discuss Europe’s competitiveness with regard to the railway industry. National and regional railway networks are excessively fragmented, and they operate by following different standards and techniques. This has led the European Commissioner for Transport and the Directorate-General for Mobility and Transport (DG MOVE) to implement joint European initiatives which aim to establish a Single European Rail Area. The Single European Railway Directive 2012/34/EU[9] aims to make networks more efficient, incentivising competition, and it separates infrastructure operators from carriers. But what is more important about this legislative document is that it entrusts railway companies in one member State the power to run services in other MS. The Directive is consequently paramount to the acceleration of railway networks’ “integration” across Europe. From a more practical standpoint, Decision no 884/2004/EC, adopted by the European Parliament and the Council, set the objective of developing a Trans-European Transport Network, denominated TEN-T, including networks of roads, airports, railways, etc. etc. throughout the EU. The TEN-T is part of a group of Trans-European Networks (TENs), which also include a Trans-European Telecommunications Network (eTEN) and a planned Energy network, called TEN-E. Improved collaboration on issues such as major roads, railroads, airports, ports (coastal and inland), motorways, as well as various systems of traffic management which are all part of TEN-T’s infrastructural projects will

[9]Directive 2012/34/EU of The European Parliament and of the Council of 21 November 2012 establishing a single European railway area can be found on the institutional website: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32012L0034.

bring about positive results for the entire Union. Financial and practical efforts in this field are handled by an executive agency, denominated Innovation and Networks Executive Agency (INEA)[10], formerly known as Trans-European Transport Network Executive Agency, dependent upon the European Commission and officially established on 31 December 2013, which is in charge of the Connecting Europe Facility and of some actions carried out under the programme[11]. Mergers in the transportation and energy sectors are subsequently needed, today more than ever, as part of a far-sighted strategy in order to provide EU companies operating in the industry with the tools they need to compete in other markets (especially Asian ones) and face the increasing aggressiveness of Chinese champions. In point of fact, the Connecting Europe Facility has already contributed more than 16 billion euros for 253 railway projects. Furthermore, a public-private partnership called Shift2Rail Joint Undertaking (S2R JU) was established in 2014 (and is part of Horizon 2020). It was set up as a result of the Council Regulation (EU) No 642/2014[12] of 7 July 2014, wishing to pool resources and coordinate efforts in Research & Innovation so as to build effective transnational infrastructures and develop technologies, laying down foundations for the completion of the Single European Railway Area, while also removing barriers



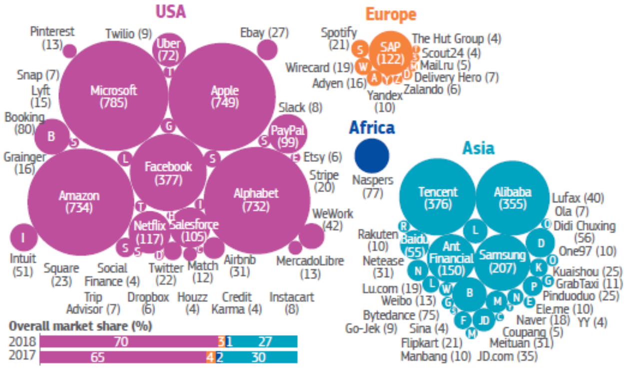
Source: Goran Puz, *Transport Network Development in South-East*

[10]INEA was created on 1 January 2014 as the successor of Trans-European Transport Network Executive Agency (founded in 2006). It was set up to coordinate the implementation of the following programmes: (1) Connecting Europe Facility (CEF), (2) Parts of Horizon 2020 – Smart, green and integrated transport & Secure, clean and efficient energy, (3) The Innovation Fund, (4) Legacy programmes: TEN-T and Marco Polo 2007-2013. INEA aims to efficiently manage the aforementioned programmes.

[11]The Connecting Europe Facility (CEF) deals with the establishment of common EU-wide standards regarding essential digital services (digital capabilities, exchanging messages, storage of documents, electronic identification). CEF has eight cornerstones: eArchiving, Big Data Test Infrastructure (BDTI), Context Broker, eDelivery, eID, eInvoicing, eSignature and eTranslation.

[12]Council Regulation (EU) No 642/2014 of 16 June 2014 establishing the Shift2Rail Joint Undertaking is available online at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014R0642.

to interoperability and finally shifting to a single EU railway market.

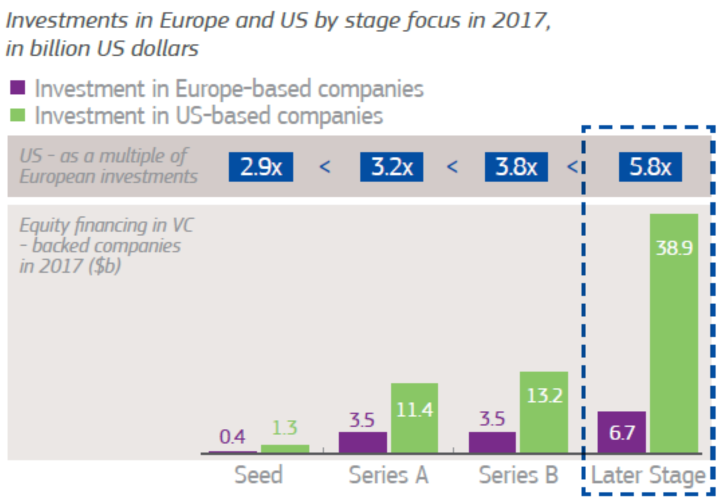


Source: Dr Holger Schmidt (TU Darmstadt/Netzoekonom.de)

After discussing the pivotal role which the railway industry will have to play in order for the Union to enhance its global competitiveness, it is also crucial to look into the critically fragmented European defence sector. By analysing MS' budgets it has been possible to determine that they invest about 50% of the overall US allocation of 680/690 billion US dollars per year (621/630 billion euros), but the total output is extremely low, at 15% of the whole expenditure. Also, lack of effective and efficient cooperation amongst Member States can cost them up to 100 million euros annually (not for single MS, but in total). An additional issue concerns weaponry and military equipment. Fragmentation certainly constitutes a major problem: 178 weapon systems are currently in use throughout the whole Union, compared to only 30 in the US[13]. Furthermore, in the EU 17 types of armoured vehicles are being utilised, whereas only 1 is used in the United States. Integration of defence policies and mergers among weapon-manufacturing companies are desirable in the medium to long term if the EU wishes to benefit from the opportunity to act independently from others and preserve its own geopolitical and military interests at home and abroad. Technological developments also represent a fundamental aspect of Europe's economic competitiveness on the global stage.

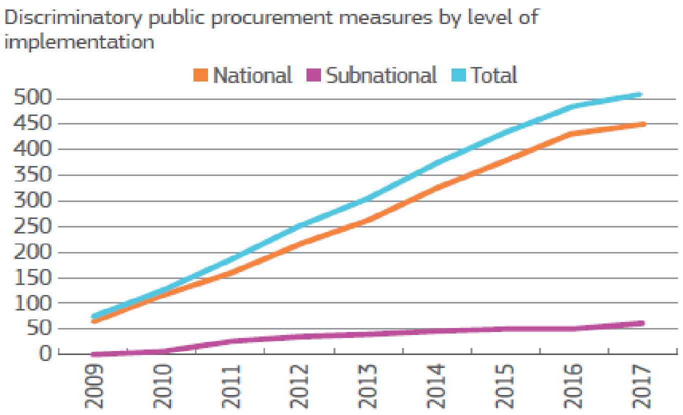
[13]Giuseppe Scognamiglio, *Without Washington* (Rome: Eastwest European Institute, published in Eastwest magazine, 2018).

1.1.3 Scale without mass: economic and bureaucratic obstacles



Source: Dow Jones VentureSource

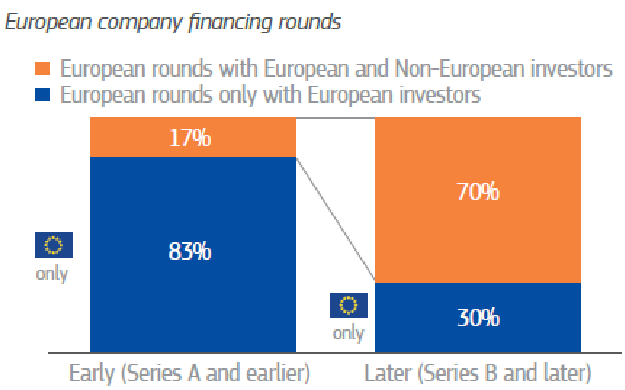
The increasing degree of digitalisation has amplified business agility (the capacity of a company to react to change and easily adapt to it), customer reach through online and off-line channels, as well as the ability to proactively improve cost-effectiveness without hampering quality goals. Nevertheless, creators of value around the planet tend not to be European. Unfortunately, there is no real Silicon Valley in Europe and domestic businesses, even those which are active in traditional sectors, risk losing ground to foreign competitors as they are not sufficiently innovative. In point of fact, many of the creative companies are American and Chinese. A large number of them began as start-ups and are now global giants; Apple, Tencent, Amazon, Alibaba, Alphabet are all part of the category. Big data analysis and appealing marketing campaigns are at the core of global companies' successful performances; in addition to these strengths, they are also capable of linking together several segments of their activities. On the other hand, innumerable European firms are nowadays operating in niche sectors, including health technologies, advanced logistics, biotechnology, aeronautics and the IoT. However, these companies, frequently called "hidden champions", are medium-sized and family-owned. Being relatively small, they encounter various difficulties when seeking to access flourishing international markets. Furthermore, many Chinese businesses, exporting their products all over the world, enjoy an unfair economic advantage, in that they have been constantly subsidised by the People's Republic government. Scale will therefore continue to be a gigantic obstacle, due to European countries' political reluctance to perfect the single market. In 2007, 42 of "Fortune 100" firms were European, but they decreased to 28 in 2017. And, by the same token, 5 out of 100 "global" unicorns are from the EU 27 (*without the UK) and



Notes: The total represents the number of measures which are currently applied at national and subnational level. The Union's most affected Member States are Germany (402 active measures), France (387) and Italy (387).

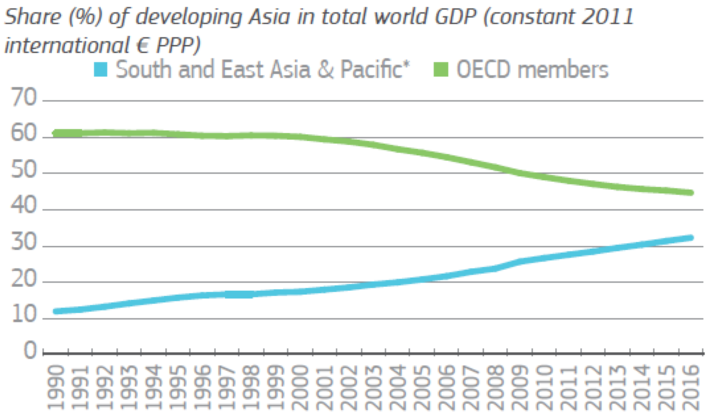
Source: WTO, Global Trade Alert database (2017)

the first of them came only 56th in the rankings. But the concept of scale itself must be reconsidered in this age of transition towards increasing levels of digitalisation. As a matter of fact, scale has now nothing to do with dimensions and mass. Immaterial assets like software, data, user pools, creative design, models of business and know-how of the firm go along with investments into R&D. A new phenomenon known as "scale without mass" increasingly characterises labour markets and incumbent firms. More prosperous start-ups (Series A and so forth) tend to exit EU markets, as they are not able to raise scale-up funds, due to Europe's deficiency of flexible and deep capital markets. It is noteworthy that Swedish Spotify had to seek help from foreign investors in order to obtain the amounts of capital necessary to move into scaleup territory and compete internationally. Additionally, emerging economies such as those of China, India and Indonesia have augmented their ability to compete at the world level with Europe. However, the EU has been capable of enduring outside pressures, so far. In 2005, the European economy was six times bigger than China's: the EU 28's Gross Domestic Product amounted to 11.6 trillion euros while China's was 1.8 trillion. The People's Republic economy today represents about 78.18% of EU 27's total GDP (China's GDP in 2019 was 13.08 billion euros, whereas Europe 27's was 16.73 trillion).



Source: CB Insights

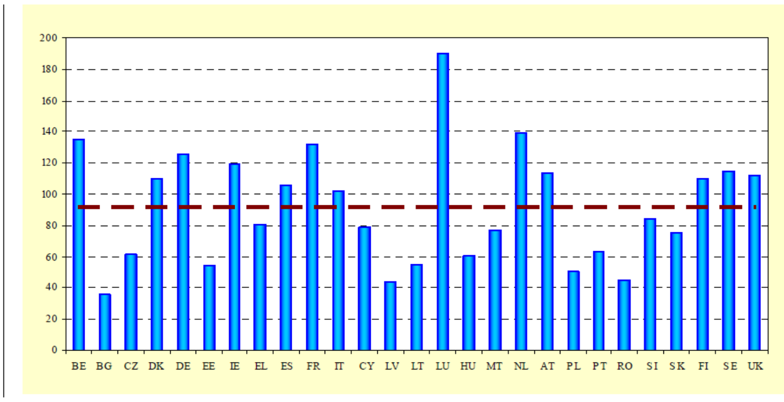
We can clearly observe that an incredible economic gravity shift has occurred towards the most easterly part of the globe; initially, European firms have benefited from the expansion of their activities in new markets. Nevertheless, the single market is still fragmented and separated along national boundaries, especially when it comes to digital, energy and capital markets. With the Industrial Policy Strategy, starting from September 2017, the Juncker Commission multiplied initiatives aimed at producing significantly positive results, contributing to advancements in the following fields: circular economy, sustainable finance, free flow of non-personal data and cybersecurity as well as 5G technology. On the subject of funding and innovation, it is crucial to examine the characteristics of R&D and protective mechanisms to defend European industries everywhere. Overall expenditure on Research and Development in the EU was about 2/3 that of the United States in 2015[14], 50% more than China's and double that of Japan. Nonetheless, a consistent part of these investments came from the public sector and only 55.3% was the result of individual companies' expenditure, whereas private investments' share was 78% in Japan, 64.2% in the US and 74.7% in China. This certainly constitutes a worrisome subject, due to industrial policies' reliance upon State intervention. In the long run, it can lead to inefficiencies in R&D departments, due to the distance from manufacturing processes, which firms shall always carry out by themselves. In order for EU industries to increase inventiveness, creativity and handle "disruption", the European Innovation Council was established in 2018 and has been provided with a 3-billion euro budget for the period 2018-2020. It has sought to fill market gaps by funding inventions and research in each business and technology sector, helping start-ups from the initial phase to scale-up procedures. It shall support rapidly expanding technological companies,



*high-income countries like Japan, Korea, Singapore, Australia and New Zealand are excluded
Source: World Bank

[14]European Political Strategy Centre, *EU Industrial Policy After Siemens-Alstom* (Brussels: European Commission, 2019), 14-15.

Labour productivity per hour worked in the total economy



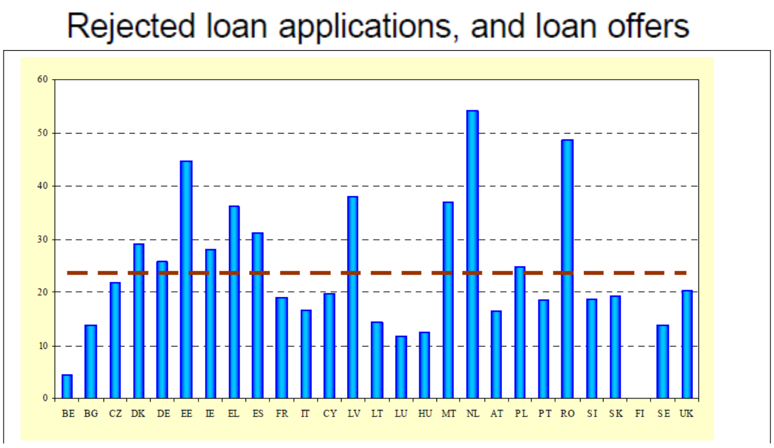
Source: Eurostat, Notes: unweighted averages

by focusing particularly on Artificial Intelligence, digital twins, etc. etc. The European Commission came forward with a proposal to invest an additional 6 billion euros to set up a long-awaited 10-billion budget. Notwithstanding the fact that the Union has launched the most relevant and forward-looking publicly-financed research plan in the world (i.e. Horizon 2020), the amount employed for technology transfers and knowledge represents a very small portion of it (1%). Institutional funds (wealth funds, pension funds and insurance companies) ought to play a more significant role in the near future so as to stimulate private investments in venture capital and efforts should be made from a political standpoint to make this possible. Flicking through several pages of data sets regarding funding schemes for start-ups, we will see that Europe has been able to partially bridge the gap between itself and the US with respect to the initial funding phases; however, it falls behind the States when it comes to subsequent stages. In particular, we can observe that in 2017 expansion capital in the EU was below 7.5% of the whole funding (6.7 euros billion, while in the US it represented 92 billion euros). Additionally, the planned *InvestEU* programme should have a minimum budget of around 15.2 billion euros and the *Capital Markets Union* has to be reinforced, in that only by promoting its development Europe can give its start-ups 2the possibility to compete globally. In this respect, the Europe 2020 strategy replacing the previous Lisbon Strategy, with its "An industrial policy for the

globalisation era" initiative, highlights the importance that innovation and growing expertise have on industrial competitiveness, emphasising aspects regarding the growth of Small and Medium Enterprises across the Union as well as the supply and storage of raw materials. The EU must face challenges originating from the diminishing expansion of exports and the levels of private consumption and internal demand, which are moderately weak, while unemployment will remain crucial, especially after the COVID-19 pandemic's induced economic downturn. By looking at available data, we can draw a comparison between countries which have endured financial distress due to the explosion of real estate bubbles and those which have been only impacted by a temporary collapse of manufacturing. The asymmetric reaction of MS to the current "black swan" will probably lead to another sovereign debt crisis, according to forecasts, if the Union does not act swiftly. What is more, the EU shall face the pending issue of fiscal consolidation and might be obliged to embark on a revolutionary programme which could also entail some form of mutualisation of the eurozone's public debts. Additional concerns can arise from uncertain international exchange rates. Notwithstanding the growing number of pessimistic estimates, general economic sentiments remain positive and the labour market should improve over time as the shock is gradually absorbed by the real economy. Member States must exploit all means at their disposal and fully deploy whichever tool they can utilise to ensure that Article 173 TFEU's provisions are properly implemented so as to enhance productivity, which is still 30% below that of the US: medium technology industries and skills weigh much more than they do in the States. Access to credit still represents an encumbrance, even after the past financial crisis of 2008/2009. SMEs have experienced stricter conditions in light of the fact that banks previously hit by the sovereign debt shock still fear their profitability could be further reduced. This, in turn, caused many governments to extend their public guarantee schemes or to directly aid enterprises in need (when allowed to do so by European norms); however this issue does remain a major impediment to future growth.

1.1.4 Building highly competitive firms for a new Europe

Before introducing the main pillars of EU industrial policy, we must present the most important indexes which are used to evaluate how competitive a country or a certain region of the planet is in comparison with others. In order to address this fundamental issue, the present section will explore some of Europe's structural strengths and weaknesses, so as to understand what the main challenges are and how to cope with them, while building a prosperous competitive environment which effectively allows and stimulates business development and growth. Nowadays, the world is facing a technological revolution, in which the role of digitalisation has greatly contributed to increasing businesses' agility, flexibility and reach.

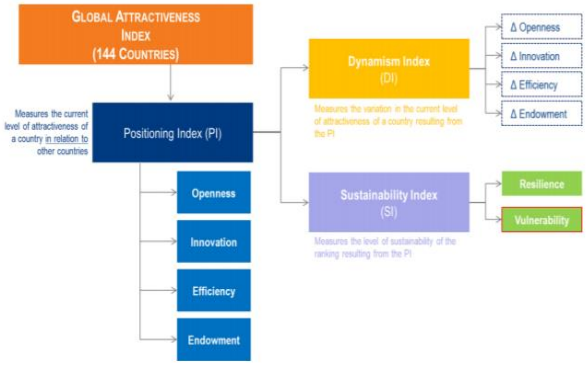


Source: Flash Eurobarometer, Notes: unweighted averages

Digital technology is not only used as a means to accomplish higher productivity goals or to improve internal processes, but also to revolutionise value chains, customer relationships and company models. The creation of value, accompanied by innovation and rising attractiveness, implies skyrocketing levels of growth and employment. New innovative firms are data-driven and technologically-intensive, and industrial markets will have to adapt to these evolving strategies or risk losing market share and competitiveness. As a matter of fact, the once strongest industries are lagging behind technological start-ups. A major part of global champions are not European. "Creative destruction" has been accelerating its pace and now the medium life expectancy of a Fortune 500 firm is 20 years, compared to 60 in the 1950s and 90 in the 1930s. One of the traditionally strongest sectors in the EU has been the automotive one, which involves about 13.3 million people, representing 6.1% of the total EU employment rate. When it comes to commercial vehicles, the EU was able to boost its net trade surplus in 2017 to

90 billion euros (including light vehicles and automobiles)[15]. How can Member States cope with the serious challenges that small and medium enterprises face? Viable solutions entail reducing the administrative burden, by following and pursuing best practices in Europe, and investing in e-government by practically adopting the principle of "think small first" to introduce structural and systemic support schemes, which are easy, simple and less onerous to implement. MS must first abide by European legislation regarding the role of competition in services and they have to tackle demanding issues, such as lack of proper road transport as well as energy generation and interconnection networks. Efficiency and celerity ought to be cherished and praised where they are present and should become an essential part in public administrations' everyday life, as their absence from many institutions certainly constitutes a gigantic burden on economic growth. Member States able to achieve high levels of performance in innovation above the EU average have been more capable of producing remarkable results and overcome phases of economic stagnation, whereas those below that baseline have not been as proactive thus far, determining an increase in pre-existing gaps. This is the pivotal reason why the rising share of skill- and technology-intensive tasks should be welcomed and encouraged in any possible way. Numerous countries have to establish new strategic priorities and they shall simplify and consolidate support delivery. The European Commission's Regional Competitiveness Index (RCI) 2019 provides information about the EU's total economic growth as well as the outlook of regions throughout the Union. In 2019, the EU was in its seventh year of continuous growth, notwithstanding an expected decline from 2.0% in 2018 to 1.4% for the EU-28. Many of the unresolved subjects which had characterised the first half of the decade right after the "Great Recession" of 2008/2009, and which affected EU countries even more in the midst of a grave European sovereign debt crisis in 2011/2012, are still here to stay and must be sorted out as soon as possible so as to improve economic resilience; for the aforesaid reasons it is absolutely imperative to exploit a diverse and vast array of policy tools both at the European and MS level. Across many of the regions analysed by the report, worrisome conditions tend to persist and not vary over time, such as extremely unstable and insecure labour markets, high unemployment, relatively low household disposable income, poor infrastructure and

[15]European Political Strategy Centre, *EU Industrial Policy After Siemens-Alstom* (Brussels: European Commission, 2019), 6-7.



Source: Structure of the Global Attractiveness Index elaborated by The European House- Ambrosetti https: https://www.ambrosetti.eu/wp-content/uploads/SCN_46-113_eng.pdf

difficult access to digital instruments. Therefore, the 2019 European Semester had to focus on the introduction of country-specific recommendations, revolving around the identification of investment needs at the national level and attempts to reduce regional and local gaps wherever this is possible. In light of the above-listed elements, it can be stated that territorial competitiveness has been officially acknowledged by the Commission to be at the core of the EU's overall progress. Using a definition of the World Economic Forum developed by Schwab and Porter[16] in 2007, competitiveness is regarded to be the «set of institutions, policies and factors that determine the level of productivity of a country»[17], while the systematic competitiveness of a territory is the «ability of a locality or region to generate high and rising incomes and improve the livelihoods of the people living there»[18]. If we add and integrate another "dimension", like that of companies' strengths and vulnerabilities to the pre-established framework of variables, we arrive at a rather different conclusion, taking account of residents and businesses' standpoints[19]. To foster competitiveness and definitely improve European companies' perspectives, we ought to consider EU internal disparities and misalignment, and that can be done effectively only by looking at other indexes such as the global competitiveness index produced annually by the WEF, based on Xavier Sala-i-Martin and Elsa V. Artadi's work. This indicator is part of the Global Competitiveness Report, which «assesses the ability of countries to provide high levels of prosperity to their citizens» and this aspect

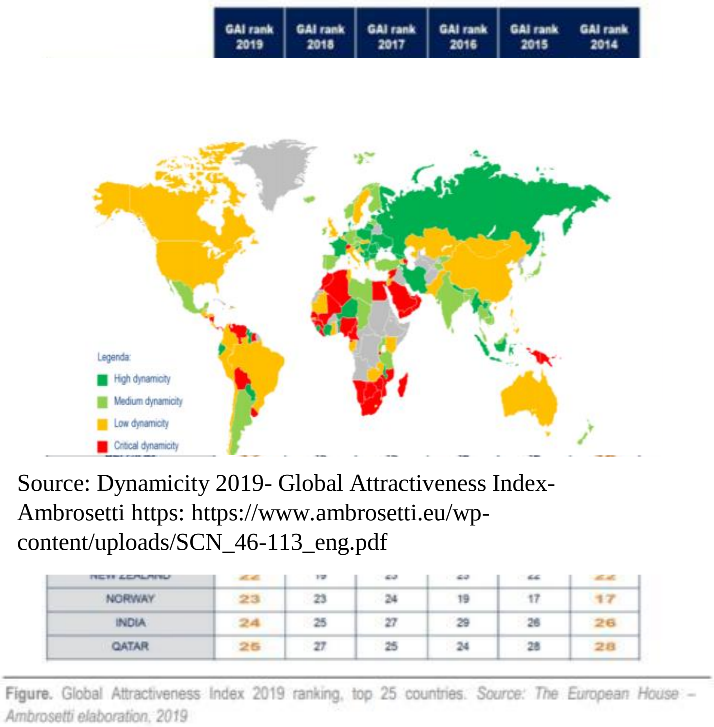
[16]Klaus Schwab, Michael E. Porter, *The Global Competitiveness Report 2007-2008* (Geneva: World Economic Forum, 2007).
[17]Paola Annoni, Lewis Dijkstra, *The EU Regional Competitiveness Index 2019* (Brussels: European Commission, 2019).
[18]Jörg Meyer-Stamer, *Systematic competitiveness and local economic development Discussion Paper* (Duisberg: Mesopartner, 2008).
[19]Lewis Dijkstra, Hugo Poelman and Linde Ackermans, *Rail passenger transport performance* (Brussels: European Commission, European Union Regional Policy Working Papers, 2019).

is also heavily intertwined with a country's productivity. The report uses a multitude of indices to measure how competitive a country is: (a) institutions; (b) appropriate infrastructure; (c) stable macroeconomic framework; (d) good health and primary education; (e) higher education and training; (f) efficient goods markets; (g) efficient job markets; (h) developed financial markets; (i) ability to harness existing technology; (j) market size (domestic and international); (k) production of new and different goods using the most sophisticated production processes; (l) innovation. By reading the report, we can observe that out of 140 nations which have been carefully examined, Singapore ranks 1st while the US comes in second place. The most successful among European Union's MS has been the Netherlands (global position: 4th), with Germany following in 7th place. France is 15th while Italy performed rather poorly, being the 30th country in the list. The aim of the Union should, thus, be to prompt cohesion and have a real common industrial policy, which can only come to light as a result of national reforms which will pave the way for unprecedented moves to be made and for some of the national competencies to be pre-empted by the EU or conferred upon it by the Member States through a new treaty. Recurring imbalances must be confronted rapidly as well as infrastructural gaps. Another index which we may take into consideration to thoroughly comprehend the importance of coordination and structural reforms is the "global attractiveness index", elaborated by the European House Ambrosetti. It classifies countries according to the following three indices: (1) positioning (by comparing results of country-systems in various international

The Global Competitiveness Index 4.0 2019 Rankings

			Diff. from 2018[2]	
Rank	Economy	Score[1]	Rank	Score
1	Singapore	84.8	+1	+1.3
2	United States	83.7	–1	-2.0
3	Hong Kong SAR	83.1	+4	+0.9
4	Netherlands	82.4	+2	—
5	Switzerland	82.3	–1	–0.3
6	Japan	82.3	–1	–0.2
7	Germany	81.8	–4	–1.0
8	Sweden	81.2	+1	–0.4
9	United Kingdom	81.2	–1	–0.8
10	Denmark	81.2	—	+0.6
11	Finland	80.2	—	—
12	Taiwan, China	80.2	+1	+1.0
13	Korea, Rep.	79.6	+2	+0.8
14	Canada	79.6	–2	–0.3
15	France	78.8	+2	+0.8

Source: Klaus Schwab, Michael E. Porter, The Global Competitiveness Index rankings); (2) dynamicity; (3) sustainability of economic growth. The GAI's determinant element is the attractiveness of a nation's economic system, which is seen as a prerequisite for its constant development. The Positioning Index (PI), going from 0 = minimum level to 100 = maximum level, monitors the global context every single year to provide a reliable frame of reference which calls attention to asymmetries amongst countries. It is, in turn, based on four keystones (openness, innovation, efficiency and resource endowment). The DI (dynamism index) calculates the variation in the current levels of attractiveness that a country has. Resilience and vulnerability of national systems have considerable repercussions on the GAI: they are therefore summarised by the resilience and vulnerability indices which are included in the measurement of the third indicator taken into account, SI (sustainability index). Germany comes once again first on the podium (score: 100.00), followed by the US (score: 99.62) and Singapore. It should be emphasised that Singapore has been climbing all the indices and now threatens the status of most European countries as concerns the attractiveness of their respective systems towards global investments. Before being de facto subjected almost completely to the People's Republic of China's decisions by May/June 2020, Hong Kong also soared in rankings going from 13th in 2017 to 6th place in 2019. What emerges by looking at the big picture is a global geopolitical shift from Europe to the Far East. If European countries wish to remain relevant, they must follow Germany's footsteps even before integrating their national industrial policies into a new one carried out at the European level. Despite the growing number of concerns about Europe's ability to cope with worldwide challenges, we can observe that EU countries have some of the highest dynamicity levels throughout the



Source: Dynamicity 2019- Global Attractiveness Index-Ambrosetti https: https://www.ambrosetti.eu/wp-content/uploads/SCN_46-113_eng.pdf

Figure. Global Attractiveness Index 2019 ranking, top 25 countries. *Source: The European House – Ambrosetti elaboration, 2019* planet, leading to an enormous potential which remains unfulfilled, but could soon be unlocked. If we want to essentially understand how competitive a country-system is we cannot rule out the global innovation index, measured by Cornell University, INSEAD and WIPO. It provides in-depth metrics about the innovation performance of 129 countries, focusing on education, infrastructure, business sophistication and evolution. In its 2019 edition, the GII report has concentrated on the medical innovation outlook trying to predict how and to what extent technological innovation will drive advancements in healthcare. This topic will be of paramount importance during a time of pandemic like the one that we are enduring (see: COVID-19 outbreak). Germany is 9th worldwide but ranks 7th in the European continent, followed by France in 16th position and Italy, which

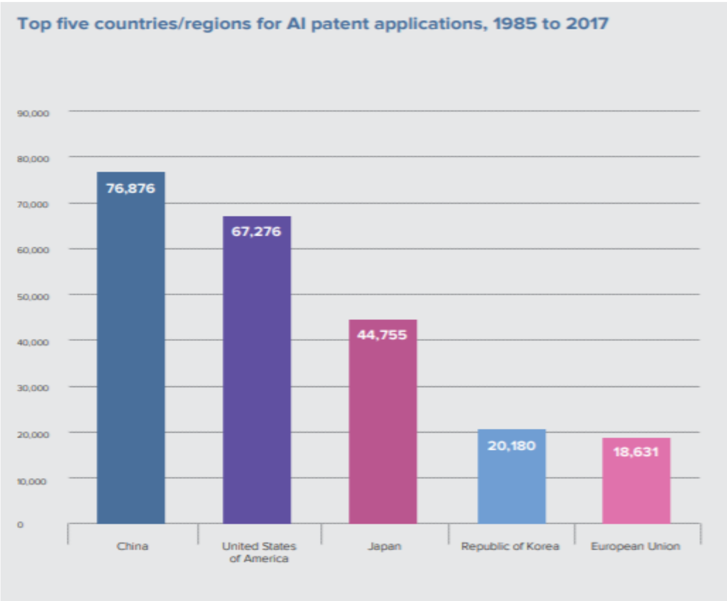
Global Innovation Index 2019 rankings

Country/Economy	Score (0–100)	Rank	Income	Rank	Region	Rank	Median 33.86
Switzerland	67.24	1	HI	1	EUR	1	
Sweden	63.65	2	HI	2	EUR	2	
United States of America	61.73	3	HI	3	NAC	1	
Netherlands	61.44	4	HI	4	EUR	3	
United Kingdom	61.30	5	HI	5	EUR	4	
Finland	59.83	6	HI	6	EUR	5	
Denmark	58.44	7	HI	7	EUR	6	
Singapore	58.37	8	HI	8	SEAO	1	
Germany	58.19	9	HI	9	EUR	7	
Israel	57.43	10	HI	10	NAWA	1	
Republic of Korea	56.55	11	HI	11	SEAO	2	
Ireland	56.10	12	HI	12	EUR	8	
Hong Kong, China	55.54	13	HI	13	SEAO	3	
China	54.82	14	UM	1	SEAO	4	
Japan	54.68	15	HI	14	SEAO	5	
France	54.25	16	HI	15	EUR	9	
Canada	53.88	17	HI	16	NAC	2	
Luxembourg	53.47	18	HI	17	EUR	10	
Norway	51.87	19	HI	18	EUR	11	
Iceland	51.53	20	HI	19	EUR	12	
Austria	50.94	21	HI	20	EUR	13	
Australia	50.34	22	HI	21	SEAO	6	
Belgium	50.18	23	HI	22	EUR	14	
Estonia	49.97	24	HI	23	EUR	15	
New Zealand	49.55	25	HI	24	SEAO	7	
Czech Republic	49.43	26	HI	25	EUR	16	
Malta	49.01	27	HI	26	EUR	17	
Cyprus	48.34	28	HI	27	NAWA	2	
Spain	47.85	29	HI	28	EUR	18	
Italy	46.30	30	HI	29	EUR	19	
Slovenia	45.25	31	HI	30	EUR	20	
Portugal	44.65	32	HI	31	EUR	21	
Hungary	44.51	33	HI	32	EUR	22	
Latvia	43.23	34	HI	33	EUR	23	
Malaysia	42.68	35	UM	2	SEAO	8	
United Arab Emirates	42.17	36	HI	34	NAWA	3	
Slovakia	42.05	37	HI	35	EUR	24	
Lithuania	41.46	38	HI	36	EUR	25	
Poland	41.31	39	HI	37	EUR	26	
Bulgaria	40.35	40	UM	3	EUR	27	
Greece	38.90	41	HI	38	EUR	28	

Source: *The Global Innovation Index 2019 Report* (Geneve: World Intellectual Property Organization (WIPO), INSEAD and Cornell University).

came 30th. European countries have achieved exceptional scores due to their average high exposure to overseas technologies, an elevated degree of inward knowledge flows, extremely strong science and industry connections, fair access to financial resources and developed venture capital markets. EU Member States have high levels of absorptive and innovative capacity as well as large exploitation of intellectual property. There are internal regional divides but they are relatively limited and not particularly complex to handle and solve. Nevertheless, South East Asia, East Asia and Oceania have been capable of filling the aforementioned gaps, at least partially and are threatening the "status quo".

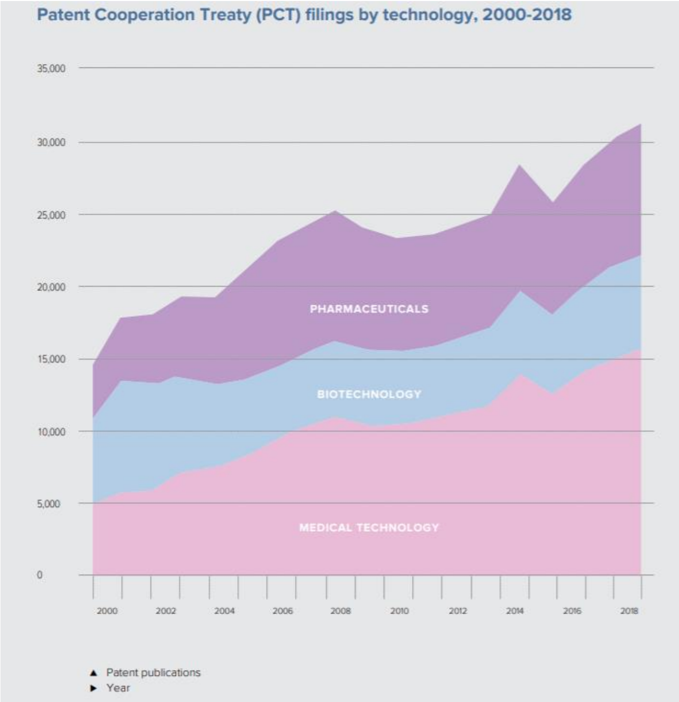
North America keeps its top-notch place, triumphing in each innovation pillar amongst those considered by the rankings. The United States and Canada are followed by Europe (2nd place). South East and East Asia together with Oceania are 3rd on stage, whereas the 4th position is occupied by Northern Africa and Western Asia. Lastly, we will find, in this exact order, Latin America and the Caribbean (5th), Central and Southern Asia (6th), Sub-Saharan Africa (7th). The European Union, albeit having attained a prestigious spot, must pay attention to North America's capacity to lead technological development, shown by its large increase in scores.



Global Innovation Index 2019 rankings

Source: *The Global Innovation Index 2019 Report* (Geneve: World Intellectual Property Organization (WIPO), INSEAD and Cornell University).

The Central and Southern Asian region constitutes another important player, in that India and Iran are gradually emerging as interesting and pivotal hubs in the region. The Global Innovation Index (GII) takes also account of non-technological innovation and creativity as crucial constituent elements in benefiting developed and developing societies (e.g. China has taken the lead in the intangible assets area; Hong Kong is first in "creative goods most important protagonist as concerns "online creativity"). Only a minority of even the most successful countries stand out in a top-10 place in all categories; among those which were able to hold a place in 3 of them, we have to mention Luxembourg (European Union) and Switzerland. As regards those which were present in two of the *classements* we may list Hong Kong (China) and Malta (European Union).



Global Innovation Index 2019 rankings

Source: *The Global Innovation Index 2019 Report* (Geneve: World Intellectual Property Organization (WIPO), INSEAD and Cornell University).

Smaller countries are strong in the "Online creativity" section; in fact, Luxembourg outclasses everyone among similarly sized economies. Even so, large countries can score enormously high in these rankings and, if truth be told, Germany, France, the US and the UK are still amongst the dominant actors in "online creativity" (they are, however, an exemption). The emergence of Artificial Intelligence as well as the growing importance of big data applications must not be overlooked, as they have played an important part in health care systems hitherto. Between 2007 and 2017, Chinese companies active in this field rose to more than 100 (start-ups, healthcare software companies, medical device manufacturers, research centres etc.). As we can see after carefully examining documents and charts, European Union countries appear to fall behind in the area of "AI patent applications" (healthcare sector) from 1985 to 2017. The EU comes fifth, after China, the

United States of America, Japan and the Republic of Korea. The Union must, therefore, catch up chart positions and come on top at the earliest to be a technological leader on the world stage, asserting itself in the global industries and services landscape[20].

In order to establish itself as a world leader, the EU must deploy more resources in areas which it considers to be of strategic importance; private investments should be encouraged and incentivised. By scrutinising and interpreting information about the "Doing business index" in Europe, provided by the World Bank in its *Ease of Doing Business* annual publication, we have to face up to the fact that the EU is constantly losing out to other crucial players, as its competitiveness and dynamicity indicators are faltering and further declining. Only two (out of 27) EU MS enhanced their positions in the 2019 rankings; other three countries were able to stand rooted to their previously reached spots, whereas all the others literally reduced their bargaining power with respect to the rest of the world, comparing these results with those which they obtained in 2018. In the meantime, numerous MS have been twiddling their thumbs and have not engaged in any significant structural change, with their extremely convoluted and bureaucratic public administration and judicial procedures, which are still to be reformed. Contract law, administrative capacity, construction permits, property registration, contracts enforcement, access to credit are all complex conundrums, but they must be smoothed over so that the Union can finally drain this swamp, bringing out MS from the standstill in which they found themselves. Another open problem relates to insolvency laws' rigidity and stringency: norms are too severe and burdensome in over a third of the Member States. Tax rates and administration seem to be two fundamental issues at stake for the EU, especially when we consider the draconian corporate tax overload which inhibits investment and employment generation. The number of EU fiscal jurisdictions is also inadequate and it makes even more difficult for businesses to untangle the potpourri of regulations and norms that characterise them. This environment is particularly inhospitable to start-ups, small and medium enterprises. Companies which are active in the European Union face higher tax compliance obligations than those which operate in the US, Canada, Australia and Japan. This, in turn, reduces EU competitiveness globally and leads to such disappointing outcomes in international rankings. While there is

[20]Soumitra Dutta, Bruno Lanvin, and Sacha Wunsch-Vincent, *The Global Innovation Index 2019 Report* (Geneve: World Intellectual Property Organization (WIPO), INSEAD and Cornell University).

growing awareness about the fact that the EU must stay true to a free market approach if it does not wish to hinder attractiveness and dynamicity, it is also clear that intervention is to be welcomed and upheld whenever it has to do with putting an end to unfair practices which are being exploited by certain emerging countries[21] (e.g. the People's Republic of China, etc.) while, on the other hand, countering protectionist tendencies when they are still in the cradle. Eventually, the Union has to get to grips with a future marked by market failures, surging costs of externalities which also threaten to alter the already fragile global ecosystem, such as climate change, rising ocean levels, climate migration and flooding of coastal regions, which are all entwined and will have immeasurable geopolitical consequences. Environmental and economic damages can also be calculated, and a distinction shall be drawn between those nations which will be able to govern these issues successfully, henceforth called "winners", and those which do not have the capacity to handle said problems, that we will consider the "losers" (respectfully speaking) of globalisation[22]. Harnessing the power of technology will be central to the EU's own strategic development and prosperity. The private sector itself has not been flawless and impeccable in the pursuit of its goals (timeframe: 2010-2020), de facto weakening the economy's innovation performance in a harsh way and losing ground to foreign actors. Businesses failed to grasp the opportunity of using digital technologies to their full potential. (a) Incentives shall be provided only to those actors which meet the minimum prerequisite of working to maximise value creation. (b) Being excessively arbitrary will not solve the problem, due to the constant and prolonged presence of inefficiencies and misguided decisions. (c) Optimal policy tools would allow the EU to build a dynamic business environment nurturing a regulatory ecosystem based on improved know-how, expertise and technology. (d) EU external and internal industrial policy objectives must coexist. (e) Member States should align their legislation goals and finance crucial industries, utilising the prescriptive and implemental tools which may be necessary to achieve pre-established targets. Continuous monitoring and assessment of competitiveness of the internal market and unravelling of external global imbalances must work hand-in-hand in order for Europe to serve its interests first and foremost, combating

---

[21]European Political Strategy Centre, *EU Industrial Policy After Siemens-Alstom* (Brussels: European Commission, 2019), 8-9.
[22]Stormy-Annika Mildner, Claudia Schmucker, *Filling the Void* (Berlin: Berlin Policy Journal, 2017).

competitors' moral hazard and free riding. But how to practically survive other players' wrongful practices? Proposals have been made which encompass changes in the WTO's governance structure and rules. The European Union has, in fact, been a vocal supporter of fair multilateral commercial exchanges, from which it profited in terms of jobs and economic growth. Nevertheless certain loopholes in legislation have permitted countries to subsidise their companies in defiance of international laws, thereby causing market distortions to persist and in some cases even increase over time. Dysfunctionalities must, therefore, cease to be passively accepted according to the EU. (1) The existing legal framework concerning e-commerce and digital trade is unsatisfactory and it leaves many grey areas unregulated. This has, subsequently, led to a skyrocketing amount of indirect industrial subsidies (e.g. sovereign loans to state- and private-owned corporations and tax cuts). These subsidies should be notified to the WTO; yet, more than 55% of member countries were either unable or unwilling to produce any notification about these State aids[23]. Thanks to the special treatment entirely based upon its developing country status in the WTO, China has certain rights notwithstanding the fact that it is the third economic power at the global level after the United States and the European Union[24]. Countries which are recognised this peculiar position within the organisation benefit from certain unilateral preference schemes which are also known as the Generalized System of Preferences (GSP). Such preferences are referred to as "special and differential treatment" (S&D) and include:

1. Longer than ordinary timespans for the implementation of commitments and agreements.
2. Actions aimed at increasing commercial opportunities for developing countries.
3. Provisions that bind each WTO member to preserve developing countries' trade interests.
4. Active support, helping developing countries to build the capacity needed to perform WTO tasks and efficiently implement the requested measures, manage

[23]European Political Strategy Centre, *EU Industrial Policy After Siemens-Alstom (*Brussels: European Commission, 2019), 10-11.
[24]International Monetary Fund, *List of countries by nominal GDP* (Washington DC: IMF website, 2019).

disputes, adopt technical standards and provisions dealing with least-developed countries (LDCs).

The "developing economy" status endows China with the tools it necessitates to retain great market access barriers vis-à-vis international competitors, albeit the fact that its real conditions do not mirror the purported intrinsic weaknesses of most vulnerable nations. Policymakers and scholars in the past tended to support the assumption according to which by joining the World Trade Organisation, China would follow EU and US standards, reforming its markets to finally allow fair trade, free from State intervention and discriminatory tactics. However, extant rules would call for any formal agreements to be adopted through the consensus procedure, with all 164 members approving them. It is clear that this Gordian knot would be virtually impossible to extricate and any change might not occur immediately. In 1995, Chinese imports and exports amounted to 3% of the global trade, but by 2018, they already represented about 12.4% of it, making China the absolute largest trader. The US only came in second position, at 11.5% of international trade[25]. China certainly benefits from its being lumped in the same category as actual developing countries. While enjoying this special status, it can impose vexatious import duties; yet its own products and services will face much lower tariff rates in comparison. In addition to its ordinary malpractice and beggar-thy-neighbour policies, the government also provides subsidies to domestic producers, so as to enlarge even more notably the plethora of instruments already at their disposal, ignoring once again the fundamentals of fair commerce. This has contributed to the multiplication of preferential trade agreements across the planet and to the overall strengthening of bilateralism and, in particular, inter-regionalism[26]. The profusion of these forms of arrangements is indicative of a phenomenon which has been analysed multiple times by academic literature. Scholarship is not unanimous on this subject, but it is still relevant to look at the well-known *spaghetti bowl effect*[27], described by Jagdish Bhagwati in his publication on "US Trade policy: The

[25]Bryce Baschuk, *Here's What It Means to Be a WTO Developing Country* (New York City: Bloomberg L.P., 2019).
[26]Mario Telò, *Regionalism in Hard Times* (Brussels: Routledge, 2017), 61-65.
[27]Jagdish Bhagwati, Pravin Krishna and Arvind Panagariya, *Where Is The World Trade System Heading?* (New York City: Adelphi Series Vol. 54, 450 2014), 17. *Spaghetti bowl effect*: According to the authors, the infatuation with FTAs might be counter-productive as it hinders multilateral institutions, such as the WTO.

infatuation with free trade agreements"[28] which dates back to 1995. On the other hand, Richard Baldwin is positive that bilateral and multilateral cooperation can coexist and that said mechanisms will ultimately be beneficial to commercial collaboration among countries. But the EU has not dillydallied in the meantime and effectively updated its trade defence instruments by May 2018[29], reinforcing anti-dumping and protection measures to be used in defence of European companies. Efforts made have saved over 320,000 jobs and there are also many other occupations which have been safeguarded indirectly. EU industry players can continue to operate safely in a well-regulated environment. Some kind of light retaliatory tools have been complemented by EU measures directed at removing barriers overseas. Since 2014, 123 obstacles have been eliminated and, as a consequence, more than 6 billion euros in additional exports are possible each year. Hence, the Union can preserve its own interests, trying to level the playing field, but it shall always adhere to internationally agreed trade standards. In order for these goals to be attained as soon as possible, the list of prerequisites for starting a business, gaining access to credit, as well as the degree of competitiveness and innovation should be rendered uniform throughout EU Member States. Additionally, global imbalances should be dealt with under the scope of the WTO's competences[30], and everyone should comply with norms and regulations; otherwise, all available retaliatory tools will be used to sort out the aforementioned problems.

1.2 The Franco-German approach

1.2.1 Most promising sectors for Superstar Firms

Leading European energy companies have been active in promoting domestic mergers and acquisitions over the last couple of decades. Understanding the implications of financial crises and credit crunches on M&A's development is therefore crucial so as to fathom the inner dynamics of European competition. To this end, convergence mergers in the gas and electricity industries are of paramount importance, but it is also

[28]Jagdish N. Bhagwati, *US Trade Policy: The Infatuation with FTAs* (New York City: Columbia University, 1995), 4.
[29]European Political Strategy Centre, *EU Industrial Policy After Siemens-Alstom* (Brussels: European Commission, 2019), 10.
[30]Ibid, 12-13.

indispensable to look at railways, transport, chemical products and other key economic sectors which are shaping innovation and prompting astounding changes. Operations such as Enel/Endesa (taking place between 2007 and 2009), Dong/Elsam/Energi E2 (occurred in 2005, and approved by the DG COMP on 14 March 2006), Gaz de France/Suez (announced by Dominque de Villepin on 25 February 2006), Iberdrola/Scottish Power (30 March 2007) are at the core of this analysis. These companies are focused on managing activities relating to gas and electricity (some of them even oil) and, consequently, expanding within the EU to have access to bigger slices of the cake: EU domestic market means standardisation of rules, economies of scale, greater profits and revenues. In this regard, two different tendencies have been identified so far: (1) the creation of a pan-European space, where domestic actors can have more leverage and become increasingly stronger; (2) the establishment of "national champions". From 2003, gas companies have attempted to gain control of electricity corporations and vice versa. Inter-industry M&A have been favoured up to this point. First of all, electricity companies are interested in obtaining a higher security of supplies when purchasing natural gas to fuel their plants. Secondly, gas companies want to enter electricity markets to expand their captive demand, thus facing less uncertainty and exposure. An extensive examination of trends regarding buyouts and integrations of businesses in the electricity and gas industries demonstrates an increase of liquidity on the part of energy companies[31]. The fact that a considerable number of them decided to invest their amounts of additional liquidity in M&A is not per se positive, as it could be a clear indication that they are focusing substantially on short-term shareholders' interests rather than on actual industry and final customers' necessities. By sinking money into enlarging their market share, they are inevitably neglecting the importance of generation, transmission and exploration processes. M&A are, without a doubt, a low-uncertainty/low-risk strategy. Nevertheless, this form of short-sightedness[32] ("myopia") may be counterbalanced by an existential need for extending their activities (product and geographic range) so as to anticipate the thorough liberalisation of the European markets and in order to prepare for subsequent

[31]Giulio Federico, *The economic analysis of energy mergers in Europe and in Spain* (Oxford: Journal of Competition Law and Economics, 2011), 611.
[32]Stefano Verde, *Everybody merges with somebody—The wave of M&As in the energy industry and the EU merger policy*, Energy Policy 36 (Amsterdam: Elsevier Ltd., 2007), 1126.

soaring levels of competition across the Union. In fact, when full liberalisation is implemented, there are several advantages for those which originally decided to broaden the scope of their "operations". This is true for players which have become essentially powerful and now enjoy large quotas in the European market; by having more limited risks and bigger company dimensions, they avoid being purchased and absorbed by larger competitors. Nonetheless, some of the mergers that have taken place in recent (or relatively recent) years are the product of a substantial and regressive return to protectionist policies, whose main aims centre on the creation of national champions. There is growing evidence supporting the idea that national governments have been active in fostering the establishment of new powerful national champions. In general, vertical and horizontal integration can be explained by the existence of economies of scale in the energy and gas industries. Adding to that, cost savings seem to be an advantageous factor in encouraging vertical integrations[33]. Analysing examples of cases which have been brought to the Commission's attention, as regards inter-industry mergers, we can mention the Dong/Elsam/Energi E2 operations. In this instance, the DG COMP has cautiously accepted Dong's moves and subsequent justifications. Dong was originally active in the Danish gas market (beginning of 2000s) and then decided to expand its business in the field of electricity production by acquiring in 2005 two important national suppliers (Elsam and Energi E2) as well as energy distribution companies Københavns Energi, NESA and Frederiksberg Forsyning. Through the merger, DONG Energy was finally established (now Ørsted, from 6 November 2017) on 14 March 2006, after the European Commission's approval. The Hungarian company Mol was acquired by the German E.On and this operation, like the previous one, falls exactly into the same category, in that the merged entity was able to broaden its product-level activities and its business and geographic scopes at the same time (the merger was approved by the European Commission, 2005b). Similarly, Endesa merged with Zedo, Polish energy supplier (operation approved by the European Commission, 2006c), while Enel acquired the Slovak electricity operator Slovenske Elektrarne (approved by the European Commission, 2005c). Many scholars and experts believe that these types of M&A will

[33]Giovanni Fraquelli, Massimiliano Piacenza and Davide Vannoni, *Cost saving from generation and distribution with an application to Italian electric utilities*, Journal of Regulatory Economics 18 (3), (Berlin: Springer, 2005), 290.

bring about substantively remarkable structural changes to the EU market, while some fear these trends will lead to an «oligopoly dominated by pan-European players»[34]. In these circumstances, however, companies' moves would be perfectly understandable and straightforward; these actors want to avoid being thrown out of the markets, and their expansion is, therefore, a mean to secure and consolidate their position, surviving and combating hostile bids and the like. The tendency leading to "convergence" of electricity and natural gas began in the US during the 1990s and the concept was eventually "introduced" in Europe during the 2000s.

A list of key reasons for these trends was provided by several authors[35]:

(a) Advancing deregulation of energy markets, e.g. the uncoupling of energy businesses certainly favoured the establishment of stronger bonds between electricity and gas supplies.

(b) Regulatory convergence among the two sectors was, then, enshrined in federal and state legislations.

(c) Links between gas and electric power generation: technological progress led to a wider exploitation of natural gas as an electricity generation source (gradual expansion of CCGT, gas microturbines and so forth).

(d) Cost reduction following liberalisation of retail operations; a rising number of businesses started to provide gas and electricity so as to offer a package of multiple services to their clients, thereby securing their position in the markets and conquering more customers. The same trends are occurring in the European Union, but we will have to examine whether the main drivers are the same as in the United States or, perhaps, slightly different. The deregulation process in Europe still falls behind the US pathway. This certainly makes it more difficult for industries and sectors to converge and there is still much to do in terms of uniformity of regulations and standards. We can, hence, affirm that American electric companies have pursued «midstream and downstream synergies between gas and electricity»[36], whereas their European homologues opted for merging

---

[34]Stefano Verde, *Everybody merges with somebody—The wave of M&As in the energy industry and the EU merger policy*, Energy Policy 36 (Amsterdam: Elsevier Ltd., 2007), 1127.

[35]Sven Bergstrom, T J Callender, *Gas and power industries linking as regulation fades*, Oil and Gas Journal 94 (Tulsa, Oklahoma: Jim Klingele, 1996), 56.

[36]Stefano Verde, *Everybody merges with somebody—The wave of M&As in the energy industry and the EU merger policy*, Energy Policy 36 (Amsterdam: Elsevier Ltd., 2007), 1127.

sales as well as exploration and production activities. An overriding factor in making such different decisions is the existence of TOP (Take-or-Pay)[37] clauses in NG contracts in the EU. TOP clauses, which are compulsory in accordance with legal norms, forbid importers from retaining capacity in excess of their current needs, which may, otherwise, be used to simply preclude import capacity to their counterparts. On the contrary, such principle is not applied in the United States. EU utilities, as a consequence, must limit their risk through the integration of the "electricity" business within their diverse range of activities. Furthermore, the variety of competitors does not seem to be the same in Europe as it is in the US. American citizens can choose from over 250 competitors which can operate based upon a *soi-disant* "dual-fuel paradigm" in gas and electricity markets. In the EU, the number of suppliers is much more restricted, and it is limited to the national level, due to technical problems and entry barriers. The United States can also benefit from a homogeneous normative framework, which is consistent in every aspect[38], whereas Europe has to rely on an overly complicated system and ought to first iron out national discrepancies before it can improve the single market. To recapitulate, European companies respond to deregulation by investing in the development of larger energy utilities which are vertically integrated and can operate both in the electricity and gas industry. In doing so, they are also internalising price volatility, while reducing uncertainty.

Despite a certain rhetoric on the need to create European champions, which in a way was borne out by facts, especially in 2005, 2006 and 2007 (when multiple transnational acquisitions were approved by the European Commission and concluded) empirical evidence suggests that a reversal in the trend has taken place since late 2007. Several Member States, in sharp contrast to the above-mentioned tendencies, have made different choices and embarked on a backward path. National interest has, in many cases, prevailed and these new government-sponsored companies are being supported vigorously with a

---

[37]Take-or-pay clauses are used in long-lasting supply contracts in the energy industry. Under TOP clauses, buyers are required to either pay a price depending on a certain pre-established amount of natural gas, thereby purchasing said amount of gas, or pay the proper price irrespective of whether they decide to buy it. In return, the vendor endeavours to provide the buyer with the pre-established quantity of natural gas.

[38]Mike Bailey et al., *Energy market consolidation and convergence- Seams Issues Revisited*, The Electricity Journal 14/2 (Amsterdam: Elsevier Ltd., 2001).

John C. Hilke, *Convergence mergers: a new competitive settlement model from Detroit, The* Electricity Journal 14/3 (Amsterdam: Elsevier Ltd., 2001), 13–15.

view to competing and aggressively asserting themselves as market leaders when thorough liberalisation is in place and some preliminary form of "energy union" comes into being. A few examples of this phenomenon are merger cases like Gaz de France/Suez and Gas Natural/Endesa. A distinctive trait of said operations is the existence of massive State intervention to favour the successful conclusion of pending deals, by implementing tailored rules which aim to hinder other European competitors' initiatives. Needless to say, these actions are contrary to EU treaties and overtly violate one of the "four freedoms" of the common market as established by the Single European Act of 1986 (i.e. the free movement of capital). Actually, the Court of Justice of the European Union has recognised that Member States can use some sort of "emergency brake", citing security reasons to impede divestment of strategic assets (see: golden share); however, this special clause can only be used under extraordinary circumstances and it cannot interfere with the proper functioning of markets. Intra-European protectionism is actively opposed by the European Commission, which opened several investigations in the past against Member States that used their power unlawfully to defend their national players from perfectly legitimate competition or even to promote hostile bids against other MS' actors[39].

Another sector which is crucial to look into is that of rail transport, including passengers and goods. Since the mid-1990s, increases have been observed as regards volumes of travellers, commuters and freight, whereas, in the meantime, the cost of funding started to reach its plateau (see: NERA 2003)[40]. Some could believe that the upsurge is strictly connected to reforms at the national and the EU level; nonetheless, research has not been able to confirm these assumptions. What is more apparent is, indeed, a positive correlation between transportation volumes and investments in high-speed railways. Progress in the Trans European Network has played a fundamental part in many instances; we could think of «the great crossing of the Alps, the Channel and the Oresund»[41]. We might use, to this end, a study of 2006 by Wheat and Nash. Notwithstanding the fact that it may be

[39]Alfredo Macchiati and Luigi Prosperetti, *La politica dei campioni nazionali: tra rinascita e crisi*, Mercato, Concorrenza e Regole 3 (Bologna: Il Mulino, 2006), 455.
[40]John Preston, *Railways in Europe: A New Era?* book review edited by Moshe Guvoni and Torben Holvad (Marcham: Alexandrine Press, 2009), 20.
[41]John Preston, *Railways in Europe: A New Era?* book review edited by Moshe Guvoni and Torben Holvad (Marcham: Alexandrine Press, 2009), 15.

perceived as not being relevant anymore nowadays, it provides various insights on the European rail market. Firstly, the EU rail industry is mainly controlled by operators which are nationally based, even though this situation has slightly evolved throughout the years enriching the landscape with the advent of the French rail freight contractor Veolia Cargo (now Captrain) and others, e.g. the former European Bulls Railfreight Alliance which was dissolved de facto by 2010 when some of its members were acquired by SNCF while others were taken over by Deutsche Bahn (see the Italian NORDCARGO). Even in the passenger rail sector, the network was expanded, new groups entered the market and transnational bonds became stronger, with efficient connections and trains, such as Enterprise, Eurostar, EuroCity/EuroNight, InterCityExpress, Intercity Direct, Thalys, Railjet, Elipsos, Oresundtrain, SJ 2000, TGV, Trenhotel, NSB. Prominent European groups operating in this area are Eurostar (EU high-speed railway service which connects London with multiple continental cities like Avignon, Brussels, Amsterdam, Paris, Lille, Lyon, Marseille) and Thalys International (French-Belgian provider serving Paris, Brussels, London, Amsterdam, Lille, Cologne; Thalys is operated by THI Factory, owned by SNCF, 60%, and NMBS/SNCB, 40%). Nevertheless, there are countless barriers to the entry of new contractors, including the development in franchising of passenger services (problem in replacing Regulation 1191/69 concerning public passenger transport services by rail and by road - see CEC, 2005). Secondly, competition is insufficient in a number of markets analysed. As it is totally comprehensible by observing the mismatch among the large number of train services operated and the amount of pan-European groups active in the industry, state-owned providers are still predominant, even where competitive pressure is higher. Thirdly, deficiencies in capacity enhancement constitute a major matter of public concern. While railroads are considered a natural monopoly, track access and competitive management of the existing infrastructure must be incentivised and encouraged. Lastly, horizontal standardisation of structure gauge, track signage and train supervision, power supply, labour practices are fundamental to ensure proper alignment of procedures. The European Railway Agency is moving forward with the application of technical specifications for interoperability (TSIs) and the unfurling of ERTMS (European Rail Traffic Management System). Thanks to the European Directive

91/440[42], separation between carriers and infrastructure operators and subsequent liberalisation have occurred in the EU. Additionally, privatisation of several state-owned enterprises and inflows of private capital have been advantageous to consumers.

1.2.2 Mergers in the Energy and Transport Sectors

In order to better grasp the difference between "horizontal"[43] and "vertical" mergers[44], we have to take into consideration the fact that horizontal forms of business expansion entail consistent investment in the acquisition of businesses which are active within the same sector; these operations can include both national and cross-border mergers. Nevertheless, horizontal mergers may be viewed as instrumental in protecting the company while preventing hostile bids, but they might also constitute a way to build larger entities with an

Trends exhibited by EU M&A in the energy industry

	Within same sector and "horizontal"	Between sectors and "vertical"
National mergers	• Defensive role against foreign hostile takeovers • Move towards a re-nationalization of the activities • Creation of an entity with sufficient bargaining power to agree favourable terms with strong European suppliers and competitors	• Restore some cost savings resulting from the integration of different steps of the supply chain • National gas + electricity companies = creation of national energy champions
Cross-border mergers	• Expansion of geographic scope of activities of each operator • Strategy to gain important weight at European level before liberalization is fully implemented	• Electricity companies securing gas supply to the gas-fired plants they own • Securing "captive" gas demand, in order to fully respect TOP clauses and reserved import capacity, by merging gas and electricity activities

Source: Stefano Verde, *Everybody merges with somebody*

European energy mergers 2004-2009: theories of harm, and remedies

Transaction (Year)	Theory of harm					
	Horizontal		Vertical			
	Wholesale	Retail	Lack of OU	Input Foreclosure	Customer Foreclosure	Loss of Liquidity
EDP/ENI/GDP (2004)						
E.ON/MOL (2005)			Divest gas TSO/storage	Gas release		
DONG/ELSAM/E2 (2006)	Gas release	Gas release	Divest gas storage		Gas release	
GDF/SUEZ (2006)	Divest Distrigaz + SPE stake	Divest SPE stake	Reliquinish control over TSO	Divest Distrigaz		
EDF/BRITISH ENERGY (2008)	Divest generation assets					Electricity release
RWE/ESSENT (2009)	Divest stake in competitor	Divest stake in competitor			Divest stake in competitor	
VATTENFALL/NUON (2009)		Divest retail subsidiary				
EDF/SEGEBEL (2009)	Divest generation assets					

Source: European Commission; own analysis.

[42]Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways can be found on the institutional website: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31991L0440.

[43]Horizontal mergers: transactions or business consolidation among companies operating in the same industry.

[44]Vertical mergers: consolidation between two or more firms providing several supply chain functions. These mergers can lead to increasing synergies and more efficient control of the supply chain, accelerating business growth.

increased negotiating power. This strategy can rely on economies of scale and serves to gain more leverage and have the upper hand at the European level. On the other side, vertical business expansion deals with saving monetary resources by incorporating various stages of the supply chain; this may lead either to the creation of national champions in the field or to the establishment of long-awaited European superstar firms. Eight mergers in the energy industry have been monitored by the Commission since late 2004, which were relevant to a number of national markets, and in particular Portugal, Hungary, Belgium, Germany and the United Kingdom. The first of said operations (EDP/ENI/GDP) was forbidden at the end of 2004; the decision was, then, ratified and endorsed on legal grounds by the European Court of First Instance, which confirmed the validity of the DG COMP's choice. E.ON/MOL, DONG/ELSAM/E2, GDF/Suez were all approved following a comprehensive Phase II investigation, but they were also contingent upon the adoption of certain detailed remedies. EDF/British Energy, RWE/Essent, Vattenfall/Nuon and EDF/Segebel were also approved subject to a series of precise remedies, as a result of Phase I investigation. Among the list of possible effects that each merging operation can involve, the leading source of concern in the case (a) EDP/ENI/GDP was the one implying competition loss by the electricity utility EDP in the wholesale gas market vis-à-vis GDP. Likewise, the vanishing of GDP as an alternative player in the electricity market, exploiting new gas-fuelled plants, would have been harmful to competition (the merger was, therefore, completely ruled out). A similar risk was also observed in the case (b) DONG/ELSAM/E2. In this instance, the European Commission recognised that ELSAM and E2, the two main electric power suppliers in Denmark, were key competitors for DONG in the gas market and their dissolution would have minimised competition, thereby constituting an actual risk. In (c) GDF/SUEZ, GDP had triumphantly penetrated the wholesale gas and electric current generation (by means of a stake in SPE) markets in Belgium. In point of fact, SUEZ was the incumbent in the two markets. Negative repercussions relating to dynamicity were identified in the case EDF/Segebel by reason of a supposed limitation of EDF's incentives to construct additional generating stations in the Kingdom of Belgium so as not to lower wholesale prices to the detriment of Segebel (SPE). Notwithstanding the fact that the two operators had a combined market share of less than 20% and GDF Suez was a much more powerful competitor, the Commission acknowledged that the establishment of a bigger rival champion would not have led to enhanced competition; rather, it could have produced a negative impact on consumers. Conversely, in EDF/British Energy and RWE/Essent, effective horizontal effects were deemed to undoubtedly take place. As concerns EDF/British Energy, the Commission was worried about the combination between British Energy's baseload capacity (primarily nuclear) and EDF's coal- and gas- generation portfolio. Extremely large incentives would come about as a consequence of the merger and the newly-established entity might have retained power to drive up prices, whereby benefiting infra-marginal capacity. In RWE/Essent, concerns arose about probable horizontal effects for the German energy generation sector. Essent's share in SWB coupled with RWE's alleged dominant position would have been dangerous (see: 30%-40% share of capacity without co-generation facilities)[45]. Again, the most significant threat was posed by the possibility of capacity withholding on the part of the new corporation. A salient characteristic of a like nature was present in the three cases (RWE/Essent, Vattenfall/Nuon and EDF/Segebel) overseen and evaluated by the Commission: wholesale electric generation markets lacked a clear-cut national scope, in light of the wide interconnectedness of European energy networks (respectively Germany and the Netherlands with respect to RWE/Essent and Vattenfall/Nuon, Belgium and France as regards EDF/Segebel). In EDP/ENI/GDP, GDF/Suez and DONG/ELSAM/E2 the actual or foreseen horizontal effect (decreasing competition) emerged as a result of intertwined gas and electric current retail pricing plans for private and industrial users. Generally speaking, the first typology of non-horizontal effects includes inadequacy of Ownership Unbundling (OU) of certain network resources, such as electricity transmission on the one hand and difficult storage and/or transportation of gas on the other. When the acquisition consists of assets which have not been spun-off, a range of negative consequences may occur, including deterioration in the quality of the network utilised by several competitors of the merged entity. The second type of vertical effects deal with input foreclosure. The latter can emerge as an outcome of the competitive endowment of a certain input, e.g. wholesale gas, which has a direct bearing on associated markets, such as electricity generation, which relies directly on the upstream gas market. The holding could, as a matter of fact, be tempted to use its leverage, raising input prices

[45]Giulio Federico, *The economic analysis of energy mergers in Europe and in Spain* (Oxford: Journal of Competition Law and Economics, 2011), 608.

to the advantage of its daughter company. This argument was used in EDP/ENI/GDP, E.ON/MOL and GDF/Suez. Stringent structural remedies were required and implemented in the case of GDF/Suez; merging parties were obliged to divest the incumbent gas subsidiary Distrigaz, which constituted the greater cause for concern by the European Commission, before the operation was finalised. In doing so, the DG COMP confronted both horizontal issues in the gas sector and input foreclosure effects in the wholesale electricity generation market. Analogous measures had to be taken in the cases EDF/British Energy and EDF/Segebel. In the latter, EDF had to dispose of one of its new Belgian projects and discontinue another one, albeit minor. Additional structural remedies were adopted to tackle horizontal problems which had arisen at the retail level in GDF/Suez and RWE/Essent; GDF had to divest SPE in Belgium and RWE was obliged to dispose of SWB stakes in Germany. Measures were taken in the case Vattenfall/Nuon; the latter had to rid of its retail business subsidiary Nuon Deutschland GmbH. Modest action was taken in DONG/ELSAM/E2, based upon DONG's promise to sell gas for a given span of time along the lines of a gas release programme so as to sort out horizontal issues (e.g., reduction in competition in the gas sector) and a few foreclosure-related problems. Nonetheless, semi-structural remedies are frequently too soft to be effective, in that delivering wholesale gas to the market for a fixed period of time cannot make up for competition losses. However, a similar solution was also adopted in the case E.ON/MOL, dealing with input and customer foreclosure. In EDF/British Energy, light electricity release programmes were utilised to address vertical liquidity concerns.

Moving away from energy markets, we shall now provide a brief overview of M&A developments in the railway sector, focusing on the rail freight industry. One of the most important initiatives of this type was the merger of the German de facto government-owned DB Cargo AG with the Netherlands' NS Cargo, giving birth to Railion (now DB Cargo) in 2000. Further acquisitions were later carried out in Italy, Denmark and Switzerland. Furthermore, DB Logistics took over the British EWS in 2007 (together with its French daughter company Euro Cargo Rail) as well as Spain's Transfesa. More recently, on 17 February 2020 Macquarie European Rail (MER) was purchased by the pan-European Akiem Group (competent authorities approved of the arrangement on the 23 April 2020). The acquisition involves a total of 137 locomotives run by 21 different freight and passenger rail contractors throughout the European continent[46]. An interesting subject of debate, to say the least, is the failed Siemens-Alstom merger, which aimed to create a European champion that might have asserted itself as a world leader in the industry. The action was impeded by the European Commission on 6 February 2019, on the grounds of possible detrimental consequences regarding competition for «railway signalling systems and very high-speed trains»[47]. This rejection strikes experts as unconventional, in that merger prohibitions are not extremely common in the EU and they tend to be limited to a handful of situations; in fact, only two mergers were blocked in 2017 and none in 2018 (less than 30 since EU Merger Regulation entered into force in 1990). A second peculiar aspect relates to the blatant wave of criticism caused by the move, especially in France and Germany, whose governments had invested a great deal to put the finishing touches and successfully complete the operation. However, France and Germany still hold cards and are commencing to push for a comprehensive reform of competition law, particularly after the (Franco-German) Treaty of Aachen of 2019. What is more, the COVID-19 pandemic of 2020 could change the rules of the game more considerably, by strengthening the two-country partnership and leaving an indelible imprint on future treaties and internal market regulations.

1.2.3 Shaping Competition Policy and the Commission's role

On 18 May 2020, France and Germany made an official, albeit informal (however paradoxical it may seem), request for the establishment of European industrial champions, as part of a central plan for European recovery from the COVID-19's pandemic, raising public awareness about the topic while revamping the "twin engine" and relaunching joint initiatives according to the "concentric circles" logic. The European Commission must accommodate its medium-term industrial strategy to the extraordinary and unprecedented circumstances which EU Member States are facing as a result of outbreaks-dependent lockdowns. The rationale behind this approach is that, since the Union has not been entrusted the competencies it should have to tackle global threats, MS

---

[46]Global Railway Review, *Akiem Group acquires Macquarie European Rail leasing business* (Westerham: Russell Publishing Ltd, 2020).
[47]Konstantinos Efstathiou, *The Alstom-Siemens merger and the need for European champions* (Brussels: Bruegel, 2019).

shall act to confer those powers upon it, at some point. The German Chancellor emphasised this need candidly and used twice the word "specifically" in reference to "European champions" in an effort to stress the concept and persuade Commissioners and technocrats. The French President Emmanuel Macron talked about urgency for "technological sovereignty" and the necessity not to focus exclusively on consumers' rights and protection while undermining the creation of EU superstar firms[48]. Digitalisation will change the face of the industrial sector which, to a certain extent, still clings to the old 20th-century paradigms. Consequently, emerging sectors such as artificial intelligence (AI) will play a more prominent role over the next decades, whereas pre-existing ones are changing right in front of our eyes, like automotive and railway industries. Yet, resources should also be pooled in traditional sectors as aluminium and steel production and processing. The primary aim of EU industrial policy is to safeguard and secure Europe's position as a manufacturing powerhouse by 2030. Granting the above-listed achievements must not be the sole purpose of the Union in this area; in fact, the EU must also continue to ensure the gradual advancement of long-term strategies directed to the creation of a carbon-neutral economy. Unambiguous objectives should be set out with a view to attaining most of them by 2030 and Europe's social market economy shall still have a place in the world. According to the "Friends of the Industry statement" of December 2018, prospective European industrial programmes ought to revolve around three cornerstones[49]: 1. extensive investment in innovation and creativity, 2. adaptation of the legislative framework, 3. effective measures to be taken.

(a) An inclusive European strategy is imperative; it must promote concrete action within the remit of InvestEU, with the engagement of certain EU institutional actors such as the European Investment Fund- EIF, harnessing private capital while effectively meeting equity requirements for start-up and technological companies.

(b) Robust EU commitment in favour of disruptive innovation in collaboration with the European Innovation Council (EIC). The objective is to fund great-risk technological

[48]Barbara Moens and Paola Tamma, *Macron and Merkel defy Brussels with push for industrial champions* (Brussels: Politico.eu, 2020).
[49]French and German Governments, *A Franco-German Manifesto for a European industrial policy fit for the 21st Century* (Berlin: Bundesministerium für Wirtschaft und Energie, 2019).

projects which must however be managed autonomously. These plans deal with the following areas: health, security, energy, climate and digital technologies.

(c) The Union has to become an undisputed world leader in the field of Artificial Intelligence: France and Germany wish to boost their cooperation in AI, with forward-looking massive contributions to research and development. For this purpose, workgroups must be formed to deal with the exchange of data, transnational experimental zones, best practices, technical benchmarks and ethical standards.

(d) Increase spending to develop ground-breaking technologies: the first Important Projects of Common European Interest (IPCEI) on microelectronics are already in place. A second IPCEI must be financed, which aims to produce a new generation of batteries. European cooperation will be vital in the areas of hydrogen systems R&D, smart health, cybersecurity, low-carbon and carbon-free processes.

(e) Financial markets must sustain industrial innovation: the Capital Market Union shall be completed as soon as possible, in order for industries to finance themselves more swiftly and without obstacles.

1.3 Treaty of Aachen's possible repercussions on European Industry

1.3.1 How to cope with global Tech giants

After calling for an overhaul of the Élysée Treaty in 2017, the French and German governments met in Aachen on 22 January 2019 to sign a Treaty, known as the Aachen Treaty (*Traité d'Aix-la-Chapelle*), concentrating on paramount objectives for the future of the European Union. The Élysée Treaty is an extremely short document instituting multiple bilateral meetings between French and German ministers, with the active involvement of senior military officers; programmes in the fields of education and youth have been implemented, establishing long-lasting bonds. Nevertheless, its main aim was to coordinate the twin engine's foreign policies so as to accelerate the economic and political integration between the two nations within the Union's (formerly, the European Community's) framework. The Treaty of Aachen further improves collaboration between the two countries within the realm of European policies and it focuses on certain important subject matters, such as cooperation in building an effectively functioning and strong Common Foreign and Security Policy (CFSP), while reasserting commitment in the areas of culture, research, education. It also underscores the need for fundamental achievements in transnational collaboration. Economic and environmental cooperation lie at the core of several provisions; the role of business and financial legislation is emphasised by a formal commitment to create a French-German Economic and Financial Council in order to deal with the harmonisation of norms. Although this certainly constitutes only a symbolic development in Franco-German relations and involves vague and vast provisions, it does entail some practical goals which the two countries hope to achieve[50]. (a) Being a statement of intent, it formally binds the two parties to increase their political and economic integration. This is, of course, a tangible achievement within the framework of European integration, in that it sets a number of objectives to be pursued in the near future.

(b) Furthermore, the Treaty insists on the defence and preservation of European values and the importance of establishing some form of "European sovereignty". (c) It also aims to weaken nationalist and populist tendencies which are spreading Italy, the Czech Republic, Hungary and Poland. In a nutshell, we may affirm that said "symbolic" objectives are more real than they appear to be. We will now analyse some of the provisions more in depth. Article 1 of the *Traité* focuses on advancement in cooperation on European policymaking; it emphasises the need for an energetic and more powerful common foreign and security policy, while intensifying cooperation on the completion of the Economic and Monetary Union (single market). In order to achieve these goals, France and Germany need a strategy: they will have to build a robust industrial base capable of fostering prosperity, economic growth, while promoting convergence in fiscal and social policies[51]. Article 4(3) identifies a number of top priorities, including the establishment and reinforcement of common defence programmes. French and German governments shall strive for the promotion of Europe's industrial and technological competitiveness, specifically in the defence sector as well as in other crucial areas. This

[50]Nicholas Dungan, *The new treaty of Aachen: More than just a symbol?*, Atlantic Council, last modified 23 January 2019, https: https://www.atlanticcouncil.org/blogs/new-atlanticist/france-germany-treaty-of-aachen/.

[51]French and German Governments, *Treaty on Franco-German Cooperation and Integration* (Aachen: Ministère de l'Europe et des affaires étrangères, 2019).

also involves participation in joint projects and export of weaponry and equipment. Article 13 aims to facilitate cross-border collaboration with a view to simplifying exchanges and removing minor barriers. Part (2) of the article concentrates on the establishment of eurodistricts which, through necessary economic resources, can in fact represent a great opportunity for the revival of the European manufacturing sector. To this end, adaptation of legal and administrative norms is strongly recommended; derogations should be used in case of an emergency. Article 20 introduces the topic of economic integration, recalling once again the paramount importance of harmonisation and coordination which is based upon the logic of European Union “concentric circles”, whereby dominant MS begin to work together, waiting for others to join later in the process. These coordinated mechanisms will certainly lead to an evolution in commercial law and policies and they will gradually enhance the attractiveness of the two countries. Coping with emerging technological giants will be demanding and European companies must be provided with all the regulatory means they need to face global challenges. Harmonising the legislative framework is, therefore, the first step to take in this direction: if the EU wants to improve its competitiveness, it should clearly reshape its competition rules. Revising them means first acknowledging that out of the 40 biggest world companies, only 5 come from the Union. France and Germany propose thorough changes in legislation, taking account of the fact that in order to level the playing field, (1) state-control and subsidies should be at the core of future discussions in the WTO and other organisations. (2) Merger guidelines ought to be updated according to current global developments; France and Germany ask for amendments to Regulation no 139/2004 on mergers and associated guidelines.

(3) What is more, they are demanding the introduction of some form of Council’s right of appeal, which could overrule the European Commission’s decisions. (4) The IPCEI, satisfactory result of a very complicated process, is not enough to cope with the recent economic conjunctures; it can be used to fund mass scale creative projects but its implementation is still extremely difficult. Conditions must be revised so that IPCEIs can positively impact innovation and disruptive processes, while improving Europe’s industrial capability. (5) The temporary involvement of Union institutions in certain industries must not be discarded as a means to ensure successful achievements in the long run.

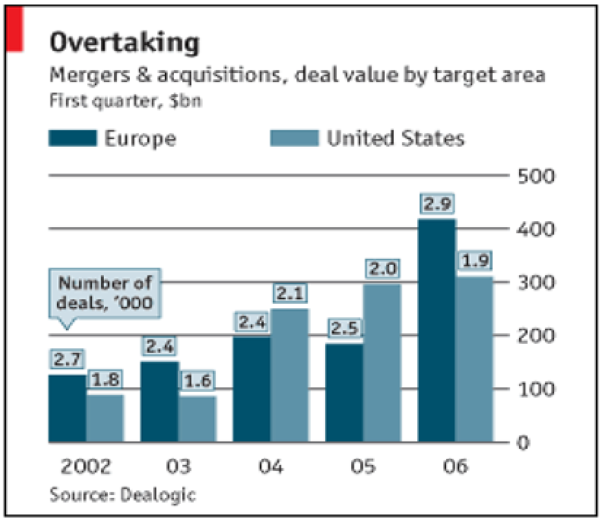
1.3.2 The impact of innovation on the common market

Some of the tools which will defend European economic sectors from aggressive tactics and unfair State involvement can be summarised in the following manner[52]:

(1) Measures which allow the application of the European foreign investment screening framework. These instruments have to be supplemented by Member States' intervention when needed. France and Germany are pushing for screening procedures to be adopted by other Member States before the Union is endowed with the competences it necessitates to act independently.

(2) A functioning reciprocity mechanism for public procurements with Rest of the World (RoW) countries must be in place in order for the EU to protect its companies even if this implies focusing on factors which are different from price-related choices; existing mechanisms must, therefore, be more flexible.

(3) As concerns relations with third countries, multilateralism, laissez-faire and bilateral or inter-regional trade arrangements must be preserved as they have contributed significantly to job creation and increasing innovation.



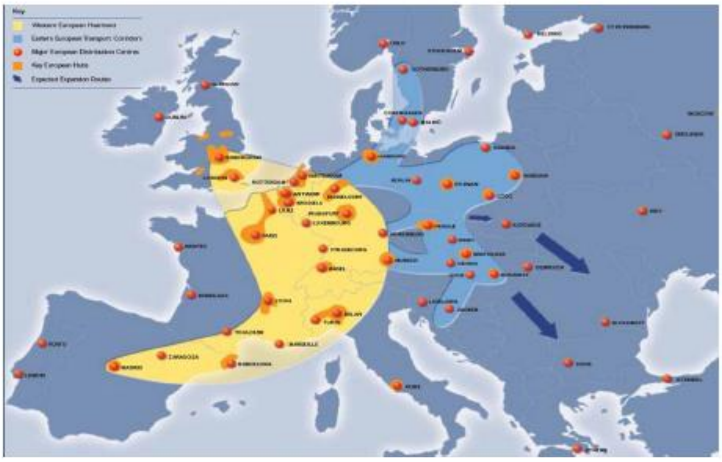
Source: "The Economist", 10 February 2017

(4) Trade policy must be adjusted in order to protect Europe's "strategic autonomy". WTO rulebook should be modernised to increase transparency and combat unfair commercial practices, e.g. subsidies to export industries.

When evaluating economies' innovativeness, the Regional Competitiveness Index (RCI)[53]

[52]French and German Governments, *A Franco-German Manifesto for a European industrial policy fit for the 21st Century* (Berlin: Bundesministerium für Wirtschaft und Energie, 2019).

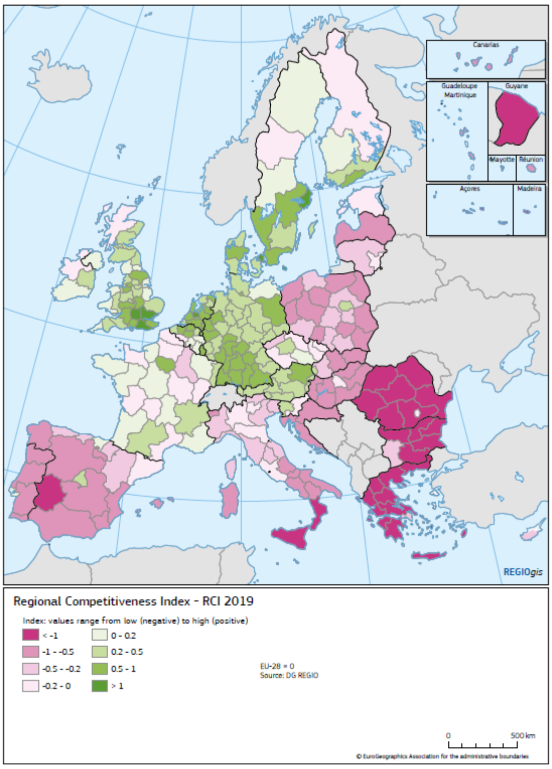
[53]Paola Annoni, Lewis Dijkstra, *The EU Regional Competitiveness Index 2019* (Brussels: European Commission, 2019).



Source: Cushman & Wakefield, Healey & Baker

considers the degree of macroeconomic stability, infrastructural development, basic education, efficiency of the job market, business sophistication and, consequentially, innovation. The Net International Investment Position (NIIP) is now utilised to calculate the macroeconomic indicator: it measures the difference between country assets and total liabilities in comparison to RoW countries. Of course, NIIP can be used to measure the external weakness of countries and the probability of financial shocks caused by fragile economic fundamentals. There exists a high correlation between NIIP and the level of household debt. The infrastructural dimension deals with accessibility indexes including access to motorways and railways. It uses a very straightforward logic: if transport infrastructure is poorly up-to-date, only a small segment of the population can be reached in less than 90 minutes of travel.

MAP 1: RCI 2019 scores (z-scores, EU-28=0)



Source: Paola Annoni, Lewis Dijkstra, *The EU Regional Competitiveness Index 2019*

Basic education evaluation relies on individuals' performance in Adult Education Surveys (AES) across countries. Labour market efficiency takes into consideration the percentage of part-time work, temporary contracts (growing from 11.2% of European workers in 2002 to 13.2% in 2018), productivity and the share of population aged 20-64 involuntarily employed in part-time jobs. Business sophistication takes account of a few indicators, such as the Regional Innovation Scoreboard (RIS) and

Innovative SMEs. RIS measures the percentage of small and medium enterprises which have introduced organisational or marketing innovations. The innovation index uses «Exports in medium-high/high-tech manufacturing» and «Sales of new to market and new to firm innovation»[54]. The export indicator is absolutely useful, in that it gives us an idea about the actual diffusion of cutting-edge technologies and qualitatively evaluates patent exploitation but does not take into account the number of patent applications, as this index has been considered methodologically irrelevant to the measurement of overall levels of innovation. What we can easily notice from the previous map is that large portions of EU territory which stretch from the Northernmost part of the Union to Central Europe, including, among the others, Germany, Benelux countries and most French regions have scored better, recording high degrees of regional competitiveness. By contrast, European southern regions (all Italian administrative regions, Spain, Greece, Portugal, Eastern European MS) have performed poorly in almost all indicators. The concept of "Blue Banana", referring to an area which corresponds roughly to Northern Italy, Western Germany, Tyrol, Benelux countries and Southern England (now outside the EU) together with the notion of "Four motors of Europe" (Rhône-Alpes in France, Baden-Württemberg in Germany, Catalonia in Spain and Lombardy in Italy) do not seem to hold true when it comes to innovation. Even the most productive regions in Spain (except the Community of Madrid) and Italy are not scoring well; their performance is probably disappointing as a consequence of inefficient central governments, red tape, obsolete institutions and burdensome regulations. Whatever solution is adopted, before Europe is capable of seriously competing with other economic giants such as the United States and China, it must resolve its internal imbalances (e.g. disparities among Member States including different levels of public and private indebtedness, housing and private sector credit flows, financial and asset market development, unemployment rates) and governments should be required to give up part of their competences so as to allow the Union to better tackle outstanding problems and face the demanding challenges of globalisation.

[54]Paola Annoni, Lewis Dijkstra, *The EU Regional Competitiveness Index 2019* (Brussels: European Commission, 2019).

Chapter 2- The failure of the Siemens-Alstom merger project

2.1 Interpretation of the legal framework

2.1.1 Assessing concentrations

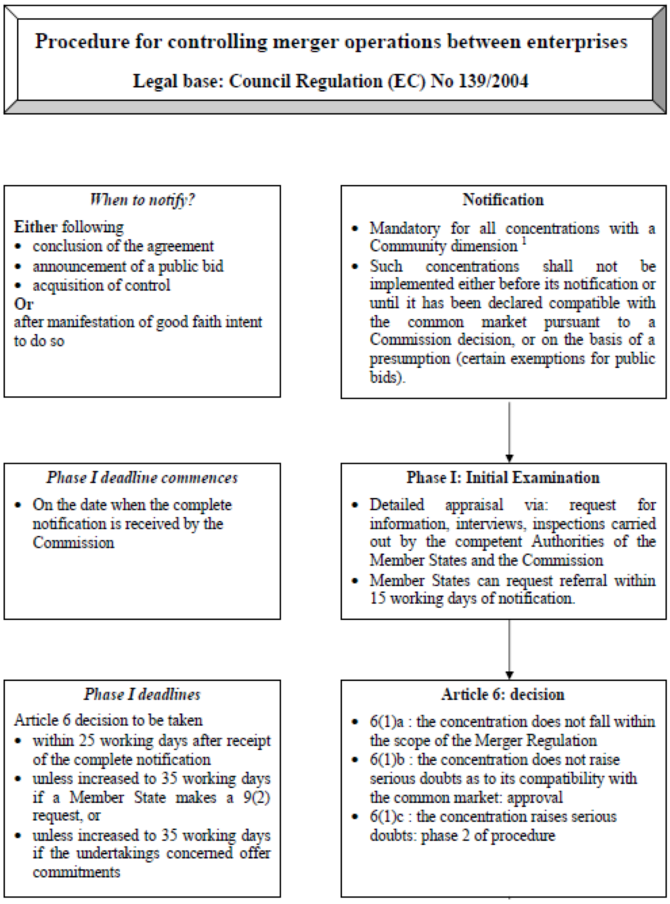
The primary aim of Chapter 2 is to provide insights into the prohibition of the Siemens-Alstom merger project so as to comprehend whether the Commission is preventing the emergence of European champion firms by means of an unduly restrictive competition policy. The first section deals with the EU's merger regulatory framework, focusing on relevant provisions and concentration assessment stages. Subsequently, the second part of the chapter directly addresses significant problems relating to Siemens-Alstom, providing a list of reasons for rejecting the proposed transaction. Part 3 ("In search of a new growth path") briefly draws a comparison between US and EU approaches to competition law and it also deals with China's use of unfair State-aid measures to support its exporting companies. It consequently deals with behavioural commitments and trade-offs stemming from merger operations. Part 4 examines why EU competition policy needs to be updated and adapted to current global trends, exploring the several solutions brought forward by the Franco-German-Polish proposal to improve the Union's competitiveness while developing a substantive industrial policy agenda. A thorough analysis of legislation followed by an in-depth study on such an important merger prohibition will allow us to identify possible flaws or shortcomings in applicable rules.

To begin, each concentration must be in conformity with provisions and regulations established by the European Commission to protect consumer rights as well as the correct functioning of the domestic market. There exist certain exemptions for mergers which result in an overall improvement of residents' welfare. Conversely, mergers which do not satisfy predefined requirements are impeded. Companies cannot acquire excessive market power as this could affect consumers, society and the economy in a number of negative ways (e.g. higher prices, limited innovation and production). Directive 2005/56/EC[55] centres around transnational mergers; it is complemented by the Economic Concentration Regulation 139/2004[56] (see *EUMR*). Norms require that merging firms apply for a

---

[55]Directive 2005/56/EC on cross-border mergers of limited liability companies can be found on the institutional website: https://eur-lex.europa.eu/legal content/EN/TXT/?uri=celex:32005L0056.

[56]European Commission, *EU Competition law: merger legislation* (Brussels: European Union, 2014), 10.

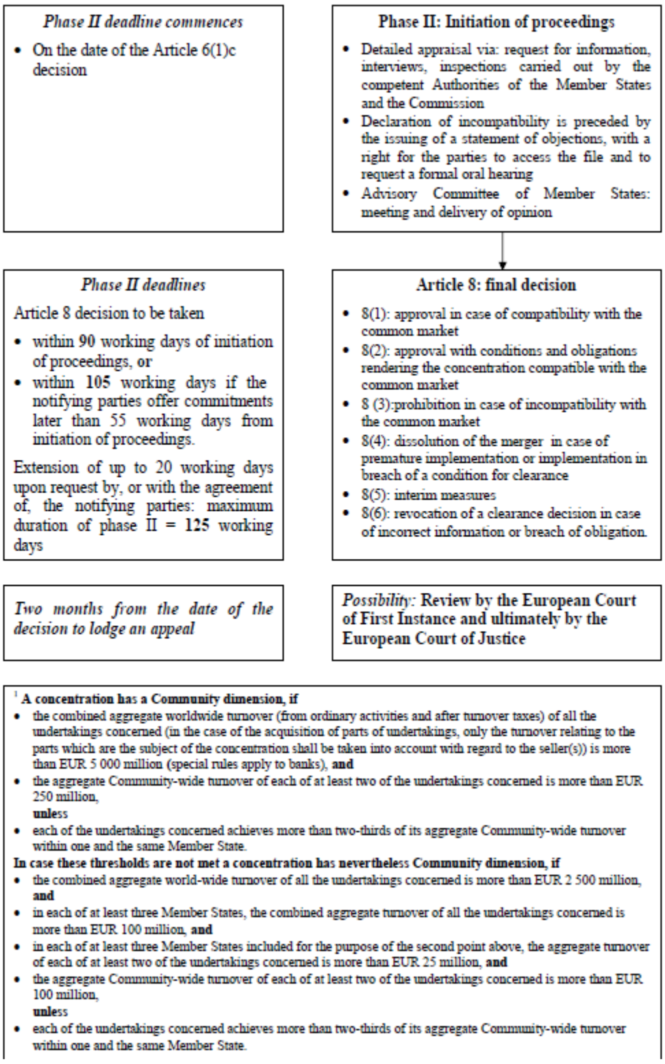


Source: European Commission, EU Competition law: merger legislation (Brussels: European Union, 2014), 8.

preliminary approval which can be provided by the Commission. It should be pointed out that the Commission has exclusive competence only over those concentrations which meet pre-established thresholds (i.e. concentrations that reach a certain community dimension). Cross-border mergers having a yearly worldwide turnover of the nascent business which exceeds 5000 million euros and a Union-wide turnover of over 250 million euros must be notified and consequently analysed by the Commission, so as to stop possible abuses of dominant position or concentrations which significantly impact and distort the free market. Nevertheless, increases in market share and size might lead to disproportionate levels of bargaining power of the newly-established entity and this may, in turn, entail several drawbacks for competitors, downstream companies (such as suppliers and distributors) and consumers. Monopolies and oligopolies are not only undesirable, but they must be avoided at all costs, as prices may be artificially driven up in order to ensure growing revenues. Council Regulation (EC) No 139/2004[57] consists of several phases. The first stage, called *Phase I*, begins when the notification has been filled in and subsequently received by the Commission. This procedure is compulsory for any concentration with a Community dimension. As a consequence, the merger itself cannot be completed until the European

[57]Economic Concentration Regulation 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) can be found on the institutional website: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32004R0139.

Commission, by means of an official decision or in certain circumstances according to a simple presumption, declares it compliant with the provisions in force and the common market itself; only at that point can the concentration be implemented. Phase I examination starts with requests for information, which might be supplemented by interviews and on-field inspections, conducted by the relevant Authorities of the Member States and those of the Commission. If they do not detect infringements to the legal framework, they can in the first instance give their consent and approval with respect to the merger. Based on Phase I procedures, MS are permitted to demand a referral within 15 days from the formal notification. The notification must take place either after the official conclusion of the deal, following communication of a takeover bid, once control has already been gained by the interested party or in cases of evidence of good faith. The decision is officially taken under Article 6 (Council Regulation (EC) No 139/2004)[58]. There is a range of possible outcomes. The concentration may not be relevant if it does not fall within the scope of the Merger Regulation, 6(1)a. Alternatively, the concentration might not give rise to concerns as it appears to be perfectly compatible with the common market and it



Source: European Commission, EU Competition law: merger legislation (Brussels: European Union, 2014), 9.

[58]European Commission, *EU Competition law: merger legislation* (Brussels: European Union, 2014), 8.

shall, therefore, be approved, 6(1)b. However, some concentrations could also raise serious doubts and this would imply the activation of phase 2, 6(1)c.

Phase I must follow strict rules and it should meet precise deadlines. Decisions based upon Article 6 must be adopted (1) within 25 working days after receiving the full notification. (2) The deadline can be postponed until 35 working days if a Member States submits a specific request under Article 9(2), or it may also be increased to 35 workdays if the companies involved in the process offer particular commitments. Phase II commences with the thorough assessment of information, interviews and inspections performed by the competent authorities. A declaration of incompatibility may be issued and it must be preceded by a statement of objections; the concerned parties are entitled to access the record and can formally request an oral hearing. The Advisory Committee of Member States meets and delivers an opinion. A decision under Article 8 (Council Regulation (EC) No 139/2004) has to be taken within 90 working days from the initiation of proceedings, or within 105 workdays if the interested parties offer specific commitments after 55 working days from the opening of the procedure. An extension of up to 20 working days can be requested by the submitting parties or it can be agreed together with the competent authorities. The maximum timespan of phase II is 125 working days. A final decision is taken according to Article 8[59]. The merger can be approved if it is deemed compatible with the single market, 8(1). The operation can be approved with peculiar conditions and certain obligations should be met in order to reconcile it with the common market under Article 8(2). The acquisition is forbidden if it is incompatible with the domestic market based upon Article 8(3). The merger can also be dissolved if it has been implemented prematurely or in violation of a condition of clearance according with Article 8(4). Certain provisional measures can also be imposed, 8(5). A clearance decision shall be revoked when inaccurate information has been provided or duties have been breached based on Article 8(6). An appeal can be lodged against the decision after two months from its issuance. The General Court can review the original ruling that shall ultimately be judged by the European Court of Justice (ECJ).

As anticipated, a concentration has a Community dimension when the combined aggregate turnover (after turnover taxes) of the undertakings is higher than 5000 million

[59]Ibid, 9.

euros, with specific provisions applying to banks, and the Community-wide turnover of each of at least two of the parties concerned exceeds 250 million euros, unless every undertaking achieves over two thirds of its combined Community-wide turnover within the same MS. In case the above-listed thresholds are not met, a concentration has a Community dimension if its total aggregate global turnover is more than 2500 million euros and, in at least three MS, the undertakings' aggregate turnover is more than 100 million euros. In addition to these criteria, in each of the three MS the combined aggregate turnover of each of at least two of the interested parties should be over 25 million euros and the Community-wide turnover of at least two of the firms concerned ought to be more than 100 million euros, except in case each undertaking achieves over two thirds of its Community-wide turnover within one Member State. The fundamental provisions regarding mergers contained in the Treaty on the Functioning of the European Union (TFEU) are Articles 101 (ex Article 81 TEC), 102 (ex Article 82 TEC), 106 (ex Article 86 TEC). Article 101 TFEU prohibits agreements between companies, associations of companies and concerted practices that might hamper commerce amongst MS and restrict competition within the single market. Activities aimed at (a) fixing purchase or selling prices, (b) limiting or controlling production, markets, investments, technical development, (c) sharing markets or supply sources, (d) applying unequal conditions to comparable transactions with alternative trading parties, (e) making the conclusion of contracts conditional upon the acceptance by the other concerned parties of supplemental commitments that are unrelated to the subject of said contracts. Article 102 TFEU forbids any abuse of dominant position within the domestic market or in a considerable part of it, as they would be inconsistent with the common market itself. Infringements of this type include actions directed at (a) charging unjust purchase or selling prices or other inequitable conditions; (b) limiting markets, production and technical development to the detriment of consumers; (c) applying different conditions to similar transactions with other trading parties; (d) making the conclusion of contracts contingent upon acceptance by other parties of additional obligations which have no relation with the subject of the contracts themselves. Article 106 deals with public or non-public undertakings to which MS grant exclusive rights. Member States cannot maintain in force measures that are incompatible with the rules provided by Articles 18 and 101 to 109 of the TFEU. Companies that have been entrusted the power of running services which have general economic interest or revenue-generating monopolies must be subjected to all Treaty rules applicable in such instances if said norms do not hinder the performance or the series of tasks that have been attributed to them. Furthermore, Article 3 TFEU lists the exclusive competences that the Union has been conferred by the Member States and these include, among the others, (a) the customs union, (b) the establishment of competition rules which are necessary for the appropriate and adequate functioning of the internal market and (e) common commercial policy. Article 14 TFEU states that the EU and its MS shall ensure that services of general economic interest and those prompting territorial cohesion are operated according to all the economic and financial conditions that allow them to comply with their obligations. The European Parliament and the Council will be responsible for setting such principles without hampering MS' competences, providing proper funding for the aforementioned services.

Source: https://www.flickr.com/photos/pittpanthersfan/49801186563.

2.1.2 An overview of relevant provisions

We will now introduce the specific rules pertaining to mergers and acquisitions' regulatory framework. We shall first focus on Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, better known as the EC Merger Regulation, OJ L 24/1, 29 January 2004[60]. The latter stresses the importance of perfecting the single market as well as the economic and monetary union, in pursuance of the following objectives: enlarging the Union, reducing international barriers to commerce, encouraging corporate reorganisations and restructuring which will involve the establishment of major concentrations. Said reorganisations must be consistent with the essential prerequisites of dynamicity in competition and they must also revive European industries' attractivity, while improving EU citizens' living conditions. Persistent impairment of competition has to be avoided. Concentrations which may hinder effective competitiveness should be discarded. To ensure that all tools available to achieve undistorted competition are effectively utilised, Regulation 139/2004 takes into account the provisions laid down in Articles (83) and (308) TEC, under which it might equip itself with further powers it necessitates so as to accomplish its goals with respect to concentrations on certain markets (Annex I of the Treaty). The Commission shall be attributed an exclusive competence to implement the Regulation; its actions will be monitored by the Court of Justice. Regulation 139/2004 de facto bypasses MS and European norms should be thoroughly applied in the entire Union especially with regard to concentrations with a Community dimension. National authorities will in fact intervene only when the Commission fails to take measures and, also, when their vital interests cannot be safeguarded under EU law. Significant differences in national legislation may hamper undistorted competition across the Union. Thus, Member States can also continue to preserve their legitimate interests in areas which are not covered by the Regulation. Concentrations are defined as «operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market.» It is essential to ascertain whether concentrations which have acquired a Community dimension are still compatible with the domestic market and that is verified only if they meet the requirement of keeping and developing competition. To this end, the Commission determine if the key

[60] European Commission, *EU Competition law: merger legislation* (Brussels: European Union, 2014), 18.

objectives envisaged in Article 2 of the TEC and Article 2 of the TEU are realised. The Commission must have effective control over all concentrations which are responsible for producing certain considerable outcomes on competitiveness. Based on Regulation (EEC) No 4064/89, concentrations with a Community dimension resulting in the creation or reinforcing of dominant positions which cause substantial impediments to competition should be regarded as non-compliant with the single market. Companies are required to provide preliminary information to the Commission about concentrations having a Community dimension which would come about as a result of an agreement, after the announcement of a public tender offer or the acquisition of controlling shares. Notice should be promptly given even in cases entailing undertakings that have previously reported information regarding their intention to conclude an agreement for the establishment of a concentration (with a Community dimension) through a comprehensive plan, a memorandum of understanding, a letter of attempts or the announcement of a public purchase offer. The implementation of the previously mentioned deals should be interrupted until the Commission reaches its final decision; in certain circumstances, the interested firms can derogate from this suspension if a proper request has been filed and accepted by the responsible authority (i.e. the DG COMP). Before granting this form of exemption the Commission should take into consideration possible factors relating to the nature and the dimension of damage to the actors involved or to third players and, *ça va sans dire*, the effects of the concentration on the internal market. The DG COMP must specify the timeframe of its action, beginning with the initiation of proceedings and terminating with its decision on the compatibility of all the aforesaid operations with the domestic market. Commission Regulation (EC) No 802/2004 of 21 April 2004[61] implemented Council Regulation (EC) No 139/2004; it was subsequently amended by Commission Regulation (EC) No 1033/2008 of 20 October 2008[62] and Commission Implementing Regulation (EU) No 1269/2013 of 5 December

[61]Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings can be found on the institutional website: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0802&from=EN.

[62]Commission Regulation (EC) No 1033/2008 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings can be found on the institutional website: https://eur-lex.europa.eu/legal content/EN/TXT/PDF/?uri=CELEX:32008R1033&from=EN.

2013[63]. To briefly conclude, the DG COMP carries out its evaluation in two steps. Following the first stage ("Phase I") in accordance with all provisions laid down in Article 6 (Council Regulation (EC) No 139/2004), it may decide to approve a concentration directly and without additional obligations or it might do so while imposing a number of conditions or commitments to the interested business entities. If the decision cannot be taken during "Phase I", due to several outstanding issues, it will be reached as a result of "Phase II". An investigation will consequently be carried out under Article 8 (Council Regulation (EC) No 139/2004) which shall lead to either conditional or unconditional approval and sometimes to the rejection of the proposal. It is the Commission's responsibility to provide evidence that a concentration would remarkably harm or impede competition. The DG COMP then communicates its concerns to the parties in order for them to formulate concrete proposals about remedies to be implemented. At this point, the actors involved can submit a series of commitments; the Commission, in fact, cannot impose any additional conditions once a decision has been authorised under Article 6, albeit subject to corrections. After receiving said proposals, the DG COMP assesses whether they can practically address and eliminate the concerns which have arisen throughout the process. If not, the only possibility that the Commission has is to prohibit the concentration according to Article 8. Extending the duration of the whole process to a second stage may, of course, represent a crucial element, in that a prohibition is only possible after a more accurate scrutiny. The DG COMP has provided guidelines based on its interpretations of the European Commission Merger Regulation[64]. In general, horizontal mergers which entail loss of direct competition are considered to be

[63]Commission Implementing Regulation (EU) No 1269/2013 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings can be found on the institutional website: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:336:0001:0036:EN:PDF.

[64]European Commission, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* (Brussels: OJ 5.2.2004 C31, 2004).
European Commission, *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings* (Brussels: OJ 18.10.2008 C 265, 2008).

particularly detrimental to the single market; conversely, vertical ones are less alarming in this regard[65].

2.2 Siemens-Alstom: Key Reasons for Rejection

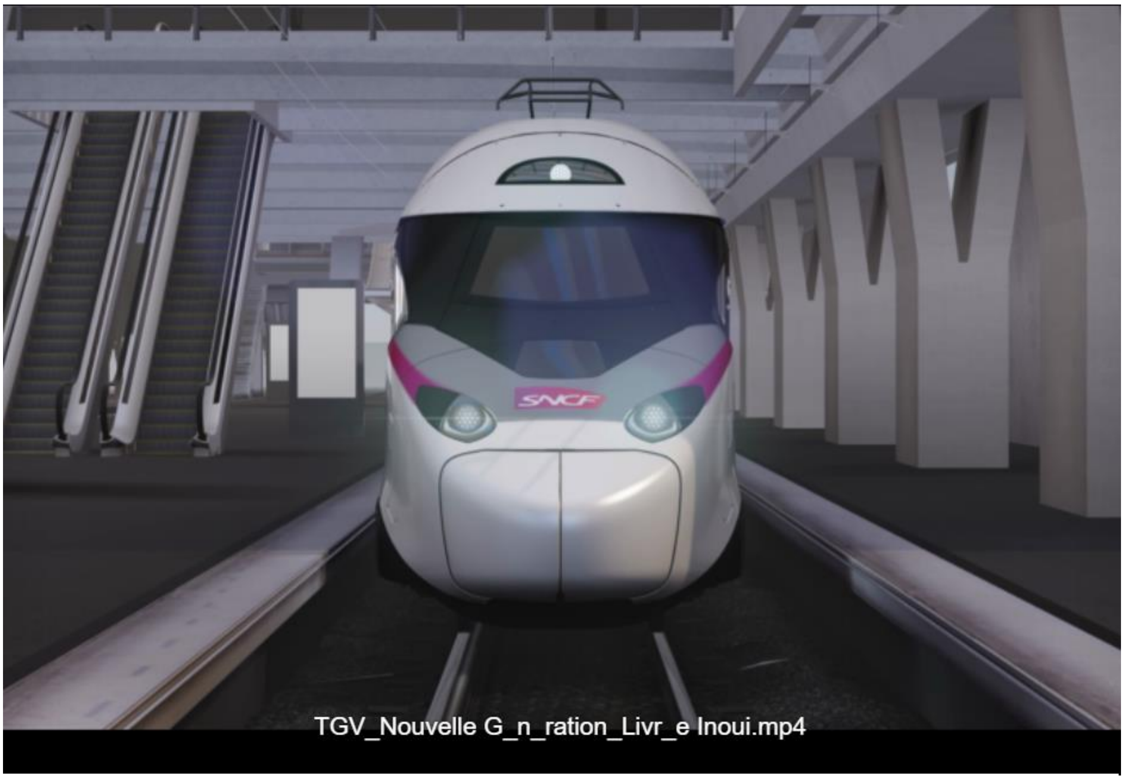
Source: published on https://www.neweurope.eu/article/eu-commission-blocks-siemens-alstom-deal-amid-competition-concerns/, EPA-EFE/Olivier Hoslet.

On 6 February 2019, the European Commission took a surprising decision: it blocked Siemens' planned acquisition of the French multinational rail transport company Alstom SA, explaining that «the merger would have harmed competition in markets for railway signalling systems and very high-speed trains.»[66] The undertakings did not offer viable remedies to address any of the issues which had been raised by the DG COMP. European Commissioner for Competition Margrethe Vestager declared that: «Millions of passengers across Europe rely every day on modern and safe trains. Siemens and Alstom are both champions in the rail industry. Without sufficient remedies, this merger would have resulted in higher prices for the signalling systems that keep passengers safe and for the next generations of very high-speed trains. The Commission prohibited the merger because the companies were not willing to address our serious competition concerns.»[67] The proposed operation would have brought about remarkable changes in the European railway sector, as the two firms involved would have shared their transport equipment and service management within the framework of a new superstar company entirely under Siemens' control. The undertakings are the largest

[65]Mark Thatcher, *European Commission merger control: combining competition and the creation of larger European firms* (London: European Journal for Political Research, article available online at: http://eprints.lse.ac.uk/54743/, 2015).
[66]European Commission, Mergers: *Commission prohibits Siemens' proposed acquisition of Alstom* (Brussels: European Commission Press Release, available online at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_881, 2019).
[67]Ibid.

European providers of rolling stock, railway and metro signalling systems. An unchallenged global leader would have resulted from the merger. It would have controlled the railway sector while considerably limiting competition, especially in the fields of signalling markets and high-speed rail, posing a significant threat to minor firms operating in the industry. Numerous advocacy groups representing customers, trade unions and alternative competitors were active throughout the whole process trying to push the Commission towards the adoption of a series of commitments and corrections with respect to the acquisition. Several EEA's National Competition Authorities expressed a number of concerns. According to stakeholders, innovation would have been hampered, a monopoly might have come about and smaller competitors would have been excluded from the markets. Given the fact that the two companies were not prepared to provide appropriate mechanisms in order to correct outstanding issues, the DG COMP prohibited the operation so as to defend competition in the European railway sector. The development of a common European railway market is only possible if multiple signalling systems are available, which conform to the European Train Control Systems (ETCS), meeting minimum requirements and high-quality standards at all levels while charging affordable and competitive prices. Moreover, it is crucial to invest in signalling systems which are compatible with environmental sustainability in order to allow a smooth transition to a climate-friendly economy. The key concerns that the Commission presented specifically with regard to the transaction related to (a) *signalling systems* (whose role is particularly remarkable as it allows passengers to travel safely while avoiding accidents) and (b) *very high-speed trains* (those which travel routes at speeds of about 300 km/h or more). The Commission's examination of the merger

Source: https://www.italiaoggi.it/news/treni-e-ferrovie-bruxelles-vieta-la-fusione-alstom-siemens-201902061056362177

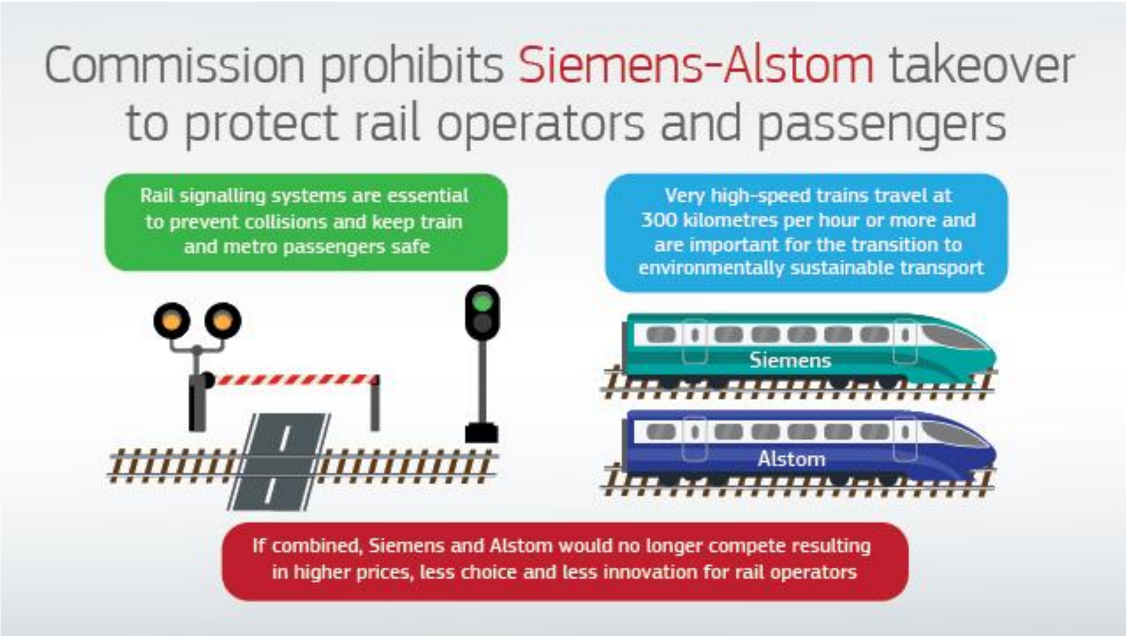


Source: https://www.partners.alstom.com/Assets/View/4aefeaf2-3362-4d85-9de8-8a0e3caf6e0a

demonstrated that as concerns *signalling systems*, the acquisition would have thrown out a relevant competitor from various urban signalling markets and mainlines. Furthermore, Siemens-Alstom would have been a monopolist in *European Train Control Systems* (on-board and tracks' systems included) throughout the European Economic Area and autonomous national interlocking systems. The newly-created superstar firm would have become an undisputed market leader within the areas of *Communication-Based Train Control (CBTC) and metro signalling systems* in general. As regards *very-high speed rolling stock*, the operation would have significantly reduced the variety of contractors. At the global level, Siemens-Alstom would have become a prominent shareholder in other well-established firms, excluding in countries like China, Japan and South Korea, which do not allow international competition in the industry. The undertakings did not present any well-founded or corroborated thesis as to why the transaction could increase efficiencies in the railway sector. In actual fact, the competitive pressure resulting from the merger would have been insufficient to guarantee effective competition. In the course of its in-depth investigation, the DG COMP took account of the competitive environment in RoW countries. It analysed the potentially dangerous effects that Chinese companies' penetration of the market might bring about in the future. (1) When it comes to signalling systems, the Commission found out that Chinese suppliers are not currently present in the European Economic Area and that they have not attempted to participate in any public bid as of today. Hence, such threat could take a while before representing a credible challenge for European infrastructure operators.

(2) As far as very high-speed trains are concerned, the Commission states that it is extremely improbable that Chinese providers will restrict competition in Europe, at least in the immediate future.

To address the Commission's concerns, the interested parties brought forward a range of remedy proposals, which have, nevertheless, been judged insufficient. When unresolved issues have to do with loss of direct competition, they should be sorted out through the implementation of corrective measures which provide structural divestiture. There exist numerous precedents of analogous structural solutions which were approved by the Commission in the past; this happened with BAFS's acquisition of Solvay's nylon business, Thales' purchase of Gemalto, Linde's merger with Praxair, GE's acquisition of Alstom's electricity production and energy transmission assets, and Holcim's purchase of Lafarge. Nonetheless, in the present case, proposed commitments were not sufficient to solve the several problems which had been identified by the DG COMP.



Source: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_881

(1) As regards mainline signalling systems, a sophisticated combination of Siemens' and Alstom's assets was proposed which involved transferring certain assets entirely or partially and others by means of licences. Business and production sites were to be separated; workforce would have been moved, but only in some cases. In addition, the asset purchaser would have continued to rely upon the merged firm as concerns certain licence and service agreements.
(2) With respect to *very high-speed rolling stock*, divestment of Alstom's Pendolino (however not high-speed according to several parameters) and a licence for Siemens' Velaro were offered as further remedies. Nevertheless, the licence was contingent upon compliance with various stringent rules, which would not have provided the buyer with much-needed incentives to develop an alternative very high-speed train.

The Commission continued to seek advice from market operators about several proposals for corrections which had been put forward. Various actors validated and endorsed the DG- COMP's position, thereby considering the proposed remedies absolutely inadequate and unsatisfactory to meet the concerns which had arisen. These measures would not have prevented high prices nor could they make up for the loss of infrastructure managers and operators. The European Commission's decision to forbid the Siemens-Alstom merger is particularly unusual and, as Vestager has pointed out multiple times, «prohibition decisions are rare.»[68] In the last 10 years, 3000 mergers were approved by the DG COMP, while 7 acquisitions were rejected. In light of these facts, France and Germany have insisted on promoting the establishment of an EU champion firm that should be able to compete with China Railway Rolling Stock Corporation Limited (CRRC), a state-run company which represents the biggest rolling stock global producer in terms of revenue: it overshadows its most important homologues Siemens and Alstom. Notwithstanding the fact that Chinese competitors are not expected to enter the railway sector in Europe in the foreseeable future, they still represent a threat which the Union must handle. However, the Commissioner highlighted that 90% of CRRC's activities remain firmly within

[68]Jorge Valero, *Six takeaways from Siemens-Alstom rejection* (Brussels: Euractiv, article available at: https://www.euractiv.com/section/competition/news/six-takeaways-from-siemens-alstom-rejection/, 2019).

China's domestic market[69]. What is more, China has not sold any high-speed train or technology to other countries, and it has not participated in a public purchase offer for signalling in the EU to date. Vestager also emphasised that Alstom and Siemens could already be considered EU Champions and they would continue to hold a strong position and significant bargaining power. When someone tried to remind the Commissioner of the Airbus case, she responded that the current issues pertaining to the railway market are largely different from the situation in the airline industry two decades ago. Airbus, meant to compete with the US-located Boeing, has always been regarded as a «good example of creating competition.»[70] European firms, at the time (2000), were too small to face the challenges of competition in the aeronautical sector and Boeing was becoming too aggressive. Nonetheless, the proposed Siemens-Alstom merger would have substantially damaged the competitive environment, as the number of actors operating in the field of rail transport would have declined and innovation would have been sacrificed. According to the Directorate-General for Competition, Siemens-Alstom might have produced detrimental effects in signalling systems, as the interested parties did not want to commit and present plans for disinvestment. With regard to high-speed trains, corrections brought forward were not adequate and they could have led to competitive constraints (see licences for Siemens' Velaro). Vestager responded to France's accusation that prohibiting the transaction would constitute a "political mistake"[71] (statement by the French Minister of the Economy Bruno Le Maire) by declaring that the Commission must act within its scope and not according to MS' domestic politics. Le Maire said that the «role of the DGCOMP is to defend the economic interests of Europe.» France showed extreme discontent owing to rising concerns about the possible risk of China attempting to enter the European railway market. Peter Altmaier, the German Economic Affairs Minister, declared that «the EU's rejection of the Siemens/Alstom merger demonstrates the urgent need for a European Industrial Strategy. It involves orders of many $100 billion worldwide. That is why we need strong European champions. France & Germany

[69]Ibid.
[70]Ibid, 2.
[71]Laura Kayali, *France's Le Maire: Blocking Alstom-Siemens merger would be a 'political mistake'* (Brussels: Springer, article available online at: https://www.politico.eu/article/france-bruno-le-maire-blocking-alstom-siemens-merger-would-be-a-political-mistake/, 2019).

agree.»[72] The DG COMP's choice came as a surprise for two reasons. The first is that merger rejections in the EU are very rare. Quoting Patrick Rey and Jean Tirole «the Commission approved 370 mergers unconditionally, and a further 23 with conditions (or "commitments") attached.» Only two transactions were ruled out in 2017, none was blocked in 2018. In total, less than 30 mergers have been prohibited since 1990[73]. Secondly, the operation enjoyed political support from France and Germany, and the fact that the DG COMP rejected it caused their disapproval and condemnation. The "Franco-German Manifesto for a European industrial policy fit for the 21st Century" was exactly designed to shape competition policy and change the existing framework, while also calling for remarkable investments in innovation and the adoption of common trade defence instrument, including anti-subsidy, anti-dumping and safeguard measures. The twin engine believes that the Commission ought to become more flexible in order to tackle potential future competition and hostile commercial tactics from global players. In the aftermath of the Siemens-Alstom case, a discussion has erupted, focusing on effective changes that may occur in competition policy so as to encourage the creation of European champions. The transaction was intended to confront the growth of China's megacorporation CRRC.

While Alstom and Siemens battle over the production of 35 high-speed trains annually, CRRC takes orders for 230[74]. In spite of the Commission's opinion that China does not pose an immediate threat to European competition, we know that the Chinese government is planning to expand its transport network and is already starting the construction of over 3,200 km of rail. Cohen has endorsed the merger based on the fact that he believes the EU market is already oversaturated and competition within the industry would not be beneficial. Member of the European Parliament Guy Verhofstadt has argued that Alstom and Siemens are active on the global stage and blocking the operation would only go in the direction of slowing down crucial developments in European industries, as the DG

[72]Ibid, 2-3.
[73]Konstantinos Efstathiou, *The Alstom-Siemens merger and the need for European champions* (Brussels: Bruegel, available online at: https://www.bruegel.org/2019/03/the-alstom-siemens-merger-and-the-need-for-european-champions/, 2019).
[20]Elie Cohen, *Alstom-Siemens, politique de la concurrence ou politique des champions européens* (Paris: Telos, available online at: https://www.telos-eu.com/fr/economie/alstom-siemens-politique-de-la-concurrence-ou-poli.html, 2019).

COMP is not taking into consideration other rival champions' capabilities[75]. Therefore, European M&A control provisions ought to become increasingly flexible and far-sighted and the EU should focus more on its geopolitical interests and face emerging threats. European firms will have to compete globally by exploiting economies of scale and they must follow Airbus' footsteps. However, Massimo Motta and Martin Peitz[76] affirm that nothing in the existing legislative framework impedes the formation of European superstar firms, if efficiency gains are clearly demonstrated and can compensate possible downsides, be they short- or long-term, such as high prices, fewer investments and possible negative repercussions on quality and innovation of railway lines and services. It is also perfectly comprehensible that national governments will always favour their own political interest even at the expense of European citizens[77]. But sometimes, the advantage of achieving important results in international competition does not outweigh several disadvantages stemming from higher charges and limitations in consumers choice. The two scholars also suggest resorting to a joint venture or similar contracts as a means to guarantee efficiencies and better coordinate production and sales.

While pointing out that efficiency should not be the only "guiding principle of competition policy"[78], the authors admit that current competition rules might not be appropriate to counter unjust commercial practices by non-European companies. "Preventive intervention" against international actors which are presumed to behave unfairly and incorrectly is presented as a valid and feasible measure so as to put an end to said practices. The exclusion of such players from public bids might be regarded as a viable option. In order to comprehend whether the Commission is effectively hindering the creation of European champions, we must resort to a theoretical framework which includes several schools of thought whose main convictions and empirical findings we will analyse more exhaustively in the third chapter. In a famous publication of 1989,

[75]Guy Verhofstadt, *Europe's Missing Champions* (Brussels: Project Syndicate, available online at: https://www.project-syndicate.org/onpoint/europe-s-missing-champions-by-guy-verhofstadt-2019-03?barrier=accesspaylog, 2019).
[76]Massimo Motta and Martin Peitz, *Competition policy and European firms' competitiveness* (Brussels: Vox EU, available online at: https://voxeu.org/content/competition-policy-and-european-firms-competitiveness, 2019).
[77]Ibid.
[78]Ibid, part 2.

Sandholtz and Zysman[79] stated that the pivotal goal of the single European market programme was to provide help to European corporations in order for them to compete with alternative global players, especially American and Japanese firms, trying to enter the Union's markets at the time. Facilitating acquisitions and mergers of EU (*European Community) domestic companies within the context of the single market would have constituted the most effective way to counteract foreign players' aggressive and expansionist behaviour. In actual fact, European transnational firms would have been the only valid response to this crucial issue. By interpreting the two authors' (Sandholtz and Zysman) earlier research, neo-functionalist scholars[80] argue that the Commission, in line with the European Court of Justice's stances and encouraged by well-established cross-border companies, has indeed contributed to growing levels of transnational trade and has also supported the development of new EU superstar firms. According to Jabko (2006)[81], the Commission has reinforced these practices and brought together a *sui-generis* coalition of actors (such as MS' governments and several undertakings) so as to accomplish its objective of promoting EU integration, while also fostering internal competition. "Post-Chicago school theories"[82] highlight the importance of avoiding mergers which increase market power in an excessive manner. On the contrary, "original" Chicago school arguments were in favour of permitting mergers even when they would result in a reduced number of competitors, which could control large segments of the market. In general, neo-functionalists believe that the DG COMP will encourage new M&A between EU companies with the purpose of consolidating European economic integration. According to their views, the Commission will always attempt to engage in a constructive dialogue with EU firms. Nevertheless, "integrationist" theories have not been comprehensively investigated and tested (this topic will be examined in detail in the third chapter). Hence, insufficient evidence has been provided as to how exactly the DG

---

[79]Wayne Sandholtz and John Zysman, *1992: Recasting the European Bargain* (Cambridge: World Politics 42, Cambridge University Press, 1989), 95-110.
[80]Mark Thatcher, *European Commission merger control: combining competition and the creation of larger European firms* (London: European Journal for Political Research, article available online at: http://eprints.lse.ac.uk/54743/, 2015), 7.
[81]Nicolas Jabko, *Playing the Market: A Political Strategy for Uniting Europe, 1985-2005* (Ithaca, NY: Cornell University Press, 2006).
[82]Mark Thatcher, *European Commission merger control: combining competition and the creation of larger European firms* (London: European Journal for Political Research, article available online at: http://eprints.lse.ac.uk/54743/, 2015), 8.

COMP can manage to maintain high levels of competition protection while fostering the creation of EU champions. However, when using datasets made available by the Commission itself, we can observe that the majority of mergers were not even subject to corrections or commitments, in that they did not threaten competition and could, thus, be regarded as harmless. Moreover, when Siemens's acquisition of Alstom was blocked on 6 February 2019, there were three additional operations undergoing phase II investigations: Vodafone's proposed acquisition of Liberty Global's cable business in Czechia, Germany, Hungary and Romania[83]; Nidec's proposed acquisition of Embraco[84]; a merging operation involving Tata Steel and ThyssenKrupp[85]. The first transaction was approved with conditions on 18 July 2019; the second was also approved on 12 April 2019, subject to obligations; the third resulted in prohibition on 11 June 2019. In general,

The Velaro family: at home all over the world.

Source: https://www.mobility.siemens.com/global/en/portfolio/rail/rolling-stock/high-speed-and-intercity-trains/velaro.html

---

[83] *Mergers: Commission clears Vodafone's acquisition of Liberty Global's cable business in Czechia, Germany, Hungary and Romania, subject to conditions*, available online at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4349.

[84] *Mergers: Commission approves Nidec's acquisition of Embraco, subject to conditions*, available online at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2136.

[85] *Mergers: Commission prohibits proposed merger between Tata Steel and ThyssenKrupp*, available online at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2948.

by looking at the amount of total rejections, we will see that 86% (the vast majority) of mergers were approved after Phase I investigation under Article 6(1)(b), 4% of them were approved subject to commitments after Phase I investigation according to Article 6(2), 1% were approved unconditionally after Phase II investigation under Article 8(1), while 2% were approved with additional conditions after Phase II under Article 8(2)[86]. Going back to our case study regarding Siemens-Alstom, what is most surprising about the Commission's decision is that the DG COMP rarely rejects mergers. Perhaps, the dimension of the concentration and its possible impact on consumers and residents across the European Economic Area would have posed a high risk as concerns domestic competition. On the other hand, the operation would have given birth to an undisputed global leader in rolling stock, signalling systems, locomotives and passenger transportation and this EU champion would have certainly been able to threaten major competitors such as the Chinese CRRC.

Additionally, France and Germany had vigorously supported Siemens' decision to acquire Alstom and establish an innovative and economically powerful superstar firm. In reaction, the twin engine's governments have started to push for fundamental changes in antitrust regulation so as to finally facilitate the creation of European champions. Conversely, Commissioner Vestager accused the two countries of being contradictory as regards the application of EU competition legislation. Therefore, the question which comes to mind with respect to Siemens-Alstom is: could the Commission be biased against certain concentrations? Perhaps, the transaction taken into consideration was only prohibited as it did not meet the requirements previously set by the Commission after Phase I investigation (as we have seen, commitments were extremely poor and insufficient to tackle some of the issues which had emerged throughout the process). Furthermore, we shall also analyse whether the Commission rejects only those concentrations having a great dimension. If that is the case, it will be important to understand how to reform competition law. It would be very premature to draw

[86]Data refers to 1990-2009. Up-to-date information is available in Chapter 3. Source: Mark Thatcher, *European Commission merger control: combining competition and the creation of larger European firms* (London: European Journal for Political Research, article available online at: http://eprints.lse.ac.uk/54743/, 2015), 18-19.

conclusions at this stage and the aforementioned problems will be better tackled in Chapter 3.

2.3 In search of a new growth path

2.3.1 Brief comparison between US and EU approaches to competition law

The failures of several merging operations and acquisition projects such as Siemens/Alstom gave rise to increasing concerns, focusing on the possible inefficacy of existing regulatory mechanisms. The legal framework appears to be obsolete and antiquated. Attaining crucial industrial objectives in Europe will constitute an even more difficult task if legislation does not adequately change adapting to Europe's emerging needs. Adjusting principles and norms to the surrounding reality is, therefore, imperative. The Union is currently facing global challenges like the growing power of Google, Apple, Facebook, and Amazon (GAFA). European competition law does not take into consideration the fact that companies based in third countries do not abide by the exact same precepts and tenets which domestic firms have to follow strictly in order for them to operate on the market. In short, when Europe applies its traditional laissez-faire principles and facilitates access to its economic area by international corporations, it immediately figures out that most RoW countries are not subordinate to even remotely similar standards and constraints. As a consequence, they have more margin of manoeuvre, fiscal space and freedom of action to accomplish goals which are frequently in contrast with European rules, violating and infringing many of them. This is mainly due to the crucial importance of competition law in the EU; in point of fact, it prevails over the whole array of Community or MS industrial policy aims and tools[87]. In order to better comprehend what ought to be done to improve Europe's current approach to competition legislation, a comparison between EU and US laws and industrial policy measures will be drawn. We shall subsequently examine China's behaviour in international markets so as to understand how the Union should respond to a number of threats with respect to global commerce. Modifications in the application of merger control might be necessary, in that an excessively rigid interpretation of the legal

[87]Bruno Deffains, Olivier d'Ormesson and Thomas Perroud, *Competition Policy and Industrial Policy: for a reform of European Law* (Brussels: Fondation Robert Schuman, 2020).

framework may hinder the formation of European champions. New paths for economic growth and enhancing competition will be explored. Taking US competition rules as a frame of reference, we will attempt to compare the two systems and see whether the US effectively uses more flexible legal instruments to deal with mergers, acquisitions and the establishment of new powerful players. In the US, States can choose to exclude a range of activities from the implementation of competition legislation. This exemption is part of the so-called "State action doctrine"[88], an idea driven by established and widespread federalist values. The American Supreme Court seems to be on average "more respectful"[89] of state sovereignty than the European Court of Justice is. The inherent purpose of competition is also different: in the United States, the primary objective of the regulatory framework is to punish private companies' anti-competitive conduct and not to sanction state-owned or -managed undertakings' actions. This doctrine is based upon a Supreme Court's ruling known as "Parker v. Brown"[90], which establishes that the Sherman Act, intended to forbid numerous anti-competitive practices, does not apply to state activities (evidence is needed in order to demonstrate that there exists "close state control of that activity"; see: Supreme Court Decision on "North Carolina State Board of Dental Examiners v. FTC18", 2015[91]). According to US competition law, it is not important to know whether a certain agency belongs to the State (this would not be enough to be exempted from the proper application of existing rules); however, it is crucial to examine whether the State has effective control over the company (or agency)'s activity and if it retains the power to give orders to said entity (this criterion is known as "intent and control"). While these mechanisms might seem not to be extremely objective as decisions are at the court's discretion, there is a marked difference in attitude with EU law. As a matter of fact, the European Union's regulatory system uses overall objective criteria to first establish the nature as well as the prerogatives of a certain entity in order to determine whether its activities fall within the remit of public authority's competences. The scope of the activity is, thus, determined more concretely: e.g. if a concessionaire of

[88]https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/state-action.

[89]Bruno Deffains, Olivier d'Ormesson and Thomas Perroud, *Competition Policy and Industrial Policy: for a reform of European Law* (Brussels: Fondation Robert Schuman, 2020), 8.

[90]Ibid.

[91]Supreme Court of the United States, *North Carolina State Board Of Dental Examiners V. Federal Trade Commission* (Washington DC, available online at: https://www.supremecourt.gov/opinions/14pdf/13-534_19m2.pdf, 2014).

public services is controlled by the State or a public authority and the concessionaire is a public body or institution, the public authority is deemed to have monitoring powers; in this instance, the controlled agency or entity might be regarded as being part of the State. Furthermore, US competition law does not apply to federally-owned companies, such as those operating in postal services. In Europe, regulation always applies, even in cases of government-owned enterprises or regulated companies. Additionally, many major "strategic" activities in the United States are not subject to the implementation of a number of competition laws. In a nutshell, the US system is more flexible and less invasive; it also entails a more subjective interpretation of legislation (N.B.: exempted companies will not fall under the jurisdiction of the Department of Justice and the Federal Trade Commission).

2.3.2 China's unchecked use of state support and economic aid

Chinese aggressive tactics in international trade involve the continuous use of unfair practices, such as government assistance to national champions competing with their European counterparts, and beggar-thy-neighbour policies. The combination of these dangerous tools is detrimental to worldwide commerce. According to the Wall Street Journal[92], Huawei has received an amount roughly equivalent to 75 billion US dollars in state aid, by means of tax breaks, financing programmes and "unrestricted" access to state resources. This allowed the company to become a global leader in telecommunications equipment and consumer electronics. However, the multinational corporation has always denied said claims. But the fact that the Chinese government actively helps technological companies enabling them to thrive in international markets in spite of competition rules is certainly evident. There are multiple forms of state aid which can be utilised by firms to access global markets more easily and rapidly: they can be subsidies, loans from state banks, capital increases and so forth[93]. Many of these transactions are invisible to European institutions (e.g. the Commission), because they may take the form of hidden

[92]Chuin-Wei Yap, *State Support Helped Fuel Huawei's Global Rise* (New York City: Wall Street Journal, available online at: https://www.wsj.com/articles/state-support-helped-fuel-huaweis-global-rise-11577280736, 2019).
[93]François Brunet and Patrice Gassenbach, *Il faut doter Bruxelles d'un vrai service d'intelligence économique* (Paris: Les Echos, available online at: https://www.lesechos.fr/idees-debats/cercle/il-faut-doter-bruxelles-dun-vrai-service-dintelligence-economique-1145764, 2019).

operations. The Commission ought to be equipped with an efficient economic intelligence service which might investigate and monitor these unlawful acts. The sophistication of Chinese "economic" tools may make it more difficult to carry out thorough analyses and investigations. For instance, the development of Contemporary Amperex Technology Co. Limited (CATL) is certainly linked to China's unrestrained utilisation of public aid. Due to massive government support (starting in 2013), the company has in fact become the world's leading producer of batteries for electric vehicles[94]. Since electric batteries constitute about 30%/40% of the total cost of an electric vehicle (EV), firms which enjoy a large share of the market de facto have a significant economic advantage within the sector. Moreover, EVs will probably represent 57% of light vehicles sales according to projections and 30% of motor vehicles by 2040. Initially, CATL manufactured substandard and second-quality batteries and was enduring distress due to growing competition in the industry: the Korean LG Chem and the Japanese Panasonic were threatening the firm's hold on the Chinese market. In 2015, in order to relieve pressure on national battery manufacturers, the government required automotive companies to purchase Chinese batteries (and equip their vehicles with them) if they wished to receive state subsidies. At that point, Chinese-based manufacturing corporations (even international producers) stopped equipping their vehicles with products from LG Chem and Panasonic. CATL began building numerous factories and thanks to government intervention, it became one of the largest manufacturers of electric batteries worldwide. CATL was also able to enter European markets. The Chinese policy of subsidising car companies which purchase batteries from Chinese suppliers is absolutely incompatible with European competition legislation. The same norm could not have been applied in the EU and it would have been incompatible with the principles of a free and functioning domestic market. The criterion of national preference is inconsistent with European state aid laws as well. Merger controls in China are based upon "variable geometry" mechanisms. Furthermore, they ordinarily (almost exclusively) apply to foreign groups, whereas Chinese government-run businesses tend to be exempted. Between 2008 and

[94]Heekyong Yang and Hyunjoo Jin Factbox, *The world's biggest electric vehicle battery makers* (London: Reuters, available online at https://www.reuters.com/article/us-autos-batteries-factbox/factbox-the-worlds-biggest-electric-vehicle-battery-makers-idUSKBN1Y02JG, 2019).

2013, only a minority of notified M&A (15%) were about transactions between Chinese companies. In comparison, 47% of all concentrations notified to the EU Commission were among European businesses, whereas 16% concerned mergers of foreign undertakings. Conversely, in China even mergers regarding state-managed industrial giants can be carried out without notifying competent authorities (see China Unicom and China Telecom in 2009). And, by the same token, the concentration between CSR and CNP was approved in order for the newly-established firm (CRRC) to become an undisputed world leader in the field of rolling stock manufacturing and related areas; this argument was also used by France and Germany to defend the proposed creation of a new firm as a result of the Siemens/Alstom merger project[95]. The CSR/CNP merger was permitted by the Chinese Ministry of Commerce (MOFCOM): the decision was taken with a view to protecting “national interest”, since the concentration would have led to the establishment of another leading Chinese champion, and industrial policy goals were predominant. Applying this logic, another merger involving China Shipbuilding Industry Corporation (CSIC) and China State Shipbuilding Corporation (CSSC)[96] was also allowed on 25 October 2019 by the state-owned Assets Supervision and Administration Commission (SASAC). Chem China’s acquisition of Sinochem was also approved by June 2018 and the deal was worth approximately 120 billion US dollars. Chinese institutions take unilateral decisions without even consulting competition authorities according to the criteria of “national interest” and “industrial policy”. Growth in global market shares actually compensates the loss of domestic competition and the government can always impose its own agenda. The main objective of comparing EU, US and China competition laws is to comprehend how European legislation can be excessively burdensome and unbearable for European firms. American and Chinese undertakings can, in fact, through various derogations and by applying the “national interest” logic, merge and create global superstar companies able to take over European markets while big EU businesses risk losing ground to their counterparts. It is clear that the Union cannot abdicate its own industrial policy ambitions, and competition law must be revised in a comprehensive manner.

---

[95] http://english.mofcom.gov.cn/article/newsrelease/counselorsoffice/westernasiaandafricareport/201509/20150901124369.shtml.
[96] https://www.maritime-executive.com/article/csic-cssc-re-merger-completed.

2.3.3 Behavioural commitments should be approved more frequently

Following the Siemens/Alstom merger failure, proposals were brought forward by France, Germany, Poland (and others) about the importance of acknowledging the fact that behavioural commitments constitute a valid alternative to structural corrections and that they should be accepted more frequently by the European Commission. In practical terms, the Commission regularly supports the implementation of structural changes such as sales of subsidiary companies, factories, divesting certain markets or activities, etc. In horizontal mergers (consolidation occurring between companies which are active within the same industrial sector, i.e. competitors; these mergers can give origin to efficient economies of scale), the Commission systematically dismisses behavioural commitments[97], and exceptions to this tacit rule tend to be extremely unusual. Several national authorities, instead, do accept behavioural corrective measures more often. In fact, from 2008 to 2018, about 36% of the decisions issued by the French Autorité de la Concurrence were subject to the adoption of behavioural remedies (not structural ones). At the European level, less than 20% of total permissions concerned mergers and acquisitions which were conditional upon the implementation of said type of commitments. Behavioural measures bring about several benefits:

(1) they are less arduous to apply; conversely structural remedies[98] are more complex, in that they frequently foresee certain strict corrections (e.g. obligations to divest parts of the purchased activities, reduction or elimination of synergies which represent some of the main advantages of horizontal mergers, etc.).

(2) They can be revised and accommodated to a number of needs in the process.

The Commission's unwillingness to adopt behavioural commitments seems to derive from the fact that these types of measures are seen as excessively expensive and they may

[97]Remedies (Antitrust). Behavioural commitments: special conditions like providing a range of services or goods subject to several responsibilities (see Case AT. 39692- IBM Maintenance Services). Available online at: https://www.concurrences.com/en/glossary/remedies-antitrust en#:~:text=Structural%20commitment%20includes%20the%20divestiture,accept%20both%20types%20of%20commitments.

[98]Ariel Ezrachi, *Under (and over) prescribing of structural remedies* (Oxford: The University of Oxford, Centre for Competition Law and Policy, available online at: https://www.law.ox.ac.uk/sites/files/oxlaw/cclp_l_13-05.pdf, 2005). Structural commitments: divestiture of assets (see Cases AT. 39388 and AT. 39389, German electricity industry).

also be easier to evade or bypass. In fact, unlike structural commitments, behavioural ones take several years to be implemented.

2.3.4 Some trade-offs must be accepted

Accepting various trade-offs between advantages and drawbacks of concentrations might be necessary in order to take account of industrial policy interests; competition law should not impede the creation of European champions, as this would be detrimental to economic growth in the long run. In point of fact, most mergers occurring between large firms create many efficiencies within a certain sector, e.g. they may enhance competition and incentivise rival companies (for example, by challenging the market position of dominant undertakings) to innovate more (this will bring about positive effects with respect to competition). However, M&A in one sector can also pose certain threats to the development of other industries, thereby creating competition problems. As a general rule, the Commission examines the numerous benefits of a merger in a specific market; afterwards, it analyses the other market (threatened by the acquisition) in isolation, while looking for solutions to several emerging issues. Nevertheless, the Commission never carries out a "genuine" cost-benefit analysis prioritising the several positive aspects of a concentration over the few disadvantages or downsides which it may involve. The DG COMP might use the Swiss Merger Regulation as a benchmark for future change to its current legislative provisions on competition. Article 10(2)b[99] (Swiss Merger Regulation) states: «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.» In order to change the existing framework, Article 2 of Regulation 139/2004[100] ought to be slightly modified, mentioning "compensation" between advantages and disadvantages of

[99]Swiss Federal Council, *Ordinance on the control of concentrations of undertakings* (Bern: Swiss Confederation, 17 June 1996 updated to include changes and amendments in legislation on 1 January 2013). Available online at: https://www.admin.ch/opc/en/classified-compilation/19960295/index.html.
[100]Economic Concentration Regulation 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) can be found on the institutional website: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32004R0139.

concentrations. Subsequently, Guidelines used for the assessment of "horizontal" and "non-horizontal" merging operations should be amended[101].

2.4 EU Competition Policy needs to modernise itself

On 4 July 2019, the German federal minister for economic affairs and energy, the French minister of the economy and finance, together with their Polish "homologue" minister of entrepreneurship and technology released a document called "Modernising EU Competition Policy", by means of which they called for the European Commission to intervene in the following areas: (1) modernisation of merger control, (2) reinforcing European cooperation and joint ventures, (3) strengthening European joint ventures and cooperation, (4) increasing the Council's input into policy proposals and decision-making, while encouraging behavioural corrective measures. In regard to competition, the three ministers made a few requests to the Commission:

Competition policy cannot work unless it takes into account what is happening in the rest of the world: in order for it to further improve, it has to effectively confront emerging threats arising from globalisation and third countries' state intervention in merger control. Many players encourage the use of unfair practices, exempt many of their industries from competition regulations and foster the growth of concentrations and the emergence of new industrial champions. Guidelines on mergers should be modernised as swiftly as possible. Financial power of state-run and subsidised firms should be considered when evaluating whether a merger would remarkably hamper competition.

It is necessary to confront unrestrained market dominance of big technological undertakings. Simplification of provisional measures should be considered in cases of urgency in order to prevent irreversible harm to competition and dynamicity. Risk of competition losses or grave limitations should be tackled and/or avoided, especially with respect to the rapidly evolving reality of digital markets. Secondly, oversight mechanisms should be strengthened so as to ensure that merger legislation is strictly respected in addressing potentially hostile takeovers. Certain companies have increasingly resorted to unfair practices such as predatory acquisitions of young firms, with the purpose of wiping

[101]Bruno Deffains, Olivier d'Ormesson and Thomas Perroud, *Competition Policy and Industrial Policy: for a reform of European Law* (Brussels: Fondation Robert Schuman, 2020), 27.

out prospective competitors and safeguarding their market power. The numerous anticompetitive effects arising from said measures are difficult to foresee. However, in order to preserve potential competition within the digital sectors, the DG COMP in coordination with MS competition authorities ought to examine such M&A more severely and opt for the imposition of strict conditions when needed[102].

The possibility to carry out ex-post analyses of merging operations should not be discarded, as assessing the impact on the market that these concentrations entail is key to maintaining high levels of competition. Leading players within the industry, e.g. major platforms should undergo in-depth evaluations. Furthermore, additional rules should be established to guarantee the effective functioning of markets and achieve fundamental innovation goals within the framework of the digital economy. These norms ought to tackle issues such as «data access, data portability, platform interoperability, unbundling and auditability.»[103] They will have to ensure transparency, observance of the legislation, while countering discriminatory practices. The adoption of thresholds based upon the amount of every merger transaction may also constitute a viable solution to block anti-competitive mergers.

An overhaul of merger control rules should be taken into consideration, as it may be useful to modernise and redefine current standards on the evaluation of horizontal mergers and the interpretation of "relevant market", so as to obtain a more flexible assessment model, while leaving more room for EU industrial policy long-term choices. Import-related competition as well as third countries' industrial policy strategies must be

[102]Bundesministerium für Wirtschaft und Energie, Ministère de l'Économie et des Finances, Ministerstwo Przedsiębiorczości i Technologii, *Modernising EU Competition Policy* (Berlin: German, French and Polish governments, 2019).

[103]Ibid.

Source: https://twitter.com/eu_competition

scrutinised in order to anticipate multinational competitors' moves and better tackle possible predatory acquisitions or the establishment of any dominant position. Subsidised companies ought to be carefully monitored. Efficiencies should be evaluated in the appraisal of mergers regarding global actors entering European markets as they may hinder EU domestic industries. The single market should benefit from clearly positive outcomes and must avoid any type of distortion caused by international firms' accession: European consumers and businesses come first. The creation of EU joint ventures shall be endorsed. It will benefit SMEs and start-ups more than other enterprises. The Commission should pay attention to transnational European value chains and must favour their establishment by guiding companies and advising them on the best strategies to pursue.

Strengthening the DG COMP's consultative role is paramount, in that only the Commission can effectively deal with the challenges of the digital ecosystem. An independent body may be set up to support the DG COMP and provide more comprehensive programmes to address the issues which have been previously mentioned. The Advisory Committee should have a greater say in merger assessment; its competences will have to be increased in order to make MS active players in the process[104].

France, Germany and Austria subsequently call for strengthening the Council's input into decision-making. Federalist MEP Guy Verhofstadt (Renew Europe- RE) would strongly support a change of course, but argued that reinforcing the Council with a view to reshaping the existing legislative framework and creating more industrial champions

[104]Ibid, 3.

could be ultimately detrimental to competition itself, as it would undermine the Commission's role in the process, rather than strengthen EU integration[105].

Behavioural remedies may be accepted in a majority of proposed domestic mergers as they are in France, albeit subject to close oversight by the Commission.

Nevertheless, before reforming competition we must take account of the fact that the acquis communautaire should set the minimum standards; the Franco-German manifesto and Franco-German-Polish proposal might be in contrast with some of the consolidated practices foreseen by the Treaties. Increasing interventionism by MS might be dangerous from the perspective of European integration[106]. As regards the creation of EU superstar companies, it is imperative to reform the legal framework without weakening the Commission's role, as EU competition policy has proven to be one of the most successful achievements of European integration and it cannot be sacrificed or hindered under any circumstance[107].

[105]Oscar Guinea and Fredrik Erixon, *Standing Up for Competition: Market Concentration, Regulation, and Europe's Quest for a New Industrial Policy* (Brussels: European Centre for International Political Economy, available online at: https://ecipe.org/publications/standing-up-for-competition/, 2019).
[106]Ibid.
[107]Guy Verhofstadt, *Europe's Missing Champions* (Brussels: Project Syndicate, available online at: https://www.project-syndicate.org/onpoint/europe-s-missing-champions-by-guy-verhofstadt-2019-03?barrier=accesspaylog, 2019) Project Syndicate.

Chapter 3- Future Perspectives

3.1 A softer Competition Policy?

3.1.1 "Protectiveness" vis-à-vis "Protectionism": implications for European integration

The fundamental aim of Chapter 3 is to provide answers to some of the questions raised in Chapters 1 and 2, by clarifying whether or not the Commission has effectively adopted an excessively restrictive competition agenda. In addition, possible deficiencies and weaknesses in legislation will be examined so as to address growing concerns over Europe's position in global competitiveness rankings and meet the expectations of European industry leaders. We shall debate some of the main ideas regarding merger evaluation ("prohibitionist" and "integrationist" views will be discussed). Numerous major findings concerning M&A prohibitions over the decades build on previous quantitative research. At the end of the Part 1 ("3.1 A softer Competition Policy?"), we will determine that, based on concentrations in various industries, the Commission is not hindering the creation of European larger firms. However, there exist numerous flaws in the present legislative framework which must be addressed and corrected, a few dealing with the possible adoption of behavioural remedies as an alternative to structural measures. The former might also be used in combination with the latter under certain circumstances. Additional vulnerabilities shall also be tackled, especially with respect to some of the provisions envisaged in the Treaty on the Functioning of the European Union (TFEU) and the Economic Concentration Regulation 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation).

Part 2 of the chapter ("3.2 The European Industrial Policy Strategy") presents a variety of medium- and long- term strategies to increase European innovativeness and make it easier to do business throughout the EU.

Before the actual analysis can be carried out, a summary of the present political situation shall be provided in order to contextualise the issues at hand and attempt to predict future developments in EU competition and industrial policies. The best starting point for an examination of current political scenarios and tendencies would be the 2017 French presidential election. From then onwards, the French Presidency has always been very open and outspoken about its range of desired changes in competition legislation.

During President Macron's speech on the European Union, delivered in the amphitheatre of the Sorbonne University on 26 September 2017, a few guiding principles were set out to further encourage achievements within the context of European industrial integration, highlighting the importance of the Franco-German engine while attempting to promote comprehensive reforms of both competition and industrial policies in order to establish a roadmap for future political, economic and social growth. Nationalist, isolationist and protectionist tendencies have spread considerably throughout the Western world in the latest decades and shall remarkably change the way in which globalisation has been conceived thus far. The argument brought forward by the French President is that populist parties and leaders simply point to the detrimental consequences of unrestrained or mismanaged globalisation but are incapable of addressing the root causes of said problems. In point of fact, extremists only offer limited responses in regard to rising challenges such as digital transition, terrorism, immigration, climate change; therefore, they simply expose unresolved issues without providing any viable answers with respect to these subject matters. Concrete and substantial decisions have to be taken in regard to domestic and global challenges. Firstly, Europe ought to tangibly focus on security. The «gradual and inevitable disengagement by the United States, and a long-term terrorist threat with the stated goal of splitting our free societies» require prompt and effective political intervention by the EU. To this end, European cyber security must be enhanced and a «common area of security and justice»[108] should be established as rapidly as possible. Defence Europe, including Permanent Structured Cooperation and the European Defence Fund[109], lies at the heart of the Union's current commitments in the realm of internal and external security. Building a "common culture" by «proposing a European intervention initiative aimed at developing a shared»[110] forward-looking strategy (which

---

[108]President Macron's *Initiative for Europe speech* is available online at: http://international.blogs.ouest-france.fr/archive/2017/09/29/macron-sorbonne-verbatim-europe-18583.html.

[109]The *Defense Advanced Research Projects Agency (DARPA)* is an agency of the *United States Department of Defense* dealing with the responsible development of cutting-edge military technologies, originally established in February 1958 by then-President Dwight Eisenhower to contain USSR influence and political might following the Soviet launch of Sputnik 1 in 1957. Projects funded by DARPA were crucial to the advancement of ICT and the spread of the Internet across the globe.

[110]Emmanuel Macron during his *Initiative for Europe speech* available online at: http://international.blogs.ouest-france.fr/archive/2017/09/29/macron-sorbonne-verbatim-europe-18583.html.

would entail the creation of a common intervention force complemented by a defence budget and a European doctrine of action; a European Intelligence Academy needs to be established) is a crucial objective.

Secondly, if the EU wishes to act consistently with regard to the ecological transition, it should adopt an industrial policy strategy addressing production and redistribution concerns. For this purpose, Europe should become a global standard-setter and a model when it comes to its highly-regarded economic and social paradigms. A functioning European energy market capable of increasing network interconnections across the Union's territory while diversifying sources of supply[111] is fundamental so as to achieve almost full autonomy from third countries.

Thirdly, digital technology ought to be properly handled so as to attain greater European sovereignty in hi-tech. Being able to attract qualified professionals is paramount and key to future economic growth. Macron also put forward proposals for the establishment of a European agency which should deal with "disruptive innovation", comparable to the Defense Advanced Research Projects Agency (DARPA) in the United States, in order for the EU to become a powerful leader within said sector. And «rather than bemoaning the fact that the current leaders in the digital technology are American, to be followed by the Chinese, we must create European champions, we must invent in this global upheaval fair securities and efficient regulations.»[112] Europe must delineate its own set of rules in order to ensure that the ferocious "jungle law" does not prevail. An updated normative framework ought to be supplemented by the creation of major digital platforms and adequate data protection systems. Corporate taxation rates should become increasingly uniform across the EU and international actors must be subject to the exact same treatment that European companies enjoy, without several unfair advantages or loopholes

[111] Simone Tagliapietra, *Dis-jointed European energy* (Rome: Eastwest European Institute, published in Eastwest magazine, 2016).

[112] The entire document can be viewed on the website: http://international.blogs.ouest-france.fr/archive/2017/09/29/macron-sorbonne-verbatim-europe-18583.html.

which they have exploited to date: competition should be fair and all players should be put on an equal footing.

Source: https://www.lefigaro.fr/politique/le-scan/2017/09/26/25001-20170926ARTFIG00105-ce-que-macron-va-proposer-pour-l-europe-dans-son-discours-a-la-sorbonne.php.

The Union's economic and political position can only be consolidated by strengthening the single currency and reinforcing the banking union. The common market cannot be neglected, in that it represents one of Europe's most successful accomplishments and, as Jacques Delors pointed out, it was intended to «create competition that stimulates, cooperation that strengthens and solidarity that unites.»[113] There is no apparent contradiction between "pan-European convergence" and competitiveness: these two aspirations are perfectly compatible with each other based on the French President's vision for the Union. The concept of «l' Europe qui protège», brought up by Macron and from this point on indicated as "protectiveness", would not equal "protectionism". In fact the two notions are regarded as being antithetical. In this sense, a more flexible competition regulation framework and a sensible long-term industrial policy strategy are not part of a "mercantilist" mindset. In other words, protectiveness would allow the Union to look after the common European interest without hampering international political and commercial relations with friends and competitors.

[113]Sofia Fernandes, Eulalia Rubio (preface by Jacques Delors), *Solidarity within the Eurozone: how much, what for, for how long?* (Paris: Notre Europe, document available online at: https://institutdelors.eu/wp-content/uploads/2018/01/solidarityemus.fernandes-e.rubionefeb2012.pdf, 2012), 6.

3.1.2 A more pragmatic vision for Europe

Contrary to all initial expectations, Brexit and Trump were able to stimulate pro-EU political stances and foster a strong sense of belonging to the European construction[114]. The Union should adopt a more pragmatic and rational approach toward its future development, abandoning universalist or idealist positions, while focusing on its exceptionalism. In fact, it ought to safeguard its liberal-democratic order domestically while accepting a return to a more fragile and unstable liberal order across the globe. The EU might also tackle issues relating to migration, free trade and the monetary union so as to better address the detrimental consequences of globalisation and assert itself as a winner in the process[115]. The so-called rules-based international order, guided by the United States, has suffered a dramatic crisis. Its first phase ("liberal order 1.0") was characterised by an underlying American project of protecting Western countries from Soviet and communist imperialism, while favouring an arms race on the part of European States to possibly counter a number of threats originating from the USSR and its powerful alliance consisting of Warsaw Pact puppet states, de facto dominated by Moscow and subject to its rule. The second stage of this order ("liberal order 2.0") witnessed a significant improvement of economic freedom with the US taking the lead during this process of continuous change followed by the European Community, which, thanks to the Single European Act of 1986, greatly contributed to the enhancement of its residents' living standards and it finally pulled down its internal borders giving its people, capital, goods and services (see "the four freedoms") the opportunity to move from one MS to another, abolishing customs and checkpoints[116]. Nowadays, EU Member States reject the notion of Westphalian sovereignty (the EU itself is a post-Westphalian construction[117]) while embracing the concept of reciprocal interference within the realms of domestic affairs and security according to the fundamental tenets of democracy, transparency and the rule of law. From 1989 to 1999, America had its "unipolar moment"; however, by the end of 1999, Europe enjoyed its role as cultural leader of a "universalist decade"[118].

[114]Mark Leonard, *L'Europe qui protège: Conceiving the next European Union* (London: European Council On Foreign Relations, 2017).
[115]See globalisation "winners", Chapter 1.
[116]Ibid, 2-6.
[117]Mario Telò, *European Union and New Regionalism* (Brussels: Routledge, 2014), 249-277.
[118]Mark Leonard, *L'Europe qui protège: Conceiving the next European* Union (London: European Council On Foreign Relations, 2017), 2-3.

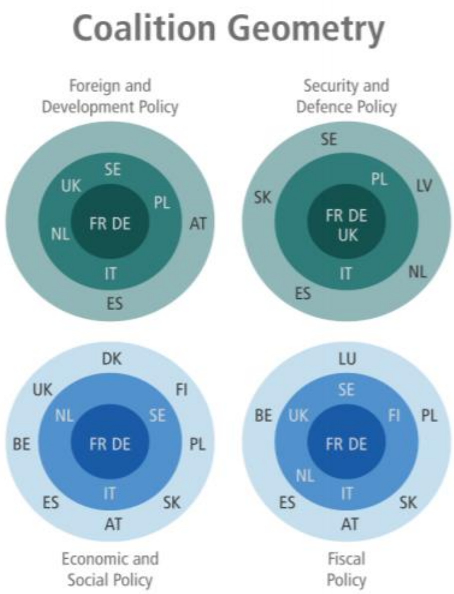
Nevertheless, from the financial crisis onwards the European Union had to face a peculiar "Galapagos moment" when it realised that it was not the only role model for the world (see Mario Telò, "Regionalism in Hard Times"[119]) and that its main strength came from internal achievements and the deepening of Union institutions. Macron's election as French President on 7 May 2017 can be regarded as a turning point for European integration. *Le Président* was able to defeat his powerful populist political adversary Marine Le Pen and he also attracted bipartisan support from right-wing republicans, neo-gaullists and Christian democrats while seducing progressive voters, on the other hand. During his electoral campaign, Macron emphasised aspects connected to the need for a common European defence and security policy, complemented by the willingness to radically reform European institutions. He also focused on the completion of the banking union and perfecting the single market. The "protection" agenda which was put forward may, therefore, be regarded as unifying in purpose, in that it can be adapted to Southern European countries' necessities (through the allocation and earmarking of monetary resources by means of funds and other instruments) and Eastern Europe's growing demands for support against Russia's political and military aggressiveness. With his various political messages, Macron has transcended numerous divisions that had characterised the EU in the past while going beyond the logic of "concentric circles", which might ultimately prove deleterious to the Union's greater good. In fact, he has been able to unite MS around common economic and foreign policy aims. Submitting his long-term plan for Europe, he has concentrated on ambitious investments and reforms. This being said, in order for such programme to be eventually successful, Germany must actively take part in the achievement of its goals. Focusing on the economic part of the plan, major goals will entail spending more on European industrial policy and strengthening the EU's traditional economic sectors, incentivising concentrations and sticking to a "protection" agenda which ought to benefit every Member State. Competition legislation and associated fields of relevance can be reformed only if the twin engine (i.e. Germany and France) is capable of displaying a remarkable breadth of vision for Europe, convincing all the other Member States of the benefits that a common

[119]Mario Telò, *Regionalism in Hard Times* (Brussels: Routledge, 2017), 51-56.

industrial policy would bring about, after getting rid of the current regulatory and bureaucratic obstacles.

3.1.3 Alternative views on merger evaluation

Returning to the core subject of our debate (i.e. the integration of established national champions to create new powerful EU firms), France and Germany need to effectively cooperate in order to reform EU industrial policy and the Union's competition regulatory framework. However, before we dive into the numerous strategies and purposes which could be pursued by the two EU members to improve European competitiveness and establish larger EU firms, we need to comprehend how the DG COMP is dealing with M&A. As regards more specifically the Commission's approach towards competition, we should take account of the fact that there exist several views on the subject. The European Community Merger Regulation (ECMR) seems to promote an "integrationist merger policy"[120]. Actually, in a majority of cases of acquisitions and merging operations, the Commission both utilises criteria relating to competition objectives and permits the development of EU champions to increase intra-European economic and political integration. In an article of 1989, Sandholtz and Zysman[121] claimed that the main aim of the common market was to allow European undertakings to compete with their US and Japanese counterparts on a level playing field, by creating transnational EU firms. Following their footsteps, neo-functionalist scholars argue that the Commission, in collaboration with



Source: ECFR's EU28 Survey 2018, www.ecfr.eu/eucoalitionexplorer

[120]Mark Thatcher, *European Commission merger control: combining competition and the creation of larger European firms* (London: European Journal for Political Research, article available online at: http://eprints.lse.ac.uk/54743/, 2015), 18-20.
[121]Wayne Sandholtz and John Zysman, 1992: *Recasting the European Bargain* (Cambridge: World Politics 42, Cambridge University Press, 1989), 95-128.

cross-border businesses, and endorsed by the European Court of Justice, supports a "tri-dimensional" process which entails enhancing transnational trade, fostering market opening and reinforcing cross-border companies[122]. According to said theories, the Commission aims to hold together a heterogeneous coalition of actors with different interests and preferences. Some of these players strive for a "depoliticization" of merger decisions while others advocate for the establishment of European superstar firms. The Commission aims to accommodate these diverse goals in upholding the idea of protecting competition. A range of purposes are encompassed, which include efficiency-related objectives, economic freedom, containing excessive business power and removing barriers to economic development[123]. Based upon neo-functionalist theses, the DG COMP will encourage mergers by European companies, against the background of a broader strategy for enhancing the degree of political and economic integration (N.B. This proposed "integrationist" view on mergers has been analysed only to a small extent). However, in light of the Siemens-Alstom rejection this may seem counterintuitive. So, what went exactly wrong with the merger? And would it be possible to reform existing legislation in such a way to advance the twin engine's "protective" agenda without hampering competition-related aims? First, we need to adopt an appropriate framework to exactly comprehend how the European Commission evaluates most mergers. Secondly, we need to properly understand whether or not the DG COMP is pursuing an "integrationist agenda". And finally we will try to find a compromise solution between the "institutional approach" of the Commission and the "industrial policy" criterion followed by MS. At the same time, we shall look for a solution to aggressive international competition within the context of European industrial integration (e.g. Could behavioural commitments represent a viable alternative to structural remedies so as to create European champion companies capable of confronting foreign players?). These issues will be debated in the following sub-paragraph about the Commission's role in mergers' appraisal.

---

[122]Wayne Sandholtz and Alec Stone Sweet, *Neo-functionalism and Supranational Governance*, (Oxford: The Oxford Handbook of the European Union, Oxford University Press, 2012).

[123] David Gerber, *Law and Competition in Twentieth-Century Europe: Protecting Prometheus* (Oxford: Clarendon Press, 2001, Published to Oxford Scholarship Online: January 2010 and available online at: https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199244010.001.0001/acprof-9780199244010).

3.1.4 Is the Commission undermining mergers? A look at the data

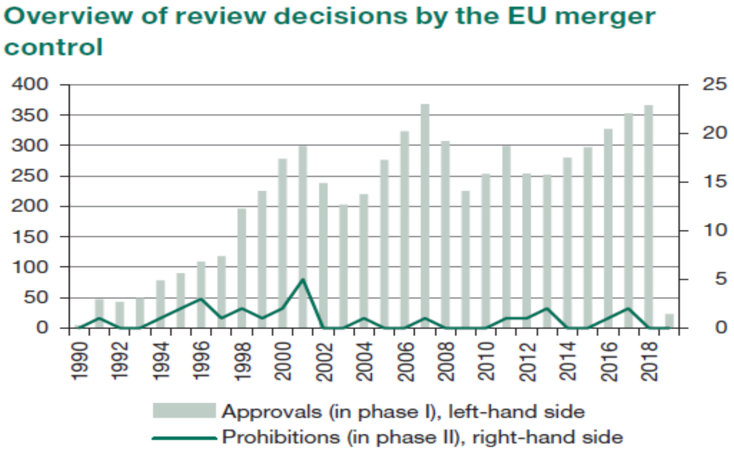
Based on a variety of aggregate data sets (from 1990 to 2009), it can be argued that the Commission has seldom utilised its powers to examine, impose corrections or reject proposed merger transactions. When it comes to procedures, the overwhelming majority of evaluations (92%) underwent phase I investigations based on Article 6 (Council Regulation (EC) No 139/2004). Only a small proportion of total cases (those that raised "serious doubts" about their consistency with the rules of the internal market) had to go through Phase II according to Article 8 (Council Regulation (EC) No 139/2004). The overall number of Phase II procedures covered 161 notifications (constituting less than 4% of all decisions). Out of the full amount of operations analysed most transactions have been approved unconditionally and swiftly under Article 6 (phase I) proceedings (3697 cases or 86% of notified operations). A minority of 190 cases (about 4%) were approved contingent upon a number of commitments to be accepted by the concerned parties under phase I process. Among the tiny group of mergers which had to make it through Phase II on the basis of Article 8, most were compatible with the European Union Merger Regulation (EUMR)[124], representing 85% (or 137) of phase II examinations. Only 15% of all proposed operations were prohibited during the second stage of merger proceedings accounting for less than 1% of total DG COMP decisions. However, we must also consider the number of effective withdrawals occurring after the notification date: in this case, the amount goes up to 3.6% (155 operations). Therefore, over 94% of all planned transactions have been accepted by the Commission[125].

[124]Economic Concentration Regulation 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) can be found on the institutional website: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32004R0139.

[125]Elisabeth Bublitz, Michael Leisinger and Nele Yang, Europe's Search for Superstar Firms: The Puzzle of European Champions (Kiel: Intereconomics, ZBW – Leibniz Information Centre for Economics, 2019), 5.

Vivien Schmidt and Mark Thatcher, *Why are neoliberal ideas so resilient in Europe's political economy?* (London: Routledge, 2014).

3.1.5 Fostering the emergence of European champions, Updating trade defence



Source: Elisabeth Bublitz, Michael Leisinger and Nele Yang, Europe's Search for Superstar Firms: The Puzzle of European Champions, retrieved from: European Commission: DG Competition. Merger Statistics, January 2019, available at https://ec.europa.eu/competition/mergers/statistics.pdf.

In view of an even more evident reduction in the number of rejections occurring between 2017 and 2018, it is extremely difficult to understand why the Siemens-Alstom merger project was ruled out in 2019, unless one takes into consideration the fact that various proposed remedies were regarded to be insufficient. Moreover, the Commission is reluctant to accept behavioural commitments. But is this a good enough reason to block the creation of a long-awaited European champion?

The facilitation of transnational mergers appears to be paramount: if potential gains in efficiency resulting from said operations were taken into greater consideration during the various stages of scrutiny, it would be easier to establish larger cross-border EU firms. Nevertheless, since the 2004 modification of EU merger legislation[126], the DG COMP has a legal duty to give more weight to efficiency gains and base its decisions on an extensive analysis of advantages and drawbacks of a proposed transaction. The negative effects on competition may, in fact, be compensated by some undeniable positive aspects originating from the merger. As we observed by looking at the data at our disposal, the DG COMP clears most mergers (prohibitions are very rare) after the first phase of investigation (90% of total cases are settled under Article 6 (Council Regulation (EC) No 139/2004) proceedings in Phase I, almost "automatically" without conditions). Mergers have to be examined only if they may exceed certain predefined thresholds and, as a

[126]Economic Concentration Regulation 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) can be found on the institutional website: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32004R0139.

consequence, they have to be formally notified to the Commission. But even among those operations which were assessed during Phase II, only 27 were rejected between 1990 and January 2019[127]. Given the fact that a majority of mergers are cleared and therefore approved by the DG COMP, some of the most prominent technocrats are worried that facilitating the application of M&A regulation even further might imply more competition losses and a decline in innovativeness and productivity gains. Therefore, according to this view, a more indulgent merger legislation would not go in the direction of favouring an increase in market's competitiveness. On the other hand, MS pushing for a more lenient domestic competition policy are demanding stricter rules to be applied in regard to foreign firms entering the single market, in order for the Union to discourage unfair practices and incorrect behaviours. Many international enterprises accessing the European Economic Area (EEA) regularly purchase and absorb start-ups and small companies before they can emerge as strong rival players. Some of these mergers, even when they acquire significant importance for the common market and might affect consumers in negative ways, are not evaluated by the competent authority (i.e. the Commission) as start-ups do not achieve a sufficient turnover and are, thus, below the pre-set relevant thresholds. This has forced several Member States to act unilaterally and introduce additional thresholds which take account of the transaction value (in addition to turnover-related prerequisites). In order to fill these gaps in legislation, the EU might intervene to reduce or modify existing thresholds[128]. The EU Commission should prevent its domestic start-ups from being swallowed up by foreign multinational enterprises and close current regulatory loopholes which damage internal competition and penalise consumers. Growing into a European champion might be particularly problematic for domestic firms that cannot gain market access due to the cumbersome presence of powerful and well-established digital platforms coming from third countries. For example, digital markets need increasing returns to scale, high externalities and effective data management. These characteristics are inherently difficult to obtain and once a big company, having invested extremely large amounts of money into the sector, has

[127]Merger statistics by the European Commission, available on the institutional website: https://ec.europa.eu/competition/mergers/statistics.pdf.

[128]Bruno Deffains, Olivier d'Ormesson and Thomas Perroud, *Competition Policy and Industrial Policy: for a reform of European Law* (Brussels: Fondation Robert Schuman, 2020), 38.

consolidated its position, it is not easy to challenge its power[129]. Going back to the main subject being dealt with in our discussion, the current definition of "dominant" businesses in EU competition law might not encompass several aspects which would need to be considered in order for it to be sufficiently comprehensive. It would be advisable to change the present rules, thereby including firms that are below existing thresholds when they have a high enough value of the transaction so as to prevent or counter possible abuses of market power. As far as the EU domestic market is concerned, becoming a European champion may entail competing with foreign undertakings (often State-sponsored or -subsidised ones) which do not comply with the principles of fair competition. This also raises the question of whether it would be appropriate to achieve effective reciprocity in commercial relations under the umbrella of international trade organisations (e.g. the WTO). Even internally some measures have to be taken in order for the EU to face emerging issues involving fair competition within the context of the common market. European state aid law currently focuses on distortive behaviours (and violation of the present legislation on government support) by MS. Said norms cannot be applied to foreign countries as they are not parties to the Treaty on the Functioning of the European Union (TFEU). On 10 April 2019, the EU Foreign Investment Screening Regulation[130] entered into force so as to implement screening mechanisms regarding Foreign Direct Investment in the Union extensively, encompassing strategic infrastructures and critical technologies. This Regulation enables competent authorities to analyse whether certain international actors are funded or controlled by another country; the Commission can now act and stop acquisitions according to public security concerns. Additionally, EU anti-dumping defensive tools have been modernised to address the issue of the level playing field. Updating these instruments is often not enough to tackle competition problems arising from unfair competitive practices. Addressing present limitations in the EU regulatory framework so as to prompt the creation of EU

[129]Government of the Netherlands, *Strengthening European competitiveness* (The Hague: Cabinet and Permanent Representations NL, available online at: https://www.permanentrepresentations.nl/documents/publications/2019/05/15/position-paper-strengthening-european-competitiveness, 2019).

[130]Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union can be found on the institutional website: https://eur-lex.europa.eu/eli/reg/2019/452/oj.

champions is crucial. Protocol No. 27 on the internal market and competition[131] affirms that the final aim of competition policy is to have an efficient system which impedes distortions to its normal functioning. In other terms, EU competition is geared towards enhancing coordination in the domestic market and preserving the system's correct operating mode from the hostile behaviour of certain market players. Ensuring the efficacy of a rule-based (relatively) laissez-faire model is crucial so as to safeguard the Union's fundamental liberties. EU law shall continue to conform with the overarching principles of non-discrimination. In fact, the present regulatory framework does not favour in any way Union-based businesses merely due to their location. Nonetheless, in order to facilitate mergers for EU companies, enabling them to effectively compete with their global counterparts, some "preferential" incentives on grounds of "protectiveness" against foreign undertakings' aggressive strategies have to be provided[132]. Competition policy certainly constitutes a major area of interest for the European Union and reforming it shall lead to improvements in competitiveness. However, other fields also need to be addressed, which may boost the economic environment in which firms operate both at the national and European level. Economic policy in particular ought to promote more specifically start-ups and established firms' continuous growth and success. Instruments of fiscal policy should be harnessed to prompt large-scale innovation. Social and employment policies (shared and special competences between the EU and its Member States) may be used to reduce or remove barriers to entry and mobility within the labour market[133]. As a general rule, these tools should only be aimed at tackling market shortfalls; businesses should be still in charge of their own investment choices. It is also important to bear in mind that domestic decisions concerning competition law will not be able to address outstanding problems originating from malfunctioning global mechanisms (an efficient level playing field can only be established if third countries consistently change their own approach to international trade). Bilateral trade agreements appear to be

[131] Protocol (No 27) on the internal market and competition the high contracting parties can be found on the institutional website: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008M%2FPRO%2F27.

[132] Mark Leonard, *L'Europe qui protège: Conceiving the next European Union* (London: European Council On Foreign Relations, 2017), 3-5.

[133] Jeromin Zettelmeyer, *The Troubling Rise of Economic Nationalism in the European Union* (Washington DC: Peterson Institute for International Economics, available online at: https://www.piie.com/blogs/realtime-economic-issues-watch/troubling-rise-economic-nationalism-european-union, 2019).

more than adequate to grant access to third countries' markets and better working conditions so as to achieve increasing reciprocity on the global stage. When these prerequisites cannot be successfully met, the revised proposal by the Commission for the establishment of an International Procurement Instrument (IPI, presented on 29 January 2016)[134] could indirectly contribute to the enhancement of global commercial relations. IPI would enable the DG COMP to look into third countries' alleged discriminatory practices directed against EU-based companies, e.g. within the context of public tenders. Therefore, the Commission would intervene to resolve said issues by negotiating them with the parties involved.

3.1.6 The ideological context

Returning to the main point of our debate, it is absolutely crucial to analyse several dominant schools of thought in the field of M&A. Chicago School theories on competition were particularly popular in the late '70s and early '80s[135]. During the Reagan Era, the US Supreme Court started to eradicate previous invasive antitrust practices which were mostly used from the 1950s to the early 1970s. By that time, the Court began to adopt more indulgent and permissive measures. As icing on the cake, the Chicago supporter Professor William Baxter (1981-1983) was designated by then-President Ronald Reagan (appointed in 1981, serving until 1989) to lead the Antitrust Division (A.D.) of the United States Department of Justice. Baxter was known as being fiscally conservative, but not a hardliner. However, he is still conventionally regarded as a leading Chicago School figure[136]. Under his tenure as head of the A.D., the competition expert upheld a "purist" laissez-faire vision of merger regulation. He affirmed that the widespread cliché according to which «big is bad and small is beautiful»[137] was only a populist catchphrase with no meaningful implication. Subsequently, Baxter ruled out

[134]Information about the International Procurement Instrument can be found on the institutional website: https://ec.europa.eu/growth/single-market/public-procurement/international_en.
[135]Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago* (Ann Arbor: University of Michigan Law School, available at: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1060&context=reviews, 2009), 1912.
[136]This classification was also used by John E. Lopatka and William H. Page, *Economic Authority and the Limits of Expertise in Antitrust Cases* (Ithaca: Cornell Law School, 2005), 634.
[137]Stuart Taylor Jr., *Antitrust post left by Baxter* (New York City: New York Times, available online at: https://www.nytimes.com/1983/12/09/business/antitrust-post-left-by-baxter.html, 1983).

intrusive stances concerning vertical restraints and M&A. He considered Antitrust intervention counterproductive as vertical restraints and mergers do benefit consumers and stakeholders and do not hamper competition[138]. The President then decided to complement Baxter's designation by appointing Chicago School economist James Miller as chairman of the Federal Trade Commission (FTC)[139]. In the years following the "Reagan Revolution", some things changed with regard to competition, especially with the advent of the Clinton Administration, but the cornerstones laid by Baxter and Miller remained intact and many antitrust agencies officials tended to favour non-intervention. On the other hand, post-Chicago theories dismissed the non-interference principle, explaining that unregulated free markets can damage consumers and significantly distort competition. Debating Chicago School-related theories (be they classic, post- or neo-) may appear somewhat preposterous while trying to provide an "ideological" framework regarding the Commission' approach to competition. However, we may also find a few similarities between different but overall comparable contexts such as those of the United States and the European Union. This is why we will attempt to reconcile post-Chicago and Freiburg School theories, taking into account the main common features which characterise the two. By 1960, the Ordoliberal Freiburg School has had a remarkable impact on European Community/European Union competition policy. The influence exerted by this doctrine over legislation is very palpable when observing the Commission's behaviour with respect to subject matters which are irrelevant to competition protection[140]. The Commission constantly aims to improve market integration and efficiency. This approach is mirrored by European Union competition law, which stipulates that the DG COMP can take measures with a view to addressing problems concerning employment within certain industries or specific regions of the Union. Additionally, the Commission can deal with industrial restructuring and may also provide special protection to SMEs[141], notwithstanding the fact that the Union has no

[138]Vertical restraints are competition limitations that can occur as a result of an arrangement between companies or individuals at different stages of production and distribution. They are frequently considered distortive. The Antitrust authority should, hence, intervene and implement proper measures.
[139]Robert Pitofsky, *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (Oxford: Oxford University Press, 2008).
[140]Giorgio Monti, *Article 81 EC and Public Policy* (Leiden: Common Market Law Review published by Wolters Kluwer Law and Business, 2002), 1057.
[141]Angela Wigger and Andreas Nölke, *Enhanced Roles of Private Actors in EU Business Regulation*

CHICAGO SCHOOL	POST-CHICAGO THEORIES
1. "Purist" laissez-faire vision on merger assessment. 2. The cliché «big is bad and small is beautiful» is not backed by evidence. 3. No interference as concerns vertical restraints and M&A. 4. Antitrust may be counterproductive: mergers and vertical restraints are the result of legitimate decisions. The "invisible hand" will make the final decision and determine how successful these choices are going to be.	1. The government (or the Antitrust authority) ought to take measures when the market is not capable of functioning efficiently and solving harmful effects of "bad" merger decisions. 2. While it is true that some monopolies and cartels might be eroded quickly and the market itself can correct inefficiencies resulting from their establishment, there are numerous counter-examples (e.g. 75 years for the United States Steel Corporation to reduce its market dominance and to attain competition and independent pricing in the market; 55 years for General Motors to lower its prices and gradually limit its product leadership due to Japanese access to the markets). 3. It is not true that securities markets are "efficient" at any moment because of their "daily" equilibrium. Merger medium and long-term effects on the economy cannot be measured by the stock market. Stock prices tend to be volatile and change within a short period of time (they are not reliable).
INTERVENTIONIST INTEGRATIONISM BY MS	ORDO-LIBERAL FREIBURG SCHOOL
1. Supports mergers by trying to politically influence Commission members. 2. Fosters the creation of European larger firms and promotes an economically aggressive international agenda (laissez-faire on the global stage, emphasising the importance of protectiveness at the European level). 3. More flexible rules and the establishment of European champions will improve EU competitiveness in the world.	1. Aims to correct the detrimental effects of mergers and hinder the creation of cartels. 2. Wants to counter abuses of dominant position. 3. The market is not always efficient. It needs intervention by Antitrust authorities to work properly and ensure that consumers (see consumer welfare model) and competitors are not deprived of economic opportunities. 4. Competition cannot be hampered in that it is a driver of European integration; monopolies will not be accepted.

exclusive competence on employment (*special competence) and industrial policy (*supporting competence) issues[142]. The Freiburg School places emphasis on "good" competition which safeguards consumers and protects the free market from unfair practices, monopolies, oligopolies, abuses of dominant position and dangerous concentrations[143]. In general, mergers which are relevant to a certain market might require in-depth oversight so as to prevent damage to competition and alleviate problems

and the Erosion of Rhenish Capitalism: The Case of Antitrust Enforcement (Brussels, Journal of Common Market Studies, available online at: https://onlinelibrary.wiley.com/doi/10.1111/j.1468-5965.2007.00719.x,2007), 487.

[142]Division of competences within the European Union, retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aai0020.

[143]Dzmitry Bartalevich, *The Influence of the Chicago School on the Commission's Guidelines, Notices and Block Exemption Regulations in EU Competition Policy* (Brussels, Journal of Common Market Studies, available online at:https://onlinelibrary.wiley.com/doi/epdf/10.1111/jcms.12292, 2015).

originating from said operations. Among the most prominent members of the School, Ludwig Erhard had a major role as CDU Minister of Economic Affairs under Konrad Adenauer from 1949 to 1963. During his term in office, he strongly supported the "social market economy" (*soziale Marktwirtschaft*), concept that still lies at the core of Germany's welfare and economic policy. Post-Chicago and Freiburg "interventionist"[144] (see Walter Eucken) stances seem to go hand in hand and, in most cases, they overlap with each other. Conversely, the non-interference principle exalted by Chicago School theorists paradoxically produces the same result as the "integrationist" theories promoted by some MS (France and Germany, in particular). In fact, non-interference with regard to mergers would bring about more concentrations as a consequence, and this is exactly what MS are seeking to achieve by means of some form of intervention in order to foster the establishment of European champion firms. Taking account of the data previously illustrated in paragraph 3.1.3 ("Is the Commission undermining mergers? A look at the data") and in light of several ideological/political approaches described in the present paragraph, we may now answer to some of the questions which we had asked ourselves in Chapter 2. We might respond that the Commission is not at all biased against certain concentrations nor does it prohibit concentrations having a great dimension (once the concentration is Community-relevant its "dimension" per se becomes relatively insignificant). In a nutshell, the DG COMP is not hindering or impeding the creation of European champions. The Commission is indeed favouring most operations (more than 94% of transactions were approved over the years); we can affirm that it pursues a moderately (or relatively) neo-functionalist "integrationist" agenda driven by ordoliberal and Freiburg School values. We may, therefore, dismiss a variety of arguments used to allegedly demonstrate that the "neo-liberal" EU Commission employs "merger constraining policies"[145] as these theories are not backed up by facts (data sets tell us a completely different story) and they would be in contrast with classic Chicago School notions according to which public authorities should not intervene in mergers.

[144]Viktor J. Vanberg, *The Freiburg School: Walter Eucken and Ordoliberalism* (Freiburg: Institute for Economic Research, University of Freiburg, 2004).
[145]For legal provisions and restrictive practices, see D.G. Goyder, *EC Competition Law, 4th edition* (Oxford: Oxford University Press, 2003).

However, based on the current regulatory framework, the DG COMP cannot accept behavioural commitments (if not under exceptional circumstances) in an overwhelming majority of cases[146]. This, in turn, increases MS' hostility towards the Commission (MS, in fact, pursue a fully integrationist agenda to facilitate the establishment of larger European companies). Since ideology might only partially explain some of the tendencies which have been observed over time, we need to look into EU competition legislation and see whether it needs to be updated.

3.1.7 Why the current legislative framework needs an overhaul

In view of the fact that the Commission is not hindering or impeding the establishment of EU champions and is not even "discriminating" merging companies according to the dimension of fledgling business entities, we ought to analyse the current concentration legislation to understand what the possible flaws or deficiencies are, so as to correct them as rapidly as possible. As specified in "EU Competition law: merger legislation" by the DG COMP[147], non-structural remedies, e.g. behavioural corrections, can be accepted only exceptionally. According to the Commission, the most appropriate way to mitigate or eliminate occurring competitive problems is for the merging undertakings to divest certain activities. Alternative commitments would also entail providing grants and the like. These viable options are listed in paragraph 61 (Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004)[148]. In the past, the DG COMP has approved remedies involving the «the granting of access to key infrastructure, networks, key technology, including patents, know-how or other intellectual property rights, and essential inputs. Normally, the parties grant such access to third parties on a non-discriminatory and transparent basis.»[149] Furthermore, in several instances the Commission can accept remedies providing non-discriminatory access to infrastructure or networks by the interested entities. In doing so «the Commission will only accept such commitments if it

[146]Bruno Deffains, Olivier d'Ormesson and Thomas Perroud, *Competition Policy and Industrial Policy: for a reform of European Law* (Brussels: Fondation Robert Schuman, 2020), 26.
[147]European Commission, *EU Competition law: merger legislation* (Brussels: European Union, 2014), 235.
[148]Ibid, 243.
[149]The Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 can be found on the institutional website: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC1022(01)&from=EN, Paragraph 62.

can be concluded that these commitments will be effective and competitors will likely use them so that foreclosure concerns will be eliminated. In specific cases, it may be appropriate to link such a commitment with an up-front or fix-it-first provision in order to allow the Commission to conclude with the requisite degree of certainty that the commitment will be implemented.»[150] For the DG COMP, certainty comes first. Paragraph 17 of the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004[151] clearly states that «Commitments relating to the future behaviour of the merged entity 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. In any case, those types of remedies can only exceptionally be accepted if their workability is fully ensured by effective implementation and monitoring in line with the considerations set out in paragraphs 13-14, 66, 69 (Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004), and if they do not risk leading to distorting effects on competition.» Legislation in force does not permit non-divestiture commitments, as promises to desist from certain commercial tactics (see: product bundling) would not ultimately resolve competition-related problems originating from merging transactions. Gauging the effectiveness of these corrections may be particularly challenging in that oversight and supervision mechanisms would be insufficient, while the issues at stake in all likelihood would not be tackled with adequate instruments, as paragraph 13 (Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004) clearly states. It would be virtually impossible for the DG COMP to ascertain whether these remedies have been adopted and the merger can eventually be deemed non-distortive. Market actors (for instance, competitors) might not have the capability to assess whether the interested parties fulfil all pre-defined requirements which have been set in order to implement the proposed commitments. Moreover, active players may not have substantial reasons to inform the Commission about their competitors' incorrect behaviours if they cannot take

[150]Ibid, Paragraph 64.
[151]Ibid, Paragraph 17.

direct advantage or reap the benefits of said remedies. Broadly speaking, the DG COMP may analyse alternative types of non-structural corrections, e.g. behavioural conditions, only under exceptional circumstances. To better comprehend what we should change in the present regulatory framework on mergers, we shall now compare the EU system with a slightly different and more "integrationist" (national) European model which, in fact, favours most mergers, thereby accepting less strict and more flexible types of commitments. In France, by 2013, the Autorité de la concurrence (French Competition Authority- FCA in English) has strongly encouraged interested parties to put forward a list of structural remedies first (the main one being divestiture of certain assets in order to ensure a certain degree of competitive pressure and not penalise other market actors or consumers)[152]. However according to FCA's updated Guidelines, structural measures may be complemented by behavioural remedies in a number of cases. In its 2019 study on the level of utilisation of several types of corrections[153], the FCA underlined that it had employed (only) behavioural or a combination of behavioural and structural commitments multiple times. In actual fact, behavioural only tools have been used in two out of 11 cases of conditional merger approvals (or conditional "clearances"). The FCA approved this type of correction in the following cases: (1) RATP Développement/Keolis/CDG X decision (forming a joint venture); (2) France Télévision/TF1/Métropole Télevision.

In RATP Développement/Keolis/CDG X, analysed a few risks stemming from the excessive market power of the joint venture, entailing its possible (monopolistic) operation of the baggage service from the centre of the city of Paris and Charles de Gaulle airport and vice versa, which the parties committed to entrust to an independent and external firm.

In France Télévision/TF1/Métropole Télevision, the competition authority accepted remedies brough forward and cleared the establishment of Salto, a joint venture which would have created a platform for the provision of television services dealing with digital terrestrial television (DTT) channels belonging to SVOD. The FCA also approved

[152]Merger Control, France, retrieved from: https://www.globallegalinsights.com/practice-areas/merger-control-laws-and-regulations/france.

[153]The Autorité de la concurrence publishes a new study on Behavioural remedies in competition law available at: https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-publishes-new-study-behavioural-remedies-competition-law.

multiple combinations of structural and behavioural measures in four out of eleven concentration appraisals and gave them conditional approval (Dr. Oetker/Alsa France, Coopératives agricoles d'Aucy et Triskalia, NDIS/SAFO, Hexagone Santé/Groupe Elsan).

Even after the implementation of the 2015 "Macron law"[154] on the subject, the French Competition Authority has adopted much more lenient merger decisions compared to its European homologue, the Directorate-General for Competition (DG COMP). To recapitulate, in order for the EU to foster the establishment of European champions, paragraph 17 (and related paragraphs) of the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 published in the Official Journal of the European Union on 22 October 2008 must be changed, especially with regard to some specifications. The phrase "commitments relating to the future behaviour of the merged entity may be acceptable only exceptionally in very specific circumstances" ought to be modified so as to include behavioural tools, in order for them to be employed more frequently, especially with a view to safeguarding the Union's strategic interests while pursuing greater industrial policy objectives.

Article 2 of Council Regulation (EC) No 139/2004 is too vague and general. It does not mention "compensations" between advantages and drawbacks of a concentration. It should be changed along the lines of Article 10(2)b of the Swiss Merger Regulation in order to examine whether a merger leads to an «enhancement in the conditions of competition on another market which outweighs the disadvantages of the dominant position.»[155]

[154]The law on economic growth, activity and equal opportunities promulgated on 6 August 2015 and known as "Macron Law" introduced a few minor restrictions concerning merger assessment, https://www.gouvernement.fr/en/law-on-economic-growth-and-activity#:~:text=The%20law%20on%20economic%20growth,opening%20up%20of%20coach%20routes. Furthermore, Decree No. 2019-339 of 18 April 2019 simplifying the procedure for notifying a concentration to the Competition Authority modified some of the pre-established conditions raising the minimum threshold for "vertically"-relevant market concentrations from 25% to 30% (the text is available online at: https://www.concurrences.com/en/review/issues/no-3-2019/alerts/reform-the-french-ministry-of-economy-and-finance-publishes-the-decree).

[155]Swiss Federal Council, *Ordinance on the control of concentrations of undertakings* (Bern: Swiss Confederation, 17 June 1996 updated to include changes and amendments in legislation on 1 January 2013). Available online at: https://www.admin.ch/opc/en/classified-compilation/19960295/index.html.

3.1.8 Compromise solutions

Article 21(4) of the Merger Regulation (Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings) stipulates that Member States can intervene to protect their «legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.» In accordance with Article 21(3) (Council Regulation 4064/89), Member States shall not apply their national legislation to economic concentrations which have a Community dimension. This apparent discrepancy between different paragraphs could be considered an asymmetry (the first one), in that it provides an exemption which MS might use to apply domestic legislation when it comes to protection of public security, plurality of the media and prudential rules, which are all regarded as "legitimate interests", pursuant to the objectives of paragraph (1)[156]. The second asymmetry stems from the fact that Article 1(2) of the Merger Regulation provides Member States with an exemption from the aggregate worldwide turnover criterion (see Chapter 2), by stating that merging undertakings will not be regarded as having a Community dimension if each of them «achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.» This goes against all evidence on the detrimental impact that the emergence of national champions has on the single market (see Gas Natural/Endesa[157]). Going back to the main topic previously presented, when actively intervening on grounds of legitimate interests based on Article 21(4) (Council Regulation 4064/89), MS will inevitably reduce consumer welfare by rejecting an operation which had already been approved by the Commission (e.g. a concentration). Such transaction could have brought about some positive effects including, for instance, a possible decline in prices. Being a derogation, art. 21(4) must be applied narrowly: its interpretation has to respect the criteria of proportionality and compatibility with EU legislation. There are several examples of how the law has been misapplied over the years to favour national champions to the detriment of European

[156]Economic Concentration Regulation 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) can be found on the institutional website: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32004R0139.

[157]Commission Decision of 15/11/2005 on the lack of Community dimension (COMP/M.3986—Gas Natural/Endesa), available online at: https://ec.europa.eu/competition/mergers/cases/decisions/m3986_15_2.pdf.

common interests: see BSCH/Champalimaud. The Portuguese Minister of Finance tried to sabotage the acquisition of the Manuel Champalimaud Group by BSCH (Spanish bank). The group operates in several industries such as energy, food logistics, moulding, plastics production, tourism and it also holds shares in publicly traded companies which are listed on the PSI 20 index. Portuguese authorities decided to block the transaction on grounds of concerns regarding possible breaches of national prudential rules. Notwithstanding their outspoken stance, no formal explanation was notified to the European Commission as to why such measures had to be taken. It was also unclear which public interests were supposedly being defended in this instance. Eventually, the Commission published an infringement decision against Portugal as the MS had allegedly violated art. 21 of Council Regulation 4064/89[158]. The most peculiar feature of Council Regulation (EC) No 139/2004 of 20 January 2004 is that the exemptions from the application of legislation which it provides are defensive in nature. In point of fact, Member States can only block operations (i.e. mergers), but they are not entrusted the offensive power to authorise concentrations which they deem to have positive effects on their own domestic markets or on the single market as a whole. Another striking characteristic of the present legislative framework deals with the recently implemented FDI Regulation. MS can adopt restrictive measures when public order or security concerns arise. Art. 4 of the FDI Regulation[159] encompasses several factors which must be taken into account by either the Commission or MS when determining whether a FDI would be advantageous or detrimental to the Union, such as the impact of major foreign investments on basic infrastructure (e.g. transportation), critical technologies (e.g. semiconductors, robotics, artificial intelligence, aerospace, defence, cybersecurity, energy storage), etc. However, MS have not been endowed with the instruments they would need to preserve or promote their own national champions (see "Factors that may be taken into consideration by Member States or the Commission"). An amendment to

[158] Commission Decision of 20 July 1999 relating to a proceeding pursuant to Article 21 of Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings (Case nº IV/M.1616 - BSCH/A. Champalimaud), available online at: https://ec.europa.eu/competition/mergers/cases/decisions/m1724_19990720_1290_en.pdf.

[159] Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union can be found on the institutional website: https://eur-lex.europa.eu/eli/reg/2019/452/oj.

art. 21(4) dealing with these issues and attributing more powers to Member States would certainly be a game changer for EU competition law.

Furthermore, the Merger Regulation does not formally take into consideration public interests as a good enough reason to clear a certain transaction. On the other hand, the German *Bundesministerium für Wirtschaft und Energie* can override decisions by the *Bundeskartellamt* when key public interests are at stake[160]. Similarly, the British Secretary of State of Business, Energy and Industrial Strategy (BEIS) can take specific measures to overrule an evaluation based on strategic interests.

The Canadian Minister of Innovation, Science and Economic Development might allow certain operations according to a cost-benefit analysis foreseen in Article 21 of the Investment Canada Act 1985[161]. In view of these facts, the current Merger Regulation seems to be unreasonably defensive and it contains excessively stringent conditions which hamper industrial policy goals and strategic priorities.

As already mentioned in Chapter 2, a proposal was formulated which would enable the Council to overturn Commission decisions albeit subject to rigid prerequisites. The Council would take part in the process to guarantee that economic and industrial policy objectives are pushed forward. If the Council were to veto Commission decisions a few problems would probably emerge as a consequence. (1) Should the veto be based on a qualified majority vote or would it require unanimity? (2) How long would it take to make a final choice and which would the deadlines be? (3) What if a certain ruling by the Commission has already been brought before the European courts prior to a Council decision in that regard? Contrary to "popular" belief, the Council's use of veto powers is not alien to EU corporate law and it has proven effective within the context of State aid. Article 108(2) subparagraph 3 TFEU envisages the possibility for a Member State to apply for derogations from art. 107 TFEU, which stipulates that «Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring

[160] Alex Nourry and Dani Rabinowitz, *European champions: what now for EU merger control after Siemens/Alstom?* (Brussels: European Competition Law Review published by Sweet & Maxwell, available online at: https://www.cliffordchance.com/briefings/2020/03/european-champions--what-now-for-eu-merger-control-after-siemens.html, 2020), 119.

[161] The Investment Canada Act R.S.C., 1985, c. 28 (1st Supp.) can be found on the institutional website: https://laws-lois.justice.gc.ca/eng/acts/i-21.8/fulltext.html.

certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.»[162] The Council, acting by unanimity, can provide for *ad-hoc* MS exemptions in the area as long as a number of preconditions are met. By the same token, the Franco-German proposal to override Commission rulings concerning mergers would endow the Council with veto powers. On the other hand, the present regulatory framework regarding state aid enables a MS to initiate the override procedure[163] in the period between the outset of the formal investigation process by the Commission and its termination. In contrast to this, the Franco-German scheme would *de facto* confer to the parties the power to exercise a procedural right. Simply put, when a Community-relevant concentration is already under the scrutiny of the Commission, the interested parties could exceptionally demand a transfer of competence to the Council, similar to what regularly happens in regard to certain state aid measures. In practical terms the distinction between "ordinary" and "extraordinary" or "exceptional" lends itself to multiple interpretations. In fact, the Council has overridden Commission decisions numerous times on grounds of exceptionality by showing a remarkable degree of flexibility[164]. It should also be noted that art. 108(2) subparagraph 3 does not give the Council unconditional powers to deal with state aid and the final authorisation by means of which a MS is allowed to utilise certain instruments may be proactively reviewed by the Court of Justice of the European Union (art. 263 TFEU)[165]. Furthermore, the implementation of said practices is constantly monitored by the European Commission to ascertain its concrete lawfulness. In order for the Franco-German proposal to be successful, modifications to TFEU articles would be needed. Art. 108(2) subparagraph 3 TFEU ought to be amended so as to address some of the most concerning issues. First and foremost, it should finally be established whether a

---

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

[163]Michel Rose, *France, Germany seek veto for EU governments on antitrust cases* (Brussels: Reuters News, available online at: https://www.reuters.com/article/us-eu-m-a-antitrust/france-germany-seek-veto-for-eu-governments-on-antitrust-cases-idUSKCN1Q81MO, 2019).

[164]Alex Nourry and Dani Rabinowitz, European champions: what now for EU merger control after Siemens/Alstom? (Brussels: European Competition Law Review published by Sweet & Maxwell, available online at: https://www.cliffordchance.com/briefings/2020/03/european-champions--what-now-for-eu-merger-control-after-siemens.html, 2020), 121.

[165]Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union can be found on the institutional website: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT.

right to apply to the Council would be possible after the Commission's verdict or in the *interim* period between the notification and the conclusion of formal appraisal procedures by the DG COMP. As a compromise solution, the Council would probably be provided with the power to take on Commission prerogatives during the course of the evaluation process (in the *interim* period) for a limited timespan of about three months[166]. Secondly, unanimous voting by the Council would be required in order for the merger to be cleared. The Council's declaration would then be subject to rigorous supervision. Such a reform might improve the Union business landscape and provide domestic firms with proper legal instruments, which could, in turn, facilitate the creation of European champions.

3.2 The European Industrial Policy Strategy

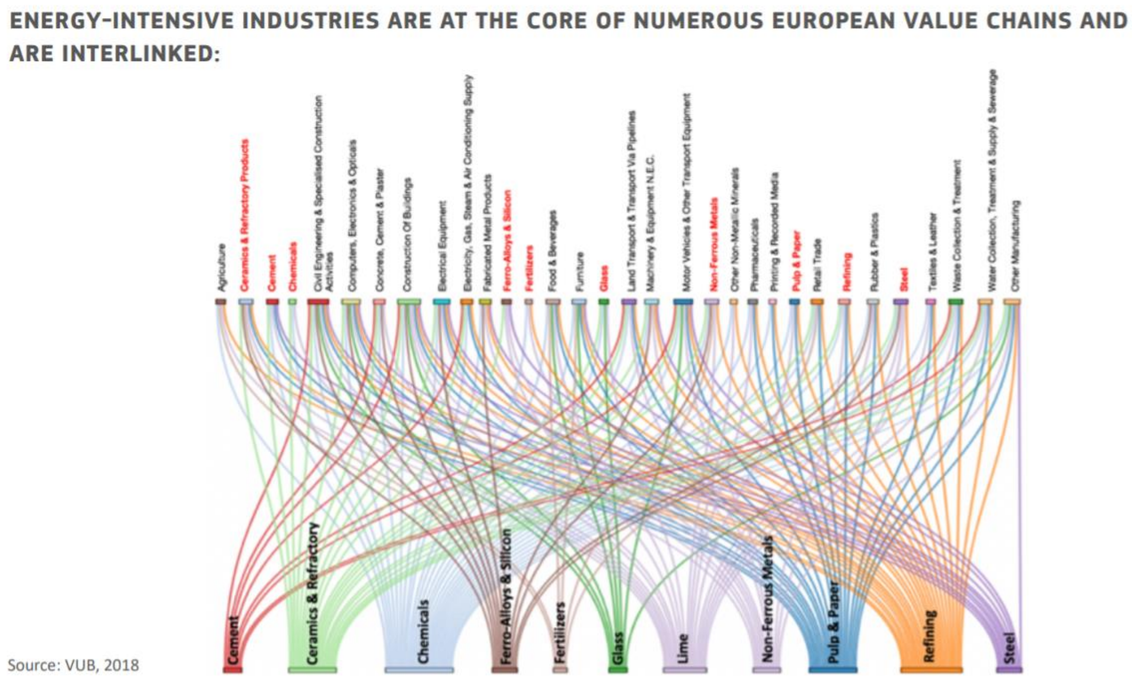
3.2.1 How to enhance competitiveness

In order to keep its competitive edge on the world stage, the EU must focus particularly on high added-value products and the provision of quality services, which account for 20% of the Union's total added value, employing more than 35 million individuals[167]. Competitiveness lies at the core of the Commission's top strategic priorities. The Union's industrial agenda deals with growing challenges, such as carbon neutrality by 2050, continuous adaptation to climate change, the digital and green transitions and the transformation of European industry. The DG COMP will actively endeavour to adopt effective worker training measures; it shall also support cutting-edge technologies as well as the transformation of the Union's energy sector leading to a "totally" circular economy (by 2050). Moreover, the Commission will fund innovation through ambitious and forward-looking plans. Intellectual property rights will be protected from economic espionage and unacceptable practices. Resources will be invested in order to develop integrated European clusters. EU fora on state-of-the-art technologies and industrial advancements will be organised along the lines of EU Industry days. In order to reach these demanding goals, the economic context shall be enhanced so as to enable

[166]David Reader, *Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights* (Norwich: University of East Anglia and Centre for Competition Policy, available online at: http://competitionpolicy.ac.uk/documents/8158338/11320618/CCP+WP+16-3+complete.pdf, 2016), 63.
[167]EU Industrial plans can be found on the institutional website: https://ec.europa.eu/growth/industry_en#:~:text=Industry%20is%20the%20backbone%20of,directly%20providing%2035%20million%20jobs.

sustainable growth and employment creation. A more efficient environmentally-friendly business landscape will allow goods to maintain their value constant over time, generating major returns. Digital transformation is making a difference in people's living standards. The Union needs to properly handle this historic change by implementing programmes aimed at exploiting artificial intelligence (AI) and big data allowing companies to thrive and break new ground. Leading change by remaining competitive will constitute a major challenge, but the European Union aims to become the first carbon-neutral continent[168]. A report titled "Masterplan for a Competitive Transformation of EU Energy-intensive Industries Enabling a Climate-neutral, Circular Economy by 2050" tackling these significant issues was drafted by the High Level expert Group on energy-intensive industries. It was published on 28 November 2019[169] in order to provide the Commission with fundamental policy proposals directed at managing problems related to polluting activities. Energy-intensive industries shall be the main beneficiary of said projects for they will need to shape this transition while preserving acceptable competition levels (see: European Green Deal[170]). European energy producers must comply with the Paris Agreement (under the United Nations Framework Convention on Climate Change) as quickly as possible. The Union must also establish a new regulatory framework addressing the need for "cleaner" steel production throughout MS. In addition to these

[168]Ibid.
[169]The Masterplan for a Competitive Transformation of EU Energy-intensive Industries Enabling a Climate-neutral, Circular Economy by 2050 – Report by the European Commission can be found on the institutional website: https://ec.europa.eu/docsroom/documents/38403.
[170]Plans for a European Green Deal can be found on the institutional website: https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.



Source: EU Energy-Intensive Industries' 2050 Masterplan – Factsheet, https://ec.europa.eu/docsroom/documents/38402

objectives, the European Commission has to set stringent and harmonised criteria for the allocation of funds (e.g. Horizon Europe, InvestEU, European Structural Funds, Digital Europe) and as regards the interoperability of financing schemes. Public and private investments in pipelines and cutting-edge projects have to be provided. In order for the Union to reach higher energy independence and diversify its suppliers, new interconnections must be built and reverse-flow systems[171] have to be realised so that the flow direction can be inverted whenever needed (see: Yamal pipeline in Poland[172]). Access to capital ought to be simplified (through de-risking mechanisms and so forth). The Commission's Action Plan on Financing Sustainable Growth shall foster the EU industry's competitiveness and attractiveness.

If the EU wishes to remain a world leader in economic and political development, the Commission must promote a level playing field with RoW countries and safeguard the Union's economic security.

[171]Simone Tagliapietra, *Dis-jointed European energy* (Rome: Eastwest European Institute, published in Eastwest magazine, 2016), 2-3.

[172]Alfonso Bianchi, *Dis-jointed European energy Part II- Twenty years of floundered attempts* (Rome: Eastwest European Institute, published in Eastwest magazine, 2016).

The single market must be strengthened as it has to generate employment opportunities while encouraging or reinforcing economic sustainability and resilience. The Strategic Forum for Important Projects of Common European Interest (SF IPCEI) can foster the establishment of innovative value chains and favour near-shoring or reshoring of crucial economic activities. EU Member States should continue to uphold a free trade model based on fair and just regulation. This implies laying the foundations for clear rules and functioning dispute settlement mechanisms. The present multilateral framework is no longer sufficient to deal with state capitalist economies and tackle fundamental problems such as the violation of international property rights[173]. Therefore, sound WTO reforms are necessary and they will enable the EU to emphasise that existing "flexibilities" utilised by developing countries ought to reflect their effective degree of development. Hence, differential treatment should be evaluated on an "individual" basis according to data and evidence. Specific and strict rules have to be implemented in order to face complicated issues such as unfair competition, subsidies to exporting firms, economic support to state-run companies, technological transfers and so forth. The Commission's revised proposal for an International Procurement Instrument must be adopted as soon as possible. Through this sophisticated tool, third countries will have to respect several conditions currently listed in the General Procurement Agreement, which does not formally apply to them. A new harmonised EU patent system shall be implemented and the EU has to take concrete initiatives when international property rights are infringed by third countries. The Union will also be active in the promotion of responsible and correct business conduct at the global level.

Fostering a laissez-faire economic system cannot put at risk the EU's economic security. In order for MS to trade safely, the Union has to take a number of precautionary measures, e.g. against undesirable investments from RoW countries.

[173]Government of the Netherlands, *Strengthening European competitiveness* (The Hague: Cabinet and Permanent Representations NL, available online at: https://www.permanentrepresentations.nl/documents/publications/2019/05/15/position-paper-strengthening-european-competitiveness, 2019).

3.2.2 Innovativeness and Efficiency: the role of SEs

Some existing European champions are registered as "Societates Europaeae" (SEs), in compliance with EU corporate law. SEs were first theorised by the Commission in a 1970 proposal seeking to establish a common statute for European companies, which aimed at aligning the regulatory framework across the Union. However, the statute took about 31 years before entering into force[174]. Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)[175] and Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees[176] constitute the legal base for the creation of larger EU firms. Council Directive 2005/19/EC of 17 February 2005 amending Directive 90/434/EEC 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States[177] should also be considered, in that it encompasses issues relating to joint-stock enterprises, tax neutrality of transnational operations in the EU and several rules which SEs have to apply strictly, e.g. those entailing intra-community mobility. However, the three combined provisions which have been listed above are not the only pieces of legislation that we should take account of, as most norms addressed to SEs are "national". Therefore, all the elements which cannot be covered by EU legislation shall be dealt with through MS laws and, specifically, by means of legal provisions enacted by the country where the SE is based[178]. As a general rule, the SE is classified as a public limited-liability undertaking: the MS where it is seated can also exempt the firm from the application of certain norms. The statute adopted for SEs is the result of a combination of national and European legislation. Originally, this particular form of commercial enterprise should

---

[174]Noëlle Lenoir, *The Societas Europaea (SE) in Europe. A promising start and an option with good prospects* (Utrecht: Utrecht Law Review,2008).

[175]Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) can be found on the institutional website: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001R2157.

[176]Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees can be found on the institutional website: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001L0086.

[177]Council Directive 2005/19/EC of 17 February 2005 amending Directive 90/434/EEC 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States can be found on the institutional website: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32005L0019.

[178]Noëlle Lenoir, *The Societas Europaea (SE) in Europe. A promising start and an option with good prospects* (Utrecht: Utrecht Law Review,2008), 17-20.

have been governed by EU corporate law so as to harmonise European legal systems and create an entirely supranational regime. Businesses would have had the opportunity to choose between the application of a "regional" or "domestic" statute and a European one. Nevertheless, Member States were concerned about an extremely probable loss of authority over commercial law and related decisions, and they eventually rejected this ambitious plan. The Netherlands dismissed the initial version of the Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)[179], as it was not content with the fact that the proposal had been mostly influenced by the German regulatory model; the Dutch would have preferred the more flexible British system as a benchmark. Afterwards, the UK and Ireland had the chapter on a fair taxation mechanism applicable to SEs removed. However, a very similar section was later added to Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States (Article 4 Council Directive 2009/133/EC)[180]. According to said provision, only capital gains generated after the transfer of assets to the selected location ("permanent establishment") can be subject to the specific MS' tax system once they begin to be exploited (until that time companies are exempted from paying; the "date of their actual disposal" becomes the starting point[181]). However, based on the same rule, when a Societas Europaea is formally resident in a certain State, but it has permanent establishment in a different MS, it shall pay the income tax in both countries. Germany was concerned about certain proposed provisions on labour, which it rejected. In fact, those rules might have been used by German undertakings to bypass the "codetermination" principle (or the right of workers to participate in the company's management).

A key reason for the establishment of SEs was operability. Nowadays, Societates Europaeae are the only public companies which enjoy full freedom of settlement within

[179]Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) can be found on the institutional website: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001R2157.

[180]Council Directive 2009/133/EC of 19 October 2009 can be found on the institutional website: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:310:0034:0046:EN:PDF.

[181]Council Directive 2009/133/EC of 19 October 2009, 35.

the Union. Nevertheless, numerous political factors play a role in creating larger European firms. Multiple times SEs have highlighted the importance of their European identity.

In 2006, then-CEO of Allianz SE (registered EU company) Michael Diekmann affirmed that: «The legal step reinforces the reality [that] Allianz is a European company at heart»[182]. The utilisation of the acronym SE may bring substantial benefits in terms of marketing, identification with the brand and targeting new population segments.

In more practical terms, SEs have a variety of mobility-related advantages, in that, notwithstanding some of their major shortcomings (e.g. a striking similarity to public limited companies), they possess an EU legal personality which enables them to freely move across several MS, thereby benefiting from remarkable levels of flexibility. The Societas Europaea has a very positive impact with respect to business mobility: transnational mergers, fiscal neutrality and transfers of registered office. Clearly there are certain conditions to fulfil before mobility procedures can be finalised: prerequisites set in Council Directive 2001/86/EC of 8 October 2001 and Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 (on cross-border mergers of limited-liability companies) have to be observed. Albeit being perceived as a deterrent, these mandatory measures can constitute a great incentive for employees to accept corporate restructuring procedures which typically follows the approval and ratification of the SE statute[183]. Workers may, in fact, decide to stop negotiating. However, they do not have a right to impede the transition towards a new firm. There are certain precedents of unsuccessful attempts to block initiated transformations, such as the one involving 324,000 employees of Volkswagen who were protesting against Porsche's choice and tried to question the decision through the filing of a lawsuit in October 2007. The attempt was ultimately unfruitful[184].

[182]Andrew Bibby, *A German twist on an EU model* (London: Financial Times, 2006, available online at: https://www.ft.com/content/ef4ad398-892f-11db-a876-0000779e2340, 2006).
[183]Noëlle Lenoir, *The Societas Europaea (SE) in Europe. A promising start and an option with good prospects* (Utrecht: Utrecht Law Review,2008), 17.
[184]Nelson D. Schwartz, *Porsche maneuvers to take control of VW* (New York City: The New York Times, 2008).

3.2.3 Reasons for choosing SEs

Resorting to SEs might be regarded as a way to enhance the management of EU corporate groups. SEs can either be publicly traded or unquoted (unlisted). These companies can adopt a monistic (with a single administrative board composed of directors) or dualistic structure (with a management board and a supervisory board monitoring it). The Societas Europaea should have a minimum legal capital of 120,000 euros. Council Regulation (EC) No 2157/2001 of 8 October 2001 provides four different viable methodologies by means of which a European limited company may be established:

(a) By merger of national public companies (SA) from several MS;
(b) By creating an SE subsidiary (or daughter company), with SAs or public limited-liability enterprises involved in the process;
(c) By setting up a joint venture between firms based in different MS;
(d) By transforming a national company into an SE.

Formations through merger operations are the most common, accounting for 85% of all newly-created entities. In spite of the numerous advantages that European companies bring about, Member States are trying to impose limitations, so as to hinder any attempt to leave a country for a different one. However, setting up an SE is very arduous, for it is not possible to establish a European limited company from scratch. These firms cannot be created directly by natural persons[185], and founding enterprises must have a (European) cross-border dimension. The key requirement for the creation of a European limited company by merger is that interested parties involved in the transaction must be situated in at least one EU MS. Conversion of a national company into an SE requires that the founding entity control a subsidiary (for a minimum of two years) which should be under the jurisdiction of another member State. Moreover, the SE has to abide by the principle of the "real seat", in that its place of registration and its headquarters must coincide. Enterprises are free to choose the place where they want to register their main office; hence, every MS would be virtually suitable ("registered office" rule[186]). Since the system

[185]Noëlle Lenoir, *The Societas Europaea (SE) in Europe. A promising start and an option with good prospects (*Utrecht: Utrecht Law Review,2008), 18.
In jurisprudence, a natural person is defined as a subject having legal personality. A private person is a private (i.e. company or non-governmental organisation) or public (i.e. government) entity possessing legal personality.
[186]Ibid.

has not been harmonised, some laws vary according to the selected location. And so, in a certain sense, firms can decide which laws will apply to them and they shall also be able to freely determine where to locate their business administration and head offices.

The SE corporate form incentivises transnational collaboration on a number of subject matters. Regulation (EC) No 2157/2001 of 8 October 2001 promotes cross-border merger operations within the Union. However, a few areas are ill-defined and it is not entirely clear whether SEs are allowed to use takeovers. Some argue that said option is not envisaged in current laws. According to the latter interpretation, SEs can only be formed through the method of merging by establishing a new enterprise. Nevertheless, there exist diverging opinions as far as this issue is concerned. Other scholars and technocrats involved consider takeovers to be a completely legitimate choice in compliance with the Regulation[187]. Thus far, European companies have been capable of effectively utilising mergers by formation so as to elude possible restrictions regarding takeover operations. Direct mergers can be carried out through two different approaches.

A holding company might be established, which acquires the assets of the Societas Europaea and those belonging to the third party. Alternatively, a two-phase transaction can also be conducted, consisting of a first stage characterised by the merger, which involves a company and a subsidiary of the SE. The second stage entails the absorption of the subsidiary by the SE.

In closing, the SE is a crucial tool which can be used by European businesses intending to efficiently formulate their growth strategy with a view to expanding at the Union level. These enterprises might include European or extra-EU daughter companies of American and Japanese multinational corporations, etc. Nonetheless, the 2001 Regulation has major deficiencies which have to be corrected.

Moreover, several ambiguities remain in regard to taxation which should be solved, as SE provisions do not contain specific information with respect to said subject matter. The issue of the registered office must also be clarified, in that it was not addressed by the Statute. Some of the aspects which ought to be improved deal with tax convergence and

[187]The absorption of an enterprise by an SE appears to be contemplated by the 2001 Regulation as it improves EU capital and labour mobility. Therefore, obliging a firm to carry out a merger by establishing an entirely new company each time it intends to do so would make the whole process excessively burdensome.

the "real seat" principle. As was clearly pointed out by Rachida Dati, French Minister of Justice in 2008, (1) tax convergence (with the implementation of a single European corporate tax base[188]) would be needed. Furthermore, (2) the "real seat" principle should be abandoned[189]. Fiscal competition shall not be completely hindered, but a more harmonised system will eventually emerge in order to simplify a number of extremely complex bureaucratic procedures.

3.2.4 A list of prominent European Public-Limited Liability Companies

Several firms have chosen to opt for the SE form of company. Amongst them, we can find giants such as Airbus (European multinational aerospace firm and largest aircraft producer at the global level), Allianz (financial, insurance and asset management corporation headquartered in Germany and listed on the Euro Stoxx 50 stock market index), Baden Aniline and Soda Factory (BASF, the world's largest chemical manufacturer operating with its subsidiaries in over 80 countries and selling its products all over the planet), E.ON (European electricity distribution company based in North Rhine-Westphalia, component of the Euro Stoxx 50 stock market index, DAX, and public traded on the Dow Jones Global Titans 50 index), Fresenius SE & Co. KGaA (German-based health care firm), LVMH Moët Hennessy – Louis Vuitton SE (luxury goods multinational corporation situated in Paris), SAP (software corporation located in Germany), Schneider Electic (European multination enterprise headquartered in France, which provides automated devices and state-of-the-art energy technologies), Unibail-Rodamco-Westfield SE (the largest real estate corporation in the world, Paris-based and a member of the Euro Stoxx 50 stock market index).

By opting for this specific company type, European champions are seeking to benefit from a considerable level of "legal arbitrage", based on which enterprises carefully select their relevant legislation according to a range of aspects that they consider advantageous, tailoring SEs to their own needs. Nevertheless, some of the differences that still exist among different national jurisdictions have yet to be evened out. These elements deal

[188]Noëlle Lenoir, *La Societas Europaea ou SE – Pour une citoyenneté européenne de l'entreprise, Rapports officiels* (Paris: Ministère de la justice, Documentation Française, 2007).

[189]A single statute should be adopted and legislative provisions ought to be uniform across the Union in order to introduce the necessary adjustments and improve competitiveness.

with the corporate governance structure, some of the main provisions on employee codetermination (Germany) as well as corporate mobility[190]. Businesses are taking advantage of the European Company legal form so as to concretely circumvent some of their "national" laws, especially when it comes to several rules concerning codetermination[191]. An increasing number of companies choose the "Societas Europaea" model and, as is shown by empirical evidence, European corporate law allows them to mitigate and, perhaps, occasionally get around multiple strict provisions which would have to be applied nationally. By way of an example, a German firm with less than 500 workers may opt for the SE legal typology as it could entirely escape codetermination even when it goes beyond the minimum 500 employee threshold[192]. Similarly, a company which has below 2000 workers might adopt the SE form before reaching that amount in order to avoid the application of codetermination provisions which would make it compulsory to have a 50% worker representation on the supervisory board[193]. The fact that many enterprises may want to avoid stringent conditions by MS partially explains why a remarkable number of German firms resort to the European Company form. As a matter of fact, out of the main 48 SEs, 31 or 65% are German.

[190]Horst Eidenmueller, Lars Hornuf and Andreas Engert, *Incorporating under European Law: The Societas Europaea as a Vehicle for Legal Arbitrage* (Brussels: European Business Organization Law Review, 2008).
[191]Ibid, 7.
[192]Wanjiru Njoya, *Employee ownership in the European company: Reflexive law, reincorporation and escaping codetermination* (Cambridge: Centre for Business Research, University of Cambridge Working Paper No. 416, 2010).
[193]Stefano Lombardo, *Regulatory competition in European company law* (Bolzano: ECGI Working Paper Series in Law, 2019), 25.

Conclusive Remarks

Chapter 1 of this study presents a few general working definitions of European and national champions. It subsequently examines the Franco-German approach towards competition policy and mergers, analysing a variety of promising and strategic sectors, concentrating more specifically on energy, transport and defence industries. The conclusive part of the chapter deals with the Aachen Treaty (*Traité d'Aix-la-Chapelle*), highlighting the importance of a less burdensome legislative landscape so as to improve the Union's innovativeness and attractiveness across the globe. The last sections focus, in particular, on internal imbalances, e.g. different levels of public and private indebtedness, housing and private sector credit flows, financial and asset market development, unemployment rates. Such discrepancies certainly need to be evened out in order for the Union to thrive in the Digital Era.

Chapter 2 provides the reader with an exhaustive overview of competition legislation, focusing specifically on mergers and acquisitions and describing the 2-phase evaluation process. Before examining the Siemens-Alstom rejection it is necessary to comprehend how the DG COMP assesses concentrations and prohibits some of them based on existing norms. Articles 6 and 8 of Council Regulation (EC) No 139/2004 are carefully analysed. The former states that if the concentration does not fall within the scope of the Regulation, it shall be cleared by means of a decision. By the same token, if the transaction falls within the scope of the Regulation but does not raise doubts about its compatibility with the domestic market, it shall be declared compliant with the relevant provisions after Phase I. When the concentration gives rise to doubts concerning its conformity with the legislative framework, it shall undergo Phase II investigations, unless the interested undertakings abandon the operation. According to Article 8 of the Regulation, when the concentration fulfils the criteria laid down in Articles 2(2) and 2(4) as well as the prerequisites envisaged in Article 81(3) TEC, it will be deemed consistent with the single market. The DG COMP can impose the adoption of a number of remedies by the merging parties. If the Commission regards said corrections as being compliant with all previously mentioned provisions, it will clear the concentration ascertaining its compatibility with the common market. If the transaction does not satisfy the range of criteria which have been set out, the Commission shall prohibit the concentration, declaring it non-compliant with the current legislation.

The second part of the chapter deals with the reasons behind the Siemens-Alstom decision. As regards mainline signalling systems, the proposed behavioural commitments were considered insufficient to address the issue of excessive reduction in market competition.

Subsequently, the chapter carries out a comparison with US concentration norms (many major "strategic" activities in the United States are not subject to the implementation of several relevant competition provisions), and it also examines China's unrestrained use of state support and economic aid to exporting enterprises. It then looks into the acceptance of behavioural commitments by the *Autorité de la concurrence* in France and proposes an overhaul of present EU rules, following French (flexible application of provisions and adoption of various alternative non-structural measures) and Swiss footsteps (Article 10(2)b Swiss Merger Regulation about "compensations" between advantages and disadvantages of concentrations).

Chapter 3 addresses the issue of "protectionism" vis-à-vis "protectiveness", with Europe focusing on the latter so as to tackle numerous challenges stemming from aggressive trade practices, cyberattacks, vulnerability to external interference, military interventionism and the growing political influence of the Eastern world. As concerns advanced cybersecurity threats, some of the solutions which have been put forwards deal with the establishment of a "single" European cybersecurity against the background of a "common area of security and justice" (see *3.1.1*). Additionally, a common intervention force with an *ad-hoc* cybersecurity unit, supplemented by a single defence budget, a European doctrine of action and a European Intelligence Academy need to be created as swiftly as possible to address emerging concerns in the area. Europe should consolidate its position, leading the global ecological transition. Building a functioning European energy market, with efficient network interconnections and reverse-flow systems, is therefore imperative in order to attain full autonomy from third countries' energy supplies or, at least, diversify the Union's providers. We have also explored the topic of digital technologies, bringing up Macron's proposals regarding the creation of a European Defence Advanced Research Projects Agency, along the lines of its US homologue DARPA. A uniform corporate taxation across the Union with a view to prompting the emergence of larger European firms is paramount. The EU should finally complete and perfect its economic and monetary union (EMU), fostering the integration of European industries within the framework of a European Industrial Union capable of effectively competing with American and Chinese players. As concerns the Commission's role in permitting the establishment of European champions, data sets confirm that the DG COMP has rarely used its powers to impose corrections or prohibit merger operations. Between 1990 and 2019, more than 90% of assessments underwent Phase I without conditional remedies: these cases were settled and cleared under Article 6 (Council Regulation (EC) No 139/2004). Furthermore, even among those operations which were assessed during Phase II (based upon Article 8, Council Regulation (EC) No 139/2004), only 27 were rejected between 1990 and January 2019. Thus, 94% of transactions (the vast majority of all evaluations) were authorised by the Commission. As a result, it would be extremely far-fetched to assume that the Commission has hindered or impeded the creation of European superstar firms. In fact, the DG COMP seems to have adopted Freiburg (similar to post-Chicago) ideas on economic concentrations, pursuing a moderately "integrationist" agenda and intervening only when concerns on excessive market dominance arise. Conversely, Chicago and *tout court* "integrationist" (supported by certain Member States, e.g. France and Germany) theories are paradoxically compatible with each other, in that the former rule out interventionism by the Commission to stop ongoing operations on grounds of *laissez-faire* paradigms while the latter promote the active involvement of MS in the establishment of EU champions, thus producing the same outcome. Subsequently, we have acknowledged that current legislative provisions ought to be reformed in order for the DG COMP to approve alternative remedies, such as behavioural only commitments, drawing on the French experience (*3.1.7 Why the current legislative framework needs an overhaul*), thereby paving the way for a more flexible evaluation of mergers and acquisitions.

In the second part of the Chapter we have addressed the issue of Societates Europaeae (SEs), a company form which has been chosen by a number of existing European champions. SEs enable firms to develop their EU-wide business strategies while benefiting from efficiencies and economies of scale. Several ambiguities which were not tackled by the 2001 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) should be solved. Corporate tax convergence and a uniform legislative framework are needed in order to encourage domestic players to choose the SE legal form.

Bibliography

Case nº IV/M.1616 - BSCH/A. Champalimaud), available online at: https://ec.europa.eu/competition/mergers/cases/decisions/m1724_19990720_1290_en.pdf.

Wigger Angela and Nölke Andreas, *Enhanced Roles of Private Actors in EU Business Regulation and the Erosion of Rhenish Capitalism: The Case of Antitrust Enforcement*. Brussels, Journal of Common Market Studies, 2007, 487–513.

Annoni Paola, Dijkstra Lewis, *The EU Regional Competitiveness Index 2019*. Brussels: European Commission, 2019.

https://www.autoritedelaconcurrence.fr/en/press-release/autorite-de-la-concurrence-publishes-new-study-behavioural-remedies-competition-law.

Bailey Mike et al., *Energy market consolidation and convergence- Seams Issues Revisited*. The Electricity Journal 14/2 Amsterdam: Elsevier Ltd., 2001, 54-65.

Bartalevich Dzmitry, *The Influence of the Chicago School on the Commission's Guidelines, Notices and Block Exemption Regulations in EU Competition Policy*. Brussels, Journal of Common Market Studies, 2015.

Baschuk Bryce, *Here's What It Means to Be a WTO Developing Country*. New York City: Bloomberg L.P., 2019.

Becker Peter, Marx Sebastian, *Europäische Champions – Aufgabe europäischer Industriepolitik? Fallbeispiel maritime Industrie*. Berlin: Diskussionspapier, Forschungsgruppe EU-Integration, Stiftung Wissenschaft und Politik, Deutsches Institut für Internationale Politik und Sicherheit, 2005.

Bergstrom Sven, Callender T J, *Gas and power industries linking as regulation fades*, Oil and Gas Journal 94. Tulsa, Oklahoma: Jim Klingele, 1996, 56–65.

Bhagwati Jagdish N., *US Trade Policy: The Infatuation with FTAs*. New York City: Columbia University, 1995.

Bhagwati Jagdish, Krishna Pravin and Panagariya Arvind, *Where Is The World Trade System Heading?* New York City: Adelphi Series Vol. 54, 450 2014), 17-38.

Bianchi Alfonso, *Dis-jointed European energy Part II- Twenty years of floundered attempts*. Rome: Eastwest European Institute, published in Eastwest magazine, 2016.

Bibby Andrew, *A German twist on an EU model*. London: Financial Times, 2006, available online at: https://www.ft.com/content/ef4ad398-892f-11db-a876-0000779e2340, 2006.

Brunet François and Gassenbach Patrice, *Il faut doter Bruxelles d'un vrai service d'intelligence économique.* Paris: Les Echos, available online at: https://www.lesechos.fr/idees-debats/cercle/il-faut-doter-bruxelles-dun-vrai-service-dintelligence-economique-1145764, 2019.

Bublitz Elisabeth, Leisinger Michael and Yang Nele. *Europe's Search for Superstar Firms: The Puzzle of European Champions*. Kiel: Intereconomics, ZBW – Leibniz Information Centre for Economics, 2019.

Bundesministerium für Wirtschaft und Energie, Ministère de l'Économie et des Finances, Ministerstwo Przedsiębiorczości i Technologii, *Modernising EU Competition Policy* (Berlin: German, French and Polish governments, 2019).

Cohen Elie, *Alstom-Siemens, politique de la concurrence ou politique des champions européens*. Paris: Telos, available online at: https://www.telos-eu.com/fr/economie/alstom-siemens-politique-de-la-concurrence-ou-poli.html, 2019.

Cohen Élie, Lorenzi Jean-Hervé, *Politiques industrielles pour l'Europe.* Paris: Conseil d'Analyse économique, Rapport 26, La documentation Française, 2000.

Commission Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings can be found on the institutional website: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0802&from=EN.

Commission Regulation (EC) No 1033/2008 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings can be found on the institutional website: https://eur-lex.europa.eu/legal content/EN/TXT/PDF/?uri=CELEX:32008R1033&from=EN.

Commission Implementing Regulation (EU) No 1269/2013 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings can be found on the institutional website: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:336:0001:0036:EN:PDF.

Council Regulation (EU) No 642/2014 of 16 June 2014 establishing the Shift2Rail Joint Undertaking is available online at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014R0642.

Crane Daniel A., *Chicago, Post-Chicago, and Neo-Chicago*. Ann Arbor: University of Michigan Law School, Scholarship Repository, 2009, 1911-1933.

D. Schwartz Nelson, *Porsche maneuvers to take control of VW*. New York City: The New York Times, 2008.
Dijkstra Lewis, Poelman Hugo and Ackermans Linde, *Rail passenger transport performance*. Brussels: European Commission, European Union Regional Policy Working Papers, 2019.

Directive 2012/34/EU of The European Parliament and of the Council of 21 November 2012 establishing a single European railway area can be found on the institutional website: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:32012L0034.

Directive 2005/56/EC on cross-border mergers of limited liability companies can be found on the institutional website: https://eur-lex.europa.eu/legal content/EN/TXT/?uri=celex:32005L0056.

Division of competences within the European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aai0020.

Dungan Nicholas, *The new treaty of Aachen: More than just a symbol?*, Atlantic Council, last modified 23 January 2019, https: https://www.atlanticcouncil.org/blogs/new-atlanticist/france-germany-treaty-of-aachen/.

Dutta Soumitra, Lanvin Bruno, and Wunsch-Vincent Sacha, *The Global Innovation Index 2019 Report.* Geneve: World Intellectual Property Organization (WIPO), INSEAD and Cornell University.

Economic Concentration Regulation 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation) can be found on the institutional website: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32004R0139.

Efstathiou Konstantinos, *The Alstom-Siemens merger and the need for European champions*. Brussels: Bruegel, available online at: https://www.bruegel.org/2019/03/the-alstom-siemens-merger-and-the-need-for-european-champions/, 2019.

Eidenmueller Horst, Hornuf Lars and Engert Andreas, *Incorporating under European Law: The Societas Europaea as a Vehicle for Legal Arbitrage.* Brussels: European Business Organization Law Review, 2008.

EU Industrial plans can be found on the institutional website: https://ec.europa.eu/growth/industry_en#:~:text=Industry%20is%20the%20backbone%20of,directly%20providing%2035%20million%20jobs.

European Commission, *Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings*. Brussels: OJ 18.10.2008 C 265, 2008.

European Commission, *EU Competition law: merger legislation*. Brussels: European Union, 2014.

European Commission, *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*. Brussels: OJ 5.2.2004 C31, 2004.

European Commission, Mergers: *Commission prohibits Siemens' proposed acquisition of Alstom*. Brussels: European Commission Press Release, available online at: https://ec.europa.eu/commission/presscorner/detail/en/IP_19_881, 2019.

European Political Strategy Centre, *EU Industrial Policy After Siemens-Alstom*. Brussels: European Commission, 2019.

Ezrachi Ariel, *Under (and over) prescribing of structural remedies*. Oxford: The University of Oxford, Centre for Competition Law and Policy, 2005.

Federico Giulio, *The economic analysis of energy mergers in Europe and in Spain*. Oxford: Journal of Competition Law and Economics, 2011, 603–629.

Fernandes Sofia, Rubio Eulalia (preface by Jacques Delors), *Solidarity within the Eurozone:how much, what for, for how long?* Paris: Notre Europe, document available online at: https://institutdelors.eu/wp-content/uploads/2018/01/solidarityemus.fernandes-e.rubionefeb2012.pdf, 2012.

Fraquelli Giovanni, Piacenza Massimiliano and Vannoni Davide, *Cost saving from generation and distribution with an application to Italian electric utilities*, Journal of Regulatory Economics 18 (3). Berlin: Springer, 2005, 289–308.

French and German Governments, *A Franco-German Manifesto for a European industrial policy fit for the 21st Century*. Berlin: Bundesministerium für Wirtschaft und Energie, 2019.

French and German Governments, *Treaty on Franco-German Cooperation and Integration*. Aachen: Ministère de l'Europe et des affaires étrangères, 2019.

Gerber David, *Law and Competition in Twentieth-Century Europe: Protecting Prometheus*. Oxford: Clarendon Press, 2001.

Geroski Paul, *Competition Policy and National Champions*. London: UK Competition Commission, 2006.

https://www.globallegalinsights.com/practice-areas/merger-control-laws-and-regulations/france.

Global Railway Review, *Akiem Group acquires Macquarie European Rail leasing business*. Westerham: Russell Publishing Ltd, 2020.

Government of the Netherlands, *Strengthening European competitiveness*. The Hague: Cabinet and Permanent Representations NL, 2019.

Guinea Oscar and Erixon Fredrik, *Standing Up for Competition: Market Concentration, Regulation, and Europe's Quest for a New Industrial Policy*. Brussels: European Centre for International Political Economy, available online at: https://ecipe.org/publications/standing-up-for-competition/, 2019.

Hilke John C., *Convergence mergers: a new competitive settlement model from Detroit*, *The* Electricity Journal 14/3. Amsterdam: Elsevier Ltd., 2001, 13–18.

http://english.mofcom.gov.cn/article/newsrelease/counselorsoffice/westernasiaandafricareport/201509/20150901124369.shtml.

https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001L0086.

https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/state-action.

https://www.maritime-executive.com/article/csic-cssc-re-merger-completed.

Information about the International Procurement Instrument can be found on the institutional website: https://ec.europa.eu/growth/single-market/public-procurement/international_en.

International Monetary Fund, *List of countries by nominal GDP* (Washington DC: IMF website, 2019).

Jabko Nicolas, *Playing the Market: A Political Strategy for Uniting Europe, 1985-2005*. Ithaca, NY: Cornell University Press, 2006.

Kayali Laura, *France's Le Maire: Blocking Alstom-Siemens merger would be a 'political mistake'*. Brussels: Springer, 2019.

Kelemen R. Daniel, *Competition Policy.* Boston: Harvard University Press, Eurolegalism, 2011.

Lenoir Noëlle, *La Societas Europaea ou SE – Pour une citoyenneté européenne de l'entreprise, Rapports officiels.* Paris: Ministère de la justice, Documentation Française, 2007.

Lenoir Noëlle, *The Societas Europaea (SE) in Europe. A promising start and an option with good prospects.* Utrecht: Utrecht Law Review,2008.

Leonard Mark, *L'Europe qui protège: Conceiving the next European Union*. London: European Council On Foreign Relations, 2017.

Lombardo Stefano, *Regulatory competition in European company law*. Bolzano: ECGI Working Paper Series in Law, 2019.

Macchiati Alfredo and Prosperetti Luigi, *La politica dei campioni nazionali: tra rinascita e crisi*, Mercato, Concorrenza e Regole 3. Bologna: Il Mulino, 2006, 455–486.

Meyer-Stamer Jörg, *Systematic competitiveness and local economic development Discussion Paper*. Duisberg: Mesopartner, 2008.

Mildner Stormy-Annika, Schmucker Claudia, *Filling the Void*. Berlin: Berlin Policy Journal, 2017.

Moens Barbara and Tamma Paola, *Macron and Merkel defy Brussels with push for industrial champions*. Brussels: Politico.eu, 2020.

Monti Giorgio, *Article 81 EC and Public Policy*. Leiden: Common Market Law Review published by Wolters Kluwer Law and Business, 2002, 1057-1099.

Mosconi Franco, EU Policy-Making, *The Single Market And European Champions: Towards A Taxonomy*. Parma: Routledge, 2015.

Mosconi Franco, *The Age of European Champions – A New Chance for EU Industrial Policy*. Brussels: The European Union Review, Vol. 11, No 1, March 2006, 29–59.

Motta Massimo and Peitz Martin, *Competition policy and European firms' competitiveness*. Brussels: Vox EU, 2019.

Njoya Wanjiru, *Employee ownership in the European company: Reflexive law, reincorporation and escaping codetermination*. Cambridge: Centre for Business Research, University of Cambridge Working Paper No. 416, 2010.

Nourry Alex and Rabinowitz Dani, *European champions: what now for EU merger control after Siemens/Alstom?* Brussels: European Competition Law Review published by Sweet & Maxwell, 2020.

Pitofsky Robert, *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust*. Oxford: Oxford University Press, 2008.

Plans for a European Green Deal can be found on the institutional website: https://ec.europa.eu/info/strategy/priorities-2019-2024/european-green-deal_en.

President Macron's *Initiative for Europe speech* is available online at: http://international.blogs.ouest-france.fr/archive/2017/09/29/macron-sorbonne-verbatim-europe-18583.html.

Preston John, *Railways in Europe: A New Era?* book review edited by Moshe Guvoni and Torben Holvad. Marcham: Alexandrine Press, 2009.

Protocol (No 27), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008M%2FPRO%2F27.

Reader David, *Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights*. Norwich: University of East Anglia and Centre for Competition Policy, available online at: http://competitionpolicy.ac.uk/documents/8158338/11320618/CCP+WP+16-3+complete.pdf, 2016.

Rose Michel, *France, Germany seek veto for EU governments on antitrust cases*. Brussels: Reuters News, available online at: https://www.reuters.com/article/us-eu-m-a-antitrust/france-germany-seek-veto-for-eu-governments-on-antitrust-cases-idUSKCN1Q81MO, 2019.

Sandholtz Wayne and Stone Sweet Alec, *Neo-functionalism and Supranational Governance*. Oxford: The Oxford Handbook of the European Union, Oxford University Press, 2012.

Sandholtz Wayne and Zysman John, *1992: Recasting the European Bargain*. Cambridge: World Politics 42, Cambridge University Press, 1989, 95-128.

Scherer F. M., *Some Principles for Post-Chicago Antitrust Analysis*. Cleveland: Case Western Reserve Law Review, 2001, 5-24.

Schmidt Vivien and Thatcher Mark, *Why are neoliberal ideas so resilient in Europe's political economy?* London: Routledge, 2014.

Schwab Klaus, Porter Michael E., *The Global Competitiveness Report 2007-2008*. Geneva: World Economic Forum, 2007.

Scognamiglio Giuseppe, *Without Washington*. Rome: Eastwest European Institute, published in Eastwest magazine, 2018.

Supreme Court of the United States, *North Carolina State Board Of Dental Examiners V. Federal Trade Commission*. Washington DC, 2014.

Swiss Federal Council, *Ordinance on the control of concentrations of undertakings*. Bern: Swiss Confederation, 17 June 1996 updated to include changes and amendments in legislation on 1 January 2013. Available online at: https://www.admin.ch/opc/en/classified-compilation/19960295/index.html.

Tagliapietra Simone, *Dis-jointed European energy*. Rome: Eastwest European Institute, published in Eastwest magazine, 2016.

Taylor Stuart Jr., *Antitrust post left by Baxter*. New York City: New York Times, available online at: https://www.nytimes.com/1983/12/09/business/antitrust-post-left-by-baxter.html, 1983.

Telò Mario, *European Union and New Regionalism*. Brussels: Routledge, 2014.

Telò Mario, *Regionalism in Hard Times*. Brussels: Routledge, 2017.

Thatcher Mark, *European Commission merger control: combining competition and the creation of larger European firms*. London: European Journal for Political Research, article available online at: http://eprints.lse.ac.uk/54743/, 2015.

The Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 can be found on the institutional website: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC1022(01)&from=EN, Paragraph 62.

The Investment Canada Act R.S.C., 1985, c. 28 (1st Supp.) can be found on the institutional website: https://laws-lois.justice.gc.ca/eng/acts/i-21.8/fulltext.html.

The Masterplan for a Competitive Transformation of EU Energy-intensive Industries Enabling a Climate-neutral, Circular Economy by 2050 – Report by the European Commission can be found on the institutional website: https://ec.europa.eu/docsroom/documents/38403.

Trouille Jean-Marc, *Re-inventing industrial policy in the EU: A Franco-German approach*. Brussels: Routledge, West European Politics, 2007.

Valero Jorge, *Six takeaways from Siemens-Alstom rejection*. Brussels: Euractiv, article available at: https://www.euractiv.com/section/competition/news/six-takeaways-from-siemens-alstom-rejection/, 2019.

Vanberg Viktor J., *The Freiburg School: Walter Eucken and Ordoliberalism*. Freiburg: Institute for Economic Research, University of Freiburg, 2004.

Verde Stefano, *Everybody merges with somebody—The wave of M&As in the energy industry and the EU merger policy*, Energy Policy 36. Amsterdam: Elsevier Ltd., 2007, 1125-1133.

Verhofstadt Guy, *Europe's Missing Champions*. Brussels: Project Syndicate, available online at: https://www.project-syndicate.org/onpoint/europe-s-missing-champions-by-guy-verhofstadt-2019-03?barrier=accesspaylog, 2019.

Weitbrecht Andreas, *From Freiburg to Chicago and Beyond—the First 50 Years of European Competition Law*. Brussels: European Competition Law Review published by Sweet & Maxwell, 2008, 81-87.

Yang Heekyong and Jin Factbox Hyunjoo, *The world's biggest electric vehicle battery makers*. London: Reuters, available online at https://www.reuters.com/article/us-autos-batteries-factbox/factbox-the-worlds-biggest-electric-vehicle-battery-makers-idUSKBN1Y02JG, 2019.

Yap Chuin-Wei, *State Support Helped Fuel Huawei's Global Rise*. New York City: Wall Street Journal, available online at: https://www.wsj.com/articles/state-support-helped-fuel-huaweis-global-rise-11577280736, 2019.

Zettelmeyer Jeromin, *The Troubling Rise of Economic Nationalism in the European Union*. Washington DC: Peterson Institute for International Economics, 2019.

LIBERA UNIVERSITÀ INTERNAZIONALE DEGLI STUDI SOCIALI

Department of Political Science

Master's Degree in International Relations

Major: European Studies

Chair of International Economics

EU Industrial Policy and European Champions after the Siemens-Alstom case

Prof. Paolo Garonna

SUPERVISOR

Prof. Giovanni Rizzoni

CO-SUPERVISOR

ID 639262 Giulio Sindaco

CANDIDATE

Academic Year 2019/2020

Table of Contents

Summary and Critical Analysis

The aim of this study is to determine whether and to what extent the European Commission is actively hindering merger transactions, thereby posing a threat to the establishment of larger European firms. The first chapter addresses the issue of globalisation, focusing specifically on general working definitions of national and European champions and emphasising the need for setting up an environment which shall be conducive to the attainment of major EU industrial policy goals.

Merging undertakings are mainly driven by economic and efficiency factors, in that EU-wide M&A can facilitate corporate mobility while also increasing economies of scale and profits. EU superstar firms might bring a variety of benefits in state-of-the-art technologies and put European businesses on an equal footing with large American and Chinese corporations. However, the DG COMP may intervene to block all those operations which it deems to be incompatible with the single market. European champions shall be created without jeopardising free and fair competition. In fact, oligopolies or monopolies may arise as a result of an increased number of concentrations which, in turn, could affect prices in an unfavourable way, limiting competition and negatively affecting consumption and distribution.

A two-stage examination of the Commission's approach towards mergers is carried out, answering to our main question (i.e. *Is the DG COMP hindering the establishment of European champions?*).

The first stage of this study will use a quantitative method to deal with said subject matters, while the second (qualitative) phase will bring forwards practical policy proposals so as to facilitate the establishment of larger European firms. Legislative issues concerning Societates Europaeae (SEs) and Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) will also be analysed.

In order to redesign EU industrial policy, an overview of the most promising sectors for European champions is provided. Some mergers in the transport and energy industries will be investigated and the issue of excessive fragmentation within those areas shall be tackled (see: Single European Rail Area, Single European Railway Directive 2012/34/EU and European energy union). In view of calls from certain Member States to enhance integration in many other fields, including defence (see: "1.3 Treaty of Aachen's possible repercussions on European Industry", with France and Germany demanding a stronger Common Foreign and Security Policy), building strong EU champions in the aforementioned sectors would be the icing on the cake at the end of a long process. Larger European firms would improve cross-border cooperation, incentivise participation in joint European projects and they might also further the development of eurodistricts. This could, of course, represent a great opportunity for the revival of the European manufacturing industry.

France and Germany have proposed thorough changes in legislation taking account of the fact that merger guidelines ought to be updated according to current global trends. In light of said fundamental needs, the twin engine (i.e. France and Germany) will actively push for amendments to Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation).

The importance of innovation for company competitiveness has been stressed multiple times, especially at the end of Chapter 1. Investing in ground-breaking technologies shall represent a crucial factor in order for European enterprises to thrive in the Digital Era. For this reason, more resources ought to be spent on Important Projects of Common European Interest (IPCEI). Innovation in the common market can only be enhanced by setting up a functioning reciprocity mechanism for public procurement in order for the EU to protect its domestic businesses. Trade policy must preserve Europe's strategic autonomy; the WTO's rulebook should be modernised to increase transparency and combat unfair commercial practices. Levelling the playing field is, thus, imperative so as to face the demanding challenges of globalisation. Whatever solution is adopted, before Europe is capable of seriously competing with other economic giants such as the United States and China, it must resolve its internal imbalances (e.g. disparities among Member States including different levels of public and private indebtedness, housing and private sector credit flows, financial and asset market development, unemployment rates) and governments should be required to give up part of their competences, allowing the Union to emerge as a powerful actor on the world stage.

Chapter 2 deals with a case study (Siemens-Alstom) and it provides the reader with an exhaustive overview of competition legislation, in order to better comprehend what needs to be changed in the current framework so as to foster innovation and competitiveness in Europe.

The chapter focuses specifically on mergers and acquisitions, describing the 2-phase merger evaluation process. Before examining the Siemens-Alstom rejection it is necessary to understand how the DG COMP assesses concentrations and prohibits some of them based on existing norms. Articles 6 and 8 of Council Regulation (EC) No 139/2004 are carefully analysed. The former states that if the concentration does not fall within the scope of the Regulation, it shall be cleared by means of a decision. By the same token, if the transaction falls within the scope of the Regulation but does not raise doubts about its compatibility with the domestic market, it shall be declared compliant with the relevant provisions after Phase I.

When the concentration gives rise to doubts concerning its conformity with the legislative framework, it shall undergo Phase II investigations, unless the interested undertakings abandon the operation. According to Article 8 of the Regulation, when the concentration fulfils the criteria laid down in Articles 2(2) and 2(4) as well as the prerequisites envisaged in Article 81(3) TEC it will be deemed consistent with the single market. The DG COMP can impose the adoption of a number of remedies by the merging parties. If the Commission regards said corrections as being compliant with all previously mentioned provisions, it will clear the concentration ascertaining its compatibility with the common market. If the transaction does not satisfy the range of criteria which have been set out, the Commission shall prohibit the concentration, declaring it non-compliant with the current legislation.

The second part of the chapter deals with the reasons behind the Siemens-Alstom decision. As regards mainline signalling systems, a sophisticated combination of Siemens and Alstom’s assets was proposed by the interested parties, which involved transferring certain assets entirely or partially and others by means of licences. Business and production sites were to be separated; workforce would have been moved, but only in some cases. In addition, the asset purchaser would have continued to rely upon the merged firm with respect to certain licence and service agreements. As concerns *very high-speed rolling stock*, divestment of Alstom's Pendolino (however not high-speed according to several parameters) and a licence for Siemens' Velaro were offered as further remedies. Nevertheless, said commitments have been regarded as insufficient by the DG COMP.

Subsequently, the chapter carries out a comparison with US concentration norms (many major "strategic" activities in the United States are not subject to the implementation of several relevant competition provisions), and it also examines China's unchecked use of state support and economic aid to exporting enterprises. It then looks into the acceptance of behavioural commitments by the *Autorité de la concurrence* in France and proposes an overhaul of present EU rules, following French (flexible application of provisions and adoption of various alternative non-structural measures) and Swiss footsteps (Article 10(2)b Swiss Merger Regulation about "compensations" between advantages and disadvantages of concentrations).

Chapter 3 responds to some of the questions which have been raised following the Siemens-Alstom rejection. Theoretical notions and underlying political ideologies will be analysed.

The first part of the chapter centres around the issue of "protectionism" vis-à-vis "protectiveness", with Europe focusing on the latter so as to tackle numerous challenges stemming from cyberattacks, vulnerability to external interference, military interventionism and the growing political influence of the Eastern world. As concerns advanced cybersecurity threats, some of the solutions which have been put forwards deal with the establishment of a "single" European cybersecurity mechanism against the background of a "common area of security and justice" (see *3.1.1*). Additionally, a common intervention force with an *ad-hoc* cybersecurity unit, complemented by a defence budget, a European doctrine of action and a European Intelligence Academy need to be created as swiftly as possible to address emerging concerns in the area. Europe should consolidate its position, leading the global ecological transition.

Building a functioning European energy market, with efficient network interconnections and reverse-flow systems, is therefore imperative in order to attain full autonomy from third countries' energy supplies or, at least, further diversify the Union's providers.

We have also explored the topic of digital technologies, bringing up Macron's proposals regarding the creation of a European Defence Advanced Research Projects Agency, along the lines of its US homologue DARPA. A uniform corporate taxation across the Union with a view to prompting the emergence of larger European firms is paramount. The EU should finally complete and perfect its Economic and Monetary Union (EMU), fostering the integration of European industries within the framework of a European Industrial Union capable of effectively competing with American and Chinese players.

With regard to the Commission's role in permitting the establishment of European champions, data sets confirm that the DG COMP has rarely used its powers to impose corrections or prohibit merger operations. Between 1990 and 2019, more than 90% of assessments underwent Phase I without conditional remedies: these cases were settled and cleared under Article 6 (Council Regulation (EC) No 139/2004). Furthermore, even among those operations which were assessed during Phase II (based upon Article 8, Council Regulation (EC) No 139/2004), only 27 were rejected between 1990 and January 2019. Thus, 94% of transactions (the vast majority of all evaluations) were authorised by the Commission. As a result, it would be extremely far-fetched to assume that the Commission has hindered or impeded the creation of European superstar firms. In fact, the DG COMP seems to have adopted Freiburg (similar to post-Chicago; see *3.1.6 The ideological context*, Viktor J. Vanberg, *The Freiburg School: Walter Eucken and Ordoliberalism*; Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago;* the Freiburg School and Ludwig Erhard) ideas on economic concentrations, pursuing a moderately "integrationist" agenda and intervening only when concerns on excessive market dominance arise.

Conversely, Chicago and *tout court* "integrationist" (supported by certain Member States, e.g. France and Germany) theories are paradoxically compatible with each other, in that the former rule out interventionism by the Commission to stop ongoing operations on grounds of *laissez-faire* paradigms while the latter promote the active involvement of MS in the establishment of EU champions, hence producing the same result, i.e. the creation of European superstar firms.

CHICAGO SCHOOL	POST-CHICAGO THEORIES
1. "Purist" laissez-faire vision on merger assessment. 2. The cliché «big is bad and small is beautiful» is not backed by evidence. 3. No interference as concerns vertical restraints and M&A. 4. Antitrust may be counterproductive: mergers and vertical restraints are the result of legitimate decisions. The "invisible hand" will make the final decision and determine how successful these choices are going to be.	1. The government (or the Antitrust authority) ought to take measures when the market is not capable of functioning efficiently and solving harmful effects of "bad" merger decisions. 2. While it is true that some monopolies and cartels might be eroded quickly and the market itself can correct inefficiencies resulting from their establishment, there are numerous counter-examples (e.g. 75 years for the United States Steel Corporation to reduce its market dominance and to attain competition and independent pricing in the market; 55 years for General Motors to lower its prices and gradually limit its product leadership due to Japanese access to the markets). 3. It is not true that securities markets are "efficient" at any moment because of their "daily" equilibrium. Merger medium and long-term effects on the economy cannot be measured by the stock market. Stock prices tend to be volatile and change within a short period of time (they are not reliable).
INTERVENTIONIST INTEGRATIONISM BY MS	ORDO-LIBERAL FREIBURG SCHOOL
1. Supports mergers by trying to politically influence Commission members. 2. Fosters the creation of European larger firms and promotes an economically aggressive international agenda (laissez-faire on the global stage, emphasising the importance of protectiveness at the European level). 3. More flexible rules and the establishment of European champions will improve EU competitiveness in the world.	1. Aims to correct the detrimental effects of mergers and hinder the creation of cartels. 2. Wants to counter abuses of dominant position. 3. The market is not always efficient. It needs intervention by Antitrust authorities to work properly and ensure that consumers (see consumer welfare model) and competitors are not deprived of economic opportunities. 4. Competition cannot be hampered in that it is a driver of European integration; monopolies will not be accepted.

We have acknowledged that current legislative provisions ought to be reformed in order for the DG COMP to approve alternative remedies, such as behavioural only commitments, drawing on the French experience (*3.1.7 Why the current legislative framework needs an overhaul*), thereby paving the way for a more flexible evaluation of mergers and acquisitions.

The European Commission regularly supports the implementation of structural changes such as sales of subsidiary companies, factories, divesting certain markets or activities, etc. In horizontal mergers (consolidation occurring between companies which are active

within the same industrial sector, i.e. competitors; these mergers can give origin to efficient economies of scale), the Commission systematically dismisses behavioural commitments, and exceptions to this tacit rule tend to be extremely unusual.
Several national authorities, instead, do accept behavioural corrective measures more often. In fact, from 2008 to 2018, about 36% of the decisions issued by the French Autorité de la Concurrence were subject to the adoption of behavioural remedies (not structural ones). At the European level, less than 20% of total permissions concerned mergers and acquisitions which were conditional upon the implementation of said type of commitments.
To recapitulate, in order for the EU to foster the establishment of European champions, paragraph 17 (and related paragraphs) of the Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 published in the Official Journal of the European Union on 22 October 2008 must be amended, especially with regard to some key requirements. The phrase «commitments relating to the future behaviour of the merged entity may be acceptable only exceptionally in very specific circumstances» ought to be modified to include behavioural tools, in order for them to be employed more frequently, especially with a view to safeguarding the Union's strategic interests while pursuing greater industrial policy objectives.
Article 2 of Council Regulation (EC) No 139/2004 is too vague and general. It does not mention "compensations" between advantages and drawbacks of a concentration. It should be changed along the lines of Article 10(2)b of the Swiss Merger Regulation in order to determine whether a merger leads to an «enhancement in the conditions of competition on another market which outweighs the disadvantages of the dominant position.»

In the second part of the Chapter we have addressed the issue of Societates Europaeae (SEs), a company form which has been chosen by a number of existing European champions. SEs enable firms to develop their EU-wide business strategies while benefiting from efficiencies and economies of scale. Several ambiguities which were not tackled by the 2001 Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) should be solved. Corporate tax convergence and a uniform legislative framework are needed in order to encourage domestic players to choose the SE legal entity type.

By way of a conclusion, notwithstanding the fact that the Commission is not actively hindering the establishment of European champions, it is clear that competition rules must be adapted to current world trends, so as to tackle the challenges of globalisation and further accelerate the process of European integration. Merger provisions ought to be modified, drawing inspiration from US norms, incorporating elements of the French and Swiss legislative frameworks and making the concentration assessment process more flexible.

Europe must be capable of living up to its ambitions, prioritising a less burdensome approach to allow the creation of long-awaited EU champions in strategic sectors.