

# Centre for Law, Economics and Society

*Policy Paper Series: 1/2019*



## **The Future of Competition Policy in Europe: Some reflections on the interaction between industrial policy and competition law**

**Ioannis Lianos**

**Centre for Law, Economics and Society**

**CLES  
Faculty of Laws, UCL**

**Director: Professor Ioannis Lianos**



**CLES Policy Paper Series  
1/2019**

**The Future of Competition Policy in Europe:  
Some reflections on the interaction between industrial  
policy and competition law**

**Ioannis Lianos**

**March 2019**

Centre for Law, Economics and Society (CLES)  
Faculty of Laws, UCL London,  
WC1H 0EG

The CLES Policy Paper Series can be found at  
<https://www.ucl.ac.uk/cles/cles-policy-papers>

All rights reserved.

No part of this paper may be reproduced in any form without permission of the authors.

Pre-published version of I. Lianos, The Future of Competition Policy in Europe,  
Concurrences (forth. 2019)

ISBN 978-1-910801-24-6

© Ioannis Lianos 2019

Centre for Law, Economics and Society

Faculty of Laws, UCL

London, WC1H 0EG

United Kingdom



# The Future of Competition Policy in Europe

## Some reflections on the interaction between industrial policy and competition law

Ioannis Lianos\*

### *Abstract*

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

**Keywords:** industrial policy, competition law and policy, national champions, merger control

**JEL Codes:** L4, L52, O25

---

\* Professor of Global Competition Law and Policy and Director of the Centre for Law, Economics and Society, UCL Faculty of Laws; Vincent Wright chair, Sciences Po Paris; Academic Director, BRICS Competition Law and Policy Centre, HSE National Research University. The author would like to thank Pierre Regibeau and Andrew McLean for helpful comments at an earlier version of this paper. The author is solely responsible for any errors.

# The Future of Competition Policy in Europe

## Some reflections on the interaction between industrial policy and competition law

Ioannis Lianos\*

### Introduction

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

This debate is not new but, as I will explain in the next section, it has been raging since the early days of merger control in the EU. I will then briefly explore the interaction between competition policy and industrial policy, before examining the roots of the problem, at least as

---

\* Professor of Global Competition Law and Policy and Director of the Centre for Law, Economics and Society, UCL Faculty of Laws; Vincent Wright chair, Sciences Po Paris; Academic Director, BRICS Competition Law and Policy Centre, HSE National Research University. The author would like to thank Pierre Regibeau and Andrew McLean for helpful comments at an earlier version of this paper. The author is solely responsible for any errors.

<sup>1</sup> See <https://www.gouvernement.fr/en/a-franco-german-manifesto-for-a-european-industrial-policy-fit-for-the-21st-century>.

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

<sup>3</sup> See P. C. Evans and A. Gawer, *The Rise of the Platform Enterprise – A Platform Survey* (The Center for Global Enterprise, 2016), available at [https://www.thecge.net/app/uploads/2016/01/PDF-WEB-Platform-Survey\\_01\\_12.pdf](https://www.thecge.net/app/uploads/2016/01/PDF-WEB-Platform-Survey_01_12.pdf)

<sup>4</sup> See [http://europa.eu/rapid/press-release\\_IP-19-881\\_en.htm](http://europa.eu/rapid/press-release_IP-19-881_en.htm)

<sup>5</sup> See <https://www.archyworlddys.com/mayor-urges-european-commission-to-end-alstom-siemens-merger>.



this is perceived by the recent critics of EU competition law enforcement, in particular following the blocking of the *Alstom/Siemens* merger transaction. Two issues will be discussed: first, the difficulties of performing a balancing test that integrates allocative and productive efficiency concerns while taking an industrial policy perspective; second, the time scale of the analysis of potential competition that is usually considered by the Commission in EU merger control. The final section will take a critical perspective on the institutional setup put forward by the Franco-German Manifesto, and will explore the technocratic or political nature of the exercise, these two issues being intrinsically related.

## **Setting the scene – EU Merger control versus national champions and national Industrial States**

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

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

---

<sup>6</sup> Art. 66 ECSC Treaty.

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

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

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

*hundred firms which, once they are large enough, would be the most likely to become world leaders of modern technology in their fields.*"<sup>10</sup>

By the time the third merger wave occurring in the US had reached its peak, it had led to the development of large conglomerates or vertically integrated firms, which operated according to what has been called the "multi-divisional form" of organisation, or "M form." The main feature of this form of corporation was the centralised control over strategic decision-making investment in new markets that could offer higher rates of return and less competition than the market(s) the company was already present on. A second characteristic was the delegation of operational decision-making to divisions (or strategic business units) that were closely monitored by the centre. This led to a decentralised profit planning relying on the discounted cash flow methodology in order to evaluate capital projects. The quest for higher rates of return became the essential driving force of expansion. This expansion has been justified by the need to diversify across product and or geographical markets, and was facilitated by investments in managerial hierarchy in order to co-ordinate production, sales and devise competitive strategies. The managerial structure was considered as the key mechanism for unlocking productivity (what Chandler later called "the visible hand hypothesis").<sup>11</sup> Although the oil crisis in the mid-1970s and the economic recession that followed ended this movement, the importance of the "M form" of organisation and the efficiencies it brought may have influenced the debate in Europe.

The same year Servan-Schreiber published his *American Challenge*, well-known American economist John Kenneth Galbraith published his bestseller book *The New Industrial State*.<sup>12</sup> In this book Galbraith attacked the price system and competition as incompatible with the modern technology-based economic system that was emerging out of the second industrial revolution. In his view, this system relied on industrial planning, which was necessary in order to provide the stability that the significant commitment of capital and time for the development of more sophisticated technologies required. According to Galbraith, the more technically sophisticated the product is, the more important it is for the economic entities to plan their industrial production, but also "manage demand" (e.g., through advertising), in advance, and thus to replace the price system with some form of planning. This could take several forms, one being vertical integration and different forms of contractual restraints. Galbraith went as far as arguing that "[t]he modern large Western corporation and the modern [at the time of writing] apparatus of socialist planning are variant accommodations to the same need,"<sup>13</sup> the corporation serving as "the prime planning instrument."<sup>14</sup> Galbraith coined the term of "technostructure" to refer to the main source of authority in this more technologically sophisticated part of the economy. This term did not only make reference to the management of corporations but to a broader corporate technocracy, which controlled corporate savings that were quite significant during this period and represented more than three fifths of the total of savings supplied. Indeed, most of the earnings of a corporation were not paid as dividends to stockholders, but were instead retained by the corporation and reinvested or used for wage

---

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

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

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

<sup>13</sup> *Ibid.*, 41.

<sup>14</sup> *Ibid.*, 46.



increases, in what has been qualified as the “retain and reinvest” model of the corporation.<sup>15</sup> The essence of the power held by the technostucture relied on the specialised knowledge that was necessary for the organisation of the production and sale of more sophisticated technologically products, capital and labour being relatively less important factors of production in this context. Galbraith noted a “*shift of power in the industrial enterprise (...) from capital to organized intelligence.*”<sup>16</sup> Profit maximisation, which is for Galbraith, “*the only goal that is consistent with the rule of the market,*” is not the goal of the technostucture, which exercises power in order to pursue other goals, and in particular the organisation’s own survival.<sup>17</sup> Price stability serves one of the main objectives of industrial planning, growth, as it facilitates “*control and minimise[s] the risk of a price collapse that could jeopardize earnings and the autonomy of technostucture.*”<sup>18</sup> Galbraith expressed a critical judgment with regard to competition law, noting that antitrust laws, “*in seeking to preserve the market, are an anachronism in the larger world of industrial planning.*”<sup>19</sup> For him, “[t]hey do not preserve the market” but “*preserve rather the illusion of the market,*” thus becoming a sort of “*charade,*” “*an act that helps to conceal the reality of industrial planning and associated price control by the great corporation.*”<sup>20</sup>

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

Notwithstanding these relatively critical perspectives on the role of competition law, and more specifically the role of merger control, in July 1973 the Commission initiated a proposed merger regulation before the Council, the text being endorsed by the European Parliament.<sup>23</sup> However, this failed at the Council in view of the opposition of some Member States to the evaluation of mergers solely on the basis of their effects on competition. A number of Member States, such as France, the UK, Italy and Ireland, advanced instead an assessment of the effects

---

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

<sup>16</sup> Ibid., 70.

<sup>17</sup> Ibid., 140 and 208–209

<sup>18</sup> Ibid., 241.

<sup>19</sup> Ibid., 244.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

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

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

of mergers on industrial policy and other social and regional goals, while Germany and Denmark promoted the evaluation of mergers solely for their effect on competition.<sup>24</sup> The Commission proposed a new draft regulation in 1981,<sup>25</sup> which again failed before the Council because of divisions among the Member States, in particular because of the industrial policy versus solely competition law debate. All the national competition law regimes of the larger Member States, such as Germany, France and the UK, provided discretion to a political decision-making body, most often the minister or secretary of state to overrule the determination of the competition authority. Merger control in each of these jurisdictions was intrinsically linked to the need to protect and manage the national industrial state.

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

At the time when this fourth merger wave gradually slowed after the market crash of 1987, the Court of Justice of the EU (hereinafter CJEU) provided further impetus for the adoption of an EU merger control system with the *Philip Morris* judgment in 1987, which applied what is now Article 101 TFEU to merger activity.<sup>27</sup> Following this judgment, there was a situation of uncertainty leading corporations to notify their merger activity to the Commission for formal or provisional clearance, under the notification and legal authorisation regime of Reg. 17/62 which applied at the time. On 21 December 1989, the Council eventually adopted a regulation requiring the pre-notification to the Commission of concentrations within its scope—those where the parties’ turnover exceeded the thresholds—and providing for possible prohibition or

---

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

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

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

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

other remedies by the Commission.<sup>28</sup> In assessing whether a merger is incompatible with the Common Market, Article 2(1) EUMR requires the Commission to take into account only competition concerns, such as, amongst others, the structure of the market, potential competition, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, as well as “*the development of technical and economic progress provided that it is to consumers’ advantage and does not form an obstacle to competition.*” Justifications on non-competition grounds were removed in 1989 from an earlier draft of this Article and replaced by these provisions.

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

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

### **National champions and competition policy<sup>32</sup>**

---

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

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

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

<sup>31</sup> *Ibid.*, 92.

<sup>32</sup> This Section draws on I. Lianos, A. Mateus & A. Raslan, Development Economics and Competition. A Parallel Intellectual History, CLES Research Paper Series 1/2012, available at [https://www.ucl.ac.uk/cles/sites/cles/files/cles\\_1\\_2012new.pdf](https://www.ucl.ac.uk/cles/sites/cles/files/cles_1_2012new.pdf).

Industrialisation has always been at the heart of any discussion on economic development. According to the “infant industry” argument, a country should have productive power by first strengthening its infant industries to level the playing field before opening its doors to free trade and competition.<sup>33</sup> In his famous statement supporting the case for infant industry protection, John Stuart Mill<sup>34</sup> alluded to one of the main prerequisites for such industries: the presence of dynamic learning effects that are external to firms. However, protection should be temporary as long as the infant industry matures and becomes viable without protection. Subsequently, Charles Francis Bastable added another condition requiring that the cumulative net benefits provided by the protected industry exceed the cumulative costs of protection.<sup>35</sup> Together, these conditions are known as the Mill–Bastable Test.<sup>36</sup>

Almost all arguments for infant industries rest on the assumption that production costs for newly established industries within a country being likely to be initially higher than for well-established, more efficient foreign producers of the same product, who have greater experience, higher knowledge and higher skill levels. With protection, infant domestic producers would raise their productivity and, over time, be able to compete with foreign firms on an equal footing. One should note that this argument is for a temporary support of the domestic industry through the suppression of competition. Although one common mechanism for competition suppression is trade protection, the modern theory of “second best”<sup>37</sup> proffers that a producer subsidy is superior to a more distorting tariff, unless the government is constrained to raise revenue or taxes are also distorting.<sup>38</sup> Another possibility would be a reduction of competition, for instance through authorising some form of merger activity, to the extent that there are some barriers to entry or expansion preventing the rapid entry into the market that may be incentivised by higher prices and super-normal profits. Regardless of the means of suppression, there are various arguments advanced by the supporters of the “infant industry” argument for a more active state intervention.<sup>39</sup>

First, it is considered important to induce investment in the acquisition of technological knowledge such as learning-by-doing and on-the-job training. Learning effects are crucial in

---

<sup>33</sup> See F. List, *National System of Political Economy* (1856): 72–73. List thought that free trade was suitable for industrialised countries and that industrialisation through free trade was possible only in case countries were on the same level of development. Alexander Hamilton encouraged “government activism” to promote industrialisation. See also M. Cowen and R. Shenton, *Doctrines of Development* (1996): 155. Cited in I. Lianos, A. Mateus and A. Raslan, *Development Economics and Competition. A Parallel Intellectual History, CLES Research Paper Series 1/2012*.

<sup>34</sup> See J. S. Mill, *Principles of Political Economy with some of their Applications to Social Philosophy* (1848): 918–919, reprinted in M. C. Kemp, *The Mill–Bastable Infant-Industry Dogma*, 68 *J. Pol. Econ.* 65 (1960)

<sup>35</sup> C. F. Bastable, *The Commerce of Nations* (10th ed. 1921) (1891), 140–143. Cited in I. Lianos, A. Mateus and A. Raslan, *Development Economics and Competition. A Parallel Intellectual History, CLES Research Paper Series 1/2012*.

<sup>36</sup> For further discussion of the Mill-Bastable Test, see M. C. Kemp, *The Mill–Bastable Infant-Industry Dogma*, 68 *J. Pol. Econ.* 65 (1960); see also M. J. Melitz, *When and How Should Infant Industries be Protected?*, 66 *J. Int’l Econ.* 177 (2005). Cited in I. Lianos, A. Mateus and A. Raslan, *Development Economics and Competition. A Parallel Intellectual History, CLES Research Paper Series 1/2012*.

<sup>37</sup> R. G. Lipsey and K. Lancaster, *The General Theory of Second Best*, 24 *Rev. Econ. Studies* 11 (1956). Cited in I. Lianos, A. Mateus and A. Raslan, *Development Economics and Competition. A Parallel Intellectual History, CLES Research Paper Series 1/2012*.

<sup>38</sup> I. Lianos, A. Mateus and A. Raslan, *Development Economics and Competition. A Parallel Intellectual History, CLES Research Paper Series 1/2012*.

<sup>39</sup> *Ibid.*

most industries, in particular at the early stages of their history.<sup>40</sup> To the extent that ‘learning gives rise to a special kind of intertemporal externality in production’<sup>41</sup> as it implies dynamic scale economies in production, it has provided an argument for the protection of an infant industry<sup>42</sup>. Learning-by-doing is a form of sunk cost. Hence, unless this learning-by-doing spills over ‘completely, instantaneously and costlessly among all rival production units, or unless at each date every unit faces strong diminishing returns to scale in production at some output levels, there are social wastes in having more than one production unit’<sup>43</sup>. Protecting the national champion from foreign competition would therefore enable it to go down its learning-by-doing curve faster, thus capturing more of the market, provided competition is in strategic substitutes. Such policy might be welfare enhancing if the domestic learning possibilities are strong and dependence on a foreign monopoly would mean that profits occurring in the domestic market are repatriated abroad.<sup>44</sup>

Second, state intervention may also produce externalities, exterior to the firm but interior to the industry. In this case, the effects of the activity of one firm benefit the others and cannot be appropriated completely by that firm. Externalities generated by the accumulation of knowledge due to R&D are of this type. When spillovers occur to other firms, it leads to a situation of under-provision of the external good. Spillovers may not be purely national and may also have an international impact. The case for government intervention through a subsidy in these cases is well established. A learning-by-doing effect with external impact to the firm is also a case for output subsidies provided by the state.<sup>45</sup> A tariff is again a second-best option because it introduces an unnecessary consumer distortion,<sup>46</sup> as would also have a restriction of the domestic competition to which the firm is faced, for instance by accepting a merger leading to the dominance of the domestic industry by the merged entity.

Third, there is ample empirical evidence in support of the assertion that R&D generates high rates of return and that the social rate is much larger than the private rate.<sup>47</sup> Problems of

---

<sup>40</sup> B. Zimmerman, Learning Effects and the Commercialization of New Energy Technologies: The Case of Nuclear Power, 13 *Bell J. Econ.* 297 (1982); M. B. Lieberman, The Learning Curve and Pricing in the Chemical Processing Industries, 15 *Rand J. Econ.* 213 (1983); M. Bell, B. Ross-Larson and L. Westphal, Assessing the Performance of Infant Industries, 16 *J. Dev. Econ.* 101 (1984). Cited in I. Lianos, A. Mateus and A. Raslan, Development Economics and Competition. A Parallel Intellectual History, *CLES Research Paper Series* 1/2012.

<sup>41</sup> P. Dasgupta & J. Stiglitz, Learning-By-Doing, Market Structure and Industrial and Trade Policies, (1988) 40 *Oxford Economic Papers* 246.

<sup>42</sup> See, the discussion in H.Y. Wan & S. Clemhout, Learning by Doing and Infant Industry Protection, (1970) 37 *Review of Economic Studies* 33.

<sup>43</sup> P. Dasgupta & J. Stiglitz, fn 40, 247.

<sup>44</sup> *Ibid.*

<sup>45</sup> I. Lianos, A. Mateus and A. Raslan, Development Economics and Competition. A Parallel Intellectual History, *CLES Research Paper Series* 1/2012.

<sup>46</sup> *Ibid.*

<sup>47</sup> T. F. Bresnahan, Measuring the Spillovers from Technical Advance: Mainframe Computers in Financial Services, 76 *Am. Econ. Rev.* 742 (1986); M. Trajtenberg, The Welfare Analysis of Product Innovations, with an Application to Computed Tomography Scanners, 97 *J. Pol. Econ.* 444 (1989); J. I. Bernstein and M. Ishaq Nadiri, Interindustry R&D Spillovers, Rates of Return, and Production in High-Tech Industries (C.V. Starr Ctr. for Applied Econ., Econ. Research Reports, 1988), available at <http://www.econ.nyu.edu/cvstarr/working/1988/RR88-04.pdf>. cited in I. Lianos, A. Mateus and A. Raslan, Development Economics and Competition. A Parallel Intellectual History, *CLES Research Paper Series* 1/2012.

coordination and imperfect markets or lack of perfect information lead to the well-known case of underinvestment. Let us suppose that there are significant fixed costs and export demand is limited due to high transportation costs or barriers to trade abroad. Profitable entry by a producer may be precluded by the non-existence of a buyer downstream in the market. The same reasoning may apply to a firm that needs inputs upstream in the market to enter into production and may also apply to network externalities that arise due to either technological or pecuniary linkages. These coordination failures may be a reason to establish a tariff in order to temporarily raise profitability in the market. However, it is doubtful that a tariff will solve the coordination problem. A superior policy would be some form of centralised system of information, a role usually performed by financial institutions, or sector or regional planning.<sup>48</sup> One may envisage that such role could be played by a national champion dominating the specific domestic industry.

Fourth, an additional problem justifying intervention arises from imperfect capital markets that either do not finance the investments required or, due to problems of adverse selection and moral hazard, require collateral that would penalise small firms and market entry.<sup>49</sup> From this perspective, a larger domestic champion would face less difficulties to attract capital. Although this argument would make sense in the context of a developing economy, where access to capital might be more difficult, it appears of less concern in the EU, where access to capital for firms big enough to trigger merger review is excellent.

Fifth, a further case for government intervention is linked to the need to build a reputation in export markets. Consumers have imperfect information and it is costly for them to discover the quality of a new firm. As a result, it is costly to build a reputation, leading some economists to advance the need for an export subsidy to help in the penetration of new markets.<sup>50</sup> Another approach would be to constitute a national champion. However, there is a serious signalling problem with this approach: oftentimes quality is associated with the intrinsic characteristics of products, and some firms have higher quality products because they are better at producing those goods.<sup>51</sup> As explained by Grossman and Horn in order to get the subsidy, every firm will have to degrade the quality of its product.<sup>52</sup> The best policies are the ones that give an incentive for firms to produce differential improvements in the quality of their products, like minimum standards and enforcing warranties. We know that in perfect equilibrium markets, intervention is almost never an optimal policy.<sup>53</sup> In any case, creating a national trademark ('Japanese sake') and have the quality monitored by an export marketing board looks a superior option than establishing a national champion.

Theoretical and empirical evidence shows that the strongest case for government intervention may arise in the first stages of introduction of a new innovative product, both in developed and developing countries. For developed countries, it is in terms of R&D. For developing countries, it is in terms of learning-by-doing. In both cases, spillover effects are very important and it may

---

<sup>48</sup> I. Lianos, A. Mateus and A. Raslan, *Development Economics and Competition. A Parallel Intellectual History*, *CLES Research Paper Series* 1/2012.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> G. M. Grossman and H. Horn, *Infant-Industry Protection Reconsidered: The Case of Informational Barriers to Entry*, 103 *Q. J. Econ.* 767 (1988).

<sup>53</sup> I. Lianos, A. Mateus and A. Raslan, *Development Economics and Competition. A Parallel Intellectual History*, *CLES Research Paper Series* 1/2012.

be difficult for private firms to appropriate all the benefits of their actions. But it should be recognised that protection comes only as a second- or even a third-best policy option. Subsidies or tax benefits to R&D and the process of learning are more adequate. Models of endogenous growth based on the introduction of new varieties or new products are important to understand how diffusion of technological innovation takes place around the world. There remains a scarcity of rigorous studies on the relevance and effects of protection for infant industries, despite its wide use by developing countries. As noted, it is only generally a third-best policy and should always be temporary, but the difficulty in practice is to identify what industries to target as an industrial policy. Furthermore, to the extent that merger policy tends to be lenient at the early stage of industries' development, it is less likely that competition law would create a problem in cases where the justification for industrial policies would be more compelling. In any case, policies for human capital accumulation and building necessary infrastructure are unambiguously positive.<sup>54</sup>

Competition policies give the framework for markets and thus largely influence resource allocation required for economic development. In fact, a discussion of competition policies and other policies that are related to the functioning of the market should precede any discussion of competition law regimes. They are the context in which competition law and enforcement take place.<sup>55</sup>

The policies that are more directly related to the functioning of the market and that can promote more competitive outcomes are market infrastructure policies, external trade policies, entry and exit of firms' policies, intellectual property rights, privatisation, investment policies, procurement, regulation and innovation policies. There are a number of other important policies required for the functioning of efficient competitive markets. Policies related to entry and exit of firms and market mobility in general are also very important.<sup>56</sup> When there are costly regulations to set up business or to operate it, the phenomena of informality takes large chunks of the economy, with clear inefficiency.<sup>57</sup> And even fiscal and monetary policies can have important competitive market implications. When the law stipulates fiscal loopholes and tax evasion is tolerated, firms in dominant positions may acquire an unfair advantage vis-à-vis their smaller competitors.<sup>58</sup> Furthermore, there can be competition distortions when firms in a dominant position have access to credit or capital markets beyond what a proper risk analysis would dictate.<sup>59</sup>

These are all policies that have to be taken into account when defining a competition law regime. They constitute the foundation in which a competition law regime operates.

---

<sup>54</sup> Ibid.

<sup>55</sup> See, generally, D. D. Sokol, T. K. Cheng and I Lianos, *Competition Law and Development* (Stanford University Press 2013).

<sup>56</sup> On the instruments of competition policy, see S. J. Evenett, What is the Relationship between Competition Law and Policy and Economic Development? (2005), available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.536.7483&rep=rep1&type=pdf>.

<sup>57</sup> De Sotro has contributed to this analysis. See H. De Sotro, *The Other Path: The Economic Answer to Terrorism* (Basic Books, 2002).

<sup>58</sup> On fiscal state aid, see, for example, P. Nicolaidis, Fiscal State Aid in the EU: The Limits of Tax Autonomy, *27 World Competition* 365 (2004).

<sup>59</sup> Moreover, access to capital markets is crucial to immature, challenger firms that cannot rely on retained earnings. See J. Tirole, The Institutional Infrastructure of Competition Policy (1999), available at: <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.201.7825&rep=rep1&type=pdf>.



Competition law is an important dimension of competition policy and should be conceived in a much broader perspective than simply antitrust rules, merger control or a system of competition law enforcement.<sup>60</sup>

There are important links between competition policy and economic development and growth. First, there are indications that more competition enhances the development potential of an economy.<sup>61</sup> Second, it is also widely accepted that competition promotes institutional innovation and the emergence of efficient institutions that support economic growth.<sup>62</sup> There is now empirical evidence that competition law enforcement is linked to economic growth in developed countries.<sup>63</sup> More generally, there is evidence that competition promotes productivity. Disney et al. conclude that competition increases productivity levels and the rate of growth of productivity.<sup>64</sup> Bloom and van Reenen show that good management practices are strongly associated with productivity and those are better when product market competition is higher.<sup>65</sup> Finally, an efficient market for corporate control with open rules for takeovers reinforces the impact of competition on productivity.<sup>66</sup> Other studies by Blundell et al.<sup>67</sup> and Aghion and Griffith<sup>68</sup> also confirm the above results. A study for Australia shows that competition-enhancing reforms in the 1990s contributed to an increase in GDP.<sup>69</sup> However, it has also been alleged that the appropriate level of competition may differ for different stages of economic development.<sup>70</sup> More importantly, recent research has highlighted the important links between industrial policy, in particular export oriented (not import-substitution oriented) Technology and Innovation policy, and competition law policy for economic development,

---

<sup>60</sup> See OFT 1390, Competition and Growth (November 2011).

<sup>61</sup> I. Lianos, A. Mateus and A. Raslan, Development Economics and Competition. A Parallel Intellectual History, *CLES Research Paper Series* 1/2012.

<sup>62</sup> See D. Acemoglu and J. Robinson, The Role of Institutions in Growth and Development (2008), *World Bank Commission on Growth and Development Working Paper No. 10*, and D. Rodrik and A. Subramanian, The Primacy of Institutions, *Finance & Development* 31 (2003).

<sup>63</sup> For overviews of the empirical evidence, see T. C. Ma, The Effect of Competition Law Enforcement on Economic Growth, 7 *Journal of Competition Law and Economics* 301 (2011); P. Buccirossi, L. Ciari, T. Duso, G. Spagnolo and C. Vitale, Competition Policy and Productivity Growth: An Empirical Assessment, 95 *The Review of Economics and Statistics* 1324 (2013).

<sup>64</sup> R. Disney, J. Haskel and Y. Heden, Restructuring and productivity growth in UK manufacturing, 113 *Economic Journal* 666 (2003).

<sup>65</sup> N. Bloom and J. van Reenen, Measuring and explaining management practices across firms and across countries, *CEP Discussion Paper* 716 (2006).

<sup>66</sup> S. Nickell, D. Nicolitsas and N. Dryden, What makes firms perform well? 41 *European Economic Review* 783 (1997); S. Januszewski, J. Koke and J. Winter, Product market competition, corporate governance and firm performance: an empirical analysis for Germany, 56(3) *Research in Economics* 299 (2002).

<sup>67</sup> R. Blundell, R. Griffith and J. van Reenen, Market Share, Market Value and Innovation in a Panel of British Manufacturing Sector, 66 *Review of Economic Studies* 529 (1999).

<sup>68</sup> P. Aghion and R. Griffith, *Competition and Growth: Reconciling Theory and Evidence* (MIT press, 2005) (noting that the greatest rate of innovation is observed in industries where the two main firms are technologically neck and neck. In these instances the incentive to innovate and thus to escape competition is the greatest).

<sup>69</sup> OECD, Sources of Economic Growth in OECD Countries (OECD, Paris, 2003).

<sup>70</sup> See, for instance, A. Singh, Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions, *ESRC Center for Business Research. University of Cambridge Working Paper* No. 246 (2002). For a discussion, D. Sokol, T. Cheng and I. Lianos (eds.), *Competition Law and Development* (Stanford University Press, 2013).

showing that although the state should play an important role in steering labour and capital in activities that the private investors might not engage in, in particular in order to build sophisticated products and services for which learning-by-doing plays an important role<sup>71</sup>, the pursuit of ‘fierce competition both abroad and domestically’ enhances accountability and constitutes an important complement to such industrial policy.<sup>72</sup>

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

### **The Williamsonian welfare trade of in competition law: is this a problem?**

If one takes an economic efficiency perspective, competition law is thought to focus on allocative efficiency. This is not linked to the transfer of wealth from consumers to producers over (infra-marginal) units of output still sold, but merely on the lost transactions which could have taken place under a more competitive scenario (i.e., the deadweight loss).<sup>73</sup> In any case, for operational purposes the focus is on consumer harm, as captured by the (likelihood of) higher prices and lower quantity; bearing in mind that in practice hardly anyone in the field of enforcement ever actually attempts to measure/estimate actual changes in either total or consumer welfare.<sup>74</sup>

Beside allocative efficiency, it is often argued that a competitive equilibrium will also maximise productive efficiency, where output is produced with the least amount of resources, given the current set of production technologies—i.e., demand is served by the most efficient firms. This is not always the case, though, in the sense that there are market configurations

---

<sup>71</sup> See, J. Stiglitz & B. Greenwald, *Creating a Learning Society* (Columbia Univ. Press, 2014); M. Mazzucato, *The Entrepreneurial State: Debunking Public vs Private Sector Myths* (Public Affairs, 2013).

<sup>72</sup> R. Cherif & R. Chami, *The Return of the Policy that Shall not be Named: Principles of Industrial Policy*, IMF Working Paper (March 2019), 6, available at <https://www.imf.org/en/Publications/WP/Issues/2019/03/26/The-Return-of-the-Policy-That-Shall-Not-Be-Named-Principles-of-Industrial-Policy-46710>.

<sup>73</sup> The irrelevance of distributional concerns is normally justified with reference to the “compensation principle” (also labelled Kaldor-Hicks efficiency criterion, or potential Pareto improvement) which posits that, if gainers can compensate losers and still be better-off, the change observed in the partial equilibrium analysis is desirable. That is to say, even if the compensation never actually takes place, it is down to the political system to take care of the redistribution of the “pie” (the separability thesis).

<sup>74</sup> There are some examples of competition authorities commissioning studies into the effects of their past decision, thus basically assessing whether their intervention (or lack thereof) has increased consumer surplus. For an overview, see OECD (2011), *Impact Evaluation of Merger Decisions*, available at <http://www.oecd.org/daf/competition/Impactevaluationofmergerdecisions2011.pdf>.

where a trade-off between allocative and productive efficiencies triggered by an increase in a position of substantial market power might emerge. The possibility of an efficiency trade-off between allocative inefficiency and productive efficiency has been put forward by Oliver Williamson, who came to the conclusion that small cost savings may offset relatively larger price increases, thus entailing a more permissive standard for antitrust enforcement.<sup>75</sup> However, his conclusions were reliant on strong assumptions, such as that the market configuration before the increase in market power was competitive; whereas if firms had already some degree of market power (so that prices were already above costs), total welfare would most likely be reduced, i.e., alongside consumer welfare.<sup>76</sup>

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

At the extreme, competition can take place “for” the market, rather than “in” the market, in the sense that rivalry occurs through highly risky “races” to innovate with the aim of utterly displacing the incumbent in order to enjoy the financial reward of monopoly power. This competitive mode, made of sequential monopolies, is labelled Schumpeterian, after the economist Joseph Schumpeter who listed innovation as a central feature of modern economies.<sup>77</sup>

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

---

<sup>75</sup> O. E. Williamson, Economies as an Antitrust Defense: Welfare Tradeoffs, 58 *American Economic Review* 18 (1968).

<sup>76</sup> M. D. Whinston, Antitrust Policy Towards Horizontal Mergers, *Handbook of Industrial Organization*, Vol. 3, Ch. 36, 2371–2440, 2374 (North Holland, 2007).

<sup>77</sup> J. Schumpeter, *Capitalism, Socialism and Democracy* (1942): 84 (“[C]ompetition from the new commodity, the new technology, the new source of supply, the new organization (...) competition which commands a decisive cost or quality advantage and which strikes not at the margins of the profits and outputs of the existing firms but at their very foundations and their very lives”).

the producers. This also increases the likelihood that a merger transaction may face some difficulties from a competition law perspective.

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

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

This is a fair criticism, but there are specific normative reasons that have led EU competition law to adopt such a distributive justice perspective favouring consumers’ interest, instead of a total welfare approach, a topic I have explored elsewhere.<sup>78</sup> It is also not clear that a total welfare approach would better accommodate industrial policy concerns than a consumer welfare standard. This would call for a different type of distributional impact analysis that probably weighs more productive efficiency concerns than price effects on consumers. If the purpose of industrial policy is narrowed down to protecting national or European champions, this more preferential regime for productive efficiency gains would presumably only apply for EU-based corporations. It is unclear how such an approach would comply with WTO rules.

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

First, the merger may involve undertakings situated upstream at the value chain and the price effects of the merger may negatively affect not final consumers but undertakings that are operating in other segments of the value chain, thus affecting their ability to improve their efficiency and compete more effectively at a global level. How would one proceed to such a complex assessment of the effects of the merger across the global value chain? Should we take into account the percentage of the value of the sector’s total market cap that each specific

---

<sup>78</sup> I. Lianos, Some reflections on the objectives of EU competition law, in I. Lianos, and D. Geradin (eds.), *Handbook in EU Competition Law: Substantive Aspects* (Edward Elgar, 2013): 1.

activity and/or undertaking represents before deciding which of the merging parties or the affected undertakings in other segments of the value chain “merits” to be protected as a national/European champion? If the focus is on the economic “upgrading” of the EU-based corporations, “*the dynamic movement within the value chain*” that would enable the EU-based champion(s) to shift to a different stage of the chain providing a higher added value for the investment, this will require a thorough analysis of inter-market effects and the way productive efficiencies would operate, along the whole value chain, something which is not currently performed as the analysis merely focuses on the productive efficiencies of the notifying parties. The informational requirements for performing such a value chain analysis in merger control would be extremely cumbersome for undertakings, eventually affecting their incentives to merge.

Second, would a total welfare approach focus on the costs and benefits to EU-based consumers (final and intermediary) and the costs and benefits of the merger to EU-based producers, or should the merger assessment open the black box of the undertakings and look for instance to the welfare effect of the merger to the EU-based versus foreign controlling shareholders, but also other business participants including non-owner managers and employees as well as other capital providers and financial owners? If the focus of merger control is no more on “consumer welfare” but on something much broader, such as “the well-being of the Union,” if we refer to a goal of EU competition law put forward by the Court of Justice of the EU in *Telia/Sonera*,<sup>79</sup> the merger assessment should integrate in the analysis the income effects that the specific merger transaction will have for a broad category of EU-based “stakeholders,” before deciding which of the companies affected by the merger would merit protection as a “European champion.” In today’s global integrated economy, organised in the context of complex global value chains, such assessment, although not theoretically impossible, would be particularly cumbersome in terms of resources and time, in particular within the limited timeframe of merger control. These are, of course, some of the many complications to which a trade-off approach in merger control would face if it explicitly integrates an industrial policy or “infant industry” perspective.

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

---

<sup>79</sup> Case C-52/09, *Konkurrensverket v. TeliaSonera Sverige AB* [2011] ECR 527, para. 21–22. The court however made explicit in the next paragraph that the concept of “well-being” is narrowly meant as focusing on the impact of the conduct on competition to the direct or indirect detriment of consumers.

<sup>80</sup> See Case No. 33/LM/Mar12, *Glencore International PLC and Xstrata PLC* in South Africa, cited by A. Raslan, *Mixed Policy Objectives in Merger Control: What Can Developing Countries Learn from South Africa?*, 39 *World Competition* 625 (2016).

<sup>81</sup> *Tongaat-Hulett Group Limited and Transvaal Suiker Beperk Middenen Ontwikkeling (Pty) Ltd/Senteeko (Edms) Bpk/New Komati Sugar Miller’s Partnership TSB Bestuursdienste (83/LM/Jul00)* [2000] ZACT 47 (27 November 2000), para. 115–116.

undertaking would not face sufficient local competition, the Tribunal mostly focusing on the effect of the merger on local consumers.<sup>82</sup>

However, the claim of the proponents of industrial policy considerations may be that the trade-off approach followed by EU merger control could dissuade, as such, many mergers that would enhance European industrial policy and the “well-being” of the Union. One may address this argument by looking to the figures. From a total of 7,289 merger transactions notified to the Commission between 1990 and 2019, only 29 of them were blocked following a Phase II assessment.<sup>83</sup> This represents less than 0.4% of notified cases. Of course, one may argue that many mergers may not have occurred because the parties were concerned about a possible negative decision from the Commission. However, this risk appears quite remote in view of these figures, in particular the very few withdrawals for cases that moved to Phase II, to be considered as a serious concern. It is also on the parties to put forward credible and well-substantiated efficiency gains, to the extent that they, and not the Commission, dispose of the relevant information about the strategic purpose of the merger transaction and the efficiencies this may generate. Inverting the order of the assessment, first exploring efficiency gains and then examining anticompetitive effects will not also, in my view, have any significant impact on the analysis. In reality, this is already informally happening, as merger notifications are usually preceded by pre-notification discussions between the notifying parties and the Commission, which assist the Commission to gather a better understanding of the possible competition concerns and the motivations of the parties to merge, including its possible efficiencies.

### **The time scale of potential competition in EU merger assessment –an issue to rethink?**

Another argument that may be put forward in order to criticise the approach followed by EU competition law is the relatively static perspective of the competitive analysis performed, as there is significant emphasis put on the actual or potential (but within a short period of time) contestability of the markets affected. Actual competitors are considered in the operation of the definition of a relevant market that may be affected by the merger. A merger where the target firm is not competing in the same relevant market of the acquiring firm can still give rise to a significant impediment of effective competition (SIEC), whether non-coordinated or coordinated, if there is a realistic prospect that the former could decide to enter the market in the near future but for the merger in question.<sup>84</sup> The threat of entry is stronger where the target company already has, or is very likely to acquire, the availability of assets that could facilitate entry, such as a distribution network which overlaps with the one used by the acquiring firm.<sup>85</sup> Evidence of actual plans to enter at an advanced stage would point towards that conclusion.<sup>86</sup> However, the likelihood of a SIEC is reduced if there are a sufficient number of potential competitors left able to discipline actual competitors.<sup>87</sup>

---

<sup>82</sup> *ISCOR Limited and Saldanha Steel (Pty) Ltd* (67/LM/Dec01) [2002] ZACT 17 (4 April 2002), para. 152 and 154.

<sup>83</sup> See <http://ec.europa.eu/competition/mergers/statistics.pdf>.

<sup>84</sup> Horizontal Merger Guidelines [2004] OJ C 31/11, para. 58.

<sup>85</sup> *Ibid.*, 59.

<sup>86</sup> *Ibid.*, 60.

<sup>87</sup> *Ibid.*

Usually, EU competition authorities have taken a relatively narrow time scale for considering potential competition. To be an effective threat, potential competitors should be able to enter within two years and on a sufficient scale.<sup>88</sup> This can lead to ignore the possibility of potential entry into a market if the time scale of this entry may be longer than two years. The difficulty resides in finding evidence that the potential competitors may have such plans and that these are credible enough to influence the competitive strategies of the merging firms. Extending the time scale to a longer period than two years may lead to a high degree of uncertainty and increase the risk of arbitrary decision-making.

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

There has nevertheless been some evolution in the way potential competition has been considered in the context of mergers, in particular with the recent turn of focusing on innovation effects. It has been alleged that many established companies proceed to “killer acquisitions” buying out smaller start-ups or small and medium undertakings with the aim to discontinue the development of the targets’ innovation projects that may challenge their dominant position, thus pre-empting future competition<sup>89</sup> and this beyond the time period of two years usually considered. Indeed, if an additional investment in R&D by a potential entrant reduces the expected profits of a rival (and vice versa), because of its business stealing effect, then a merger between these two firms may internalise this negative externality, and reduce innovation. In this context, the European Commission has looked beyond the R&D pipeline to explore the dynamic resources and capabilities of the specific firms to innovate and the development of specific “lines of research.”<sup>90</sup> It has looked, for instance, to investment in basic R&D that may with some degree of probability become eventually profitable, even if this probability remains limited, for instance 10%. This approach seems to expand both the locus and the time period that is usually considered in assessing actual or potential competition, as the Commission has examined the overlaps between the parties, not only at the level of innovation spaces, by

---

<sup>88</sup> Horizontal Merger Guidelines [2004] OJ C 31/13, para. 74 and 75.

<sup>89</sup> Some analysis in the pharmaceutical sector argues that more than 6% of acquisitions every year are “killer acquisitions”: see C. Cunningham, F. Ederer, and S. Ma, *Killer Acquisitions* (2018), available at: [http://faculty.som.yale.edu/songma/files/cem\\_killeracquisitions.pdf](http://faculty.som.yale.edu/songma/files/cem_killeracquisitions.pdf).

<sup>90</sup> A theory that has, for instance, influenced the approach of the European Commission in *Dow/DuPont*: European Commission, Case M.7932 *Dow/DuPont* (2017).



looking to “early pipeline projects” and “lines of research,” but also at the level of the industry. The Commission has indeed taken into account the global characteristics of R&D organisations, that is, the resources, personnel, facilities, and other tangible and intangible assets dedicated to research and development.<sup>91</sup> If such a broader analysis may be perfectly justifiable in order to assess the innovation effects of the merger transaction and reduce the likelihood of “killer acquisitions,” it would also make sense to adopt a similarly flexible perspective when assessing potential entry when this could constrain the pricing strategies of the merged entity. Unless one is to consider that price effects would merit a different approach than innovation effects. This could make a difference in some cases, in particular if it is reasonable to expect that the future competitor may have the incentives and ability to enter the market in the medium term, on the basis of its tangible and intangible assets, idiosyncratic resources and capabilities, possibly in view of some history of previous expansion in other geographic markets.

### **Merger control, industrial policy and competition policy: political or technocratic balancing?**

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

However, the Franco-German Manifesto may be understood as not being related to a more EU-centric trade-off assessment framework of the welfare effects of the merger, but to aim for some form of re-politicisation and re-nationalisation of EU merger control, to the extent that it is suggested that this assessment should be conducted by a political organ, probably at the level of the Council of the EU.<sup>92</sup> One may doubt on the capabilities of such a political organ to

---

<sup>91</sup> Ibid., para. 1957.

<sup>92</sup> The proposal suggests a “*right of appeal of the Council which could ultimately override Commission decisions*” “*subject to strict conditions.*”

perform a detailed analysis of the possible social costs and benefits of the merger to the European economy and society, and it is unclear on what type of evidence this assessment would rely upon. As previously mentioned there are some examples of successful competition law regimes with an elaborate evidence-based analysis of a limited number of public interest concerns, such as economic and industrial development, South Africa constituting an example, although as I have explained international competitiveness considerations had little impact in practice. However, this assessment is not conducted by a political organ but by the competition authority, which balances these various concerns, the process being subject to judicial review. The aim is to preserve the rule of law, with organised procedures ensuring the participation of all interests affected, from the risk of arbitrary decision-making, as the operation of balancing is based on an adversarial process of collecting and comparing evidence of various impacts. In my view, such a balancing can only be performed by a technocratic institution on the basis of a technocratic evidence-based assessment. Such technocratic institution should be able to perform the complex distributional impact analysis that would be required in today's globalised economy. It will have to develop concepts and tools, for instance a value chain perspective, or agent-based modelling, as well as the computational capability, that would enable it to go beyond the effects of the merger on specific relevant markets and would also explore the inter-market and value-chain effects in the medium and long term. Of course, the computational costliness of such an approach would be considerable and should, at least as long as the computational technologies are underdeveloped, be performed for a very limited number of mergers that would be selected on the basis of strict criteria (e.g., growth potential and employment impact of the specific sector of economic activity). It is unlikely that the Council of the EU has the necessary capabilities to perform such a complex balancing analysis. The college of commissioners, which benefits from the important technocratic and analytical resources of the Commission, in particular various DGs, seems much better placed. Hence, I do not see any reason why we should move the centre of decision-making from the college of commissioners where it currently resides to the Council of the EU, for instance by introducing in the EUMR the possibility to justify an anticompetitive merger on the basis of industrial policy concerns.<sup>93</sup> This analysis would complement the competition assessment of the merger, both of them being publicly available (excluding confidential information), thus making the decision-making transparent and therefore subject to the scrutiny of the public. This will also enable some limited judicial review of the decisions for manifest error, taking into account the complexity of the evidence relied upon and the weight provided to policy considerations.

However, this institutional proposal put forward by the Franco-German Manifesto can be explained by an implicit rejection of a balancing or trade-off evidence-based approach for one that would rely on the political collective "will" of the governments of the EU expressed through some form of qualified majority voting at the Council of the EU. Such an approach would not rely on a technocratic balancing but would prioritise industrial policy concerns in comparison to competition concerns on the basis of a political assessment performed by the Council. In my view, this is deeply unsatisfactory. First, it would open the door to the influence of private interests, the decision-making process being close to an EU political horse-trading we have witnessed on several occasions, with usually negative effects for the well-being of the Union. Second, this more political process would provide large Member States, which dispose of more votes at the Council, more influence in the final decision made, in comparison to the situation in which such decisions are made at the level of the college of commissioners. There

---

<sup>93</sup> Although Article 21(4) presently enables Member States to take into account some limited legitimate concerns, Member States can only invoke this provision to scrutinise the transaction and eventually prohibit the merger, rather than as a way to authorise a merger on public interest grounds.

is one commissioner per Member State and these should represent the EU collective interest, rather than the interests of the EU Member State that has appointed them. To the extent that the most important, in terms of number of votes at the Council, jurisdictions in the EU, Germany and France, are the first- and the second-largest economies of the EU, and where most of the largest corporations in Europe are based, the distributional impact of such an approach could be devastating for the smaller and poorer economies of the EU, in particular Southern and Eastern European Member States. The consumers based in these Member States would likely suffer from the anticompetitive practices and higher prices, without these negative welfare effects for these jurisdictions being outweighed by, for instance, higher corporate tax or shareholders' revenue income resulting from the increased international competitiveness of the European champions, as the shareholders of these European champions will likely be based in the richer EU Member States.<sup>94</sup> One may also expect that smaller and poorer Member States will not dispose of equal institutional resources and capabilities to proceed to a thorough analysis of the welfare effects of these mergers on their economy, in comparison to the larger and richer Member States, with the result that the decision-making process at the Council may be biased in favour of the latter.

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

In my view, a truly European industrial strategy should not aim to maintain the industrial States put in place by the EU Member States in the 19th and 20th centuries but to replace them with an EU-wide industrial and competition policy that takes advantage of the fourth industrial revolution in order to develop a more equitable industrial development across the Union. This should provide opportunities to start-ups and small and medium undertakings in poorer EU Member States, which are already confronted to challenging credit/investment and institutional environment conditions, to become more competitive at the international level. The solution to the European competitiveness problem does not come from enabling larger and richer EU Member States to more freely subsidise their national champions or to preserve them from competition with a lax merger policy, when this has negative effects on the consumers and the economies of other Member States. This does not mean that reforms should not be undertaken at the EU level. As I explained above, merger control needs to be less focused on the simple static economics of the relevant market and should embrace a more dynamic and complex economic perspective, taking into account learning effects, network effects, increasing returns to scale, path dependency, tipping and leveraging points that shape global competition between and within business ecosystems in the digital economy, while eventually integrating in the analysis out-of-market efficiencies and some industrial policy concerns.<sup>95</sup> These concerns should not only be narrowed down to international competitiveness but should also engage

---

<sup>94</sup> McDonnell and Farber note that powerful firms are not randomly distributed across Europe, and hence "*producer surplus is likely to accrue primarily to the most powerful and wealthy EU members, increasing existing wealth disparities at the margins*": B. McDonnell and D. A. Farber, Are Efficient Antitrust Rules Always Optimal?, *Antitrust Bulletin* 807 (Fall 2003): 825.

<sup>95</sup> I. Lianos, Polycentric Competition Law, 71 *Current Legal Problems* 161 (2018).

with other dimensions of the EU social market economy.<sup>96</sup> However, the institutional setting of the recent Franco-German Manifesto appears ill-suited for such an ambitious reform agenda. It focuses, excessively in my view, on the preservation of national industrial states rather than the establishment of a Europe-wide one. It also moves the centre of decision-making from the EU-minded and well-resourced—from a technocratic perspective—body of the college of commissioners to the more national politics-based and less well and more unequally resourced—from a technocratic perspective—body of the Council of the EU. Hence, the Memorandum may well ask the right questions but provides inadequate answers.

---

<sup>96</sup> Article 3(3) TEU provides that the Union shall establish an internal market with the goal of achieving “*a highly competitive social market economy*” aiming at full employment and social progress. Article 11 TFEU stipulates that “[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities.” Article 9 of the TFEU states that “[i]n defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.” To a certain extent these principles may provide broader guidance in the analysis performed, for instance, as to what would constitute a socially valuable direction for industrial competitiveness (e.g., Green New Deal).