

EXECUTIVE SUMMARY

In an engagement letter dated 24 December 2018, the Minister for the Economy and Finance and the Minister of State reporting to the Minister for the Economy and Finance tasked the Inspectorate General of Finance (IGF) and the General Council for the Economy (CGE) with assessing European competition policy and proposing adjustments in order to contribute to the preparation of the European Commission's agenda. A new Commission will be appointed after the European elections in May 2019.

1/European Union (EU) Competition Policy, which is enforced more strictly than in non-EU countries and which is more restrictive in terms of state aid, is in need of change

In the light of the objectives assigned to it by the Treaties, European competition policy seems to have been generally effective in fulfilling its role without hindering the rollout of European industrial projects in terms of numbers:

- ◆ Merger control has led to the rejection of a small number of transactions: since 2000, only sixteen refusals have been decided on from over 6,000 reported transactions
- ◆ Antitrust law has not prevented the Commission from taking up flagship cases in the digital sphere and sanctioning Google three times since 2017 with aggregate fines of over €8bn. In this area, the broad application of State aid rules to include tax rulings has made it possible to partially compensate for the lack of tax harmonisation in the EU
- ◆ The modernisation of State aid control in 2014 increased the number of exemptions and encouraged the financing of important projects of common European interest (IPCEIs), which the Member States, in particular France, seized upon in December 2018 to grant €1.75bn to an R&D project in the field of microelectronics. Other projects, including one for the design and production of next-generation battery cells and modules, are under consideration.

With the exception of State aid control, which is unique in the world and thus by definition more restrictive, the body of legislation framing European competition law is based on an analysis which is fairly broadly shared at global level. However, it appears to be more strictly enforced in the EU than elsewhere, as evidenced by the fact that market concentration has increased in the United States over the last two decades while it has decreased in Europe. This is due to a more flexible enforcement of competition policy in non-EU countries, in particular in the United States, in relation to European practices, in particular:

- ◆ the tendency of the Commission to make its authorisations for mergers subject to structural commitments with the risk, which has been noted in 50% of cases since 2010, of the sale of strategic assets to competitors outside Europe
- ◆ the Court of Justice's constraint placed on DG COMP, by encouraging it to interpret legislation as strictly as possible

2/To better integrate the interests of the EU into competition decisions and to take into account the legal and political difficulties in obtaining “disruptive” solutions, the task force calls for the further development of the criteria for analysis on the basis of existing primary law

Since the last revision of the European legal framework on competition, the global economy has undergone far-reaching changes, with the rise of emerging stakeholders who are not playing under the same rules and the development of platforms, the very nature of which is based on the acquisition of dominant positions which are difficult to challenge.

In order to bring about changes to merger control, the task force therefore examined four institutional scenarios allowing the EU to base its decisions on considerations of general interest other than competition alone. However, it will not be possible to implement these potential solutions until the Treaties have been amended, irrespective of the arrangements envisaged - maintaining the Commission's competence or, even more so, if the Council was given evocation rights based on the French or German model. Current legislation does not provide a sufficient legal basis to change European law in this respect.

The difficulty in achieving such options and the significant timeframes required for implementation of such a strategy need to be taken into account. The task force therefore suggests giving priority, at least in the immediate future, to a series of improvements to the current procedures and instruments, on the basis of existing primary and secondary law, and to extending the scope of DG COMP's analysis, in particular by overhauling guidelines and communications under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. These six proposals aim to:

- ◆ take better account of the potential entry of non-European competitors on the internal market, particularly when they receive subsidies
- ◆ rely on other Directorates-General or even independent persons to enhance DG COMP's analysis, improve collective responsibility, take into account efficiency gains or build remedies

With regard to the digital sector, the task force calls for the supervision of “systemic” players by an *ad hoc* committee involving officials from DG CONNECT, DG GROW, DG HOME and DG COMP, with powers to examine and investigate. It also recommends introducing ex post reviews of mergers where the value ratio of the transaction to the turnover of the acquired company suggests competition issues and responding more rapidly to digital issues by means of interim measures and by increasing DG COMP's expertise on these technical matters.

3/ With both international industrial and digital competition, other levers can be applied to give the EU back the means of ensuring its sovereignty

First, it is important that the European agenda for trade negotiations, which is required to get past the current WTO deadlock, is supplemented by a strengthening of the EU's arsenal of trade measures to better respond to the concerns of European citizens and to adjust to the non-cooperative strategies of our main partners. The EU's primary objective in this area should be to refocus the Commission's approach, which is currently too exclusively centred on the conclusion of free trade agreements, on monitoring the enforcement by our partners of agreements already signed. The appointment of a chief enforcer would give the EU a function dedicated to this task. In addition, the EU should use public procurement as a lever to put pressure on countries whose public procurement remains closed, to increase their openness and thus the opportunities for European companies to tap into new markets. To win the support of our partners, these reforms should not be part of a defensive approach, which would certainly be rejected by many Member States, but part of an informed strategy to marshal all of the resources at the EU's disposal for the benefit of European businesses and consumers.

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Lastly, in order for Europe to equip itself with the resources of an industrial power needed for its sovereignty and to prevent the single market from being merely a meeting place for European consumers and American and Chinese businesses in technological fields, it is essential for the EU to provide a common and comprehensive response. This includes the development of funding structures for innovative enterprises and better coordination and increased European public financing for research and innovation. On this last point, the task force therefore suggests a comprehensive review of the monitoring of aid for R&D and innovation (R&D&I) so that the aid can be implemented as smoothly as possible by minimising the ex ante control exercised by the Commission. This paradigm shift would send a strong political signal about the EU's determination to finally meet the objectives it set itself almost 20 years ago and to catch up with its competitors. At the very least, improvements are needed in order to speed up the examination of such aid and to develop IPCEIs, in particular by giving a coordinating role to the Commission in order to introduce bold initiatives for the benefit of European interests.

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INTRODUCTION

In an engagement letter dated 24 December 2018, the Minister for the Economy and Finance and the Minister of State reporting to the Minister for the Economy and Finance tasked the Inspectorate General of Finance (IGF) and the General Council for the Economy (CGE) with assessing European competition policy and proposing adjustments in order to contribute to the preparation of the European Commission's agenda. A new Commission will be appointed after the European elections in May 2019.

The task force worked against a backdrop of:

- ◆ the announcement of the Commission's rejection of the draft terms of merger between Alstom and Siemens on 6 February 2019, a decision which the task force chose not to address directly in this report, in particular due to lack of access to the file. The task force however took note of the proposals put toward by the French and German ministers as part of their Manifesto for a European industrial policy fit for the 21st Century, which was published on 18 February 2019. The proposed competition guidelines are examined and presented in detail in the second part of the report.
- ◆ criticism from some European countries, particularly France, of China which is accused of not applying the same rules as the EU in a context in which its Silk Road strategy now extends as far as Italy
- ◆ increasing trade tensions which, over and above cyclical frictions, reflect the deadlock in multilateral trade
- ◆ the conducting of a large amount of work on the effects of the digital economy on competition policy¹

The task force worked for three months and its work was informed by meeting a wide range of stakeholders: academics, competition law practitioners, economists, businesses, French and European government departments, in Paris and Brussels. The task force also contacted all our European partners, including through their Permanent Representations to the EU, and conducted an international comparison of the regulatory framework in non-EU countries (US, Japan and China), with support from the Regional Economic Departments of the Directorate General of the Treasury.

The conclusions drawn from the work are that:

- ◆ while it has met its objectives in terms of consolidating the internal market and in the face of new challenges, competition policy seems to be enforced more strictly in Europe than elsewhere (part 1)
- ◆ taking into account the EU's strategic interests in competition decisions would require giving a right of evocation to the Council, which would represent an in-depth amendment of EU law (part 2)
- ◆ competition policy is not necessarily a key solution to the issues raised, and European trade policy, investment control and access to public procurement should be overhauled and an offensive European industrial strategy should be developed (part 3)

¹ *Digital policy for the digital era*, submission of the report by Heike Schweitzer, Jacques Crémer and Yves-Alexandre de Montjoye, special advisers to Commissioner Vestager, for example.

1. As a condition for the proper functioning of the internal market, competition policy seems to be enforced more strictly in Europe than elsewhere, while having to address the rise of China and the digital challenge

1.1. European competition policy has been generally effective in achieving the objectives assigned to it by the Treaties

In order to remedy shortcomings associated with businesses' behaviour, when they hamper the proper functioning of markets, whether these result from anti-competitive practices (cartels, abuses of a dominant position) or excessive concentration, European competition policy can rely on a clear economic basis: economic literature largely documents the positive link between the degree of competition and various macroeconomic indicators such as productivity,² GDP growth,³ inequality and innovation.⁴

For implementation of the single market, competition policy benefited from early, though differentiated, integration into European legislation.⁵ As Article 3 TFEU confers exclusive competence on the European Union (EU) for establishing competition rules, it is DG COMP that is responsible for these direct enforcement powers, in collaboration with the national competition authorities. To this end, it relies on:

- ◆ rules applicable to businesses which are now subject to a certain degree of international harmonisation on the basis of a more economic approach to merger control (see 1.1.1) and to combating cartels and abuses of a dominant position (see 1.1.2)
- ◆ worldwide control of the aid granted by Member States to companies (see 1.1.3)

1.1.1. European merger control, which was revised in 2004 using a more economic approach, has led to the rejection of a very small number of transactions

1.1.1.1. European merger control results from joint analysis by competition authorities of comparable countries like the US

Originally, and contrary to the antitrust enforcement framework, merger control was not provided for in the Treaty. It was introduced into EU law in 1989 by means of Regulation No 4064/89 on the control of concentrations between undertakings,⁶ which was

² Ahn, S. (2002): "Competition, Innovation and Productivity Growth: A Review of Theory and Evidence" OECD Economics Working Paper No. 317.

³ Gutmann, J., & Voigt, S. (2014): "Lending a Hand to the Invisible Hand? Assessing the Effects of Newly Enacted Competition Laws", February 2014.

⁴ Aghion, P., Bloom, N., Badldell, R., Griffith, R., & Howitt, P. (2005): 'Competition and Innovation: An Inverted-U Relationship', *The Quarterly Journal of Economics*, 120 (2), 701-728. It should be noted, however, that the effects of competition on innovation are sometimes ambiguous, since a monopoly company may be induced to innovate in order to prevent its position in the market from being challenged by new entrants.

⁵ The Treaty of Rome, which entered into force in 1957, already considered competition policy to be one of the key instruments for completing the single market.

⁶ Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings.

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revised in 2004,⁷ in order to allow the Commission to examine ex ante the possible effect of concentrations with a Community dimension.⁸

As regards form, the examination carried out by DG COMP is increasingly governed by Community legislation.

After a period of informal, voluntary, yet essential, discussions⁹ to prepare the main operations, the parties notify the merger to the Commission which has an initial period of 25 days to conduct its appraisal. This period is five days shorter than in the United States, Japan and China. A large majority of cases are settled at this stage on the basis of a simplified procedure implemented since 2013.¹⁰ In the event of serious doubts, the Commission carries out a detailed examination in so-called second phase investigations. It then has 90 days to make its final decision.¹¹ If the Commission considers that the project could affect competition, it can impose “remedies” (first and second phases), which are essentially amendments to the project that uphold competition within the Union.

Within the EU, the timeframe for examining mergers¹² rose from 206 days on average between 1990 and 1995, to 337 days between 2011 and 2016.¹³ This is essentially due to the time that is now spent on discussions prior to notification.

As regards substance, European law requires the Commission to establish whether a concentration is compatible with the common market in light of the sole criterion of the significant impediment to effective competition (SIEC). This approach, set out in Article 2¹⁴ of the Merger Regulation, follows a series of steps aimed at:

- ◆ identifying the markets affected by the concentration
- ◆ estimating the risks of harm to competition on the basis of the degree of concentration on these markets¹⁵
- ◆ analysing a range of effects (on suppliers, customers, etc.) depending on whether the merger involves competing firms (in this case a horizontal merger), companies present at different levels of the value chain (vertical merger)¹⁶ or not directly linked to each other (conglomerate merger)

This analysis, which was widely revised and upgraded in 2004 to make it less formal and less legal-oriented (see box1), is now very close to that adopted by most OECD countries, notably the United States, and its credibility is widely recognised at international level.¹⁷

⁷ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

⁸ Unless there are cross-referrals between authorities in order to ensure that the concentration is handled by the entity most able to analyse its effects, the breakdown between authorities is based on a series of criteria laid down in Article 1(2) of Council Regulation (EC) No 139/2004.

⁹ DG COMP, *Best practices on the conduct of EC merger proceedings*, 20 January 2004.

¹⁰ As an indication, in 2018, the Commission adopted 393 decisions in merger cases: 366 were authorised during the first phase without corrective measures, 302 of which were subject to the simplified procedure.

¹¹ This period may be extended, for example, by 15 days, where commitments have been made by the parties after the fifty-fifth day of the proceedings.

¹² Calculated as the time between the public announcement of the proposed concentration and the final decision of the Commission.

¹³ *Real review timetables under the EU merger regulation*, Christopher Cook, 2017.

¹⁴ Article 2 states that “A concentration which would not 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 compatible with the common market”.

¹⁵ The Commission considers that a market share is problematic if it exceeds 25 % in a horizontal merger and 30 % in a vertical or conglomerate merger.

¹⁶ By the acquisition of a distributor, supplier or any other stakeholder present either upstream or downstream.

¹⁷ OECD, “*Public interest in merger control*”, Background Paper by the Secretariat for Session III at the 123rd meeting of the OECD Working Party No 3 on Cooperation and Enforcement, June 2016.

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Other countries, usually non-OECD members such as China¹⁸ or South Africa,¹⁹ have made different choices for historical and political reasons.

Box1: Revision of the merger rules in 2004

The Commission's rejection of several mergers²⁰ and the challenge of such decision by the Court of Justice of the European Union (CJEU)²¹ in some of the cases have sparked a debate on the implementation of merger control. This, in turn, has led to the upgrading of the framework for analysing mergers and the promotion of a less formal and less legal-oriented approach, in favour of a more economic one, thus bringing Europe closer to the American model.

In particular, Council Regulation (EC) No 139/2004 introduced a very important change in the "substantive test" implemented to examine a proposed concentration. It replaces the legal criterion of "creating or strengthening a dominant position" with that of "substantial lessening of competition" (SLC). This Regulation also provides for setting up a team of economists reporting to the Director-General, who are tasked with a highly independent review of the transactions. The team now comprises around 30 people with PhDs in economics.

Source: Task force

The definition of the relevant markets is also a focal point of the Commission's appraisal, (see box 2) since too broad (or too narrow) a definition of the relevant market leads to an underestimation (or over-estimation) of the market share of the undertakings concerned and of the concentration ratio. Two comments should be made here:

- ◆ When assessing the level of competition resulting from a merger on the European market, the Commission takes account of all the global players²² operating on this market. This means that when **the Commission states that there is no competition from a non-EU country, for the time being, in a given sector, the issue is not so much whether or not it takes into account non-EU country undertakings that may be active on the European market - because it does so - but rather to ensure that, when these undertakings are not active in Europe, it does not underestimate, based on the concrete information available to it, their ability to enter the European market in the medium term**: it is an analysis of the players that may compete with the merging parties.
- ◆ The Commission assesses the level of competition brought about by mergers of companies, whether European or not, on the European market alone (as the US Department of Justice and the Federal Trade Commission do for the US market). Asking it to explicitly take account of the effect of a merger on an external market, such as in a country in which one of the parties is exporting, would mean, at least in theory, that their European customers would be funding the international strategy pursued by the groups involved in the merger. This would be the case unless it is able to be shown that the

¹⁸ Article 15 of the Chinese Anti-Monopoly Act requires that the authorities take into account, in their appraisal, a range of issues including, "the impact of a transaction on third parties", "national economic development", the protection of "justifiable" interests for international economic cooperation, or "control of production surpluses in economic downturns".

¹⁹ In South Africa, the Competition Commission has to analyse the effects of a merger on "*the capacity of businesses owned by historically disadvantaged citizens [by Apartheid] to become competitive*".

²⁰ In particular, ATR/Havilland in 1991 and Alcan/Algroup/Pechiney in 1999. The refusal of the Alcan/Algroup/Pechiney merger led Alcan to take over successively Algroup and then Pechiney and ultimately to the disappearance of the latter.

²¹ Airtours/First Choice, Schneider/Legrand and Tetra-Laval/Sidel in 2002.

²² In accordance with Article 2(1) in the appraisal of concentrations, the Commission takes particular account of: "(a) *the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outwith the Community*".

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efficiency gains associated with the merger will lead to a control or even a reduction in costs for European customers, which is almost always difficult to prove. However, under current legislation, the development of competitiveness is not a criterion for appraising mergers.

Box 2: Definition of the relevant markets

The definition of the relevant markets makes it possible to delineate the market where the undertakings concerned by the merger compete with each other. It covers markets (product/service markets as well as geographic markets) where the parties operate but also related markets that could enhance the market power of the new entity.

A relevant market is defined as the location where supply and demand for a specific product or service meet. In theory, in a relevant market, the units offered are substitutable for consumers who can thus choose between suppliers where there are more than one. This means that each supplier is exposed to competition by the prices of the others. In practice, as two goods are rarely perfectly substitutable, the purpose of the market delineation is to define which goods can be considered as sufficiently substitutable to exercise competitive pressure on each other.

In order to define the relevant markets, the Commission can draw on qualitative and quantitative indicators (transport costs, legal constraints specific to the geographical areas, customer preferences, distribution channels, etc.) and use various methods of quantitative analysis:

- The diversion ratios are used to calculate which products buyers turn to, and to what extent, when faced with an increase in the price of the goods they usually consume
- The hypothetical monopolist test involves simulating a small increase in the price of a product (between 5% and 10%), which could result from the proposed merger, and observing the behaviour of consumers. If this price increase causes a significant number of consumers to buy another product and to make this increase unprofitable for the hypothetical monopoly, then the test concludes that the proposed merger will not encourage the merged entity to raise its prices excessively.

In carrying out this appraisal, the Commission relies on the data, studies and analyses provided by the parties, on information gathered from the other undertakings during the market tests and any available public information, market research or analysis.

Source: Task force

1.1.1.2. In terms of numbers, this legal framework was not an obstacle to mergers being carried out in Europe

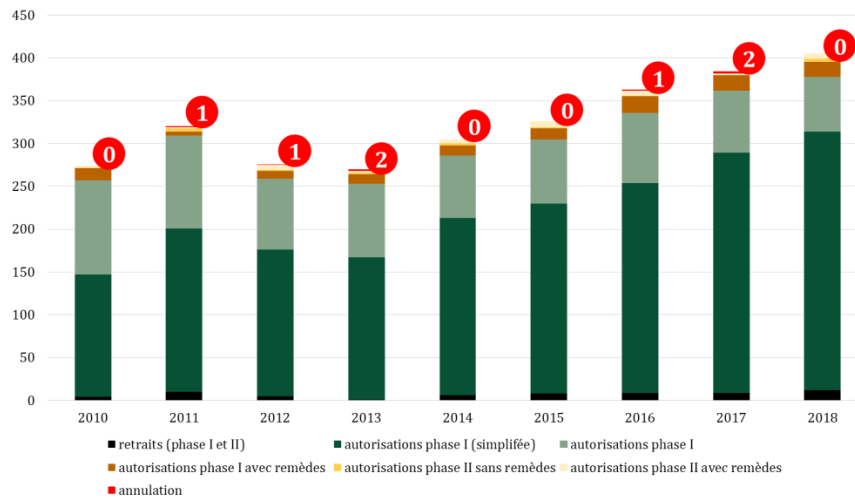
Since 2010 (and until the end of 2018), 2,980 mergers were notified to the European Commission²³ (see figure 1). These included:

- ◆ 2,704 accepted without conditions, i.e. 91%, of which 1,949 or 65% were accepted under the simplified procedure
- ◆ 156 mergers authorised subject to conditions, of which 118 during Phase I and 38 during Phase II
- ◆ 56 projects withdrawn before the end of Phase I and nine withdrawn before the end of Phase II
- ◆ 7 mergers, i.e. 0.003%, rejected by the Commission

²³ Almost 40 % of the notified transactions were carried out by undertakings in the manufacturing sector.

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Figure 1: Review of merger control since 2010



Source: Task force The numbers in the red discs show the number of mergers rejected.*

retraits (phase I et II)	withdrawals (phase I and II)
autorisations phase I avec remèdes	Phase I authorisations with remedies
annulation	cancellation
autorisations phase I (simplifiée)	Phase I authorisations (simplified procedure)
autorisations phase II sans remèdes	Phase II authorisations without remedies
autorisations phase I	Phase I authorisations
autorisations phase II avec remèdes	Phase II authorisations with remedies

The figures show that merger control by the European Commission is not a real quantitative constraint on mergers or concentrations.

In total, since January 2000, and taking account of the Commission's refusals on 6 February 2019,²⁴ sixteen cases have been rejected (out of 6,063 notified cases), twelve of which involved proposed mergers between European undertakings (see table 1). Since the entry into force of the 2004 Regulation, 11 mergers have been rejected compared to 18 between 1990 and 2004.

²⁴ Alstom/Siemens and Wieland/Aurubis Roled Products/Schwermetall operations.

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Table 1: List of mergers rejected by the Commission since 2000

Parties (nationality)	Date of refusal
MCI Worldcom and Sprint (USA)	28 June 2000
SCA (Sweden) and Metsä Tissue (Finland)	31 January 2001
General Electric and Honeywell (USA)	3 July 2001
CVC (Luxembourg) and Lenzing (Austria)	17 October 2001
Schneider (France) and Legrand France	4 December 2002
ENI (Italy), EDP (Portugal) and GDP (Portugal)	9 December 2004
Ryanair and Aer Lingus (Ireland)	11 October 2007
Olympic (Greece) and Aegean Airlines (Greece)	26 January 2011
Deutsche Börse (Germany) and Nyse Euronext (United States)	1 February 2012
UPS (United States) and TNT Express (Netherlands)	30 January 2013
Ryanair (Ireland) and Aer Lingus III (Ireland)	27 February 2013
Hutchison 3G UK (UK) and Telefonica UK (UK)	11 May 2016
Deutsche Börse (Germany) and London Stock Exchange Group (UK)	29 March 2017
HeidelbergCement (Germany), Schwenk (Germany), Cemex Hungary (Hungary) and Cemex Croatia (Croatia)	5 April 2017
Siemens (Germany) and Alstom (France)	6 February 2019
Wieland, Aurubis Rolled Products and Schwermetall (Germany)	6 February 2019

Source: Task force based on European Commission data.

At the same time, a number of mergers took place in that context: nine acquisitions of more than \$17bn between European undertakings since 2010 (see table 2).

Table 2: Main mergers between EU undertakings since 2010 (transaction value)

Date of the announcement of the merger	Target	Buyer (s)	Sector	Value (in \$bn)
7 October 2015	SAB Miller (UK)	AB Inbev (Belgium)	Beer	116.1
8 April 2015	BG Group Limited (UK)	Royal Dutch Shell Plc (UK)	Energy	86.4
15 June 2014	Covidien (Ireland)	Medtronic (Ireland)	Pharmaceuticals	48.1
18 October 2017	Aberti (Spain)	CSA (Spain), Atlantia (Italy)	Motorways	36.8
12 May 2010	Fortis (Belgium)	BNP Paribas (France)	Bank	23.2
15 April 2015	Alcatel-Lucent (France)	Nokia Corporation (Finland)	Telecom	23.1
4 October 2010	Wind Telecom (Italy)	VEON (Netherlands)	Telecom	23.0
15 December 2014	EE Limited (UK)	BT Group (UK)	Telecom	18.6
16 January 2017	Luxottica (Italy)	Essilor (France)	Optical	17.2

Source: Task force

There are, however, two caveats:

- ◆ While it is low, **the number of blocked deals remains slightly higher than that of other authorities:**
 - With fewer cases (2,274), the Chinese authority has, since 2008, approved all mergers involving two Chinese undertakings. Only two cases have been rejected: Coca Cola/Huiyan (2009) and Alliance P3 (2014)²⁵
 - In spite of Japan being an OECD member country, the Japanese Fair Trade Commission has not prohibited any merger since 2000

²⁵ The Qualcomm/NXP merger, which was abandoned in the summer of 2018, should be added to these cases.

- ◆ While it is an important indicator, the number of rejected mergers is not sufficient to evaluate the strictness of competition authorities. Moreover, it says nothing about **mergers which undertakings have preferred to abandon as they were aware of the difficulties in carrying them out.**

1.1.2. The fight against cartels and abuses of a dominant position has also changed with an eye to aligning the Commission's instruments with market realities and the functioning of the economy, in particular the digital economy

Cartels²⁶ and abuses of a dominant position²⁷ refer to conduct by which one or more undertakings exploit market power which is not based “on the merits” in order to allocate themselves an undue profit. These two situations call for the intervention of DG COMP, whose task is to detect anti-competitive behaviour, to put an end to it and, where appropriate, to impose sanctions on the undertakings guilty of such behaviour after characterising the practices in question on the basis of:

- ◆ in the case of cartels, Article 101(1) TFEU. It should be noted, however, that even if an agreement can be regarded as restrictive, it may be authorised under Article 101(3) TFEU if it ultimately has the effect of stimulating competition (for example, by promoting technical progress or by improving distribution).
- ◆ in the case of abuse of a dominant position, Article 102 TFEU. Although it is not illegal per se for an undertaking to enjoy or acquire a dominant position, it is prohibited “to abuse a dominant position” in order to prevent market entry or to squeeze out competitors.

The antitrust approach has been overhauled to better deal with cases of cartels:

- ◆ With a move away from cumbersome and administrative ex ante notification of agreements between undertakings to ex post controls.²⁸ This reform allowed for procedural savings and significant gains in time, both for companies and for the Commission, at the expense of greater, but manageable legal uncertainty for undertakings.
- ◆ By revising, in 2002, the leniency policy inspired by the criminal law of the United States²⁹ and by which almost 80% of cases are detected. Subject to certain conditions, the system grants partial or total immunity from fines to companies which are members of a cartel and which enable it to be dismantled by providing information to the authorities.

²⁶ In the context of a cartel, undertakings coordinate their behaviour in a way that is harmful to competition, for example by colluding on prices, controlling the production of outlets, technical development or investments, or sharing markets or sources of supply between competitors. More “lightweight” methods of coordination exist. They can take the form of exchanges of information between competitors, going beyond the communication of lawful information.

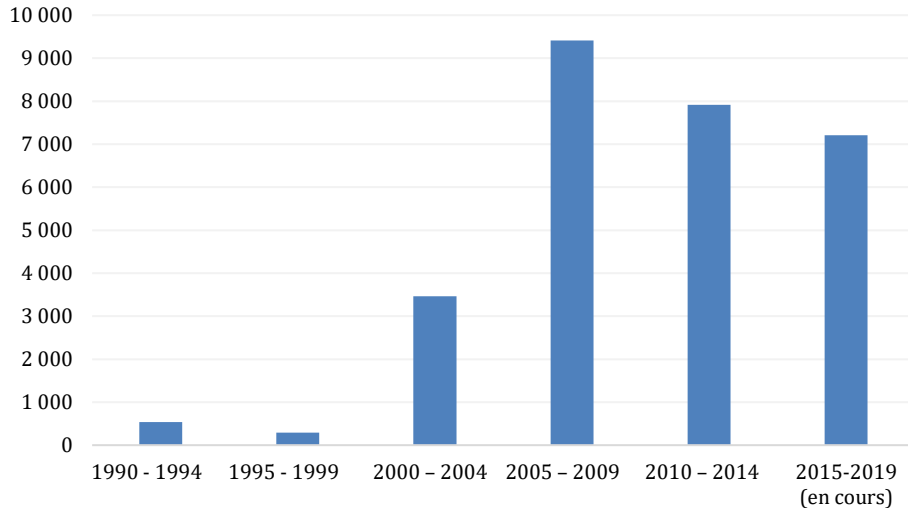
²⁷ In the case of abuse of a dominant position, the undertaking in question uses its market power to extend such power by excluding competitors, either on the market where it enjoys a dominant position or in a related market. These abuses can take various forms (tying, predations, quantity discounts, price squeeze, etc.) and reduce the intensity of competition. More “lightweight” methods of coordination also exist. They can take the form of exchanges of information between competitors, going beyond the communication of lawful information.

²⁸ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

²⁹ The first policy was introduced in 1996 and proved to be ineffective, since the conditions for granting leniency were too restrictive with too few incentives.

These changes were accompanied by a significant increase in the fines imposed on companies. For instance, the amount of fines imposed by the Commission on businesses for cartel practices has more than doubled since the early 2000s (see figure 2). As an example, on 19 July 2016, the Commission imposed a total fine of €2.93bn (after the Court ruling) on five European truck producers for colluding on gross prices of heavy goods vehicles and commercial vehicles in the European Economic Area between 1997 and 2011.

Figure 2: Commission fines imposed on cartels since 1990 (in EUR million)



Source: Task force based on figures provided by the European Commission.

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In the case of abuse of a dominant position, **the increase in fines is due in particular to the record amounts charged to digital companies.** For instance, fines have been imposed on Google on three occasions since 2017. In July 2018, the Commission imposed a fine of €4.34bn on Google for breach of EU competition rules on the grounds that, since 2011, the company had imposed illegal restrictions on Android device manufacturers and mobile network operators in order to consolidate its dominant position on the general online search market.

In the latter field, while DG COMP has the means to investigate and punish possible exclusionary or exploitative abuses by platforms, the key issue is its responsiveness, particularly in view of the speed at which companies operating in this field acquire market power.

1.1.3. The State aid regime, which is unique to the EU, has recently changed to limit the number of cases subject to notification and to foster major and innovative projects

Besides the tasks usually entrusted to competition authorities, DG COMP is also responsible for State aid. This is a specificity of the EU with three objectives:

- ◆ A primary objective of the **achievement of the internal market**, in particular harmonisation of competition conditions and the arrangements for supporting businesses between Member States
- ◆ An incidental target of **limiting negative cross-border externalities** between Member States

- ◆ A **fiscal objective**, which is unrelated to the proper functioning of the internal market. In this respect, the Commission’s supranational control of State aid is part of discussions with governments on compliance with common fiscal rules and on limiting inefficient public spending.

1.1.3.1. The Treaty prohibits State aid if it is likely to distort competition

Articles 107 to 109 TFEU lay down a general principle that State aid may be prohibited where it is liable to distort competition.³⁰ In fact, State aid is deemed to be incompatible with the internal market, except for the categories of aid declared compatible as a departure from the general principle. The exceptions are intended to address market failures and to promote objectives of common interest generating positive externalities.

The compatibility of State aid with the market is assessed in the light of the TFEU, but also in the secondary legislation on State aid developed by the Commission essentially in two sets of legal instruments: The regulations laying down the rules on the compatibility of aid with the internal market³¹ and the guidelines, frameworks or other communications from the Commission specifying the criteria according to which it intends to assess the compatibility of the aid.

Box 3: Classification as State aid

For a measure to be classified as State aid, four cumulative criteria, which the Commission assesses in an extensive manner, must be met:

- A transfer of state resources which is imputable to the State
- A selective advantage, i.e. favouring certain undertakings, products or territories. It is often the absence of selectivity that allows classification as State aid to be avoided since, on that basis, the so-called “general” measures to support the economy or measures taken by a public entity acting as a private market economy operator are excluded from the scope of Article 107
- An effect on competition in the internal market, even if limited to the Member State
- An impact on intra-Community trade, which is generally deemed to have been fulfilled if the first three criteria are met

Source: Task force

Under Article 108(3) TFEU, any new aid or alteration of existing aid must be notified by the State and approved by the Commission before it is implemented, otherwise it is considered to be illegal. This does not preclude future compatibility with the Treaty. Certain aid is, however, exempted from the notification requirement (“existing” aid within the meaning of amended Procedural Regulation No 659/1999, *de minimis* aid and aid fulfilling the conditions of the General Block Exemption Regulation, GBER).

³⁰ Article 107(1) TFEU provides that “*Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*”.

³¹ These regulations include general regulations, comprising the General Block Exemption Regulation (GBER) No 651/2014 and Commission Regulation (EU) No 1407/2013 on *de minimis* aid and specific regulations on agriculture and forestry, fisheries and aquaculture. Other regulations, which deal with State aid, specify the provisions in force concerning authorisations and procedure.

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A distinction should be made between:

- ◆ “individual” aid awards, which are granted on an ad hoc basis to one or more beneficiary undertakings, which in most cases are subject to notification
- ◆ Aid schemes under the revised 2014 GBER,³² on the basis of which one-off aid measures may be granted, without notification, to several beneficiaries not yet determined or individualised

To anticipate possible difficulties relating to the content of the proposed aid or scheme, the Commission has introduced a pre-notification phase which allows for changes to the arrangements before they are finalised and provides entitlement to a so-called “simplified procedure”. This pre-notification phase, which takes the form of informal discussions with the Commission services, may take several months and was subject to formal guidelines³³ in 2009. Relevant government departments have highlighted the cumbersome nature of the procedure.

1.1.3.2. This legal framework has been revised and upgraded to make exemption the rule and to foster the funding of major innovative projects

Upgrading State aid has resulted in the recasting of most of the legislation and regulations governing the compatibility criteria. This means that the Commission has moved away from ex ante control to ex post control, in return for increased transparency (for exempted schemes with an annual budget exceeding €150 million) and evaluation (for aid exceeding €500,000) obligations:

- ◆ The GBER was substantially amended with the entry into force on 1 July 2014 of Regulation (EU) No 651/2014 of 17 June 2014. It extends Regulation (EC) No 800/2008 which preceded it,³⁴ raises the ceiling for admissible aid and relaxes its oversight
- ◆ The *de minimis* Regulation was also amended. Following its revision, which took effect on 1 January 2014, it no longer excludes undertakings in difficulty from its scope³⁵

The result of the reform of the GBER has been a significant increase in the share of exempted aid (see chart 1):

- ◆ Since 2015, more than 96% of new aid (74% in the case of France) have been exempted, an increase of 28% compared with 2013
- ◆ In 2017, 87% of aid was exempted (62% in the case of France)
- ◆ In terms of expenditure, 48% of the amounts of aid granted under the State aid scheme were exempted (32% in the case of France)

Certain sectors make frequent use of the GBER. Over 80% of State aid expenditure on training, R&D and regional development comes under the block exemption regime.³⁶

³² Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty

³³ Code of Best Practices for the conduct of State aid control procedures.

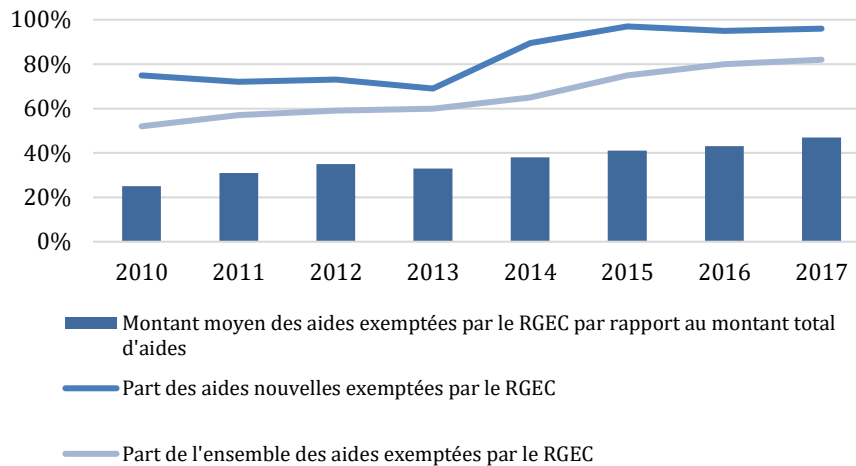
³⁴ It extends Regulation (EC) No 800/2008 to the sports infrastructure sector, the development of innovative clusters, the development of organisational and procedural innovations, the cultural field, new forms of social assistance aimed at developing people’s autonomy and improving their adaptation to the working environment. A further extension adopted on 14 June 2017 extended the scheme to regional airports and ports.

³⁵ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 TFEU to *de minimis aid*. It replaces Regulation (EC) No 1998/2006 of 15 December 2006.

³⁶ State Aid Scoreboard 2018, European Commission.

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Chart 1: GBER exemption for State aid (2010-2017)



Source: Task force based on data provided by the European Commission.

Montant moyen des aides exemptées par le RGEC par rapport au montant total d'aides	Average amount of aid exempted by the GBER compared to the total amount of aid
Part des aides nouvelles exemptées par le RGEC	Proportion of new aid exempted by the GBER
Part de l'ensemble des aides exemptées par le RGEC	Proportion of overall aid exempted by the GBER

An analysis of the GBER focused on France shows lower exemption rates than the EU average, which may reflect a design of the country's support schemes which only partially reflects the European regulatory framework. This is in line with the June 2015 findings of the Inspectorate General of Finance (IGF) in a State aid report which noted France's under-use of the exemption schemes.³⁷

At the same time, **the Commission adopted a Communication on Important Projects of Common European Interest (IPCEIs)**,³⁸ setting out the conditions under which Member States can support transnational projects of strategic importance to the EU within the meaning of Article 107(3)(b) TFEU.

This specific State aid scheme aims to encourage Member States to support projects that clearly contribute to economic growth, employment and Europe's competitiveness. It may represent the basis for a future European industrial policy.

Although the Commission's Communication dates back to June 2014, it has only been used, to date, in the infrastructure field. But, in December 2018, and for the first time in a technology sector, the Commission authorised a French, German, Italian and UK consortium to grant public support of €1.75bn to a joint research and innovation project in the field of microelectronics.³⁹ Other projects are being developed, including one on the design and production of new generation battery cells and modules for electric vehicles.

³⁷ IGF Report No 2014-M-094-02.

³⁸ Communication from the Commission 2014/C 188/02 - Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest.

³⁹ http://europa.eu/rapid/press-release_IP-18-6862_fr.htm.

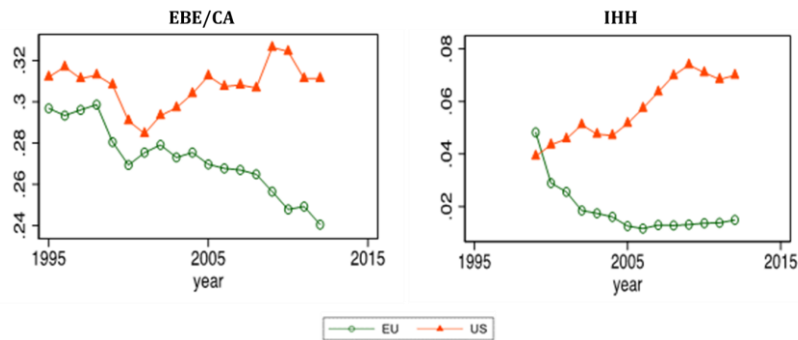
1.2. Our competition policy is enforced more strictly than in non-EU countries and is more restrictive in terms of State aid, while the EU is having to address the rise of China and the digital challenge

1.2.1. While competition policy has met its objectives of harmonising the internal market, it is enforced more strictly in Europe than by our competitors

1.2.1.1. Competition law seems to have been enforced more strictly in Europe than in the US in recent years

A number of studies show a mixed trend in competitive intensity between the United States and Europe in recent years. While concentration has increased in the United States over the last two decades,⁴⁰ especially in sectors not exposed to international competition, this change has been less marked in Europe, with the degree of concentration of the economy and prices remaining relatively stable.

Figure 3: Evolution of margins (left) and concentration (right) in the US and in Europe since 1995⁴¹



*Source: Gutiérrez and Philippon (2017).** The graph on the left depicts the change over time of the ratio of the average gross operating surplus of enterprises in the relevant sectors to their turnover. It reflects the margins generated by companies. The right-hand graph shows the development over time of the Herfindahl-Hirschmann Index (HHI) which is used by competition authorities and which measures market concentration. This index (composite in this case to represent an average industrial concentration in the area concerned) is calculated by adding the squares of the market shares of the enterprises in a sector and then weighting these sectors (and the countries in the case of Europe) appropriately. An HHI of more than 2,000 would generally reflect a concentrated market structure that presents a competitive risk.

Without playing down other factors that explain this trend (the effects of the 2008 crisis, the lack of specific rules on the regulation of platforms, etc.), **it is clearly also the result of stricter enforcement of competition policy in Europe than in the United States:**

⁴⁰ See Gutiérrez G., Philippon T. (2017): “Declining Competition and Investment in the US” NBER Working Paper No 23583; Gutiérrez G., Philippon T. (2018): “How EU Markets became More Competitive Than US Markets: A Study of Institutional Drift”, BER Working Paper No 247000; Bajgar M., Berlingieri G., Calligaris S., Criscuolo C., TimdJ (2019): “Industry Concentration in Europe and North America”, OECD Productivity Working Papers, 2019-18, OECD Publishing.

⁴¹ See Gutiérrez G., Philippon T. (2018), op.cit. Concentration and margins in the five industries which have been most concentrated in the United States since 1995: information telecom, arts and recreation, wholesale and retail trade, other services and information publishing.

- ◆ In the US, this is thought to be **the consequence of the relaxation of competition policy in the 2000s** and the reform of the merger guidelines in 2010, the new version of which is considered to be more flexible⁴² than the previous versions
- ◆ In Europe, DG COMP's higher "activism" can be partly explained by **its higher degree of independence from political interference**, which is aimed at preventing and neutralising Member States' "capture" strategies vis-à-vis EU institutions

A comparative analysis of cases dealt with by the US and European authorities, even if it dates back a little, confirms this finding. On the basis of a sample of EU and US mergers between 1993 and 2003 - and therefore before the 2004 revision of the Merger Regulation - and taking account of the specific features of each case, it was possible to compare the decision that the other authority would have taken had it had to decide on the case at hand.⁴³ The conclusion of this analysis is that merger control in Europe was stricter, in particular in the case of mergers leading to a dominant position and in cases of relatively low market shares.⁴⁴ DG COMP appears to have a more repressive approach than that of the US authorities in relation to collusive behaviour.

While these findings tend to confirm stricter enforcement of competition law in the EU, this is also thought to have led to higher concentration, margins and prices in the US than in Europe.

1.2.1.2. This phenomenon can be explained by a number of factors

First, the Commission has a stronger tendency than other authorities to make its merger authorisations conditional on strong, mainly structural, compensatory measures.

The Commission points out that the effectiveness of behavioural remedies will be assessed by reference to structural remedies, which are used as a benchmark. It considers that only the latter "prevent, durably, the competition concerns which would be raised by the merger as notified, and do not, moreover, require medium or long-term monitoring measures".⁴⁵ In practice, when the Commission identifies competition concerns, undertakings are in most cases obliged to dispose of assets to remedy them. **Of all the cases approved subject to conditions in 2017 and 2018, less than 20%⁴⁶ were subject to behavioural commitments in the EU, compared to 80 % in China during the same period.**⁴⁷

These commitments sometimes represent very strong concessions imposed on companies, with the **risk of compelling European players to withdraw from activities or dispose of strategic assets in favour of competitors from outside Europe.** Overall, since 2010, this situation has occurred in almost half of the cases.⁴⁸ This applied to the transfer of Hardware

⁴² See Grullon G., Y. Larkin and R. Michaely (2018): "Are US Industries Becoming More concentrated?", forthcoming, Review of Finance.

⁴³ Bergman et al. (2010): "Comparing Merger Policies in European Union and the United States", Rev. Ind. Org.305

⁴⁴ On this subject see also Duso T., Gugler K. and Yurtoglu B. (2011): "How Effective is European Merger Control", Discussion Paper Series of SFB/TR 15 Governance and the Efficiency of Economic Systems, Free University of Berlin, Humboldt University of Berlin, University of Bonn, University of Mannheim, University of Munich.

⁴⁵ Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004.

⁴⁶ The figure is slightly lower than the 25% trend observed since 2010.

⁴⁷ Out of ten cases approved subject to conditions in 2017 and 2018, eight were subject to behavioural commitments in China: Dow/DuPont (2017), Broadcom/Brocade (2017), HP/Samsung (2017), Agrium/Potash (2017), Maersk Line v Hamburg Süd (2017), Bayer/Monsanto (2018), Luxottica/Essilor (2018) and Linde/Praxair (2018).

⁴⁸ 41 divestments resulting from structural commitments have led to the sale of assets or activities to stakeholders outside the EU out of the 83 transactions for which data is available.

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Security Modules (HSMs) from the French company Thales to its US competitor Entrust Datacard in February 2019.⁴⁹

Box 4: Behavioural remedies

To remedy distortions of competition created by a merger, the parties may make commitments to the Commission in return for authorisation of the concentration. These commitments or “remedies” can be of a structural nature (usually divestments) or behavioural remedies: amendment of long-term contracts, opening technology, infrastructure, resources or networks to a competitor, eliminating links with competitors or any other type of constraints on the business practices of the future group.

These behavioural remedies have the advantage of being reversible and adaptable to market developments. For instance, on 22 June 2017 in Decision No 17- DCC-92 reviewing the injunctions in the decision on the Canal Satellite –TPS merger, the French Competition Authority eased the injunctions imposed on the Canal Group in 2012 on the grounds that the arrival of competitors such as Netflix and Amazon had weakened the channel’s dominant position.

Source: Task force

Second, the CJEU exercises heightened control over merger decisions that increases the constraints on DG COMP. There are at least two reasons for this:

- ◆ The successive decisions of the Court of Justice on rejections issued by the Commission in 2002 in the Airtours/First Choice, Schneider/Legrand and Tetra-Laval/Sidel cases led DG COMP to heighten obligations in terms of data transmission and analysis imposed on the parties
- ◆ The publication of all DG COMP decisions (as opposed to only refusal decisions in the US) and the Court’s case law⁵⁰ which places on the Commission the burden of proving that a merger authorisation decision does not raise competition concerns. This forces the Commission to go into great detail, in particular concerning elements that do not, at first glance, raise competition concerns. This has led to an increase in the arguments put forward and in the number of pages of decisions. Complex cases typically have more than 500 pages, which is three to four times more than at the very beginning of the 2000s.⁵¹

As regards cases of vertical mergers more specifically, the analysis of the US authorities is considered to be more flexible than that of DG COMP, in particular in similar cases,⁵² as the Federal Trade Commission (FTC) generally disregards the “vertical effects” of these mergers, unlike DG COMP.

Lastly, and even if it does not have a direct link to the degree of concentration of these two economies, it is striking that **our competitors, China and, to a lesser extent, the United States, have, in the absence of a regulatory framework equivalent to our State aid rules, a great deal of freedom to develop sectors and to foster the establishment of activities in their countries** with high levels of public support. This is the case, for instance, in the semiconductors⁵³ or batteries sectors. In the latter sector, for example, \$2.4bn of the \$787bn

⁴⁹ <https://www.thalesgroup.com/fr/group/investisseurs/press-release/thales-signe-accord-definitif-ceder-son-activite-gp-hsm-entrust>.

⁵⁰ Impala v Commission, 13 July 2006, T-464/04 and Bertelmann and Sony v Impala, 10 July 2008, C-413/06.

⁵¹ *Real review timetables under the EU Merger Regulation*, Christopher Cook, 2017.

⁵² In the case of Abbott Laboratories/Alere in 2017, the FTC reached the same conclusions as DG COMP on horizontal effects, but did not point to potential foreclosure effects.

⁵³ In a study in August 2018 (which preceded the conclusion of the microelectronics IPCEI and therefore did not take into account the amounts allocated under this project), the World Semiconductor Council compared regional investment programmes worldwide. Amounts invested in the EU represented around one third of the US amounts (part of which, financed by the Defense Advanced Research Projects Agency (DARPA), was not included in the amount presented, for reasons of confidentiality) and less than 1/50th of the Chinese amounts.

in the US economic recovery plan adopted in 2009 have been earmarked for the battery cell sector.

While it is difficult to establish a counterfactual for determining whether aid granted by our competitors could have been granted under a scheme such as that in force in the EU, the DG Research and Innovation (R&I) commissioned a study to look into this issue in the field of R&D.⁵⁴ It is based on an analysis of eight cases where publicly funded companies set up their R&D centre in China, Japan, South Korea and the US. While this sample does not allow definitive conclusions to be drawn concerning the aid scheme in force in the EU, it is interesting to note that in seven out of eight cases the aid in question is unlikely to have been judged compatible with EU law.

1.2.2. The rise of China and the digital challenge make it necessary to raise the question of the effectiveness and agility of competition policy resources and the policy's place in the European institutional game

The European legal framework on competition is almost fifteen years old, and since its last revision, the global economy has undergone major changes. Competition policy now faces two main types of challenge:

- ◆ China is taking on an aggressive industrial policy, backed by the public authorities, and is building national champions, which are destined to be global in the future, and against which Europe needs to better equip itself (see 1.2.2.1)
- ◆ The rise of platforms, mainly Chinese and American, the very nature of which is based on the acquisition of dominant positions which are difficult to challenge, requires adaptation to these new markets (see 1.2.2.2)

1.2.2.1. Against a backdrop of international trade tensions, European competition policy is having to deal with the rise of emerging players, in particular Chinese, who are not playing by the same rules

The European Council of 21 and 22 March 2019 provided an opportunity to reiterate the EU's priority of ensuring fair competition within the single market and at global level.⁵⁵ In this respect, the rise of China and the widening of its reach, in particular to several EU Member States, is a challenge for European competition policy.

China's increased economic power is part of a global shift of the centre of gravity of the world economy towards Asia.⁵⁶ This rise is driven by the enrichment of its middle class and by a domestic market of more than 1.4 billion people. Nevertheless, the Chinese strategy is mainly based on meticulous economic planning ("Made in China 2025", "Silk Road", etc.) and is very bold in terms of gaining market share, for instance. While there were no Chinese companies in the world's top ten manufacturers of solar panels in 2004, there are now seven.

The State plays a leading role and relies on:

- ◆ the **presence of state-owned enterprises that implement the economic agenda** of the Chinese government.⁵⁷ These companies, particularly those belonging to central

⁵⁴ *State aid support schemes for RDI in the EU's international competitors in the fields of Science, Research and Innovation*, Bird & Bird, November 2015.

⁵⁵ European Council conclusions, 21 and 22 March 2019.

⁵⁶ In just over ten years, China has almost caught up with the EU in economic terms. While in 2005, the European economy, with its current scope, was around six times the Chinese economy, the ratio was almost balanced in 2018 (€13,500 billion for the EU-27 and €11,400 billion for China).

⁵⁷ Between 25% and 30% of Chinese industrial production depends on these companies.

government, enjoy a special status that exempts them, in practice, from merger control.⁵⁸ For example, the merger between the two telecoms giants China Unicom and China Telecom in 2009 was not notified to the competition authorities.

- ◆ a **financial system that is highly dependent on public institutions**, which makes it difficult to identify precisely the financing channels and forms of support, subsidies to banks that “trickle down” to industrial players
- ◆ various public support and constraint mechanisms⁵⁹ to facilitate the emergence of national giants (but also “zombies” which only survive due to subsidies)
- ◆ **restrictions on access to public procurement** for non-Chinese firms and barriers to foreign investment (local content requirements, forced technology transfers, preferential treatment for Chinese companies, etc.)
- ◆ a **strategy for setting technical standards and specifications**, particularly in emerging technologies where China wants to assert itself as a world leader, in order to impose international standards in the long term. This would provide a favourable framework for Chinese companies.

Despite the lack of transparency and the difficulties in gathering quantitative information, the economic distortions associated with public subsidies are well documented in certain sectors such as aluminium.⁶⁰ Conversely, although forced transfers of technology seem to be a reality in many sectors, they remain difficult to prove because of their indirect and non-regulated nature.

While the development of the Chinese domestic market is expected to offer new opportunities for our companies, the rise of China, due to the continued strong barriers to entry⁶¹ and the lack of a level playing field,⁶² is a threat. It therefore seems that the success of China’s strategy will, in the absence of a reaction, be to the detriment of the interests of the European economy.

In a context of increasing international tensions and non-cooperation between the major trading powers, these practices represent a challenge for the EU and, especially, for its competition policy - but also for its trade policy:

- ◆ The size and financial strength of certain companies, both from China and from other countries such as Russia and the United Arab Emirates, make them **potential dominant players capable of operating within a short period of time on the European market**, whether they are already on the internal market or not. It is, however, difficult for the competition authorities to substantiate this general impression with facts.
- ◆ **The massive subsidy practices of** certain countries, in the absence of a worldwide level playing field and the unenforceability of the EU State aid system abroad:

⁵⁸ There are several reasons for this: (i) the managers of these national-scale undertakings enjoy the same or higher positions than the Minister with responsibility for competition; (ii) merger projects between state-owned enterprises are approved at a higher level on the basis of industrial policy priorities.

⁵⁹ For example, in the aluminium sector, the introduction of export taxes has fostered overcapacity of primary aluminium, allowing large processing export companies to benefit from inputs at lower costs.

⁶⁰ The OECD report (January 2019), “*Measuring distortions in international markets: The aluminium value chain*”, OECD Trade Policy Papers, No. 218, OECD Publishing, sets out how China imposed itself as the world leader in aluminium production in all segments of the value chain, highlighting in particular how government support for this industry led to significant overcapacity.

⁶¹ For example, in aviation, although the Chinese authorities certified the Airbus A350-900 in July 2018, talks on a bilateral aviation safety agreement (BASA), setting out a framework and procedures to facilitate the mutual recognition of certificates between the European Aviation Safety Agency (EASA) and its Chinese counterpart (CAAC), which started in 2016, have remained unsuccessful.

⁶² The level playing field concept refers to a playground which does not favour any of the teams present. Metaphorically, the field is “level” when there is no interference (massive State aid or distortions of competition) affecting the ability of players to measure themselves under fair conditions.

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- increase their power and speed of arrival on the European market without this being able to be accurately documented
- represent a real comparative advantage helping these companies conquer international markets, as the sophistication of subsidy mechanisms does not always make it possible to do away with them on grounds of incompatibility with World Trade Organization (WTO) rules.

1.2.2.2. The rise of the digital economy and powerful and multifaceted players raises new challenges for the competition authorities, which have, however, shown that they are able to adjust

The second challenge facing competition policy is the **digitalisation of the entire economy and the rise of digital platforms**, which are considered to represent the third industrial revolution. These issues have spurred radical change for society and the economy: global business models easily and rapidly rolled out, incumbent business models being challenged, short innovation cycles, ubiquity of supply of goods and services, blurred frontiers between free and market activities, move away from price-based competition to innovation- and quality-based competition.

The features of these platforms raise a number of issues for competition authorities.

The main feature of the digital economy is to foster the often swift emergence of dominant players and to maintain “network effects”, as the quality of service provided by platforms depends on the size of their user base and the data they generate. By cutting the cost of transactions for users and by better matching both sides of the market, these network effects, whether direct⁶³ or indirect,⁶⁴ essentially favour large platforms and thereby the concentration of the sector through a “snowball” effect. There are two significant repercussions for competition:

- ◆ The large size of the platforms, the multifaceted nature of their activities and the strong synergy they generate between them encourage **the appearance of conglomerate effects**, i.e. where a firm is able to increase its business in a given segment by drawing on the market power it possesses over another product or market. For instance, Google, which initially operated in general content searches, was subsequently able to expand its business to vertical search engines (such as Google Shopping).
- ◆ **This trend for large scale platforms leads to a higher probability of abuse of a dominant position**

To address these challenges, competition policy can rely on a **flexible rulebook**, the concepts of which can change and adjust to new practices. For instance:

- ◆ The current rules did not prevent the Commission from imposing a fine of €2.42bn on Google for having abused its dominant position on the market for search

⁶³ Direct network effects appear when each network user has a connection to the network of other users “of the same type”. Therefore, the benefit that a user gains from the service increases with the number of connected persons. The topical example is instant messaging such as WhatsApp.

⁶⁴ Indirect network effects appear when several categories of users interact on platforms connecting different types of stakeholders in a “many-sided” market, such as multiple buyers and multiple sellers. Examples are Amazon, Uber or Google (between users of the search engine and advertisers).

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engines by favouring its own price comparison service, Google Shopping, in its search results and ranking behind those of its competitors⁶⁵

- ◆ In the absence of harmonised taxation adapted to the practices of digital giants at European level, the Commission has relied on State aid rules to put an end to distortions of competition involving GAFA and to summon Ireland before the CJEU for non-recovery of €13bn of tax benefits granted illegally to Apple⁶⁶

Nevertheless, the digitalisation of the economy, and in particular the complexity of its instruments and business models, raises more specific problems for the competition authorities whose intervention in this field supplements that of sectoral regulators and regulatory provisions specific to the digital sector.⁶⁷

While the human resources and skillsets earmarked for these issues are limited in DG COMP,⁶⁸ certain trends require, at the very least, the development of the Commission's instruments and practices to be considered, at a time when:

- ◆ **The presence of algorithms makes behaviour opaque and difficult to analyse** and the size of the players and the ballooning of digital trade require the collection and processing of huge amounts of data: 5.2 terabytes of data covering 1.7 billion searches as part of the Google Shopping case, for instance.
- ◆ **The faster pace of change in business and market life calls for swift and proactive processing of cases**
- ◆ The authorities' task is made more complicated by the development of digital firms through external growth or even "killer" acquisitions in a market where
 - the free use of data and free business models are revolutionising the way the "value" of a company is assessed. For example, the acquisition by Facebook of WhatsApp (400 million users in 2014 but turnover, estimated at the time by Forbes, of only \$20 million) for an amount of \$19bn was not examined by the Commission
 - start-ups may have an interest in being acquired by stakeholders who have almost unlimited capacity to make acquisitions^{69 70}

A compounding factor for the Commission is that these problems interact with other issues (use of data, privacy, effects on the quality of information) where competition policy is not always best placed to act directly. All these issues raise questions of sovereignty that are exacerbated by the fact that the digital leaders are American (Google, Amazon, Facebook, Apple, Microsoft), Chinese (Alibaba, Baidu, Tencent) and non-European.

Overall, **there is a need to retain control over these quasi-systemic stakeholders, while at the same time promoting the emergence of European players.** The task force also noted the ongoing discussions on sectoral regulation which would marshal instruments adapted to digital technology and, in particular, to the dominant firms in this field, but whose impact on innovation would need to be assessed.

⁶⁵ http://europa.eu/rapid/press-release_IP-17-1784_fr.htm

⁶⁶ http://europa.eu/rapid/press-release_IP-17-3702_fr.htm

⁶⁷ For instance, the adoption of the GDPR has had a significant influence on competitive conditions in Europe.

⁶⁸ The next annual EU budget provides for a line of appropriations to recruit data scientists for DG COMP and to equip the Directorate with resources which match the digital challenges.

⁶⁹ For instance, \$270 billion of cash flow for Apple in 2017.

⁷⁰ Since 2010, according to publicly available information, Google is thought to have taken interests in 111 start-ups, Apple in 39, Facebook in 53, Twitter in 38, Amazon in 31 and Microsoft in 44.

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In this context, France and other Member States, such as Germany and Austria, as part of its Presidency of the Council in the second half of 2018, have stated their determination to promote an integrated, sustainable and globally competitive industrial strategy. This is why the Council invited the Commission “to present, by the end of 2019, a long-term vision for the EU’s industrial future with concrete measures to implement it”.

Without calling into question the existence of the competition rules which oversaw the implementation of the internal market, **there is a need to consider how these rules can be more effectively matched to European industrial goals** (economic and legal ecosystem conducive to the emergence of “champions”, support for disruptive innovation, reorientation of industrial sectors in difficulty) to:

- ◆ defend European economic sovereignty, which could be defined as our ability to produce certain key components for our industry and to keep control of essential infrastructure, whether physical or intangible
- ◆ create or maintain industrial jobs in the EU
- ◆ promote the interests of consumers in the longer term as these are threatened by the unanticipated entry of non-EU players into the European market
- ◆ improve the export performance of the relevant firms and bring our current account into balance

To address all these challenges, trade policy, the implementation of a genuine European industrial strategy or sectoral regulation are instruments that may sometimes appear more effective than competition policy. However, in **order to take account of the continuing misalignment of the interests of the Member States and the difficulty in activating certain defensive levers, such as anti-subsidy duties, or in promoting offensive rules in trade matters, the ways in which our competition policy should develop need to be considered.**

2. European competition policy and the EU's strategic interests

The following set of proposals does not amount to a relaxation nor bolstering of the instruments at DG COMP's disposal, but rather to the development of these resources to make them more agile, effective and better able to take account of the changing nature of the subject matter to be controlled and the international economic context, which is not the same as when these rules were laid down.

Concern about the EU's strategic interests when implementing European competition policy has nothing to do with the promotion of protectionism, but with asserting sovereignty and a form of European independence. This in turn involves the EU is equipping itself with the means to respond to the emergence of non-European players and the leverage required to negotiate in an increasingly less cooperative world. Without a response from the EU, these players will cause a deterioration in the conditions for competition in the Union in the long term and will "capture" European resources, in particular intangibles. These resources will be central to future wealth generation with consequences for European jobs, our capacity to get things done, and also for the independence of our media and our privacy.

2.1. Improve instruments and their implementation to make them more agile and effective in the face of digital challenges

The digital revolution has raised concerns and specific questions. Digital regulation needs to take account of the special characteristics of the sector, without, however, creating a "sector-specific competition law" or rolling out mechanisms that would stifle innovation and reduce the pro-competitive effects which are beneficial to consumers.⁷¹

2.1.1. Consider sector-specific regulation and change our rules to factor in new forms of behaviour, in particular those of digital players

In this context, the capacity of competition law to address these issues should be discussed. This horizontal law cannot, at least in theory, target digital players specifically. These limitations are subject to broad discussions today and lead to other forms of regulation being considered. These include an asymmetric proactive regulation of digital players, based on the model introduced in the telecoms sector.

Ex ante regulation⁷² would involve a scope of intervention that could overreach its intended target and that could be costly both for public authorities and for the smooth operation of the market. Nevertheless, the task force acknowledges the need to:

- ◆ **identify a category of players with a systemic dimension**, both from an economic and social standpoint (hate speech, fake news, access of SMEs and start-ups to market places, protection of personal data, cybersecurity, etc.), to prevent the risks that these major players pose for European citizens as a whole

⁷¹ Increased transparency on price and the standard of products and services, easier access to competing offers, new business opportunities, reduction of transaction costs, development of new services, etc.

⁷² The potential solution of "terminal neutrality" would require a choice between lower prices and greater freedom of choice.

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- ◆ **entrust the supervision of these players to a specialised committee, with powers to examine and investigate**, thereby involving DG COMP staff alongside, in particular, officials from DG CONNECT, DG GROW and DG HOME. This structure, whose cooperation with the EU Observatory on the Online Platform Economy⁷³ created in 2016 should be determined, could, for instance, have the power of injunction to issue formal notice to platforms to make certain data available or to open up certain interfaces.
- ◆ consider regulatory arrangements informed by competition law cases and on the basis of ongoing oversight and continuous development of the supervisory arrangements. Possible obligations include:
 - the obligation for systemic players to report all their acquisitions
 - requirements concerning the transparency, interoperability and transferability of data
 - the obligation imposed on these systemic players to provide access to third parties (in particular small firms) to their data to foster innovation

Proposal No. 1: Establish a European level digital systemic stakeholder oversight committee involving staff from DG COMP, DG CONNECT, DG GROW and DG HOME with powers to examine and investigate.

This supervisory body should make it possible to address the shortcomings of the current authorities, at a time when some recent mergers, such as the acquisition of WhatsApp by Facebook, may have created concerns that there is a legal vacuum as regards merger control. This is the case, for instance, for acquisitions of innovative start-ups or new players which have not yet monetised their innovation, a phenomenon that is also present in the pharmaceutical sector.⁷⁴

The current notification thresholds for DG COMP controls are based on the turnover of the merging firms. For all transactions that do not exceed these thresholds, there is no review via merger control.⁷⁵ There are generally three options for changing the law at European level:

- ◆ A reduction in turnover thresholds to cover more transactions, based on the model implemented by the German competition authority. Since this change to the thresholds would necessarily apply to all sectors, their definition would be complex. Too low a threshold would lead to the notification of too many mergers, the majority of which would not raise competition concerns. Conversely, too high a threshold would pose the risk of making the arrangements ineffective.
- ◆ The introduction of a transaction value threshold, possibly with a rebuttable presumption of anti-competitive behaviour. This solution, which already exists in Germany, Sweden, Japan, the USA and Canada, caters for the fact that a high transaction value for a business with no turnover is a first sign to take into account. However, such a system remains rather malleable, as the amount of the acquisition depends on agreement between the buyer and the seller and may be combined with other non-financial advantages. In addition, it does not cover mergers under a certain price which nevertheless raise competition issues.

⁷³ In April 2016, an EU Observatory on the Online Platform Economy was set up to monitor problems and opportunities in the digital economy, with an eye to enabling the Commission, where appropriate, to add to its legal instruments.

⁷⁴ Cunningham, Colleen and Ederer, Florian and Ma, Song, "Killer Acquisitions" (2018).

⁷⁵ There is a risk that Brexit will accentuate the problem as the UK turnover of companies operating in the EU will no longer be taken into account and, consequently, a number of operations will escape from DG COMP's remit.

◆ The establishment of ex post control powers⁷⁶

This could be the case where (i) undertakings or groups of individuals or legal entities, whose worldwide turnover, for example, is more than €750 million, are parties to the transaction; (ii) there are substantial competition concerns, possibly identified in advance by the oversight committee responsible for monitoring these matters (see proposal No. 1). In this context, **platforms considered “systemic” may be obliged to notify the oversight committee of all their acquisitions.**

While this solution may create more legal uncertainty for undertakings, its principle is similar to that of an antitrust operation where companies are aware that they run a risk when engaging in anti-competitive action.

In order to ensure legal certainty for undertakings, however, it would still be necessary to define deadlines⁷⁷ and to allow DG COMP to require information from the parties. It should also be verified that DG COMP does not take up only cases with the highest media profile or those which are emblematic. In this respect, the work of the oversight committee and the improvement of supervisory techniques, in particular through artificial intelligence, should ensure that this is the case.

In order to restore predictability, this control could also be implemented ex ante, in a preventive manner along the lines of business letters, at the initiative of the parties which anticipate competition issues.

A hybrid solution, which the task force prefers, would be to allow for ex post control of the acquisitions of undertakings determined on the basis of a ratio combining the value of the transaction and the turnover of the undertaking.

Proposal No. 2: Introduce an ex post review of mergers a short time after the fact where the ratio of the transaction value to the turnover of the undertaking purchased points to a potential competition issue.

2.1.2. Act more quickly and effectively by facilitating the use of interim measures and by empowering DG COMP to build up digital skills

The time taken for the substantive processing of competition cases is not always compatible with business time, and the emergence of digital technology has further exacerbated this problem. Even before decisions are taken, practices may seriously undermine the economy, for example causing the disappearance of firms and thereby reducing competition on the market in a sustainable manner. By way of illustration, the Commission fined Google €4.3bn in 2018 in relation to the Android operating system for practices that had been considered illegal since 2011. This operating system, which was placed on the market in September 2008 and was being used by 40% of smartphones sold in 2011, had a global smartphone market share of over 80% at the time of the fine.

⁷⁶ Many countries have such a resource. In Europe, this is the case, in various forms, in Hungary, Ireland, Lithuania, the UK and Sweden. In the rest of the world, this is the case, for example, in Brazil, the US, Canada and Japan. Some countries, such as the US, may intervene without any time limit, and sometimes even several years after the merger has taken place.

⁷⁷ For example, a period of two years, after which ex post intervention would no longer be possible.

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In this context, **the interim measures,⁷⁸ codified in Article 8 of Council Regulation (EC) No 1/2003,⁷⁹ are particularly useful.** However, and while these measures form part of the range of resources used by national competition authorities, in particular in France,⁸⁰ DG COMP **has very rarely used it** (nine decisions since 1980). This situation is largely the result of the restrictive conditions imposed by the current framework for taking decisions of this type at European level:

- ◆ The requirement of a *prima facie* infringement appears to be a very strong constraint on the standard of proof bolstered by case law⁸¹
- ◆ The stipulation in the Notice on the handling of complaints that national courts are better placed to adopt such measures seems to be excessively dissuasive
- ◆ There is no organised procedure in which complainants wishing to have interim measures adopted can formally refer the matter to the Commission

It is therefore necessary **to change the existing regulatory framework in order to relax the requirements that currently over-regulate use of this type of measure** by (i) relaxing the requirements of case law as regards the assessment of the unlawful nature of the practices, which entails amending Council Regulation (EC) No 1/2003; (ii) lowering the standard of evidence as regards the prejudice by reviewing the need to demonstrate the “irreparable” character of the infringement; (iii) extending the options for initiating such a procedure at the request of the complainants.

Proposal No. 3: In the event of the danger of serious and immediate harm to the market, implement interim measures pending a future decision on the merits of the case, as is the case in France.

Furthermore, in view of the proliferation of data to be analysed and the faster pace of business life, particularly in the digital sector, the issue of the adequacy of DG COMP’s technical and human resources to address the issues at stake is central. In this respect, it would be advisable to:

- ◆ adapt DG COMP’s technical resources for detecting anti-competitive practices (improving alert systems, analysing new ways of communication, extracting data stored on remote servers, etc.), monitor commitments and effectively sanction practices involving the use of algorithms and artificial intelligence
- ◆ bolster the expertise of DG COMP staff on these topics, which would involve:
 - recruiting specialist profiles, for example developers, data scientists, economists, investigators and lawyers able to determine the anticompetitive nature of new practices on the market
 - investing in the training of current staff, including in certain digital resources used by businesses to more easily identify the “right” questions for digital players

⁷⁸ Interim measures consist of requiring companies to suspend a given practice or to return to the previous state of affairs before a substantive examination in order to preserve a *de facto* situation on the market (and in particular to ensure the survival of possible competitors harmed by an anti-competitive practice).

⁷⁹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

⁸⁰ In its Decision No 08-MC-01 of 17 December 2008, the French Competition Council considered that the exclusivity granted by Apple to Orange to distribute the iPhone in France was, at this stage of the investigation, able to be withdrawn and liable to seriously and immediately undermine competition on the mobile telephone market and for consumers. The Council therefore decided to take interim measures, shortly before the marketing of this product in France, pending its decision on the merits of the case.

⁸¹ According to the Court of First Instance and the CJEU in the IMS Health case, a decision to take interim measures can be annulled if it is demonstrated that there are serious doubts as to the correctness of the legal analysis underlying the Commission’s *prima facie* assessment.

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- internally, promoting a “venture capitalist” approach to analysing markets and detecting problem acquisitions more easily. While the CJEU still applies strict criteria (need to provide material evidence in support of a presumption of a dominant position), it could be receptive to a more flexible approach, based on a close economic analysis of the markets. To do so, DG COMP could rely on the expertise of banks or funds which publish market analyses or enlist the services of analysts working in these professions.

Proposal No. 4: Upgrade DG COMP’s digital skillsets by recruiting sector specialists (data scientists, algorithm specialists, etc.) and develop venture capitalist reflexes to determine the potential anti-competitive behaviour of systemic players.

2.2. Several possible options, some of which should probably be disregarded as they require amendments to the Treaties, could change the rules and practices of our merger control for a European “power”

Several proposals for changes represent a series of options for reforming European competition policy. They are not all equivalent in terms of ambition and ease of implementation. There are two categories of options:

- ◆ **A series of cumulative improvements**, on the basis of existing primary and secondary law, for which our partners would be prepared to follow us, subject to more in-depth contacts and discussions. They would principally involve improving current procedures and extending the scope of DG COMP’s analysis to address the challenges described above (see 2.2.1).
- ◆ **A range of more disruptive institutional scenarios** that are more complicated to roll out from a legal standpoint, the effects of which are uncertain at this stage, and regarding which our partners would be reluctant or even hostile (see 2.2.2)

They address criticism, which is sometimes levelled at competition policy, that:

- ◆ it does not sufficiently incorporate long-term considerations such as the appearance of a competitor on the European market (Proposal No. 5)
- ◆ it does not take sufficient account of sectoral specificities and is implemented by DG COMP alone working in silos (Proposal No. 8)
- ◆ it does not factor in the subsidy practices of our competitors (Proposal No. 7)
- ◆ it imposes overly burdensome measures on companies in return for merger authorisations (Proposals Nos. 6 and 10)
- ◆ it does not take sufficient account of the extra-competitive gains generated by mergers (Proposal No. 9)

2.2.1. The procedures and instruments used by the Commission can be improved without involving changes to primary law

Since the last review of the framework for merger control, the global economy has undergone major changes. Against this backdrop and independently of the following proposals, the Commission could usefully conduct an assessment - based on a broad public consultation - of

the Merger Regulation⁸² and its implementing guidelines and communications, in particular by looking into relevant options for recasting or adapting these texts.

2.2.1.1. *Take better account of potential entry into the internal market of competitors from outside Europe, particularly when they receive subsidies*

As part of merger control, the Commission carries out an appraisal that factors in future market changes that are reasonably foreseeable.⁸³ **Although it may vary,⁸⁴ the timeline for its appraisal is normally set at two to three years.** This short period is out of step with the longer-term perspective of businesses and does not allow the major changes relating to innovative players entering the market to be fully anticipated.⁸⁵ This applies, in particular to the digital revolution and to heavily subsidised companies which are the armed wing of the industrial strategy of non-EU countries.

The Commission's Guidelines indicate that a new entry will only be considered a competitive constraint if it is sufficiently swift and sustained to deter or defeat the exercise of market power. They state that while an appropriate time period depends on the characteristics and dynamics of the market, a new entry should normally take place within two years in order to be considered timely.⁸⁶

To encourage the Commission to factor in more long-term considerations, the Guidelines on the assessment of horizontal mergers could:

- ◆ be amended by deleting the reference to the two-year period in paragraph 74 to limit itself to the general principle that the timeline of the analysis of potential competition “depends on the characteristics and dynamics of the market, as well as the specific capabilities of potential entrants”.
- ◆ make express provision for developing benchmarks giving historical examples of longer-term changes to competitive conditions in close markets. This would highlight comparable developments that could be anticipated in the markets affected by the merger. However, as the competitive analysis must be carried out on a relevant market within the meaning of the Court's case law, the scope of which is determined beforehand, the Commission may be reluctant to take account of benchmarks relating to different markets in its analysis.

⁸² For the record, the legal bases of Council Regulation (EC) No 139/2004 are Article 103 TFEU (formerly Article 83 EC) and Article 352 TFEU (formerly Article 308 EC). In accordance with the procedure laid down in those legal bases, the Regulation may be amended by the Council only by unanimity, on a proposal from the Commission, after obtaining the consent of Parliament.

⁸³ CJEU, 12 February 2005, Tetra Laval, Case C-12/03P.

⁸⁴ It should be noted that in *Wabtec/Faiveley Transport*, the Commission conducted a more flexible analysis, looking at the market over four years, but this was at the expense of the parties. It decided that the timeline for its forward-looking analysis could be different (i) when the prospective entrant is one of the merging parties and (ii) when a third party entering the market can be considered to be a factor placing a constraint on the merged entity's market power.

⁸⁵ In its 2008 *Tom Tom/Tele Atlas* decision, the Commission considered that Google was not able to intervene sufficiently quickly and forcibly in the digital maps market to mitigate the anti-competitive effects of the merger, even as Google Maps had been launched in April 2006 in the EU.

⁸⁶ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, §74.

Proposal No. 5: Encourage the Commission to take greater account of long-term factors by (i) deleting the reference in the Guidelines to the two-year period for factoring in the entry into a market of a potential competitor and (ii) stipulating that DG COMP should develop a benchmark for other comparable sectors that have experienced market shifts that could occur in the sector considered.

The almost exclusive use, for the objective reasons set out above, of binding and irreversible structural remedial measures for the parties does not sufficiently take into account, once the Commission has made its decision, of events that could not be foreseen when the case was examined.

In order to remedy this situation, consideration could be given **to fostering the use of behavioural remedies**, by giving them priority or at least placing them on an equal footing with structural remedies. This development would align European practices with those of our competitors and would require the amendment of the Commission's Notice on Remedies, in particular paragraphs 15, 22 and 61. The principle of proportionality could be raised in support of this development.⁸⁷

The task force also recommends encouraging the introduction of review clauses for behavioural commitments during their term of application. This is expressly provided for in the Commission Notice⁸⁸ but is contingent on "exceptional circumstances". This mention could usefully be deleted.

Conversely, the task force has more reservations concerning the possible implementation of hybrid deferred application commitments along the lines of the Chinese hold-separate remedies.⁸⁹ A commitment would only be activated if, ultimately, the competition announced by the parties does not materialise. Although the current legal framework is not, in principle, incompatible with such a measure, it would be too complex in comparison with the benefits generated and represent a potential source of differences in interpretation and therefore of legal uncertainty for businesses.

Proposal No. 6: As part of merger control, make more systematic use of behavioural remedies with review clauses to better adapt to the rapidly changing nature of many markets.

Lastly, to examine the competitive constraint that a potential entrant could exert on the new entity created by the notified merger, all the competitive advantages that could benefit that competitor should be considered. In this respect, receipt of massive subsidies should be included in the competitive analysis as a competitive advantage that will facilitate its entry and expansion on the European market.

The elements that the Commission may accept in its body of evidence are not yet listed exhaustively. While this acceptance does not require changes to the current legal framework, to ensure that such a criterion is factored in, the Guidelines on the assessment of horizontal mergers should be supplemented to explicitly mention that such subsidising of a competitor should be considered according to the extent of competitive constraint exerted on the merged entity. The composition of such an assessment would be based on qualitative and quantitative

⁸⁷ For instance, drawing on Article 7 of Council Regulation (EC) No 1/2003, the Commission may "impose any behavioural or structural remedy which is proportionate to the infringement committed and necessary to bring the infringement effectively to an end" by stating that "a structural remedy can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy".

⁸⁸ Commission Notice on Remedies, Section 4, § 71-76.

⁸⁹ This kind of intermediate remedy between structural and behavioural commitments requires the parties to maintain some of their independent activities for a period after which fresh approval from the authorities is usually necessary. The Chinese government's authorisation of the merger of Advanced Semiconductor and Siliconware Precision Industries in 2017 was conditional on maintaining the independence of both structures for two years, without altering their business model or practices.

elements assessed on a case-by-case basis, using evidence provided by the parties to the merger.

Proposal No. 7: Include the fact that a potential competitor benefits from massive public subsidies in the Commission's competitive analysis.

2.2.1.2. Rely on internal expertise, the other Directorates-General or even independent experts to enhance DG COMP's analysis

While DG COMP has very high quality staff, the Directorate-General is one of those that employs younger officials who work, at least for those involved in mergers, the most. This can also lead to a high staff turnover. During the limited time for assessing mergers, this means that the teams work in silos. This not only undermines the collective responsibility requirement of the decisions taken by the College of Commissioners, but also the examination of cases.

◆ **Review the examination process to restore effective collective responsibility in decisions.**

The Rules of Procedure of the European Commission provide that Commission departments and Directorates-General work in close cooperation and in a coordinated manner to prepare or implement decisions, in accordance with the principle of collective responsibility laid down in the Treaties. As things stand, this means:

- ◆ before a proposal is voted on by the College of Commissioners, the department responsible must consult the Directorates-General with a legitimate interest in the proposal owing to their areas of responsibility, the nature of the assignments or the nature of the cases
- ◆ the department responsible shall endeavour to frame a proposal that has the agreement of the departments consulted
- ◆ any Member of the Commission may, in the course of the written procedure, request that the proposal be discussed by the College, with the decision then being adopted orally by a majority of Commissioners following a vote.⁹⁰ Discussions are confidential and minutes are taken.⁹¹

However, even if the inter-departmental consultation theoretically allows all the relevant Directorates-General to be heard:

- ◆ **The process is subject to constraints:** In the field of merger control, this consultation involves collecting, in five days, the opinion of the departments concerned on a dedicated platform and, as a result, other DGs may be tempted to validate the DG COMP proposal without further scrutiny
- ◆ **The balance of power within the Commission, which incidentally has exclusive competence, and the asymmetry of information, do not appear to enable these directorates to fully counter the opinions of DG COMP.** However, in the absence of exhaustive and official data, it seems that, to date, the College has always abided by DG COMP's decisions.⁹²

Without changing existing primary law, it would be advisable to:

- ◆ Request DG COMP **to provide more details on the outcome of the consultations** for the proposed merger decisions

⁹⁰ In accordance with Article 8 of the Rules of Procedure of the European Commission.

⁹¹ Articles 8, 9 and 11 of the Rules of Procedure of the European Commission.

⁹² Only one case to the contrary was reported to the task force: the proposed prohibition of the merger between Mannesmann, Vallourec and Ilva in 1994.

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- ◆ **Heighten discussions, within DG COMP, between the departments responsible for merger control and those responsible for State aid** in the same field - in particular with an eye to sharing their opinions on the situation of the market or the undertakings concerned
- ◆ **Expand the secondment of staff from the sectoral departments to DG COMP, for the duration of a case**, by posting them to the case team⁹³
- ◆ **Systematically provide for discussions followed by a vote on problematic cases**, without a Commissioner having to specifically request this
- ◆ **Perpetuate the practice of having “groups of Commissioners”** that ensure systematic collegial debate of certain EU policies and consider its implementation for competition issues. More broadly, continue to have DG TRADE and DG COMP cooperate so that the former can inform the second on practices in non-EU countries.

Proposal No. 8: Better involve the sectoral DGs in the examination of merger cases and increase transparency in decision-making within the College of Commissioners.

- ◆ **Better assess the efficiency gains presented by businesses and encourage them to seize upon them.**

The Commission is required, as part of its analysis framework that was recast by the 2004 Regulation, under the terms of the guidelines on the application of Article 101(3) TFEU, to balance the anti-competitive effects of a merger against the efficiency gains⁹⁴ it generates, with European courts monitoring compliance with this approach.⁹⁵ However, it appears that the balancing and offsetting mechanism is not sufficiently clear in Article 2 of the Merger Regulation of 20 January 2004, which lists the criteria to be taken into account in the competitive appraisal and ultimately aims for the development of technical and economic progress, “provided that it is to consumers’ advantage and does not form an obstacle to competition”, whereas it would have been preferable to adopt the wording of Article 101(3) TFEU, namely “no elimination of competition”.

⁹³ For example, as part of the review of the Deutsche Börse/Euronext merger in 2012, DG FISMA officials were integrated into the case team.

⁹⁴ These positive effects are quantitative or qualitative gains that create value other than cost savings, in terms of diversity, quality and innovation. These include “increasing the competitiveness of industry, thereby improving the conditions of growth and raising the standard of living in the Community” (point 76 of the Guidelines on the assessment of horizontal mergers).

⁹⁵ The European Union General Court explicitly highlighted the balancing mechanism in a judgment of 9 March 2015 in Case T-175/12, Deutsche Börse: “it is appropriate, in the light of the foregoing considerations, to reject the argument that the contested decision acknowledged the existence of substantial efficiencies and failed to balance them against the competitive harm in a reasoned manner” (pt. 208).

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It can therefore be considered that this balancing test:

- ◆ could be better described by the wording of Article 2 of Council Regulation (EC) No 139/2004, drawing on that of Article 101(3) TFEU
- ◆ could be enhanced by additional illustrative criteria including employment, public security and technological sovereignty, as well as sustainable development, as part of new cross-cutting guidelines concerning the concept of efficiency gains that would relate to both merger control and the fight against cartels, and abuses of a dominant position.

As matters stand, it will still be difficult for the notifying undertakings, which bear the burden of proof, to actually establish that the merger will bring benefits for consumers. This is compounded by the fact that the Union General Court checks the Commission's analysis of efficiency gains and may find that the evidence provided is insufficient.⁹⁶ Moreover, the parties may be concerned that they are steering DG COMP's analysis towards the most problematic issues of the case by claiming gains on a specific market.

As a result, it might be useful to also provide for a second opinion on DG COMP's appraisal of these gains by an independent college of experts, economists and lawyers.

Proposal No. 9: Take better account of efficiency gains from mergers by clarifying legislation through publication of specific guidelines and by introducing a second opinion procedure, following on from the Commission's assessment of these gains, to be conducted by an independent college.

- ◆ **Raise the professionalism of remedy building.**

While a significant part of discussions during the process of determining remedies involves identifying the industrial, financial and commercial feasibility of these compensatory measures and, contrary to its practice regarding competitive appraisal of the markets, DG COMP does not use industrial or sectoral strategy experts to assist it with this process.

The appraisal is largely based on the answers of the parties' competitors to DG COMP's questionnaires.

Developing this skill would enable the Commission to consider more innovative measures and to be less exposed to a risk of being "hostage" to opponents to the merger or potential buyers who have an interest in remedies and who hold information.

This initiative could be coupled with a **systematic ex post evaluation of remedies** under the responsibility of independent stakeholders (Secretariat-General of the Commission, European Parliament, independent consultants, body of national inspectorates, etc.).

Proposal No. 10: Set up a team of industrial or sectoral strategy experts within DG COMP, to support the case team in identifying the industrial, financial and commercial feasibility of the remedies. Carry out systematic ex post evaluation of the latter.

2.2.2. Basing EU competition decisions on non-competitive considerations, regardless of the planned conditions, means amending the Treaties

To go beyond merely tweaking competition policy, in line with the public statements of the French and German Economy Ministers, the task force is also tabling a number of disruptive options.

These scenarios are all based on direct consideration, rather than incidentally as is the case today, of issues other than competition in Commission decisions and, for some of them, on recasting European institutional balance in favour of the Council of the EU.

⁹⁶*Ibid.*

They all require **substantive and major changes to European competition law**:

- ◆ **At least an amendment to Council Regulation (EC) No 139/2004**, which would require a Commission proposal and unanimity of the Council.

Said Regulation was adopted in accordance with the procedure laid down in Article 352 TFEU, in so far as Article 103 TFEU is not sufficient to control all concentrations.⁹⁷ However, this article of the Treaty explicitly provides for a vote by the Council deciding unanimously on a proposal from the Commission. This procedure would therefore also be necessary to amend this Regulation or take an initiative on the same basis, the only appropriate legal base for merger control.

- ◆ **As well as an amendment to the Treaties**, even for the less disruptive scenarios providing for maintenance of the competence within the Commission.

The existing legal framework requires the Commission to examine the compatibility of a concentration with the common market in light of the sole criterion of the significant impediment to effective competition (SIEC). To amend the Regulation so as to allow the Commission to base its decision on considerations of general interest other than maintaining competition, the Treaties should provide a sufficient legal basis, as is the case, for instance, with defence or agricultural policy.⁹⁸

Theoretically, this revision of the Merger Regulation should be carried out using the same legal bases that were used for adoption of the Regulation in 2004 (Articles 352 and 103 TFEU). Alternatively, the EU could base the inclusion of industrial and employment objectives in these competition decisions on the articles of the Treaties that expressly refer to them: the amendment to the Merger Regulation could be based on Article 147(2) TFEU, which provides for the promotion of a high level of employment by the Union, or on Article 173, which focuses on the competitiveness of the Union's industry.

In reality, **it would very likely be argued before the Court that a regulation allowing decisions on mergers between undertakings to be taken on grounds other than a competitive analysis would be contrary to the TFEU** insofar as:

- ◆ Article 352, together with Protocol (No 27), states that the internal market, as set out in Article 3 of the TEU, includes a system ensuring that competition is not distorted, and adds, in addition, that Article 352 allows the Union to take the necessary action to achieve this

⁹⁷ Recital (7) of Council Regulation (EC) No 139/2004.

⁹⁸ Article 42 TFEU sets out a general derogation rule from competition law rules for the sectors covered by the CAP, to the extent determined by the EU lawmaker.

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- ◆ Article 352, together with Declaration 42, reiterates that “In any event, this Article cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaties without following the procedure which they provide for that purpose”.
- ◆ The last paragraph of Article 173 TFEU, which refers to the Union’s industrial competitiveness, specifies that this Article cannot allow for the introduction of “any measure which could lead to a distortion of competition”.

The introduction of a right of evocation for the Council would also entail the inclusion of merger control in an article of Title VII of the TFEU on common rules on competition. However, this amendment could be made in accordance with the simplified revision procedure provided for in Article 48(6) TEU.

Moreover, as regards form, **these changes would require more or less substantial changes to European procedural law.**

Lastly, **our partners would need to be won over.** Pending tangible proposals, **many of them are rather reluctant to accept** broad institutional reform of European competition policy, **or even opposed to it.**

More specifically, the scenarios addressed consist in:

- ◆ within the Commission, providing for a review of the case which factors in all the criteria, whether competition-related or not (Scenario 1), or even granting the President of the Commission a right of evocation (Scenario 2)
- ◆ giving the Council of the EU a right of evocation based on the French or German model (Scenario 3)
- ◆ setting up an independent competition authority and providing the Commission with a right of evocation (Scenario 4)

2.2.2.1. Keeping such decision-making at Commission level appears to be the least disruptive for the current EU institutional balances

Scenario 1: Basing the decision of the College of Commissioners on a review of the case which takes into account all criteria, whether competition-related or not (employment, environment, health, industrial development, technological sovereignty, etc.).

In this scenario, competition-related arguments would naturally be the responsibility of DG COMP, with the review of non-competitive criteria being carried out by another Directorate-General, chosen according to its remit.⁹⁹ These two Directorates-General could report separately to the College without calling into question the principle of the sole jurisdiction of the Commission to take decisions under the Merger Regulation. The College would decide, by drawing on all the arguments, on the basis of a comprehensive approach in the “general interest of the Union”, a concept already used by the Commission when it comes to triggering anti-dumping measures.¹⁰⁰ The procedural changes set out above (systematic discussions and voting on complex procedures, etc.) could usefully be included in this scenario.

⁹⁹Another option would be for DG COMP to include strategic or “general interest” considerations not strictly related to competition in its analysis. However, this option would undermine the credibility of DG COMP’s action internationally as well as the clarity and transparency of its analysis, and would cause significant legal uncertainty for companies and parties involved in the case. This explains why a large proportion of the economic stakeholders heard by the task force were reluctant to adopt this option.

¹⁰⁰ Article 21 of Regulation (EC) No 2016/1036 of 8 June 2016 on protection against dumped imports from countries not members of the European Union provides that “A determination as to whether the Union’s interest calls for

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To ensure a thorough review by the two Directorates-General, there should be a double appraisal of the case. However, such a change would not only increase the burden, duration and therefore cost of the merger control procedure for companies, but also the resources rolled out by the Directorates-General to examine cases. To facilitate the exercise and to minimise the extra burden for the parties, the task force considers, if it was decided to take this path:

- ◆ that this system should be reserved for Phase II concentrations
- ◆ that a specific structure, along the lines of a “one-stop shop”, subject to business confidentiality, to coordinate the double appraisal of the case could usefully be set up within the Commission¹⁰¹
- ◆ that a specific communication from the Commission, similar to the Notice on the treatment of simplified procedures,¹⁰² could clarify the conditions for implementation of this system

The benefits of such a scenario are:

- ◆ maintaining the collective responsibility and prerogatives of the Commission, which “shall promote the general interest of the Union” (Article 17(1) TFEU)
- ◆ the fact that, among the disruptive scenarios, it minimises the risk of decision-making being hostage to one or more Member States having an interest in the case
- ◆ upholding of the international credibility of the European competition authority

However, there are limitations, in particular:

- ◆ The risk of maintaining, at least for a certain period of time, an imbalance between Directorates-General in favour of DG COMP, which is more used to the exercise. Broadly speaking, one of the keys to rebalancing the power relationship between departments is to entrust the Union with strong policy priorities in the fields of industry, innovation and technological sovereignty and, to have the Directorates-General responsible for these public policies play a greater role.
- ◆ **Displaying a potentially arbitrary decision and a risk of legal uncertainty**, as the Commission’s final decision would be based on criteria for which it would be difficult, under the control of the Court, to assess the correct weighting
- ◆ **A false impression of institutional *status quo***

In the event of a revision of the Treaties, the task force would favour the adoption of this scenario. This would mean obtaining the agreement of the other Member States by highlighting the continued competence of the Commission, which is supported by a large majority of States.

Scenario 2: Granting a special right of evocation to the President of the Commission for competition matters.

Such an option would mean giving the President of the Commission autonomous power to adopt merger decisions. He/she would take part in the vote of the College of Commissioners on issues relating to the upholding of competition only and he/she could then decide to refer to the College’s decision on the grounds of separate European general interest.

Such a solution would require (subject, as mentioned above, to providing for an adequate legal base in the Treaties) amendments to:

- ◆ the Merger Regulation to introduce a derogation from Article 2

intervention shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers”.

¹⁰¹ Article 20 of the Rules of Procedure of the European Commission.

¹⁰² Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004 (2013/C 366/04).

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- ◆ the Rules of Procedure of the European Commission, to give its President autonomous power in the field of mergers, whereas, as legislation currently stands, the President of the Commission has no casting vote

However, from a political standpoint, it would be problematic for the President of the Commission to take decisions which are contrary to those decided on by a majority of the institution he/she heads up even if, at least theoretically, the two decisions would not be based on the same principles. Moreover, this solution is over reliant on the decision of a single person with high risks of the decision being taken hostage and suspicions depending on the nationality of the future president.

2.2.2.2. Reviewing the institutional balance in favour of the Member States within the Council creates a high risk of the politicisation of competition decisions and seems to be unacceptable for a majority of Member States

Scenario 3: Giving the Council of the EU a right of evocation concerning concentration cases based on the French or German model.

At European level, the introduction of such a mechanism would involve giving the Council of Ministers, and thereby the Member States, a right of evocation over the Commission's decisions and the right to review these decisions on grounds other than competition law.

From a legal point of view, in addition to the above-mentioned issue of the existence of an adequate legal base in the Treaties, the Council's intervention in the merger control process would depart from the notion of the Commission's sole jurisdiction which is provided for in Article 21(2) of the Merger Regulation. This would therefore have to be reviewed. While it may also be contrary to Article 105 TFEU which grants the Commission the power to apply competition law, it could be argued that, as the Council takes decisions solely on the grounds of general interest and not competition, the Commission retains its sole jurisdiction.

However, it would appear more advisable to incorporate this new control into an article of Title VII of the TFEU, which covers the common rules on competition, taxation and approximation of laws. This amendment could be made in accordance with the simplified revision procedure provided for in Article 48(6) TEU.¹⁰³

With this revised legal framework, Council intervention could be based on the State aid mechanism provided for in Article 108(2) TFEU.¹⁰⁴ Provision could be made for a Member State to be able to request the Council, taking decisions unanimously or by qualified majority, to authorise a concentration in the event of that it had been prohibited by the Commission (or planned to be prohibited) if this is justified by the protection of general interest objectives other than preserving competition.

¹⁰³In formal terms, this method of revision involves a unanimous vote by the Council on the revision decision, after consulting the European Parliament and the Commission.

¹⁰⁴ This provision allows States to send requests directly to the Council for decisions concerning the compatibility of State aid with the internal market. However, it has not been used since 2009 as there are constraints on its use (unanimity in the Council, very short deadlines, ability to rule on the compatibility of aid only until the Commission takes a final decision on the measure). In addition, the CJEU has held that this provision should be interpreted strictly, as the European Commission has the central role in State aid control and readily brings actions for annulment - which it wins 50% of the time - against the Council's decisions.

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The system is likely to be challenged before the Court. To win over our partners and also to regulate use of the system and bolster its legal robustness, it would be appropriate to:

- ◆ **provide for a non-exhaustive list of criteria with a European dimension** to form the basis for Council decisions using the words “in particular” before the list to avoid inflexibility and to allow for the emergence of new events of general interest. Particular attention should be paid to the definition of these objectives, as some concepts such as the protection of employment have geographically targeted impact. Possible goals include the EU’s economic security and technological sovereignty
- ◆ **ensure that there are detailed and quantified reasons for the** Council decisions to allow the CJEU to limit its review to the manifest error of assessment. This would mean that Member States and the General Secretariat of the Council are able to provide these analyses.

This solution, which enables the Commission to retain independent competitive analysis which is focused on the interests of European buyers, is the best way to bolster the influence of Member States in European competition policy. It means that the Council assumes responsibility for economic and political choices which, in some cases, will lead to the merged companies’ industrial strategy being funded through purchasing power concessions by European citizens.

However, entrusting such a right of evocation to the Council would appear to give rise to a number of major difficulties:

- ◆ From a procedural and technical standpoint, while the average timeframe for a Commission Phase II decision is already approximately seven months from the date of notification, the Council’s intervention would necessarily extend the process. As a result, it should be regulated to bring it closer to the 25 working day timeline governing the right of evocation of the French Minister for the Economy under French law (see box 5).
- ◆ **This change could have an impact on the outcome of mergers through wider political arbitration and negotiations between Member States** (some of which may negotiate their support for a merger approved by a State in return for the latter’s support for other policies)
- ◆ These negotiation tactics would **undermine their credibility and spread the feeling among economic stakeholders and non-EU countries that there is a “arbitrary” risk on the part of the EU**
- ◆ As far as administrative sociology is concerned, **this could freeze the Commission’s positions**. As a result, for difficult decisions, the parties may pass over an examination on the merits and put the discussion solely on a political level. This would mean that Member States would be negotiating at the Council without a safety net.
- ◆ **Such a reform would face strong opposition from both the Commission and the Member States.**

For all these reasons, and because the cost-benefit balance of such a major reform does not appear to be positive, the task force does not recommend adopting this scenario.

Box 5: The right of evocation in EU countries

In several countries, including France, Germany, Italy, the Netherlands, Spain, Portugal and the United Kingdom, the government (usually the Minister for the Economy) has a right of evocation in merger control which allows it to review decisions taken by the competition authority:¹⁰⁵

- In France, pursuant to Article L.430-7-1, II of the Commercial Code, the Minister for the Economy has 25 working days, following a Phase II decision, to exercise his or her right of evocation and to rule on the merger for reasons of general interest other than preserving competition
- In Germany, the parties may apply to the Minister in order to obtain authorisation for a concentration. The Minister has four months to grant an authorisation from the date of receipt of the request. After six months the application is deemed to have been rejected.

The criteria on which the government's decision can be based vary depending on the country from the general interest to more specific considerations (stability of the financial system, environmental protection, etc.). In France, the Commercial Code contains a non-exhaustive list of grounds of general interest, including industrial development, the competitiveness of the relevant undertakings with regard to international competition or the creation or protection of employment.

These decisions are subject to appeal. In some cases, as in France or Germany, the Minister may stipulate conditions for authorisation to mitigate the negative impact on competition.

Countries that allow for such an “evocation” only use it on very rare occasions. In Germany, for instance, where this right has existed since 1973, there have been only nine authorisations using this procedure. In France, it was used only once in 2018 in the context of the merger between William Saurin and Cofigeo.

Source: Task force

2.2.2.3. Creating an independent authority and giving the Commission a right of evocation would not address the issues raised

Scenario 4: Setting up an independent competition authority in place of DG COMP and introducing a right of evocation for the Commission.

Such a reform would amount to mirroring, at European level, the French model of the *Autorité de la concurrence* (competition authority) and the right of evocation, entrusted here to the European Commission in order to avoid the “hostage” effects mentioned in Scenario 3.

Its main advantage would be to ensure a clear separation between reviewing and judging competition decisions, which is not the case at present.

To implement such a scenario, setting up a decentralised agency¹⁰⁶ is unlikely to be sufficient as such a delegation of powers would entail a shift of responsibilities which is contrary to the principles of institutional balance established by European case law.¹⁰⁷ The Treaty would therefore need to be amended to create a new institution¹⁰⁸ which would be entrusted with the tasks which are currently the exclusive remit of the Commission in the field of competition. This new institution would be independent from the Commission.

In this context, a right of evocation granted to the Commission could be based on the model described above.

¹⁰⁵ In some rare cases (Canada, Hungary and Israel) some mergers may even be exempted ex ante from control.

¹⁰⁶ Decentralised agencies such as Frontex, the European Food Safety Authority or the European Banking Authority are responsible for carrying out technical and scientific tasks to support the European institutions in implementing policies and taking decisions.

¹⁰⁷ ECJ, 13 June 1958, Meroni, Case 9/56; CJEU, 22 January 2014, United Kingdom v Parliament and Council, Case C-270/12.

¹⁰⁸ The EU institutions (European Parliament, European Council, Council, European Commission, CJEU, European Central Bank, Court of Auditors) and the Economic and Social Committee and the Committee of the Regions are listed in Article 13 of the TEU.

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Besides the fact that such an option would be cumbersome and complicated to implement, and as there is little European support for it, entrusting an independent authority with European competition policy would increase the risk of a rigid application of this law.

For these reasons, the task force does not recommend adopting this scenario.

Figure 4: Summary of the disruptive scenarios tabled by the task force

	Description	Avantages	Inconvénients	
Au sein de la Commission	Scénario 1 Fonder la décision du collège sur un ensemble de critères sortant du strict bilan concurrentiel	<ul style="list-style-type: none"> ▪ Double instruction des dossiers en phase II ▪ Décision du collège se fonde sur l'ensemble des analyses ▪ Vote systématique sur les cas complexes 	<ul style="list-style-type: none"> ✓ Maintien de la collégialité et des prérogatives de la COM ✓ Plus acceptable par nos partenaires ✓ Préservation de la crédibilité internationale de l'autorité chargée de la concurrence 	<ul style="list-style-type: none"> ✗ Lourdeur d'une double instruction ✗ Affichage d'une décision arbitraire et risque d'insécurité juridique ✗ Fausse impression d'un <i>statu quo</i> institutionnel
	Scénario 2 Confier un pouvoir d'évocation au président de la COM	<ul style="list-style-type: none"> ▪ Donner au président de la COM un pouvoir autonome en matière de concentrations ▪ Participation au premier vote puis éventuellement évocation de la décision du collège 	<ul style="list-style-type: none"> ✓ Maintien des prérogatives de la COM 	<ul style="list-style-type: none"> ✗ Incohérence de faire revoter le président sur une décision du collège ✗ Repose sur la décision d'une seule personne avec risque de capture et de suspicions selon sa nationalité
En dehors de la Commission	Scénario 3 Doter le Conseil d'un pouvoir d'évocation	<ul style="list-style-type: none"> ▪ Instauration d'un pouvoir d'évocation des décisions de la COM ▪ Fonder la décision sur la base d'une liste non exhaustive de critères ▪ S'assurer de la motivation de la décision du Conseil (solidité juridique) 	<ul style="list-style-type: none"> ✓ Renforcement du pouvoir des EM dans la politique de concurrence ✓ Incitation à construire une vision industrielle européenne autour d'intérêts stratégiques partagés ✓ Préservation d'une analyse concurrentielle indépendante 	<ul style="list-style-type: none"> ✗ Remise en cause profonde de l'équilibre des institutions ✗ Moindre crédibilité auprès acteurs économiques et partenaires ✗ Cristallisation possible de la position de la COM ✗ Forte opposition des autres EM ✗ Fragilité juridique
	Scénario 4 Autorité de la concurrence indépendante à la place de la DG COMP	<ul style="list-style-type: none"> ▪ Transposition des modèles nationaux ▪ Possibilité de donner un pouvoir d'évocation à la COM 	<ul style="list-style-type: none"> ✓ Assurer une séparation nette entre l'instruction et le jugement des décisions de concurrence 	<ul style="list-style-type: none"> ✗ Mise en œuvre complexe et lourde ✗ Accroissement du risque d'une application rigide de ce droit ✗ Pas d'appétence des autres EM

Source: Task force

	Description	Benefits	Drawbacks
Within the Commission Scenario 1 Base the College's decisions on a set of criteria removed from a strict review of competition	Double appraisal of case in Phase II College's decisions based on all analyses Systematic vote on complex cases	Maintaining the Commission's collective responsibility and prerogatives More acceptable for our partners Upholding the international credibility of the authority responsible for competition	Cumbersome nature of the double appraisal Displaying arbitrary decisions and risk of legal uncertainty False impression of institutional <i>status quo</i>
Scenario 2 Grant the President of the Commission a right of evocation	Giving the President of the Commission autonomous power regarding mergers Participation in the first vote then, potentially, evocation of the College's decision	Maintaining the Commission's prerogatives	Irrational to have the President revoke on the College's decisions Decisions based on a single person with the risk of "capture" and suspicions depending on his/her nationality
Outside the Commission Scenario 3 Give the Council of the EU a right of evocation	Introduction of a right of evocation over the Commission's decisions Decisions based on a non-exhaustive list of criteria Ensuring justification of the Council's decisions (legal soundness)	Bolstering the influence of MSs in competition policy Incentive to build a European industrial vision based on shared strategic interests Maintaining an independent competitive analysis	Major reappraisal of the balance of the institutions Less credibility vis-à-vis economic stakeholders and partners Possible freezing of the Commission's positions Strong opposition from other MSs Weak legal situation

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<u>Scenario 4</u> Independent competition authority in the place of DG COMP	Mirroring of national models Option of granting a right of evocation to the Commission	Ensuring a clear separation between reviewing and judging competition decisions	Complex and cumbersome implementation Increased risk of rigid application of this law No support from other MSs
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The task force considers that priority should be given to the further development of the criteria for analysis on the basis of existing primary law - as presented in 2.2.1 -, in particular if, in tandem with the bolstering of our trade defence instruments, it is decided to make progress on an instrument of reciprocity in public procurement and to create an ecosystem that fosters innovation and the assertion of European technological sovereignty.

The other options throw up major political and legal obstacles, in particular due to the difficulty in reconciling Member States' positions and in defining shared strategic interests.

3. The European Union must adopt an offensive trade strategy and continue its efforts to become an industrial power capable of competing with the United States and China

Competition policy reforms are both necessary and possible. However, the defence of European strategic interests cannot be limited to this for at least two reasons:

- ◆ **The main issue with international industrial competition is not that competition standards are too high in Europe but that non-EU companies are not subject to some of these rules while benefiting from access to the European market.** In this respect, the ongoing discussions concerning Brexit are highly topical.¹⁰⁹
- ◆ **In the digital sector, while competition policy does apply common cross-cutting rules to all sectors, it is not the appropriate instrument to address the challenges of personal data processing and privacy, the fight against fake news, hate content and cybersecurity.**

European ambition and cohesion in this respect were underscored by President Macron during the official visit of the President of the People's Republic of China from 24 to 26 March 2019 and are key factors for the EU's success in this endeavour.

The task force considers that, despite the sometimes very divergent interests of the Member States on industrial¹¹⁰ and, especially, trade issues, the global economic (structural weakening of the German exporter model due to the slowdown in global demand and China's refocusing on its domestic market, American protectionism) and political (election of Donald Trump, Brexit, the Chinese hegemony attempts with the "Silk Road" and "Made in China 2025" plans) context and the resulting trade tensions are all factors favouring a coordinated and offensive response.

3.1. At a time when the multilateral trade system is at a deadlock, the EU must continue to equip itself with offensive instruments to have influence in talks with its partners

3.1.1. The European trade policy approach must adapt to the new international trade situation and better respond to the concerns of European citizens

The deadlock in the current multilateral trade system is mainly due to:

- ◆ the WTO's failure to respond to the issues raised by, inter alia, the digital economy and, more importantly, to adjust its model to the rise of the service economy, in particular in the United States, in so far as its remit is limited to goods

¹⁰⁹ Should the UK leave the EU, European rules prohibiting State aid could stop applying to the UK. Although the British government has expressed its willingness not to depart from the current Community line and has stated that it will continue to monitor subsidies by maintaining a common regulatory framework with the EU, there is still a risk of dumping and non-cooperative behaviour on the EU's doorstep.

¹¹⁰ While several countries do not share the French vision of promoting "champions", many are in favour of a bold European industrial strategy as witnessed by the joint statement of the Friends of Industry signed on 18 December 2018 by 20 Member States.

- ◆ **an inadequate legal framework for China**, the world's leading exporter of goods, but which is still considered a developing country.¹¹¹ China is being accused of failing to comply with the commitments made at the time of its accession, for example with regard to forced technology transfers. It also operates on the basis of a state-controlled and sprawling economic rules and structure,¹¹² and this was not sufficiently taken into account by the WTO when it joined. According to currently effective rules, it is very difficult to highlight the links between central government and many entities receiving more or less direct support.

It is against this backdrop that the US has toughened its stance, in line with the long-standing arguments of the US administration:¹¹³ blocking the appointment of new judges to the WTO's Appellate Body, which could compromise the dispute settlement system; invoking national security issues to unilaterally introduce additional customs duties on a range of products from China but also from close allies like the EU; threatening to levy customs duties on around \$200bn of imports from China.

While the EU and Japan have not adhered to the method used, they share many of the US's concerns vis-à-vis China and are working with it to table changes to WTO rules as part of a trilateral partnership,¹¹⁴ and to put forward multi-stakeholder solutions.

However, **it seems important that the European agenda for trade negotiations, which is needed to break the deadlock at the WTO, should be supplemented by bolstering the battery of EU trade measures**, in line with recent progress in this respect (see below). This is all the more necessary as the EU is an entity that has made the original choice of opening up to global markets, unlike China and US, and as the Commission's political rhetoric focuses almost exclusively on the negotiating agenda and conclusion of new Free Trade Agreements (FTAs):

- ◆ The EU economy has never been more integrated with the rest of the world than it is today:
 - The share of extra-EU trade in its GDP has increased from 15% in the mid-1980s to 24% today. In nominal terms, total extra-EU trade has risen by 66% since 2007, compared to 56% for the US.¹¹⁵
 - Since the beginning of the current Commission's term of office, successful negotiations have been conducted with Canada, Japan, Vietnam and Singapore, and talks have been started or continued with Chile, Mexico, Mercosur, Indonesia, Korea, China and the US¹¹⁶
- ◆ Concurrently, there is a significant gap between the degree of openness of European markets and those of its competitors, even by looking at regulatory restrictions alone, without factoring in the operational difficulties faced by European companies after entering the markets of non-EU countries.¹¹⁷

¹¹¹ The status of the countries is linked to a self-declaration system and not to objective criteria. This status obliges developed member countries to take account of this in the application of WTO agreements.

¹¹² In his article entitled "*The 'China, Inc.' challenge to global trade governance*" (2016), Mark Wu uses the expression "China Inc." to express the influence and strong involvement of the state and the Communist Party in the Chinese economy.

¹¹³ Sébastien Jean, "International trade disagreements: Beyond Trump", Foreign Policy no. 1/2019, pp.57-69, Armand Colin.

¹¹⁴ http://europa.eu/rapid/press-release_STATEMENT-18-5915_en.htm

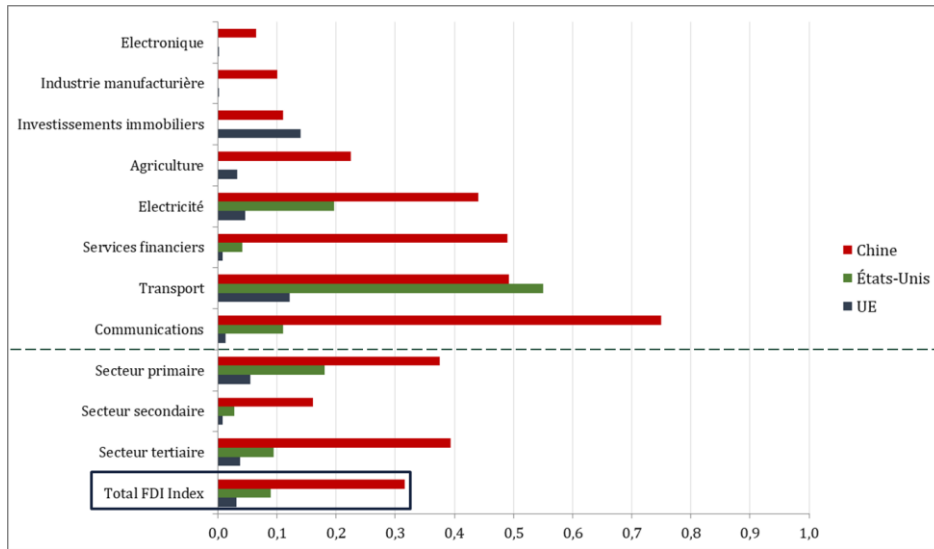
¹¹⁵ DG TRADE, *Trade Statistical Guide*, June 2018.

¹¹⁶ After the failure of talks for a Transatlantic Trade and Investment Partnership (TTIP) in 2016, many Member States intend to relaunch an initiative. France is not in favour of this approach.

¹¹⁷ For instance, in China, in the cosmetics sector, the requirement for animal testing for the approval of imported cosmetics prevents many French producers from entering the Chinese market.

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Figure 5: Comparison of the degree of closure of the Chinese, US and European markets¹¹⁸ in 2017



Source: Task force based on OECD data. The EU includes the 24 Member States present in the OECD's FDI Regulatory Restrictiveness Index. N.B.: In 2017, on a scale of 0 to 1 (0 being a fully open market, 1 being a completely closed market), the degrees of closure of the EU, US and Chinese markets were 0.032, 0.089 and 0.316 respectively.*

Chine	China
Etats-Unis	United States
UE	EU
Electronique	Electronics
Industrie manufacturière	Manufacturing
Investissements immobiliers	Property investments
Agriculture	Agriculture
Electricité	Electricity
Services financiers	Financial services
Transport	Transport
Communication	Communications
Secteur primaire	Primary
Secteur secondaire	Secondary
Secteur tertiaire	Tertiary
Total FDI Index	Total FDI Index

¹¹⁸ The figures for the EU were obtained by taking the average of results in the 24 Member States in the database, regardless of their GDP or the size of the sector under review.

It is therefore necessary to **rebalance European trade policy¹¹⁹ to address the new challenges of global trade and to provide a response to the rise of public mistrust, in particular in France,¹²⁰** as regards trade integration and the increasing need for protection. This rebalancing means heightening the EU's ability to uphold the interests of European businesses more systematically, more swiftly and more effectively and compliance with the rules deriving from the multilateral system and from all our bilateral trade agreements.

The appointment of a chief enforcer, as suggested by President Macron in his Sorbonne speech in September 2018, would create with the EU a position dedicated to monitoring compliance with the rules and commitments made by our trading partners and would allow broader action to counter unfair behaviour by non-EU countries which harms it.

This proposal is a response to the need for greater effectiveness and visibility of EU action in this area. The chief enforcer's comprehensive view of the situation would enable him or her to marshal all the legal resources available to the UE, to put forward new coordinated strategies and to offer European businesses a one-stop shop. It would involve:

- ◆ appointing a credible figure, under the direct authority of DG TRADE, to head up an enforcement unit bringing together all the staff working on these issues who are currently in different structures. This would prevent DG TRADE's enforcement teams from being disconnected from those tasked with negotiations, whilst clearly putting both fields on an equal footing.
- ◆ increasing the Commission's human resources assigned to fighting unfair practices and improving the consistency and use of existing legal instruments to combat such practices

At the same time, one of the Commission's Vice-Presidents could be tasked with establishing a coherent policy to ensure compliance with all international trade rules and the best possible cooperation within the Commission, in particular between DG TRADE and DG COMP.

A number of our European partners see the creation of such a position as representing a protectionist move leaving us open to potential reprisals from the relevant non-EU countries and, ultimately, as a pretext for signing fewer agreements. It is therefore important to underscore the fact that **the introduction of this mechanism would be a way of demonstrating that the EU is using all the resources at its disposal to defend itself against trade practices that are incompatible with the rules it has agreed to, in the interests of European businesses and consumers.** It should also be stressed that any agreement entails reciprocal rights and obligations for both parties. These are defined in the negotiating mandate that Member States give to the Commission. As a result, failing to verify that the opposite party is complying with its obligations is a breach of the mandate.

Proposal No. 11: Appoint a chief enforcer to coordinate all the Commission's actions on behalf of the EU in order to foster compliance with trade rules and give him/her authority over the competent departments. His/her teams and their powers of investigation should be bolstered to better document public aid for non-EU companies operating in the EU.

¹¹⁹ The European Commission has exclusive competence (Article 3 TEU) for the implementation of trade rules, in the same way as all trade policy rules.

¹²⁰ In a 2017 study, "*La tentation de l'Île : le protectionnisme est-il la solution?*", French polling institute IPSOS found that 60% of French people have a poor opinion of globalisation, 13% favour more open trade and 75% advocate greater protection against foreign competition.

3.1.2. The effectiveness of the new European trade defence instruments will depend on the new Commission's ability to seize upon it

The aim of the anti-dumping, anti-subsidy and safeguard instruments is to combat the unfair competition of our economic partners (see box 6).

Box 6: Trade defence instruments

Anti-dumping and anti-subsidy measures generally take the form of countervailing duties that target specific countries. They make it possible to correct the effects of unfair trading practices in cases where it has been established that import conditions are likely to distort international competition. This applies in particular to:

- A company in a non-EU country exporting a product to the EU at prices below the "normal value" of the product on its domestic market or using another method of calculation where the country in question is not a market economy (*dumping*)
- Cases where a subsidy granted specifically to a sector or undertaking confers an economic advantage on its beneficiary

Safeguard measures are emergency measures where the increase in imports of particular products causes or threatens to cause serious injury to the domestic industry of the importer. They apply *erga omnes*.

Source: Task force

Their use is strictly regulated by EU regulations implementing WTO trade defence agreements.¹²¹

Overall, the EU uses these instruments less than other countries, particularly the- United States, which take a proactive stance in their trade measures through the use of unilateral measures, whose compatibility with the WTO is also questionable¹²². For example, in the course of 2016, 68 new anti-dumping investigations were initiated by India, 33 by the United States, 25 by Argentina and 17 by Australia and Turkey, against 14 by the EU.

By the end of 2018, 121 anti-dumping, 13 anti-subsidy and 1 safeguard measures were in force in the EU, well behind the US (470 measures in force at the beginning of 2019). Nearly 44% of these measures concerned imports of steel products. Of all the measures in force, more than two thirds (68%) targeted products imported from China. The Commission estimates that these measures protected 320,000 European direct jobs¹²³ in early 2019.

In December 2017 and May 2018, the EU reorganised its trade defence instruments by introducing a new methodology for the calculation of anti-dumping duties in cases where state intervention¹²⁴ in the non-EU country introduces distortion. This new methodology introduces:

¹²¹ Thus, for these measures to be adopted, the WTO agreements require that there be evidence of dumping or subsidies, that the European industry in question suffered prejudice, and that there is a causal link between dumping and the prejudice. However, European legislation goes beyond the requirements of WTO agreements, since the imposition of measures must not be contrary to the interests of the Union, i.e. the Union must assess whether taking defensive measures harms the interests of importers, users of the product or the final consumer.

¹²² Section 232 of the *Trade Expansion Act* of 1962 limits imports that would jeopardise the country's "national security" and section 301 of the *Trade Act* 1974 takes all possible and appropriate measures to put an end to trade barriers as well as subsidies from third countries to which US exports are exposed.

¹²³ "Annual Report from the Commission to the Council and the European Parliament on the EU's Anti-Dumping, Anti-Subsidy and Safeguard activities and the Use of trade defence instruments by Third Countries targeting the EU in 2018," March 2019.

¹²⁴ Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European

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- ◆ Higher duties in the context of anti-subsidy cases, as well as anti-dumping cases concerning imports made from raw materials and energy supplied at an artificially low price. This is an adaptation of the “lesser duty rule.”¹²⁵
- ◆ Stepped-up implementation of measures with the reduction of the investigation period prior to the imposition of interim measures from nine to seven months
- ◆ Better taking into account of the additional costs incurred by EU businesses in complying with the more protective labour and environmental standards they apply
- ◆ Improved predictability for businesses, by informing them three weeks before the collection of duties is started and specific support for SMEs to make it easier for them to file complaints and provide them with advice
- ◆ Precise, systematic documentation of market distortions by non-EU countries, thus providing companies with evidence to support their complaints and implement the anti-dumping measures more quickly. These investigations are collated in a report made public. In 2017, China was the subject of a detailed report.¹²⁶

While these measures go in the right direction and provide the Commission with a solid battery of trade defence instruments, the Commission must take action to trigger more investigations, with a resolute proactive approach, even though many Member States are reluctant to bolster our positions, for fear of retaliatory measures and with a view to favouring their interests of exporting countries. The personality of the European Commissioner for External Trade and his or her capacity to sustain this ambition will be essential.

Moreover, these developments only partly address the main problem of the activation of anti-subsidy measures, which is the lack of formal evidence of practices in certain non-EU countries. This is particularly acute as the absence of a clear dividing line between the public and private sectors often makes it difficult to define what constitutes wrongdoing.¹²⁷ By way of illustration, the Commission’s export aid qualification of the role the Chinese government played in the takeover of Pirelli demonstrates both the difficulty of countering sophisticated predatory practices (see box 7) and the Commission’s twofold willingness to bolster the use of the anti-subsidy instrument and test the limits of the concepts of the WTO’s Agreement on Subsidies and Countervailing Measures (public entities, export subsidies, etc.).

Box 7: The takeover of Pirelli by CNRC

In an anti-subsidy investigation initiated in October 2017 against alleged unfair imports of rubber tyres for buses and trucks from China, the Commission took an interest in Chinese government financial support in the acquisition of the Italian group Pirelli in 2015.

The Commission concludes that the Chinese State intervened in the acquisition of Pirelli for the benefit of China National Tire & Rubber Co. Ltd (CNRC) to enable the company to multiply its export opportunities, thus characterising a subsidy conditional on export under the WTO Subsidies and Countervailing Measures Agreement (SCM). This intervention took the form of:

- A grant awarded by the State Agency in charge of the supervision of state-owned enterprises
- A preferential loan of €800 million from a public banking consortium combined with repayment of the interest paid by the Ministry of Finance

Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union.

¹²⁵ The lesser duty rule is a rule according to which the authorities impose a duty lower than the margin (the difference between the export price and its actual value) if that duty is sufficient to eliminate the prejudice.

¹²⁶ European Commission, "Commission Staff Working Document on Significant Distortions in the Economy of the People’s Republic of China for the Purposes of Trade Defence Investigations," December 2017.

¹²⁷ From this point of view, the G20 Global Steel Capacity Forum set up in 2016, the country reports issued by the Commission, and efforts by the OECD contribute to the consolidation of complaints and create a favourable environment for European companies to pass on information and build up cases, while some are still reluctant to do so, for fear of losing contracts.

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- A €530 million equity stake in the Pirelli group by the Silk Road Fund and €266 million from the China Cinema Asset Management Co. Ltd. In this respect, this is the first time that the Commission has named an investment transaction from public funds as a means for constituting an export subsidy.

Source: Task force based on information provided by DG Trésor.

In the event of an escalation of trade tensions, to put pressure on China and in a number of sectors identified as benefiting from significant and unreported subsidies, a more offensive solution would be to assume that Chinese companies are massively benefiting from subsidies and reversing the burden of proof (“rebuttable presumption”).¹²⁸ It would thus be up to a Chinese company to prove that it has no government financing.

The appropriateness of such a measure should first be considered within the trilateral group made up of Japan, the United States and the EU, and which is currently considering a modernisation of the WTO Agreement on Subsidies and Countervailing Measures.

Proposal No. 12: Consider introducing a rebuttable presumption in a series of identified sectors in which Chinese companies are massively benefiting from subsidies and reversing the burden of proof.

3.1.3. Recent progress, which has led to the adoption of a regulation on the screening of foreign investment, must be carried forward to provide the EU with leverage to curb unfair practices by non-EU countries

3.1.3.1. The Commission has recently established a foreign investment screening mechanism

As a result, the EU is the first area in terms of foreign direct investment (FDI), with around 35% of its total assets belonging to foreign-owned companies, an increase of almost 10 percentage points since 2007.¹²⁹ The stock of these investments held by non-EU investors amounted to €6,295 billion at the end of 2017. Several trends in recent years can be identified:¹³⁰

- ◆ Traditional investors such as the US, Canada, Switzerland, Norway, Japan and Australia remain the majority and account for 80% of foreign interests in all sectors of the EU economy, but emerging economies, in particular China in terms of aeronautic construction and the manufacturing of specialised machinery, have seen their share in these FDI increase over the last 10 years
- ◆ Investment by state-owned enterprises has also increased. This type of company from China,¹³¹ Russia and the United Arab Emirates carried out three times as many acquisitions in the EU in 2017 as in 2007.
- ◆ Foreign ownership is high in certain sectors such as oil refining, pharmaceuticals, electronic and optical products and electrical equipment.

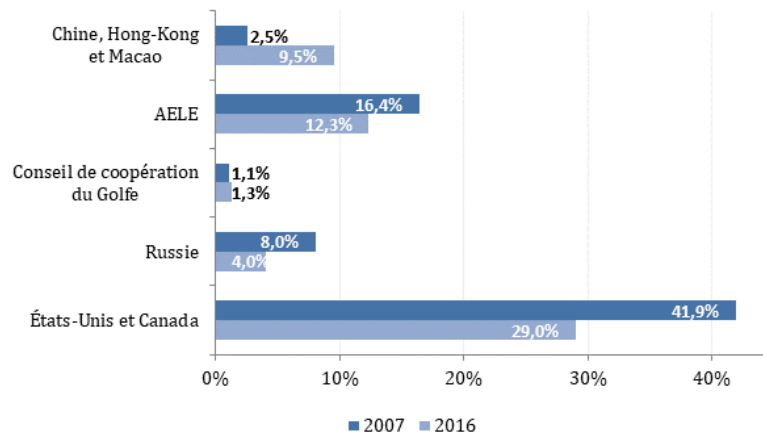
¹²⁸ The EU proposed in 2015 to introduce a general rebuttable presumption in the framework of the WTO, where any unnotified subsidy would be presumed to cause serious harm to other members and could give rise to an action. It would then have been up to the member granting the subsidy to show that the latter did not cause prejudice. This initiative was not followed up.

¹²⁹ On the other hand, the number of European companies held by foreign investors is relatively stable and is below 3%, as these investors favour the acquisition of large enterprises and therefore affect a relatively small number of companies.

¹³⁰ European Commission, "Working Paper on Foreign Direct Investment in the EU," March 2019.

¹³¹ A total of nearly 60 acquisitions have been made by Chinese structures of this type since 2007.

Figure 5: Share of foreign investment, according to origin, in European companies



Source: European Commission, Working Paper on Foreign Direct Investment in the EU, March 2019.

More specifically, Chinese investments in Europe are concentrated in the United Kingdom (€4.2 billion in 2018), Germany (€2.1 billion)¹³² and France (€16 billion), with these three countries attracting 45% of Chinese FDI in the EU. Brexit, together with the signing on 24 March 2019 of 29 contracts and memoranda of understanding between China and Italy, for a total amount that could reach €20 billion, should result in some rebalancing between Member States.

However, the participation of one founding Member State, such as Italy, in the Silk Routes initiative is a cause for concern in the rest of the EU. Italy, which was behind the the foreign investment screening project that entered into force on 10 April 2019,¹³³ alongside France and Germany, is s one of the only two countries abstaining from its adoption at the Council meeting of 5 March 2019.

This scheme is based on the general exception relating to defence and the public policy and public security exception referred to in Article 65 TFEU on the free movement of capital. **This mechanism, although modest in its ambition, nevertheless constitutes a first political signal in favour of a “Europe that protects”** and should have a knock-on effect as some Member States, initially reluctant to the adoption of the Regulation, are now working on their own screening system.¹³⁴ More specifically, the mechanism:

- ◆ Establishes an obligation to cooperate and exchange information between countries (investor’s nationality, company structure, investment value, sector of activity, etc.), whether or not they have a national regime for the control of foreign investment, which will enable both the creation of a common understanding of the impact of foreign investment, and a better identification of trends in foreign investment
- ◆ Respects the competence of Member States, who remain in charge of the final decision on foreign investment following comments and opinions from the other Member States and from the Commission. This was a condition *sine qua non* for its adoption.
- ◆ Allows for a specific monitoring of foreign investments that could affect European projects and programmes (Galileo, Copernicus, Horizon 2020). The new mechanism gives the Commission a stronger right of scrutiny, as the Member State must provide explanations if it does not follow the Commission’s recommendations.

¹³² Brexit will therefore probably result in China's investments in the EU falling in nominal terms as from next year.

¹³³ As requested by the Council, the Regulation will only be applied 18 months after its entry into force to allow Member States to set up contact points and adapt their legislation if necessary.

¹³⁴ This is in particular the case for Sweden, Malta, Denmark and the Czech Republic.

Even though the instrument has nowhere near the ambition and scope of the US CFIUS,¹³⁵ it is expected to cover a large share of the activities of mergers and acquisitions of non-EU countries, particularly China, in Europe. A March 2019 study estimates that its retrospective application would have covered more than 82% of Chinese investment in the EU in 2018¹³⁶.

3.1.3.2. Using public procurement as offensive leverage would make it possible to put pressure on China

Despite recent progress,¹³⁷ European companies still face great difficulties in accessing non-EU countries' public procurement markets. Of the four countries in the world that are most impacted by discriminatory procurement measures, three are European (Germany, France and Italy).¹³⁸

According to the Commission, open public procurement is only 32% in the United States and 28% in Japan. These countries retain restrictive legislation requiring the use of local providers; Under the Buy American Act, 50% of the cost of manufactured goods must be of American origin and assembled on American soil. Moreover, countries that are not members of the WTO Government Procurement Agreement such as China, Australia and India do not have to open their public procurement markets.

This is a major economic issue. Foreign public procurement markets from which European companies are deprived represent a total of €12 billion.

At the same time, **EU public procurement is *de jure* one of the most open in the world.** However, it should be borne in mind that:

- ◆ The share of European public procurement awarded directly to non-EU country firms is less than 5% (in terms of number of contracts) in the majority of Member States, with significant differences between countries, with smaller countries being most likely to turn to foreign firms. Thus the only countries granting more than 10% of their public contracts to non-domestic firms are Malta, Ireland and Luxembourg;
- ◆ In the case of public contracts not awarded to domestic undertakings, **the share of European businesses in value terms remains largely dominant but has fallen** from 84.4% in 2009 to 73.2% in 2015.

¹³⁵ The Committee on Foreign Investment in the United States, which is chaired by the Treasury Department, is responsible for assessing the impact on national security of any proposed merger, acquisition or takeover where that transaction leads to control of a US company by a foreign entity. This mechanism was reinforced in August 2018 by extending the concept of "national security" and the scope of controlled operations. Thus, the CFIUS must now decide on foreign investment in "critical, emerging and fundamental" technologies (AI, robotics, nanotechnologies, biotechnologies, semiconductors, etc.), even when they do not result in the acquisition of control by the US company.

¹³⁶ 46% of transactions have to do with "sensitive" sectors, accounting for 71% of the total value of Chinese investment, 25% were carried out by state-owned entities and 58% related to the "Made in China 2025" programme. "Chinese FDI in Europe: 2018 trends and impact of new screening policies," report of the Rhodium Group (RHG) and Mercator Institute for China Studies (MERICS), March 2019.

¹³⁷ Since 2014, 123 public procurement barriers have been lifted, generating €6 billion in additional exports to the EU.

¹³⁸ Source: WTO, Global Trade Alert database (2017).

Table 3: Share of public procurement not awarded to domestic companies

Year	Share of non-EU businesses with direct contracts		Share of non-European firms with indirect contracts *	
	In number of contracts won (%)	Value (%)	In number of contracts won (%)	Value (%)
2009	12.6	15.6	39.1	33.0
2010	12.4	14.6	39.2	30.6
2011	16.9	14.1	39.4	30.5
2012	18.3	20.9	39.5	31.5
2013	28.7	24.8	38.2	32.6
2014	26.7	27.4	38.3	31.9
2015	26.4	26.8	37.6	33.8

Source: Task force based on work by the London School of Economics for the European Commission. In this case, the company that wins the contract is based in the same country but is a subsidiary of a foreign company. This is referred to as an indirect cross-border market. N.B.: in 2015, 26.4% of public contracts not awarded to companies in the country concerned were directly won by- non-European companies.*

Some recent cases have, however, led to criticism. They concern projects that, while they receive EU funding, have been awarded to heavily-subsidised Chinese companies:

- ◆ A Chinese consortium led by China Road and Bridge Corporation, a subsidiary of Chinese construction firm CCCC, won the tender for the first phase of the Peljesac bridge and its access roads in Croatia in January 2018. The project benefits from EU funding of €357 million from the Cohesion Fund;
- ◆ The Chinese Bulrail consortium 2018, led by CCCC, won a project of over €200 million for the construction of a rail link in Bulgaria. The Connecting Europe Facility funds this project for a total of €150 million.

Faced with these imbalances, the EU is struggling to implement effective solutions:

- ◆ In FTAs under negotiation, the Commission’s power is diminished as a result of European unilateral opening
- ◆ While the implementation of national reciprocity instruments is permitted under European law, it does not have the same authority as a coordinated instrument, and exposes States to even more retaliatory measures by targeted non-EU countries
- ◆ A reciprocity instrument, known as IPI (International Procurement Instrument),¹³⁹ was proposed by the Commission in 2012 but has been blocked in the Council since then, despite a further attempt in 2016.

Such a mechanism would enable the EU, in line with the approach to investment screening, to open public procurement to varying degrees, taking into account the degree of openness of applicant countries’ countries of origin. **In addition, it would provide an incentive for these countries to open their markets further, but it would appear possible only with the support of Germany:** the BDI report of January 2019 suggests that this may change in the coming months, although some Member States initially in favour of the initiative are now more reserved.

¹³⁹ In 2014 and 2016, two versions of the IPI were proposed by the Commission to regulate access to EU public procurement markets for non-EU companies from countries that are not signatories to the WTO Government Procurement Agreement.

In any case, **the task force considers that this tool should be presented to our partners not as a pure form of reciprocity, the aim of which would be to close our markets** in proportion to the closure of those of our trading partners, but as a means to:

- ◆ A level playing field for European companies vis-à-vis competitors not complying with market rules in award procedures
- ◆ **Create leverage to pressure countries whose public procurement markets remain closed into increased openness** and thus opportunities for European companies to grow and win international markets

After an investigation confirming discriminatory practices or measures against an EU country, the Commission could invite the country concerned to remedy the situation within a limited period of time. As a last resort and until the situation is resolved, it could, after consulting the Member States, apply measures restricting access to the European public procurement market (in the form of closing markets or imposing high price penalties), for goods and services from the non-EU country concerned, to create a level playing field.

In addition, to promote its political acceptability, the Commission could opt for a decentralised application in line with the mechanism implemented in the context of foreign investment screening. In such a case, it may decide, if a Member State does not comply with its recommendations, to limit or eliminate European funding for the project.

Proposal No. 13: Using public procurement as an offensive lever to open up Chinese markets to European companies.

The overhaul of European trade defence instruments must also be part of an in-depth analysis of European vulnerabilities, in particular in strategic sectors such as AI, robotics and microtechnologies, to identify areas where additional measures are needed to preserve Europe's strategic autonomy.

3.2. Europe must give itself the means to be an industrial power at the service of its technological sovereignty

Creating a genuine European industrial strategy is a recurrent challenge for the EU. Compared to the United States or China, which rely to a varying degree on strong state interventionism, firms with a strong financial strength and large domestic markets, the EU budget seems limited, risk capital is underused, and the European market is still too fragmented.

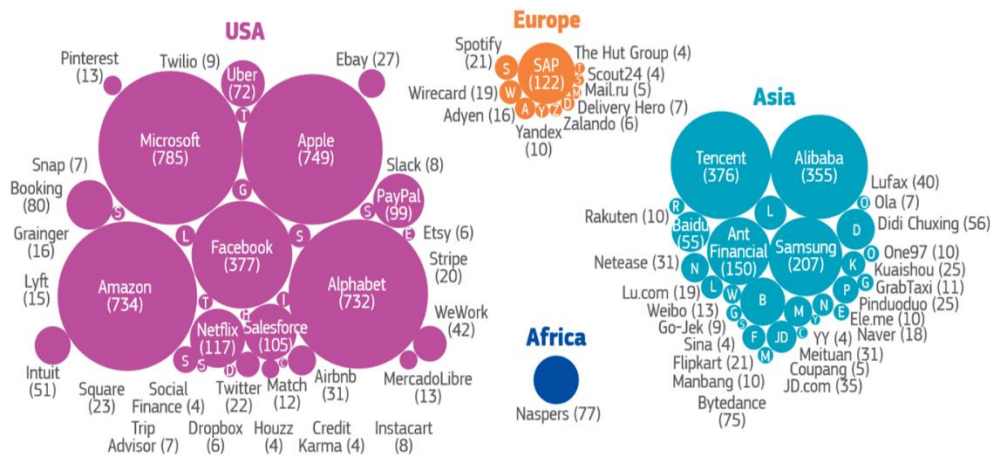
In this context, **efforts are mainly driven by the Member States, whose initiatives are not always coordinated**,¹⁴⁰ create risks of duplication of work that are ineffective as they are under-critical, and do not mobilise sufficient resources to absorb the risks of technological uncertainty, in particular in the area of disruptive innovation.

Today's best performers are those using digital technology not only to increase productivity and improve their internal processes, but also to innovate, reinvent their business models, value chains and customer relations. While the creation of added value is increasingly at the crossroads of goods and services markets, the main leaders of this competition are not European, but rather US and increasingly Chinese.¹⁴¹

¹⁴⁰ As part of its Artificial Intelligence (AI) strategy adopted in April 2018, the Commission announced increased coordination of funding to allocate at least €20 billion of public and private investment in AI research and innovation by the end of 2020 and more than €20 billion per year in the next decade. While this is the reflection of a needed effort, it appears small compared to the sums that the digital giants are able to mobilise. For example, in 2018, Amazon spent more than \$22 billion on R&D.

¹⁴¹ Worldwide market shares in the platform sector are as follows (2018): 70% for US firms, 27% for Chinese companies and 3% for European companies.

Figure 6: Size of main digital platforms per continent according to their market value in 2018 (in \$ billion)



Source: Nezoekonom.de.* Europe includes Russia.

To catch up, it is essential for the EU to provide a common and comprehensive response, in particular through:

- ◆ **Better coordination and increased European public funding in research and innovation** through the improvement of the State aid regime
- ◆ **Developing the European internal market and funding structures for innovative enterprises**

To take account of the specific characteristics of the EU, which, unlike its competitors, is not a sovereign state, it is necessary to promote projects with a European dimension, aligning the interests of the Member States as much as possible without blocking countries wishing to move forward with initiatives that are more limited in scope.

3.2.1. In order to compete on a level playing field with our competitors, encourage appropriate injection of public money while ensuring smooth coordination of innovative projects

Although the Europe 2020 strategy increased investment in R&D to 3% of GDP by 2020 in the EU, amounts invested remained virtually stable at 2.03% in 2016, compared with 1.79% in 2002.

Even though this is not directly linked to the existence of the State aid control system, it can't be completely ignored: **it complicates and prolongs the procedure for granting public support in comparison with practices observed in non-EU countries**, with priority being given exclusively to the conduct of industrial policy (and not competition). In particular, the above-mentioned study by Bird & Bird has noted that timeline for the payment of aid in the EU is two to three times longer than in comparable non-EU countries (between 7 and 8 months on average).

The task force therefore suggests a thorough review of the monitoring of aid to R&D and innovation (R&D&I) so that aid can be implemented as smoothly as possible by minimising ex ante control. Such a measure would have several advantages:

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- ◆ Against a backdrop of increasingly shorter business cycles, particularly in the area of technology, it would save time for project leaders, but also for the Commission, whose efforts and resources could thus be focused on coordinating innovative projects with a European dimension
- ◆ It sends a strong political message concerning the EU's desire to finally meet the objectives it set for itself nearly twenty years ago as part of the Lisbon Agenda and to catch up with its competitors
- ◆ It would circumvent difficulties faced by Member States in activating the "matching clause" (see 3.2.1.2)

This could be done in a number of ways, at different scales.

Article 107 TFEU contains a list of categories of aid that are compatible with the internal market, which can be extended to "such other categories of aid as may be specified by decision of the Council on a proposal from the Commission". Since a Treaty change is not a credible short-term objective, two options are available to step up aid implementation, where necessary, while maintaining maximum legal certainty:

- ◆ A first option to relax control would be a revision by the Commission of the GBER, specifically Section 4 on R&D&I aid. Although it is a simple solution, it should be done within the framework currently laid down in the Regulation empowering the Commission to adopt measures on certain categories of State aid declared compatible with the internal market and exempted from notification.¹⁴² As part of this, thresholds — which would be raised — as well as the conditions for exemption should necessarily be maintained.¹⁴³ An overall exemption for R&D&I of more than 95% in numbers of aids and 90% in amounts could, for example, be considered.

This revision could be part of the ongoing GBER evaluation procedure or the "fitness check" undertaken by the Commission on 7 January 2019 to modernise State aid control. By way of reminder, the current rules are in force until 2022.

- ◆ A second option, which would lead to a more far-reaching recast of the texts, would consist of amending the Enabling Regulation by the Council in order to exempt aid for R&D&I from any condition relating to thresholds¹⁴⁴ and intensity¹⁴⁵ of aid provided for today¹⁴⁶, without, however, simply exempting, on pain of illegality, those measures from the control of aid provided for under the Treaty. They would then be exempt from prior notification, but would still be subject to the possibility of ex post controls, to be differentiated based on the extent of the aid and its nature, of their compliance with the Single Market.

This amendment would have to be proposed by the Commission and then adopted by the Council after consulting with the Parliament. It would require a qualified majority in the Council of at least 16 Member States, representing at least 65% of the EU population.

¹⁴² Council Regulation No 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories of horizontal State aid.

¹⁴³ According to Article 1(2) of the Enabling Regulation, the exemption regulation adopted by the Commission must specify at least for each category of aid (i) the objective of the aid, (ii) the beneficiaries, (iii) the exemption thresholds, (iv) the conditions for combining aid, and (v) the conditions of control.

¹⁴⁴ For example, aid for basic research may not exceed €40 million per undertaking per project.

¹⁴⁵ Defining the maximum rates applicable in a Community Regulation, which would not be the same on R&D and on innovation, would probably contribute to better legal certainty for project leaders.

¹⁴⁶ In detail, a new article specifically dedicated to R&D&I aid could be included in this Regulation in order to allow the Commission to amend section 4 of the GBER. The review of the monitoring of R&D&I aid could, alternatively, be fully decided by the Council. The latter could adopt a Regulation on R&D&I aid only providing for all conditions relating to the exemption from notification. Under these circumstances, the Council be empowered to significantly lighten the R&D&I regime.

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In any case, relaxing the criteria would require appropriate and possibly differentiated treatment of R&D aid on the one hand and innovation aid on the other: their proximity to the market is not the same as they do not intervene at the same level of the value chain. Ambiguity concerning the applicable criteria and a revision having the effect of creating too high a threshold effect between these different types of aid would undoubtedly have the effect of increasing litigation and, consequently, the legal uncertainty affecting the recipient companies, particularly SMEs and start-ups.

Proposal No. 14: Thoroughly overhaul monitoring of R&D&I aid so that such aid can be implemented without ex ante European control as often as possible.

The task force proposes that the following be immediately implemented:

- ◆ The time needed for the examination of such aid should be shortened (see 3.2.1.1)
- ◆ Better account should be taken of State aid paid by non-EU countries (see 3.2.1.2)
- ◆ IPCEIs should be developed, particularly by improving the role of the Commission in coordinating initiatives (see 3.2.1.3)

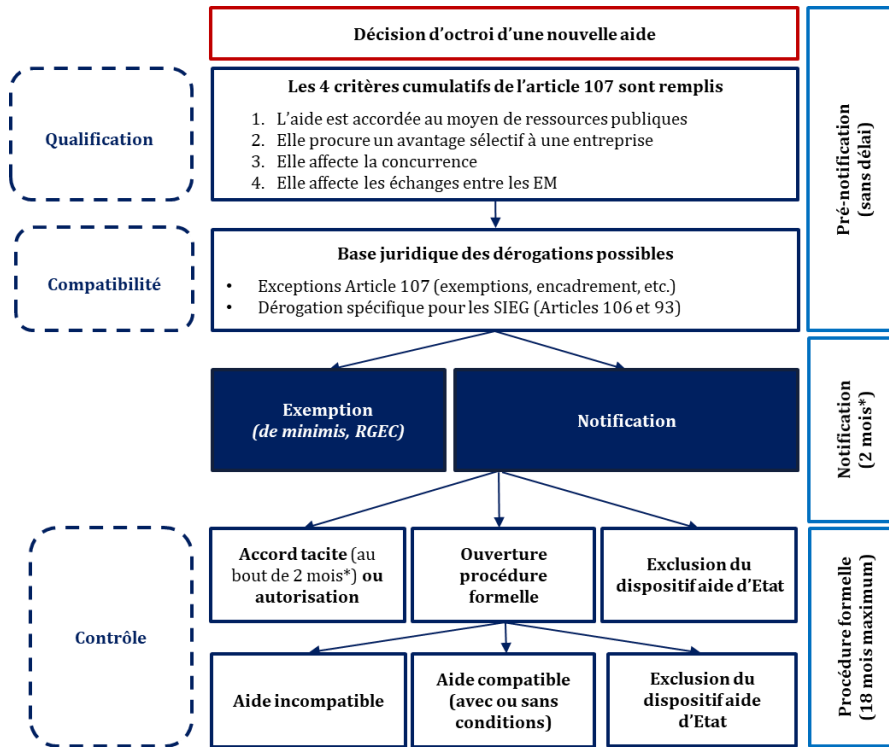
3.2.1.1. Shortening the time limits for State aid examination

The period within which to conclude the examination of State aid investigations is laid down in Regulation (EU) No 2015/1589.¹⁴⁷ In principle, the Commission has two months to adopt a decision from the date of notification of an aid project provided that it is in possession of complete information. In practice, and insofar as the Commission alone is able to consider whether or not it has complete information on an aid project, it is often the case that the Commission regularly questions the Member State, triggering the two-month period once again.¹⁴⁸ This is the main issue at stake in the pre-notification phase, which aims to prevent periods of examination being extended after the notification phase, since the Commission will not have all the information it requires.

¹⁴⁷ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union

¹⁴⁸ For example, in October 2017, the Directorate-General for Energy and Climate (DGEC) initiated proceedings with the Commission for the notification of a mechanism for regulating the essential infrastructure for the storage of natural gas with formal notification in January 2018. Since then, DG COMP has sent six sets of questionnaires to DGEC and the Energy Regulatory Commission.

Figure 7: Process for reviewing new aid (excluding SGEL)



* Chaque demande de la COM relance le délai

Source: Task force

Decision to grant new aid				
Qualification	The four cumulative criteria in Article 107 are met 1. The aid is granted from public funds 2. It allows a company to gain a selective advantage 3. It has an effect on competition 4. It affects trade between Member States			Pre-notification (no deadline)
Compatibility	Legal basis for possible exemptions - Exemptions based on Article 107 (exemptions, framework, etc.) Specific exemption for SGELs (Articles 106 and 93)			
	Exemption (de minimis, GBER)	Notification		Notification (2 months*)
Control	Tacit approval (after two months*) or authorisation	Opening of formal proceedings	State aid not allowed	Formal procedure (max. 18 months)
	Aid incompatible	Aid compatible (with or without conditions)	State aid not allowed	

In total, given the length of the pre-notification phase, which is not, by its nature, subject to deadlines, the notification phase and the potential opening of a formal investigation procedure, the time-limits for which are limited to 18 months to guarantee the rights of the defence, **sometimes the examination of State aid takes more than two years, which appears to be totally incompatible with business time.**

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For this reason, more ambitious objectives are needed for the timetable for the examination of cases. The formal procedure could thus be limited to a period of 12 months. There are a few things to consider here:

- ◆ Such a reduction could lead to an extension of the pre-notification phase, during which Member States and the Commission could seek to resolve any related issues further upstream
- ◆ There is a risk that Member States withdraw their projects more frequently because they are unable to answer the Commission's questions in a timely manner. The national authorities are already asking for extra time. For this reason, the 12-month period should be indicative only and not binding.
- ◆ Such a deadline implies that the Member States are able to provide all the information requested by the Commission in a timely manner. A shortening of the time limits therefore also requires the government departments in charge of aid files to act more quickly. As part of this, **France should ensure that its projects comply with the frameworks provided for by the exemption regulations**, a strategy to be developed aid scheme design stage, in order to concentrate on the new cases and those with the most difficulties.

Proposal No. 15: Include among the procedural rules on State aid a maximum recommended duration of 12 months for the investigation of cases. For its part, France should ensure that its projects are better aligned with the frameworks provided for by the exemption regulations and that the processing of cases is stepped up.

To achieve such a time reduction, in addition to improvements brought about by raising the thresholds proposed above, particular attention should be paid to simplifying the Commission's counterfactual analysis. More broadly, it is important, when dealing with cases, to pay particular attention to the specific characteristics of the markets concerned, in particular the energy market.¹⁴⁹

3.2.1.2. Establishing rules to better take into account State aid paid by non-EU countries

This also means restoring a more acceptable playing field with our industrial competitors (see 3.1.2).

In theory, the matching clause mechanism¹⁵⁰ has since 1996 allowed R&D aid to be paid to companies exceeding the authorised thresholds if it is shown that a competing company outside the EU receives aid from a non-EU country. This provision makes it possible to align itself with the level of aid granted to the non-European entity for similar activities. However, this mechanism has never been invoked because of a very high standard of proof in view of the difficulty of proving a precise level of aid to which a competitor from a non-EU country would benefit. Should the EU decide to assume a level of public support in non-EU countries allowing it to trigger trade defence mechanisms, such a clause could be more easily activated.

Nevertheless, and even simplified, **the matching clause appears to be a limited instrument** in so far as:

¹⁴⁹ For example, power-intensive industries can only operate on European territory subject to conditions of access to electricity that are comparable to those of their main international competitors. These conditions are negotiated with suppliers under very long-term contracts, whose parameters are far removed from the parameters governing contracts with other electricity consumers. These contracts are submitted to DG COMP. It is important that their ongoing review takes into account the specific characteristics of the sector. This is also underlined in the "National Industry Strategy 2030" issued in February 2019 by the BMWi (pp. 13-14).

¹⁵⁰ Section 5.1.7 of the R&D&I framework

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- ◆ The differences in the level of subsidy found between China and the US on the one hand, and the EU on the other hand still raise the question of the effectiveness of the aid paid in these first countries. The existence of deadweight effects, the risk of support for 'lame duck' or 'zombie' companies, the limited impact of aid to attract businesses unlike other factors such as agglomeration effects,¹⁵¹ etc.
- ◆ Most importantly, it would in any case be impossible to align with the level of subsidies paid to Chinese companies because of the budgetary constraint on our public finances.

As anti-subsidy procedures are part of the EU's trade policy, and DG TRADE's powers in this area are much weaker than DG COMP's prerogatives to conduct its State aid control within the EU, there is a strong asymmetry between the constraints imposed on European companies vis-à-vis non-EU countries. Aligning the standard applied to non-EU country firms in the context of anti-subsidy investigations would almost amount to rendering State aid control ineffective. Instead, it might be advisable to strengthen DG TRADE's powers in its anti-subsidy cases, building on the above-mentioned presumption of subsidies mechanism (see 3.1.2) or, at a minimum, to **promote the joint work of DG COMP and DG TRADE to improve the collection of precise information on funding and support provided to our non-European competitors.**

To support European businesses more effectively — the aim of a recent joint initiative by DG COMP and DG TRADE — and to generate feedback within a framework of trust, it would be appropriate to improve communication and come up with more secure ways of exchanging information.

3.2.1.3. Develop IPCEIs, in particular by improving the role of the Commission in coordinating initiatives

As part of the investigation of IPCEIs, the special nature of such projects gives special roles for the Commission's other Directorates-General, since they are responsible for identifying the sectors which may be the subject of an IPCEI. While DG COMP's place remains central, the initiative and the capacity to run these projects depend primarily on the sectoral directorates, which have, in the opinion of the Member States, a positive role in seeking to speed up exchanges for decision-making within short deadlines.

The current organisation between the Commission's various Directorates-General therefore seems satisfactory, exchanges are ongoing and of good quality.

It could, however, be clarified at the next review of the Commission's Communication on the Criteria for the analysis of the compatibility with the internal market of State aid to promote the execution of important projects of common European interest of June 2014, in a new point.

In the event that the raising or even elimination of the thresholds, advocated by the task force, is not implemented, it would also be appropriate to extend this best practice to the examination of other State aid cases on R&D, in order for DG COMP to systematically involve the sectoral directorates concerned by an aid project upstream and throughout the investigation. An identical point to that inserted in the IPCEIs guidelines could usefully be added to the Commission's Communication on the Framework for State aid for research and development and innovation¹⁵² by clarifying the modalities of an instruction involving the different Directorates-General concerned at the outset of the investigation.

¹⁵¹ OECD, "Government R&D funding and company behaviour — measuring behavioural additionality", 2006.

¹⁵² Communication from the Commission – Framework for State aid for research and development and innovation (2014/C 198/01).

Proposal No. 16: Detail the arrangements for implementing IPCEIs by formalising the initiative and leadership role of the sectoral Directorates-General and the framework for their association with DG COMP at the outset of the investigation. Extend this practice to the investigation of the other State aid cases concerning R&D.

In addition, two issues identified at the time of the first IPCEI could be corrected by DG COMP.

- ◆ The need for the project to be of benefit not only for the companies or sectors concerned (paragraph 17 RAG)
- ◆ Analyses of counterfactual scenarios (paragraph 29)

However, an IPCEI must by definition make a significant contribution to the Union's objectives, for instance by being of major importance for the Europe 2020 strategy, and involve several Member States and companies.¹⁵³ In these circumstances, it seems unnecessary to impose additional conditions for the dissemination of knowledge beyond the companies or sectors concerned, as the participating companies are already numerous and the sectors are broad.

The same applies to the requirements in respect of the counterfactual scenario, whereas in the absence of an IPCEI such projects would simply not exist, or in a less ambitious form.

In order to facilitate the investigation of the cases, it could therefore be considered that, in the case of an IPCEI, those two conditions are presumed to be met.

Proposal No. 17: Accelerate and streamline the investigation of IPCEIs by revising paragraphs 17 and 29 of the Guidelines to indicate that the requirement for the project to be of benefit not just for the companies or sectors concerned and the counterfactual scenario analyses are presumed to be met.

But IPCEIs are only one way to develop common technologies and to imagine transnational forms of intervention. **It is necessary to encourage temporary collaboration or the establishment of a consortium of European companies**¹⁵⁴ that complement each other so that they can respond to joint invitations to tender, increase their presence on the markets, combine their production and increase the impact of their R&D.

These initiatives are interesting but they are only for implementing an industrial strategy to assert European sovereignty. This means:

- ◆ **Targeting globally-important sectors of the future with high added value**, in particular those where Europe has a competitive advantage, with the aim of restoring the capacity to develop rules and standards for emerging technologies
- ◆ **Thinking in terms of value chains to preserve our strategic autonomy and our production capabilities.** Over-reliance on Asia for the production of raw materials and, above all, key components exposes the EU to a loss of know-how, disruption of its production line or the risk of compromised equipment be a part of its critical infrastructure. For example, without the development of a European large-scale electric battery manufacturer, the transition from motor cars to electric cars would lead to the loss of up to 1 million jobs in the EU-28.¹⁵⁵

We therefore need to identify where the value chains are already disrupted or threaten to do so, and to agree on concrete measures to prevent further erosion or even to reverse the trend.¹⁵⁶

¹⁵³ 4 Member States and 27 aid beneficiaries in the case of the microelectronics IPCEI.

¹⁵⁴ Volkswagen and Northvolt have just announced the setting up a new European consortium for the production of cells for electric batteries.

¹⁵⁵ Natixis, Flash économie, April 2019.

¹⁵⁶ Our German partners express the same concern in the above-mentioned "National Industry Strategy 2030": "We need an independent, comprehensive and ruthless analysis of the strengths and weaknesses of all economies in the

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European Union, including the German economy. The available studies are frequently incomplete or their assessment criteria opaque. We must know where we stand so that we can master the future together.”

CONCLUSION

Responding to the challenges posed by digital technology and by the emergence of stakeholders that do not play by the same rules requires a change of our competition policy and a reshaping of our trade policy.

However, in the absence of a common industrial, tax and financial strategy, this is not enough to foster the emergence of European digital players or sectors of the future. As a result, the risk remains that the internal market can be summed up as the meeting place between European consumers on the demand side, and US and Chinese companies on the supply side. This has implications for our technological autonomy and more broadly on the EU's ability to exist as a sovereign power between the United States and China (but also Russia or, tomorrow, India).

To implement this industrial strategy, which goes beyond the scope of this report and complements the measures proposed by the task force, it is therefore necessary to:

- ◆ Better leverage and coordinate funding, whether European or national, public or private, direct or otherwise, in particular at an advanced stage of maturity of our companies¹⁵⁷
- ◆ Step up support for breaking down research, development and innovation by drawing inspiration, in particular, from best American practices in this area, in abundant use in the European budget,¹⁵⁸ building on a European agency modelled on the DARPA model¹⁵⁹ or by making more systematic use of public procurement
- ◆ Bring about a digital single market to provide innovative companies with a demand pool of comparable size to the US market, as well as large enough growth opportunities to be able to face competition

¹⁵⁷ The Commission announced the launch in April 2018 of a network of pan-European venture capital funds of funds, Venture EU, with €410 million.

¹⁵⁸ For example, in current euros, the main R&D and innovation programme, Horizon Europe, grew by 30% between the MFF 2014-2020 and the Commission's proposal for the MFF 2021-2027.

¹⁵⁹ Attempts to transpose the DARPA model have so far failed. The differences in military budgets between Member States, not only in absolute terms, but even as a percentage of their GDP, and the fact that military spending and strategies are national in Europe when they are federal in the US has proved to be obstacles. The ongoing "European Innovation Council" project under Horizon 2020 to form a European agency for disruptive innovation is an encouraging development.

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Paris, 19 April 2019

Victor blonde



Inspecteur des finances

Under the supervision of Anne PERROT



Inspectrice générale des finances

With the participation
From Axel ROSRSP
Assistant

Serge Catoire



Ingénieur général des mines

Hervé Mariton



Ingénieur général des mines

LIST OF PROPOSALS

Developing new instruments to respond to the digital challenge	
1	Establish a European level digital systemic stakeholder oversight committee involving staff from DG COMP, DG CONNECT, DG GROW and DG HOME with powers to examine and investigate
2	Introduce an ex post review of mergers a short time after the fact where the ratio of the transaction value to the turnover of the undertaking purchased points to a potential competition issue
3	In the event of the danger of serious and immediate harm to the market, implement interim measures pending a future decision on the merits of the case, as is the case in France.
4	Upgrade DG COMP's digital skillsets by recruiting sector specialists (data scientists, algorithm specialists, etc.) and develop venture capitalist reflexes to determine the potential anti-competitive behaviour of systemic players.
Changing our merger control system to foster the emergence of a European power	
5	Encourage the Commission to take greater account of long-term factors by (i) deleting the reference in the Guidelines to the two-year period for factoring in the entry into a market of a potential competitor and (ii) stipulating that DG COMP should develop a benchmark for other comparable sectors that have experienced market shifts that could occur in the sector considered.
6	As part of merger control, make more systematic use of behavioural remedies with review clauses to better adapt to the rapidly changing nature of many markets.
7	Include the fact that a potential competitor benefits from massive public subsidies in the Commission's competitive analysis.
8	Better involve the sectoral DGs in the examination of merger cases and increase transparency in decision-making within the College of Commissioners.
9	Take better account of efficiency gains from mergers by clarifying legislation through publication of specific guidelines and by introducing a second opinion procedure, following on from the Commission's assessment of these gains, to be conducted by an independent college.
10	Set up a team of industrial or sectoral strategy experts within DG COMP, to support the case team in identifying the industrial, financial and commercial feasibility of the remedies.
Boosting our trade tools to better serve EU interests	
11	Appoint a chief enforcer to coordinate all the Commission's actions on behalf of the EU in order to foster compliance with trade rules.
12	Consider introducing a rebuttable presumption in a series of identified sectors in which Chinese companies are massively benefiting from subsidies and reversing the burden of proof.
13	Using public procurement as an offensive lever to open up Chinese markets to European companies.
Giving the EU the means to be an industrial power	
14	Thoroughly overhaul monitoring of R&D&I aid so that such aid can be implemented without ex ante European control as often as possible.
15	Include among the procedural rules on State aid a maximum recommended duration of 12 months for the investigation of cases.
16	Detail the arrangements for implementing IPCEIs by formalising the initiative and leadership role of the sectoral Directorates-General and the framework for their association with DG COMP at the outset of the investigation.
17	Accelerate and streamline the investigation of IPCEIs on the basis of a presumption of satisfaction with the requirements for positive externalities and by simplifying the counterfactual analysis.