Beyond *Alstom-Siemens*: Is there a need to revise competition law goals?

EU policy after *Siemens/Alstom*: A look into the right tools to preserve the EU industry's competitiveness at global level

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I. Lessons from *Siemens/Alstom*

1. Background

1. In September 2017, Siemens and Alstom, the two largest rolling stock manufacturers active in the EEA, announced their intention to join forces to create a "*European Champion in Mobility*" presented as a merger of equals. The merger, strongly backed by France and Germany, was to bring together two of the largest rolling stock and signaling suppliers globally in a combination that would have reached approx. €15 billion in yearly revenues. One of the stated reasons for the proposed merger was the emergence of CRRC, the state-owned Chinese rolling stock manufacturer with approx. €30 billion in revenues, which Siemens and Alstom saw as changing global railway market dynamics.

2. On 6 February 2019, however, the European Commission ("EC" or "Commission") blocked the merger after a lengthy Phase II investigation. The Commission essentially blocked the merger based on the significant overlaps in the parties' activities and its finding that the entry of CRRC in the EEA was unlikely in the foreseeable future. The prohibition decision triggered questions concerning political (Member State) interference in EU merger control and a heated debate on whether current EU merger control rules prevent the creation of "European champions" and whether these rules are still appropriate in the wake of the emergence of Asian corporate giants in a wide variety of industries.[1]

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The present article should not be considered or construed as legal advice on any individual matter or circumstance. The views set forth herein are the personal views of the authors and do not necessarily reflect those of Jones Day.

1 The Siemens/Alstom aftermath has had a some influence on the ‚new Commission's work plan. The Mission Letter from newly appointed Commission President Ursula von der Leyen to Margrethe Vestager, reappointed as Commissioner for Competition, expressly states her tasks will include (i) reviewing the EU's competition rules, taking into account the EU's industrial strategy and address the issue of foreign state ownership and subsidies. Likewise, the impact of Siemens/Alstom can also be felt in the Mission Letter to the new Commissioner for Trade.

2. Political influence/ interference in EU merger control

3. *Siemens/Alstom* has been notable for its very high degree of Member State interference in the Commission procedure. Throughout Phase I and Phase II, French and German politicians from the highest level have multiplied strong statements directed towards the Commission on the need for the EU to allow the creation of "European champions" and the EU merger control process to better take into account industrial policy considerations. Behind the scenes, political pressure on the commissioner, her cabinet and her team has been even stronger.

4. EU competition rules only allow Member State or other political influence to play a limited role in merger control proceedings. The EUMR provides that the Commission is to proceed with its investigations in constant liaison with the relevant Member States (Article 19 EUMR). Member States are given access to file and the opportunity to make their views known at every stage of the procedure. This, however, does not mean that Member States have a decisive role in the Commission decision-making process, nor that the Commission is bound to follow the views of Member States. The main channel whereby Member States can exercise some influence is the Advisory Committee (made up of representatives of all national competition authorities), which under the EUMR, the Commission is bound to consult before the adoption of a Phase II decision. Here again, however, the obligation imposed by EU rules on the Commission is merely one of consultation. Comments by the Advisory Committee on the draft Phase II decision are thus not binding.

5. The limited room for political maneuver in EU merger control is linked to the fact that EU merger rules make clearance dependent on the effects of a merger on competition based on objective grounds (i.e., the parties' market power, barriers to entry, extent of horizontal or vertical issues, etc.) and that industrial policy or other political objectives (e.g., labor issues) should only play a limited contextual role. The test of the EU Merger Regulation provides that the Commission is to block concentrations that would "*significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position*" (Art. 2(3) EUMR). This test is now unanimously understood as referring to consumer harm. In its assessment of a merger, the Commission has to take into account "*the structure of all the markets concerned*," "*the actual or potential competition from undertakings located either within or outwith the Community*," "*the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.*" The EUMR test has been described as based on objective and established competition considerations "*with only the smallest nod in the direction of anything else.*"[2]

6. The tension between competition law and its goal of promoting competition, on the one hand, and industrial policy, on the other hand, is not a new one. Neelie Kroes, former competition Commissioner, once referred to "*the great ideological divide*" that exists between the two.[3] Industrial policy relates to an interventionist approach justifying government intervention in the economy because of market's fallibility, while competition law, a liberal tool, relies on fair competition enabling innovation and on the free market to determine the distribution ownership of companies.[4]

7. While for obvious reasons industrial policy is thus not a formal factor in EU merger control, it cannot be said that it cannot impact merger decisions. One channel through which industrial policy can find its way in merger procedures is Article 21(4) EUMR. Under this provision, Member States can interfere with EU merger control to protect their legitimate interests in specific circumstances. A few grounds for doing so are listed in the article: public security, plurality of media and prudential rules. This list, however, is not exhaustive as other grounds can justify Member State intervention. The Commission has some discretion to accept non-listed grounds as legitimate objectives. In the past, Article 21(4) EUMR has been used by Member States to protect national interests to often facilitate mergers between national companies, salvage strategic companies and protect national champions from foreign takeovers.[5] In most cases, however, Member States' interventions based on this provision have been blocked by the Commission.

8. It is also noteworthy that final decisions in Phase II cases are adopted by the College of Commissioners, so that, where relevant, commissioners can make their voice heard when a given transaction has an impact on their respective policies. In addition, while commissioners are not supposed to represent the interests of their Member State, the reality is that they currently retain strong links with the political environment of their home Member State. As a consequence, the College of Commissioners can be another channel for policy considerations to be taken into account in merger control procedures or for Member States to influence the Commission's merger control assessment. In *Siemens/Alstom*, it was reported by the press that German Commissioner Oettinger strongly advocated a clearance of the deal during the College of Commissioners meeting, even though, arguably, the deal's impact on his field of competence, i.e., digital market, budget and human resources, was fairly limited.

9. Over the years, repeated attempts have been made to pressure the Commission into taking industrial policy into account in its merger control process. The Commission, however, tends to have stayed its course, sticking to a strict assessment of mergers based on their objective

2 L. Brittan, The Early Days of EC Merger Control, *EC Merger Control: Ten Years On*, International Bar Association, London, 2000.

3 N. Kroes, Industrial Policy and Competition Law Policy, Fordham International Journal, Vol. 30, Issue 5, 2006.

4 G. Babin, European Union Merger Control: The End of Member State Industrial Policy?, *Columbia Journal of European Law*, 2015.

5 Ibid.

impact on competition. The *Siemens/Alstom* case is not the only decision that highlights the EC's reluctance to give in to political pressure. Political interference and/or calls for "*industrial policy*" objectives to be taken into account in EU merger control were for instance also made in *Schneider/Legrand*,[6] *Deutsche Börse/NYSE*,[7] and others.

10. In 2012, the EC refused to clear *Deutsche Börse/NYSE*, stating that the merger would have created a "*near monopoly*" in European exchange-traded derivatives. At the College of Commissioners meeting, the press reported that then-Commissioner Almunia was heavily lobbied by fellow commissioners to allow the creation of a European champion. The EC nevertheless blocked the merger, stressing that "*no industrial policy could tolerate monopolies*" and that it doesn't want "*a world of large behemoths protected by the fact that they carry national flags.* (…) *The price of creating a European champion cannot be to let a de facto monopoly dictate its commercial conditions on thousands of European firms operating with European derivatives.* (…) *A monopoly would have been more beneficial for the parties' shareholders, but it would have harmed customers.*"[8]

11. These past examples, together with the outcome in *Siemens/Alstom*, show that heavy political interference may do more harm than good. When facing intense political pressure, the Commission's reaction can be an increased focus on the effect on competition test as set out in the EU rules, with a higher disregard for the policy arguments the political players are putting forward. Political support may also lead parties to a transaction to be overconfident and to refuse any concessions. In *Siemens/Alstom*, there is a perception that the French-German political support led the parties to overplay their card. An earlier discussion of remedies, for instance, could have changed the outcome of the transaction. On this and on other aspects, a closer look at the *Siemens/Alstom* procedure offers helpful advice for competition law practitioners.

3. Fifteen months of *Siemens/Alstom*

12. Given the sensitive nature of the deal, it is not surprising that the parties opted for an extended pre-notification period. Talks with the Commission started soon after the announcement of the deal in late September 2017, thus before the actual business combination agreement was signed by the parties (in March 2018). The proposed concentration was notified after about eight months of pre-notification, in June 2018. The Commission also acted cautiously from the start. Already early on in the pre-notification period, it showed willingness to educate itself on the railway industry and get a first idea of how the proposed concentration was perceived by meeting with industry stakeholders.

13. Throughout the pre-notification and the actual Phase I and Phase II procedures, the strategy of the parties appears to have been to try to strong arm the Commission based on (over) reliance on the French and German political support for the deal. Even though it was clear to most people involved in the transaction that it would lead to significant competitive issues in some markets and that therefore substantial commitments would need to be offered, the parties refused to engage into any remedies talks before very late in the procedure and, even at that stage, refused to offer clear and substantial remedies in accordance with the Commission's practice. The parties stayed their course until the very end of Phase II and maintained that no anticompetitive effects would result from the transaction. It is only on the very last day of the EUMR period for submitting remedies that the parties finally did so. A corollary of this approach is that the parties fought hard to drive home their point of upcoming Chinese competition in the EEA. In the parties' view, this element constituted the rationale for the transaction, but also the main reason why, notwithstanding sometimes quasi-monopoly combined market shares, no remedies were required.

14. Because it was to bring together the two largest players in the EEA, the proposed concentration logically faced strong opposition from certain stakeholders. Some regulatory authorities, in particular the UK's Competition and Markets Authority and Office of Rail and Road, actively opposed the deal based on concerns that the merged entity would have held a quasi-monopoly position in certain signaling markets. Other stakeholders, in particular some railway operators and infrastructure operators (respectively buyers of rolling stock and signaling equipment), opposed the transaction but may have been less vocal in their opposition. Due to the virtual unconditional support provided by the French and German governments to the deal, French and German public-owned customers may have been in a tough position to provide objective feedback. Other players assumed that with such strong government support, the merger was a done deal and that, consequently, it was better not to start on the wrong foot with the soon-to-be EU rail giant. Altogether, these different elements made that it is only when Phase II was significantly advanced that many industry stakeholders started to openly express their opposition.

15. Strong opposition, substantial overlaps between the parties and political interference triggered a lengthy and heated merger review process. High public scrutiny meant that the Commission could ill afford not to get to the bottom of things. This translated in numerous requests for information, both for the parties and for other industry players. Some competitors were addressed tens of RFIs. The Commission's investigation was characterized by a laborious effort to collect very thorough and detailed market intelligence, it sent out a couple of

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6 European Commission, Case M.2283 – *Schneider/Legrand*, SG(2002) D/228272.

7 European Commission, Case M.6166 – *Deutsche Börse/NYSE Euronext*, C(2012) 440.

8 European Commission press release, 28 February 2012, http://europa.eu/rapid/press-release_SPEECH-12-131_en.htm.

hundreds of RFIs, looking for details on every single aspect of the very technical rolling stock and signaling markets in question, and was also in close contact with national competition authorities for gathering facts about national specificities of the markets in question. Under pressure from the Commission, the parties had to even accept a stop the clock for about a month in the summer 2018 in order to enable them to gather all the data requested by the Commission. The Commission's meticulous approach translated in a very well-substantiated decision of what were in the end quite straightforward horizontal effects, including an in-depth analysis of bidding data and closeness of competition between the parties.[9]

16. As previously mentioned, the parties decided to only submit remedies on the last day where the EUMR allows parties to do so (working day 65 in Phase II). After very strong adverse market feedback, the Commission deemed these remedies not to suffice to alleviate the competitive concerns it had identified. Early remedies discussions typically enable parties and the Commission to smooth things over some time before the decision deadline starts exerting pressure on remedies talks. In the present case, although the Commission showed willingness to accept significant changes to the initial remedy package even long after the formal deadline for submitting remedies, the parties ultimately lacked some time to come to an agreement with the Commission. A takeaway from the case, however, is that the Commission can show greater flexibility on modifications of the initial remedy package in controversial cases. In *Siemens/Alstom*, second and third remedy proposals were submitted respectively 12 and 24 days after the formal deadline, and it is reported that, subject to limited amendments, the Commission carefully considered them and may even have been close of accepting them.

II. Revamp of EU merger control?

1. Franco-German Manifesto

17. In the wake of the Commission prohibition decision in *Siemens/Alstom*, France and Germany started pushing for a modification of EU competition law, with the principal aim of allowing to more strongly factor in industrial policy considerations in Commission competition law decisions. The suggested approach and modifications to EU competition law were set out in a joint communication, the Franco-German Manifesto for a European industrial policy fit for the 21st Century.[10] The Manifesto set out France's and Germany's view that EU competition law has reached a certain level of obsolescence because it does not take enough account of changing global competition dynamics. Even though not expressly mentioned in the Manifesto, it is obviously focused on the emergence of Asian corporate giants.

18. Claims such as those advanced in the Franco-German Manifesto are not new. It is interesting to point that, during the 2014 restructuring of Alstom, EU merger control rules prevented the French government for implementing some of its plans for the company. Then French Minister of Economy A. Montebourg strongly disagreed with the Commission's position and was reported to have stated that "*The rules have to now change after this story, because we need to make champions*."[11] One cannot deny the French government's consistency in its approach to EU competition law.

19. Changes to competition law suggested by the Manifesto are twofold. First, France and Germany wanted the Commission to expand the time frame it takes into consideration for the assessment of potential competition as future entry and to take greater account of competition at the global level. Second, they proposed a right of appeal of the Council, which would ultimately be able to override Commission decisions in "*well-defined cases*."[12] In practice, this second suggestion thus amounts to instituting a veto right in favor of the Council with regard to Commission competition decisions in mergers.

2. Assessment of potential competition

20. France, Germany and other critics of current EU merger rules also claim that current rules lead the Commission to take a too rigid stance when assessing potential competition. Concretely, it is argued that the time frame in which the Commission assesses potential future entry should be broadened. Commission Guidelines currently state that entry is in principle only considered timely if it occurs "*within two years*."[13]

21. While other ways to better address potential competition may be considered, it is important to stress that, contrary to the French and German view, the legislative

9 The non-confidential version of the Commission decision was released on 2 August 2018 and can be accessed at https://ec.europa.eu/competition/mergers/cases/decisions/m8677_9376_3.pdf.

10 Bundesministerium für Wirtschaft und Energie and Ministère de l'Économie, A Franco-German Manifesto for a European industrial policy fit for the 21st Century, p. 3, available at https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf?__blob=publicationFile&v=2.

11 *Wall Street Journal*, 26 June 2014. *See also* D. Neven, F.-C. Laprévote and A. Winckler, European champions and merger control rules, *Concurrences* No. 2014.

12 Bundesministerium für Wirtschaft und Energie and Ministère de l'Économie, A Franco-German Manifesto for a European industrial policy fit for the 21st Century, p. 3, *supra*.

13 Para. 74, European Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, pp. 5–18.

tools we currently have at our disposal, i.e., the EUMR[14] and Guidelines,[15] appear adequate to deal with a dynamic view of the market, and do not prevent an enlarged time frame to assess potential competition—as evidenced in the recent Commission case law discussed below.

22. It is important to point out that the Commission has actually been gradually expanding the time scope it takes into account when analyzing "*potential competition*." Under its initial approach, applied in a great number of cases such as *J&J/Guidant*,[16] potential market entry was analyzed on the short term, at the most within two to three years.[17] In a series of cases from 2014 to 2016 (*Medtronic/Covidien*,[18] *Novartis/GSK*,[19] and *Pfizer/Hospira*),[20] however, the Commission based its assessment of potential competition from the merging parties' pipeline products on a five-to-seven-year period.[21]

23. While, admittedly, these cases are "innovation" cases, in which the merging parties were pharmaceutical companies and potential competition was mostly stemming from pipeline products, the time frame for the assessment of potential competition thus went well beyond the two to three years normally considered, which shows flexibility in the Commission's practice and proves that current legislative tools enable a dynamic market assessment. It should be noted that a key element in this regard is the intensity of entry. Future entry tends to be looked at as a black or white exercise while, as is well known, it often takes several years after actual entry for a player to exert real competitive constraint even after entry.

24. If there is anything to change, it is not the EU Merger Regulation, but the Commission's asymmetric approach towards "*potential competition*." When the Commission analyzes potential competition stemming from the merging parties, it uses a long/flexible time frame: two to ten years, whereas potential competition stemming from third parties is analyzed on a time frame of two to three years. In other words, the threat of entry is analyzed differently if it stems from a third-party competitor. While this is understandable, given that the Commission will first focus on the elimination of competition between the merging parties and the closeness of their competition, a longer time frame could still be considered for assessing third-party competition, especially in concentrated markets.

25. The reality is that current rules do allow a longer-term assessment of future entry, and past Commission decisions show that the Commission is willing to make use of some flexibility provided by the rules. Arguably, however, the Commission could make even greater use of this flexibility so that a longer-term assessment becomes the norm. Future guidelines could also provide for a longer term than the currently considered two-year term, although this minor modification is not such as to justify on its own the adoption of new guidelines.

3. Worldwide markets and European champions

26. Another claim by the French-German manifesto is that current EU merger rules prevent the creation of European champions because of the (narrow) geographic market definitions they bring about.

27. Current principles, however, provide that geographic market definition is to be based on business reality. Market definition is a factual and empirical exercise and is not a policy statement: "*markets define themselves*."[22] The Commission's Relevant Market Notice defines a relevant geographic market as the geographic area in which the merging companies offer their products and in which the conditions of competition are sufficiently homogeneous.[23] In a context of increased globalization, many companies operate on a global scale and compete with various suppliers in different parts of the world. Over the past years, the Commission has consequently increasingly based its merger assessments on worldwide markets. Even where only EEA markets are considered, the Commission has in practice taken into account third-party imports where such imports are a reality.[24]

28. The Commission thus investigates every market on a case-by-case basis, among others through inquiries with industry stakeholders. On this basis, it is hard to find how France and Germany would in practice like market definition principles to be amended. It is also noteworthy to keep in mind that, in *Siemens/Alstom*, the Commission did look at worldwide markets (however excluding some closed Asian national markets such as China, Japan and South Korea). It is therefore far from certain that under modified geographic market definition rules the outcome would have been different without the offering of appropriate remedies.

29. The necessity of looking at global markets is actually put forward as a superficial general policy argument, disregarding the economic and competition law assessment required to determine what the relevant geographic market is and where competition actually takes place. France and Germany have stressed the need to foster "*national and*

14 Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, pp. 1–22.

15 Ibid.

16 European Commission, Case M.3687 – *Johnson & Johnson/Guidant*, C(2005) 3230.

17 *See* M. Todino, L. Stoican and G. van de Walle, EU Merger Control and Harm to Innovation—A Long Walk to Freedom (from the Chains of Causation), *Antitrust Bulletin*, I-20, 2018.

18 European Commission, Case M.7326 – *Medtronic/Covidien*, C(2014) 9215.

19 European Commission, Case M.7275 – *Novartis/GlaxoSmithKline Oncology Business*, C(2015) 538.

20 European Commission, Case M.7559 – *Pfizer/Hospira*, C(2015) 5639.

21 In *Novartis/GSK*, the Commission assessed potential competition from pipeline products that may or may not enter the market in five to seven years' time. In Dow/DuPont, the Commission assessed innovations that may or may not successfully enter the market in ten years' time.

22 *Competition Policy brief*, Market definition in a globalised world, http://ec.europa.eu/competition/publications/cpb/2015/002_en.pdf.

23 Commission notice on the definition of the Relevant Market for the purposes of Community competition law, OJ C 372, 09.12.1997, p. 5.

24 *See*, for instance, Case M.8444 – *ArcelorMittal/Ilva*, C(2017) 2858.

European champions," who would be big enough to compete on the global market with the US and China. A recurring point in favor of "European champions" is the scale economy argument. Critics stress that the enforcement of the EUMR prevents firms from becoming big enough to successfully compete on a global market. In *Siemens/Alstom*, CRRC had indeed greater turnover than Siemens and Alstom combined, but virtually all of it was domestic Chinese business. Only 9% of CRRC's turnover is achieved outside of China—this means that each of Siemens and Alstom is in fact three times bigger than CRRC in the world market.[25]

European competition law will take into account global markets where there is evidence that competition takes place at that level. There is also no dogmatic view at the Commission against the creation of European champions. Recent mergers such as *AB InBev/SAB*,[26] *Peugeot/Opel*,[27] *BASF/Solvay*,[28] *Essilor/Luxottica*,[29] demonstrate that the EC does not stay away from worldwide market definitions, as long as this is in line with the market reality.

30. A number of economists, including Massimo Motta and Martin Peitz have clearly pointed out that there simply is no good justification for the claim that a merger such as Alstom/Siemens would increase European industry's global competitiveness. Any synergies that such merger would supposedly bring can be achieved without one, the economists point out: "*For example, European firms may form a joint venture (or other agreement) allowing them to coordinate foreign production and sales, thereby attaining most of the efficiency gains that the merger could have achieved. Provided that the joint venture does not have an impact on the European market, it would be approved by the European Commission.*"[30] In this sense, the Manifesto does not seem to go in the right policy direction—it calls for the creation of giants that would be better able to face the threat of global giants on the basis of economic scale, and ignores the risk of creating monopolies in Europe that could be free to raise prices, lower output, reduce innovation, etc. The cornerstone of EU's industrial policy and the building block of the EU internal market over the past 60 years has been free and healthy competition. The ability of EU companies to succeed on a competitive EU market has also made them stronger competitors at global level. Scale is also not everything. For instance, it is common sense to acknowledge that Chinese companies will always be bigger in scale than most European companies given the size of its national markets. The key here is not size, but competing on a level playing field—this calls for EU policy to rely on other more efficient trade tools.

25 M. Sandbu, The good, the bad and the ugly of last week's Franco-German proposal, *Financial Times*, 25.02.2019.

26 European Commission, Case M.7881 – *AB InBev/SABMiller*, C(2016) 3212.

27 European Commission, Case M.8449 – *Peugeot/Opel*, C(2017) 4857.

28 European Commission, Case M.8674 – *BASF/Solvay*, Decision not yet published.

29 European Commission, Case M.8394 – *Essilor/Luxottica*, C(2018) 1198.

30 M. Motta and M. Peitz, Competition policy and European firms' competitiveness, *VOX*, 20.02.2019, https://voxeu.org/content/competition-policy-and-european-firms-competitiveness.

4. Council's veto right

31. The second proposed reform relates to a right of appeal of the Council, which would ultimately be able to override Commission decisions in "*well-defined cases, subject to strict conditions*."[31] While this may be tantamount to instituting a veto right in favor of the Council with regard to Commission competition decisions, it is unclear whether the veto would apply to antitrust decisions or be limited to merger decisions, given that the Manifesto is silent on this point.

4.1 Mirroring pre-existing state aid provisions?

32. Proponents of the Council's veto right argue that the possibility of the Council to interfere in the EU competition law procedure already exists under state aid provisions. It is therefore interesting to take a closer look at those provisions.

33. Article 108(2) paragraph 3 TFEU enables the Council acting unanimously, at the request of a Member State, and where this is justified "*by exceptional circumstances*," to declare a specific state aid measure compatible with EU state aid rules.[32] This prevents the state measure at stake from being investigated by the Commission. Where a Commission investigation on the measure had been initiated already, the Council intervention brings it to an end. This provision has only rarely been used, mainly in the agriculture sector.[33]

34. From a legal perspective, this cannot be assimilated to an actual "veto" right attributed to the Council which would enable the Council to override a pre-existing Commission decision. The Council can only decide that the aid is compatible with the internal market, but cannot decide that the aid is incompatible, and this can only happen if the application has been filed prior to the conclusion of the Commission's formal investigation.[34] Moreover, if the procedure of the Commission has been concluded under Article 108(2) TFEU, the so-called "veto" of the Council can no longer be exercised. If the Commission has adopted a negative decision declaring the aid incompatible with the internal market, the Council can no longer authorize the aid.[35] One should therefore be cautious in drawing parallels between the Council veto as proposed in the Manifesto and the Council's right to intervene in state aid.

31 Bundesministerium für Wirtschaft und Energie and Ministère de l'Économie, A Franco-German Manifesto for a European industrial policy fit for the 21st Century, p. 3, *supra*.

32 Article 108(2) paragraph 3 TFEU: "*On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known*."

33 e.g., Council decision 87/197/EEC of 16 March 1987, OJ L 78, 20.3.1987, pp. 51–52.

34 *See* P. Werner in F. J. Säcker and F. Montag (eds.), *European State Aid Law – A Commentary*, Beck, 2016, p. 1535.

35 ECJ, Case C-110/02, *Commission v. Council*, [2004], ECR I-6333.

4.2 A Council veto right may require a change to the TFEU

35. A competence of the Council to overrule merger decisions of the Commission does not seem clearly possible under current treaty rules. A Council veto right may require an amendment of the TFEU.

36. According to Recital 7 of the EU Merger Regulation, its legal basis is "*not only Article 103 TFEU (ex-Article 83 EC) but principally, Article 352 TFEU (ex-Article 308 EC).*" Therefore, a change to the EU Merger Regulation that would confer the Council a veto right over the Commission's merger decisions would have to comply with Article 103 TFEU.

37. Article 103 TFEU reads:

> "*1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament.*
>
> *2. The regulations or directives referred to in paragraph 1 shall be designed in particular:*
>
> (…)
>
> *(d) to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph* (…)"

38. Therefore, according to Article 103 TFEU, the only EU institutions listed has having the functions of enforcing competition law are the Commission and the Court of Justice. While, as in many other areas, the Council has the general power to lay down the rules on proposal of the Commission, it is not considered as having any enforcement or review functions under paragraph 2 of Article 103 TFEU. A strict interpretation of this article may require an amendment that would provide the Council with enforcement and review functions. Others may also argue that Article 103 TFEU only refers to antitrust and not to mergers; this argument is from the outset devoid of any sense, since the first EU Merger Regulation was adopted only in 1989 and has its basis, inter alia, in Article 103 TFEU itself.

39. It follows that vesting the Council with a veto right over Commission competition law decisions may require an amendment of Article 103 TFEU. This would also be consistent with the fact that the so called 'veto' right of the Council in state aid matters is enshrined in the treaty (Article 108(2) TFEU).

40. It is, in any event, at the core of the EU law system that merger rules are to be enforced by a politically independent supervisory authority active at EU level, which is the only mechanism capable of preserving healthy competition, free from pollution of national interests.

41. This may be one of the reasons why so many Member States have already expressed their disagreement and their concerns about the contemplated possibility of allowing EU merger decisions to be overruled by national ministers.

42. On 15 May 2019, the Dutch government issued the first major rebuttal to the Franco-German Manifesto, publishing its own position paper that endorses the Commission and stresses that competition authorities should remain "*politically independent*," and "*political national interests are not always in line with the general interest*." The paper further affirms Europe should "*build on healthy competition*," stressing that "*size isn't everything*."[36] and that "*Bigger is not always better*."

43. The governments of Sweden, Belgium, Finland, Denmark and Portugal all spoke out publicly against the Manifesto.[37]

44. The competition law community also expressed its concerns about the contemplated veto proposal. A senior director of mergers at the Competition and Markets Authority stressed that a push for EU ministers to wield powers to overturn merger prohibitions is a backward step that would undermine hard-won principles of transparency and certainty.[38] The president of the German Bundeskartellamt, Andreas Mundt, also expressed its position on the matter and said that the ministerial veto on EU merger decisions is "*very difficult*" to get right.[39] Ninety-two competition lawyers, economists, and practitioners signed an op-ed opposing the Franco-German proposals to reform EU competition rules, stressing that this "*would undermine competitive markets in the EU, make EU citizens worse off and put the legal certainty that businesses demand at risk*."[40] Similarly, Europe's biggest business lobby stated that a Council veto right over Commission merger decisions would be a step too far, because it risks excessive political interference.[41]

45. At the time of writing, however, the French government seems to have recently drawn back from its initial Council veto proposal.[42] France's idea of introducing a ministerial override to EU mergers decisions appears more distant after a group of experts appointed by the

36 Dutch Government, Ministry of Economic Affairs, Position paper, Strengthening European competitiveness, 15 May 2019, available at https://www.permanentrepresentations.nl/documents/publications/2019/05/15/position-paper-strengthening-european-competitiveness.

37 MLex, EU merger law overhaul finds few friends among smaller governments, 27 May 2019.

38 MLex, Franco-German mergers manifesto undercuts legal certainty, UK antitrust official warns, 26 April 2019.

39 MLex, Ministerial veto on EU merger decisions "very difficult" to get right, Mundt says, 14 March 2019.

40 Franco-German proposals would undermine competitive markets in the EU, Financial Times, 29 April 2019.

41 MLex, Fix EU merger rules or risk more political interference, 20 March 2019.

42 Inspection générale des finances et Conseil général de l'économie, La politique de la concurrence et les intérêts stratégiques de l'UE, avril 2019, available at http://www.mlex.com/GlobalAdvisory/DetailView.aspx?ppo=25&cid=1097248&siteid=244&rdir=1.

French government published a report saying that France should focus its attention on securing changes that are more likely to be achieved. The report takes a more pragmatic approach, favoring changes that can be achieved without a change to the EU treaties, such as elimination of the two-year horizon for potential entry from the Merger Guidelines, and creating a special unit within DG COMP with industry expertise that is supposed to deal exclusively with remedies.

4.3 Other reasons why a Council veto right would be the wrong route

46. Even if it were possible under current EU rules, politicizing EU merger enforcement through the immixture of the Council in the procedure is not desirable due to several reasons.

47. First, it would run counter to the division of powers in the EU and impact the Commission's independence. The Commission is the so-called guardian of the treaties, and is the only institution that must act independently of national interests in order to advance the EU agenda. Making it subject to EU government powers, even if this would only happen in "exceptional circumstances," would have a significant symbolic impact and, more importantly, affect the independence of the Commission as competition enforcer, while this independence is exactly one of the reasons why the Commission is so widely admired and followed as a model competition authority around the world. Further, the Commission is already held accountable in front of the EU Parliament, no advantages in terms of democratic accountability would therefore be achieved.

48. Second, the Council is not the adequate forum to decide on merger decisions. The Council lacks any type of technical competition law experience, which is necessary for establishing whether a merger impedes competition in the internal market or not. In addition, it is a political forum where its representatives pursue their national interests. It is not difficult to imagine that political horse trading and irreparable fights over national egos may take place, which would ultimately harm EU businesses and consumers.

49. Third, it would render EU merger control political and arbitrary. This would have a negative impact on legal certainty, predictability of EU competition rules. From a business perspective, no worse effect can be imagined. Ultimately, a political veto is thus likely to scare businesses away from M&A activity in Europe, and would thereby harm the EU's economy.

50. Finally, there is little doubt that a veto right on merger review would be a dormant provision impossible to use in practice, as it already is to a large extent in the state aid field. Even if it required only a qualified majority, it is very unlikely that such majority would ever be reached on specific merger cases, which most of the time will only involve several Member State interests.

III. The right tools to address state supported foreign firms

51. Actors in the debate in the aftermath of *Siemens/Alstom* have been vocal about the unfair competition European companies face by state-supported foreign firms. With a growing feeling that EU companies are being held back whilst policies of certain third countries are effectively nurturing domestic champions breaded to compete globally, it is hard to blame the general feeling of helplessness. However, it is possible to discuss and criticize the orientation the debate has taken. The Franco-German Manifesto focused mainly on proposals designed to afford relief to domestic firms from the allegedly narrow-minded appreciation of competitive concerns implemented by the Commission. As we have shown, the competition community is rightly wary about using competition rules to address trade distortions finding their origin outside the EU. However, other, more sensible routes, were also briefly explored and merit further consideration.

52. Turning to the international trade aspect of the debate, the leitmotif ticks on the issues of reciprocity in the implementation of international trading rules and asymmetrical market access. Traditionally a fervent defender of multilateralism, the EU has already started raising price tags and bringing down the curtain on its own playground in a general feat to get other global players to play by the rules. As adequately coined in the EPSC report, whilst "*openness should remain the name of the game,* (…) *it must be a two-way street*."[43] We will show that the EU already has an arsenal of legal instruments which, coupled with strong competition rules on its own turf, can protect its industry from trade distortions whilst pursuing access to foreign markets.

1. Trade Defense Instruments

53. The EU anti-dumping and anti-subsidy regulations ("EU regulatory framework")[44] established under the umbrella of the rules of the World Trade Organization ("WTO") are intended to address trade distortive practices causing injury to the Union industry.

54. The EU regulatory framework has the central objective of addressing the injury caused to the Union industry by the sale, in the EU, of imported products at dumped and/or subsidized prices. These rules act as

43 EPSC, EU Industrial Policy After Siemens-Alstom – Finding a New Balance between Openness and Protection, 18 March 2019.

44 Regulation (EU) 2016/1036 of 8 June 2016 on protection against dumped imports from countries not members of the EU and Regulation (EU) 2016/1037 of 8 June 2016 on protection against subsidized imports from countries not members of the EU.

a safeguard to the openness of the EU market. They provide tools to offset harm caused by imports capitalizing on state support or advantageous economic circumstances captured in exporting markets to undercut the EU industry.

55. As opposed to competition law, the mandate of the Commission when enforcing the EU regulatory framework is much larger as it is tasked with the prevention of material injury being inflicted upon the "*Union industry*," taken as Union-based producers affected by the foreign practice. Furthermore, account must also be taken of the impact trade defense measures (generally in the form of tariffs) may have on the general "*Union interest*," which includes importers, users, consumers and the domestic industry. Contrarily to the EUMR, trade defense instruments ("TDI") may be adopted after consultation of the Member States. The latter are granted a veto right over the measures, conditional on qualified majority. Therefore, even though it is very uncommon for Member States to block the imposition of TDI by the Commission, the balancing work which needs to be implemented by the Commission has a much wider scope and often involves more affected parties than merger proceedings.

56. The rules governing subsidies are particularly relevant to the present debate. As a distant parent of the EU state aid rules, it appears as a weapon of choice to alleviate the advantage state-supported firms can bear on EU markets. Plus, it represents an international translation of the principle of competitive neutrality laid down in the TFEU. Another similarity lies with the constitutive features of a subsidy which remind the text of Article 107 TFEU. Subsidies are defined under the WTO agreement on subsidies and countervailing measures as a financial contribution by a government or any public body, or any form of income or price support, which confers a benefit on a specific enterprise or industry. On paper, these measures address situations where subsidized products cause material injury to the Union industry, whilst enabling a balancing exercise to be struck with the wider interest of the Union. However, there are a number of hurdles in the EU regulatory framework that need to be kept in mind.

57. First, in order for a subsidy to be investigated by the Commission, in general complainants have to demonstrate a prima facie case of subsidy, material injury and the existence of a causal link between the affected products and the injury—an exercise stemming directly from WTO obligations. However, the Commission also has the power to initiate proceedings *ex officio*.

58. Second, the adoption of TDI faces an issue of scope, since they only concern goods, not services.

59. Third, the imposition of TDI is subject to a specific procedure, which can be time-consuming. To begin with, in contrast to state aid rules, there is only *ex post* control of subsidies. More, the adoption of TDI is a long and complex process compelled with time-consuming investigations including collection of observations from numerous interested parties. Also, the process is sometimes plagued with the lack of observance of the WTO notification rule for subsidies.

60. Finally, it can be argued that the EU's implementation of the WTO rules has been rather on the soft end of the spectrum. For instance, the adoption of measures is further conditioned by the "lesser-duty rule" ("LDR"),[45] which intervenes as an expression of the general principle of proportionality embedded in EU law and goes beyond WTO obligations. The same applies with respect to the Union interest test.

61. Experience has shown that faced with the WTO agreements' gaps and the difficult prospect of reaching consensus between 164 members, the EU addressed the issue by unilaterally equipping itself with certain tools to ensure the effectiveness of its TDI.[46] The LDR has recently been modulated in an unhidden attempt to address the large levels of state support afforded abroad and the limited use of a similar rule by other WTO members.[47] With regards to subsidies, the LDR is simply waived so that, unless it is against the overall interest of the EU, distortive subsidies are fully offset.

62. It is doubtful that the above-mentioned items could be addressed on a unilateral basis outside the WTO platform. Up until now, the EU has addressed the issue of government subsidies by relying on the imposition of tariffs and conducting bilateral negotiations to promote state aid rules in third countries.[48] One other route that has been suggested is to introduce "matching clauses", which allow state aid for EU companies when they face companies benefiting from state aid outside the EU that distort competition.[49]

63. Through the WTO, a possible option would be to address the issue of transparency as a means to enhance the efficiency of TDI. The EU also recently suggested to create a rebuttable presumption according to which a subsidy which has not been notified would be presumed to be causing harm to other members.[50] This would provide an incentive for WTO members to respect their notification obligation and effectively streamline the process of

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45 This rule commands a comparison be struck between the dumping/subsidy margin and the injury margin so as to use whichever is lower as a basis to offset the injury.

46 This is notably the case with regards to rules preventing circumvention of TDI. *See*, for example, Recital 20 of the anti-dumping regulation: "*Given the failure of the multilateral negotiations so far and pending the outcome of the referral to the World Trade Organisation ('WTO') Anti-Dumping Committee, Union legislation should contain provisions to deal with practices, including mere assembly of goods in the Union or a third country, which have as their main aim the circumvention of anti-dumping measures.*"

47 For instance, Recital 10 of Regulation (EU) 2018/825, amending the EU Regulatory Framework provides that "*The amount of State aid authorised by the Commission has steadily been reduced over time. When determining the level of countervailing measures, it is, in general, no longer possible to apply the lesser duty rule*." *See also* EPRS, Modernising trade defense instruments, July 2018, p. 3.

48 *See* Memorandum of Understanding on a dialogue in the area of the State aid control Regime and the Fair Competition Review System, April 2019.

49 EU state aid rules on research, development and innovation (RDI) contain such "matching clauses", which allow RDI aid to be approved if competitors outside the EU receive similar aid, but this clause has never been applied.

50 Commission Paper on WTO modernisation, Introduction to future EU proposals, September 2018.

adoption of provisional measures. This would also allow for a dose of competitive neutrality to irrigate the international scene and this is a route that the Commission should start pursuing firmly today to preserve European businesses from unfair playing fields.

64. Another possibility, based on the US model, would be to steer away from the WTO umbrella and find leverage in bilateral trade negotiations by adopting EU legislation designed to provide for retaliatory action in certain limited cases. For example, the US has often had recourse to several domestic rules such as Sections 232 (imports jeopardizing national security) and 301 (unfair trading practices outside the scope of trade agreements and restricting US commerce) of the Trade Act of 1974 to impose tariffs on imported products. However, such a move would negate the EU's approach of favoring multilateralism and would likely be in violation of the EU's international obligations and possibly even at odds with the objectives referred to in treaty provisions.[51]

2. Public procurement rules

65. Public procurement rules provide another venue to address unfair trading practices, in particular in the form of state support of foreign firms which gain an advantage enabling them to undercut domestic competition in European markets. By preventing access to such firms, procurement rules can afford a short-term and partial remedy to the gap in enforcement of anti-subsidy rules. More, barring access to EU procurement markets may generate long-term results by providing leverage to the EU in obtaining the opening of foreign markets to its own undertakings. Europe, with its International Procurement Instrument ("IPI") pending adoption, is seeking to enhance an existing carrot-and-stick strategy to achieve reciprocity in public procurement access.

66. The EU is already equipped with a set of *de jure* barriers to procurement markets. Starting from the WTO level, the EU has carved out entire areas of procurement from its international commitments contained in the General Procurement Agreement ("GPA").[52] In particular, the rail sector stands out with many segments being expressly excluded with regard to suppliers and service providers from, inter alia, Canada, China and the US until the EU finds that reciprocal access has been afforded to EU suppliers and service providers in the identified countries' own procurement markets.

67. At EU level, access can also be regulated. Contracting authorities may take account of observance of environmental, social, labor law provisions and respect of certifications—areas which traditionally pose difficulties to extra-EU candidates—when establishing the conditions of access to a procurement procedure and *in fine* the characteristics of the successful candidate.[53] Also, contracting authorities may determine the most economically advantageous offer based on a life-cycle costing approach[54] and screen out tenders appearing to be abnormally low—state aid being expressly listed as a relevant factor.[55] This broad freedom of contracting authorities is limited by the governing principles of procurement, namely, transparency and non-discrimination, which extend to all economic operators from (i) other EU Member States and (ii) third countries party to the GPA or a Free Trade Agreement ("FTA").

68. So why the need for further instruments? For one, while these rules do not guarantee the extension of transparency or non-discrimination in access to EU procurement markets (the carrot) to foreign companies, they do not either preclude Member States from welcoming foreign operators in their markets. With government-fueled financial strength, certain foreign operators can easily undercut EU producers in procurements where contracting authorities establish the awarding criteria on a strict best price principle. This makes for a somewhat flexible stick, which takes a toll on the EU's ambition to foster European preference in procurement and enhance reciprocity in access to foreign markets. With the International Procurement Instrument proposal,[56] the goal is to strengthen the stick and get more trading partners to agree on an FTA with specific procurement access rules such as the EU–Canada CETA and the EU-Japan agreement.[57]

69. The IPI has been identified as a possible solution to address some of the distortions generated by subsidies and state-owned enterprises.[58] On paper, the draft proposal advocates for the establishment of an innovative—albeit not entirely new[59]—tool designed to sanction those countries which remain outside the framework of the GPA and offer access to a fragment only of their procurement market, often on unequal terms with domestic firms.

70. The proposal went from barring access to EU procurement markets completely[60] to the imposition of a pricing penalty on undertakings of closed-off countries,

51 Article 206 TFEU refers to the "*harmonious development of world trade*" and the "*progressive abolition of restrictions on international trade*."

52 Appendix I of the Government Procurement Agreement, EU Schedules Notes to Annex 3.

53 For instance, *see* Recital 55 and Article 36(2) of Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors.

54 Ibid., Art. 83.

55 Ibid., Art. 84.

56 Amended Commission proposal for a Regulation on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries (2012/0060 (COD)).

57 Both agreements for instance provide for the removal of existing barriers to procurement in the railway sector.

58 *See* M. Heim and C. Midões, Protecting competition or protecting (some) competitors: A European debate, *Concurrences* No. 2-2019.

59 *See* Articles 85 and 86 of Directive 2014/25/EU of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors.

60 The 2012 proposal suggested closing the EU market to goods and services originating in certain third countries. This resembled existing US Trade Agreements Act of 1979, which simply bans purchases from countries with closed procurement markets.

the tenders of which are constituted of more than 50% of third-country goods or services. If the Commission found a particular country to be implementing restrictive and/or discriminatory procurement measures and failed to secure reciprocal access through consultations, national contracting authorities would be charged with imposing the price penalty on the country's undertakings. The proposal contains a material scope large enough to encompass the three following scenarios: discriminatory access to a foreign country's market (i) compared to access granted by the Union to undertakings from the said country, (ii) compared to access granted to national firms and (iii) compared to access granted to other third countries. Therefore, if adopted, the IPI would constitute an effective means, coupled with the use of the available flexibility in EU procurement rules, to put pressure on foreign governments to lift the veil on their procurement markets and apply equal treatment to EU firms.

3. Foreign direct investment screenings

71. The final instrument we will discuss is that of national screenings of foreign direct investments ("FDI"). The latter have regularly been mentioned[61] as a better tailored remedy to the issue of acquisitions of EU assets by state-owned foreign companies. The debate currently takes place against the backdrop of the increasing number of controlling stakes taken notably by foreign enterprises particularly in key strategic sectors.[62]

72. The central objective of FDI screening mechanisms is to provide a safeguard to the general openness to both intra- and extra-EU investment enshrined in the TFEU.[63] An important number of Member States have long been equipped with means to protect strategic assets under the umbrella of national concepts of public order and security. However, this has not prevented them from seeking further tools in order to prevent "*a possible sell-out of European expertise*."[64] Today, the EU has taken determining steps towards achieving convergence, and possibly the multiplication, of FDI screening procedures in the EU.[65]

73. The new EU framework on FDI ("FDI Regulation"),[66] rather than creating an EU-wide screening mechanism, provides for coordination and cooperation between Member States. Notably, it states that final decisions on FDI remain with the Member State concerned. Thereby, the final text was notably stripped-down of its most ambitious feature, as the Commission was initially keen on acquiring a competence to review and eventually block investments liable to pose a threat to projects of EU interest.

74. The FDI Regulation builds on the many different national systems and extends a role to play to all Member States by imposing the setting up of contact points for the implementation of the regulation. The underlying objective seems to be to trigger synergies between members by imposing duties of information exchange upon them such as to achieve general convergence in the enforcement of the respective screening mechanisms. The success of this objective will turn on the extent of "due consideration" each state will afford to each other's positions as well as the Commission's.

75. In practice, the FDI regulation does not require the creation of a screening mechanism by Member States, nor does it suggest jurisdictional thresholds or procedures of enforcement. Apart from a general scheme to foster cooperation, the regulation provides a set of minimum standards of transparency and judicial remedy. As such, the new regulation resembles more a set of guidelines clarifying what an EU law compliant FDI screening looks like. Nevertheless, the FDI regulation is particularly relevant to the ongoing debate as, on one side, it has the potential to enhance an already existing opportunity for Member States to veto or impose restrictions on EU merger clearance decisions and, on the other, it falls short of providing another tool to address trade distortions and opening up foreign markets.

76. With regards to mergers, the scope of the FDI Regulation encompasses, inter alia, investments conferring control on the investor and thereby may overlap with the EUMR. As discussed, the EUMR already provides Member States with a tool to adopt those measures which they deem necessary and proportionate to protect legitimate interests.[67] The FDI regulation expressly commands that the EUMR and FDI be applied in a "*consistent manner*." Remarkably, the FDI regulation contains a non-exhaustive list of factors to be taken into account by Member States when assessing whether an investment is likely to produce negative effects on public order and security. With this list, the legislator gave substance to a notion traditionally left for the Member States to define within the limits of EU law and effectively provides an incentive for them to review a virtually larger set of investments.

77. Whilst a surge in investment reviews can be anticipated and despite the Commission's and (some) Member States' ambition,[68] we cannot expect the mechanism to be what it is not—namely, a tool to counter foreign unfair

61 *See* speech delivered by M. Vestager at the EU industry days on 6 February 2019, An industrial strategy for all of Europe. *See also* M. Heim and C. Midões, Protecting competition or protecting (some) competitors: A European debate, *supra*.

62 Commission Staff Working Document on Foreign Direct Investment in the EU, 13 March 2019.

63 Art. 63 TFEU.

64 Letter from B. Zypries, M. Sapin and C. Calenda to C. Malmström, February 2017.

65 *See* R. Antonini, J. Beninca, N. Brice, E. Monard, S. Crosio, B. Maniatis and F. Merino, White Paper, Screening of Foreign Direct Investments in the EU under the New FDI Regulation, April 2019.

66 Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union.

67 *See above* section II.

68 Commission Communication on Welcoming Foreign Direct Investment while Protecting Essential Interests (COM(2017) 494 final), p. 5; Letter from B. Zypries, M. Sapin and C. Calenda to C. Malmström, *supra*.

trading practices and to directly provide leverage to open up access to foreign markets. First, while the Regulation explicitly identifies investors' collection of subsidies or their being part of "*state-led outward projects*" to be factors to be taken into account by screening authorities, as a matter of scope, the FDI regulation cannot stretch to protect the EU industry against unfair competition without due justification on the terrain of national public order and/or security. It remains that openness to investment, as a rule, extends to extra-EU Member States and the Court of Justice applies a strict test to Member States' measures restricting it.[69] This means it is highly unlikely that the FDI regulation—or EU law in general—provide fertile ground for a similar case as the US *Broadcom/Qualcomm* prohibition, the latter having been loosely justified for reasons of national "*technological competitiveness*."[70]

78. Second, in contrast to the proposed IPI, no element of reciprocity is provided for in the FDI regulation, which can thus hardly provide direct leverage in international negotiations to secure equal access opportunities to EU firms. Thus, the FDI Regulation may not prevent another *Pirelli* case,[71] where substantial competitive advantage was accrued through foreign subsidies, and thereby regulate subsidies through the backdoor. However, as the former Director General Laitenberger emphasized and as we attempted to demonstrate in this article, through a consistent application of the array of legal instruments at the EU's disposal, the block can already do much to address third-country unfair trading practices without changing competition rules.[72]

IV. Conclusion

79. Many will agree that on the basis of current EU competition rules, Commissioner Vestager and DG COMP were right in prohibiting the Siemens/Alstom merger. The Commission did an extensive and thorough assessment of the market dynamics in place and the parties came with too little remedies entirely too late. Approving the merger in those circumstances would have been breaching the rule of law and constituted a hit to legal certainty. The great consequence of this decision is that it revealed the necessity for a strong coherent and ambitious EU policy to preserve European businesses from distortive trade practices and enable them to compete on a level playing field outside the EU. They can certainly be adapted or improved but there is no need to drastically change healthy competition rules that support innovation and fair game in the internal market. Policy makers have to understand that would most likely be pressing on the wrong button. It would be both ineffective to protect European businesses (their scale will always be smaller than many global companies) and potentially harmful in the EU (enabling possible dominant positions and fewer choices for consumers). Policy makers need to press on the right buttons now and consider relying more heavily on one of the oldest concepts in commercial law, reciprocity, "you can't play in my market if I can't play in yours." While the WTO forum and imposing such reciprocity may be a lengthy process, it seems to the right path to pursue. More importantly, the EC can start relying now on procurement rules and other genuine commercial tools to accelerate fair commercial reciprocity and preserve a strong EU internal market and the businesses that compete in it. This should stay on top of the next Commission's agenda. ■

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69 *See*, for example, CJEU, judgment of 14 March 2000 in Case C-54/99 – Église de scientologie, para. 17.

70 D. Thomas, Is US investigation of Broadcom bid just a patriotic ploy? *Financial Times*, 09.03.2018 (last accessed 02.05.2019).

71 *See* EPSC, EU Industrial Policy After Siemens-Alstom – Finding a New Balance between Openness and Protection, *supra*.

72 Speech delivered by J. Laitenberger on 15 February 2019: Recent developments and issues in EU antitrust law: Comments on the European Commission's merger decisions Wieland/Aurubis and Siemens/Alstom.