448–461

EU CONTROL OF CONCENTRATIONS: UPDATE TO THE REALITY OF GLOBAL BUSINESS?

Václav Šmejkal*

Abstract: *The European Union is intensively discussing changes in its merger control to adapt the existing regime, laid down by Regulation No 139/2004 (EUMR), to new realities. These are, besides the challenge posed by the development of the digital economy, issues connected with the global success of competitors from non-EU countries, which are presumed to be better placed to succeed in global competition due to more lenient policies of their home countries while EU businesses remain subject to disproportionally stricter competition supervision. In the current EU, the call for some subordination of competition decision-making to industrial policy priorities is growing in order to allow EU-based companies to grow through mergers and acquisitions and reach the size necessary for withstanding competitive pressure from non-EU corporate giants. The text maps and evaluates current proposals for changes to the EU merger control regime, advocating maintaining a strong competition policy unsubordinated to industrial policy, however a competition policy which would be more sensitive to its wider context.*

Key words: *control of concentrations of undertakings, globalisation, European Union, China*

INTRODUCTION

"The nature of global competition has changed", asserted the economic ministers of Germany, France, Italy and Poland in their letter to the European Commission Vice-President and Commissioner for Competition, M. Vestager, issued on February 4, 2020.[1] Based on this assertion, the four biggest countries of today's EU advocate a rapid change in EU Competition rules and policy in order to boost and not to weaken the chances of European companies to succeed in global competition. The rules of merger control are focused more than other branches of competition law. It should not be a surprise as the control of concentrations is politically the most sensitive part of the protection of economic competition because of its impact on the structural development of national (and European) economies. While the ban on cartels and on abuse of dominance was laid down (in its present wording) already in the Rome Treaty of 1957, the power to control concentrations was transferred to a transnational authority – the European Commission

* Assoc. Prof. JUDr. Václav Šmejkal, Ph.D., lecturer of competition law at European Law Department at Charles University Law Faculty in Prague and Law and Economics Department at Škoda Auto University in Mladá Boleslav, Czech Republic. Author is thankful for support to the Charles University research program "PROGRES Q02 – Publicization of law in the European and international comparison".

[1] Letter of P. Altmaier S. Patuanelli, B. Le Maire and J. Emilewicz, respectively ministers in charge of economic affairs of Germany, Italy, France and Poland, addressed to M. Vestager on February 4, 2020. In: *Politico* [online]. 6. 2. 2020 [2020-09-30]. Available at: <https://www.politico.eu/article/eu-big-four-france-germany-italy-poland-press-executive-vice-president-margrethe-vestager-to-clear-path-for-champions/> (hereinafter *"Letter of 4"*). The letter was preceded in 2019 by joint manifestos, first of economic ministers of Germany and France in February, *A Franco-German Manifesto for a European industrial policy fit for the 21st Century*, and of Germany, France and Poland in June. In: *Moderniser la politique de concurrence de l'Union européenne (UE)*. [online]. [2020-09-30]. Available at: <https://www.bmwi.de/>.

– at the end of 1989 after decades of difficult bargaining.[2] Since then every time when a major merger has been blocked by the Commission, there have been voices calling for change.[3]

In 2019 the Commission prohibited three mergers,[4] and especially that of *Siemens and Alstom*[5] triggered a wave of criticism and also of discussions about desirable, and potentially feasible, amendments to the regime laid down by EU Merger Regulation (EUMR). Almost all documents and papers addressing the issue stress two major factors pushing for a change: the digital economy and the global competition in which non-European competitors "benefit from substantial state support or from protected domestic markets".[6] The following text will focus only on the second factor, even if the overlap of the two is obvious (e.g. major IT companies come to Europe from outside and very often pay insignificant taxes due to clever "tax optimization", or enjoy political and financial backing in the case of Chinese State-controlled companies).

In the present text, it is necessary to narrow the attention to key issues, rather than strive to provide an exhausting overview of all emerging problems and proposed solutions. At the same time, however, a broader context must not be forgotten as the current challenge to EU merger rules has deep political or even existential connotations. If the EU competition policy gets subjugated to the new industrial policy,[7] as is now very often called for, there will be a complete reversal of priorities. Since its inception, the competition policy preferred the side of buyers to that of sellers / producers, i.e. it has fundamentally put the *democratic* priority of consumer welfare before the *aristocratic* interests of businesses in their market success, size and power. And now, it looks like the unstoppable rise of Chinese firms gives no other option than to turn it upside down, in the name of preserving the EU industrial power-base.

[2] The role of the EU in merger control has been since then regulated by secondary legislation (Council Regulation 4046/89, now Regulation 139/2004) and is not yet captured in primary EU law. This text works with the legal framework provided by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (hereinafter *"EUMR"* – EU Merger Regulation).

[3] It has to be stressed that an outright prohibition of a notified merger by the Commission has always been exceptional. Out of approximately 400 notified mergers per year, only 5-8% get somehow "complicated" by the Commission, i.e. remedies are imposed as conditions to their approval, or they are prohibited, or notifications are withdrawn by companies themselves. See in MADERO VILAREJO, M. *Recent Developments in Merger Control*, Speech at European Law Workshop, Brussels, 14 January 2020. The official statistical database of EU merger decisions from its beginning (21. 9. 1990) up to August 31, 2020 shows that from 7601 notified mergers only 30 have been prohibited by the Commission, i.e. less than 0,4 %. [online]. [2020-09-30]. Available at: <https://ec.europa.eu/competition/mergers/statistics.pdf>.

[4] Merger cases: *Wieland/Aurubis*, *Siemens/Alstom*, *Tata Steel/ThyssenKrupp/IV*. In: *European Comission database* [online]. [2020-09-30]. Available at: <https://ec.europa.eu/competition/elojade/isef/index.cfm?fuseaction=dsp_merger_by_date>

[5] Commissionęs decision M.8677 – *Siemens/Alstom* of 6. 2. 2019.

[6] Letter of 4, op. cit. note 1.

[7] The EU Industrial Policy Strategy adopted by the EU Council on 27, May 2019 requires to "update our European competition framework to new technological and global market developments". See Council Conclusions on an EU Industrial Policy Strategy: A Vision For 2030, Brussels, 27 May 2019, document 9263/19 COMPET 398 IND 173 MI 434, p. 4. See also CHATIGNOUX, C., RENAUD, N. La politique industrielle commune, nouvel horizon de l'Europe. *Les Echos*, 16 mai 2019.

The first part of the text sorts and maps the main proposed changes to the EU control of concentrations regime (as of February 2020).[8] It evaluates them in terms of their acceptability as legislative changes. The second part of the text then focuses on the specific problem of the efficiency gains as benefits of concentration. In particular, the question it tries to answer is whether the concern for greater competitiveness (as a result of a merger) should become one of the efficiency gains that can outweigh the assessment of a merger in favour of its authorisation. The third part briefly covers the issue of undertakings of a different nature that come to Europe from countries with a socio-economic order to a great extent incompatible with Western standards. This issue goes beyond the scope of the EUMR amendment, but it is possible to ask whether this instrument of competition law should also respond to the challenge.

1. MORE AND LESS PLAUSIBLE CHANGES

The common denominator of proposals for changes of the EU merger control that reflect the interests of European industry is first of all to facilitate those concentrations that will allow European businesses to succeed in competition with Chinese and American giants. The envisaged changes range from the (now perhaps abandoned) requirement for revision of the Commission's decisions by the EU Council to changes to the Commission's interpretation of the applicable rules laid down in its Notices-Guidelines. At first glance there is, quite understandably, a big difference whether the proposed change requires an amendment to the EUMR, which needs to be approved unanimously in the EU Council, or just the issuance of a new soft law by the Commission. As it is very difficult to achieve unanimous support from Member States for a major legislative change, many of the proposals under discussion prefer, at least for the immediate future, improvements in the institutional functioning and in the interpretation of EU law in force.

There seems to emerge three areas of plausible change: i) an expansion of the range of institutions and instances which express their opinion on the notified concentration; ii) a change in the definition of the relevant market affected by the concentration (i.e. the Commission Notice on the definition of the relevant market);[9] iii) a change in the assessment of the pros and cons of mergers (i.e. of the Commission's Guidelines on the assessment of horizontal mergers)[10] – which will be paid attention in a separate part of the following analysis.

---

[8] The present analysis is first of all based on the aforementioned ministerial addresses (op. cit. note 1), the speeches by representatives of DG Competition of the European Commission [online]. [2020-09-30]. Available at: <https://ec.europa.eu/commission/presscorner/home/en> and several expert studies, namely: DEFFAINS, B. dęORMESSON, O. PERROUD, T. *Competition Policy and Industrial Policy: for a reform of European Law*, Paris: Fondation Robert Schuman January 2020, also studies contained in the issue of Concurrences – Competition Law review No. 2/2019 dedicated to the question *Which Competition and Industrial Policies for the New EU Commission after Siemens /Alstom* and partly also MOTTA, M., PEITZ, M. Competition Policy and European firmęs competitiveness. In: *VOX – CEPR Policy portal* [online]. 20. 2. 2019 [2020-02-24]. Available at: <https://voxeu.org/content/competition-policy-and-european-firms-competitiveness>.

[9] Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03).

[10] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03).

1.1. Wider base for assessment, more holistic approach

The aforementioned letter of four ministers invites the Competition Commissioner to adopt a *more holistic and comprehensive* approach (or also a *pragmatic* approach) towards ever more complex challenges of globalised competition. By outsiders the DG Competition and its competition police are seen, according to server *Politico*, as "lone guns, who do not allow a significant role for other parts of the Commission and the national capitals."[11] Therefore, the Commissioner for Competition and its (i.e. and its DG) should show in the future "greater collegiality in the assessment of the EU's industrial challenges in the evaluation of competition rules, merger control and state aid rules."[12] This means, in practice, to give voice to a broader range of interest groups and their arguments.

Even today, each Commission's merger decision passes through an Advisory Committee made up of Member States' representatives and is subsequently adopted by the College of Commissioners; nevertheless, the impact of the DG Competition on the final result remains decisive. The Advisory Committee on concentrations, based on Article 19 of the EUMR, is convened by the Commission (i.e. its DG Competition) and the Commission presides over it, sets its agenda, and may suggest that the physical meeting be replaced by a video conference or telephone contact. The Committee shall deliver its opinion by a majority of its votes. This is subsequently made public, but the Commission is only obliged to "take it into account",[13] which means that it is not bound by it. Decisions within the College of Commissioners are mostly made in writing when the Competition DG formulates a draft decision and the other Commissioners' cabinets confirm their agreement.[14] Neither the debate in the college nor the formal vote is compulsory. Part of the criticism is therefore directed against the allegedly limited view that DG Competition is able to enforce upon (i.e. enforce upon the Commission) the Commission's decision under the established practice.

The aforementioned economic ministers' manifestos of 2019 and 2020 therefore call for the strengthening of the role of the Advisory Committee on mergers, for the involvement of a wider range of experts (even the establishment of an independent expert body to "support", in reality rather countervail, the DG Competition opinion) and for a more active intervention by other Directorates-General and Commissioners in assessing and adopting draft decisions. The experts' proposals also aim specifically at the duty of debate in the College of Commissioners on all problematic or significant concentrations, the establishment of the post of EC Chief Statistics Officer to objectify the view of changes in affected markets, broader consultations with corporate experts in formulating commitments for undertakings as conditions for the authorisation of a concentration, etc.[15] In

---

[11] BRAUN, E. LARGER, T. VAN DORPE, S. EU big four press Vestager to clear path for champions. *Politico*, February 6, 2020.

[12] Letter of 4, op. cit. note 1.

[13] European Commission, Working Arrangements for the Committee on the Advisory Committee on concentrations. [online] [2020-02-24]. Available at: <https://ec.europa.eu/competition/mergers/legislation/>. See also article 19 para 6 of EUMR, op. cit. note 2.

[14] WINCKLER, A. A competition policy agenda for the next Commission. *Concurrences-Competition Law review.* 2019, No. 2.

[15] Ibid.

general, these are *de facto* changes to established procedures, the purpose of which is to include more views and inevitably also to take into account more influences, when assessing the concentration.

This so-called *holistic approach* has undoubted support in EU primary law, but unfortunately for industrial policy proponents more in terms of social, ecological and consumer-oriented decision-making. The provisions of the TFEU with general application, the so-called horizontal clauses of Articles 7–13, oblige EU institutions to ensure consistent non-discrimination, high levels of employment, protection of the environment, consumers, animals, etc. in all their activities (including in the field of competition protection), but do not mention higher competitiveness. According to point 23 of the EUMR Preamble, the EC should also "place its appraisal" of the concentration in the "general framework of the achievement of the fundamental objectives", namely (in the present numbering) Article 3 TEU. The latter sets out the objective of a highly competitive social market economy, aiming at full employment and social progress, as well as other objectives, which include economic growth and price stability on the one hand, but social, solidarity and environmental objectives on the other. It is clear that choosing only the higher competitiveness at the expense of other objectives would contradict both the letter and the spirit of the Treaties, and at the same time that pursuing all the objectives listed in the Treaties would bring merger control into insoluble dilemmas. It is therefore much more rational to require that the Commission's decisions on concentrations do not openly deny any of the EU wider priorities, rather than pursuing and promoting these non-competition objectives with the same emphasis as the competition ones.

Such an interpretation of the holistic approach can lead to greater involvement of other parts of the Commission and national experts from governmental and non-governmental structures in the preparation of decisions without implying that competition is subject to industrial policy or political interests in general. Such a "minimalist" solution may require no, or just technical, changes to the EUMR Regulation. However, it will not materialise without a thorough preliminary discussion determining which decisions and at what stage such decisions should be subjected to the indicated holistic assessment. One of the Commission's intentions is to improve merger control also by reducing the burden on businesses and speeding up the handling of notifications. If, in the name of a more comprehensive assessment of a merger, the deadlines for taking decisions (provided for in Article 10 of the EUMR) were extended, new mechanisms for settling a wider range of proposals were instituted, as well as a conciliation procedure for cases of clashes was established, then inevitably some mergers would be considered longer and notifying parties would be expected to have a more burdening cooperation with the Commission. This implies that a holistic approach could only realistically be applied where DG Competition, on the basis of an in-depth assessment of competition criteria, aims either to ban a concentration or to authorise it under restrictive (in particular structural)[16] conditions.

[16] Structural conditions (commitments/remedies) mean that, as a rule, the undertakings concerned must sell off certain assets, parts of capacity, to their competitors. Business circles therefore call for greater use of behavioural conditions (commitments/remedies) consisting in a monitored change in their behaviour. However, these are more difficult to define and control from the position of the Commission, and their efficiency for maintaining competition in the future is generally lower than when structural commitments are imposed.

1.2. Other definition of relevant markets

It is argued that if the Commission stops defining markets with homogeneous conditions of competition inside and different conditions outside (i.e. so-called relevant markets) too restrictively in terms of time frame and geographical size, it would make the global strategical goal of European companies easier to reach.[17] There are two theoretical points to be made here before specific changes to the relevant market definition could be discussed.

First, Commissioner Vestager rightly warns that, in competition cases, the relevant markets are not "defined" as if borders between countries are agreed by drawing a line on a map, because their "definition" rather resembles "charting of a coastline".[18] It is thus not about making "political" choices as the relevant markets' delimitation must be based on evidence of customers' and suppliers' behaviour in order to establish who puts competitive pressure on whom. Second, in spite of such "objective nature" of the relevant market delimitation, there was a choice made in the very beginning: for the benefit of buyers/consumers. The relevant markets are defined from the demand side perspective not the supply-side one. As the DG COMP puts it: "We are looking into the actual competitive structure and try to answer the question *'Can customers turn to someone else if prices go up, quality down or innovation stops?' ".*[19] If the European customer (more precisely the customer on the market affected by the merger concerned) ends up with no choice, then no success of merging companies on the global scale can outweigh such an outcome.[20] On the other hand, if the industrial policy gets priority, relevant markets defined by producers/suppliers would look differently. Their horizons will inevitably be larger and these markets would include all potential competitive threats to their business.[21]

As the complete value reversal of competition policy is still unlikely, there is no other way than to consider how the view of the relevant markets can be expanded without abandoning the consumer perspective. The logic is still the same: the greater the geographic scope of the relevant market(s) in the assessment of a concentration, the more likely the market share of the merged entity will be smaller and the more likely the presence of countervailing competition. It is, however, already true that the integration of the national markets of the EU countries and progressive globalisation have led the Commission to work in two thirds of the assessed mergers with a relevant market equal to the whole EU internal market, the European Economic Area (EEA) or even wider.[22] Nevertheless, as Commissioner Vestager pointed out, this "larger scale" cannot always be guaranteed, since the relevant markets will still have to be defined in the light of the particular situation of each

---

17 DEFFAINS, B. d'ORMESSON, O. PERROUD, T. op. cit. note 8, p. 24.

18 VESTAGER, M. *Defining markets in a new age*. Speech at Chillin' Competition Conference in Brussels. [online]. 9. 12. 2019 [2020-09-30]. Avaliable at: <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defining-markets-new-age_en>.

19 MADERO VILAREJO, C. op. cit. note 3.

20 This is also why harm caused to consumers in the market affected by a concentration cannot be offset by the various benefits of the same concentration in the neighbouring markets.

21 See the discussion in DEFFAINS, B. d'ORMESSON, O. PERROUD, T. op. cit. note 8, pp. 24–25.

22 VESTAGER, M., op. cit. note 18.

individual concentration. Therefore, in the future, as in the case of the criticised *Siemens/ Alstom* merger decision, some relevant markets affected by a merger will be defined as global and others as narrowly national.

The definition of the relevant market affected by the concentration has also its time perspective. The longer this perspective is, the more likely – especially in the context of progressing globalisation – the emergence of new competition, counterbalancing the merged entity. The Commission prefers in its Guidelines a two-year period for such prediction[23], but in reality, makes many exceptions to this standard. For example in the *Siemens/Alstom* case, the probability of a massive penetration of their Chinese competitor, CRRC, to the European market was considered in a 5–10 year horizon. However, in a situation where this company has not yet received any contract in the EEA and currently sees no potential to bid outside the Chinese market, the Commission could have hardly concluded that CRRC would exert a significant competitive pressure on the potentially merged Siemens-Alstom entity. Similarly, in another blocked merger in 2019, *Tata Steel/Thyssen,*[24] the Commission found that supplies from China lacked the quality and reliability that would be necessary to put competitive pressure on EU-produced steel in the foreseeable future.

In any case, significant incursions of potential competition from remote markets to the markets affected by the concentration must be practically feasible in the foreseeable future and sufficient in magnitude, not merely hypothetically possible as the imaginable future. Otherwise, the assessment of the impact of the concentration on competition and consumers would contradict the empirical reality. Even if the Commission's estimate was confirmed for *x* coming years and subsequently denied by the evolution of the situation at *x + 1*, this would not change the fact that, if such merger was authorised, European customers would remain without choice of a competitive offer for *x* years and would have to suffer one-sided dependence on the merged undertaking. The Commission would then have a hard time honouring its task of safeguarding the preservation of effective competition in the internal market and the fulfilment of the related Treaty objectives.[25] Moreover, a retrospective examination of cases in which the Commission did not accept the merging firms' assertion that a massive invasion of Chinese competition was very likely has shown that the Commission was not mistaken in most of them.[26]

The issuance of new wording in the Commission's Relevant Market Notice has already been announced.[27] For the reasons explained above, it is very likely that it will only change the definition of technology markets or "ecosystems" for assessing competitive pressures in the online world, but will not provide "relief" for European industrial champions in the form of a lenient approach to delimiting their playground.

[23] Guidelines on the assessment of horizontal mergers, op. cit. note 10, point 74.
[24] Commission's decision M.8713 *Tata Steel/Thyssenkrupp* of 11. 6. 2019.
[25] EUMR, op. cit. note 2, points 2-5 of the Preamble and article 2, para 1.
[26] DEFFAINS, B. d'ORMESSON, O. PERROUD, T. op. cit. note 8, pp. 24–25.
[27] VESTAGER, M. op. cit. note 18.

2. BALANCING MORE EFFICIENCY GAINS, SPECIFICALLY HIGHER COMPETITIVENESS

Assuming that the definition of the relevant markets and the potential presence of competition on them can be more sophisticated in the future, but not different *in principle* from today's practice, there is no other possibility but to suggest a change in the balancing of the negatives and positives of the concentration under consideration.

In the case of such proposals[28], the question is whether the EC should keep insisting that the benefits of a merger, so-called efficiency gains, must be (i) beneficial to consumers (in those relevant markets where there are negative effects of the merger concerned), (ii) merger specific (a direct and specific consequence of the concentration, unreachable through means less harmful to competition) and also (iii) objectively verifiable.[29] Today, these requirements do not logically make it possible to compensate for the monopolisation of markets within the EEA by a greater likelihood of the monopolist's future commercial success in markets outside the EEA. In the current debate, it was rightly pointed out in this regard that some change could occur if the Commission replaces the existing EU *consumer welfare* standard by a broader EU *total welfare* standard.[30] Total welfare implies a quantifiable surplus for both consumers and businesses, and it means considering greater profits and the growing market value of businesses. Its proponents rely on the not fully proven neoliberal assumption that the welfare trickles-down from businesses and their owners to ordinary consumers.

Ioannis Lianos appropriately puts an equality sign between supporters of the criterion of total welfare and those who promote the primacy of industrial policy over the protection of competition.[31] Its current protection is, despite all criticisms addressed to it from the left of the political spectrum,[32] democratic in that it prefers the buyer-consumer perspective over the interests of the producer. This contradicts the efforts of industrial policy to create, quickly and easily, strong European champions, although it is not true that merger control has been systematically hindering it, as the number of concentrations prohibited by the Commission is, as already pointed out above, statistically negligible. The correct question thus must be whether to extend the above-mentioned criteria of acceptable efficiency gains by higher competitiveness – as a verifiable effect brought by the assessed

[28] Manifesto *Moderniser la politique de concurrence de l'Union européenne (UE)* op. cit. note 1, invites the Commission to clarify for the benefit of companies how it would evaluate the impact of mergers in the form of higher efficiency and better competitiveness in the whole industry.

[29] Guidelines on the assessment of horizontal mergers, op. cit. note 10, points 76-88.

[30] LIANOS, I. The future of competition policy in Europe: Some reflections on the interaction between industrial policy and competition law. *Concurrences- Competition Law review*. 2019, No. 2.

[31] Ibid.

[32] For example, the requirements to include social and environmental priorities in the assessment of competition cases in line with the objective of the social market economy (Article 3 (3) TEU). This means to pay attention not just to the efficiency or consumer welfare, as they do not include negative social and environmental externalities of the market behaviour. See the Resolution of the European Parliament from January 31, 2019 *On the Annual Report on Competition Policy* (2018/2102(INI) and also SENN, M., EU competition policy: a more holistic approach needed. *Social Europe*, 28. 3. 2019; WIGGER, A., BUCH-HANSEN, H. Too Big to control? The politics of mega-mergers and why the EU is not stopping them. *Corporate Europe Observatory*, June 2017.

merger. It should not be a question of the competitiveness of the merging firms themselves, as this is always the main motive for which they are merging. The merger would therefore have to benefit the competitiveness of the whole sector or, more generally, of the EU as a whole.

The problem is that we are not anymore in the situation of 1953 when Charles E. Wilson, then the president of General Motors, declared "What was good for our country was good for General Motors, and vice versa."[33] Globally competing businesses nowadays optimise their operations regardless of a country's or continent's borders (as well as interests) and there is not any guarantee that a successful penetration of the Chinese market by a merged European champion would increase employment, tax revenues, or dynamics of innovation in EU countries. Of course, this could happen even today, the question however is how to define, assess and secure such effects of mergers.[34] Numerous authors are sceptical regarding the existence of a link between the competitiveness of a company and the so-called competitiveness of the whole industry, of a nation (even more of a regional integration entity).[35] And certainly, the verifiable national (European) competitiveness that is sought here cannot simply consist in the increased attractiveness of a country (the EU as a whole) for large multinational firms.

The Commission's Guidelines on the assessment of horizontal mergers[36] explain what kind of efficiencies would be accepted as benefiting consumers. These could be of two kinds: lower prices or other benefits to consumers. Positive future impact on prices should be based on reductions in variable or marginal costs of the merged entity as mere cost reductions, which would just result from anti-competitive reductions in output, would never be considered as efficiencies benefiting consumers. The category of "other benefits to consumers" includes new or improved products or services, for instance resulting from efficiency gains in the sphere of R & D and innovation. Both kinds of efficiencies must be real enough in the foreseeable future as the later the efficiencies are expected to materialise in the future, the less weight the Commission assigns to them. What is crucial for the competitive edge of a merged entity is that the Commission considers its definitely bigger size, bigger market share, to be an obstacle to the efficiencies benefiting consumers. Only the existence of sufficient competitive pressure from the remaining firms in the market and from potential entry can guarantee that efficiency gains will be passed to consumers.

If increased competitiveness is to become another acceptable efficiency gain in the assessment of mergers, it must therefore be: i) different from the greater competitive potential of the merged entity as such; ii) different from the efficiencies already accepted as beneficial to consumers; iii) independent of the greater size (market share) of the merged entity. National (European) competitiveness *in general* must therefore be sought among its *soft* factors, such as (following, for instance, the list of the World Economic Forum): quality of infrastructure, skills and health of human capital, ICT adoption, innovation ca-

[33] McARDLE, M. What's good for GM isn't necessarily good for America. *The Washington Post*, 28. 11. 2018.
[34] MOTTA, M., PEITZ, M. op. cit. note 8.
[35] NEČADOVÁ, M.; SOUKUP, J. Kontroverzní pojem národní konkurenceschopnost a výsledky zemí V-4 v mezinárodních žebříčcích konkurenceschopnosti. 2007–2012. *Politická ekonomie*. 2013, No. 5, pp. 583–604.
[36] Guidelines on the assessment of horizontal mergers, op. cit. note 10, points 80–84.

pability of the industry concerned, etc.[37] It is not easy to imagine how these *soft* criteria of national (European) competitiveness of the whole industry could be – in a positive way - directly and verifiably influenced by a mega-merger of two or more large companies in a given business sector.[38]

They could rather be, more easily, included in the list of remedies, i.e. commitments imposed on a merger by the Commission in order to clear it. Naturally, these "general competitiveness gains" commitments would be of different nature than those foreseen by the EUMR *with a view to rendering the concentration compatible with the common market.*[39] Paragraph 30 of the EUMR Preamble interprets this condition in a direct connection with the negative impact of a merger: *such commitments should be proportionate to the competition problem and entirely eliminate it.* That is why the Commission Notice on remedies[40] deals with divestitures of a viable and competitive business, non-reacquisition clauses, transfers to a suitable purchaser, removals of links with competitors, etc., as with the commitments suitable to mitigate competition risks. Commitments relating to the future behaviour of the merged entity may be acceptable only exceptionally in very specific circumstances. Therefore, a commitment of a merged entity to invest into the EU's ICT infrastructure or excellent research centres' networks that could give a boost to its general competitiveness, would not fit into the current legal standard and would require an amendment not only to the Notices-Guidelines but very likely to the EUMR too. Anyway, the call on the European Commission to accept more often behavioural commitments also figures on the list of proposed changes.[41]

At the end of this section, it should not be forgotten that European firms can achieve greater competitive edge to penetrate the markets of China, Russia or India by creating joint ventures in their markets.[42] Their creation and behaviour would then be a question addressed to the competition law of the countries mentioned, not to the EU. Assuming that such type of cooperation directed outside of the EU would not lead to coordination between undertakings concerned within the EU, it would be the least problematic, even an elegant, solution from the point of view of EU competition law. The calls to the Commission thus also include the issuance of a methodology guaranteeing legal certainty in such "outward" oriented concentrations.[43] From a regulatory point of view, if greater chances to succeed outside of the EU can be achieved by merging or cooperating on non-European markets, this is then the right way, always preferable to a problematic intra-EU merger.

---

[37] See for instance any ranking produced by the World Economic Forum. [online]. [2020-02-24]. Available at: <https://www.weforum.org/reports>.

[38] A merger between two private universities or hospitals could surely have an impact on such *soft* factors but these examples are irrelevant for the control of mergers at the EU level and for the efficiencies that could prevail over an anti-competitive impact of a corporate giantsę merger that threatens to reduce competition on the EU markets.

[39] EUMR, op. cit. note 2, articles 6, 8, 10 and 19.

[40] Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (2008/C 267/01).

[41] DEFFAINS, B. d'ORMESSON, O. PERROUD, T. op. cit. note 8, pp. 26–27.

[42] MOTTA, M., PEITZ, M. op. cit. note 8.

[43] *Moderniser la politique de concurrence de l'Union européenne (UE)* op. cit. note 1 and Letter of 4, *ibidem.*

2.1 Treatment of companies from countries of different norms and rules

The question of what to do with competitors coming to the EU from countries with a culture of competition and an entire economic and political system that cannot stand comparison with the West, is the most difficult and the least clear of the questions raised. The requirement to become "efficient and effective in tackling potential abusive behaviour in the single market of economic operators from outside the EU, including state-backed or subsidised companies", formulated in the letter of economic ministries already cited, can be answered by different EU policies.[44] However, when the EU is called to enact its own "competitive neutrality instrument"[45] or even to develop its "sixth branch" of competition law[46] targeted explicitly at State-owned or backed enterprises from countries that do not respect the same liberal market rules, there is surely a role to play for concentration control as for "the preventive and structural arm of European competition policy".[47]

The key question here is whether merger control should abandon its universal-neutral approach applying the same criteria to mergers, irrespective of the origin and the owner of the acquiring/merging entity. DG Competition, as well as most experts writing on the subject, is opposed to such a radical change. Establishing a different "status" of certain non-EU undertakings for the purposes of competitive merger control, is politically explosive and technically complicated. Regarding the political level of the problem, which is not analysed here, it is sufficient to recall that the "special treatment" of undertakings coming to the EU from regimes which cannot be regarded as liberal, rule of law based, market economies would trigger a reaction from the countries concerned, in particular those that can influence Europe's prosperity the most – China and Russia. This would be opposed in the EU by both those Member States that depend heavily on the supply of raw materials and investments from these countries, as well as those large European businesses that are deeply engaged in these markets.

A more politically neutral and sophisticated solution would consist in giving up the uniform concept of *undertaking* as an addressee of the EU competition rules. The question here is whether *undertaking* should still be defined only as an entity independently engaged in an economic activity consisting in offering products and services in a potentially competitive market.[48] The problem with this definition is manifest in cases of state-

---

[44] The EU already adopted Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union. The instruments of the common commercial policy designed to combat dumped and subsidised imports, the pressure to comply with certain standards of fair competition in bilateral trade agreements, etc. are also contemplated. The whole range of possible measures was proposed by BUSINESSEUROPE in its comprehensive EU strategy to rebalance the relationship with China: *The EU and China Addressing the Systemic Challenge* issued in January 2020. [online]. [2020-09-30]. Available at: <https://www.businesseurope.eu/sites/buseur/files/media/reports_and_studies/2020-01-16_the_eu_and_china_-_addressing_the_systemic_challenge_-_full_paper.pdf>

[45] Ibid., p. 104.

[46] DEFFAINS, B. d'ORMESSON, O. PERROUD, T. op. cit. note 8, p. 28.

[47] CRÉMER, J.; DE MONTJOYE, Y.-A.; SCHWEITZER, H. *Competition Policy for the digital era – Final report*. Luxembourg: Publications Office of the European Union, 2019, p. 124.

[48] See the classical definition of undertaking provided the EU Court of Justice in the judgment C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH from* 23. 4. 1991 ECLI:EU:C:1991:161, para 21. For a more detailed explanation see WHISH, R.; BAILEY, D. *Competition Law*, 9th Edition. Oxford University Press, 2018, pp. 84–99.

controlled economic actors, which, especially in the case of China, represent nowadays the backbone of its economy and also its investment penetration into EU countries. EU law confers the status of undertaking only to an entity that behaves autonomously in market competition, which means that it must not be subject to active control and influence by another entity. Therefore, business groups made up of the parent entity and the network of subsidiaries constitute a single economic unit, one and the same undertaking. And if the parent entity is a State that acts not only as a regulator and a passive shareholder, but actively interferes with the composition of management, business and investment planning, etc., then the undertaking/single economic entity should be made up of all companies under such centralised control.[49]

The difficulty then lies in the fact that competition law, including its merger control branch, applies to the conduct of independent undertakings vis-à-vis each other, not within uniformly controlled undertakings/single economic entities. A merger of two or more Chinese state-controlled companies, respectively their EU-based subsidiaries, then represents an internal transformation within one and the same undertaking, not a merger between undertakings falling under the Commission's control.[50] Large conglomerates of companies supervised by the Communist Party of China, could thus easily outgrow their European competitors without being hindered by EU competition law, specifically its merger control branch. It is certainly an extrapolation of development on the basis of one "loophole" in the rather complex legal framework, but it is well showing that the current definition of *undertaking* is not always fit for the purposes of controlling mergers of non-EU corporate giants.

Maintaining competitive neutrality and preserving the *effet utile* of EU competition rules would then suppose treating the state-owned or supported undertaking in a way that does not allow them to escape competition law supervision and scrutiny. The Commission in its Guidelines – Notice and the Court of Justice in its judgments could postulate that concentrations between companies owned by the same State will no longer be qualified as internal developments inside single economic units. The change would then consist in a different approach to private undertakings and state-controlled undertakings applied regardless of "nationality" of the latter.[51]

Another possibility to hinder an easy penetration of EEA markets through acquisitions by foreign state-controlled undertakings would consist in the establishment of an axiom (another *theory of harm* to competition) that the state ownership or support shelter the company concerned from usual market pressures (if not provided in line with the EU state aid rules laid down in Articles 107-108 TFEU). The evidence that a foreign state-owned company may benefit from state resources or receives any other form of public support

---

49 See e.g. DE KOK, J. Chinese SOEs under EU Competition Law. *World Competition*. 2017, Vol. 40, No. 4 or BRIGUET, J. The State 's Invisible Hand: Chines SOEs Facing EU Antitrust Law. *Journal of World Trade*. 2018, Vol. 52, No. 5.

50 See for details in ŠMEJKAL, V. Chinese State-owned Enterprises and the Concept of Undertaking under EU Competition Law. *InterEULawEas. 2019,* Vol. 6, No. 2.

51 For detailed argumentation in favour of a differentiated approach to state-owned firms see in PETIT, N. Chinese State Capitalism and Western Antirust Policy. [online] [2020-02-24]. Available at: <www.ssrn.com/abstract'2798162 21/06/2016>; BRIQUET, J. op. cit. note 48, ŠMEJKAL, V. op. cit. note 49.

could then activate a rebuttable presumption that such a company disposes of a significant market power.[52] Increasing such market power through a merger or acquisition would inevitably lead to a significant impediment to competition which means that this move should be blocked under the current EUMR regime. In order to ascertain what kind and size of support enjoys a company from China or Russia, the Commission may need its own "economic intelligence service" so that it need not rely on information provided by the merging entities in their merger notification questionnaire in which they would, quite naturally, argue against the presumption of enjoying significant market power because of the state support.[53]

As the definition of undertaking or the interpretation of its market power are fixed neither by the Treaties nor by the EUMR, they do not necessitate major legislative amendments. It is therefore likely that some of these "reformulations" (or similar to) them come to light relatively quickly.

CONCLUSION

The debate about the EUMR reform affects a wide range of problems, and is far from being just a matter for lawyers and economists. In a deeper sense, the matter touches upon an imaginary "basic code" from which we derive the parameters not only of the market economy but also of our society. The growing scepticism about the universal applicability and success of the liberal vision has thus a partial reflection in the area of merger control. Is it time to admit that the former periphery is becoming stronger than the former metropolis, and in the future it will not be possible to play according to rules reflecting the Western notion of freedom of competition in free markets? Should the EU competition regulation remain democratic in defending in the first place consumer welfare or should we sacrifice some of these values for greater hope of success in confronting the challenges facing Europe from the outside world? Due to such far reaching implications of the current debate, the present analysis could not fully exhaust all the issues related to the reform of merger control in the EU. It therefore focused on the currently feasible changes that do not reverse the existing doctrine and its value anchoring.

The clear conclusion is that there are likely changes in EU merger control that do not require a legislative solution that would necessitate unanimous support from Member States. From the existing proposals, the most plausible are those that could be done by the Commission itself, either by modifying existing Guidelines – Notices or by issuing new ones as well as by forwarding other interpretations of some notions and standards. For this reason, the following reforms of EU Merger Control can be expected:

Considering the broader range of effects of mergers by extending the fora where the decisions on the most important and problematic concentrations are discussed and maybe also by including a defined contribution to greater competitiveness in their assessment.

[52] See for details in HEIM, M. How can European competition law address market distortions caused by state-owned enterprises? *Bruegel, Policy Contribution*. 2019, No.18.

[53] DEFFAINS, B. d'ORMESSON, O. PERROUD, T. op. cit. note 8, p. 28.

Changing the definition of undertaking, at least for cases of state-controlled companies and ex-ante control of their merges, so that they cannot escape the ambit of EU competition law.

Linking the state control of a company with a presumption of its significant market power, which must be subject to strict control if it seeks further strengthening through mergers and acquisitions.

Although the external context today has a stronger impact on the EU than before, the future remains open and the current EU competition policy is certainly not condemned to be a relic of the past. The EU should not give in to this challenge of its own model of protection of competition. Historical results of EU antitrust so far are definitely much better than those brought to Europe by the concentration of economic, technological, information and political power in the hands of selected "winners".