Common Market Law Review **56**: 329–338, 2019.

EDITORIAL COMMENTS

Think big? Think twice! EU competition law in the face of calls for European champions

In trying times like these, it is soothing to recall a piece of good news. On 14 February 2019, the outgoing CEO of Airbus SE, Tom Enders, reported some impressive figures: an 8 percent rise in his company's revenues and a 29 percent rise in earnings per share during 2018. Airbus shareholders could look forward to a 10 percent increase in dividends.[1] Only collectors of "Superjumbo" posters and paraphernalia may have shed a tear as Airbus simultaneously announced the end of production of its giant A380 jet. Otherwise, this day could be seen as the latest milestone in the success story of a truly European champion. Going back to 1970 when the Airbus Consortium was formed as a French-German joint venture, which was joined by Spanish and British partners four years later, Airbus has emerged and asserted itself as the only remaining competitor of Boeing in the market for large jets and a successful player in the overall aerospace sector. This is surely a story with a lesson. But which lesson?

"L'Airbus du rail" and other visions of European champions

For some, this lesson seems clear: Airbus is a story to be repeated, if necessary even at the expense of competition and consumers in the EU. In this vein, plans for a merger between Siemens and Alstom in the field of transport equipment and service activities were initially hailed as the advent of an "Airbus du rail". However, the European Commission saw things differently. On 6 February 2019, the Commission prohibited Siemens' proposed acquisition of Alstom under the EU Merger Regulation.[2] After an in-depth investigation ("phase II"

1. <www.airbus.com/newsroom/press-releases/en/2019/02/airbus-reports-strong-fullyear-2018-results-delivers-on-guidance.html#media-list-document-document-all_ml_0>.
2. Case M.8677. This editorial comment is based on information available from the Commission's press release of 6 Feb. 2019, <europa.eu/rapid/press-release_IP-19-881_en.htm>, and from a speech given by the Director-General for Competition, Johannes Laitenberger, at the Brussels meeting of the Studienvereinigung Kartellrecht, on 15 Feb. 2019, <ec.europa.eu/competition/speeches/text/sp2019_02_de.pdf>.

in merger control parlance), the Commission concluded that the proposed transaction would significantly impede competition in the markets for very high-speed trains, which are trains operating at a speed of 300 km per hour or more, and for signalling systems, which are essential to keep metro and rail travel safe. In particular, the Commission could not detect any sufficient competitive pressure from Chinese competitors in the foreseeable future that would constrain the market power of the potential European rail giant created by the merger, as the parties had claimed. While it is true that the railway division of CRRC, a state-owned Chinese conglomerate, surpasses the combined size of Siemens' and Alstom's respective railway units, there are indeed no signs that CRRC will any time soon be a credible competitor outside its home markets. CRRC has never sold any very high-speed trains outside China. Considering CRRC's lack of a track record in the relevant European market and the high regulatory barriers to entry, the Commission found that CRRC would not succeed in Europe for many years to come. The same finding was made with regard to another State-owned Chinese company, CRSC, a producer of signalling systems. According to the Commission, CRSC is technologically not on a par with Siemens and Alstom and has therefore not even tried to participate in any tender for European rail projects. Against this background, the merger between Siemens and Alstom would have significantly reduced the choice of suppliers for train operators and rail infrastructure companies in crucial areas of the European railway sector. The bill for this detriment to competition would ultimately have been footed by European consumers in the form of higher railway fares, poorer services, or both.

As straightforward as this argument may be, as soon as the prohibition of the merger became apparent, the Commission was attacked by the Siemens CEO as being "technically right, but getting everything wrong for Europe".[3] This may be discarded as an undiplomatic outburst by a disappointed manager. However, more significantly, the underlying view that if European competition rules prevent the creation of a European champion, the competition rules have to give way, is shared by the German minister for economic affairs Peter Altmaier and his French colleague Bruno Le Maire. In a nicely timed initiative published exactly one day before the Commission

3. On 28 Jan. 2019, the Siemens CEO wrote on Twitter: "Wer Europa liebt, der sollte seine Zukunft gestalten und sich nicht in rückwärts gerichteten Formeln verlieren. Es muss bitter sein, wenn man technisch recht hat aber für Europa doch alles falsch macht." This message was subsequently deleted from his Twitter account, but is still available at <spiegel.de/wirtschaft/unternehmen/alstom-fusion-siemens-chef-kritisiert-margrethe-vestager-a-1250427.html>.

decision was announced, Mr Altmaier presented his "National Industry Strategy 2030".[4] Taking account of developments in the US, China and Japan, Mr Altmaier advocated public interventions in strategic economic fields in order to secure what he regards as a global level playing field for German industry. As the German minister anticipated, the execution of such a plan would require a reform of competition and State aid rules and, in particular, a "facilitation of mergers where size is an indispensable prerequisite for entrepreneurial success". A few days later, Mr Le Maire was more precise as to how such a reform of the EU merger control could be implemented. Having already denounced a prohibition of the Siemens/Alstom merger as an "economic error" and a "political mistake" before the Commission decision was reached,[5] the French minister demanded a right for the leaders of EU Member States to overturn merger decisions by the Commission, a "more dynamic" approach to mergers (allowing for subsequent adaptation of an initial clearance decision if competition problems emerged), and a "more systematic" assessment of competition risks based on companies' global market shares.[6] These elements are also reflected in the "Franco-German Manifesto for a European industrial policy fit for the 21st century" published by both ministers on 19 February 2019.[7] In this paper, the ministers suggest, among other measures, an adaptation of the Merger Regulation "to take greater account of competition at the global level, potential future competition and the time frame when it comes to looking ahead to the development of competition to give the European Commission more flexibility when assessing relevant markets" as well as the introduction of "a right of appeal of the Council which could ultimately override Commission decisions in well-defined cases, subject to strict conditions".

Before getting carried away by dreams of two, three, many Airbus clones in fields such as railway infrastructure, self-driving cars, battery production or wherever European politicians may be led by the fear of Asian or American dominance, we should carefully consider both the substantive and the institutional aspects of any change of the competition rules, in particular of the Merger Regulation, that purportedly stand in the way of realizing these dreams.

4. <bmwi.de/Redaktion/EN/Pressemitteilungen/2019/20190205-altmaier-presents-national-industry-strategy-2030.html>.

5. <politico.eu/article/france-bruno-le-maire-blocking-alstom-siemens-merger-would-be-a-political-mistake>.

6. <ft.com/content/ad7a02f4-2ebd-11e9-8744-e7016697f225>.

7. <bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf>.

European champions and global competition

Regarding the substantive merits of the argument in favour of European champions, it is primarily important to consider the bigger picture of State-sponsored industrial projects. Whoever sets out to imitate Airbus' success may unwittingly end up on the path of British Leyland or other examples of long-forgotten companies that were neither promoted to champions nor even secured from bankruptcy by State interventions. On balance, attempts by States at second-guessing and fostering strategically important economic sectors (either by active involvement or by relaxing legal constraints) seem to have enjoyed, at best, mixed success. One should therefore beware of any false Airbus analogies.

Siemens/Alstom is a case in point. Unlike Airbus, a new entity that combined Siemens' and Alstom's strengths in the railway sector would not have to face a world-wide market with a duopoly of competitors, like Boeing and McDonnell Douglas at the time when Airbus launched its first jet. In the absence of sufficient incentives from global competitive pressure, it is far from clear whether a European railway giant would develop the economic resilience acquired by Airbus in its long, but ultimately successful quest to join Boeing as market leader. Generally speaking, in the absence of a relevant market with a world-wide dimension, it is hard to see any economic benefits from creating a European champion, unless we count monopoly rents or x-inefficiencies as advantages. In particular, it is questionable whether innovation will be spurred if vigorous competition is replaced by the pooling of resources in a dominant market player. Without rehearsing the classic controversy between Schumpeter and Arrow about the nexus between market power and innovation, suffice it to say that empirical studies suggest a dampening effect of mergers on R&D activities.[8] Accordingly, the Commission has recently begun to scrutinize more closely potential harms of mergers to innovation.[9] Therefore, the idea of preparing European firms for the cold world outside the internal market by allowing them to merge into entities that dominate the internal market has little to commend it. Against this background, the suggestion to take companies' "global market" shares as a benchmark for merger decisions in cases where in fact no global market exists and where the future emergence of such a market cannot be determined, would most likely lead to a dysfunctional merger control.

8. Szücs, "M&A and R&D: Asymmetric effects on acquirers and targets?", 43 *Research Policy* (2014) 1264; Haucap, Rasch and Stiebale, "How mergers affect innovation: Theory and evidence", 63 *International Journal for Industrial Organization* (2019), 283.

9. Case M.7932 – *Dow/DuPont*; Case M.8084 – *Bayer/Monsanto*.

Regardless of these objections to a fundamental revision of the standards of merger control in favour of European champions, it is legitimate to ask whether in its recent merger practice, the Commission has adopted a tougher stance that is unduly strict on transactions affecting the internal market.[10] For casual observers, this impression may have been nurtured by the fact that on 6 February 2019, the Commission simultaneously issued two prohibition decisions in merger cases,[11] thus bringing the total of prohibition decisions issued since the entry into force of the Merger Regulation on 21 September 1990 to 29. But this snapshot is hardly proof of a significant trend towards stricter enforcement. As can be seen from the Commission statistics covering all merger cases between 1990 and 31 January 2019,[12] there has neither been any discernible increase of prohibition decisions in recent years, nor has there generally been a significant rise in the number of cases in which phase II proceedings were initiated. This long-term observation of quantitative continuity in EU merger control has hardly been reversed by the two most recent prohibition decisions.

If firms and their advisers still perceive merger control in Brussels as somewhat harsh, this may have more to do with the more lenient treatment experienced by firms with market power in other jurisdictions, such as the US. However, this does not justify the conclusion that the EU is going astray in its handling of merger cases. If anything, there should be more, not less concern about the global increase of market power. In the US, complaints about the "curse of bigness" and a "new gilded age" by proponents of the "New Brandeis Movement" (or, less respectfully named, "antitrust hipsters") are on the rise.[13] These complaints are not unfounded. Between 1980 and 2016, average markups (the ratio of price to the marginal cost of production) have gone up from 21 percent to 61 percent above cost in the US, and from 10 percent to 60 percent globally.[14] Even accounting for effects of globalization and technological change, there is reason to believe that this rise is at least partially due to the accumulation of market power.[15] So if it is true that in

10. As e.g. discussed by Werner, Clerckx and de la Barre, "Commission expansionism in EU merger control: Fact and fiction", 9 JECLAP (2018), 133.

11. Apart from *Siemens/Alstom*, the Commission prohibited Wieland's proposed acquisition of Aurubis Rolled Products and Aurubis' stake in Schwermetall, Case M.8900 (press release available at <europa.eu/rapid/press-release_IP-19-883_en.htm>).

12. <ec.europa.eu/competition/mergers/statistics.pdf>.

13. Cf. Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia University, 2018).

14. De Loecker, Eeckhout and Unger, "The rise of market power and the macroeconomic implications", *NBER Working Paper No. 23687* (August 2017, an updated version of 22 Nov. 2018 is available at <janeeckhout.com/wp-content/uploads/RMP.pdf>); De Loecker and Eeckhout, "Global market power", *NBER Working Paper No. 24786* (June 2018).

15. Haucap, "Je größer, desto besser?", available at <faz.net/aktuell/wirtschaft/unternehmen/wie-gut-sind-fusionen-von-grossunternehmen-fuer-die-volkswirtschaft-16046102.html>.

global comparison the EU is somewhat more cautious about market power than other jurisdictions, this should be welcome.

Proponents of European champions are naturally inclined to turn this argument on its head: Should we not give tit for tat and grant our firms the same competitive privileges as their competitors in jurisdictions that are more lenient on market power or even actively support their national champions? The answer is that, probably, not much would be gained by such a strategy. On the one hand, market dominance in the EU does not necessarily translate into better prospects to succeed in foreign markets. It would, for example, be illusory to believe that in the Chinese railway market a European supplier formed by the merger of Siemens and Alstom would stand a better chance to compete successfully with CRRC than Siemens and Alstom on their own. On the other hand, there are more suitable instruments to tackle issues that may occur in the reverse direction if foreign national champions, possibly with the support of their home States, enter the internal market by unfair means. Anti-dumping measures are an effective method of preventing artificially low-priced imports. The new European framework for the screening of foreign direct investments makes sure that national security interests can be protected.[16] In addition to these and other instruments, there is no need to encourage the formation of European champions as a countervailing power.

Quis iudicabit?

Whatever we think of the weakness or strength of the argument for European champions, the choice between fostering these and the goal of protecting unfettered competition in merger cases is clearly not a decision for this Editorial Board to make. This choice is a matter for democratically accountable decision-makers. National competition laws frequently provide for such a choice by granting a minister or a council of ministers the competence to overrule, on public interest grounds, any decisions of their respective national cartel authorities to prohibit mergers.[17] Such a two-stage procedure draws a line between technical concerns of competition that are dealt with by the cartel authority, and the political question of balancing the

16. The proposed Regulation EU 2019/… establishing a framework for the screening of foreign direct investments into the Union was adopted at first reading by the European Parliament on 14 Feb. 2019. A consolidated text is available at <europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2019-0121+0+DOC+XML+V0//EN&language=EN#BKMD-8>.

17. Examples from EU Member States are L. 430-7-1 Code de commerce (France); s. 42 Gesetz gegen Wettbewerbsbeschränkungen (Germany); Art. 25 Legge per la tutela della concorrenza e del mercato (Italy); Art. 60 Ley de defensa de la competencia (Spain).

goal of protecting competition against other public interest concerns, such as the preservation of jobs, or, in our case, the strengthening of strategically important segments of national industry in order to prepare them for the challenges of a global playing-field.[18] This division relieves national authorities from political pressure, and it places the responsibility for getting the political choice wrong where it belongs.

Seen from this institutional angle, the Franco-German initiative seems to be right that something is missing in the Merger Regulation. Concentrations with a Community dimension that fall within the scope of the Regulation are only appraised by the Commission (unless there is a referral to a national authority). It is a question older than the Regulation itself whether this appraisal should exclusively be directed at the goal of protecting competition or whether it should take account of public interest considerations, in particular of industrial policy concerns. Originally, the Commission intended to secure a wide margin of discretion, allowing it to authorize concentrations on industrial policy grounds, as evidenced by Article 2(4) of the Commission proposal of 25 April 1988.[19] But, at the time, these aspirations were thwarted by the Council, namely by Germany and the UK. Accordingly, the creation or strengthening of a "dominant position" as the central criterion of the Merger Regulation that entered into force on 21 September 1990[20] was intended to focus the Commission's appraisal on the protection of competition. This was not changed by the reform of the Merger Regulation in 2004, in which the "dominant position" was replaced by a "significant impediment to effective competition".[21] In the present Merger Regulation, industrial policy considerations are only vaguely implied by modest remnants of the original Commission proposal, namely by the reference to "the development of technical and economic progress" in Article 2(1)(b) and by Recital 23,

18. This is not meant to imply that the scope of admissible public policy considerations in the national exemption provisions cited *supra* note 17 necessarily encompasses these aspects.

19. Amended proposal for a Council Regulation (EEC) on the control of concentrations between undertakings, O.J. 1988, C 130/4. Art. 2(4) of the proposal reads: "The Commission shall authorize concentrations as compatible with the common market where they contribute to the attainment of the basic objectives of the Treaty, in particular to improving production and distribution, to promoting technical or economic progress or to improving the competitive structure within the common market, taking due account of the competitiveness of the undertakings concerned with regard to international competition and of the interests of consumers, provided that they do not: (a) impose on the undertakings concerned restrictions which are not indispensable to the achievement of the concentration; (b) do not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the goods or services concerned."

20. Art. 2(2) and (3) Council Regulation (EEC) 4064/89 of 21 Dec. 1989 on the control of concentrations between undertakings, O.J. 1989, L 395/1.

21. Art. 2(2) and (3) Council Regulation (EC) 139/2004 of 20 Jan. 2004 on the control of concentrations between undertakings, O.J. 2004, L 24/1.

according to which "the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty establishing the European Community and Article 2 of the Treaty on European Union".

Quite evidently, this legislative decision to exclude industrial policy concerns from the Commission's assessment under the Merger Regulation has not silenced political efforts by Member States aimed at protecting and promoting their respective national champions, thus putting the Commission under immense pressure in important merger cases, as can be seen in *Siemens/Alstom*. However, apart from rare exceptions such as the *cause celèbre Mannesmann/Vallourec/Ilva*,[22] where a split Commission overruled the advice of DG Competition, the Commission normally makes sure that non-competitive concerns either do not prevail or are at least made invisible. It is hard to deny that in terms of transparency, this approach does not compare favourably to the two stage-model of national competition laws. While embracing its political role in other regards, the Commission clearly tries to remain in its technocratic role as guardian of the Treaties in the field of competition law and, more specifically, to stay within its mandate under the Merger Regulation. Politically charged decisions on conflicts of competition and industrial policy concerns are therefore carefully avoided or glossed over. But these conflicts exist and continue to seethe below the surface. So would it not be better to relieve the Commission of that burden and entrust a bolder EU institution, such as the Council, with the competence to overrule merger decisions by the Commission on public interest grounds?

A European model for such a reform could be seen in Article 108(2) TFEU, which authorizes the Council to overrule the Commission in State aid cases by unanimous decision, if such a decision is justified by exceptional circumstances. It is arguable that Article 352 TFEU as the principal basis of competence for adoption of the Merger Regulation[23] would allow this example to be followed in the field of merger control. To be sure, the internal market as set out in Article 3(3) TFEU includes a "system ensuring that competition is not distorted",[24] and under Article 173 TFEU, industrial policy measures must be "in accordance with a system of open and competitive markets"[25] and not "lead to a distortion of competition".[26] But despite the clear precedence these provisions give competitive markets over a planned economy, there seems to be more than one way (and therefore some discretion

22. Case M.315.
23. According to Recital 7, the Merger Regulation is "based not only on Article 83 [now 103 TFEU] but, principally, on Article 308 of the Treaty [now 352 TFEU]".
24. Protocol No 27 on the internal market and competition.
25. Art. 173(1) TFEU.
26. Art. 173(3) TFEU.

for the EU legislature) under Article 352 TFEU to define how the objective of "a highly competitive social market economy" (Art. 3(3) TFEU) can be attained, including an authorization of the Council to overrule merger decisions by the Commission in order to safeguard the competitiveness of European firms in an international context.

However, it is submitted that such a step would not be advisable. First of all, any attempt at transplanting the national two-stage model of merger control in such a way into the world of European merger control would ignore the general institutional arrangements of the EU (notwithstanding the anomaly of Art. 108(2) TFEU). The Commission is not the equivalent of a national competition authority that is subordinate to a national government, nor is the Council the equivalent of a national government. In particular, there would be no sizeable advantage in terms of democratic accountability by putting the Council in charge as, in contrast to national competition authorities, the Commission can be held accountable by the European Parliament. Therefore, the rationale of the two-stage model would fail if imposed on the EU in such a way. Secondly, the Council does not appear to be a suitable arbiter when it comes to making the choice between undistorted competition in the internal market and the creation of a European champion. Members of the Council are representatives of their Member States, and these Member States would typically be at odds over such a decision. It is likely that Member States whose citizens would be employed by a new European champion created by a merger, or whose authorities would hope to collect taxes from such a champion, will be quite vocal in their support of a decision to overrule a prohibition. But it is equally foreseeable that Member States whose businesses and consumers would merely have to pay the bill for the establishment of a new dominant player will defend a prohibition with the same force. Ultimately, only political power plays and horse trading would be likely to settle such a clash of irreconcilable interests. Last but not least, as national experience shows, where the overruling of a merger prohibition reached by a national competition authority was occasionally mishandled by the superior minister,[27] issues of due process must be taken seriously. It would require a huge effort for the Council to have the necessary rules and human resources in place in order to safeguard due process. Against this background, it would be wise to abstain from authorizing the Council to overrule the Commission in merger cases. It is almost unnecessary to add that the Commission can be

27. In the German case *Edeka/Tengelmann*, the decision of the German minister for economic affairs to overrule a prohibition decision by the Federal Cartel Office was quashed by the Oberlandesgericht (Higher Regional Court) Düsseldorf, Order of 12 July 2016, Case VI-Kart 3/16 (V), (2016) *Neue Zeitschrift für Kartellrecht,* 380.

trusted not to neglect its own interests by initiating such a daring change to the merger rules.

Proponents of European champions may, however, try to work towards a reform of the legal framework that ensures a more flexible balancing of competition and industrial policy concerns in merger decisions made by the Commission. As this approach would, unlike the two-stage model, openly grant the Commission discretionary power, the Commission could possibly warm to such an idea and dust off its unsuccessful proposal of 1988. In view of the fact that one of the former key opponents of this proposal (the UK) is about to leave the EU and the other (Germany) has apparently changed its mind about the merits of industrial policy, it could indeed be tempting to give it another try. However, this option is deeply unattractive for at least some Member States, whose unanimous consent would be needed for such a change under Article 352 TFEU. In particular, smaller Member States whose voice would carry less weight in a lobbying fight over the granting of an industrial policy exemption by the Commission would have to fear being thrown under the bus by such an arrangement.

So hopefully for all those who are sceptical of the calls for European champions in the wake of *Siemens/Alstom*, the present debate will ebb away without any sizeable consequences for the legal framework of the European Merger Regulation – until the next (possibly digital) Airbus rises above the horizon of our collective imagination.