

Competition Policy and Industrial Policy: for a reform of European Law

Bruno DEFFAINS | Professor in Economic Science, Panthéon-Assas, Director, Paris Center for Law and Economics, CRED.

Olivier d'ORMESSON | Lawyer specialised in competition law, lecturer in competition law, SciencesPo, HEC and Paris 2 Panthéon Assas.

Thomas PERROUD | Professor in Public Law, Panthéon-Assas, Director, Institut de préparation à l'administration générale de Paris.

SUMMARY

In Europe the recent period has been marked by the emergence of a debate on the modalities and objectives of the competition policy. The failures of certain merger projects such as Alstom/Siemens raise questions about the inadequacy, or even obsolescence, of existing mechanisms and, above all, the place of competition law in relation to other public policy objectives.

Other challenges are also being set for competition law that must be tackled head-on: firstly, the current law faces challenges raised by the digital economy (in particular the power of the GAFAs); then, European competition law does not take sufficient account of the competition that European companies face from third countries that do not respect the same principles.

In other words, when Europe decides to open up its market, it quickly realises that other countries are not subject to the same constraints and often have more room to manoeuvre to support the implementation of industrial projects likely to contravene competition rules. This is because, in Europe, competition law takes precedence over all other national or Community approaches to industrial policy. On the one hand, this is certainly due to the structure of European texts, in that the Treaty provisions on competition enjoy almost "constitutional status". On the other, competition law instruments are used by the European Commission to pursue objectives that are far removed from the classic notion of competition. Should a rebalancing be carried out between competition policy and industrial policy so that the objectives of the latter can be deployed?

Furthermore, our analysis aims to address issues of institutional structure in two stages: improvements and modifications to the law as it stands, and improvements and modifications requiring the amendment of the Merger Regulation or the Treaty. Can we maintain the current system in which the Commission, as a political actor, takes a decision involving private actors in the markets even though the College of Commissioners has never heard the parties concerned? Should DG Competition "COMP" be given its independence and left to decide on its own, with the College of Commissioners having the power to make proposals, allowing it to weigh competition objectives against other public policy objectives?

It would also be worth reflecting on how these other objectives should be taken into account. Should it be a purely political process or an expert consideration? Should we propose that the College of Commissioners base its decision on a reflection informed, for example, by a cost-benefit analysis?

Table des matières

1.	INTRODUCTION	1
1.1.	THE PLACE OF COMPETITION POLICY IN THE CONSTRUCTION OF EUROPE	3
1.2.	THE ROLE OF ORDO-LIBERALISM IN THE DEVELOPMENT OF A SPECIFIC EUROPEAN COMPETITION LAW.....	4
1.3.	FRANCE AND GERMANY: TWO TYPES OF CAPITALISM WHICH EXPLAIN TWO DIFFERENT APPROACHES TO INDUSTRIAL POLICY	5
1.4.	THE ECONOMIC FOUNDATION OF THE COMPETITION POLICY.....	5
2.	PRESENT DIFFICULTIES: AN INADAPTED/OBSOLETE LAW?	7
2.1.	THE SPECIFIC NATURE OF EUROPEAN COMPETITION LAW IN INTERNATIONAL COMPETITION	7
2.1.1.	THE US: COMPETITION LAW DOES NOT IMPEDE INDUSTRIAL POLICY	8
2.1.1.1.	STATE AID LAW	12
2.1.1.2.	COMPARATIVE ANALYSIS OF STATE AID LAW IN EUROPE AND THE US.....	12
2.1.2.	CHINA HELPS ITS NATIONAL CHAMPIONS UNRESTRAINEDLY	14
2.2.	THE PRIMACY OF COMPETITION LAW OVER INDUSTRIAL POLICY IN EUROPE	15
2.2.1.	HOW DID WE GET HERE?	16
2.2.2.	WHAT SOLUTIONS ARE THERE ?.....	17
2.2.3.	DOES THE COMMISSION USE LEGAL TOOLS IN THE COMPETITION LAW TO ACHIEVE GOALS OUTSIDE OF THIS LAW AND NOTABLY INDUSTRIAL POLICY GOALS?.....	18
3.	THE LACK OF AMBITION REGARDING MOST REFORM PROJECTS (MODIFICATIONS WITH NO CHANGE TO THE TREATY OR MERGER REGULATION)	22
3.1.	PROPOSED MODIFICATION IN THE APPLICATION OF EUROPEAN MERGER CONTROL	23
3.1.1.	CHANGING THE TIME AND GEOGRAPHIC SCOPE OF THE DEFINITION OF MARKETS	23
3.1.1.1.	THE TIME FRAME OF THE MARKETS.....	23
3.1.1.2.	THE GEOGRAPHICAL TIME FRAME OF THE MARKETS	24
3.1.1.3.	GOING BEYOND THE DEFINITION OF RELEVANT MARKETS: OTHER CRITERIA	25
3.1.2.	ACCEPTING BEHAVIOURAL COMMITMENTS MORE OFTEN.....	26
3.1.3.	TAKING INTO CONSIDERATION STATE AID AND SUPPORT THAT THIRD COUNTRY COMPETITORS ENJOY (MOSTLY IN ASIA).....	27
3.1.4.	TAKING BETTER ACCOUNT OF EFFICIENCY GAINS.....	28
3.1.5.	ACCEPTING A « TRADE-OFF » BETWEEN THE POSITIVE AND NEGATIVE ASPECTS OF CONCENTRATION FROM THE POINT OF VIEW OF COMPETITION.....	29
3.1.6.	STRENGTHENING THE COMMISSION'S RESPONSIVENESS TO THE POLITICAL GUIDELINES LAID DOWN BY THE COUNCIL.....	29
3.1.7.	IMPROVING THE PROCEDURE FOR THE CONTROL OF CONCENTRATIONS AND ABUSE OF DOMINANT POSITION.....	30
3.2.	PROPOSAL TO AMEND THE STATE AID RULES.....	30
3.2.1.	SHORTENING THE TIME LIMITS FOR STATE AID PROCEDURES AND STREAMLINING IPCEI PROCEDURES.....	30
3.2.2.	WIDENING THE EXEMPTIONS FROM NOTIFICATION AND THE PRESUMPTION OF LEGALITY OF CERTAIN STATE AID MEASURES	31
3.3.	THE UNION'S EXTERNAL TRADE POLICY	32
3.3.1.	A STRENGTHENING OF EUROPE'S TRADE POLICY MAY BE ILLUSORY	32
3.3.2.	TRADE DEFENCE PROPOSALS	33
4.	EXPLORING NEW PATHS	35
4.1.	FOCUS ON THE RECOGNITION OF EFFICIENCY GAINS.....	36
4.2.	PROCEDURAL CHANGES	38
4.3.	STRUCTURAL CHANGES.....	39
	CONCLUSION	41

1. INTRODUCTION

In Europe the recent period has been marked by the emergence of a debate regarding the modalities and objectives of competition policy. This debate has been triggered by two observations: on the one hand, the failures of certain projects such as Alstom/Siemens and, on the other hand, the observation made by a number of experts that existing measures are inadequate or even outdated.

Recent positions taken by leading figures reflect the issues at stake in this debate fairly well. In particular, it is interesting to note developments in the discourse of Margrethe Vestager, Commissioner for Competition. In a speech in 2016, "Competition in a big data world", she stated that: "... I hope it makes clear that we don't need a whole new competition rulebook for the big data world". In a speech in 2019, "Defining markets in a new age", she stated that: "The challenges we're facing, at the start of this new decade, mean that we need to look again at the tools we use to enforce the competition rules", concluding that it was necessary to "Keep the rulebook up to date".

On the occasion of a conference organised by the OECD in December 2019, "Competition Under Fire", Jean Tirole, Nobel Economics Prize winner, discussed the relationship between industrial policy and competition policy and raised the issue of "participatory" antitrust.¹

Philip Lowe, former DG for Competition insisted on the fact that, "*the economic and political environment in which competition law is enforced and applied has changed extensively over the last decade. Globalisation and a renewed focus on industrial policy have generated calls for more flexible competition policy*". In particular he concluded that: "*There are strong arguments in favour of an active industrial policy at European and national level. Both state aid control and competition policy need to take account of the international dimension of markets, and a dynamic assessment of competitive pressures in markets is essential...*"².

The observations made by many experts are in line with the analysis made of the challenges raised by the digital economy, in particular the power of the GAFAs, and with the observation that when Europe decides to open its market, other regions of the world are not subject to the same constraints and often have more room for manoeuvre to support the implementation of industrial policy projects.

The decision in the Alstom-Siemens dossier appeared to some to be the product of European economic law that ignores the fact that, in globalised markets, not everyone plays by the same rules, not everyone has the same interests, not everyone has the same tax system. To think that the WTO will be the place where China, the United States, Japan or Korea will submit to European rules seems totally improbable, especially at a time when multilateralism is giving way to American trade policy or the Chinese Silk Routes. We should therefore start from the realistic observation, shared by many players, that the WTO is no longer in a position to fulfil

¹ Jean TIROLE. "Competition policy at a crossroad" (Video online). YouTube, 28 novembre 2019.

² Philip LOWE. "Competition and industrial policy in Europe: how can they work together?" Oxera, October 2019.

its role, and will not be able to do so for a long time to come. Therefore, some proposals for the WTO to sanction regulatory dumping by certain States are simply not realistic³.

It must also be stressed that "DG COMP" has become the main - if not the only - instrument of economic regulation at European level. The financial crisis of the late 2000's-early 2010's illustrated this perfectly. The issues raised by the regulation of the digital economy only reinforce this trend further. One of the important consequences is that DG COMP - and no doubt this is also true of most competition authorities in Europe - is overloaded with work and is forced to deal not only with competition but also with many other subjects sometimes far removed from its core business.

In such a context, the question also arises of the objectives of competition policy in terms of consumer welfare and of a more global reflection regarding the concept of general interest. If competition law rightly excludes other general interest objectives from its purpose and reasoning, the political decision-maker cannot do the same. The final political decision must be informed by an expert reflection on the overall well-being generated by the competition decision by integrating industrial, employment, innovation and environmental policy concerns. This is Philip Lowe's opinion: "assessment cannot be based on hunch or fantasy; it must be rigorous and realistic. And it needs to be carried out by an administrative authority that is subject to control by the courts but is free from political interference and independent of business interests⁴."

The protection of the competitive process, which is legitimate, sometimes seems to take precedence over the issue of its outcome. These observations raise questions about the relationship between market authorities and political power.

In this respect, it is no doubt useful to consider the European project as it was conceived a few decades ago. What is the European model, if it really exists? How does it assert itself both in relation to national models and in relation to those of the globalised economy? The major stages of legal construction can enlighten us.

³ See Section 3 below.

⁴ Op. Cit. note 2.

1.1. THE PLACE OF COMPETITION POLICY IN THE CONSTRUCTION OF EUROPE

The European Economic Community (EEC), created in 1957, has long been known as the "Common Market". However, the EEC is not just a trade organisation. It aims to merge the economies of the Member States through a process of economic integration. In order to understand the nature of the EEC, it is therefore essential to look at its mode of economic regulation, i.e. the relationship between national and Community public authorities, enterprises and non-state actors in the management of economic activity⁵.

The Community has tackled State intervention in the economy on three fronts since its construction. Firstly, internally, by monitoring very closely the way in which European States could hinder the free movement of goods, services, capital and persons. In this sense, it has succeeded in creating a real market. The case law of the Court of Justice on free movement, since the *Cassis de Dijon* judgment, has succeeded in identifying all state techniques constituting barriers with the aim of favouring national production. European companies now have a "level playing field" for selling their products throughout the common market.

Then, externally, although debates over the liberal or protectionist nature of the EEC took centre stage in the years 1956-1959, they became secondary because the European Community very quickly demonstrated its openness to the outside world. The fundamental controversies are in fact much more about macroeconomic regulation within the EEC on the one hand, and the regulation of industrial structures on the other. The latter topic has long been ignored by historiography even though it covers a fundamental controversy in the history of the EEC and beyond, in economic history, that of the opposition between competition policy and industrial policy, the former having become hegemonic since the "public shift" in competition law in the 1980s⁶.

Competition policy is a form of economic regulation based on state intervention in relations between companies to encourage or repress cartels (agreements between two independent companies), abuses of a dominant position and concentrations (or mergers). Even if this public policy can be applied according to various political and economic doctrines, it is the German *ordo-liberal* trend which has very strongly influenced its definition within the EEC and, in particular, in the inclusion of these rules in the Treaty⁷: "In no other country is competition law placed at such a "constitutional" level."

⁵ See Laurent WARLOUZET (2018), « *Governing Europe in a Globalizing World* ». *Neoliberalism and its Alternatives following the 1973 Oil Crisis*, Oxon; New York, Routledge, coll. « Routledge Studies on Government and the European Union ».

⁶ V. Mélanie Vay, *La mise en problème européen de l'économie publique (Socio-histoire des mondes de l'entreprise publique au contact de la politique européenne (1957-1997))*, Political Science Thesis, Université Panthéon-Sorbonne (Paris 1), *passim*, not. p. 334.

⁷ As Mélanie Vay shows in the above-mentioned thesis, it was France that made an intense effort of persuasion to have the rules on public services introduced into the Treaty. The author tries to show "how the attitude of Guy Mollet's government in the pursuit of the negotiations of the European Recovery [after the failure of the EDC], which enabled the mobilization of the French public economy, led the French delegation to put forward the cause of public enterprises and services in the future Common Market, which resulted in the tabling, on 4 January 1957, at the negotiating table of the Val Duchesse Intergovernmental Conference, of a proposal to add articles on "public undertakings, public services and State monopolies" to the EEC Treaty. She then examines "how the French position, which demanded the recognition of a unique status for the public economy in the Common Market, became part of these first European debates which, on this specific point, led to a form of compromise between two opposing interpretations of the Community treaties, one *dirigiste*, the other liberal." (P. 36).

1.2. THE ROLE OF ORDO-LIBERALISM IN THE DEVELOPMENT OF A SPECIFIC EUROPEAN COMPETITION LAW

Ordo-liberalism provides the State with a very important role in establishing a framework for economic activity that ensures the free exercise of the laws of the market. Public authorities must therefore be given strong prerogatives to monitor the behaviour of companies and prohibit those that could prove harmful in the respect of economic freedoms. On the other hand, the State must confine itself strictly to this function of impartial arbiter. It must not intervene in the functioning of industrial structures to stimulate a particular sector or company.

On the contrary, industrial policy encourages this specific type of action by public authorities. These interventions are justified by purely economic considerations, but also to support social or territorial cohesion objectives (aid to a sector in crisis) or industrial policy objectives, innovation (support for a strategic sector or cutting-edge industries for example).

These two forms of economic regulation have a fundamental role to play in the context of European integration. Indeed, competition policy must ensure the establishment of a common market among EEC member States. It must prevent tariff and quota barriers from being replaced by obstacles such as cartels or monopolies. The example of the cartels of the inter-war period, when very large international cartels controlled many markets in a public manner, justifies the development of their surveillance. Industrial policy, for its part, can strengthen European industrial power and thus its international influence. It can also make it easier to set up companies that are more European than national, thus affirming Europe's identity.

In the Treaty of Rome, the Community institutions have important prerogatives in the field of competition policy. In terms of industrial policy, the Treaty is much vaguer, but Article 173 on the coordination of national economic policies may legitimise such developments. The Europe of competition and the Europe of industrial policy are therefore two possible interpretations of the Treaty of Rome, which are both complementary and incompatible. They respond to different economic doctrines, but also to different social and political visions of the EEC.

Between 1958, when the Treaty of Rome came into force, and 1970, the date of a major memorandum on Community industrial policy, there was a lively debate on the definition and coordination between the Europe of competition and the Europe of industrial policy. In this crucial period for the definition and affirmation of the EEC, the whole specificity of Community Europe was at stake. Initially, a competition policy of ordo-liberal inspiration was very quickly defined but its implementation was disappointing. Then, from 1965 onwards, approaches relating to industrial policy were developed. A confrontation between these two interpretations of the Treaty of Rome even took place in the second half of the 1960s, laying the foundations for a debate that is still topical today.

We should certainly not underestimate what separates us, despite a certain convergence between France and Germany regarding industrial policy, which explains a rather broad misunderstanding.

1.3. FRANCE AND GERMANY: TWO TYPES OF CAPITALISM WHICH EXPLAIN TWO DIFFERENT APPROACHES TO INDUSTRIAL POLICY

The differences between France and Germany on this subject are due to very different approaches to capitalism. Since after the Second World War French industrial policy was built on the central State, which established a certain number of great national champions, which Michel Aglietta calls an "industrial-state innovation system"⁸ and which distinguished itself in aeronautics, land transport, nuclear power and chemistry, among other fields. The German system is centred on a dense network of highly innovative SMEs. The German Mittelstand has thus become "*the benchmark for competitive excellence in Europe*"⁹. This fabric of highly competitive SMEs depends much less on the federal government to innovate.

This difference in capitalism helps us understand the divergence on this subject that has existed for a long time between the two countries. Similarly, an understanding of the economic underpinnings of competition policy provides insight into the current situation.

1.4. THE ECONOMIC FOUNDATION OF THE COMPETITION POLICY

In general, the tools needed for competition policy are provided by industrial economics, both the so-called traditional Harvard structural approach (structure–conduct–performance) and the game-theory and contract-theory approach.

It should be stressed that, in such a framework, most analyses are generally conducted in partial equilibrium and not in general equilibrium, which may seem rather paradoxical when trying to understand the effects of firms' strategies in terms of efficiency, i.e. their ability to promote or reduce economic and social well-being¹⁰.

The foundation of competition policy is indeed the microeconomic theory of welfare economics, according to which a competitive market economy should promote the maximum welfare of society as expressed in the first theorem of welfare economics.

It should be noted that this approach to competition policy is based on restrictive hypotheses: no increasing returns (or else markets are contestable: no barriers to entry and exit, access for any entrant to the best technology, no anticipation of price reductions by the installed firm after the entry of a competitor), no indivisibility, no externalities, perfect information, therefore symmetrical. It is generally accepted that if these assumptions are not respected, we speak of market failures. These failures require regulatory policies in certain sectors (network industries, banks) and industrial policy measures.

Moreover, it should be noted that this microeconomic perspective in terms of market efficiency as a basis for competition policy inevitably raises the question of the relationship with other objectives of economic policy or other social or, more generally, political considerations.

⁸ M. Aglietta, Europe. Sortir de la Crise et inviter l'avenir, Michalon, 2014, p. 102.

⁹ Ibidem.

¹⁰ The sum of partial equilibria the achievement of general equilibrium and the optimal allocation of resources by the market does not mean that the objectives in terms of social justice and equity are achieved.

It also raises the question of whether competition is an objective in itself. In the context of European integration, the answer is negative insofar as competition is primarily conceived as an instrument for achieving the ultimate objectives of economic policy.

The Treaty establishing the European Community in fact mentions competition policy as one of the means of achieving the general objectives of the Treaty (objectives cited in Article 3 of the Treaty: sustainable and balanced growth, economic and social cohesion, high employment, social progress): "*Action by the Community shall include a system ensuring that competition in the internal market is not distorted*"¹¹. Reference is also made in this respect to Article 120 TFEU: "*Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Union as defined in Article 3 of the Treaty on European Union and in the context of the broad guidelines referred to in Article 121(2). The Member States and the Union shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119*".

Competition is therefore not an exclusive mean, and the maintenance of competition is justified only as long as the general objectives of the Treaty are better achieved by the competitive process than by other forms of control such as regulation or by cooperation between private or public economic agents, especially if competition or the intensification of competition has perverse effects. This is what economic theorists call the theory of the second best. For example, the setting up of a crisis cartel might be preferable to intensified competition if the latter results in a race to increase investment leading to huge overcapacities, as was the case, for example, in the synthetic fibers sector from 1975 and in the European steel industry during the 1970s.

Similarly, State aid may not only be aimed at remedying market failures, for example by supporting investments by SMEs, subsidising investments generating externalities, such as investments in training and those with a favourable effect on the environment but may also be justified by an objective of social cohesion or regional development.

Moreover, the reference to competition policy in the articles of the Treaty reflects the objective of the single market. European competition policy must, for example, prevent corporate behaviour from re-establishing internal barriers between the countries making up the European Union. Thus, in the text of Articles 101 and 102 TFEU (hereinafter the "Treaty"), one of the conditions of application is the effect on trade between Member States, which reflects the objective of the first articles of the Treaty. It is this condition of effect on trade between Member States that differentiates Articles 101 and 102 of the Treaty from the equivalent provisions on antitrust in the national competition laws of the Member States.

¹¹ Drafted prior to the Treaty of Lisbon, 13 December 2007; taken up in principle by Protocol No 27 on the internal market and competition annexed to the Treaties.

2. PRESENT DIFFICULTIES: AN INADAPTED/OBSOLETE LAW?

To understand the need for reform of European competition law, it must first be appreciated that European competition law does not operate in an empty environment. European companies compete with companies in other regions that do not have as comprehensive and demanding an understanding of competition law as we do.

European competition law has been used to deal with problems that are not economic problems, but to address, in many cases, deficiencies in the European political process. Moreover, other regions we are in competition with do not have such a broad concept of competition law. This puts us at a disadvantage and means that we have to think about remedies to take account of this disadvantage, which international trade law will not be able to resolve.

2.1. THE SPECIFIC NATURE OF EUROPEAN COMPETITION LAW IN INTERNATIONAL COMPETITION

To take two examples, China and the United States do not have constraints like those stemming from European competition law.

As noted by David Bosco and Catherine Prieto¹², attempts to harmonise competition law at international level have failed, partly due to the United States. However, we would like to show here that the very extensive scope of European competition law, in its various aspects, limits the action of European companies faced with that of foreign groups which are not subject to such limitations.

The United States, which were a pioneer in the field of antitrust¹³, has gradually reduced its control of concentrations by allowing entire sectors of its economy¹⁴ to concentrate. The US authorities and Courts have also more or less abandoned the prosecution of abuses of dominant positions. But more importantly, the US have no State aid law, and does not apply competition law to public activities.

In China, the State's declared policy of supporting, especially financially, their national champions by all means, has led to the creation of huge groups under State control. These groups are active worldwide and increasingly in Europe. Moreover, where state-owned groups are concerned, the application of merger control is subordinated to the "industrial policy" objectives, defined by the Chinese state.

While everything is guaranteed in Europe to ensure that State intervention cannot distort competition, this is not the case in the United States (1), and a fortiori not the case in countries such as China (2).

¹² D. Bosco, C. Prieto, *Droit européen de la concurrence*, Bruylant, 2013, spéc. Chapter 3.

¹³ The Sherman Act, 1890 et The Clayton Act, 1914.

¹⁴ Thomas Philippon, *The Great Reversal*, Harvard University Press, 2019.

2.1.1. THE US: COMPETITION LAW DOES NOT IMPEDE INDUSTRIAL POLICY

Competition law provides another illustration of how public action in the economy is dealt with in both blocks. This treatment is profoundly different. U.S. competition law is not intended to apply to public activities, to control the states' actions, which would have an anti-competitive effect. This is not the case in Europe.

First of all, states can choose to exempt certain activities from the application of competition law. The U.S. doctrine that allows states to be exempt from the application of competition law, called the state action doctrine, is directly inspired by federalism and the idea that the will of each state must be respected. Therefore, we shall see to what extent the American Supreme Court is more respectful of state sovereignty than its European counterpart. In the words of Eleanor Fox, "*the United States ... has given preference to state sovereignty over national governance, when the opposite choice would have increased national well-being,*"¹⁵. To this choice must be added another element, relating to the purpose of competition law in the United States, which is to punish private anti-competitive practices, and not the activities of entities attached to the state¹⁶.

The ruling on which the doctrine of state action is based is the Supreme Court's ruling *Parker v. Brown*¹⁷ of 1943, in which it states that the Sherman Act - which is the law prohibiting certain anti-competitive practices in the United States - is not intended to apply to state action. As the Supreme Court has narrowed the scope of this theory, immunity now applies only where the state has clearly indicated its intention in law and where the state exercises close control over the activity in question. This development was influenced by the theory of regulatory capture, as research had shown that both agencies and state parliaments could be called upon to take action in the interests of certain groups rather than in the general interest.

The most recent Supreme Court decision in this area was in 2015, *North Carolina State Board of Dental Examiners v. FTC*¹⁸. In this State, every dentist must be licensed by the Order in order to practice. Tooth-whitening activity developed on the fringes of the profession, so that the order, considering that this activity falls within the profession of dentist, ordered those professionals to cease that activity. Is there a violation of competition law here? The Federal Trade Commission (FTC), one of the agencies in charge of sanctioning anti-competitive practices, considered that there was indeed a violation of the law, while the Order considered that it was protected by the State action doctrine. The Supreme Court agreed with the FTC. In order to qualify for exemption, a company must exercise the sovereign powers of the state, whereas the order comprises private individuals regulating their own professions. It must be able to demonstrate close state control of that activity.

Whether the order is regarded as an agency of the state is irrelevant to the Court, which is only concerned with the "risk that actors active in the market may seek to pursue a private interest by restricting trade", which is exactly the case since the order is composed of market actors. What degree of control is needed? The State must retain the power to instruct the agency in question. The Supreme Court's approach differs somewhat from the criteria set out above (intent and control). It focuses on an objective element, the fact that the members of the order are also

¹⁵ V. E. Fox, "What if *Parker v. Brown* were Italian?", Chap. 19 in 2003 *Fordham Corp. L. Inst., International Antitrust Law & Policy* (B. Hawk ed. 2004) at p. 463.

¹⁶ V. P. E. Areeda, H. Hovenkamp, *Antitrust Law, An Analysis of Antitrust Principles and Their Application*, Aspen, 2nd ed., vol. I, p. 140.

¹⁷ 317 U.S. 341 (1943).

¹⁸ 574 U. S. (2015).

market players. Whether the agency will be controlled by private interests is, for Sasha Volokh, difficult to determine. That is why Judge Alito, in his dissenting opinion, points out that the focus should be more on the nature of the agency: is it a state agency or not? The criteria are therefore not fully assured. What is clear, however, is the difference in approach with European Union law.

European Union law uses exclusively objective criteria to determine whether an activity is subject to competition law: does it involve the use of public authority prerogatives? Does it constitute an activity related to social welfare? In all cases, the nature of the activity is determined in concrete terms by the judge. A typical case of the application of competition law in France is the concessionaire of a public service. This is actively controlled by the public entity. If the concessionaire is a public establishment, the public entity has supervisory powers. It is therefore conceivable that, in this hypothesis, the establishment could be regarded as part of the State.

Thus, Eleanor Fox can conclude: "In *Parker v. Brown*, the state won; under European Union law, it would have lost"¹⁹. In addition, U.S. competition law does not apply to federally owned enterprises, such as the postal service.²⁰ and it does not apply to regulated companies either, whereas it does in Europe.

As a result, the United States has a much less intrusive competition law than its European counterpart. To this must be added the fact that many major activities enjoy legislative exemption from competition law.

The legislature has been able to exempt certain conduct from competition law. These behaviours will therefore not be subject to the jurisdiction of the agencies in charge of sanctioning anti-competitive practices, the Department of Justice and the FTC.

The insurance sector provides us with an example²¹. In this case, the specific legislative exemption prevents any action against insurance companies. This is a case of explicit exemption. The exemption may also be implicit, where judges consider that the legal framework of the regulated sector prevents the concurrent application of competition law. An example of this reasoning can be found in the judgement *United States v. National Association of Securities Dealers*²². In this case, the government brought action against the National Association of Securities Dealers (NASD), certain mutual funds, mutual fund purchasers and brokers, accusing them of violating Section 1 of the Sherman Act by engaging in an agreement to restrict the sale and fix the resale prices of certain financial instruments. The Supreme Court

¹⁹ V. E. Fox, "What if *Parker v. Brown* were Italian?", préc. ; E. M. Fox, D. Healey, When the State Harms Competition – The Role for Competition Law, April 10, 2013, NYU Law and Economics Research Paper n° 13-11. V. aussi H. Hovenkamp, Rediscovering Capture: Antitrust Federalism and the North Carolina Dental Case, CPI Antitrust Chronicle, April 2015 (2) : « How much can a state default on its sovereign obligations and continue to be called sovereign? The standard that the Supreme Court has developed is actually not all that high. The final decision must come from a government decision-maker with power to review and disapprove, but largely under any standard that the state wishes to articulate. What the state cannot do, however, is simply paste the label "sovereign" or "agency" on a purely private actor ».

²⁰ *Postal Service v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736 (2004).

²¹ "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended [15 U.S.C. 41 et seq.], shall be applicable to the business of insurance to the extent that such business is not regulated by State Law." (*McCarran-Ferguson Act*, 15 U.S.C. '1012(b)).

²² 422 U.S. 694 (95 S.Ct. 2427., 45 L.Ed.2d 486).

first recalled that, in principle, “*in the absence of an explicit prohibition on the sale of certain financial instruments, the government was not required to take any action against the NASD, but rather to take action against the NASD*”²³. However, in this case, the SEC's close monitoring of the activities of the actors in question leads to the conclusion that there was an implicit exemption. What is the Court's reasoning? The Court's reasoning is as follows: “The SEC's control over the NASD is extensive. Not only does the Maloney Act require the SEC to determine whether an association meets the legal requirements set forth in the statute and therefore may be permitted to monitor the business activities of its members, but it also requires the approved association to submit any proposed changes to its rules to the SEC for approval. The Maloney Act further authorizes the SEC to request changes or additions to the rules submitted to it. In exercising its authority over the association's rules and practices, the SEC is responsible for protecting the public interest as well as the interests of the shareholders and has repeatedly stated that it takes competition concerns into account in the exercise of its control. As this Court has previously recognized, the conferring of such supervisory power on the SEC suggests that Congress intended to exempt the activities of the approved association from the application of the Sherman Act²⁴.”

Cases in which the Supreme Court finds an implied exemption are rare. In numerous rulings, the Court has applied competition law to regulated sectors²⁵ and refused to grant an exemption. In *Philadelphia National Bank*, the Supreme Court stated that: “It is settled case law that an exemption in the application of competition law is not lightly implied.”²⁶ The judge added: “*This method of interpretation, which reflects the indispensable role of competition policy in maintaining a free economy, binds us here. In the absence of any indication in the legislative history of the 1950 amendment to §7 of Congress' willingness to grant a special exemption to the banking industry,*” this implicit exemption cannot be recognized as “*a special exemption for the banking industry.*”²⁷

These cases show that judges take into account the letter of the law as well as the legislative history of the text or, finally, the entire regulatory framework to determine whether Congress intends, explicitly or implicitly, to exempt certain sectors from the rigors of competition law.

Similarly, in the landmark case of *Otter Tail Power Co. v. United States*, which involved a denial of interconnection and power supply, the Supreme Court rejected the argument that the role of the regulator would make reliance on competition law superfluous. The argument is swept aside: “*The District Court held that Otter Tail's continued refusal to sell wholesale electricity ... to its municipal customers constituted an illegal monopoly practice. Otter Tail argues here that its refusal to sell is exempt under anticompetitive law because the Federal Power Commission has the power to compel involuntary electricity interconnections under § 202(b) of the Federal Power Act. The purpose of this provision, however, is to encourage*

²³ *United States v. National Association of Securities Dealers*, 422 U.S. 694, 719-720, 95 S.Ct. 2427, 2442-2443, 45 L.Ed.2d 486 (1975); *Gordon v. New York Stock Exchange*, 422 U.S. 659, 682, 95 S.Ct. 2598, 2611, 45 L.Ed.2d 463 (1975); *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-351, 83 S.Ct. 1715, 1734, 10 L.Ed.2d 915 (1963).

²⁴ *US v. National Association of Securities Dealers* 422 U.S. 694.

²⁵ See developments in: *Antitrust Enforcement in Regulated Sectors Accommodating Regulatory Approaches In An Antitrust Universe: The U.S. Experience In Harmonizing Antitrust With Laws That Restrain Competition*, Disponible ici : <http://www.internationalcompetitionnetwork.org/uploads/library/doc378.pdf> (consulted the last time on 6th August 2013).

²⁶ *People of State of California v. Federal Power Comm'n*, 369 U.S. 482, 485, 82 S.Ct. 901, 903—904, 8 L.Ed.2d 54. Cf. *United States v. Borden Co.*, 308 U.S. 188, 198 199, 60 S.Ct. 182, 188—189, 84 L.Ed. 181; *United States v. Southern Pac. Co.*, 259 U.S. 214, 239—240, 42 S.Ct. 496, 501—502, 66 L.Ed. 907.

²⁷ *United States v. The Philadelphia National Bank et al.* 374 U.S. 321 (83 S.Ct. 1715, 10 L.Ed.2d 915).

*electricity interconnections on a voluntary basis. Only if a company refuses the interconnection can the Federal Power Commission order the interconnection, within limits not related to competition law. The standard that must guide its decision is whether its action is "necessary and appropriate in the public interest". While competition law considerations may be relevant in forming its opinion, they are not determinative. There is nothing in the legislative history to indicate a desire to exempt electricity companies from the application of competition law. On the contrary, the history of Part II of the Federal Power Act indicates an overriding policy objective to develop the maximum degree of competition consistent with the public interest. ...] Congress clearly rejected an intrusive regulatory system to control interstate electricity distribution trade and favored a system based on the establishment of commercial relationships on a voluntary basis. As long as these relationships are governed primarily by commercial judgment and not by regulatory obligations, courts must be reluctant to conclude that Congress intended to neutralize fundamental national policies contained in competition law"*²⁸.

It is clear from the last paragraph of that judgment that, in order to obtain an exemption, the regulation of commercial relations by the regulatory authority must be such as to remove the voluntary nature of those relations. Since the purpose of competition law is to control the commercial relations of private undertakings and not the political choices of federal agencies, competition law will apply where the regulatory framework still leaves sufficient room for commercial freedom for the judges to consider that genuine competition is taking place. Otherwise, an implied exemption may be inferred.

The European and US situations can easily be compared using the electronic communications sector as a starting point. In the United States, the Supreme Court has ruled out the concurrent application of competition and regulatory law in two important decisions: *Verizon*²⁹ and *Pacific Bell Telephone*³⁰. In Europe, on the contrary, competition law applies in parallel with regulatory law. This is apparent from the rulings *Deutsche Telekom*³¹ and *Telefonica*³².

In the context of transatlantic trade, Europe will therefore not be particularly fortunate. This can also be seen, and even more clearly, in the area of State aid.

²⁸ *Otter Tail Power Company v. United States*, 410 U.S. 366 (93 S.Ct. 1022, 35 L.Ed.2d 359). Also see *United States v. Radio Corporation of America*, supra, at 351, 79 S.Ct. 457, 467.

²⁹ *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko LLP* (02-682) 540 U.S. 398 (2004) : « When there exists a regulatory structure designed to deter and remedy anticompetitive harm, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Here Verizon was subject to oversight by the FCC and the PSC, both of which agencies responded to the OSS failure raised in respondent's complaint by imposing fines and other burdens on Verizon. Against the slight benefits of antitrust intervention here must be weighed a realistic assessment of its costs. Allegations of violations of §251(c)(3) duties are both technical and extremely numerous, and hence difficult for antitrust courts to evaluate. Applying §2's requirements to this regime can readily result in "false positive" mistaken inferences that chill the very conduct the antitrust laws are designed to protect ».

³⁰ *Pacific Bell Telephone Co. v. Linklinecommunications Inc.* (No. 07-512) 503 F. 3d 876.

³¹ TPICE, 10 April 2008, T 271/03, *Deutsche Telekom AG v Commission of European Communities*; CJCE, CoJ 14 October 2010, C-280/08 P.

³² CJUE, 10 July 2014, C-295/12 P, *Telefónica SA*.

2.1.1.1. STATE AID LAW

Following the 2008 crisis, while Peugeot-Citroën's competitors in Europe were tracking down the slightest aid given to the PSA group in view of denouncing it to the European Commission, the US government was giving General Motors (GM) \$50 billion in unconditional support!

In this operation, the US Treasury recovered 60.8% of GM's capital and imposed a drastic restructuring plan. GM had to close 16 plants out of 47, had to sell off many brands (notably Saab, Hummer, Pontiac, Saturn) and 11,000 jobs were cut in the United States.

Very quickly, GM recovered and began hiring again. Starting in 2010-2011, the company posted record profits - it became the world's most profitable industrial group (for one year) and, in 2011, the world's largest car manufacturer³³.

State aid of \$50 billion like this, implemented in record time, accompanied by nationalisation³⁴ and granted in an extremely competitive market³⁵, would probably not have been possible in Europe, as it would have been contrary to the rules of Articles 107 and 108 of the Treaty.

The study of this case naturally leads us to clarify the legal framework of State aid law on both sides of the Atlantic.

2.1.1.2. COMPARATIVE ANALYSIS OF STATE AID LAW IN EUROPE AND THE US

It is in the area of state aid law that the radical difference in economic governance between the United States and Europe is best perceived.

What is the situation in the United States? The issue is not studied at all, because there is no litigation. Apparently, there is no debate on the issue. How can we envisage trading with such a powerful partner that does not obey the same rules of the game? Hence, we only found one article that deals with the question³⁶.

Abraham Bell and Gideon Parchomovsky begin their analysis by showing the de facto importance of state aid in the United States, which they call *givings* (as opposed to expropriation, *takings*). There is indeed no textual basis for the prohibition of aid in the US Constitution, the Fifth Amendment of the Constitution merely guarantees compensation for expropriations. For these authors, the basis for a ban on aid should be sought in the grounds for the ban on expropriation. The example developed is that of an expropriation carried out for the benefit of a business: in the case of *Poletown Neighborhood Council v. City of Detroit* (304 N.W.2d 455 [Mich. 1981]), the City of Detroit had expropriated property for the benefit of General Motors, and the expropriation was deemed legal, but the authors consider that the outcome might have been different with a ban on aid. They continue their argument by analogy: the purpose of the prohibition of expropriations is to prevent a faction from enriching itself to the detriment of the community. However, if the aim of the prohibition of expropriation is to prevent the enrichment of a few to the detriment of all, such would also be the prohibition of

³³ With 9.02 million vehicles in 2011, 8% more than in 2010. GM has since lost that lead.

³⁴ Since then, the U.S. state sold its shares in GM; in the process, the U.S. state lost \$11.2 billion, but saved an entire chunk of the U.S. industry that would have been devastated in the event of GM's liquidation.

³⁵ Ford and GM's other main competitors have not been helped.

³⁶ V. A. Bell, Gideon Parchomovsky, *Givings*, Yale Law Journal, Vol. 111, No. 3 (Dec., 2001), pp. 547-618.

aid. The final argument put forward by these authors is that equity and efficiency, which justify the prohibition of expropriation, can also be the basis for a prohibition of state aid.

Curiously, these authors do not use the European example to develop their argument. The basis for the prohibition of state aid under European law is not to be found on the side of expropriation, it is to be found on the side of equality: one criterion for aid under EU law is the selective favour granted to a company to the detriment of competitors. Under French administrative law, the prohibition of public subsidies is based on the protection of public funds and public property law. On this last point, moreover, it should be noted that the textual basis on which the Constitutional Council relies to prohibit the sale of public property at a price lower than its value is Article 17 of the Declaration of the Rights of Man and of the Citizen, which protects private property from expropriation³⁷.

There is, however, case law which enables the regulation of State aid for undertakings pursuing private interest objectives. The vast majority of states have a provision in their constitutions known as a "public purpose requirement". For example, the Constitution of the State of New York provides that "State funds may not be given, loaned or used to assist a corporation or association, or a private enterprise" (Article 7 § 8). These provisions date back to the 19th century and were a response to the massive aid granted at the time to build networked public services, with the result that at the time nine states defaulted and four cancelled all or part of their debt.

However, in the view of the doctrine, these provisions never really prevented State aid to private companies, since the intention behind the adoption of these articles had to yield in the face of the 1930s crisis, in particular, one in which states massively subsidised private industry.³⁸ By the end of the twentieth century, "state courts expanded the range of public interest goals that could be the subject of state aid, so that almost all state supreme courts had recognized the legality of at least one type of economic program involving direct assistance to particular enterprises (grants, subsidised interest loans, and tax reductions).³⁹ The European and American positions could therefore not be more different.

Why is there no state aid control in the United States, even though state aid is very important? In the United States, it is felt that it is the democratic process that must correct this problem. There is every reason to believe that the issue of protecting public money is not an issue in the United States. Common law generally does not address public property and the common good, and this is reflected in the absence of a prohibition on aid.

At the end of this analysis, it is clear that on many points, the way in which the United States and Europe regulate state intervention in the economy is deeply divergent and could cause harm to Europeans by depriving them of the legal means to enforce a principle of equity between economic actors who must not benefit from undue advantages granted by the public authorities.

We find the same problem regarding China, to a much greater degree, of course.

³⁷ See the so-called Privatisation Decision of 1986.

³⁸ V. R. Briffault, *Disfavored Constitution: State Fiscal Limits and State Constitutional Law* 34 Rutgers L.J. 907 (2002-2003), spéc. p. 912.

³⁹ V. R. Briffault, *Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, préc., p. 913.

2.1.2. CHINA HELPS ITS NATIONAL CHAMPIONS UNRESTRAINEDLY

China supports its national champions without constraint, who - as a result of this State aid - compete unfairly on world markets, particularly against European groups.

The Wall Street Journal states in an article published on December 25th 2019, that Huawei has benefited from some 75 billion dollars in state aid, in the form of tax breaks, funding and cheap state resources, which has enabled it to become the world's leading telecoms equipment supplier.⁴⁰ Huawei disputes that it has received such subsidies.

The financial aid provided by the Chinese State to large national groups is undeniable. It can take the form of subsidies, capital increases, loans from State banks, etc. It can also take on more disguised dimensions that are difficult for European players to identify, particularly the European Commission, which often lacks proof. This is why some authors have suggested that the Commission should be equipped with a real economic intelligence service.⁴¹

The subtlety of Chinese aid can be illustrated by the development of CATL, which, thanks to the support of the Chinese government, has become the world's largest manufacturer of batteries for electric vehicles (in terms of installed production capacity, installed production capacity, etc.)⁴².

The electric battery represents between 30 and 40% of the cost of an electric vehicle ("EV"), and whoever controls this essential component has a significant hold on the sector. However, according to some forecasts, EVs are expected to account for 57% of passenger vehicle sales and 30% of the world's vehicle fleet by 2040.⁴³

In 2013, CATL, which manufactured lower quality batteries was suffering strong competition in China on the part of Korean battery manufacturers, LG Chem and the Japanese Panasonic⁴⁴. In 2015, the Chinese government announced to car manufacturers that they could only sell their EVs in China with the planned subsidies if they were equipped with Chinese batteries. Chinese-based car manufacturers (international and Chinese groups) notably stopped buying their batteries from LG Chem and Panasonic. CATL eventually built huge factories in China and gradually closed its technological gap to become one of the world's leading manufacturers of electric batteries. CATL also sells its batteries in Europe.

The Chinese measure, which made the granting of subsidies for the purchase of EVs conditional on the use of batteries from Chinese manufacturers, could not have been transposed in Europe. Indeed, national preference is incompatible with European State aid rules.

Moreover, the application of merger control in China functions according to "variable geometry". It applies (almost) normally, and sometimes rigorously, to foreign groups⁴⁵ and to private Chinese groups. It rarely applies (or not at all) to Chinese State-run businesses⁴⁶.

⁴⁰ Article du Wall Street Journal du 25 décembre 2019, repris dans l'Opinion du 26 décembre 2019 « *Comment l'Etat chinois a financé l'essor mondial de Huawei* ».

⁴¹ Les Echos of 6 November 2019, Tribune de François Brunet et Patrice Gassenbach, « *Il faut doter Bruxelles d'un vrai service d'intelligence économique* ».

⁴² L'Opinion/WallStreet Journal, 5 November 2019, « *Véhicules électriques : cette firme chinoise qui a la mainmise sur les batteries* »

⁴³ Bloomberg New Energy Outlook report.

⁴⁴ There are no European manufacturers of EV batteries (for the time being)

⁴⁵ See the NXP acquisition project (Netherlands) by Qualcomm (USA), abandoned because the Chinese authorities refused to give their approval.

⁴⁶ These State businesses represent between 25 and 30% of Chinese industrial output .

According to a study covering the years 2008 to 2013, only 15% of the notified concentrations in China concerned mergers between purely Chinese companies, while 45% concerned mergers between non-Chinese companies. By comparison, over the same period, 47% of the mergers notified to the European Commission concerned purely European companies, while 16% concerned mergers between non-European groups.⁴⁷

Public industrial groups, under central government, are subject - in theory - to merger control. In practice, however, when two state-owned groups merge, they sometimes dispense with notification to the Chinese competition authority. For example, the merger between the two telecom giants China Unicom and China Telecom in 2009 was not notified.

On the basis of pure competition law criteria, one wonders how the two Chinese railway groups CSR and CNP were able to create the world leader CRRC, which was so extensively discussed in the Alstom/Siemens case.⁴⁸ This concentration was authorised by the MOFCOM⁴⁹ but apparently on the basis of "national interest" and thus on the basis of industrial policy criteria.

Similarly, the merger between two shipbuilding giants, China Shipbuilding Industry Corporation (CSIC) and China State Shipbuilding Corporation (CSSC) was approved on 25 October 2019 by SASAC⁵⁰ and the merger between two chemical industry giants "Chem China" and "Sinochem" is now underway.

These giant concentrations are decided at the highest State level. The Chinese Administration⁵¹ decides on these transactions according to criteria of "national interest" and "industrial policy" that complement the pure competition criteria and cannot de facto oppose the will of the central government.

We have therefore seen how European competition law places the Union in an unfavourable position to pursue an ambitious industrial policy in relation to its competitors. How did we manage to reach this point? How did we end up abdicating all European ambitions in terms of industrial policy? This is largely due to the "constitutional" nature of competition law in Europe, which has no equivalent anywhere else.

2.2. THE PRIMACY OF COMPETITION LAW OVER INDUSTRIAL POLICY IN EUROPE

European competition law, which was an "emerging law" in the 1970s and 1980s, became a "dominant law" at the beginning of the 21st century.

Competition law is relatively recent⁵², the first Regulation implementing Articles 101 and 102 dates from 1962, the Merger Control Regulation from 1989. The first procedural regulation on State aid dates from 1999.

⁴⁷ M. Mariniello, « *The Dragon Awakes: Is Chinese Competition Policy a Cause for Concern?* », Bruegel Policy Contribution, 2013/2014.

⁴⁸ CRRC was mentioned as a potential competitor in Europe, that could prevent the domination of the new Alstom/Siemens group.

⁴⁹ Replaced in 2018 by the SAMR.

⁵⁰ *Assets Supervision and Administration Commission* of the Chinese State Council

⁵¹ Now the SAMR is replacing the MOFCOM.

⁵² In comparison with the American competition law for example.

However, this law has gradually become dominant due to the principle of the primacy of European law over national laws and the broad powers of the European Commission in competition matters, which have been continuously extended with the active support of the case law of the European Court of Justice.

Articles 101 to 109 of the Treaty relating to competition law give the Commission some major powers: to sanction cartels and abuse of dominant positions, power to order the recovery of State aid, etc. The Commission has also been given the power to impose fines on companies that have infringed the rules of competition law.

On the other hand, Article 173 of the Treaty, which refers to the Union's industrial policies, does not confer direct powers on the Commission. As in other areas, it is the Council and the European Parliament that decide, with the Commission having only coordinating powers. Moreover, Article 173 specifies *in fine* that any industrial policy measure may not "lead to distortions of competition".

It is therefore clear, in the light of these articles from the Treaty, that a potential European industrial policy is subordinate to competition policy.

Similarly, any national laws and measures are subordinate to the Commission's decisions in competition matters because of the principle of primacy. The fact that in 2007, following the Lisbon Treaty (and at the request of France, represented by Nicolas Sarkozy), "free and undistorted competition" is no longer an objective of the European Union"⁵³ did not change a great deal. Invoking Protocol No 27 annexed to the Treaty of Lisbon, the Court of Justice stated in its judgments that ⁵⁴ that this "downgrading" did not alter the continued application of the competition rules as they existed before the Lisbon Treaty.

2.2.1. HOW DID WE GET HERE?

During the negotiation of the Treaty in 1956-57, competition rules were defended mainly by Germany, imbued with *ordo-liberal* thinking. It was traumatised by the experience of cartels under the Nazi regime and aimed to adopt the most advanced national competition law in Europe⁵⁵. During the negotiation of Implementing Regulation 17/62 in 1962, France gave priority to its agricultural interests (adoption of the Common Agricultural Policy (CAP) on 14 January 1962) and gave Germany certain concessions in the field of competition⁵⁶.

Competition policy could therefore develop independently from industrial policy and with only an advisory voice on the part of the Member States. During the negotiation of the Merger Regulation in 1989, many voices were raised, particularly in France, arguing that some competition restrictive mergers could be saved on the ground of industrial policy consideration, such as international competitiveness and the protection of jobs.

The Competition Commissioner at the time, Sir Leon Brittan⁵⁷, and several Member States, including the United Kingdom, fought hard to ensure that the Merger Regulation did not contain

⁵³ See Art. 383 of the Treaty on European Union.

⁵⁴ Notably see, ECJ decision of 17th February 2011, C-52/09, points 20 to 22.

⁵⁵ Laurent Warlouzet, *Journal of Common Market Studies*, vol. 54, n°3 p.729 et 730 – *La Concurrence*, Olivier Freget, Editions Odile Jacob, 2015.

⁵⁶ Warlouzet, *Ibid.*, p. 731

⁵⁷ See the Early Days of EC Merger Control dans *EC Merger Control: Ten Years On*, IBA, 2000.

any reference to "industrial policy"⁵⁸, which was the case in the text adopted on 21 December 1989. When the Merger Regulation was revised in January 2004, no reference to "industrial policy" was introduced and the concentration compatibility test in Article 2 of the Regulation remained purely competitive.⁵⁹

It is clear then, that when the Treaty, Regulation 17/62 and the Merger Regulation were adopted - unanimously by the Member States in the case of all three texts - competition criteria always took precedence over those involving "industrial policy". In various rulings, the Court of Justice has drawn the consequences of these provisions, which are the result of political haggling.

This seems to be due to the fact that a certain consensus was formed between Member States on competition policy, whereas there was no consensus on industrial policy, nor was there a willingness to delegate powers to the European Commission in this area.

This imbalance between competition law and industrial policy objectives was recently illustrated by the Alstom/Siemens case, which can be summarised as a choice between, on the one hand, allowing the creation of a railway leader that would be in a position to compete more effectively with the Chinese giant CRRC on the Asian, American or African markets or, on the other, protecting European consumers against its excessive market power on certain European markets. It is questionable whether, given the terms of the Treaty, the Merger Regulation and the Guidelines, the Commission could have done otherwise.

2.2.2. WHAT SOLUTIONS ARE THERE ?

To introduce more "industrial policy" criteria would require a "rebalancing" of the Treaty and the Merger Regulation, which can only be changed by unanimity of the Member States. In order to achieve a balance between industrial policy and competition policy in Europe, industrial policy would either have to be raised to the same legal level as the competition provisions, or the competition rules would have to be downgraded to a lower level.

In the first case, Article 173 of the Treaty should be amended and supplemented to give the Commission the means to promote a genuine European industrial policy.

Competition law does give way only to other policies with equal or higher status in the Treaty hierarchy. Thus the Court of Justice, in a rare decision⁶⁰, did not impose the primacy of competition rules in agricultural matters. But this is only because Articles 39 to 44 of the Treaty limit the application of competition rules in the agricultural sector. Thus Article 42 of the Treaty recognises the primacy of the common agricultural policy ("CAP") over competition law in the measures necessary to achieve its objectives. There are currently no identical provisions concerning the objectives of European industrial policy. In the area of public service, the Treaty and the Court attempt to strike a balance between undertakings entrusted with a service of general economic interest and competition law, as the Treaty itself has so decided.

⁵⁸ Buhart and Henry, Industrial Policy....and Siemens/Alstom, Concurrences, n°2 – 2019, §3, 6

⁵⁹ Art. 2(i)(b) of Regulation 139/2004 targets however "*the development of technical and economic progress*" however after this the following is added « as long as this [...] *does not form an obstacle to competition*"

⁶⁰ See ECJ decision "Endives", of 14 November 2017, case C-671/15

2.2.3. DOES THE COMMISSION USE LEGAL TOOLS IN THE COMPETITION LAW TO ACHIEVE GOALS OUTSIDE OF THIS LAW AND NOTABLY INDUSTRIAL POLICY GOALS?

The European Commission essentially has the power to propose legislative or regulatory acts which are adopted by the Council and the European Parliament. It has direct powers only in the areas of the common agricultural policy, trade policy and competition policy.

In competition matters, the Commission can take direct decisions sanctioning companies, imposing the termination of infringement or ordering the repayment of State aid. It also has exclusive competence in competition matters.⁶¹ This explains the power of DG COMP and the fact that the Competition Commissioner is often perceived as the most powerful personality of the College, at least in economic matters, on a par with the President.

The combination of these powers has meant that competition law instruments and, in particular, State aid rules have been used to pursue pan-European policies in several sectors, including banking and energy, and to achieve a degree of tax harmonisation by eliminating the most aggressive "tax rulings". They have also been used, to some extent, to implement an embryonic industrial policy at the European level.

2.2.3.1. THE USE OF STATE AID LAW TO HARMONISE CERTAIN BANKING RULES

During the "banking crisis" that erupted in 2007-2008, the need was felt for a regulator at the European level, which did not exist at the time. DG COMP played this role by using its State aid powers as Member States had to intervene to rescue banks in order to restore confidence in the banking system and avoid a systemic crisis. All support measures and aid granted by States had to be approved by the European Commission on the basis of Article 108 of the Treaty on State aid procedure. Within this framework, 112 banks in the EU received State aid; that is 30% of the European banking system (in terms of assets). Aid in cash represented 5.4% of EU GDP (€671 billion) and aid in guarantees 10.3% of GDP (€1288 billion €)⁶².

The Commission has examined and authorised all this aid (very little aid was prohibited because the Member States accepted the conditions imposed by the Commission). It can be seen that the Commission's decisions, which had to adapt its rules to the situation of failing banks and financial institutions, were taken very quickly and sometimes within days, whereas before the crisis proceedings involving large amounts of State aid usually lasted more than one year.

Moreover, rules promulgated during this period have since become applicable throughout Europe. For example, between 2008 and 2011, the Commission published 7 Communications or Guidelines on the application of State aid rules to measures taken by Member States in favour of financial institutions in the context of the financial crisis.

The Commission has clarified the conditions for the financial restructuring of banks and the modalities for restoring their viability, including strict criteria for the remuneration of managers of banks receiving State aid⁶³. During this period, the Commission played the role of a de facto

⁶¹ Article 3(1)(b) of the Treaty.

⁶² Competition State aid brief, European Commission, February 2015 (« State aid to European banks »)

⁶³ Commission Press release 10 July 2013, IP/13/672

pan-European banking regulator defining acceptable recovery measures, criteria for bank viability and maximum remuneration for the managers of assisted banks. The Commission established an industrial policy applicable to the banking sector. Subsequently, on the basis of the Commission's proposals, the Union has adopted a number of directives aimed to clean up the banking sector and avoid, as far as possible, a further financial crisis.

2.2.3.2. THE USE OF STATE AID LAW TO REFORM THE ENERGY SECTOR

Nearly 60% of all aid granted in Europe to industry and services is earmarked for environmental protection, energy efficiency and the production of renewable energy (mainly "green electricity").⁶⁴ They are reviewed and approved in accordance with the criteria set by the Commission, in particular in its Guidelines.⁶⁵ This has led it to adopt a pan-European "Industrial Policy" which aims to encourage support for "good" ("green") energy sources and to discourage support for polluting energies. The directive nature of the pan-European guidelines in the energy sector is illustrated by the Commission's decisions on "capacity mechanisms", introduced by public authorities to guarantee the security of electricity supply and to ensure that the supply of electricity meets demand at all times in the medium and short term. The Commission has imposed its own vision in this area on Member States which have not always shared the Brussels view. On 7 February 2018, the Commission simultaneously approved six capacity mechanisms in the electricity sector to ensure security of supply in Belgium, France, Germany, Greece, Italy, Poland and Germany.⁶⁶ These capacity mechanisms negotiated with the Commission concern six States representing more than half of the Union's population. The Commission has asked the Member States to amend their projects when they do not meet the criteria which it has laid down.⁶⁷ It can thus be seen that in this area, as in general in the field of renewable energy, the Commission has played the role of a European regulator of the energy sector.

2.2.3.3. THE USE OF STATE AID LAW TO COUNTER THE MOST AGGRESSIVE "TAX RULINGS"

The Commission has been trying for decades to harmonise certain aspects of direct taxation in the Member States in order to avoid excessive taxes which are reported in the press and which scandalise public opinion in the largest European countries.

So far, the Commission's attempts at harmonisation have been to no avail, and this is likely to continue. Indeed, no progress is being made in harmonising direct tax rules because any reform in this area must be adopted unanimously and there is always one or more Member States to block any progress.⁶⁸ In order to (partly) circumvent this obstacle, the Commission has

⁶⁴ Production of Green electricity, by Phedon Nicolaidis, State aid blog, 22 October 2019; according to "*State Aid Scoreboard 2018*", 53% of aid granted in 2017 (agriculture aside) was given for the protection of the environment and energy efficiency;

⁶⁵ Notably see Guidelines on State aid for environmental protection and energy covering the period 2014-2020 (2014/C 200/01).

⁶⁶ See decisions of 7 February 2018 and the press release of 7 February 2018, IP/18/682.

⁶⁷ Notably: calls for tender open to all types of capacity providers, measures enabling capacity providers in other Member States to take part etc ...

⁶⁸ The countries that implement direct tax rates that are often of great interest to multinationals and who interests in a status quo are notably: Ireland, Luxembourg, the Netherlands.

considered using State aid rules to attack the most aggressive "tax rulings" in certain Member States⁶⁹.

For example, it has already adopted eight decisions condemning "tax rulings" and requiring large groups to repay aid received by means of these discriminatory and competition-distorting tax advantages within the European market. The most emblematic decision is the one requiring the Apple group to repay €14.3 billion (with interest) to Ireland.⁷⁰ The Commission has opened a dozen State aid procedures⁷¹ against the tax benefits received by five groups in Luxembourg, three groups in the Netherlands, one group in Ireland (Apple) and against Belgian and British schemes⁷², and Gibraltar in favour of multinationals. On appeal before the Court of First Instance, the Commission has already lost twice (Belgian scheme and Starbucks) and won once (Fiat).

But the Commission has essentially won its political battle, since Ireland, Luxembourg and especially the Netherlands have reformed their tax legislation to amend the provisions which had allowed the adoption of the "tax rulings". Thus, it has indirectly achieved a real harmonisation of direct taxation in Europe by obtaining the abolition of the most aggressive tax provisions designed to attract multinationals to set up in certain countries with lenient taxation.

To summarise, what it has not been able to achieve under the rules of the Treaty, which can only be modified by the unanimous agreement of the Member States, in the area of direct taxation, it has been able to achieve, in part, by using the State aid rules set out in the "Competition Rules" chapter of the Treaty.

These various examples illustrate the Commission's use of its powers in the field of competition and, in particular, in the field of State aid, deciding which are the "good" and "bad" aids, to shape or recompose certain sectors of the economy. This is nothing new: in the past it had already used the instrument of State aid to pursue a European industrial policy, particularly in the steel, coal and shipbuilding sectors.⁷³

The Commission has recently expressed the wish to use its powers to grant aid for important projects of common European interest⁷⁴ ("IPCEI") to pursue an ambitious industrial policy in several high-technology areas⁷⁵. So much so that one wonders whether the "Commissioner for Competition" should not also be called the "Commissioner for Industry"?

But this method should be questioned. As the Commission has not been given direct powers in the field of industrial policy, it is using its extensive pan-European powers in the field of State aid to pursue industrial policy objectives.⁷⁶ This could be seen as a stopgap measure or rather

⁶⁹ These are mainly agreements granted by national authorities on tax schemes put forward by multinationals.

⁷⁰ Commission decision 30 August 2016, appeal lodged with the EU Court pending.

⁷¹ Nine of these proceedings have resulted in decisions, 3 are ongoing.

⁷² Following the annulment of the Commission's decision on the Belgian scheme by the European Court of Justice, the Commission opened proceedings against the aid received in Belgium by 39 multinationals on the basis of identical tax provisions (Commission press release of 16 September 2019, IP/19/5578).

⁷³ See, *The Interplay Between Industrial Policy and State Aid: Natural Continuation or Strange Bedfellows?* Pim Jansen, *European State Aid Law Quarterly*, EStAL 4/2016 p. 575.

⁷⁴ Communication of 20/06/2014, JOUE C188/4.

⁷⁵ Notably see "Strengthening Strategic Value Chains for a future-ready EU Industry", Report of the Strategic Forum for Important Projects of Common European Interest, European Commission, 5 November 2019, [https://www.earto.eu/wp-content/uploads/Strategic-Forum_Strengthening-Strategic-Value-Chains-for-a-future-ready-EU-Industry.pdf]

⁷⁶ The approval of the IPCEI batteries on 9 December 2019 by the Commission was qualified as "the first success of an ambitious European industrial policy" by Peter Altmaier, the German Minister for the Economy (Financial Times, 10 December 2019)

as a dysfunction to remedy the deficiencies of the European decision-making process. Under these circumstances and if there is (apparently) agreement on the objectives - which should be defined by the Council at European level - would it not be time to give the Commission more powers in industrial matters?

Furthermore, has the Commission set up an independent body to assess the relevance of these projects, along the lines of the agencies which exist in the United States or Korea in this field?

Is it not time to clarify the situation by giving the Commission greater powers, and if possible "direct" powers, to conduct industrial policy, the goals of which would be determined by the Council?

3. THE LACK OF AMBITION REGARDING MOST REFORM PROJECTS (MODIFICATIONS WITH NO CHANGE TO THE TREATY OR MERGER REGULATION)

The prohibition of the Alstom/Siemens merger on 6 February 2019 triggered numerous reactions from companies, competition specialists (lawyers and economists) and politicians. In this section, we will examine the main suggestions "at constant law", i.e. without amendment - with unanimity of the Member States - of the Treaty or the Merger Regulation⁷⁷, which have been put forward in reports, articles and other statements.

Less than two weeks after the Alstom/Siemens ban on 19 February 2019, the German and French Ministers of Economy published a "*Franco-German Manifesto for a European industrial policy adapted to the 21st century*"⁷⁸. The manifesto proposes changes to the rules on merger control and State aid. [It follows a joint declaration on 18th December 2018, by 18 Member States working together under the framework of the « Friends of Industry »⁷⁹, which called for the introduction of an industrial policy and certain modifications to the competition rules.](#) The speech delivered by Bruno Le Maire at the OECD on 3 June 2019 expressed the hopes of the French government⁸⁰. Poland joined the Franco-German initiative on 4 July 2019 and the three countries issued a communiqué "for a modernised competition policy"⁸¹. These positions were confirmed and further developed by French ministers, often in association with Germany⁸².

In addition, numerous studies, position papers and articles have been published, mainly on the rules of merger control, but also on State aid and procedure. It is these proposals for amendments that we will summarise and examine, provided they do not require amendments to the Treaty or the Merger Regulation.

⁷⁷ Council Regulation n°139/2004, JOUE of 29/01/2004, L24 p1.

⁷⁸ Bruno LE MAIRE et Peter ALTMAIER, « Manifeste franco-allemand pour une politique industrielle européenne adaptée au XXIème siècle », 19 février 2019, Paris.

⁷⁹ Final declaration, Friends of the Industry, 6th Ministerial Meeting, 18th of December 2018, Paris.

⁸⁰ Anne PERROT, Victor BLONDE, « Les politiques de concurrence et les intérêts stratégiques de l'Union Européenne », Inspection générale des finances (IGF) et Conseil Général de l'économie, de l'industrie, de l'énergie et des technologies, avril 2019.

⁸¹ Jadwiga EMILEWICZ, Bruno LE MAIRE, Peter ALTMAIER, « Pour une politique européenne de la concurrence modernisée, Communiqué de presse du ministère de l'Economie et des Finances », 4 juillet 2019.

⁸² Speech by Bruno Lemaire at the Bruegel Institute (Eurozone Agreement...), 8 July 2019 ; 50 Franco-German Council, Press release Ministry for the Economy n°1429, 19 September 2019 and Franco-German priorities for the next European institutional cycle on economic, financial and trade matters; Amis de l'industrie, Press release Ministry for the Economy n°1462, 4 October 2019

3.1. PROPOSED MODIFICATION IN THE APPLICATION OF EUROPEAN MERGER CONTROL

3.1.1. CHANGING THE TIME AND GEOGRAPHIC SCOPE OF THE DEFINITION OF MARKETS

This would essentially involve amending the Commission's Notice on the 'definition of the relevant market' of December 1997⁸³ - the world has changed considerably since the late 1990s - and amending the Guidelines on the assessment of horizontal mergers of 5 February 2004.⁸⁴

3.1.1.1. THE TIME FRAME OF THE MARKETS

The Horizontal Merger Guidelines provide in paragraphs 74 and 75 that potential competition from a player intending to enter a market can only be taken into account to "offset" the market power of the merging parties, if such new entry is (i) credible, (ii) of sufficient magnitude and (iii) timely. On the latter point, the Commission clarifies in paragraph 74 that entry must (normally) take place within two years. This is the point that was heavily criticised after the Alstom/Siemens ban.⁸⁵ It would seem necessary to amend this two-year period and therefore paragraph 74 of the Guidelines.

However, it should be pointed out that there are many exceptions to this principle and that the Commission did not apply this two-year period in the Alstom/Siemens case. After the late publication of the almost complete text of the decision in September 2019, it became clear that, despite the controversy on this issue, the Commission examined the possibility for the Chinese railway giant CRRC to win tenders in Europe over the next 5 years and even 10 years after the merger.⁸⁶

That said, as all economists admit, it is extremely difficult to predict the evolution of a market more than 3-5 years ahead. This depends essentially on the economic sector involved.⁸⁷ Beyond a certain number of years, the Commission's work would amount to divination and could be challenged before the Luxembourg courts by competitors who often complain when their competitors merge.

Nevertheless, the 1997 Notice on the 'definition of the relevant market' and the 2004 'Horizontal Merger Guidelines' deserve a serious overhaul to adapt to the realities of today's world.

⁸³ JOCE 9 décembre 1997, C372/5.

⁸⁴ JOUE 5 February 2004, C31/3

⁸⁵ Notably see PERROT Anne, BLONDE Victor, ROPARS Axel, CATOIRE Serge and MARITON Hervé, « La politique de la concurrence et les intérêts stratégiques de l'UE », *Report de l'Inspection générale des finances & Conseil général de l'économie, de l'industrie, de l'énergie et des technologies*, April 2019, point 5; BUHART Jacques, FUNKE Thomas G., HEIM Mathew, HENRY David..., "Which competition and industrial policies for the new EU Commission after Siemens/Alstom?", *Revue des droits de la concurrence n°2-2019* pp.266-269, 1^{er} May 2019, point 2 ; Ioannis Lianos, The future of competition policy in Europe, *Concurrences*, n°2, 2019 §40 ; Fondapol Report, recommendation n°3 ; Assemblée Nationale report, proposal 12.

⁸⁶ Siemens/Alstom Decision, Aff. M. 8677 06/02/2019 §498 p. 99.

⁸⁷ For example: in the field of "shipbuilding" or "aircraft construction", the time frame is longer than in the technology or consumer goods sectors.

On 9 December 2019, Commissioner Margrethe Vestager announced her intention to review and amend the 1997 Notice on the definition of the relevant market.⁸⁸

3.1.1.2. THE GEOGRAPHICAL TIME FRAME OF THE MARKET'S

In the context of the Alstom/Siemens case, the Commission's geographic market definition was also criticised, with many commentators arguing that the relevant market should have been the world market, including Asia.⁸⁹ There were many calls for the Commission to stop defining narrow markets - national or sub-national and even European - and to retain global markets when products or services are sold all over the "globe".⁹⁰

One way of broadening the definition of geographic markets would be to define markets from a supply-side perspective. But for more than 50 years, markets have traditionally been defined from the demand side of the equation.⁹¹

This often leads to incomprehension on the part of the managers of large groups. There is often a gap between the geographical horizon for companies and for competition authorities. For example, in the field of mobile telephony, the managers of major operators feel that competition is played out at European level (Orange sees itself as a competitor to Deutsche Telecom, Vodafone, BT, Telefonica, Telecom Italia, KPN, etc.). However, according to the Commission, the market remains national, mainly due to Member States' regulations and the fact that a private individual will only be able to take out a mobile phone subscription with a national player. Since the main objective of merger control is to protect consumers, it is logical that the market should be defined from the point of view of consumer demand, whether the consumers are individuals or companies.

Another criticism of the traditional geographic market definition, especially after the Alstom/Siemens case, is the Commission's reluctance to take into account potential competition and, in particular, Asian competition.

It is true that the conditions set out in the Guidelines on the "Assessment of Horizontal Mergers" for admitting potential competition are too restrictive⁹². These criteria should be made more flexible to take into account, in particular, the power of Chinese public groups.

It would be useful in this respect to carry out "ex-post" audits, consisting in taking about ten Commission merger decisions where the parties and the Commission did not share the same opinion on the arrival of Asian competitors on the market, and to look five or ten years after the Commission's decision at whether these competitors have actually gained market share in Europe.⁹³

⁸⁸ Speech at the Chilin' Competition Conference, Brussels, 9 December 2019.

⁸⁹ China, Japan and Korea were excluded from the relevant market in the Alstom/Siemens decision on the grounds that these markets are 'closed'.

⁹⁰ SELLAL Pierre, WIEGEL Michaela, GINESOTTO Nicole and BOURLANGES Jean-Louis, « La politique de concurrence de l'Union européenne », *Le nouvel esprit (podcast)*, 2019, points 1 et 3 ; HEIM Mathew, "Modernizing European Competition Policy : a brief review of Member States 'proposals", *Bruegel*, 24 July 2019, points 6 and 7.

⁹¹ Notice of 09/12/1997 on the "definition of relevant market" §13 et s.

⁹² See above and §69 to 75 of the Guidelines on the assessment of horizontal mergers dated 5 February 2004.

⁹³ This exercise is suggested in the Assemblée Nationale report, proposal 10.

This exercise has already been carried out in part by competition authorities and it appears that entry by potential competitors has not always been confirmed⁹⁴.

Finally, the Commission has been widely criticised, following the decision to forbid the Alstom/Siemens merger, for not having studied (and ignored) the risk of entry into the European market by the Chinese giant CRRC. Now that the text of the Alstom/Siemens decision is (finally) available, it can be seen that the risk of CRRC's entry into the European market is analysed on several pages and is finally considered to be low.

3.1.1.3. GOING BEYOND THE DEFINITION OF RELEVANT MARKETS: OTHER CRITERIA⁹⁵

Under the competition policy, the definition of the relevant market is a necessary pre-condition for the analysis of all the cases of abuse of dominant position, agreement⁹⁶ or concentration. By simply referring to French law, it is useful to recall the definition given by the former Competition Council, which is explicitly taken up in a number of decisions⁹⁷: « *A relevant market is defined as the place where supply and demand for a specific product or service meet. In theory, in a relevant market, the units offered are perfectly substitutable for consumers, who can thus arbitrate between suppliers when there are several of them, which implies that each supplier is subject to price competition from the others. Conversely, a supplier on a relevant market is not directly constrained by the pricing strategies of suppliers on different markets, because the latter market products or services which do not meet the same demand and therefore do not constitute substitutable products for consumers. Since perfect substitutability between products or services is rarely observed, the Council regards as substitutable and as being on the same market those products or services which can reasonably be regarded by applicants as alternative means between which they can arbitrate to satisfy the same demand.*

Despite the apparent simplicity of this definition and the centrality of the concept of relevant market in competition law, its analytical foundations are at best unclear, if not ambiguous, which regularly gives rise to considerable controversy when cases are investigated by competition authorities. Although there is a great deal of economic work on the subject of relevant markets, it is probably worth reviewing in depth the "relevance" of the concept of relevant market from the point of view of economic analysis.⁹⁸

When a large amount of market data is available, it is no longer necessary to precisely define "relevant markets" in order to assess the risk of unilateral effects of a concentration. This assessment can be obtained by using quantitative tests such as the "UPP" (upward pricing

⁹⁴ See the study ordered by the European Commission from the University of East Anglia, Norwich, « Geographical Market Definition in European Commission Merger Control » by Amelia Fletcher and Bruce Lyons ; also see the ex-post study by KPMG in 2017 for the English Competition and Markets Authority (CMA), when of the four decisions studied, CMA's forecasts of new competitor entries did not take place.

⁹⁵ See the Assemblée Nationale report, proposal 13.

⁹⁶ With the exception of cartels, where "market definition" is not a prerequisite for conviction.

⁹⁷ The definition is set out in the following decisions in particular: Decision No. 04-D-66 of December 1, 2004, Decision No. 04-D-28 of July 2, 2004, Decision No. 07-D-12 of March 28, 2007.

⁹⁸ Deffains B. and J. Pellefigue (2018), « Une analyse économique des marchés pertinents », Revue Trimestrielle de Droit Commercial, September 2018, 555-575.

pressure) or "GUPPI" (gross upward pricing pressure index) tests. These tests provide an initial approach to the risk of price increases that could result from a concentration.⁹⁹

Another reason for revising the concept of relevant market is that the economy has changed profoundly as a result of globalisation and digitalisation. On the one hand, the absence of borders obliges an update of the concept. On the other hand, the emergence of the digital economy leads to insist (i) on the impossibility of using the SSNIP test when the product is free and (ii) on the fact that digital companies often offer several products and services through an "ecosystem" and that it is therefore necessary to assess whether consumers are not locked into this ecosystem. This kind of reform proposal of the relevant market is explicitly mentioned in the report "A new competition framework for the digital economy" by the German working group "Competition 4.0" (proposal No. 1).

3.1.2. ACCEPTING BEHAVIOURAL COMMITMENTS MORE OFTEN

After the Alstom/Siemens decision, many suggested that the Commission should recognise behavioural commitments more often¹⁰⁰. At present, the European Commission systematically favours structural commitments (sale of subsidiaries, factories, etc.)¹⁰¹. In horizontal mergers, i.e. between competitors, the Commission rejects behavioural commitments as a matter of principle. Exceptions to this principle are very rare¹⁰².

The French Competition Authority, for its part, admits behavioural commitments much more often. Between 2008 and 2018, 36% of French decisions approving mergers with remedies included behavioural commitments, whereas they represented less than 20% of cases in the Commission's practice.¹⁰³

- And yet behavioural commitments have advantages:
- - They are less "traumatic" and "definitive" than structural remedies which, very often by imposing the resale of a significant portion of the acquired activity, diminish or eliminate the synergies sought by the concentration.
- - They can be reviewed and adjusted in the light of market developments¹⁰⁴.

⁹⁹ See draft Guidelines on concentrations, published by the French Competition Authority on 16 September 2019, para. 628 et s.

¹⁰⁰ France-Germany-Poland Proposal of 04/07/2019, point 7 ; IGF / CGE Report, quoted previously, proposal 6 ; JEAN Sébastien, PERROT Anne and PHILIPPON Thomas, « Concurrence et commerce : quelles politiques pour l'Europe ? », *Les notes du Conseil d'analyse économique*, May 2019, proposal 1 ; ENCAOUA David and GUESNERIE Roger, « Politiques de la concurrence », *Les Reports du Conseil d'analyse économique*, 2016, proposal 4 ; « Moderniser la politique de concurrence de l'Union européenne », Permanent Representation of France to the European Union, summer 2019, proposal 7 ; Assemblée Nationale report, proposal 11.

¹⁰¹ Commission Notice on remedies acceptable to the Commission, JO C267, 22/10/2008.

¹⁰² There are rarely exceptions: see, however, the very recent Telia/Bonnier decision, M. 9064, of 12 November 2019, where several behavioural undertakings were accepted for a period of 10 years.

¹⁰³ Behavioural commitments account for 16% of decisions with commitments in the United Kingdom and in Germany, this type of commitment is accepted only exceptionally. See Etienne Chanterel *Poursuivre la réforme du contrôle des concentrations*, Concurrences n°3 – 2019, pp. 14 – 18.

¹⁰⁴ See – in the practice of the French Competition Authority – the review of behavioral commitments subscribed by Canal+ (decision of June 22, 2017) and by Altice/SFR (decision of October 28, 2019), in both cases to take account of market developments several years after the merger.

The European Commission's reluctance stems from the fact that behavioural commitments are often criticised for being very costly in terms of time and resources (which the competition authorities could better use) and for generating more breaches of commitments since, unlike structural remedies, they extend over several years.

However, it would seem appropriate for the Commission to change its policy¹⁰⁵ and accept behavioural remedies in the context of its merger control more often.

3.1.3. TAKING INTO CONSIDERATION STATE AID AND SUPPORT THAT THIRD COUNTRY COMPETITORS ENJOY (MOSTLY IN ASIA)

Following the Alstom/Siemens case, it was proposed that the Commission should take into account State aid and support to competitors established in third countries, mainly the Chinese¹⁰⁶. In particular, it has been argued that the European Commission should be given the power to allow the creation of transitional dominant positions where the likely entry of a major Chinese player is of such a nature as to rebalance the competitive playing field in the medium term.

The idea would be to take into account "increased" competitive pressure if the new merged group's competitors are third-country companies financially supported by their State. This consideration of "increased competition" would be justified by the unfair competition of these foreign (often Chinese) companies that receive State support whereas European groups are subject to the discipline of State aid.

In terms of merger control, amendments to the Guidelines on "horizontal mergers" of 5 February 2004 and "non-horizontal mergers" of 18 October 2008 should suffice to implement such a reform.¹⁰⁷

Such "compensation" is similar to the "Matching Clause" applicable to State aid. This Matching Clause mechanism allows, in theory, for larger amounts of aid to be paid to companies above the authorised thresholds, when it is proven that a competing company outside the Union is receiving aid from a third State. Such a "Matching Clause" exists in the Communication on "State aid for research, development and innovation"¹⁰⁸ and in the Communication on "Important Projects of Common European Interest" (IPCEI)¹⁰⁹.

However, since 2014, this mechanism has never been invoked or applied!

It is therefore suggested that the Commission adopt a mechanism that would allow "compensation" for unfair competition from public undertakings supported by third States, both in the context of merger control and State aid control. More importantly, the Commission would need to apply this mechanism effectively. It seems that the Commission is preparing a policy

¹⁰⁵ And therefore, its communication "concerning admissible remedies" (cited above).

¹⁰⁶ France-Germany-Poland Proposal of 04/07/2019, point 1 ; IGF/CGE Report, proposal 7 ; Fondapol Report, recommendation n°3 ; Assemblée Nationale Report, proposal n°15 ; Representation of France to the EU 2019, proposal 1 ; Mathew Heim-Bruegel, proposal 12.

¹⁰⁷ An amendment to the Merger Regulation 139/2004 would not be necessary a priori.

¹⁰⁸ Point 92 of the Communication from 27 June 2014 (JOUE C198/1 27 June 2014).

¹⁰⁹ Point 34 of the Communication from 20 June 2014 (JOUE C188/4 20 June 2014).

paper on this subject entitled "Instrument on Foreign Subsidies" which could be published in March 2020.¹¹⁰

With regard to the abuse of a dominant position by public groups supported by third countries, predatory pricing can be condemned, but the dominant position of these foreign groups in Europe is still necessary to be demonstrated, which is far from obvious.¹¹¹

In addition, the Dutch government issued a "Non-paper" on 4 December 2019 suggesting tighter control against any acquisition, merger or behaviour by groups that are subsidised by a third country or enjoy a dominant position in that third country. Such groups would have transparency obligations and would be prohibited from abusive behaviour. It goes so far as to speak of a "sixth branch" of competition law.

The Commission often encounters difficulties in detecting and demonstrating the sometimes-concealed State support enjoyed by Chinese public groups. Hence we should ask whether it would not be appropriate to provide the European Commission with a real "economic intelligence service" in order to provide a better information base when the latter takes merger or State aid decisions in markets where Chinese groups are, currently or potentially, active¹¹².

3.1.4. TAKING BETTER ACCOUNT OF EFFICIENCY GAINS

Many commentators rightly consider that the European Commission is too restrictive to consider gains in efficiency resulting from a merger and which might counterbalance the impact of the said merger on competition.¹¹³

Most of the time the Commission deems that the efficiency gains have not been demonstrated¹¹⁴ or more rarely that they exist but are not enough to counterbalance the negative effects on competition.¹¹⁵

The Merger Regulation contains references to efficiency gains (in particular Recital 29 and Article 2 (1-b)), but these are interpreted too restrictively in the Guidelines on the "Assessment of Horizontal Mergers". They should therefore be amended.

¹¹⁰ MLex 4 December 2019: "EU preps options for tackling Chinese companies backed by state subsidies"; also see section here below on "The Union's External Trade Policy".

¹¹¹ See however, the case concerning the Russian group Gazprom, which was condemned by the European Commission for obstructing the free movement of gas and applying unfair conditions in certain European countries, see case AT 39816 24 May 2018, Press release 24 May 2018, IP/18/392 ; see, for the application of competition rules to public groups supported by third States: Mathew Heim-Bruegel, « *How can European Competition law address market distortions caused by state-owned enterprises?* », Bruegel, issue n°18, December 2019.

¹¹² See article from Les Echos 6 November 2019, « *Il faut doter Bruxelles d'un vrai service d'intelligence économique* » by F. Brunet et P. Gassenbach.

¹¹³ France-Germany-Poland Proposal 4 July 2019, point 3 ; Fondapol Report, Recommendation 2 ; IGF/CGE, proposal 9 ; Assemblée Nationale Report, proposal 16 ; Belmin Concurrences, proposal 9 ; Mathew Heim-Bruegel, proposals 8 and 10.

¹¹⁴ See §76 to 88 of the Guidelines on the "Assessment of Horizontal Mergers" of 5 February 2004, when the Commission imposed very restrictive conditions for the acceptance of efficiency gains.

¹¹⁵ Notably see UPS/TNT Express ban, decision M. 6570 of 30 January 2013.

3.1.5. ACCEPTING A « TRADE-OFF » BETWEEN THE POSITIVE AND NEGATIVE ASPECTS OF CONCENTRATION FROM THE POINT OF VIEW OF COMPETITION

Sometimes a merger can be positive in one market, for example by increasing competition against a dominant company, and create competition problems in another.

Currently, the Commission is analysing this other market in isolation and will seek remedies to resolve the competition concerns in this other market. The Commission refuses to take a global view where the positive aspect in one market may outweigh the negative aspect in another.¹¹⁶

It is suggested that the Commission be guided by the Swiss Merger Regulation, Article 10(2)b¹¹⁷: "*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*".

Since Article 2 of Regulation 139/2004 is drafted in a general way, it would appear that compensation between the positive and negative aspects of a concentration can be provided for by amending the Guidelines on "the assessment of horizontal" and "non-horizontal" concentrations.

3.1.6. STRENGTHENING THE COMMISSION'S RESPONSIVENESS TO THE POLITICAL GUIDELINES LAID DOWN BY THE COUNCIL

The Commission should treat favourably merger or State aid projects that would make a positive contribution to European policy objectives, in particular in the industrial sector.¹¹⁸

The "Competitiveness Council" currently sets and will in the future set even more objectives for European policies contributing to industry. It should be expected that the Commission, and in particular DG COMP, will have to take these objectives into account.

Similarly, the role of the "Advisory Committee", which gives the position of each Member State on all merger and antitrust decisions, could usefully be strengthened.

¹¹⁶ This current position of European law seems to differ from that adopted by the Supreme Court of the United States which admits a certain "offsetting", notably in the decision *Ohio v. American Express* of 25 June 2018 (See on these differences: Cyril Ritter, *Journal of European Competition Law in Practice*, Volume 10, Issue 3, March 2019, pp. 172 - 179).

¹¹⁷ Federal Act on Cartels and Other Restraints of Competition of 6 October 1995, Article 10.2.b

¹¹⁸ France-Germany-Poland Proposal 4 July 2019, point 6; Friends of Industry, proposals 1 and 5 ; Mathew Heim-Bruegel, proposal 14 ; Belmin Concurrences, proposal 9.

3.1.7. IMPROVING THE PROCEDURE FOR THE CONTROL OF CONCENTRATIONS AND ABUSE OF DOMINANT POSITION

Companies consider European Commission merger review procedures too long and, in particular, the pre-notification period which is not governed by legal deadlines, such as Phase 1 and Phase 2, the lengths of which are laid down in the Merger Regulation.

It is therefore suggested that pre-notifications be abolished in the simplest cases¹¹⁹ and to impose maximum time limits for other pre-notification cases¹²⁰.

National Assembly's report dated 27 November 2019 proposes that we follow the British example and replace compulsory notification with a voluntary notification system¹²¹. Such a reform would, however, require Member States to amend the Merger Regulation unanimously.

In the field of "abuse of dominant position" and in order to combat certain practices in the digital field in particular, it is suggested that the Commission make much more widespread use of interim measures¹²².

Indeed, without an accelerated procedure, the Commission's decisions in high-tech sectors often come too late. The Commission has taken only nine "interim measures" decisions since 1962, but on 16 October 2019, it adopted the first interim measure in 18 years against Broadcom¹²³.

The French authority uses this instrument much more often¹²⁴.

The Commission should therefore, if the Court of Justice so permits, make more frequent use of the interim measures instrument and, if necessary, make the conditions for their application more flexible by revising Article 8 of Regulation 1/2003¹²⁵.

3.2. PROPOSAL TO AMEND THE STATE AID RULES

3.2.1. SHORTENING THE TIME LIMITS FOR STATE AID PROCEDURES AND STREAMLINING IPCEI PROCEDURES

It is generally considered that State aid procedures are too lengthy and constitute an obstacle to the implementation of industrial policy measures by Member States¹²⁶.

¹¹⁹ As in France.

¹²⁰ Business Europe, "Improving EU Competition and State Aid Policy", 4 September 2019, p5 ; ERT "Competing at scale", 6 October 2019, p 12

¹²¹ Assemblée Nationale Report, proposal 7.

¹²² IGF/CGE Report, above-mentioned, proposal 3 ; CAE 2019 Report, proposal 2. ; Assemblée Nationale Report, proposal 9

¹²³ In the field of chipsets for television and modems, decision of 16 October 2019, AT. 40608.

¹²⁴ The French Competition Authority ruled in 44 interim measures cases since 2009 and ordered 8 interim measures.

¹²⁵ Regulation 1/2003 16 December 2002 JOCE L1/ 4 January 2003.

¹²⁶ Notably : IGF / CGE Report, above-mentioned, proposals 15 et 16 ; Friends of Industry, proposal 7.

The report by the Inspection des Finances and the CGE therefore suggests that a recommended maximum duration of 12 months for the examination of cases should be included in the rules of State aid procedure¹²⁷.

The procedures for "Important Projects of Common European Interest" (IPCEI) are also too long¹²⁸. It should be recalled that IPCEIs play and should play in the future a central role in the implementation of a European industrial policy¹²⁹. The microelectronics IPECI decision was taken quickly after the notification, but pre-notification discussions with the Commission were endless¹³⁰.

The IPCEI decision on batteries was taken faster, but the procedure was still long and restrictive¹³¹. The IPCEIs will only be successful if the Commission's monitoring procedure is not too long. Indeed, they operate in high-technology sectors where action needs to be taken quickly.

Moreover, certain conditions featured in the IPCEI communication¹³² appear superfluous. These are the conditions set out in points 17 and 29 concerning, on the one hand, the impact of the project beyond the companies or sectors concerned; these spillover effects could be presumed and, on the other hand, the analysis of the 'counterfactual scenario' without State aid: an analysis which is superfluous, since without State aid this type of project would simply not see the light of day or would take a much less ambitious form.

It should therefore be assumed that the two conditions (paragraphs 17 and 29) have been met¹³³.

A Commission spokesperson stated in December 2019 that the IPCEI Communication was being revised and that the conditions of application could be relaxed¹³⁴.

3.2.2. WIDENING THE EXEMPTIONS FROM NOTIFICATION AND THE PRESUMPTION OF LEGALITY OF CERTAIN STATE AID MEASURES

In substance, the assessment of State aid should be based primarily on the economic concept of "market failure".

¹²⁷ IGF / CGE Report, above-mentioned, proposal 15, page 53. It should be noted that there is already a recommended maximum duration of 18 months for "Phase 2" (after the initiation of proceedings) in the Procedural Regulation on State aid.

¹²⁸ IGF/CGE Report, above-mentioned, proposals 16 and 17 ; Amis de l'Industrie, 4 October 2019, point 2.

¹²⁹ Report of the Strategic Forum for IPCEI/PIIEC, European Commission, DG GROW, 5 novembre 2019.

¹³⁰ Discussions with the European Commission in this case lasted about 20 months. Microelectronic IPCEI decision, 18 December 2018, SA-46705 (France) more decisions Germany, Italy, UK, Press release IP/18/6862.

¹³¹ IPCEI decision on batteries, 9 December 2019, SA-54794 (France) more decisions Germany, Belgium, Finland, Italy, Poland, Sweden, press release IP/19/6705 ; in this press release, The Commission states that the time between the "pre-notification" and the decision was 5 months, in fact the discussions with the Commission lasted almost a year.

¹³² Commission Communication "important projects of common European interest" 20 June 2014, JOUE C188/4 20/6/2014.

¹³³ IGF / CGE Report, above-mentioned, proposal 17 ; Business Europe : Position Paper 4 September 2019 ; Belmin Concurrences, proposal 11 ; Friends of Industry, proposal 2 et 9.

¹³⁴ See Euractiv 22/12/2019 : <https://www.euractiv.com/section/competition/news/commission-ponders-state-aid-review-to-support-airbus-of-the-future/>

Aid for Research and Development (R&D&I) should benefit from a positive presumption and most - if not all - of it should be exempted from ex ante control¹³⁵, i.e. of notification¹³⁶.

Provision could also be made for a presumption of legality for all business support measures that would be implemented in a coordinated manner between at least 3 Member States representing a certain percentage of EU GDP¹³⁷.

3.3. THE UNION'S EXTERNAL TRADE POLICY

The Union's trade policy is also an exclusive competence of the European Commission¹³⁸. It has trade defence instruments which should enable unfair practices originating in third countries to be remedied: these are essentially the anti-dumping¹³⁹ and anti-subsidies regulations¹⁴⁰.

In their report, the Inspection des Finances and the CGE consider, with regard to the difficulties encountered by European groups in international industrial competition, that "the main problem lies not in competitive standards that are too high in Europe, but in the fact that non-European companies partly escape these rules while at the same time benefiting from access to the European market"¹⁴¹.

The report suggests that the solution would be to strengthen the trade policy instruments at Europe's disposal, rather than reforming competition law.¹⁴²

It could, however, be an illusionary vow.

3.3.1. A STRENGTHENING OF EUROPE'S TRADE POLICY MAY BE ILLUSORY

The main problem with the solution mentioned earlier - strengthening trade policy and only marginally reforming competition policy - is that European trade policy has so far been ineffective.

The WTO is completely paralysed. US President Donald Trump has refused to renew or appoint judges to the WTO's Appellate Body, which has been deadlocked since December 2019, for an as yet unknown period of time. Moreover, all attempts to adopt common rules on competition in the WTO have failed¹⁴³.

¹³⁵ IGF / CGE Report, above-mentioned, proposal 14 : absence of notification, possibly ex-post checks to see whether the rather loosely defined conditions are met.

¹³⁶ However, the State Aid Scoreboard 2018 indicates that already 96% of new R&D&I measures have been exempted from notification under the Block Exemption Regulation. A broader exemption than at present could also be envisaged for aid for environmental protection and green energy.

¹³⁷ Les Echos 12/02/2019 and Institut Montaigne, J.P. Tran Thiet and Sophie Gegond.

¹³⁸ Article 3 of the Treaty.

¹³⁹ Regulation (UE) 2016/1036 8 June 2016 on protection against dumped imports..., JOUE L176/21 du 30/06/2016.

¹⁴⁰ Regulation (UE) 2016/1037 8 June 2016 on protection against subsidised imports from countries which are not members of the European Union, JOUE L176/55 du 30/06/2016.

¹⁴¹ IGF / CGE Report, above-mentioned, page 38.

¹⁴² See IGF / CGE Report, above-mentioned, p 38 and s. as well as p. 5 and 9.

¹⁴³ Notably in Cancun in 2003.

It is also well known that WTO rules apply only to goods, whereas a significant part of world trade is in services¹⁴⁴.

The European regulation of 8 June 2016 against subsidies has not been a real success. At the end of 2018, a dozen compensatory (anti-subsidy) measures were in force, half of them concerning China¹⁴⁵. It would appear that the use of this Regulation is difficult, in particular it has to be demonstrated that injury has been suffered by European producers representing 25% of the European industry and that the measures envisaged will not be to the detriment of the "Union interest"¹⁴⁶.

But the main obstacles lie in the WTO's lax interpretation of the concepts and, above all, the lack of political will in Europe to use these instruments.

Indeed, for a long time, some "Northern European countries"¹⁴⁷ opposed the active use of compensatory measures against subsidies. Now the atmosphere has changed, and in view of developments in the United States and China, there seems to be a consensus for the more active use of the EU's trade defence instruments in the future. However, the number of EU officials dealing with these issues (around 150) remains very small compared to the hundreds of US officials dealing with trade policy¹⁴⁸.

3.3.2. TRADE DEFENCE PROPOSALS

One solution would be to find a consensus between Member States and the Commission to make better use of existing instruments and, in particular, anti-subsidy measures¹⁴⁹. Developments in US and Chinese trade policy should help build this consensus.

Another solution would be the appointment of a "Trade Prosecutor" or "Chief Enforcer" responsible for coordinating all actions undertaken by the Commission on behalf of the Union to ensure compliance with trade rules¹⁵⁰. This person could head an enforcement unit within DG TRADE.

In addition, it would be beneficial to adopt the instrument imposing reciprocity in access to public procurement markets which was proposed by the Commission but has been blocked by the Council since 2012¹⁵¹. European public procurement markets are currently accessible to companies from third countries, even though European companies cannot bid - in law or in fact - for public contracts in those countries.

¹⁴⁴ Services account for 22% of trade today and the WTO considers that they will account for a third of world trade in 2050 (source WTO, "World Trade Report 2019")

¹⁴⁵ Recent examples include the "Tyres" case with the Chinese subsidy for the acquisition of Pirelli; the "Glass Fibre" case with Chinese and Egyptian subsidies; the "Steel" case with Chinese investments in Indonesia.

¹⁴⁶ While this criterion is not imposed by WTO rules. The interests of final consumers, importers and intermediate buyers must be taken into account, etc. See article 31 du Regulation 2016/1037.

¹⁴⁷ See Fondapol Report, November 2019, partie 2, p. 13, 14.

¹⁴⁸ According to the Fondapol Report, 125 agents at the Commission and 400 in the US Administrations (ITA and ITC), Fondapol Report, November 2019, part 3, p. 25.

¹⁴⁹ Regulation (EU) 2016/1037 above-mentioned; See CAE Report2019 above-mentioned, proposal 7.

¹⁵⁰ IGF / CGE Report, above-mentioned, proposal 11 ; CAE Report2019, Recommendation 5.

¹⁵¹ IGF / CGE Report, above-mentioned, proposal 13 ; CAE Report2019, Recommendation 4.

It would appear that, on this point too, the lines could move and that the Commission's proposal on reciprocity in public procurement might find the necessary majority in the Council.

Finally, it seems essential that any bilateral trade agreement to be signed between the European Union and a third country should contain precise, binding and easy-to-implement clauses aimed at protecting companies in one country from unfair subsidies granted in another¹⁵².

We note that the "constant law amendments" presented above are rather modest and may not have much impact on the application of competition law in Europe.

More substantial changes should therefore be considered, which would require amendments to the Treaty or the Merger Regulation.

¹⁵² The free trade agreement to be signed between England and the EU after Brexit could serve as a model in this respect...

4. EXPLORING NEW PATHS

Competition law is a "policy" in its own right. We have noted a certain imbalance between a competition policy that appears dominant in the European context and a European industrial policy that is difficult to put in place. The explanations relate both to the economic history of the European construction and to the drafting and structure of the Treaty.

In reality, the idea of developing European industrial policies is not absent from the landscape since the Commission wishes to use its powers in the field of aid for Important Projects of Common European Interest ("IPIEC") to go into the field of industrial policy in high-technology areas. However, beyond such rhetoric, the question is above all one of means; as much on the financial level as on the legal level, these means are lacking. This situation alone helps to explain why the strategy used to carry out industrial policy projects essentially involves State aid. However, this strategy poses more difficulties than it solves, since it ultimately consists in hijacking a legal tool which is not priori designed for this purpose.

The key issue is therefore to consider other solutions that aim to provide the European Union with real legal instruments for developing industrial policies.

Different modalities are theoretically possible. A first solution would be to integrate other objectives into competition law. The debates on the objectives of competition policy are well known, in particular around the opposition between consumer welfare and overall welfare¹⁵³ or the competitive process. However, this first solution may be difficult to implement. On the one hand, the pursuit of efficiency itself raises a question of the multiplicity of objectives which is not easy to deal with, as illustrated by the consideration of efficiency gains in the competition policy (efficiency defence). On the other hand, because this approach inevitably comes up against a whole series of practical difficulties, starting with the existence of perception bias due to the fact that a competition authority responsible for investigating a case will inevitably find it difficult to divest itself of the conditions of the investigation if it is also in charge of the final decision.

These observations inevitably lead to the question of other solutions designed to place the consideration of industrial policy objectives at another level. We shall distinguish between procedural solutions, including the question of the Council's veto right, the strengthening of the tasks of the "Advisory Committee" or a model based on the "Trade Defence Instruments Committee", before focusing on the role of the College of Commissioners and, more specifically, on how to restore its original role.

A final set of solutions would consist in thinking more directly about how a European industrial policy could be established within the framework of the European institutions by means of an amendment to Article 173 of the Treaty and the creation of a European DARPA.

¹⁵³ In a recent interview, T. Christoforou emphasises that the case law of the Luxembourg courts has moved away from the traditional criterion of "protection of the competitive process" to the American criterion of "protection of consumer welfare". However, this criterion of "consumer welfare" raises some problems when services are free, as some of the players in the digital economy are proposing, since there is no risk of price increases for consumers. T. Christoforou believes that a choice should be made between the traditional European criterion of "protection of the competitive process" and that of "protection of the consumer welfare", which is increasingly used in Europe. Competition Litigation Conference, London, 20 Sept. 2019, MLEX 20 Sept. 2020.

4.1. FOCUS ON THE RECOGNITION OF EFFICIENCY GAINS

The efficiency gains argument can be linked to the debates concerning the relationship between competition policy and industrial policy since efficiency defence raises the question of the definition of efficiency pursued by the competition policy¹⁵⁴ and, consequently, the possibility of taking industrial policy objectives into account.

As Huveneers points out, "*should competition not only be effective for the benefit of the consumer, in the sense of distributive efficiency or should it also promote an efficient productive structure (productive efficiency)? This introduces a problem of trade-offs. Thus, increasing the number of competitors on a market allows a lower price level to be achieved which optimises distributive efficiency, but can degrade productive efficiency because this increase in the number of competitors may prevent economies of scale from being fully exploited and forces producers to spread their fixed costs over a more limited production volume, which may even cause certain firms to incur losses.*"¹⁵⁵.

From a Schumpeterian perspective, efficiency defence can thus prompt competition authorities to accept the lawfulness of restrictions on competition by using a dynamic efficiency test aimed at relaxing a prohibition in principle in the name of the general interest. In law, efficiency defence has always applied to the ban on cartels through Article 101 TFEU, which sets out the conditions under which agreements promoting technical and economic progress may benefit from an exception to the prohibition principle in Article 101 TFEU¹⁵⁶.

It is in this context that one can question the place of the efficiency defence with regard to the possible interactions between competition policy and industrial policy.

As Huveneers points out in the case of the Union, "*in the past there has been a desire to assert a certain complementarity between the two policies, particularly when competition policy is presented as an instrument for achieving the European Union's growth objectives. This suggests that not only can industrial policy considerations be taken into account in the competitive analysis carried out by competition authorities under Community or national competition law, but also that competition policy could play a role in industrial policy*"¹⁵⁷.

Technically, this means that efficiency defence may involve taking into account both static and dynamic efficiency gains. Static gains in mergers or cooperation agreements between firms are economies of scale and scope of a technological nature. In contrast, gains that can be observed from a dynamic point of view are synergies that allow firms to improve their performance, whether in terms of costs, quality, service or variety, on a continuous basis. The role of dynamic efficiencies is particularly emphasised for products and markets that develop rapidly and where

¹⁵⁴ Notably see David Encaoua and Roger Guesnerie. *Politiques de la Concurrence*. Conseil d'Analyse Economique. La Documentation française, 2006.

¹⁵⁵ C. Huveneers, "Les multiples objectifs de la politique de concurrence : un système de N équations à N+1 inconnues" *Reflets et perspectives de la vie économique* 2008/1 (Tome XLVII).

¹⁵⁶ Regarding article 102 TFEU, there was originally no efficiency defence, but there is now a form of "business justification" for conduct deemed abusive, since 2009 and the "Communication from the Commission - Guidance on the Commission's priorities for the application of Article 102 of the EC Treaty to abusive exclusionary conduct by dominant undertakings".

¹⁵⁷ C. Huveneers, "Les multiples objectifs de la politique de concurrence : un système de N équations à N+1 inconnues", *Reflets et perspectives de la vie économique* 2008/1 (Tome XLVII).

non-price competition is important, because consumers may have much more to gain from innovation and quality than from lower prices for existing products.

On this basis, a number of authors consider that the regulatory activity of the European Union in the field of competition policy, and even the case law in competition law, would reflect the possible taking into account of certain imperatives of industrial policy (in particular innovation). This is the case of the Commission Regulation of 14 December 2010 on the application of Article 101 § 3 of the Treaty on the Functioning of the European Union to certain categories of research and development agreements. There has also been some recognition of efficiency defence in European merger control since the entry into force of the second merger control regulation of 2004 (Regulation 139/2004). Similarly, it may be noted that industrial policy concerns may occasionally arise, for example in paragraph 4 of the Regulation: "*Such restructuring [of undertakings] should be assessed positively provided that it meets the requirements of dynamic competition and is likely to increase the competitiveness of European industry, improve the conditions for growth and raise the standard of living in the Community*".

In fact, while the question of efficiency defence raises the issue of the relationship between competition policy and industrial policy, most authors agree that the system is highly flawed. Anne Perrot sums up the situation well: "The stakes of these divergences are considerable. The European point of view, in fact, largely ignores the efficiency gains that accompany certain mergers and even transforms the "efficiency defence" argument put forward by companies involved in the merger into one of "efficiency offence": the Commission's decision here denies the existence of a specific demand for the global products offered by the merged entity. These global offers, which in conglomerate mergers are one of the authorities' main concerns, allow buyers to save transaction costs by negotiating once they have several interlocutors, by making savings on costs linked to the variety of systems and products, etc. The Commission's decision here denies the existence of a specific demand for the global products offered by the merged entity. This is therefore a case where the merger may involve efficiency gains, which benefit both the merging companies and the buyers. A test that considers only the merged entity's dominance is therefore unable to take this into account. This example therefore illustrates how the implementation of competition policy, through the objectives pursued and the used criteria, can constitute a barrier to growth". And the author notes: "*... a merger prohibited in Europe because it creates or reinforces the dominance of a competitor may be authorised in the United States because of efficiency gains that are large enough to compensate for the harm to competition*"¹⁵⁸.

In addition, when it comes to merger control, the Commission is in fact more than reluctant to apply efficiency defence. The judgment of the Court of First Instance in *UPS v. Commission* improved nothing. The only references to efficiency gains in Regulation 139/2004 are in paragraph 29 and Article 2(1)(b), which refers to "*developments in technical and economic progress provided that such developments do not ... constitute an obstacle to competition*". Moreover, this was interpreted in an extremely restrictive manner by the Commission in its Horizontal Merger Guidelines (§ 76 et seq.). Ultimately, a genuine consideration of efficiency gains in this area would probably require an amendment to the Merger Regulation.

¹⁵⁸ Anne Perrot, « La politique de la concurrence contribue-t-elle à la croissance économique ? Une analyse à partir des cas américains et européens », *Économie publique/Public economics* [Online], 12 | 2003/1, published online 3 January 2006, consulted 19 April 2019. URL : <http://journals.openedition.org/economiepublique/333>

4.2. PROCEDURAL CHANGES

At the procedural level, several solutions might be considered to promote the integration of industrial policy objectives¹⁵⁹. A first option could be giving the Council a right to veto¹⁶⁰. The right to veto is provided for in terms of State aid in article 108-2 paragraph 3 of the Treaty¹⁶¹. However, this option seems problematic because the Council is a place of "bargaining" between States and mergers between companies must not be affected by such practices. Moreover, the reform would have to be approved unanimously¹⁶².

A second option would be to strengthen the role of the "Advisory Committee" of Member States in antitrust or merger control. However, such a reinforcement does not seem very satisfactory, as the Advisory Committee only gives an opinion which may not be followed by the Commission.

A third option would concern the transposition into competition law of the "Trade Defence Instruments Committee" provided for in the anti-dumping and anti-subsidy Regulations, where the representatives of the Member States forming this Committee may oppose a Commission decision by qualified majority¹⁶³.

The first three possible procedural options appear inadequate or very difficult to implement.

There remains the possibility of restoring the original role of the College of Commissioners with regard to strategic decisions at European level. The idea would be to delegate in practice to a limited number of "specialised" Commissioners (e.g. five to ten Commissioners) so that they can carry out a real cost/benefit analysis based on the work of a team of experts. It should be recalled that as regards the rules and procedures for merger control, the Commission's task is to assess mergers and acquisitions between companies whose turnover exceeds certain thresholds¹⁶⁴ and to prevent concentrations that would significantly impede effective competition in the Union or a substantial part of it. The vast majority of notified concentrations do not raise competition concerns and are cleared after a routine review. From the date of notification of a transaction, the Commission usually has 25 working days to decide whether to clear the transaction (Phase I) or to open an in-depth investigation (Phase II). Under the proposed mechanism, the panel of specialised Commissioners would thus have the task of hearing the parties before the College takes a decision. In this way, the Commission (DG COMP) remains fully in control in phase 1 and it is only in phase 2 that a company could "plead" its case before the College. This would mean restoring the original role of the College

¹⁵⁹ Franco-German Proposal 19/02/2019 but no longer included in the Franco-German-Polish proposal of 4/07/2019

¹⁶⁰ Franco-German Proposal 19/02/2019 but no longer included in the Franco-German-Polish proposal of 4/07/2019

¹⁶¹ Article 108(2)(3) of the Treaty provides that the Council, acting unanimously, may decide that aid is to be considered compatible with the internal market, by way of derogation from the provisions of Article 107 of the Treaty. In view of the restrictive interpretation of this article by the Court of Justice and the requirement of a unanimous vote of the Member States, this Article 108(2) has been used very little, see for example the cases *Commission v. Council of 4 December 2013, C-117/10 (Poland), C-118/10 (Lithuania), C-121/10 (Hungary), C-111/10 (Lithuania)*.

¹⁶² On this point, see the contribution of the Club des Juristes: <http://www.leclubdesjuristes.com/les-publications/concentrations-communautaires>.

¹⁶³ See Regulation (EU) 2016/1037 of 8 June 2016 (anti-subsidy) and Regulation (EU) 2016/1036 of 8 June 2016 (anti-dumping) which both refer to articles 4 and 5 of Regulation (EU) 182/2011 of 16 February 2011 on the functioning of the Committees.

¹⁶⁴ See Article 1 of the above-mentioned Regulation, No 139/2004.

of Commissioners¹⁶⁵ stipulating that, in difficult cases (phase 2), DG COMP would make a proposal to the College (based on the competition rules), while the College could possibly decide on criteria other than competition, in consultation with the other DGs and experts. The College carries out a cost-benefit analysis and thus takes a decision.

It is precisely because this option is open in phase 2 that we can speak of a genuine return to the original philosophy of the role of the College of Commissioners. It should be emphasised that, in view of the statistics for phase 2, the scale of the work does not appear to be disproportionate¹⁶⁶. At the end of this procedure, the College's final decision should be reasoned precisely on the basis of the expert opinions carried out so that a sound and transparent basis can be justified. It should also be possible to start this overall cost-benefit assessment without delay from the beginning of phase 2¹⁶⁷.

4.3. STRUCTURAL CHANGES

Among the possible avenues for institutional reform, it also seems useful to explore new possibilities for rebalancing within the framework of the Treaty between competition policy and industrial policy.

One observation must be made: as long as Article 173 remains unchanged, it will be difficult to make progress in the implementation of industrial policy decisions at European level. For the time being, this article is worded as follows:

“1. The Union and the Member States shall ensure that the conditions necessary for the competitiveness of the Union's industry exist. For that purpose, in accordance with a system of open and competitive markets, their action shall be aimed at:

- speeding up the adjustment of industry to structural changes,*
- encouraging an environment favourable to initiative and to the development of undertakings throughout the Union, particularly small and medium-sized undertakings,*
- encouraging an environment favourable to cooperation between undertakings,*
- fostering better exploitation of the industrial potential of policies of innovation, research and technological development.*

2. The Member States shall consult each other in liaison with the Commission and, where necessary, shall coordinate their action. The Commission may take any useful initiative to promote such coordination, in particular initiatives aiming at the establishment of guidelines and indicators, the organisation of exchange of best practice, and the

¹⁶⁵ It should be noted that in the recent period, all decisions to prohibit concentrations have been taken without debate within the College, in an essentially written procedure. An exception was made for the Alstom/Siemens merger, where a discussion took place within the College.

¹⁶⁶ It should be noted that in the recent period, all decisions to prohibit concentrations have been taken without debate within the College, in an essentially written procedure. An exception was made for the Alstom/Siemens merger, in which a discussion took place within the College.

¹⁶⁷ The Commission carries out impact studies on a regular basis, but these are often lengthy and incompatible with the need to act quickly in the field of strategic decisions involving European companies.

preparation of the necessary elements for periodic monitoring and evaluation. The European Parliament shall be kept fully informed.

3. The Union shall contribute to the achievement of the objectives set out in paragraph 1 through the policies and activities it pursues under other provisions of the Treaties. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, may decide on specific measures in support of action taken in the Member States to achieve the objectives set out in paragraph 1, excluding any harmonisation of the laws and regulations of the Member States.

This Title shall not provide a basis for the introduction by the Union of any measure which could lead to a distortion of competition....”

As currently drafted, this is essentially a question of coordination between Member States and not of defining industrial policy objectives. A subparagraph should therefore be added to paragraph 173 as follows:

“4. The Competitiveness Council shall each year set industrial policy objectives to be taken into account by the Commission in its decisions”.

The Commission’s direct power might be defined by a regulation modeled after article 103 of the Treaty regarding competition¹⁶⁸.

In addition to this adjustment of Article 173, a second reform should be carried out at institutional level by considering the creation of a European DARPA¹⁶⁹, a European agency devoted to undertaking industrial policy actions, in particular those likely to lead to innovative, breakthrough and competitive projects on a European scale. In practice, this would involve the creation of a European breakthrough innovation fund along the lines of the *American Defense Advanced Research Projects Agency*, which has \$3 billion at its disposal. Such a measure, provided that adequate resources are available, would aim to protect and stimulate European industry. The aim would be to have a selection of industrial projects financed from public funds within the framework of an "agile" and "light" structure, capable of working with start-ups, universities or private companies in a bid to bring innovative projects to the market. In practice, we can imagine the European DARPA operating in the same way as the ERC model, which would call on scientific and industrial experts working with a concern for impartiality and efficiency.¹⁷⁰

Furthermore, the relationship between the Competitiveness Council and DARPA at European level should be precisely defined. The first step would in terms of the Council for the Member States' economic ministers to meet annually to define the priorities¹⁷¹. In a second phase it would be up to the DARPA to implement the Council’s recommendations.

¹⁶⁸And article 109 of the Treaty regarding State aid rules.

¹⁶⁹ It should be noted that in February 2019, the French Minister of Economy Bruno Le Maire mentioned the possibility of "Creating a sovereign and independent Europe in the industrial field" during a meeting of the National Council of Industry (CNI). According to the Minister, European industrial power must be based on three pillars: the construction of European industrial champions, the ability to question transversal European policies and the protection of the sector.

¹⁷⁰ See in this sense the recommendations made by the Nobel Prize in Economics, Jean Tirole.

¹⁷¹ See Report Strengthening Strategic Value Chains for a future-ready EU Industry”, Report of the Strategic Forum for Important Projects of Common European Interest, European Commission, 5 November 2019, [https://www.earto.eu/wp-content/uploads/Strategic-Forum_Strengthening-Strategic-Value-Chains-for-a-future-ready-EU-Industry.pdf]

CONCLUSION

The purpose of this report is not to confine itself to observations. It is intended to be constructive and geared towards the search for operational solutions that will make the European competitive framework compatible with industrial policy objectives.

We thought it would be useful to recall the principles on which Europe was built and not to lose sight of this heritage when considering the conditions for modernising the existing system. For the time being, almost all reports focus on essentially technical issues which largely overlap: the idea of a European "prosecutor", changes to the notice on the definition of relevant markets, the idea of developing behavioural remedies, taking better account of efficiency gains, developing a European innovation policy, seeking solutions in international trade law to promote industrial strategies, etc.

These measures are, if not accessory, at very least insufficient if not simply utopian, for example by resorting to WTO law. They are also of a rather "conservative" nature, since they adopt as their first principle that competition policy is self-sufficient and that no in-depth reform - particularly with regard to the Treaty - is either necessary or desirable. However, this is an issue that deserves discussion. Of course, we can consider that competition policy is satisfactory overall and that the important thing is to supplement it on other fronts, such as data law, which some people are calling for in response to the challenges of the power of digital companies, or renewed international trade law to strengthen the tools needed to deal with State aid. However, it seems difficult to defend such a position, given the interlocking and fragile nature of the systems.

Moreover, competition law is used for all purposes and outside its traditional field. Thanks to the considerable powers conferred on the Commission by the rules on State aid, it has become the instrument for implementing a pan-European industrial policy. It is also employed to regulate the use of data by the GAFA, to combat unfair competition from groups supported by third countries - in particular China, etc.

Why deprive ourselves of a reflection that goes further? Could we not imagine reforming the system beyond mere tidying up? Why not imagine "relieving" the work of DG COMP by asking it to investigate cases, leaving the decision-making power to another independent authority? This would avoid confirmation bias and would be in line with the lessons learned from economic research). Why not grant, in exceptional cases, a right of escalation to the politics on certain issues such as mergers or State aid? We might also consider whether it might not be possible to transpose to competition policy and industrial policy the distinction between final and intermediate objectives practised in monetary policy. The protection of effective competition would be the intermediate objective and the maximisation of the sum of the producer and consumer surplus would be one of the ultimate objectives. Other final objectives could be defined in the general interest, such as growth, employment, the environment, etc.

Going further, the conclusions of this report explore these different avenues by focusing on the path of reform both at the procedural level - giving an important role to the College of Commissioners - and at the institutional level - the revision of Article 173 TFEU and the creation of a European DARPA.

It is the combination of these reforms that should make it possible to reconcile the problems of competition policy and industrial policy.

ANNEX 1

List of recently published Reports and Studies quoted in this report concerning Competition and Industrial Policy and the reform of European competition law ¹⁷²

- Non-Paper « [Strengthening the level playing field on the internal market](#) », The Netherlands, *Non-paper des Pays-Bas*, 4 décembre 2019.
- [Projet de rapport sur le rapport annuel sur la politique de concurrence de l'Union européenne \(2019/2131\[INI\]\)](#), *Rapport Parlement européen 2019*, Parlement européen, Commission des affaires économiques et monétaires, YON-COURTIN Stéphanie (rapporteuse), 26 novembre 2019.
- [Rapport d'information n°2451 sur le droit européen de la concurrence face aux enjeux de la mondialisation](#), *Rapport Assemblée nationale Fr 2019*, Assemblée nationale, Commission des Affaires européennes, présenté par les députés ANATO Patrice et LE GRIP Constance, 27 novembre 2019.
- « [Report of the Strategic Forum for Important Projects of Common European Interest](#) », **Report of the Strategic Forum for IPCEI**, European Commission, GROW F1, 5 novembre 2019.
- « [L'Europe face aux nationalistes économiques américains et chinois](#) », *Rapport Fondapol*, COMBE Emmanuel, HYPPOLITE Paul-Adrien et MICHON Antoine, Fondation pour l'innovation politique, Novembre 2019.
- Position Paper de l'Autriche « [on National and European Champions in Merger Control](#) », *Position Paper Autriche*, Novembre 2019.
- « [Competition and industrial policy in Europe: how can they work together?](#) », Philip Lowe, *Oxera 2019*, Octobre 2019.
- « [EU Competition Policy fit for the Global Stage](#) », *Rapport ERT*, European Round Table for Industry, 7 octobre (et 9 décembre) 2019.
- « [50^e Conseil économique et financier franco-allemand](#) », *Communiqué Ministère de l'économie et des finances*, 19 septembre 2019.
- « [Improving EU Competition and State Aid Policy](#) », *Business Europe*, 4 septembre 2019.
- « [La politique de la concurrence et les intérêts stratégiques de l'Union européenne](#) », *Perrot et Blonde – Concurrences*, PERROT Anne et BLONDE Victor, *Revue des droits de la concurrence n°3-2019* pp.2-4, 1^{er} septembre 2019.
- « [Possible reform of competition law: Food for thought to improve the interplay between merger control and other EU policies](#) », *Belmin - Concurrences*, BELMIN Pascal, *Revue des droits de la concurrence n°3-2019* pp.2-4, 1^{er} septembre 2019.
- « [Cinq mesures pour une Europe plus forte](#) », *Kaeser – Les échos*, KAESER Joe, *Les Echos*, 9 août 2019.
- « [Moderniser la politique de concurrence de l'Union européenne](#) », *Représentation de la France auprès de l'UE 2019*, Bundesministerium für Wirtschaft und Energie — Ministère de l'Économie et des finances — Ministerstwo Przedsiębiorczości i Technologii, *Représentation de la France auprès de l'Union européenne*, été 2019.

¹⁷² These Reports and Studies are listed in chronological order, with the most recent first. They are quoted as shown in italics.

- “[“Modernizing European Competition Policy: a brief review of Member States’ proposals”](#)”, *Mathew Heim – Bruegel*, HEIM Mathew, *Bruegel*, 24 juillet 2019.
- « [«How should the relationship between competition policy and industrial policy evolve in the European Union?»](#) », *Petropoulos – Bruegel*, PETROPOULOS Georgios, *Bruegel*, 15 juillet 2019.
- « [« Proposition de la France, de l’Allemagne et de la Pologne pour une politique européenne de la concurrence modernisée »](#) », *Proposition France-Allemagne-Pologne du 4/07/2019*, 4 juillet 2019.
- “[“Redefining Europe’s economic sovereignty”](#)”, *Bruegel*, LEONARD Mark, PISANI-FERRY Jean, RIBAKOVA Elina, SHAPIRO Jeremy, WOLFF Guntram, *Bruegel (Policy Contribution Issue n°9)*, Juin 2019.
- « [« Politique de la concurrence et champions européens »](#) », *Winckler – RJSP*, WINCKLER Antoine, *Revue des juristes de Science Po*, 6-17, p.35, Juin 2019.
- « [« Competitiveness Council »](#) », *Communiqué Conseil de l’Union européenne*, 27 et 28 mai 2019.
- « [« Le Conseil préconise une stratégie globale à long terme, dotée d’une vision à l’horizon 2030 »](#) », *Communiqué Conseil européen*, 27 mai 2019.
- « [« An EU industrial policy strategy: a vision for 2030 – Council conclusions »](#) », *Communiqué Conseil de l’Union européenne*, 27 mai 2019.
- « [« Concurrence et commerce : quelles politiques pour l’Europe ? »](#) », *Rapport CAE 2019*, JEAN Sébastien, PERROT Anne et PHILIPPON Thomas, *Les notes du Conseil d’analyse économique*, Mai 2019.
- « [« L’industrie a-t-elle besoin de l’industrie européenne ? »](#) », *OFCE 2019*, ALSIF Anne-Sophie, BALME Richard, CHARLET Vincent, COHEN Elie..., *Note de l’OFCE*, Mai 2019.
- “[“Which competition and industrial policies for the new EU Commission after Siemens / Alstom?”](#)”, *After Simens / Alstom – Concurrences*, BUHART Jacques, FUNKE Thomas G., HEIM Mathew, HENRY David..., *Revue des droits de la concurrence n°2-2019* pp.266-269, 1er mai 2019.
- « [« La politique de la concurrence et les intérêts stratégiques de l’UE »](#) », *Rapport IGF / CGE*, PERROT Anne, BLONDE Victor, ROPARS Axel, CATOIRE Serge, MARITON Hervé, *Inspection générale des finances & Conseil général de l’économie, de l’industrie, de l’énergie et des technologies*, Avril 2019.
- “[“The Return of the Policy That Shall Not Be Named: Principles of Industrial Policy”](#)”, *IMF Working Paper 2019*, CHERIF Reda et HASANOV Fuad, *IMF Working Paper (WP/19/74)*, Mars 2019.
- « [« EU Industrial Policy after Siemens-Alstom: Finding a new balance between openness and protection »](#) », *Rapport Centre européen de la stratégie politique Commission européenne*, 18 mars 2019.
- « [« Keep Politics out of Europe’s Competition Decisions »](#) », *Rey-Tirole*, REY Patrick et TIROLE Jean, *Competition Policy International*, 5 mars 2019.
- “[“Joint statement by France, Austria, Croatia, Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Luxembourg, Malta, Netherlands, Poland, Romania, Slovakia, Spain”](#)”, *Friends of Industry*, 6ème reunion ministérielle, 18 décembre 2018.
- « [« Politiques et concurrence »](#) », *Rapport CAE 2016*, ENCAOUA David et GUESNERIE Roger, *Les rapports du Conseil d’analyse économique*, 2016.

ANNEX 2

The people interviewed in contribution to this paper

David BOSCO, Professor of competition law and European law at the University of Aix-Marseille.

Anna DIAS, Member of the Bars of Brasília and Paris, Gide Bruxelles, specialised in international trade law and European competition law.

Alan HERVÉ, Associate Professor, in charge of the Europe and World Affairs Master's Degree at the Rennes Institute of Political Studies.

Vincent MARTENET, Professor at the University of Lausanne and Chairman of the Swiss Federal Competition Commission.

Catherine PRIETO, Member of the Competition Authority since March 2019 she is Professor of Law at Sorbonne University.

Olivier PROST, Lawyer, Partner/Responsible for the Brussels office of Gide, Vice-President of the Trade & Investment Section of the ICC.

Laurent WARLOUZET, Professor of European History at Sorbonne University.

ANNEX 3

Towards the creation of a European DARPA?

Created in 1958 following the “Sputnik Crisis” the DARPA¹⁷³ part of the United States Department of Defense is responsible for research and development of new technologies for military use. For example, it developed ARPANET, which later became the Internet. Its mission is to invest in revolutionary technologies for national security. Its main operating characteristics are a high degree of autonomy and flexibility; mission-focused programmes; projects involving basic research but also applied research (high risk taking and tolerance of failure).

The need to create a DARPA at European level

Compared to the United States and China, Europeans are lagging behind in the field of technology. The establishment of a powerful instrument to support innovation at European level is recommended since it could lead to a stronger industrial policy, promote technological advances in strategic sectors of the European economy or develop public procurement¹⁷⁴. At European level, a few instruments have been put in place. The European Research Council¹⁷⁵ whose current Framework Programme (2014-2020) aims to integrate research and innovation by establishing seamless support throughout the process; to put research and innovation funding at the service of tackling major societal challenges; and to support innovation and near-market activities so as to create new business opportunities. The European Institute of Innovation and Technology aims to strengthen Europe's capacity for networked innovation; contributes to the training of researchers in entrepreneurship and good practices to decompartmentalise research and innovation. The EIB supports the financing of venture capital (through direct or indirect individual loans; mixed financing solutions and advice to optimise the profitability of investments; financing of venture capital funds and guarantee mechanisms for funds through its subsidiary - EIF).

The record of these instruments is mixed in practice¹⁷⁶. Policy proposals have been made. In 2017, French President Emmanuel Macron gave a political dimension to this subject by voicing his interest in setting up a European Agency for Breakthrough Innovation on the DARPA model, the aim of which would be the joint financing of emerging technologies and sciences such as artificial intelligence. The idea was reaffirmed in particular by Bruno Le Maire in 2018¹⁷⁷. There is already a fund for breakthrough innovation in France, which could prefigure a fund at the European level and should have the same power as DARPA¹⁷⁸. The establishment of such a European agency could take two forms: either as a supranational agency under the

¹⁷³ DARPA: Defense Advanced Research Projects Agency.

¹⁷⁴ MACRON E., 26 September 2017, speech delivered at La Sorbonne, Paris (See online: <https://www.elysee.fr/emmanuel-macron/2017/09/26/initiative-pour-l-europe-discours-d-emmanuel-macron-pour-une-europe-souveraine-unie-democratique>).

¹⁷⁵ Created during the 7th Framework Programme for technological R&D for the period 2007-2013.

¹⁷⁶ Information report tabled by the Committee on European Affairs on European policy on breakthrough innovation, presented by Mrs Christine HENNION and Mrs Sophie AUCONIE (MPs), pp. 30 à 32 (See online: <http://www.assemblee-nationale.fr/15/pdf/europe/rap-info/i1293.pdf>).

¹⁷⁷ See online: <https://fr.reuters.com/article/topNews/idFRKCN1GA1LH-OF RTP>

¹⁷⁸ See online: <https://fr.reuters.com/article/topNews/idFRKCN1GA1LH-OF RTP>

Commission with a budget line allocated by the Union; or as an intergovernmental agency financed directly by the Member States.

The Franco-German Initiative: Joint European Disruptive Initiative (JEDI)

JEDI is a Franco-German collective imagined in 2017 by a hundred or so managers of major French and German groups, start-ups and research organisations¹⁷⁹. It advocates the creation of a Disruptive Innovation Agency inspired by the DARPA, which would not aim to achieve precise and restricted objectives but to solve development problems. It is on this point that it is inspired by DARPA. However, unlike DARPA, it would focus only on funding civilian projects. In fact, it would be similar to a start-up, with so-called "agile" operations, projects that are limited in time, renewable only once and unprofitable in the short term, ensuring revolutionary innovations within ten years or more, enabling Europe above all to regain its position, competitiveness and independence in the ever-shorter technological development cycles. *"The JEDI is created to encourage a winning mentality by radically changing the financing of risky projects and their execution time. The aim is to regain our position as a technological leader and thus restore our strategic and economic independence."*¹⁸⁰.

In the long term, the aim would be to extend this Franco-German initiative to the whole of the Union, which in fact seems compromised because the project does not meet with unanimous approval. By way of example, Carlos Moedas, the European Commissioner for Research, felt that the idea was similar to the pilot of the European Innovation Council. In reality, most of the tools in this pilot focus on market innovation.

The pilot project of a European Innovation Council (EIC)

An EIC was put forward by the European Commission in 2018.¹⁸¹ A pilot was launched for the period 2019-2020 with a view to organising a gradual transition to the new structure of the future Horizon Europe programme, succeeding Horizon 2020 from 2021 onwards. It is a public funding scheme for projects and companies that develop or launch the marketing of a breakthrough or radical innovation. It should lead to *"moving radical and breakthrough innovations from the laboratory to the marketing stage and help start-ups and SMEs to develop their ideas"*¹⁸². The EIC has two financing instruments: the Pathfinder, which aims to support early-stage projects that seek to develop advanced technologies; and the Accelerator, which aims to develop breakthrough technologies in the market to a development phase attractive to private investors (for ideas that are commercially viable in the long term but which are high risk for private investors). As regards its operation, the Commission will have to appoint innovation officers to a EIC Advisory Board to oversee the pilot project, prepare the future EIC and will have to recruit an initial group of programme managers with leading edge expertise in new technologies to supervise and support the projects.

¹⁷⁹ The project brings together personalities such as CNES President Jean-Yves Le Gall, CEA Director of Technological Research Stéphane Siebert, Airbus Defense and Space CEO Dirk Hoke, and Guillaume Poupard, the leader of Anssi, the agency for the fight to counter cyber-attacks.

¹⁸⁰ See online: <https://www.euractiv.fr/section/concurrence/news/return-of-the-jedi-european-disruptive-technology-initiative-ready-to-launch/>

¹⁸¹ The idea of creating a CIS was initiated by European Commissioner Carlos Moedas in 2015. In his view, the CIS on the model of the European Research Council (ERC) would promote the emergence of growth-enhancing innovations.

¹⁸² See online: https://europa.eu/rapid/press-release_IP-19-1676_fr.htm?locale=FR.

This tool focuses mainly on innovations close to the market, without making any real attempt to push research in a particular direction. Its structure does not seem to allow its staff to be as involved as DARPA officers are, or even to steer projects as directly. Thus, it is unlikely that the establishment of such a Council would enable it to reach a level equal to that of the American agency in terms of risk-taking and mission accomplishment.

Without further delay, the European Union must arm itself in terms of innovation. Like its competitors, it must consolidate its strategic autonomy and establish a certain economic leadership in terms of innovation. Although the JEDI seems ambitious, it only concerns two Member States: France and Germany. As for the EIC, it is mainly focused on market-specific innovations, so its scope is somewhat limited. The need to set up a "Euro-DARPA" is keenly felt, but it also raises several questions, particularly as to its structure, its method of financing, the sectors concerned, the coordination of programmes and the reconciliation of divergent industrial priorities from one Member State to another.¹⁸³

¹⁸³ This annex was written by Myriam Dziewit Benallaoua.

FONDATION ROBERT SCHUMAN

The Robert Schuman Foundation that was founded in 1991 after the fall of the Berlin Wall has been approved by the State for its services to the public; it works to promote the construction of Europe. The Foundation which is a reference research centre develops studies on the European Union and its policies promoting the content of these in France, Europe and elsewhere in the world. It encourages, contributes to and stimulates European debate thanks to the wealth of its research, publications and the organisation of conferences.

203 bis Boulevard Saint-Germain, 75007, Paris

Tél : +33 (0) 1 53 63 83 00

info@robert-schuman.eu

11 rue d'Egmont B-1000 Bruxelles

Tél : +32 (0)2 502 47 13

bruxelles@robert-schuman.eu

