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LIST OF ABBREVIATIONS

CJEU	Court of Justice of the European Union
DG	Directorate General
EC	European Community
ECSC	European Coal and Steel Community
EEC	European Economic Community
EU	European Union
EUMR	EU Merger Regulation
FDI	foreign direct investment
ICT	information and communication technologies
IP	intellectual property
M&A	mergers and acquisitions
NCA	national competition authority
OBOR	One Belt One Road
OECD	Organisation for Economic Cooperation and Development
R&D	research and development
RCC	Romanian Competition Council
TFEU	Treaty on the Functioning of the European Union
TEU	Treaty on the European Union
SA	sociedad anonima
SIEC	significant impediment to effective competition
SOE	state owned enterprise

INTRODUCTION

Foreign direct investments (FDIs) contribute to the Union's economic prosperity by promoting competitiveness, bringing of technologies, expertise, innovation as well as capital. Despite their potential, FDIs can trigger public policy concerns for Member States when they take the form of takeovers or M&A activity in areas of national strategic importance. In 2016, unprecedented apprehension among Member States on the matter was caused by the sharp increase of Chinese investments in the European Union.[1] The dramatic rise in FDIs in the EU is the result of numerous policies launched by the Chinese government in 2015. The first initiative was the One Belt One Road (OBOR) initiative, a state-backed campaign for enhancing cooperation, trade and investments across the Silk Road Economic Belt.[2] The OBOR initiative is heavily centred around infrastructure investments along the belt road countries. In order to support outward investments, the Chinese government has set up a number of institutions entirely geared towards the support of foreign Chinese investments. These include for instance the Silk Road Fund and the Asia Infrastructure Investment Bank, which provide tax advantages and special insurances or safeguards for undertakings investing abroad.[3] A second driver of the exponential increase of Chinese FDIs was the release in 2015 of the industrial policy 'Made in China 2025'. The latter is a comprehensive industrial plan to make Chinese industry 'more efficient and more integrated so that it can occupy the highest parts of global production chain'.[4] In addition, the denomination of the plan itself hints to a clear goal of localising production and manufacturing in China.[5] In terms of figures, the objective to be reached is raising the production of core materials and products to 70 per cent by 2025.[6] The ultimate aim is to establish Chinese companies in various fields as global power players

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[1] Thilo Hanemann and Mikko Houtari, 'Record flows and growing imbalances: Chinese investment in Europe in 2016' (2017) 3 Merics Papers on China <https://www.merics.org/en/report/record-flows-and-growing-imbalances-chinese-investment-europe-2016> accessed 3 July 2022.

[2] Yuan Li, 'Belt and Road: A Logic Behind the Myth' in Alessia Amighini (eds), *China's Belt and Road: a Game Changer?* (Edizioni Epokè-ISPI 2017) 13-34.

[3] Julan Du and Yifei Zhang, 'Does One Belt One Road initiative promote Chinese overseas direct investment?' (2018) 47 China Economic Review pp 189-205.

[4] Scott Kennedy, 'Made in China 2025' (2015) Center for Strategic and International Studies available at <https://www.csis.org/analysis/made-china-2025> accessed 12 July 2022.

[5] Ibid.

[6] Ibid.

on the international market.[7] Additionally, the Chinese government has openly urged Chinese companies to 'rationally and orderly carry out overseas investments activities'[8] where 'joint development with the investments target countries shall be achieved'.[9]

The European Union at first adopted a moderate position towards China. In fact, despite recognising that 'the rise of China has happened with unprecedented scale and speed'[10] and acknowledging that 'a renewed emphasis on "going global" means that it is seeking a bigger role and exerting greater influence on an evolving system of global governance',[11] in 2016, the European Commission suggested to 'seize new openings and to strengthen its relations with China'.[12] Nevertheless, the sentiment of the EU has changed given the lack of reciprocity with regard to EU investments in China as well as due to the increased suspicion of Member States regarding Chinese M&A activity in the Union.[13]

In 2019, the Commission openly acknowledged the economic and strategic threats posed by China. In particular, it stressed that 'China's proactive and state-driven industrial and economic policies such as "Made in China 2025" aim at developing domestic champions and helping them to become global leaders in strategic high-tech sectors'.[14] Furthermore, the European Parliament drew attention to 'the Chinese interest in strategic infrastructures investments in Europe' largely operated by state owned enterprises (SOE).[15] In this regard, Member States have exercised extensive pressing on the European Commission in order to consider public policy implications of uncontrolled foreign investments in the Union. Such considerations range from national security

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[7] Alexandr Svetlicinii, 'The Interactions of Competition Law and Investment Law: The Case of Chinese State- Owned Enterprises and EU Merger Control Regime' in Julien Chaisse, Sufian Jusoh and Leïla Choukroune (eds), *Handbook of International Investment Law and Policy* (Springer Nature Singapore Pte Ltd. 2019).

[8] General Office of the State Council,'Notice of the General Office of the State Council on Forwarding the Guiding Opinions of the National Development and Reform Commission, the Ministry of Commerce, the People's Bank of China and the Ministry of Foreign Affairs on Further Directing and Regulating the Direction of Overseas Investments' (2017), Guiding Ideology, <http://www.lawinfochina.com/display.aspx?id=26336&lib=law> accessed 13 July 2022.

[9] Ibid.

[10] European Commission, 'Joint Communication to the European Parliament, and the Council "Elements for a new EU strategy on China" ' JOIN(2016) 30 final.

[11] Ibid.

[12] Ibid.

[13] Jerker Hellström, 'China's Acquisitions in Europe: European Perceptions of Chinese Investments and their Strategic Implications'(2016) FOI <https://www.researchgate.net/publication 315497771_China's_Acquisitions_in_Europe_European_Perceptions_of_Chinese_Investments_and_their_Strategic_Implications> accessed 13 July 2022.

[14] European Commission, 'Joint Communication to the European Parliament, the European Council, and the Council "EU-China – A strategic outlook" ' JOIN(2019) 5 final.

[15] European Parliament, 'Resolution of 12 September 2018 on the state of EU-China relations' (2017/ 2274(INI)).

concerns relating to investments in strategic sectors to the emergence of corporate giants that undermine the competitiveness of European undertakings on the global market.[16]

The growing concern of Member States nudged the Commission towards the adoption of Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the Union (Regulation 2019/452 or FDI screening Regulation). The newly established instruments created a cooperation systems for a greater protection of public interest within the Union. Nonetheless, Member States persist in requesting further intervention by the Commission, especially in the realm of merger control at EU level.[17] Member States stress the importance of striking a balance in merger appraisals between the competitive analysis and wider implications deriving from the conclusion of the transaction. On the other hand, the Commission has proven to be reluctant in taking into account potential risks going beyond competition-based considerations, in order to guarantee the independence and transparency which characterised the Commission's merger scrutiny for over 30 years. Nonetheless, the rise of Chinese corporate giants has posed significant questions as to the adequacy of European merger control in relation to changing global markets. Some Member States are advocating for a more politicised merger control, where concerns like national security and industrial policy are given greater relevance.

The present thesis addressed the convoluted interaction between merger control and public interest consideration, by analysing Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EUMR) and Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the Union. Firstly, the thesis will examine the merger control regime, by briefly outlining the core elements of the Commission's appraisals of concentrations. The chapter will then consider how public interest considerations are incorporated in the European merger control regime, through the analysis of Article 21(4). The different approaches adopted by the Commission and National Competition Authorities (NCAs) in respect to public interest concerns will be highlighted. The chapter will then evaluate the role played by public interest in merger appraisals at European level through a brief analysis of relevant cases. The research question guiding this chapter is to what extent is the public policy discourse taken into consideration in the EUMR. The second chapter offers a scrutiny of the newly introduced Regulation creating a framework for the screening of FDIs. This section offers an overview of the circumstances that led to the adoption of the Regulation as well as a picture of the coordinated

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[16] Hellström (n 13) p 25.

[17] Joshua Posaner and Thibault Larger, 'Paris and Berlin rail against merger block in Brussels' (2019) Politico <https://www.politico.eu/article/paris-and-berlin-rail-against-merger-block-in-brussels-alstom-siemens/> accessed 14 July 2022.

screening activities carried out by Member States in the first year of its application. This section intends to explain the coordination framework set up by the Regulation. The third chapter scrutinises the interplay of the two regimes, by providing evidence of potential overlaps between merger control and investment screening at national level. In addition, the interaction is examined by outlining a controversial merger decision, which led to increasing debates around the review of European merger control. The concluding section provides an outlook to the possible developments in the merger control regime.

1. PUBLIC INTEREST CONSIDERATIONS UNDER THE EUMR

1.1 Purpose and historical evolution of European merger control

Merger control is the realm of competition law which aims at handling concentration of economic power in the hands of a single company. Concentrations have the potential effect of lessening competition and to lead to or to reinforce a position of 'dominance' on a given market.[18] The European legal framework does not prevent *per se* any act which reduces competition or strengthens a position of dominance. Instead, it distinguishes depending on the way in which competition is being reduced or a position of dominance is being strengthened or created. In fact, European merger control is particularly concerned with 'external growth' of companies, where the strengthening of a position of dominance originates from the merger of previously independent undertakings.[19] This is due to the fact that when two previously independent undertakings merge and give rise to a market concentration, the economic capacities that were originally controlled by two separate entities are then under the control of a sole company. As a result, competition on the market may be impacted in the form of higher prices or lower innovation. As a consequence, external growth is usually the object of merger control review. Nonetheless, only concentrations that may cause a negative lasting effect on competition are prevented under European merger control. To this end, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EUMR) prevents concentrations that 'would significantly

[18] The concept of "dominant position" had to be firstly interpreted by the Court of Justice of the European Union (CJEU) as employed in Article 86 of the EEC Treaty in Case 27/76 *United Brands v. Commission* [1978]. The CJEU determined a dominant position as being a 'position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers'.

[19] Michael Rosenthal and Stefan Thomas, *European Merger Control*, (Verlag C.H. Beck Hart, 1st edn, 2010).

impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position'.[20]

Provisions dealing with the control of concentrations were firstly introduced in the Treaty establishing the European Coal and Steel Community (ECSC), but their application was limited to the coal and steel sector.[21] Conversely, the Treaty establishing the European Economic Community (EEC Treaty) did not comprise provisions on merger control, while it included Articles 85 and 86 respectively dealing with prohibited market conducts and abuse of dominant position. The need to enact special provisions with regard to merger control became apparent in 1973 with the *Continental Can* case.[22] The latter is of particular importance for the development of merger control in the European Union, as the Commission attempted to block the acquisition of Thomassen & Driver-Verblifa NV by Continental Can on the basis of article 86 EEC Treaty (abuse of dominant position). Due to the dominant position that Continental Can was already exercising on the European market via its subsidiaries, the Commission held that the acquisition of a competitor was in violation of Article 86, as it would have reinforced Continental Can's position of dominance. The Court of Justice of the European Union (CJEU) upheld the Commission's argument, nonetheless the provision would not have been applied had Continental Can not already been a dominant player on the market. This meant that where a merger resulted in the creation, and not in the strengthening of an already existing dominant position, Article 86 EEC Treaty would not have been applied.[23] As a result of this judgement, the Commission proposed its first draft for the introduction of concentration control instruments.[24] Nonetheless, due to the opposition of a number of Member States, Regulation 4064/89 on the control of concentrations between undertakings was only enacted in 1989.[25] The EUMR replaced Regulation 4064/89 in 2004.

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[20] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24, Article 2(3).

[21] Treaty establishing the European Coal and Steel Community [1951], Article 66.

[22] Case C 6-72 *Continental Can v. Commission* [1973] E.C.R. 215.

[23] Catalin Stefan Rusu, *European Merger Control: The Challenges Raised by Twenty Years of Enforcement Experience* (Kluwer Law International, 2010).

[24] Commission Proposal for a Regulation of the Council of Ministers on the Control of Concentrations between Undertakings [1973] OJ C92/1.

[25] Paul Craig and Grainne De Búrca, *EU Law: Text, Cases and Materials* (Oxford University Press, 6th edn, 2015).

1.2 European Merger Regulation: jurisdiction and appraisal of concentrations

The European merger control system is based on an *ex ante* or preventive assessment of concentrations. This means that possible concentrations that fall under the jurisdictional thresholds set out in the EUMR need to be notified and approved by the Commission before being implemented. For this purpose, Article 7(1) EUMR establishes a suspension obligation according to which during the time period in which the concentration is being scrutinised by the Commission, no implementation of the transaction can occur. In order to comply with the notification obligations set out by the EUMR, it must be determined whether the Regulation is applicable to the transaction at hand. In this regard, Article 3 of the EUMR is the benchmark in order to assess whether the foreseen transaction may qualify as a concentration. A concentration may be refereed to as such in the event of 'mergers',[26] 'change of control on a lasting basis [arising from an] acquisition'[27] and where a 'joint venture performing on a lasting basis all the functions of an autonomous economic entity'[28] is created. If the planned transaction falls under the definition of concentration, the allocation of jurisdiction needs to be considered next.

In the EU, merger regulation takes place both at Union and national level in order to allow the most competent institution to scrutinise the transaction. The general rule on allocation of jurisdiction is based on the 'Community dimension'[29] test, whereby concentrations meeting the community dimension are reviewed by the Commission and those that do not qualify as concentrations having community dimension fall under the jurisdiction of National Competition Authorities (NCAs). The EUMR establishes a dual track in order to assess whether a concentration meets the community dimension criteria. The first test is contained in Article 1(2), which establishes primary turnover thresholds. Where a concentration meets such thresholds, it has community dimension and shall be notified to the Commission. A second test is then provided in Article 1(3)

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[26] Reg 139/2004 Article 3(1)(a). According to the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings 2008/C 95/01 (herein after Consolidated Jurisdictional Notice) a merger 'occurs when two or more independent undertakings amalgamate into a new undertaking and cease to exist as separate legal entities' or where 'an undertaking is absorbed by another, the latter retaining its legal identity while the former ceases to exist as a legal entity' or 'two or more undertakings, while retaining their individual legal personalities, establish contractually a common economic management'.

[27] Reg 139/2004, Article 3(1)(b). Article 3(2) defines the concept of 'Control' as 'the possibility of exercising decisive influence on an undertaking'. The Consolidated Jurisdictional Notice specifies that the mere possibility of exercising control on an undertaking is enough to trigger the Article. The Consolidated Jurisdictional Notice further points out the fact Article 3(1) is defined in order 'to cover operations only if they bring about a lasting change in the control of the undertaking concerned and (…) in the structure of the market'.

[28] Reg 139/2004, Article 3(4). A joint venture is considered a concentration where the former is 'performing on a lasting basis all the functions an autonomous economic entity (so called full-function joint ventures)'. It is further specified that a join venture is fully-functional when it is autonomous in the operational respect. *See* Consolidate Jurisdictional Notice paras 92-93.

[29] Reg 139/2004, Article 1(2).

where alternative turnover thresholds are listed. The aim of Article 1(3) is to reach concentrations that do not meet primary turnover thresholds, but which carry considerable cross-border implications and would therefore be subject to notification obligations in multiple Member States.[30] To sum up, turnover thresholds allow merging parties to establish when to notify to the Commission or NCAs.

When a concentration qualifies as having community dimension, the Commission has exclusive jurisdiction on the review procedure. This principle is enshrined in article 21(2) and it is referred to as 'one-stop shop'. The latter is a cornerstone in European merger control legislation as it avoids multiple review processes to be conducted by several Member States[31] and eliminates the possibility of having conflicting interpretations of Union legislation at national level.[32] Furthermore, Article 21(2) establishes that Member States shall not apply their national competition laws where a concentrations has met the thresholds of the community dimension test. Nonetheless, it should be specified that the EUMR does not supersede national competition laws on merger control. The latter are applicable where a concentration does not qualify as having community dimension, but falls under the jurisdictional scope of a Member state's merger control regime.

Case referrals can alter the allocation of jurisdiction between the Commission and NCAs. In fact, a referral can both happen from the Commission to the NCAs[33] and from a NCA to the Commission.[34] The former case scenario would take place where a concentration met the community dimension thresholds, but a NCAs would be better suited to conduct the review. Conversely, the latter situation would unfold in the event in which a concentration did not meet the community dimension test, but due to specific circumstances, the Commission would be more

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[30] Rosenthal (n 19).

[31] European Commission, 'White Paper Towards More Effective EU merger Control' COM(2014) 449.

[32] Rosenthal (n 19).

[33] A referral from the Commission to a Member State's NCA is governed by Articles 4(4) and 9 EUMR. Article 4(4) allows merging parties the possibility to request a referral of the procedure from the Commission to a NCA even though the concentration meets the community dimension, where 'the concentration may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market'. The request shall be sent prior to the notification of the merger to the Commission. Article 9 allows a Member State to request the referral of a case that meets the community dimension test from the Commission to the NCA. Such request shall be sent from the Member State within 15 working days from the date in which the merger was notified to the Commission.

[34] On the basis of Articles 4(5) and 22 EUMR a request for referral of a concentration from the NCA to the Commission can be authorised. According to Article 4(5) EUMR, merging parties can file an application for referral from NCAs to the Commission, where a concentration does not have community dimension, but is 'capable of being reviewed under the national competition laws of at least three Member States'. This article provides for a pre-notification request of referral. Article 22 EUMR entitles a Member State to request a referral to the Commission to review a concentration without community dimension where the concentration 'affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request'.

effective in reviewing the case. Where the Commission accepts the referral, the one-stop shop principle applies and national authorities will not apply their national merger control regimes.[35]

When a transaction falls under the definition of concentration and meets the community dimension thresholds, the Commission will conduct a substantive appraisal of the concentration in question. Market definition is the first step undertaken by the Commission during the review process. This analysis is of pivotal importance in order to determine the competitive framework between undertakings and any competitive constraints between them. In particular, the Commission stated that:

> 'the objective of defining a market in both its product and geographical dimension is to identify those actual competitors of the undertaking involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure'.[36]

Market definition is a 'necessary precondition for any assessment of the effect of a concentration on competition'.[37] In fact, where an excessively broad market definition is determined, the concentrating parties' market shares will be negligible and the detrimental effects on competition may be disregarded. Conversely, in case of an overly narrow market definition, a potential concentration having pro-competitive results may be prohibited.[38] When conducting market definition analyses, the Commission is obliged to assess the relevant market *de novo* in each case.[39] Nevertheless, according to the Commission's practice, it tends to follow previously reached market definitions.

In order to evaluate the compatibility of a concentration with the internal market, the Commission conducts a substantive effects-based assessment, which appraises the concentration's competitive effects on the market. The criteria of such substantive test are included in Article 2 EUMR. The latter establishes, in paragraph 3, that 'a concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with

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[35] Vellah Kedogo Kigwiru, 'The European Union's Jurisdiction in Merger Regulation'(2020) < http://dx.doi.org/10.2139/ssrn.3534986> accessed 22 June 2022.

[36] European Commission, 'Notice on the definition of the relevant market for purposes of Community competition law' (1997) OJ C 372.

[37] Joined Cases C-68/94 and C-30/95 *France and Others v Commission* [1998] ECR I-1375, para 143.

[38] Moritz Lorenz, *An Introduction to EU Competition Law* (Cambridge University Press, 2013).

[39] Joined Cases T-125/97 and T-127/97 *Coca-Cola and Coca-Cola Enterprises Inc. v. Commission* [1997] ECR II-1737, para 82.

the common market'.[40] The so called SIEC test (Significant Impediment to Effective Competition) was introduced as part of the modernisation of EU merger control in 2004. In fact, the previous Regulation only prevented those concentrations that created or strengthened a dominant position. With the introduction of the SIEC test, the dominance assessment is no longer the only decisive factor. Despite being an important indicator of a concentration's incompatibility with the internal market, a 'significant impediment to effective competition' may arise from the 'elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors'[41] in oligopolistic markets.

The substantive appraisal of the effects of a concentration is divided into two phases: the identification of the types of the concentration's competitive effects and the subsequent assessment of their nature.[42] The concentration can bring about three different types of effects, that might be present simultaneously in a transaction: (a) horizontal effects, where merging parties are competitors at the same market level, (b) vertical effects, where merging parties operate on different levels of the supply chain and (c) conglomerate effects, where merging parties are involved in different markets. For the above mentioned effects to be regarded as being a significant impediment to effective competition, it has to be proven that these are causally connected to the concentration. In order to ascertain this causal link the Commission 'compares the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger'.[43] Therefore, the Commission operates a counterfactual analysis where a hypothetical case-scenario following the concentration is compared to one where the transaction does not take place.[44] Where a causal link is established, countervailing effects can be taken into consideration in order to counterbalance harmful effects on competition caused by the concentration.[45]

From the brief outline on the appraisal process of concentrations established in the EUMR, it can be concluded that the review procedure of concentrations having community dimension is

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[40] Reg 139/2004, Article 2(3).

[41] Reg 139/2004, Recital 25.

[42] Rosenthal (n 19).

[43] European Commission, 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings'[2004] OJ C 31, para 9; European Commission, 'Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings'[2008] OJ C 265, para 20.

[44] Lorenz (n 38).

[45] The Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings introduce in paragraph 12 three types of countervailing effects namely buyer power, the extent of entry barriers and possible efficiencies put forward by the parties.

strictly linked to a substantive competitive effects test, aiming at scrutinising anti-competitive effects potentially caused by a transaction on a relevant market. In fact, little to no consideration is left to other possible implications that might arise from merger activity. In spite of that, numerous Competition Commissioners have stated that European economic growth is tightly connected to the protection of competition in the internal market and that other objectives such as protectionist debates of Member States or industrial policy considerations shall not interfere in the application of competition rules in the Union.[46] Commissioner Leon Brittan declared that '[t]he Regulation gives clear primacy to the competition criterion with only the smallest nod in the direction of anything else …'[47] More recently, Commissioner Margrethe Vestager reinstated that:

> 'The success of European business can never be built at the expense of Europe's people – their rights and freedoms, their confidence that the market serves their needs, their trust in a secure future, with good jobs and strong safety nets'.[48]

The message that non competition grounds shall not play a role in European merger control procedures has been strongly reinforced. Nonetheless, a slight opening is still possible under Article 21(4) of the EUMR.

1.3 The role of "public interest" in merger control at European and Member State level

When dealing with the concept of public interest at European level, the first obstacle to be faced is its definition. In fact, 'public interest' remains an open-ended concept that finds no unanimous pan-European interpretation.[49] In fact, when considering the approach practically employed in resorting to public interest consideration, Member States have exploited the lack of harmonisation in order to include in such nebulous concept a wide range of policy considerations. This gap is particularly useful when analysed in contraposition to the level of harmonisation of competition law in Europe. Nonetheless, it is understandable that no convergence has been reached when it comes to the concept of 'public interest'. The European Union itself is based, on the one

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[46] Alex Nourry and Dani Rebinowitz, 'European champions: merger control after Siemens/Alstom?' (2020) 41(3) European Competition Law Review.

[47] Lord Brittan,'The Early Days of Merger Control, EC Merger Control: Ten Years On', (EC Merger Control: Ten Years OnConference, London, 2000); Ibid.

[48] Margrethe Vestager, 'The champions Europe needs' (WELT Economic Summit, Berlin, 2019).

[49] Niam Dunne, 'Public Interest and EU Competition Law' (2020) 65(2) The Antitrust Bulletin 256-281; Giancarlo Piscitelli, 'Public Interest in Merger Control Systems in the EU and US: A Comparative Analysis of the Uneasy Relationship between Merger Control and Public Interest' (2019) 3 Eur Competition & Reg L Rev 380.

hand, on the pursuit of an ‘ever closer union’[50], and on the other, it recognised the peculiarities and differences among its Member states’ values and identities. Hence, the concept of public interest may be considered to reflect the impossibility to reach a universally European shared understanding expressing the unique considerations that arise across Member States.[51]

In the context of competition law, the approach towards non-competition grounds in merger control differs considerably when comparing European Union law and national competition legislation. In fact, numerous Member States allow either their government or NCAs to take into consideration non-competition grounds, such as public interest, in the context of merger control. For example, French law awards the French Minister for Economy the power to step in after a merger appraisal conducted by the NCA and to interfere with the process on grounds of public interest, which may range from employment concerns, competitiveness of the firm on wider markets or industrial policy.[52] Same goes for Germany, where the Minister of Economics can authorise a merger based on an overriding public interest, even where the Bundeskartellamt (German national competition authority) blocked the transaction.[53] In other jurisdictions, the same NCAs are allowed to take into consideration non-competition grounds during mergers’ appraisals. In this regard, the Austrian competition authority may approve a concentration, despite it having adverse effects on competition, where the international undertaking’s competitiveness is at issue.[54]

Going back to the European level, the Commission strictly anchors its appraisal of concentrations on a substantive competition effects analysis. As previously seen, it is reluctant to consider non-competition grounds in the realm of merger control. Nonetheless, an important exception is present in the EUMR, namely Article 21(4). The article applies to concentrations that have a community dimension and are therefore scrutinised by the Commission. According to Article 21(3), Member States are not allowed to apply national law to a concentration having community dimension. Nonetheless, Article 21(4) EUMR empowers Member States to take 'appropriate measures to protect legitimate interests other than those taken into consideration by [the] Regulation’. The article further specifies in sub-paragraph 2 that ‘public security, plurality of the

[50] Kalypso Nicolaidis, ‘The Idea of European Demoicracy’, in Julie Dickson and Pavlos Eleftheriadis (eds) *Philosophical Foundations of European Law*, (Oxford University Press, 2012).

[51] Dunne (n 49).

[52] Commercial Code (*Code de Commerce*), Article L.430-7-1.

[53] Foreign Trade and Payments Act (*Außenwirtschaftsverordnung*) 2013 , Sections 55(1a), 56(1), 56(2) and 56(3); Alison Jones and John Davies, ‘Merger Control and the Public Interest: Balancing EU and National Law in the Protectionist Debate’ (2014) 10(3) European Competition Journal.

[54] Austrian Federal Act against Cartels and other Restrictions of Competition (Cartel Act 2005 - KartG 2005) Federal Law Gazette I No. 56/2017, §12(2).

media and prudential rules' are recognised as legitimate interests under the EUMR. A further open-ended subparagraph is included as part of Article 21(4), where it is established that other public interests may fall under the meaning of legitimate interest subject to the Commission's consent. The Commission's approval can be granted following an assessment of such interest's compatibility with general principles and other provisions of Community law. Article 21(4) is an exception to the general rule providing for the Commission's exclusive competence on the appraisal of community dimension concentrations, therefore the article shall be interpreted narrowly.[55]

According to Article 21(4) EUMR, Member States can raise concerns regarding a concentration and potentially block the transaction or introduce further regulatory steps during a merger control assessment. Nonetheless, Member States can not overrule a Commission's decision regarding a concentration, meaning that they are not authorised to approve a transaction previously blocked by the Commission or disregard remedies imposed by the latter.[56] In fact, the powers granted by Article 21(4) are solely defensive. The rationale behind the nature of such powers is based on the fact that by giving Member State the possibility to authorise a Community dimension concentration based on 'legitimate interest', the exclusive jurisdiction of the Commission of reviewing concentrations at European level would be undermined.

An important feature of the Article at hand is the definition of three 'recognised interests', which are considered *prima facie* as legitimate. Where national measures aim at the protection of public security, protecting the plurality of media and enforcing prudential rules and are compatible with the principles of proportionality and non discrimination, no prior notification or approval by the Commission is required.[57]

The 'public security' legitimate interest can be invoked by Member States if there is a 'genuine and sufficiently serious threat to a fundamental interest of society'.[58] Two situations fall under the concept of 'public security'. Firstly, the latter can be enforced in concentrations regarding the 'production of or trade in arms, munitions, and war materials'.[59] Additionally, the concept can be relied upon when a merger affects the 'security of supply of a product or service considered of

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[55] Nourry (n 46).

[56] OECD, 'Public interest considerations in merger control: note by the European Union' DAF/COMP/WP3/WD(2016)11, p 4.

[57] Ibid p 4.

[58] Ibid p 4.

[59] Ibid p 4.

vital or essential interest for the protection of population such as energy supply'.[60] Security of supply can be applied where measures to be imposed are necessary in order to guarantee a minimum level of supply in case of a crisis. Utilities covered by security of supply are for instance electricity and water. In *Lyonnaise des Eaux/Northumbrian Water* case,[61] the legitimate interest of guaranteeing an adequate and sufficient number of stand-alone water providers on the market was recognised by the Commission and British authorities were authorised to apply national regulations to the concentration.[62]

Under 'plurality of media' Member States can impose measures directed to the maintenance of 'diversified sources of information' and ensuring 'plurality of opinion and multiplicity of views'.[63] On various instances The Commission has recognised interventions of Member States on this ground. For example, in *News Corp/BSkyB* case, measures by British authorities on the basis of media plurality were authorised.[64]

The third legitimate interest recognised under Article 21(4) subparagraph one is prudential rules. The latter regard **'**providers of financial services as applied by national bodies entrusted with the surveillance of banks, stock-broking firms and insurance companies'.[65]

The application and scope of legitimate grounds in the context of Article 21(4) should be interpreted narrowly. Their application is strictly subject to requirements of proportionality and non-discrimination. Specifically, the measures applied on grounds of the legitimate interest enshrined in Article 21(4) shall firstly be appropriate for achieving the pursued objective and should not exceed what is necessary in order to secure it.

When Member States aim at safeguarding 'other legitimate interests', national measures are subject to a notification requirement and a consequent *ex ante* scrutiny by the Commission. The latter shall communicate its decision to the Member State and the national measures' conformity with 'general principles an other principles of Community law'[66] within 25 working days. In its scrutiny the Commission is particularly weary of interventions that might hamper freedom of establishment and free movement of capitals. In order to assess the conformity of national

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[60] Ibid p 4.

[61]*Lyonnaise des Eaux/Northumbrian Water* (Case No IV/M.567) Commission decision [1995].

[62] Svetlicinii (n 7).

[63] OECD, 'Public interest considerations in merger control' (n 56) p 4.

[64] *News Corp/BSkyB* (Case No. COMP/M.5932) Commission decision [2010] OJ C37/2, para 308; Svetlicinii (n 7).

[65] OECD, 'Public interest considerations in merger control' (n 56) p 4.

[66] Reg 139/2004 Article 21(4) subpara 2.

measures, the Commission conducts a threefold analysis considering if (a) such interventions constitutes an obstacle to trade (b) national measures may be legitimate on the basis of other public interests grounds and (c) whether proportionality and non-discrimination principles are respected.[67]

Where national measures are adopted in violation of Article 21 EUMR, the Commission will usually render a decision addressing the legality of the national intervention according to Article 21 EUMR. If necessary, the Commission orders the withdrawal of the measures at issue. An infringement proceeding in accordance with Article 258 of Treaty on the Functioning of the European Union (TFEU) is initiated where the Member State fails to comply with the Commission's decisions.

1.4 Cases applying Article 21 EUMR

Despite cases regarding decisions under Article 21 EUMR being extremely rare, this Section will bring some example of the Commission's approach by outlining decisions both approving and rejecting Member State's measures in community dimension transactions.

In a number of occasions the Commission acknowledged the legitimacy of Member States' interventions regarding concerns over various public interests. For instance, in *Newspaper Publishing*, the UK was able to bring forward concerns over media plurality following the merger between Newspaper Publishing plc and Promotora de Informaciones SA, Editoriale L'Espresso SpA and Mirror Group Newspaper plc. Despite clearing the transaction, the Commission recognised that the merger could have brought about concerns such as 'accurate presentation of news and free expression of opinion',[68] therefore the UK Secretary of State was granted the power of according formal consent under relevant national law. However, any intervention had to be 'limited to the minimum action necessary to ensure protection of the legitimate interest in question'[69] in order to be in accordance with the principles of proportionality. The same acknowledgement was reached in the merger between Thomson, a French company active in professional electronics and defence systems, and Racal, a UK-based company active in defence, industrial electronics and transportation services. The Commission recognised that national security concerns were potentially present in the realm of defence electronics. Just like in the previous case, the Commission retained

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[67] OECD, 'Public interest considerations in merger control' (n 56) p 5.

[68] *Newspaper Publishing* (Case No IV/M. 423) Commission decision [2010] OJ L-2985.

[69] Ibid.

its powers and cleared the merger and in parallel the UK started an investigation on the security concerns following the concentration.[70]

On the other hand, there have been numerous instances where measures adopted by Member States have given rise to investigations, warning letters or negative decisions by the Commission. The first case in which measures enforced by a Member State on a concentration having community dimension were opposed by the Commission dates back to 1999. In *BSCH/A. Champalimaud*,[71] Portuguese authorities opposed a transaction which would have resulted in the acquisition of joint control of several Portuguese banks by Banco Santander Central Hispano. Nonetheless, Portuguese authorities failed to notify the public interest that they considered necessary to protect by means of a decision of opposition to transaction. The notification obligation was provided by article 21(3) of Regulation No 4046/89, in fact a notification was required as the public interest that Portuguese authority were aiming to protect, did not feature as one of the interests considered as legitimate by the paragraph at hand.[72] Due to the failure of such notification requirement, Portuguese authorities were in breach of Article 21 of Regulation No 4046/89. Additionally, the Commission specified that had the Portuguese authorities notified the legitimate interest, it would not have been accepted anyway based on the fact that the latter was contrary to the principles of non discrimination by reason of nationality. The Portuguese decision was firstly suspended as ordered by the Commission and eventually withdrawn.

The *E.ON/Endesa* merger is another noteworthy case where the European Commission opposed measures imposed by Spanish authorities due to the incompatibility with Article 21(4) EUMR.[73] In 2005 Spanish Gas Natural and German E.ON launched two public bids for the takeover of Endesa, Spain's electricity historic operator. With regard to the first bid, the one launched by Gas Natural, the transaction did not meet the community dimension threshold, therefore the Spanish competition authority had jurisdiction for reviewing the merger. Conversely, the Commission was competent for the review process of E.ON's bid. Due to the fact that the Spanish government preferred Endesa to remain national, the Spanish National Energy Regulator was given extensive power to review acquisitions in the energy sector in order to comprise non-Spanish undertakings in the scope of the required authorisation regime. Following this amendment

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[70] *Thomson CSF/Racal (II)* (Case COMP/M.1858) Commission Decision [2000] OJ C141/17.

[71] *BSCH/A.Champalimaud* (Case No IV/M.1616) Commission Decision [1999].

[72] The legitimate interests recognised by Article 21(3) Regulation No 4064/89 were public security, plurality of the media and prudential rules.

[73] *E.ON/Endesa* (Case No COMP/M.4197) Commission decision [2006].

by the Spanish government in the powers and scope of the authorisation regime to the National Energy Regulator, the Commission issues a Decisions based on Article 21 EUMR declaring that Spain was in breach of the aforementioned provisions due to the failure to notify the measure invoked. Spain argued that the measures were not notified as they were covered by the security of energy supply legitimate interest recognised in Article 21(4) EUMR. Nonetheless, the Commission stated that the latter legitimate interest was to be interpreted according to case law as referring to security of supply in time of energy crises or shocks. Additionally, where there are reasonable doubts as to the applicability of the legitimate interest to the transaction in question, the notification obligation to the Commissions stands for recognised legitimate interests as well. However, Spanish authorities instead of removing the contested measures, lowered the conditions that were regarded as problematic. As a consequence, the Commission initiated proceeding against Spain before the CJEU arguing that the intervention by the Spanish authorities targeted E.ON's bid consisting in a threat to freedom of establishment and free movement of capitals. The Court found that Spain failed to implement the Commission's decision requiring the withdrawal of the contested measures.[74]

The last transaction that will be analysed is the *Abertis/Autostrade* merger.[75] Abertis, a Spanish infrastructure company and operator of toll motorways notified the Commission about its intention to acquire Autostrade, an Italian operator of toll motorways. The transaction was cleared by the Commission, however the Italian government appeared to be hostile to the transaction from the very beginning. Indeed, Italian authorities denied the sector authorisation for the transaction, that was needed on the basis of Italian national law regulating the operation of toll motorways. The denial of the authorisation was based on a negative binding opinion of the Italian Minister for Infrastructure. The latter was hesitant on Abertis' capacity of investing in the Italian motorway infrastructure.[76] The Commission immediately contested the refusal of the Italian authorities arguing that the reasoning of the decision was not sufficiently motivated. The Commission eventually initiated proceedings against Italy on breach of Article 21 EUMR. Due to the fact that after a few months the sector specific authorisation still was not granted by Italian authorities, the

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[74] European Commission, 'Mergers: Commission welcomes Court judgment on Spain's failure to withdraw illegal conditions imposed on E.ON / Endesa merger' (2008) <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_08_147> accessed on 13 July 2022.

[75] *Abertis/Autostrade* (Case No COMP/M.4249) Commission decision [2008].

[76] Pedro Callol, 'National and European Law Instruments for the Protection of Public Interest Considerations in the Framework of Mergers and Acquisitions' (ABA Antitrust Spring Meeting, Washington DC, 2019).

interested parties decided to abandon the transaction. As a consequence, the proceedings against Italy were dismissed.[77]

In conclusion, it is possible for Member State to raise public interest concerns in merger control procedures when the transaction has community dimension, but it is for the Commission to assess such considerations in the overall merger appraisal. As seen through case law, public interest concerns rarely alter the outcome of the merger appraisal. More frequently, public interest considerations raised by Member States, where accepted, can trigger an investigation at national level or impose conditions on the transaction at hand. A competition-based assessment remains the predominant test in EU merger control and the importance of Article 21(4) EUMR shall not be overestimated.

2. THE FDI SCREENING REGULATION: COORDINATION AT EUROPEAN LEVEL

2.1 Chinese investments and European concerns

In light of the restrictive interpretation of public interest concerns in the context of merger control and the growing protectionist sentiments across Europe, the European Union has been under pressure by Member States to enact reforms in the EU merger control regime.[78] Increasing concerns by Member States result from the changing nature of the investment landscape in Europe. The relevance of new Foreign Direct Investment (FDI) providers is growing. The greatest concerns are directed to China, which pursues strategic industrial policy initiatives via state-owned enterprises in the form of FDI in Europe, while on the other hand restricting its market access to foreign investors.[79] Calls for reform of the current EU merger control regime stem from acknowledgement that EU competition law is able to tackle unfair competition, but it fails to address public interest or public security concerns in relation to M&A activity, which are either interpreted narrowly in competition appraisals or fall outside the scope of the competition regime.[80] A slight shift in the Commission's position regarding public interest issues was witnessed in former Commission President Juncker's 2017 State of the Union Address where he acknowledged that strategic interests

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[77] Ibid.

[78] David Reader, 'At a Crossroad in EU Merger Control: Can a Rethink on Foreign Takeovers Address the Imbalances of Globalisation?' (2017) 1(2) European Competition and Regulatory Law Review.

[79] European Parliament, 'EU Framework for FDI Screening' (2019) <https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/633165/EPRS_ATA(2019)633165_EN.pdf> accessed 13 July 2022.

[80] Luca Arnaudo, 'On foreign investment and merger controls: A law and geo-economics view'(Indian Law Institute, New Delhi, 2017).

are to be protected despite continuing to safeguard free trade and openness in the European market.[81] More precisely, he mentioned that: ‘if a foreign, state-owned, company wants to purchase a European harbour, part of our energy infrastructure or a defence technology firm, this should only happen in transparency, with scrutiny and debate’.[82]

The change of heart has been prompted by the drastic rise in FDI flows in 2016, which saw an increase of Chinese investments in Europe of 77 per cent compared to 2015.[83] Investments mostly targeted high-tech and strategic assets, such as machinery, information and communication technology, energy and transportation. A further shift in FDI inflows has been witnessed as to the recipient countries that are interested by investments. Prior to 2016, the core of Chinese investments was concentrated in Southern European economies, such as Portugal, Greece and Italy. While investments in 2016 have been consistent in the latter countries as well, such as with the Port of Piraeus and MP & Silva transactions, a redirection of investments to the three big European economies (Germany, the UK and France) was observed.[84] Germany was the most attractive country for Chinese FDIs in 2016, with 37 acquisitions only in the first half of the year. The number of acquisitions doesn’t change greatly from the previous year, which accounted for 39 transactions, nonetheless the targeted companies considerably differed in size and sectors.[85] In fact, 2016 Chinese investments in Germany accounted for an overall of 11 billion euros, which is more than the investments’ value of the previous ten years put together.[86] Additionally, sectors of interest saw a change as well. An increase interested particularly high-tech undertakings, while we saw decrease in traditional investment sectors such as real estate.[87]

Conversely, over the same time period, investments of European companies in China were following a decreasing trend. The imbalance between investments flows were, among others, a result of “persisting formal and informal market barriers for foreign companies in China”.[88] The

[81] European Commission, ‘State of the Union 2017-Trade Package: European Commission proposes framework for screening of foreign direct investment’ (2017) <http://europa.eu/rapid/press -release_[P-17-31 83-en.htm> accessed 13 July 2022.

[82] Ibid.

[83] Hanemann (n 1) p 4.

[84] Hannemann (n 1) p 6.

[85] Angela Stanzel, ‘Germany’s turnabout on Chinese takeovers’ (2017) European Council on Foreign Relations <https://ecfr.eu/article/commentary_germanys_turnabout_on_chinese_takeovers_7251/> accessed on 3rd July 2022.

[86] Hannemann (n 1) p 8.

[87] Stanzel (n 85).

[88] Hannemann (n 1) p 5.

lack of reciprocity between Europe and China together with the increment of Chinese FDIs by state-owned enterprises with tight government links fuelled concerns on behalf of Member States as to security and public interest effects in Europe. Indeed, in early 2017 a joint letter by Germany, France and Italy was presented to the European Commission expressing increasing apprehension on M&A activity of non-EU investors. In particular, the letter laid out the Member States' concerns as to the loss of competitive advantage in terms of know-how and technologies as a result of such transactions and requested the Commission to evaluate the possibility for Member States to block FDIs in light of the above mentioned lack of reciprocity.[89] In addition, the fragmented and decentralised landscape of screening mechanisms of FDIs in the European Union raised doubts as to its effectiveness in countering new challenges.

The European Union has no centralised FDI screening mechanism on security grounds. As seen in the previous chapter, foreign direct investments, in the form of mergers and acquisitions falling under the definition of concentration, are assessed under competition law at European level. The assessment nonetheless is an economic one and leaves little to no consideration to security or public order interests raised by Member States. In fact, national security is as such an exclusive competence of Member States, as enshrined in Article 4(2) of the TEU. In addition, Article 346(1)(b) TFEU establishes that Treaty provisions shall not preclude a Member State to 'take measures (…) for the protection of the essential interests of its security'. Hence, FDI screening is a competence that rests with Member States, which are free to decide whether to employ any kind of screening mechanism and, if they do, its scope and design. Such mechanisms, where present, vary significantly. Up Until the Commission's proposal no coordination framework was in place among Member States.

2.2 FDI Screening Regulation

As a result of the growing unsettlement at state level, the Commission took action in September 2017 when the proposal for the creation of an EU-wide framework of FDI screening mechanisms for strategic sectors was proposed. The urgency in the adoption of such a legislative act was given by the fact that the proposal was not accompanied by any impact assessment, as is usually required. The Commission justified the absence of the documentation by stating that 'the rapidity of changing economic reality [and] growing concerns of citizens and Member States'[90]

[89] Stanzel (n 85).

[90] European Parliament (n 79) p 5.

prevented the adoption of the impact assessment. The proposal materialised in 2019 when Regulation 2019/452 of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the Union was adopted. The Regulation creates a general framework in order to scrutiny FDI into the European Union under Member States' screening mechanisms, where these pose threats or may affect security and public order. The common coordination framework allows Member States and the Commission to control more effectively risks to security and public order in the Union. At the same time, the Regulation does not interfere with the exclusive competence of Member States of safeguarding their own national security and essential security interests. In fact, the Regulation preserves the ability for Member States to scrutiny FDI on grounds of security and public order based on the individual case scenarios and the national peculiarities, as the final decisions rests with Member States. Nonetheless, the Regulation is a pivotal first step towards a more harmonised and solid screening of FDI in the Union.

Regulation 2019/452 creates a coordination framework within the Union with regard the screening of FDIs on the grounds of security or public order.[91] A mechanism of cooperation between Member States and the Commission is established and the latter is empowered to provide opinions on investments. Nevertheless, the Regulation does not set up a general requirement for Member States to create screening mechanisms at national level. The choice whether to scree FDIs or not remains a sole responsibility of Member States.

With regard to countries that have screening mechanisms in place, the FDI Regulation provides some ground rules and procedures for Member States to maintain, amend or adopt. For instance, Article 3 establishes that screening mechanisms shall be 'transparent and not discriminate between third countries'. Furthermore, it shall be clearly laid down in which circumstances is an FDI subject to screening procedures, the grounds for it to be screened and the procedures that will apply.[92] In addition, timeframes shall be applied to screening mechanisms taking into consideration the possibility for the Commission and other Member States to provide opinions on FDIs.[93] Recourse against screening decisions shall be allowed[94] and mechanisms in order to prevent the circumvention of the screening mechanism is to be introduced.[95] The Commission is in charge of

[91] Reg 2019/452 Article 1.

[92] Reg 2019/452 Article 3(2).

[93] Reg 2019/452 Article 3(3).

[94] Reg 2019/452 Article 3(5).

[95] Reg 2019/452 Article 3(6).

keeping an updated list of FDI screening mechanisms, which have to be notified to the former by Member States.

The Regulation gives guidance as to which grounds could give rise to security or public order concerns. A non-exhaustive list is provided in Article 4 which includes, among others, investments regarding critical infrastructures in the energy, transport, water, health or communications sectors, investments in critical technologies such as artificial intelligence or robotics, or investments in supply of critical inputs like energy or raw materials. Other elements that can be taken into account by Member States or the Commission are 'whether the foreign investor is directly or indirectly controlled by the government' whether the foreign investor has already been implicated in investments causing security and public order concerns or whether there is the severe threat that the investor will engage in criminal or illegal activities.

The core aspects of the FDI Regulation regard the cooperation mechanisms between Member States themselves and Member States and the Commission. Such cooperation framework is in applied both in relation to investments subject to screening mechanisms and investments not subject to screening mechanisms. With regard to the first circumstance, i.e. a Member State which provides for a FDI screening mechanism under its national law, the Regulation sets out a number of obligations in Article 7. The Member State that performs a screening of the investment at hand is required to notify the Commission and other Member States of the investment undergoing scrutiny in its territory. Detailed information on the transaction shall be rendered available. The list containing the information requirements is included in Article 9 of the FDI Regulation. The latter encompasses the ownership structure of the foreign investor and of the target undertaking, the value of the investment, the business activities of the foreign investor and of the target, the Member State in which the investment is planned to be completed, the funding of the investment and its source and the date in which the transaction is planned to be concluded.

Article 6 further allows for the possibility for a Member State to provide a comment to a Member State undergoing screening of an FDI, if the former Member State considers that the investment could affect its security or public order. The comment shall be notified to the Commission, which will then inform the screening Member State of the issued observation. The same possibility is granted to the European Commission. The latter may issue an opinion on an investment screening procedure, if according to the Commission, the FDI is likely to impact the security or public order of one or more Member States. Furthermore, the Commission shall issue an opinion where one third of Member States agree that an investment may have an effect on their security or public order. The Commission is in charge of notifying the Member States. The

comments and opinions need to be ‘duly justified’.[96] The Member State targeted by the FDI may also request the opinion of the Commission or of other Member States. Comments and opinions need to be taken in ‘due consideration’ by the targeted Member State, nevertheless there is no formal obligation of accommodating them into the final screening decisions which remains a sole prerogative of the interested Member State.

Issues may arise when an FDI targets a country where no screening mechanism is provided. The Regulation covers this case scenario as well. In such circumstance, a Member State, which deems that an investment planned or completed in another Member States where no screening is performed, may affect its security or public order, can issue a comment to latter Member State and to the Commission at the same time.[97] Such as in the case in which the interested Member State operates a screening mechanism on the FDI, the Commission issues an opinion on the investment where (a) it acts autonomously as it considers that the investment is likely to impact the security and public order of one or more Member States; (b) at least a third of Member States request a Commission’s opinion and (c) the affected Member State itself petitions the issuance of an opinion by the Commission. The last circumstance is particularly important as it enables to encompass a situation where the targeted Member State does not have control over the FDI either because its national law doesn’t provide for a screening mechanism or because the FDI doesn’t fall under the scope of the FDI screening instrument.[98] The targeted Member State must give ‘due diligence’ to the comments and opinions issued by other Member States and by the Commission.

Article 8 of the FDI Regulation is of pivotal importance as it allows to protect projects and programs having ‘Union interest’. Something like a definition is provided in Recital 19 of the FDI Regulation where a project or program having a Union interest is described as one that ‘serves the Union as a whole and represents an important contribution to its economic growth, jobs and competitiveness’.[99] An exhaustive list of projects and programs of Union interests is provided in the Annex to the Regulation. Under this Article, the Commission is empowered to issue on opinion if it believes that the FDI will possibly affect projects or programs having Union interest. The commission is authorised to do so both where FDI screening mechanisms are in place or not. The procedures previously dealt with provided by Articles 6 and 7 apply to such instance *mutatis*

[96] Reg 2019/452 Article 6(5).

[97] Reg 2019/452 Article 7(1).

[98] Renato Antonini and others 'Screening of Foreign Direct Investments in the EU under the New FDI Regulation' (2019) Jones Day <https://www.jonesday.com/en/insights/2019/04/screening-of-foreign-direct-investments> accessed 13 July 2022.

[99] Reg 2019/452 Recital 19.

mutandis. Above all, where projects and programs of Union interest are concerned, the targeted Member States shall 'take utmost account of the Commission's opinion and provide an explanation to the Commission if its opinion is not followed'.[100] In this particular case, it may be affirmed that the opinion of the Commission bears a 'quasi-binding' nature, as it is reasonable to maintain that where a Member State disregards the Commission's opinion an infringement procedure under Article 258 TFEU is likely to be triggered.[101]

The FDI Regulation is of pivotal importance with regard to the protection of security and public order in the Union, not only as it creates a common framework for Member States having FDI screening mechanisms, but most importantly as it introduces a system able to address FDIs not undergoing screening at national level and to protect projects or programs interested by a substantial share of Union funding or covered by Union law. In fact, despite the fact that no scrutiny is provided at national level, the targeted Member State is required to deliver information on the transaction that is planned or was completed in its territory. Additionally, comments provided by other Member States need to be at least taken in due consideration. This requirement is further supported by Recital 17 where it is explicitly stated that due consideration shall be given to opinions and comments, where suitable, through 'measures available under [their] national law, or in [their] broader policy-making, in line with [their] duty of sincere cooperation laid down in Article 4(3) TEU'. Therefore, opinions and comments of other Member States and of the Commission are extremely relevant both for screening and non-screening Member States which can not disregard them despite their non-biding nature. This is particularly true when it comes to FDI impacting on projects and programs of Union interest.[102] Albeit not imposing an obligation on Member States to provide for an FDI screening mechanism in their jurisdiction, the Regulation forces non screening Member States to scrutiny FDI in their territory anyway due to the obligations stemming from Article 7. As a result, after the adoption of the Regulation a number of Member States introduced screening mechanisms at national level.

In 2017, when the Regulation was proposed by the Commission, only 11 Member States provided for FDI screening mechanisms, whether sector-specific or of a wider scope. By 2021, the number grew to 18 and numerous Member States amended their current regimes by broadening the scope of already in place screening mechanisms and implementing requirements enshrined in the

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[100] Reg 2019/452 Article 8(c).

[101] Antonino Alì, 'The Intersection of EU and its Member States' Security in Light of the Foreign Direct Investments Screening Regulation' (2020) 3 La Comunità Internazionale pp. 439-453.

[102] Antonini (n 98) p 3.

Regulation.[103] The ultimate objective is to have screening mechanisms in each Member States as declared by the Commission in its Communication on Trade Policy Review:

'In the security field, under the FDI Screening Regulation, the Commission restates its call to all Member States to set up and enforce a fully fledged FDI screening mechanism to address cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order in the EU. The Commission will continue implementing the cooperation mechanism with Member States' authorities to protect security and public order from risky foreign direct investments and consider enhancing the cooperation mechanism established by the FDI Screening Regulation".[104]

There is a strong expectation on the Commission's side for remaining Member States[105] to implement screening mechanisms in order to safeguard risks to security and public order from third country investor in the whole Union in a more effective and unitary way. In addition, the adoption of this common framework under the FDI Regulation might constitute only an initial step towards a greater harmonised and unified system. In fact, together with the above-mentioned obligations regarding cooperation mechanisms, the FDI regulation requires Member States to annually report on the 'aggregated information on foreign direct investment that took place in their territory (…), as well as aggregated information on the requests received from other Member States'.[106] Member States with FDI screening mechanisms also have to provide aggregated information on the application of their screening mechanisms.[107] These elements, together with the cooperation obligations enshrined in articles 6, 7 and 8 and the exhaustive list of information to be provided will likely produce the effect of having increasingly harmonised screening systems at national level, which will ensure a more uniform and efficient EU-wide screening of FDI from third country investors.

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[103] European Commission, 'First Annual Report on the screening of foreign direct investments into the Union' SWD (2021) 334 final.

[104] European Commission, 'Trade Policy Review - An Open, Sustainable and Assertive Trade Policy' COM(2021) 66 final, p 23.

[105] According to the 'List of screening mechanisms notified by Member States' available on the Commission's website, last updated on the 10th of May 2022, 18 Member States include FDI screening mechanisms in their national legislative frameworks. Six Member States have initiated a consultative or legislative process in order to adopt a screening mechanism. The interested Member States are Belgium, Estonia, Greece, Ireland, Luxembourg and Sweden. Bulgaria, Croatia and Cyprus have not reported any initiate for the implementation of an FDI screening mechanism *See* note 75 p 9.

[106] Reg 2019/452 Article 5(1).

[107] Reg 2019/452 Article 5(2).

2.3 Screening activity of Member States in 2020

In accordance with Article 5 of Regulation 2019/452, Member States have reported to the Commission relevant information on FDI that took place in their territory. The First Annual Report on the screening of foreign direct investments into the Union issued in November 2021 summarises the screening activity of Member States from the entry into force of the Regulation i.e. October 2020. A total of 1.793 investment dossiers were reported to the Commission by seven Member States, however only about 20 per cent of such FDIs underwent a formal screening procedure.[108] The remaining 80 per cent did not require a scrutiny either because there was no apparent risk regarding security and public order, or because the transaction fell outside the scope of relevant national legislation.[109] Only 2 per cent of screened FDIs was blocked and conditions were applied to 12 per cent of investments scrutinised.[110] From the above-mentioned figures, it can be concluded that despite the increasing wave of protectionism that led Member States to urgently request more coordination at community level, the European Union remains a very favourable environment for investments, with Member States interfering in a marginal number of instances.

On the basis of the cooperation framework set up under Article 6 of Regulation 2019/452, 265 notifications of FDIs were filed by 11 Member States during the period concerned.[111] However around 90 per cent of notified FDIs were submitted by five Member States, namely Austria, France, Germany, Italy and Spain.[112] The most affected sectors by FDIs were manufacturing, ICT and wholesale and retail. As provided by the FDI screening Regulation, the assessment of the investment concerned may follow two different phases. Phase 1 is the initial step of the FDI assessment which starts with the notification by the Member States of the FDI and the subsequent launch of screening investigations. Within 15 days, possible requests for additional information on the investment can be solicited. Most screening assessments are closed during Phase 1 and a limited number of transactions are followed by a Phase 2 investigation. The latter implies a more in depth scrutiny of the case, if it risks to affect the security and public order of one or more Member States. During this phase the Commission requests additional information regarding the investment to the

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[108] European Commission (n 103) p 10.

[109] European Commission (n 103) p 10.

[110] European Commission (n 103) p 11.

[111] The period considered by the First annual report concerns notifications from the 11 October 2020 through 30 June 2021.

[112] European Commission (n 103) p 11.

targeted Member State.[113] Usually, the information that is requested during this Phase regards issues like: ‘data on products and/or services of the target company; possible dual-use classification of any products involved; customers, competitors and market shares; the IP portfolio and R&D activities of the target company; and additional defining characteristics of the investor’.[114] Over the period taken into consideration by the report, only 14 per cent of the notified transactions proceeded to Phase 2.

The United States, the United Kingdom, China, Canada and the United Arab Emirates were the five main countries of origin of FDI in the EU over the period taken into account by the report. The Commission’s Staff Working paper accompanying the Annual Report on screening of FDI in the Union shows a drastic decrease of inward FDIs compared to 2019. One of the main findings of the working paper is that the United States and Canada ranked as the countries with the highest shares of FDIs in the Union. On the other hand, China saw a sharp decrease of investments in the Union starting from November 2019. In terms of figures, 2020 saw a fall in Chinese M&A activity of 62.5 per cent in comparison to 2019. This is of particular relevance in relation to the three years prior to the pandemic. In fact, as previously stated, one of the main reasons why Member States and the Commission acted promptly with regard to FDI was the increase of Chinese investments in the Union.[115] Nonetheless, based on China’s “Made in China 2025” strategic plan, investments are likely to increase especially in the high-tech sectors in order to enhance the Chinese innovation-led growth.[116]

All Member States provided a positive feedback as to the functioning of the newly introduced cooperation framework under Regulation 2019/452. Its value lies particularly in the sharing of relevant information in order to gain a ‘comprehensive view of FDI into the EU, including particular investment targets and investor profiles’.[117] According to Member States, the possibility to refer comments and ask for further information on transactions at hand represents the strongest feature introduced by the system. In addition, the creation of an Expert Group under

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[113] European Commission, ‘Commission staff working document Screening of FDI into the Union and its Member States’ (2021), Section 1.

[114] European Commission (n 103) p 12.

[115] From 2016 through 2019, Chinese investments in the Union grew by 26.1% compared to the previous 4 years. *See* note 85.

[116] The Chinese government will ramp up tech commitments by boosting research and development spending by more than 7% over the time period from 2021 through 2025. Advancements in the tech sector are of particular importance in relation to the confrontation between China and the United States as well as with other countries in the realm of technology policy. *See* ‘China Ramps up tech commitment in 5-year plan, eyes 7% boost in R&D spend’ (2021) Reuters <https://www.reuters.com/article/us-china-parliament-technology-idUSKBN2AX055> accessed 6 July 2022.

[117] European Commission (n 103) p 15.

Article 12 constitutes the ideal framework where 'good practices and lessons learned'[118] can be exchanged among Member States. The notification requirement increases awareness between Member States as to which type of transactions are more suspicious and rightly need to be notified. Furthermore, owing to the cooperation mechanism, elements of transactions which should raise concerns as to the impact on security and public order on one or more Member States are likely to be uncovered in the early stages of the assessments as a result of previous experience of other Member States.[119]

Procedural issues have been encountered by Member States as well. Pitfalls regarding the new FDI screening coordination system primarily regard a constraint of resources for screening authorities and particularly stringent deadlines especially when dealing with complex multi-jurisdictional transactions.[120]

Regulation 2019/452 is still at the early stages of its application, however it constitutes an important step towards a more harmonised and unified protection of the public interest in the Union. In this realm of law, the willingness of the Commission in implementing and, in the future, enhancing the regime of FDI screening at Union level is strong.[121] This is particularly important when taking into consideration the scope of the Regulation, which is precisely the one of protecting security and public order interests in each Member State. The Regulation effectively achieved a balance between the exclusive competence of Member States of protecting their national security, as enshrined in Article 4(2) TEU, and the coordinating function of the Union, which was indeed requested by numerous Member States. The exercise of balancing these two functions is particularly burdensome, even more so when dealing with such a sensitive area, such as national security. In fact, it is worth noting that national security is the only exclusive competence of Member States that was deliberately included in the wording of the Lisbon treaties. Even though competences not expressly conferred to the Union remain with the State, Article 4 of the TEU explicitly points out the exclusive competence of Member States in the realm of national security.[122] This specification points to the sensitive nature of the matter for Member States.

Regulation 2019/452 entered into force in a very special context characterised by Covid-19. The economic effects of the pandemic constituted a peculiar test for the new framework applied as

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[118] Reg 2019/452 Article 12.

[119] European Commission (n 103) p 16.

[120] European Commission (n 103) p 16.

[121] European Commission, 'Trade policy review' (n 104).

[122] Alì (n 101).

from 11 October 2020, which highlighted the importance of a coordination system in times of economic vulnerability. In this peculiar context, the Commission acted promptly and issued a Communication providing guidance to Member States 'concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452'.[123] This Communication answered the concerned raised by a number of Member States in a letter to the President of the European Council, Charles Michel, on the economic implications of the pandemic.[124] Member States were particularly worried about the potential risks resulting from a depressed economic and financial system, vulnerable to predatory operations targeting strategic assets in the realm of health, biotechnology and infrastructure, but also those that are critical for European security and public order.[125] In this context, the Commission suggested that Member States made full use of their FDI screening mechanisms taking particular consideration of the extraordinary challenges to critical strategic assets and, more importantly, urged Member States that did not have a screening mechanisms or whose mechanisms did not cover 'all relevant transactions' to promptly introduce one or to update it.[126] In the meantime the Commission has solicited those Member States

> 'to use all other available options to address cases where the acquisition or control of a particular business, infrastructure or technology would create a risk to security or public order in the EU, including a risk to critical health infrastructures and supply of critical inputs'.[127]

The existence of a screening mechanism for each Member State is the first step in order to achieve an even more comprehensive framework for the whole Union.

3. THE INTERACTION BETWEEN THE TWO REGIMES. WHAT'S NEXT?

3.1 Interaction between the two regimes at national level

The interaction between the merger control and the FDI screening regimes is a convoluted and extremely heated one. At European level, the Commission has frequently declared that a sharp

[123] European Commission 'Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (FDI Screening Regulation)' C(2020) 1981 final.

[124] The letter was signed by the presidents and prime ministers of Belgium, France, Greece, Ireland, Italy, Luxemburg, Portugal, Slovenia, Spain. The letter is available at <https://www.governo.it/sites/new.governo.it/files/letter_michel_20200325_eng.pdf> accessed 7 July 2022.

[125] Alì (n 94).

[126] European Commission, 'Guidance to the Member States' (n 114).

[127] European Commission, 'Guidance to the Member States' (n 114) p 2.

distinction exists between the two. As previously seen, the merger control system relies on a competition based analysis of the notified transaction, while the FDI screening system is an assessment conducted at national level where national security issues are the screening's driver. At Member State level the hard dividing line between the two regime present at European level, fades significantly. Especially with regard to the implementation of the cooperation framework provided by Regulation 2019/452, a number of Member States have relied on NCAs in order to fulfil the newly introduced obligations under the FDI screening Regulation.[128] Examples of Member States where the overlap between the regimes is more evident will be provided.

A notable example is Romania. The Romanian NCA, the Romanian Competition Council (RCC), is involved in the screening activity of FDIs as provided by the amendments of 2011 to the Romanian Competition Act. The act requires the RCC to notify to the Supreme Council for State Defence (SCSD), chaired by the President of Romania, any transaction that may have raised national security concerns. As part of the amendments, an important role is granted to the RCC, namely the one of contact point for Romain as provided by Article 11 of Regulation 2019/452. An *ad-hoc* Commission for the Screening of the Foreign Direct Investments was also set up. The former is comprised by representative of the RCC, inter alia. The Romanian NCA is also the secretariat of the newly established commission and is in charge of submitting to the Romanian screening commission any transaction in strategic sectors. Furthermore, fines can be imposed by the RCC if an investment fails to be notified or if insufficient information is provided.[129]

Poland is also a relevant case in which the FDI screening and competition regimes blend together. In 2020 the Polish FDI screening regime was amended by broadening the scope of application of the screening mechanism. Resulting from this wider application of the FDI screening mechanism, the increased number of notifications had to be dealt with by the Polish legislator. Eventually, the Polish NCA, the Office of Competition and Consumer Protection, was appointed as competent authority for the screening of FDI. The noteworthy feature of the Polish system lies in the fact that the Polish NCA was also awarded with the decision-making powers with regard to screening procedure of FDI possibly implying risks to Poland's national security or public order. In addition to that, the NCA is in charge of merger control reviews not having community dimension and falling under the scope of the relevant Polish national legislation. In this regard, the Office of

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[128] Alexandr Svetlicinii, 'Two hats on one head: Competition authorities and FDI screening' (2020) Lexxion <https://www.lexxion.eu/en/coreblogpost/two-hats-on-one-head-competition-authorities-and-fdi-screening/> accessed 7 July 2022.

[129]Alexandr Svetlicinii, 'National competition authorities and FDI screening: the case of Romania' (2020) Kluwer Competition Law Blog <http://competitionlawblog.kluwercompetitionlaw.com/2020/10/28/national-competition-authorities-and-fdi-screening-the-case-of-romania/> accessed 9 July 2022.

Competition and Consumer Protection can consider public interest during a merger control appraisal and subject potentially riskier transactions to conditions. As a consequence, the lines between the two regimes are particularly blurred due to the choice of the Polish government to award both competences to the same national competition authority.[130]

On the one hand, it may be argued that the choice of overlapping competition and FDI screening is a smart move as it allows the NCA to have a comprehensive picture of the M&A activity in a given Member State, both taking into account the competition landscape as well as additional potential threats. On the other hand, the consequences stemming from the engagement of NCAs in FDI screening procedures might be undesirable, particularly so if NCAs are awarded decision-making powers, such as in the case of Poland. In fact, if an NCA is both empowered to carry out competition-based investigations and FDI screening assessments, the risk might be that the former employs its FDI screening competences to block a concentration for which it has insufficient evidence as regards anti-competitive effects.[131] Furthermore, the negotiation of remedies might also be affected by such overlap between competences. As a matter of fact, the FDI screening regime addresses considerations dealing with national security or wider policy concerns, which are far from the anti-competitive effects that merger control assessments are concerned with. The interaction of competences at national level may induce NCAs to bring in wider policy concerns when negotiating remedies under the merger control regime.[132]

3.2 Calls for 'politicisation' of European merger control

It is clear that such overlap can only be witnessed at Member State level. In fact, as previously seen in numerous instances, the Commission is reluctant at accommodating non-competitive considerations under merger control assessment, despite the pressure by Member States. Instead, one of the reasons for the adoption of the FDI screening Regulation was the introduction of a framework, other than merger control, to assess security concerns raised by Member States in the Union. Therefore, from the perspective adopted by the Commission, it is of utmost importance to clearly separate, through procedural safeguards, the competitive-based scrutiny from the FDI screening assessment at Member State level. Indeed, the Commission's objective in this regard is trying to avoid the so-called 'politicisation' of merger control.

[130]Alexandr Svetlicinii, 'National competition authorities and FDI screening: the case of Poland' (2020) Kluwer Competition Law Blog <http://competitionlawblog.kluwercompetitionlaw.com/2020/10/08/national-competition-authorities-and-fdi-screening-the-case-of-poland/> accessed 9 July.

[131] Svetlicinii,'Two hats on one head' (n 128).

[132] Svetlicinii,'Two hats on one head' (n 128).

Despite the introduction of the FDI screening Regulation, the discussions around the political considerations of merger control review have become particularly heated. Such concerns regard both security issues and wider industry policy objectives, particularly in light of the flow of FDIs in the Union. Member States' repeatedly demanded the reform of competition rules in order to 'better take into account competition at global level and protect strategic common European interest'.[133] In 2019, in the context of the seventh Friends of Industry Ministerial Conference, 17 Member States signed a joint statement highlighting the most pressing discussions in the realm of industrial policy among which figures the issue of industrial competitiveness in the external dimension of European enterprises.[134] More specifically it was pointed out that in order to keep up with market developments 'the Commission should review the current legislative framework to better deal with the challenges arising from digitalisation by strengthening and seeking out possibilities to speed up both merger control and antitrust law enforcement'.[135] The argument brought forward by Member States is indeed that the European competition framework has 'grave implications for EU industry's capacity to retain its leading global position'.[136] This is because the strict implementation of competition rules prevents the formation of larger companies, also known as 'national champions'[137], or in the European context 'European champions'. In order for the latter to be created, the current merger control regime should be amended in favour of European industrial policy. This request was expressly demanded by the Federation of German Industry, which stated that:

'While in China large corporations are forged by government interventions on a global scale (e.g. in the railway sector with the formation of the large corporation CRRC in 2015), the competition authorities in the EU only consider the European internal market as the relevant market

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[133] Bundesministerium für Wirtschaft und Energie, Ministère de l'Économie et des Finances and Ministerstwo Przedsiębiorczości I Technologii 'Modernising EU Competition law' (2019) <https://www.bmwk.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf__blob=publicationFile#:~:text=The%20overall%20aim%20would%20be,arise%20for%20consumers%20and%20enterprises.> accessed 8 July 2022.

[134] Federal Ministry Republic of Austria Digital and Economic Affairs ' "Vienna Declaration" Joint declaration on the future of EU Industrial Policy by Austria, Bulgaria, Croatia, Denmark, France, Germany, Greece, Italy, Latvia, Luxembourg, The Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden' (2019) <https://www.bmaw.gv.at/en/Topics/Europe-and-EU/Austria-in-the-European-Union/Seventh-Friends-of-Industry-Ministerial-Conference.html#:~:text=The%20Friends%20of%20Industry%20are,open%20to%20any%20Member%20State.> accessed 13 July 2022.

[135] Ibid p 7.

[136] European Parliament, 'EU industrial policy at the crossroads: Current state of affairs, challenges and way forward' (2019).

[137] In the context of merger control a "government support for a merger between two domestic firms to create a more powerful entity, often also expressly opposing the takeover of one of the domestic firms by a foreign company". *See* Jonathan Galloway 'The pursuit of national champions: the intersection of competition law and industrial policy' (2007) European Competition Law Review.

for European mergers. Here, countermeasures should be taken and the market-driven formation of European champions should be permitted.'[138]

The European Commission has opposed such requests holding on to the creation of fair and strong competition in the internal market as a critical factor of success on the wider global market as well.[139] Interferences of political nature with a view to economic protectionism into merger control are starkly in contrast with the stance adopted by the Commission for more than a decade.[140] Indeed, tensions between Member States and the Commission skyrocketed when an intensely politicised merger between the two largest rolling stock manufacturers in Europe, i.e. Siemens and Alstom, was blocked.

3.3 Siemens/Alstom

The proposed merger between Siemens and Alstom has become one of the most remarkable merger control procedures, due to the unusual political interference exercised by Member States in the Commission's review.[141] The prohibition of such proposed merger resulted in a heated debate between the Commission and Member States regarding the revision of merger control in favour of the creation of 'European champions'. In order to understand the consequences that such prohibition triggered, the proposed merger will analysed.

The transaction at hand involves the rail transport sector, more precisely the area of signalling systems and very high-speed trains.[142] The parties involved were Siemens and Alstom. The latter is a French based company whose business activities range from 'high-speed trains, metros, monorails, trams to turnkey systems, services, infrastructure, signalling and digital

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[138] Federation of German Industries BDI, 'China – Partner and Systemic Competitor How Do We Deal with China's State-Controlled Economy?' (2019) <https://english.bdi.eu/publication/news/china-partner-and-systemic-competitor/> accessed 8 July 2022.

[139] European Parliament, 'EU industrial policy at the crossroads' (n 137) p 20; Andrea Renda and Agnes Sipiczki, 'Competition Policy and State Aid: Defining a Sustainable Path for Europe's Recovery'(2021) Task Force Working Group Report CEPS <https://www.ceps.eu/ceps-publications/competition-policy-and-state-aid-defining-a-sustainable-path-for-europes-recovery/> accessed 13 July 2022.

[140] In 2000 Competition Commissioner Mario Monti stated that: 'A competitive economy not only ensures the optimal functioning of the Internal Market and the competitiveness of European industry in the world-wide arena, it also creates benefits for consumers and our societies as a whole' See Mario Monti, 'Policy Modernisation of EU Competition Rules' (Launch of the Competition Act 1998, London, 2000) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_00_64> accessed 13 July 2022.

[141] *Siemens/Alstom* (Case COMP/M. 8677) Commission decision [2019] OJ C270/1.

[142] 'Signalling systems (…) are essential to keep rail and metro travel safe by preventing collisions and (…) very high-speed trains (…) are trains operating at speeds of 300 km per hour or more.' See European Commission, 'Mergers: Commission prohibits Siemens' proposed acquisitions of Alstom' (2019) <https://ec.europa.eu/commission/presscorner/detail/it/IP_19_881> accessed on 9 July 2022.

mobility'.[143] Siemens is a German multinational company active in the mobility sector as well. Indeed, the merger concerned its mobility division, which is involved in 'rolling stock, rail services, rail automation and electrification solutions, turnkey systems'.[144] In 2017, parties to the transaction announced their intention to join forces and combine transport equipments and service activities in a new company, under the control of Siemens.[145] The notable feature of this proposed merger was the amount of political weight it carried. As a matter of fact, the transaction was strongly supported both by the French finance Minister, Bruno Le Maire, and by his German counterpart, Peter Altmaier, who were very much in favour of the creation of a 'European Champion in Mobility'.[146] The newly established company would have in fact reached approximately €15 billion in yearly revenues.[147] Both parties and political entities supporting the merger argued in favour of the creation of this European champion in order to resists competition from Chinese companies. More specifically, the emerging importance of CRRC, a state-owned Chinese company active in rolling stock manufacturing,[148] likely to enter the European market in the near future, was brought as evidence of the imminent competitive threat in the international railway market.

Interaction between the Commission and merging parties started after the announcement of the transaction in late 2017, while the formal notification was submitted in June 2018. Throughout the merger control procedure in its various Phases, parties appeared to push the deal on the basis of the strong political support they were backed with. Nevertheless, it was clear that the transaction posed significant anti-competitive concerns on targeted markets and that compromises had to be made by Siemens and Alstom. However, remedies were proposed only at the very end of Phase II, namely on working day 65 of Phase II, which is the last day for submitting remedies according to the EUMR.[149] They strongly maintained over the course of the merger appraisal that the transaction did not pose threats to competition and over-relied both on political backing and on the potential threat of a new Chinese player in the European market. The adopted strategy turned out to be

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143 Alstom, 'Company' <https://www.alstom.com/company> accessed 9 July 2022.

144 Siemens Mobility, 'Rail' <https://www.mobility.siemens.com/global/en/portfolio/rail.html> accessed 9 July 2022.

145 European Commission,'Mergers: Commission prohibits Siemens' (n 142).

146 Bernard Amory, Henry de la Barre and Charles de Navacelle 'Beyond Alstom-Siemens: Is there a need to revise competition law goals?' (2019) (New Frontiers of Antitrust Paris, 2019) <https://www.concurrences.com/en/review/issues/no-4-2019/conferences/beyond-alstom-siemens-is-there-a-need-to-revise-competition-law-goals-new> accessed on 9 July 2022.

147 Ibid.

148 Ibid.

149 Ibid.

unsuccessful as in February 2019 the Commission blocked the merger due to the failure of the two companies in addressing the anti-competitive effects of the proposed transaction.

In its decision, the Commission argued that the deal 'would have created the undisputed market leader in some signalling markets and a dominant player in very high-speed trains'.[150] The merger would have compromised competition in these two sectors having particular detrimental effects on the two companies' customers, namely train operators and rail infrastructure managers. For instance in the signalling systems market, the Commission concluded that 'the Merger entity [would have had] an incentive to foreclose access to upstream signalling products post Transaction because it [would have been] a profitable strategy'.[151] Innovation and investments was another area of doubt for the Commission. The latter argued that through the creation of such a powerful entity on the market, investments in the realm of signalling systems compliant with European standards would have dropped. Furthermore, competition between already powerful entities like Siemens and Alstom boosts innovation in order to transition to a greener and more sustainable railway system.[152]

During the merger appraisal, the Commission took into consideration also the numerous complaints and negative opinions on the proposed transaction. In particular stakeholders, such as customers, competitors, industry associations and trade unions, manifested their opposition to the deal. In addition, several NCAs sent negative comments to the Commission on the matter. Most notably, the British Competition and Markets Authority suggested that following the takeover, the entity would have exercised a 'quasi-monopoly position'[153] on the interested markets. Also the German Bundeskartellamt claimed in a letter to the Commission that the remedies proposed by the two parties were 'neither suitable not sufficient' to lower concerns over anti-competitive effects.[154]

Together with the competitive landscape within the Union in the interested markets, the Commission took into close consideration one of adduced reasons for the conclusion of the transaction i.e. potential competition coming from Chinese state-owned CRRC. However, the Commission found that any Chinese company was active in the signalling systems market within the European Union. In addition, the Commission did not find evidence of an imminent entry into

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[150] European Commission,'Mergers: Commission prohibits Siemens' (n 142).

[151] Case M.8677, para 1236.

[152] Case M.8677, para 361.

[153] Amory (n 146) p 5.

[154] RTM, 'German watchdog raises 'serious doubts' over Siemens-Alstom merger in latest blow', (2019) available at <https://www.railtechnologymagazine.com/Rail-News/german-watchdog-raises-serious-doubts-over-siemens-alstom-merger-in-latest-blow> accessed 9 July 2022.

the market, as any Chinese supplier had even tried to participate in tenders in the Union market.[155] Therefore, according to the analysis of the Commission, Chinese state-owned supplier were not likely to enter the European market for signalling systems in the foreseeable future. When turning to the very high-speed trains market, the Commission held that 'market entry by CRRC (…) does not appear likely, timely or sufficient to deter or defeat any potential anti-competitive effects of the Transaction in the (…) market for very high-rolling stock'.[156]

Siemens' and Alstom's remedies proposed at the end of the merger appraisal were not enough to change the Commission's stance on the negative competition effects that would have occurred post-transaction. Negative feedbacks of stakeholders and the lack of evidence of potential market entries from third-country parties corroborated the Commission's analysis. The proposed merger between Siemens and Alstom was prohibited in February 2019.[157]

3.4 The Franco-German Manifesto

Due to the highly politicised nature of the deal, reactions were to be awaited as a consequence of the merger's prohibition. The same day the Commission blocked Siemens/Alstom, the French Economy Minister Bruno Le Maire, appeared on French television and openly suggested to "look to the future and reset European competition rules" and that in liaison with the German Minister for Economy, Altmaier, they 'will make proposals to overhaul these rules and have a more ambitious European industrial policy'.[158] Their commitments soon took the form of a joint communication, the Franco-German Manifesto for a European industrial policy fit for the 21st Century.[159]

According to France and Germany, Europe's industrial strategy should be centred around three pillars: (i) 'massively investing in innovation' (ii) 'adapt our regulatory framework' and (iii) 'effective measures to protect ourselves'.[160] The second pillar sets out suggested amendments to

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[155] Case M. 8677, para 886.

[156] Case M.8677 para 533.

[157] Thibault Larger, 'Brussels blocks Alstom-Siemens mega merger' (2019) Politico <https://www.politico.eu/article/brussels-blocks-alstom-siemens-rail-mega-merger/> accessed 13 July 2022.

[158] Bruno Le Maire @BrunoLeMaire "Alstom-Siemens : Il faut désormais se tourner vers l'avenir et refonder les règles de la concurrence européenne. Avec mon homologue allemand @peteraltmaier, nous allons faire des propositions pour refonder ces règles et avoir une politique industrielle européenne plus ambitieuse", 9 February, 11:59, Tweet.

[159] Bundesministerium für Wirtschaft und Energie and Ministère de l'Économie et des Finances, 'A FrancoGerman Manifesto for a European industrial policy fit for the 21st Century' (2019) <https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-aeuropean-industrial-policy.pdf ?__blob=publicationFile&v=2> accessed 13 July 2022.

[160] Ibid.

European competition law, which is considered outdated and unfit to compete on global markets. Indeed, the Manifesto hints to the fact that only 5 among the top 40 biggest companies are European.[161] Their concerns stems from the acknowledgement that no global level playing field exists to this day and it is unlikely that a general consensus on the matter will occur in the imminent future. Despite not expressly mentioning China, the Manifesto clearly points to the fact that some countries heavily subsidise companies, which are eventually very difficult to fairly compete with.

Different suggestions are brought forward by the joint communication. The first option to be taken into consideration regards the issue of state-control and subsidies, which according to the Manifesto should play a greater role in merger control appraisals. The framework of merger control itself lies at the very core of the amendment proposals of France and Germany. In fact, it is suggested to:

> 'take greater account of competition at the global level, potential future 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'.[162]

The most debated and controversial suggestion proposes to grant a right of appeal to the Council in 'well-defined cases, subject to strict conditions'.[163] Even though suggestions comprised in the Franco-German Manifesto appear to be at their birth stages and might not have gone through an in depth conceptual development, it is worth taking a closer glance at the proposal for a right of appeal of the Council and its potential of politicising merger control.

The proposal enshrined in the Manifesto has caused extensive discussions, mainly because the right of appeal of the Council proposed by France and Germany would constitute instead a fully fledged veto right exercised by the Council. In fact, the Manifesto specifies that such right could 'ultimately override Commission decisions'[164] where the competition assessment is not in line with other interests, such as industrial policy. However, the proposal fails to specify what 'well-defined cases' or 'subject to strict conditions' would mean. The enactment of such right would drastically change competition policy and enforcement in the Union. The anti-competitive and economic assessment now performed by the Commission would be replaced by a political one based on Member States' needs and will. In addition, the proposal raises further significant concerns. Firstly, the Council veto puts at severe risk consumer protection, which is one of the main drivers of the

[161] Ibid p 3.

[162] Ibid p 4.

[163] Ibid p 3.

[164] Ibid p 4.

Commission's appraisal in merger control procedures. If the Council decides to override a decision of the Commission, which is the result of many months of careful analysis of the potential anti-competitive effects on the market, consumers can be severely affected.[165] Additionally, such a political interference in an established law-based appraisal would undermine legal certainty as well as predictability. The extensive set of decisions issued by the Commission have given guidance to companies and law practitioners as to the Commission's approach in its merger appraisals. Conversely, the French and German proposal doesn't make clear on what grounds will a merger be assessed. Regardless of whether guidance will be provided or not, a political assessment is *per se* more nebulous and unpredictable than an appraisal based on law.[166] A further problematic feature stemming from the introduction of this veto right, is the increased vulnerability that the system of competition enforcement would suffer. Under the EUMR, the merger appraisal operates according to extensive autonomy both from Member States and from external pressures. In a situation where politicians are given the power to overrule a decision, lobbyist pressure will dramatically increase. Lastly, changing the architecture of merger control could have detrimental effects on the inflow of investments from third countries. Foreign investors might be less willing to invest in the European Union where politicians enjoy such far-reaching powers on merger control appraisals. The credibility and standing of the Commissions' review has become a model and a source of legal certainty for foreign companies.[167] Commission Vestager has repeatedly maintained that 'independence is simply non-negotiable. Because we know that our legitimacy, our credibility and – ultimately – the impact of our action depend on it'.[168]

This non exhaustive series of concerns points to the problematic nature of the proposal, which would also be complicated to introduce according to the Treaties. In fact, according to Article 103 TFEU, it is for the Commission and the Court of Justice to enforce European law, while the Council is empowered to enact provisions following a proposal of the Commission, after having consulted the European Parliament. Consequently, in order for the Council to exercise a veto right a revisions of Article 103 TFEU might be required.

Moreover, many Member States have already expressed their concerns and general disagreement with the proposal submitted by Germany and France. The Netherlands were the first

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[165] Nicholas Levy, David R. Little and Henry Mostyn 'European Champions - Why politics should stay out of EU merger control' (2019) 2 Concurrences.

[166] Ibid p 28.

[167] Ibid p 29.

[168] Margrethe Vestager, 'Independence is non-negotiable' (Introductory remarks at the Chatham House Competition Policy Conference, London, 2015).

Member State to come forward by stating that 'strong and politically independent enforcement of competition rules is vital to creating competitive firms and low prices for consumers'[169] , expressly going against the proposal of politicising merger control. Additionally, Sweden, Belgium, Finland, Denmark and Portugal have contested the proposal of the Franco-German Manifesto.[170] Interestingly, France itself seems to have taken a temporary distance from its initial proposal. Indeed, in a paper published by the Ministry of Economics and Finance on competition policy and the strategic interest of the European Union it is suggested to prioritise a series of improvements to the current procedures and instruments. In particular, the paper advises to give relevance to the revision of Merger Guidelines and its two-years time frame for potential entry in the market[171] and to rely on independent persons or even on other Directorates-General (DG) in order to enrich DG Competition's analysis.[172]

Despite the controversial nature of the Franco-German Manifesto, the latter has raised the apparent issue of competitiveness at a global scale of European companies. The solution of abandoning 'a technocratic balancing [and to] prioritise industrial policy concerns in comparison to competition concerns on the basis of a political assessment performed by the Council'[173] is clearly unsatisfactory. Nonetheless, a change in the approach adopted by the Commission with regard to the way forward for competition policy has been witnessed. In its Mission letter to Commissioner and Executive Vice-President for a Europe fit for the Digital Age Vestager, Ursula Von der Leyen introduces the topic of industrial policy. In particular, the President of the Commission stated that Commissioner Vestager should 'ensure [that] our competition policy and rules are fit for the modern economy, vigorously enforced and contribute to a strong European industry, both internally and on the global stage'.[174] Among the tasks assigned to Vestager feature objectives such as the review of European competition rules, with an explicit mention to merger control, as well as ensuring that competition law shall support the European industrial strategy. Specifically, Von der Leyen stresses

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[169] Dutch Government, Ministry of Economic Affairs, 'Strengthening European competitiveness' (2019) <https://www.permanentrepresentations.nl/documents/publications/2019/05/15/ position-paper-strengthening-european-competitiveness.> accessed 13 July 2022.

[170] Levy (n 165).

[171] European Commission, 'Guidelines' (n 43) para 74.

[172] Inspection générale des finances et Conseil général de l'économie, 'La politique de la concurrence et les intérêts stratégiques de l'UE' (2019) p. 2 <https://www.igf.finances.gouv.fr/files/live/sites/igf/files/contributed/IGF%20internet/2.RapportsPublics/2019/2018-M-105-03-UE.pdf> accessed 13 July 2022.

[173] Ioannis Lianos, 'The Future of Competition Policy in Europe: Some reflections on the interaction between industrial policy and competition law' (2019) CLES Policy Papers Series UCL <https://www.ucl.ac.uk/cles/sites/cles/files/cles_policy_paper_1_2019.pdf> accessed 13 July 2022.

[174] Mission Letter from Ursula Von der Leyen to Margrethe Vestager (1 December 2019).

the fact that 'the competitiveness of our industry depends on a level playing field that provides businesses with the incentives to invest, innovate and grow'.[175] To this end, 'as part of the industrial strategy, (…) tools and policies [should be developed] to better tackle the distortive effects of foreign state ownership and subsidies in the internal market'.[176] Even though it is unlikely that during the current Commission's mandate a revision of the Merger Regulation will take place, it is reasonable to expect that some openings will be made in favour of the promotion of the European industry.

An interesting benchmark in assessing whether the declaration of the new Commission would have translated into practice as well, was the proposed merger between Fincatieri and Chantiers de l'Atlantique. The deal would have created a European champion in the market of ship building. The proposed merger would have been a notable sequel to *Siemens/Alstom* in the shipbuilding industry. The cases shared the fact that they both would have created a European Champion in their markets and they also had the common feature of a potential threat coming from Chinese corporations entering into the Union's market.[177] Unfortunately, in early 2021 France and Italy jointly disclosed that they agreed to block the proposed merger due to the challenging economic situation caused by Covid-19.

CONCLUSION

The EUMR has a been a tool of undisputed importance in the Union for the creation of fair competition and for the establishment of the European internal market. The FDI Regulation, on the other hand, has been a significant achievement for the protection of European national security and other strategic interests that could be threatened by foreign investments. Lately, the interaction between competition and public interest consideration has become more evident and pressing. In particular, the increase of Chinese foreign investments in the Union starting from 2016 has worried Member States, which saw strategic sectors and infrastructures particularly targeted. Where national screening mechanism apply, acquisitions in strategic sectors can be blocked. However, given the size of Chinese SOEa investing in Europe, EUMR thresholds have been met. Hence, Member States

[175] Ibid p 6.

[176] Ibid p 6.

[177] Natalie McNelis, 'Fincantieri's shipbuilding 'European Champion' may not float with EU regulator' (2019) MLex <https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/mergers-and-acquisitions/fincantieris-shipbuilding-european-champion-may-not-float-with-eu-regulator> accessed 13 July 2022.

have argued that competition scrutinies carried out at European level could be a central tool to address their concerns. This means that those circumstances in which the Commission is competent in carrying out a competitive appraisal, wider considerations should be handled. Nonetheless, as seen in the first chapter, the Commission gives very little consideration to public interest concerns raised by Member States. In fact, Article 21(4) is interpreted very narrowly and instances brought by Member States hardly play a role in the final decision. This is particularly so, when Member States enact measures based on 'other legitimate interests' not expressly recognised in the EUMR. In order for national measures to be in line with the EUMR, the legitimate interest aimed to be protected should be notified to the Commission and the latter should give its approval. Member States have sought to prevent transactions or influence the Commission's decision on grounds of national security, media plurality, prudential rules and, at times, also for economic protectionist objectives. Nonetheless, such efforts have mostly been quashed either by the Commission or by the Court of Justice. Hence, it can be concluded that the public policy considerations play a very limited role in the context of the EUMR.

The rising concern of Member States have been addressed by the Commission with the introduction of Regulation 2019/452 establishing a framework for the screening of foreign direct investments into the Union. The legislative tool has created a coordination framework for FDI screening in the Union and it has reinstated the need for the introduction of screening mechanisms across the Union. Among its important features lies the fact that it was expressly adopted on grounds of security and public order in the European Union as whole. Even though the competence of conducting the screening assessment rests with Member States, the Regulation sets up an unprecedented framework at European level for the protection of security and public order.

Despite the importance of the aforementioned framework, amendments to the current EU merger control policies have continuously been requested. Such discussions became particularly heated with the *Siemens/Alstom* merger prohibition. As a result of this case, some Member States have called for the amendment of the EUMR in order for it to allow the creation of 'European Champions'. Indeed, the broader context of the proposed merger, characterised by increasing geopolitical and economic frictions, highlighted the interplay between competition action and broader considerations, such as industrial policy or other public interests. The interaction between the two regimes lies in the fact that a potential concentration could not only entail consequences in terms of competition, but it could be aimed at achieving wider policy objectives. These could range from increasing the undertaking's competitiveness on the global market or, such as in the case of some Chinese SOEs' transactions, to pursue national industrial and strategic objectives. This

interaction becomes problematic when the wider policy considerations contradict findings resulting from a competition-based scrutiny. At the moment, we have seen that at European level in the context of the EUMR, the competition-driven assessment is the prevailing one. Nonetheless, due to the increasing pressure exercised by countries like France and Germany arguing in favour of a more political scrutiny, a revisions will likely be considered.

However, the path that merger control will be taking in Europe is unclear. Politicising merger control in light of the proposal issued by the Franco-German Manifesto would be bold move. In fact, allowing the Council to veto Commission's decisions would undermine competition's role in the overall picture of the European project. The change brought about by such a shift of paradigm would be drastic. Indeed, competition law is a crucial means for the establishment and functioning of the internal market, the objective *par excellence* of the European initiative. The Treaty on the European Union states that 'the Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy […].'[178] Therefore, the profound change in merger control policy brought forward by the Franco-German Manifesto would entail rethinking the objectives of the European scheme as whole. Rendering merger control a political exercise would mean 'abandoning the objective of the single marker altogether or negating the decisive role competition plays in ensuring the single market'.[179] While the issue of European companies and their competitiveness in the wider global market is a pressing one, the value of competition policy and enforcement for the protection of the internal market should not be underestimated.[180]

The increasing protectionist sentiment will likely bring to a revision of the merger control regime in Europe. The Commission has increasingly taken into consideration the convoluted interaction between different interests that lie behind M&A activity.[181] In practice, such revisions has been tabled, as enshrined in the Mission Letter of Von der Leyen to Commissioner Vestager. Amendments will likely take into account more political and other non-competition grounds such as strengthening European industry. Until now, the Commission has tried to avoid the revisions of competition policy in light of non-competition grounds by adopting other regulatory responses, one

[178] Article 3(3) Treaty on the European Union *See* Anja Naumann, 'The Siemens-Alstom merger-thriller - indicator of a new era for European Champion?' (2019) Lexxion Der Juristiche Verlag <https://www.lexxion.eu/coreblogpost/the-siemens-alstom-merger-thriller-indicator-of-a-new-era-for-european-champions/> accessed 13 July 2022.

[179] Ibid.

[180] Pedro Callol, 'Protectionist trend in cross-border mergers and acquisitions in Europe: national interest, FDI and other ingredients of the growing regulatory maze' (2021) 42(3) European Competition Law Review.

[181] Thibault Larger, 'Polish energy deal signals a more political Vestager'(2020) Politico <https://www.politico.eu/article/poland-energy-deal-pkn-orlen-lotos-margrethe-vestager/> accessed 13 July 2022.

being the FDI Regulation as well as anti-dumping measures as provided within the framework of the WTO. Nevertheless, the pressure by Member States and the awareness of an inevitable choice to be made seems non deferrable.

ABSTRACT

The European merger control regime is centred on a competition effects assessment of potential concentrations on the European market. This system has always been a technocratic one, free from political interferences and public interest considerations. This strictly economic procedure has recently been questioned under a wave of increasing protectionism due to a dramatic rise of Chinese foreign direct investment in the Union. Member States feared a predatory approach targeted at putting at risk their national security and the European competitive advantage in certain strategic sectors. Following such concerns, Regulation 2019/452 was adopted in order to establish a coordinated system of foreign direct investment screening mechanisms among Member States. Nevertheless, the latter did not perceive the adopted lRegulation as satisfactory and repeatedly advocated for a review of the current merger control regime in Europe. The primary issue lies in the fact that competition law preserves a competitive environment on the European market, but it proves to be unfit to guarantee competitiveness of European companies on the global stage. The thesis analyses the relevance of public interest considerations in the framework of Regulation 139/2004 by scrutinising how non-competition grounds are integrated in the merger control regime. Furthermore, the interaction between Regulation 2019/452 and Regulation 139/2004 is assessed in light of recent developments in merger control enforcement.

Im Mittelpunkt des europäischen Fusionskontrollsystems steht die Bewertung der Auswirkungen möglicher Zusammenschlüsse auf den europäischen Markt auf den Wettbewerb. Dieses System war immer ein technokratisches System, frei von politischen Eingriffen und Erwägungen des öffentlichen Interesses. Dieses rein wirtschaftliche Verfahren wurde in jüngster Zeit durch eine Welle des zunehmenden Protektionismus in Frage gestellt, die auf den dramatischen Anstieg der chinesischen Direktinvestitionen in der Union zurückzuführen ist. Die Mitgliedstaaten befürchteten ein rücksichtloses Vorgehen, das ihre nationale Sicherheit und den europäischen Wettbewerbsvorteil in bestimmten strategischen Sektoren gefährden könnte. Aufgrund dieser Befürchtungen wurde die Verordnung 2019/452 erlassen, um ein koordiniertes System von

Screening-Mechanismen für ausländische Direktinvestitionen zwischen den Mitgliedstaaten zu schaffen. Die letzteren empfanden die angenommene Verordnung jedoch nicht als zufriedenstellend und sprachen sich wiederholt für eine Überarbeitung des derzeitigen Fusionskontrollsystems in Europa aus. Das Hauptproblem besteht darin, dass das Wettbewerbsrecht zwar ein wettbewerbsfähiges Umfeld auf dem europäischen Markt bewahrt, sich aber als ungeeignet erweist, die Wettbewerbsfähigkeit europäischer Unternehmen auf der globalen Bühne zu gewährleisten. Die vorliegende Arbeit analysiert die Relevanz von Erwägungen des öffentlichen Interesses im Rahmen der Verordnung 139/2004, indem sie untersucht, wie Nicht-Wettbewerbsgründe in das Fusionskontrollsystem integriert werden. Des Weiteren wird die Wechselwirkung zwischen der Verordnung 2019/452 und der Verordnung 139/2004 im Lichte der jüngsten Entwicklungen bei der Durchsetzung der Fusionskontrolle bewertet.

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