

# Fighting Fire with Fire: Fostering of A European Champion

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## Abstract

Countries have a financial interest in subsidizing companies originating from their respective territories to foster growth, enabling them to succeed against foreign competition, and attract further investment. However, this behaviour incentivises other nations to engage in a race of subsidies, distorting the competitive playing field, and leaving everyone worse off. For this reason, the EU has established internal market rules which prohibit Member States from creating European champions, even when facing the subsidized foreign competition originating from outside the internal market. Following the Commission's prohibition of the merger between Siemens and Alstom, the Franco-German manifesto was published. It protested the current approach and called for a number of reformations to enable the fostering of so-called 'European champion', subsidized European companies, which could compete equally against global competition.

In its latest competition policy review, the Commission emphasizes the importance of fair competition, enabling European firms to reach a sufficient scale in the face of global competition. This paper studies whether the Franco-German manifesto's proposals are feasible in the light of the Union's new competition aims and goals. It is found that fostering of a European champion is not strictly prohibited, making proposals regarding the timeframe and market definition unnecessary. However, the Commission's restrictive view of the current rules de facto prevents its emergence. In light of the Union's latest competition policy review, it is proposed that this strict interpretation may not be consistent with the current competition policy aims and objectives.

**Keywords:** *European Champion, Merger, Foreign Subsidy, State Aid, Public Policy*

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# 1 Introduction

## 1.1 Background

Some of the larger EU Member States have for a long time pushed for loosening merger control rules to allow the formation of so-called “European champions”. This ill-defined term lacks any official description, but for the purposes of this paper these entities can be understood as “*firms given favourable treatment by the state to help them maintain a dominant presence in the home market and a competitive share in the world market*”.<sup>1</sup> The Commission considers them problematic not because of their size but due to the distortion of the internal market this *favourable treatment* may cause. For example, during an acquisition process a subsidized company is capable of overpaying for acquisition and thus crowding out a potentially more efficient competitor without similar additional resources. This can lead to an expansion of these less efficient subsidized companies at the expense of non-subsidized companies. The result is a loss of effectiveness and higher prices, both which are detriments to the consumer welfare.<sup>2</sup> Currently, the Commission employs state aid control and merger control among other similar tools to ensure that this kind of distortion of the EU’s internal market does not take place. It has earned high praise both from domestic and foreign stakeholders for ensuring a competitive playing field.<sup>3</sup>

If that is the case, why would certain Member States passionately push for reforms which entail counterproductive results? In the Siemens/Alstom case, the Commission prevented the biggest railway companies in France and Germany from merging, causing a storm of heavy criticism. This culminated in a so-called “Franco-German manifesto”, where advocates of the merger claimed that the Commission had failed to assess the competitive distortions caused by foreign subsidies received by a Chinese competitor and the merger

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<sup>1</sup> Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy*, Cambridge University Press 1996, p. 47. The description is given to “national champions”. This paper sees them as a synonym to European champions as the only practical difference is the EU-wide dimension of the latter.

<sup>2</sup> Gerd Schwarz – Benedict Clements, *Government subsidies*. *Journal of Economic Surveys* 13(1) 1999, p. 129–130.

<sup>3</sup> Levy et. al 2019, p. 1–2.

rules were not equipped to consider political realities.<sup>4</sup> In other words, the Commission utilized a narrow market definition by excluding China.<sup>5</sup> To counter this, the loosening of the merger rules and a proposal to allow the Council to intervene when it was politically expedient was brought up.<sup>6</sup> The advocates insisted that in a worldwide market “*the size matters*”<sup>7</sup> and pointed out that many foreign competitors are heavily subsidized, such as the cases’ Chinese competitor CRRC.<sup>8</sup> They continued that while the Commission had strong measures to take against European companies that would receive favourable treatment from their respective EU Member States, there was little it could do against foreign businesses that received those subsidies outside the internal market. This results in an uneven competitive playing field both in domestic and worldwide markets.

The Commission recognized this regulatory gap and agreed that making amendments was necessary.<sup>9</sup> For this purpose, it brought up new tools, such as the foreign direct investment directive (FDI) in 2019 and a proposal for the new anti-subsidy regulation in 2021. It has also proposed a new amendment to merger control and ordered an assessment of the market definition notice from a separate consultant group. However, there is no concession to the demands of the Franco-German manifesto. These new tools would allow the Member States to refer cases under the thresholds to the Commission<sup>10</sup>, per-

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<sup>4</sup> Federal Ministry for Economic Affairs and Climate Action, A Franco-German Manifesto for a European industrial policy fit for the 21st Century, 2019 p. 2–3. <https://www.bmwk.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf>, Accessed 10 January 2022.

<sup>5</sup> Commission Decision 921/2019: Declaring a concentration to be incompatible with the internal market and the functioning of the EEA Agreement (Case M.8677 Siemens/Alstom), para 24.

<sup>6</sup> Federal Ministry for Economic Affairs and Climate Action 2019 p. 2–3. They claim that it would be limited to “...*well-defined cases, subject to strict conditions*”, but this kind of ill-defined language leaves it open for multiple interpretations. It would probably refer to any case where similar policy considerations would take preference.

<sup>7</sup> Alex Nourry – Dani Rabinowitz, European champions: what now for EU merger control after Siemens/Alstom?. *European Competition Law Review* 2020, p. 3.

<sup>8</sup> Federal Cartel Office CRRC/Vossloh Locomotives, decision 27.04.2020, B4-115/19, p. 1.

<sup>9</sup> European Commission 05.05.2021, Commission proposes new Regulation to address distortions caused by foreign subsidies in the Single Market, Press release 05.05.2021. [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_1982](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1982), Accessed 5 January 2022.

<sup>10</sup> Commission Communication COM(2021) 1959 final: Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases.

mit state aid if the competitors are found to be benefiting from foreign subsidies<sup>11</sup>, and subject the foreign businesses to a similar merger control procedure if they desire to operate in the internal market,<sup>12</sup> but do not include legislative steps which would change how the market definition is conducted, or allow the industrial policy considerations during mergers. The Commission seems to solely tackle the distortion of the internal market caused by foreign subsidies – or at least tries to, and it remains to be seen – but leaves unaddressed the global situation where European companies face subsidized foreign companies in the worldwide market.

This is the root cause of the problem that remains unresolved. European companies lose against the less effective companies that are subsidized by their respective home countries as the EU Member States are unable to provide them with similar support. Other countries have incorporated industrial policy considerations in their respective merger controls which causes a potential spill-over effect in the EU internal market.<sup>13</sup> The amount of subsidized foreign companies in the EU has steadily increased, leading to potential consumer harm. The problem is EU-wide, and for this reason the Commission has a legal obligation to act.<sup>14</sup> The EU is pushing for reformation of international instruments such as WTO agreements, but this is likely to take time.<sup>15</sup> The Franco-

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<sup>11</sup> Commission proposal COM(2021)223 final: Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market.

<sup>12</sup> COM(2021)223 final.

<sup>13</sup> Alex Nourry – Dani Rabinowitz, European champions: What now for EU merger control after Siemens/Alstom?. *European Competition Law Review* 2020, p. 120. The following section especially is especially very eye-opening: *“Article 21 of the Investment Canada Act 1985 provides that the Minister of Innovation, Science and Economic Development may permit qualifying transactions only insofar as they are likely to be of net benefit to Canada. The factors in this assessment include, among others, the impact on employment, industrial efficiency, compatibility of the investment with national industrial policies, and the contribution of the investment to Canada’s ability to compete in world market...”* *The Chinese merger control regime includes the objective of “promoting the healthy development of a socialist market economy” and the emergence of Chinese firms to compete more effectively with foreign multinationals... the State Administration for Market Regulation (SAMR) may sanction a merger with serious anti-competitive issues if “there is evidence that it will be in the public interest...”*

<sup>14</sup> Staff Working Document SWD(2021) 99 final: Staff Working Document Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, para 36. *“In any event, there seems to be a need for action at EU level. Subsidies cause distortions on the internal market including in the context of acquisitions of EU targets and of public procurement. The situation is comparable to State aid granted by EU Member States.”*

<sup>15</sup> *Ibid.*, p. 5, 29.

German manifesto argues that this should be pursued simultaneously with merger rules modifications for that reason.<sup>16</sup>

This as the background, it is the opinion of this paper that the Commission falls short from its aim despite the best efforts of the legislators. This raises the question, would the amendments proposed by advocates of the Franco-German manifesto improve the situation? Among other things, they claim that the narrow market definition applied by the Commission prevents the European companies from reaching the necessary mass they need to compete against the global companies benefiting from foreign subsidies.<sup>17</sup> As the Commission has not been able to effectively tackle this problem and is unlikely to do so in near future due to its deeply held reservations,<sup>18</sup> it seems appropriate to consider the other side of the coin. There exists multiple authorities that claim the European champion is a necessary countermeasure in addition to studies that conclude that it would be beneficial for the consumer welfare.<sup>19</sup> Based on this, it seems a worthwhile enterprise to study whether there exists a possibility to enact these measures in the first place. Maybe it is true that at this point it is necessary to adapt the tactics of foreign competition and fight fire with fire.

## 1.2 Purpose and research question

This paper is going to research whether the arguments advanced by advocates of the Franco-German manifesto have any merit. More specifically, the purpose is to determine whether making necessary amendments to allow the formation of a “European champion” as advanced by the Franco-German manifesto is feasible in light of the Union’s current competition policy aims and objectives. To this end, the Commission’s latest competition policy review will be used to determine its views.

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<sup>16</sup> Federal Ministry for Economic Affairs and Climate Action 2019 p. 5.

<sup>17</sup> Philip Lowe, Preserving and Promoting Competition: A European Response. Competition Policy Newsletter 2006, p. 4.

<sup>18</sup> European Political Strategy Centre, EU Industrial Policy After Siemens-Alstom: Finding a New Balance Between Openness and Protection 2019, para 4.

<sup>19</sup> Franco Mosconi, The Single Market and the development of "Europeans champions", University of Parma 2022.

To fulfil the purposes of this paper, the following research question will be answered:

- In light of the Union's competition policy aims and objectives, do the current merger rules prevent the formation of the European champion as claimed by the Franco-German manifesto?

In order to answer the research question, the following sub-questions will be addressed:

- 1) How to define the "European champion" that should be fostered?
- 2) Is the geographical market defined too narrowly without adequate consideration for worldwide competition?
- 3) Is the timeframe used to determine the existence of 'potential competition' too short?
- 4) Is it possible to include the 'veto right' to the EU Merger Regulation as envisioned by the Franco-German manifesto? If not, is there something else that can be done?

The Franco-German manifesto advocates for revisiting the existing rules to "*take into account industrial policy considerations in order to enable European companies to successfully compete on the world stage*"<sup>20</sup> and points out that there exist only five European companies in the list that includes the top 40 biggest ones in the world – in other words, it proposes a fostering of European champions. To achieve this end, it seeks to update the current merger guidelines to "*take greater account of competition at the global level, potential future competition and the time frame... to give the European Commission more flexibility when assessing relevant markets*".<sup>21</sup> These will be as a part of the response to the sub-questions two and three. As the Commission has already acknowledged that competition at the global level is a concern,<sup>22</sup> it will not be separately investigated.

Lastly, the Franco-German manifesto asks for "*greater consideration of the state-control of and subsidies for undertakings within the framework of merger control*".<sup>23</sup> It proposes a possibility for a right of appeal to the Council which could "*override Commission decision... in well-defined cases*". The need for this will be researched in the context of a fostering of European champions. As the Franco-German manifesto does not clarify what other changes

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<sup>20</sup> Federal Ministry for Economic Affairs and Climate Action 2019 p. 4.

<sup>21</sup> Ibid.

<sup>22</sup> European Commission 2021.

<sup>23</sup> Federal Ministry for Economic Affairs and Climate Action 2019 p. 4.

should be included to the merger control, this paper utilizes a recent supporting piece<sup>24</sup> by Alex Nourry and Dani Rabinowitz for possible considerations. With this research as a backdrop it is possible to answer the research question and fulfil the purpose of this paper.

### 1.3 Methodology and limitations

This subject is a complicated intersection between legal, economic, and political considerations, and for this reason it is appropriate to call this somewhat traditional qualitative research. However, on its legal aspects this paper utilizes a legal dogmatic method. This is done in parallel with the political and economic analysis when required. The legal dogmatic method uses sources of law to solve a legal problem by applying a rule of law to it. It can be further understood with the concepts of *de lege lata* – an inquiry into the law with an aim to describe the law as it is – and *de lege ferenda* – an aim to solve a problem with a justified recommendation.<sup>25</sup>

In terms of materials, the legal dogmatic method usually employs generally accepted sources of law, such as legislation and case law. As our interests lie in the context of EU law, the primary law (such as the Treaties), general principles of law and secondary law will be considered, out of which especially the EU Merger Regulation is worth to highlight as relevant. Article 17 of the Treaty on European Union (TEU) endows the Commission with power to make rules, regulations, and guidelines regarding the EU's competition policy. For this reason, its latest published competition policy objectives will serve as a guiding tool. This is also called a teleological construction,<sup>26</sup> an interpretation of a provision in light of its aim.<sup>27</sup>

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<sup>24</sup> Nourry – Rabinowitz, 2020.

<sup>25</sup> Aleksander Peczenik, Legal doctrine and legal theory. In: Roversi – Corrado (eds.), *A Treatise of Legal Philosophy and General Jurisprudence*, p. 814–842, . In this paper, the reader can see this practically applied when the law is first described in relation to the research question (*de lege lata*) which is then used as a necessary foundation when formulating a recommendation in the light of Union's competition aims to the problem (*de lege ferenda*).

<sup>26</sup> Aleksander Peczenik, Legal doctrine and legal theory. In: Roversi – Corrado (eds.), *A Treatise of Legal Philosophy and General Jurisprudence*, p. 24.

<sup>27</sup> The Commission bases its opinions on a soft law instruments such as impact assessment and staff assessment reports, which will be studied for more comprehensive understanding.

## 2 Union's competition rules and aims

The main objective of the EU's competition rules is to ensure the proper functioning of the internal market. The merger rules consist of a set of different regulations, but our sole interest is the EU Merger Regulation.<sup>28</sup> The Commission has published a Market Definition Notice<sup>29</sup> and Guidelines<sup>30</sup> to give a better understanding of the practical application.

The EU merger rules will apply to mergers of both domestic and foreign companies in the EU internal market area if the annual turnover of the combined businesses exceeds specified thresholds. The objective is to maximize consumer welfare through increased efficiency and minimize the harmful effects on competition. What this practically means can be found from the Commission's latest review on its competition policy, "*A competition policy fit for new challenges*".<sup>31</sup> This will serve as this paper's basic foundation for understanding the Union's current paradigm regarding its competitive aims and objectives. These include advancing the creation of a green, digital and resilient single market.<sup>32</sup> The review emphasizes the importance of ensuring fair competition in all sectors "*to enable European firms to reach efficient scale in the face of global competition*".<sup>33</sup> This can be seen as a small nod to those advocating for European champions – as long the result is not to the detriment of consumers.

## 3 Definition of a 'European champion'

As stated before, the "European champion" lacks proper definition. Even its advocates have not properly described it and the term is very loosely used. This paper needs to cover not only the base definition but also the broader semantics of the term before addressing the more technical aspects to understand what the Commission is expected to foster.

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<sup>28</sup> Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. This is the limitation placed by the Franco-German manifesto, and thus other considerations fall out of the scope.

<sup>29</sup> Commission Notice 97/C 372/03: The Definition of Relevant Market for the Purposes of Community Competition Law.

<sup>30</sup> Commission Guideline 2004/C 31/03, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings.

<sup>31</sup> Commission Communication COM(2021)713: A competition policy fit for new challenges.

<sup>32</sup> *Ibid.*, p. 6.

<sup>33</sup> Commission Communication COM(2021)713, p. 3.



In the Franco-German manifesto, the advocates referred to a statistic which ranked the 50 biggest companies worldwide – presumably, based on their revenue.<sup>34</sup> This implies that they consider only those European companies found from the list significant enough to be called a “European champion”. The broader context would also suggest these “European champions” would enjoy a favourable treatment from the Commission in a similar fashion to the national champions that are subsidized by their home countries. For example, in the Siemens/Alstom case, the proponents of the merger insisted on the policy point that the merger was necessary due to the subsidized competition from a Chinese state-owned company CRRC, expecting the Commission to give a clearance without need for remedies.<sup>35</sup> It was only at the last possible moment when they offered concessions.<sup>36</sup> For this reason, the introduction’s definition regarding national champions by Susan Strange seems to capture all necessary aspects as envisioned by the architects of the Franco-German manifesto and thus is well-suited as a definition.

Then, what would be the necessary qualities in a company to justify favourable treatment in light of the Union’s competition aims? “*Effective competition*” is constituted by low prices, high quality products, a wide selection of goods and services, and innovation.<sup>37</sup> As the EU’s competition policy is to foster effective competition,<sup>38</sup> the companies that promote these effects should also be considered as potential beneficiaries. Using this and the research by the think tank Bruegel as a basis, it can be extracted that even small companies with high innovative properties can be champions that should be fostered even if they lacked in revenues or market shares<sup>39</sup>. The architects of the Franco-German

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<sup>34</sup> Federal Ministry for Economic Affairs and Climate Action 2019, p. 3. The architects of Franco-German manifesto do not specify their source, but a number of European companies they use corresponds amount found in Fortune Global 500 statistic 2019. Other famous statistics such as Forbes’ Global 2000 have more variation. This is probably because they include attributes such as assets, market value, sales and profits. However, the basic premise is not changed whichever is used.

<sup>35</sup> Commission Decision 921/2019.

<sup>36</sup> Bernard Amory et al, Beyond Alstom-Siemens: Is there a need to revise competition law goals?. *Concurrences* 4 2019, p. 5.

<sup>37</sup> Commission Guideline 97/C 372/03.

<sup>38</sup> COM(2021)713, p. 19. “...may not secure European firms’ competitiveness if fair competition is not also assured on the global stage. Openness requires fairness abroad as well as at home.”

<sup>39</sup> Mathew Heim – Catarina Midoes, 26.07.2019, European champion-ships: industrial champions and competition policy. <https://www.bruegel.org/blog-post/european-champion-ships-industrial-champions-and-competition-policy>, Accessed 10.01.2022.

manifesto probably did not consider all of this, but these aspects are bound to be relevant to the Commission's assessment.<sup>40</sup>

Lastly, to distinguish the correct targets, it is relevant to define "European". The ownership of market shares by EU citizens could be considered a possible determining factor as it would not make sense for the Commission to favour companies where the majority owners are foreign shareholders outside of its reach.<sup>41</sup> However, the company is under full EU regulation if it establishes its headquarters inside the EU's territory, making it easier to supervise that the Union's policies are implemented.<sup>42</sup> In light of the Union's competition aims,<sup>43</sup> it makes this a more compelling criterion for the purposes of this paper.

## 4 Analysis of the merger rules

The Franco-German manifesto's claim can be divided loosely into two sections, considerations regarding the merger guidelines and the revamping of the EU Merger Regulation. In this chapter, the former will be addressed by answering the sub-questions regarding the market definition and the timeframe. The latter will be addressed by answering the final sub-question regarding the inclusion of the 'veto right'.

### 4.1 The scope of the market

Market definition is a tool to define the boundaries of competition between firms.<sup>44</sup> Is this tool employed too narrowly to account for worldwide competition when defining the geographic market? The defenders of the Commission's restrictive approach emphasize that the investigations are conducted on a case-by-case basis in cooperation with industry stakeholders based on a

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<sup>40</sup> COM(2021)713, p. 17. *"For its assessment of mergers, the Commission takes a number of factors into account such as price, quality, choice and innovation..."*

<sup>41</sup> Heim – Midoes 2019.

<sup>42</sup> Additionally, they are obligated to respect the Union's aims regarding values such as the sustainability and transparency. These principles have been incorporated into the competition goals in the latest competition policy review from the Commission. It should be also noted that both Siemens and Alstom were European companies with their headquarters in France and Germany, indicating that view of this kind was also the understanding of the architects of Franco-German manifesto.

<sup>43</sup> This makes them direct subject to EU's environmental and competition regulation. This is desirable in the light of Union's competition objectives such as sustainability and transparency.

<sup>44</sup> Commission Notice 97/C 372/03, para. 1.

factual and empirical exercise<sup>45</sup> - “*the markets define themselves*”.<sup>46</sup> The Commission evaluation results support this view. It finds that the Notice succeeds in the assessment of geographic markets even in the context of globalization.<sup>47</sup> The global market as one of the plausible markets in the Commission’s evaluation considerations has risen to 30% between 2005–2018, from 20% in 1992–2004, demonstrating its flexibility, contrary to the claims of the Franco-German manifesto.<sup>48</sup> However, even though the market definition allows the Commission to take into account the new developments of the worldwide competition, critics point out that the Notice should define global markets explicitly, especially in the context of digitalization and rapidly evolving markets.<sup>49</sup> The Commission is certainly liable to periodical mistakes, and it seems to at least fail to consider the political initiatives and foreign subsidizes.

For example, in the Siemens/Alstom case, it determined that the CRRC did not exercise a competitive constraint in the EEA “*on a standalone basis and its entry into the EEA did not appear likely*”.<sup>50</sup> However, the CRRC entered the European markets on 26 August 2019 by acquiring Vossloh AG, undermining the Commission’s assessment.<sup>51</sup> It should be noted that the FCO found that CRRC’s access to financial resources was exceptional due to heavy subsidizes it received from China.<sup>52</sup><sup>53</sup> This paper considers it very relevant to emphasize that the CRRC’s intention was already possible to determine at the stage the Commission excluded China from its scope.

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<sup>45</sup> European Commission 01.03.2015, Competition policy brief: Market definition in a globalised world, p. 3, 5. [https://ec.europa.eu/competition/publications/cpb/2015/002\\_en.pdf](https://ec.europa.eu/competition/publications/cpb/2015/002_en.pdf), Accessed 10.01.2022.

<sup>46</sup> Amory et. al 2019, p. 7-8.

<sup>47</sup> Commission Notice 97/C 372/03.

<sup>48</sup> Ibid., p. 43.

<sup>49</sup> Commission Notice 97/C 372/03, para 1.

<sup>50</sup> Commission Decision 921/2019, para 522, 536.

<sup>51</sup> Federal Cartel Office B4-115/19.

<sup>52</sup> Ibid., p. 61.

<sup>53</sup> COM(2021)223 final, para 17.

This is because China's main strategies "*Belt and Road Initiative*" was launched already in 2013 followed by "*Made in China 2025*" in 2015, and as the Locomotive manufacturer Vossloh AG was a potential strategic target.<sup>54</sup> The reason why the Commission failed to consider this is not clear. However, it can be speculated that it does not consider political initiatives when defining the market as they are not concern "*from a competition point of view*".<sup>55</sup><sup>56</sup>

This seems to somewhat confirm what the advocates for Siemens/Alstom merger claimed. The Commission is not required to consider potential competition when defining the geographical market, and even if it does, it seems ill-equipped to assess political initiatives and the subsidized global competition. The CJEU's case-law explains that in order to establish the existence of potential competition, the Commission needs to ensure that; "*...given the structure of the market and the economic and legal context within which it functions, there are real concrete possibilities for the undertakings concerned to compete among themselves...*"<sup>57</sup> Not only is this a high bar, it seems unlikely that the Commission would factor political initiatives as this kind of competitive constraint when defining the market.<sup>58</sup> Based on this and the views that

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<sup>54</sup> European Court of Auditors, The EU's response to China's state-driven investment strategy 2020, Review 3, p. 16–30. The Second Belt and Road Forum for International Cooperation, 28.04.2019, Xi Jinping Chairs and Addresses the Leaders' Roundtable of the Second Belt and Road Forum for International Cooperation (BRF) 2019, <http://www.beltandroadforum.org/english/n100/2019/0429/c22-1392.html>, Accessed 05.01.2021. FCO cleared it anyway as assessing those factors was outside the mandate of the competitive assessment of acquisitions. It should be emphasized that both China's political initiatives encourage Chinese private companies to invest in strategic sectors abroad, such as building transport and energy infrastructure, enhancing trade and developing digital networks and economic corridors.

<sup>55</sup> Commission Notice 97/C 372/03, para 4.

<sup>56</sup> OECD 2021, Concept of potential competition: OECD Competition Committee Discussion Paper 2021, p. 9. <https://www.oecd.org/daf/competition/the-concept-of-potential-competition.htm>, Accessed 11.01.2022. This kind of a 'potential competition' can be understood loosely as "*a competitive constraint on a firm's behaviour that might potentially arise, but has not yet actually done*".

<sup>57</sup> CJEU joined cases T-374/94, T-375/94, T-384/94 and T-388/94 (European Night Services and Others v. Commission), judgment 15.09.1998, ECLI:EU:T:1998:198. CJEU T-461/07 (Visa v. Commission), judgment 14.04.2011, ECLI:EU:T:2011:181.

<sup>58</sup> Commission Notice 97/C 372/03, para 14. It is not specified what kind of additional factors are analysed: "*... from potential competition are in general less immediate and in any case require an analysis of additional factors. As a result such constraints are taken into account at the assessment stage of competition analysis.*" However, its practice and views (as will be later elaborated) indicate its focus is very narrowly only on the economic considerations. Political initiatives would thus likely be out of the Commission's scope.

various commissioners hold,<sup>59</sup> the Commission seems to consider economic aspects at the expense of other factors. As previously pointed out, the commissioners see this kind of “fair” approach as a strength that ensures effective competition.<sup>60</sup> However, the reluctance to consider political factors may make it blind to politically motivated moves, which may have ended up being the case here.<sup>61</sup>

However, in more recent judgements, the CJEU has stated that “*a firm intention and an inherent ability to enter the market can be assessed by determining... whether the manufacturer had taken sufficient preparatory steps to enable it to enter the market...*”<sup>62</sup> From this line of case-law it can be extracted that despite its seeming reluctance, the Commission is under legal obligation to consider previously mentioned factors such as China’s political initiatives. For example, it can be argued that for the CRRC, as a state-owned enterprise, the existing strategic guidelines demonstrate a sufficient preparatory step for entering the market.<sup>63</sup> However, to consider this would require an early analysis on the potential worldwide competition. The current wording does not mandate this, and for this reason seems ill-suited in the light of these newer judgements.

This paper concludes that despite the Commission being capable of assessing the evolving worldwide markets, its current approach may lead to mistakes at

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<sup>59</sup> Levy et al 2019, p. 1–2.

<sup>60</sup> Ibid.

<sup>61</sup> It remains unclear whether the Commission would be able to include the foreign subsidies of a potential competitor in the “*economic and legal context*”. Neither the Guidelines or the Market Definition Notice specifically talk about the foreign subsidies or subsidized competition, but it is hard to see how the subsidies are not both economic and legal in nature despite not being explicitly mentioned. Thus, the CJEU’s wording is broad enough to allow inclusive interpretation as well, but it has yet to see further development to enable drawing this conclusion. It can be speculated that the Commission is reluctant to address this area because the foreign subsidies are also deeply politically motivated. This would force it into an unfamiliar territory and jeopardize its hard-earned status as a fair supervisor.

<sup>62</sup> OECD 2021, p. 49. CJEU C-586/16 (Sun Pharmaceutical v. Commission), judgment 25.03.2021, ECLI:EU:C:2021:241. CJEU C-588/16 P (Generics v. Commission), judgment 25.03.2021, ECLI:EU:C:2021:242. CJEU C-591/16 P (Lundbeck v. Commission), judgment 25.03.2021, ECLI:EU:C:2021:243. CJEU C-601/16 P (Arrow v. Commission), judgment 25.03.2021, ECLI:EU:C:2021:244, CJEU C-611/16 P (Xellia Pharmaceuticals and Alpharma v Commission), judgment 25.03.2021, ECLI:EU:C:2021:245. CJEU C- 614/16 (Merck v. Commission), judgment 25.03.2021, ECLI:EU:C:2021:246.

<sup>63</sup> As a state-owned company CRRC had the excess capacity to conduct the acquisition due the foreign subsidies it had received from the Chinese state authorities, establishing a clear financial incentive to follow the Chinese political initiatives.

the expense of EU consumers and businesses. The newest developments found in the CJEU's case law should be incorporated into the wording. It would be beneficial to make it mandatory to consider the potential competition at least when there is a "*real and concentrate possibility*" for the foreign competitor to enter the EU market. The current criterion seems too limiting as it only considers the potential competition if there are worries "*from a competition point of view*". This may potentially lead to missing things such as political initiatives. In addition to the previously established, the subsidized foreign competition is not specifically addressed either in the Guidelines or the Market Definition Notice. These instruments would benefit from modifications which would incorporate clear instructions on how to deal with them. This change would be consistent with the Union's current competition aims and objectives.<sup>64</sup>

## 4.2 The timeframe

The central claim of the Franco-German manifesto was that the timeframe of an entry for a potential competition should be modified to allow for "*more flexibility*". This implies it should be lengthened. Currently, the potential competition is considered timely if it occurs "*within two years*."<sup>65</sup> It has been proposed that this should be considerably extended.<sup>66</sup> However, those defending the Commission's approach have countered to this by pointing out that despite the wording, the current framework does not prevent the Commission from enlarging the timeframe to assess potential competition. The Commission's evaluation results affirm this by concluding that the Commission is able to account for the evolving markets.<sup>67</sup> The case law seems to prove these claims as well. While in *J&J/Guidant*<sup>68</sup> the market entry of a potential competition was analysed at the most within two to three years, in *Medtronic/Covidien* and *Pfizer/Hospira* cases the Commission used a five-to-seven-year period timeframe.<sup>69</sup> This proves that the current wording does not prevent the Commission from considering the potential competition with a longer timeframe if necessary. However, it has been noted that these are so-

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<sup>64</sup> COM(2021)713, p. 19. "*...may not secure European firms' competitiveness if fair competition is not also assured on the global stage. Openness requires fairness abroad as well as at home.*"

<sup>65</sup> Commission Guideline 2004/C 31/03.

<sup>66</sup> Amory et. al 2019, p. 7.

<sup>67</sup> Commission Notice 97/C 372/03.

<sup>68</sup> Commission Decision C(2005)3230: Johnson & Johnson/Guidant (Case M.3687).

<sup>69</sup> Commission Decision C(2014)9215: Medtronic/Covidien (Case M.7326) and C(2015)5639: Pfizer/Hospira (Case M.7559).

called “innovation” cases, meaning that the “potential competition” was stemming from pipeline products which were the reason for an extended time scope.<sup>70</sup> Yet it shows there exists a practical flexibility even under the current rules, though there are no instructions that obligate the Commission to use a longer timeframe with subsidized foreign competition.

For this reason, the current wording is not restricting in a way that the architects of the Franco-German manifesto feared. If anything, it can be seen as too broad. It seems problematic from a legal point of view that there exists an asymmetrical approach on how the timeframe is determined. For this reason, it is very hard to predict beforehand how the Commission will assess the potential competition. For example, in the Siemens/Alstom case the Commission mostly relied on disparity of a stakeholder opinion with partly opposing takes.<sup>71</sup> The reason for the outcome was deemed the untrustworthiness of Siemens and Alstom, not any well-established approach regarding foreign subsidized competition. While understandable from a practical point of view – these probably must be handled case-by-case basis – it is still detrimental to legal certainty, one of the general principles of the European Union. Reformulating the wording with a definite timeframe for cases where there is found to exist a potential competition with a non-EU dimension could be a potential improvement. This would be justified by the fact that the foreign investment and suspected subsidized acquisitions have steadily risen.<sup>72</sup> This would not only be consistent with the EU’s general principles, but also its current competition aims and objectives.<sup>73</sup>

### 4.3 Revamping of the EU Merger Regulation

The current state of the EU Merger Regulation does not favour the formation of a European champion as defined by this paper, but not necessary because of the formulation of legal wording. The Commission's Executive Vice-President Margrethe Vestager has stated "*they can't build those (European) champions by undermining competition... businesses do best when they can compete on a level playing field*".<sup>74</sup> According to critics, the Commission has mul-

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<sup>70</sup> Amory et. al 2019, p. 8.

<sup>71</sup> OECD 2021, p. 37.

<sup>72</sup> COM(2021)223 final, para 29.

<sup>73</sup> COM(2021)713, p. 19. "...may not secure European firms' competitiveness if fair competition is not also assured on the global stage. Openness requires fairness abroad as well as at home."

<sup>74</sup> European Commission 09.01.2019, The champions Europe needs: Speech at WELT Econ. Summit. <https://ec.europa.eu/newsroom/comp/items/642222>, Accessed 09.01.2022.

multiple times intervened “to prevent the creation of what would have been national or European champions”.<sup>75</sup> This demonstrates very strict standards that exclude any kind of favourable treatment even in the face of an unfair worldwide competition where other countries openly take the opposite approach.<sup>76</sup> This is the reason why the Franco-German manifesto proposed the inclusion of a right of appeal to the Council – it is not the legislation that prevents European champions but the Commission’s restrictive interpretation of it. Is this approach correct in light of the Union’s competition policy aims and objectives? Those defending the current practice are afraid that the inclusion of the right of appeal would permit the Council to override the Commission’s decisions to push the industrial policy in a detrimental manner.<sup>77</sup> The proponents of European champions argue that these fears are unfounded and point out that a possibility for the Council to interfere in the EU competition law procedure already exists under Article 108(2) of the TFEU. As they describe it, “this represents a sort of ‘safety valve’ ... with the object of allowing Member States to override the Commission’s point of view, for political reason”.<sup>78</sup> Thus, there is an existing precedent what to imitate.

However, those against the European champion have contested this point by explaining that Article 108(2) only enables the unanimously acting Council to decide that the state aid is compatible prior to the Commission’s investigation is concluded. This is further restricted by the fact that it can only occur “under the presence of extraordinary or exceptional circumstances”.<sup>79</sup> For this reason, it cannot be compared with the effective “veto right” that the Franco-German manifesto is proposing.<sup>80</sup> They continue by stating that the inclusion of a veto right may require an amendment to the TFEU. Article 103 TFEU only provides the CJEU and the Commission with power to enforce competition law. A strict interpretation would thus require a separate amendment for the inclusion of

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<sup>75</sup> Nourry – Rabinowitz, 2020, p. 1. They refer to cases “*Aerospatiale-Alenia/de Havilland (1991)*; *Airtours/First Choice (1999)*; *Volvo/Scania (2000)*; *Tetra Laval/Sidel (2001)*; *Schneider/Legrand (2002)*; *Ryanair/AerLingus (2007)*; *Deutsche Börse/London Stock Exchange Group (2017)*.”

<sup>76</sup> *Ibid.*, p. 119-120. “Article 21 of the Investment Canada Act 1985 provides that the Minister of Innovation, Science and Economic Development may permit qualifying transactions only insofar as they are likely to be of net benefit to Canada... The Chinese merger control regime includes the objective of “promoting the healthy development of a socialist market economy.”

<sup>77</sup> Amory et. al 2019, p. 8.

<sup>78</sup> Ortiz Blanco, *EU Competition Procedure*, Oxford University Press 2000, para. 21, 97.

<sup>79</sup> Amory et. al 2019, p. 8.

<sup>80</sup> *Ibid.*, p. 8.



the Council.<sup>81</sup> The proponents of a European champion have countered this by pointing out that Article 21(4) exemption allows a Member State to provide defensive measures to protect its legitimate interests, enabling it even to block concentrations cleared by the Commission. If the ‘veto’ right would be legally infeasible to include, it could be enough to broaden this exemption rule to allow the Member States to clear concentrations under similar public interest grounds, “*one of which could be industrial policy*”.<sup>82</sup> This would make the Merger Regulation internally more consistent as well.

It is the opinion of this paper that a ‘veto right’ as envisioned by the Franco-German manifesto is simply neither politically<sup>83</sup> nor legally feasible. As feared by the Commission, it would probably damage the EU’s reputation in a way which would repel potential foreign businesses, and thus be detrimental to consumers and the Union’s competition aims. Additionally, the legal modifications can be divisive and are unlikely to achieve consensus, while simultaneously encountering potential legal hurdles as previously laid out. However, the possibility to make an adjustment to Article 21(4) to allow Member States to clear EU-wide concentrations on public policy grounds – such as the industrial policy - could be an interesting compromise. If it would mirror the present defensive capabilities under Article 21(4), these clearings would always have to be proportionate and compatible with EU law, placing some basic restrictive rules to prevent abuse. Taking clues from the state aid rules, it could be formulated in a way which makes it only conditional to “*the presence of extraordinary or exceptional circumstances*”. The Commission could utilize its extensive experience with state aid rules to determine what those circumstances are. This way it would still be in possession of the ultimate regulatory power. Yet it would entail a need to have a dialogue with Member States which would have a chance to express their policy worries. This compromise would make every side unhappy, but it would enable the fostering of a European champion without making a drastic change that could potentially result in consumer harm.

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<sup>81</sup> Amory et. al 2019, p. 9. It is noteworthy that they admitted that other interpretation of this provision is certainly possible. It could be understood to only concern antitrust rules.

<sup>82</sup> Nourry – Rabinowitz, 2020, p. 2.

<sup>83</sup> Dutch, Swedish, Belgium, Finnish, Danish, and Portuguese governments have all spoken out publicly against the Manifesto. e.g. Dutch Government 15.05.2019, Position paper: Strengthening European competitiveness, <https://www.permanentrepresentations.nl/documents/publications/2019/05/15/position-paper-strengthening-european-competitiveness>, Accessed 10.01.2021.

However, this would necessarily entail the inclusion of the political element to the EU Merger Regulation and make it subject to potential abuse despite the previously mentioned requirements regarding proportionality and compatibility with the EU-law. For example, in the BSCH/Champalimaud case, the Portuguese authorities froze Champalimaud's assets to block the acquisition without clarifying the public interests they tried to protect.<sup>84</sup> While eventually the Commission adopted an infringement decision against Portugal, this demonstrates that the Member States are not above of utilizing Article 21(4) to protect their national interests and to hinder a legitimate acquisition process. The proposed mechanism would certainly endure similar abuse. Thus, it must be formulated very carefully after an extensive cost-benefit analysis has been conducted.

This proposal begs for a broader conversation about the elephant in the room, giving Member States a voice during the assessment procedure and the inclusion of policy objectives to the EU Merger Regulation. The Commission has strongly rejected the pressure for any changes, claiming that the Council and Member States are lacking in necessary technical competition law experience. But so is the Commission lacking in political experience. For example, it could be argued that Member States are in a better position to assess the impact of political initiatives as seen with the Siemens/Alstom case. Cooperation between different authorities seems needed when both lack expertise in their respective fields. This is to ensure the Union's competition aims and objectives can be achieved, consistent with the Commission's current policy goals.<sup>85</sup>

## 5 Conclusion

The aim of this paper, compared to other takes on the topic, is to examine whether the Commission's latest policy review would provide grounds for fostering a European champion as laid out by the Franco-German manifesto. The architects of the manifesto claimed that the EU's merger rules need to be changed to allow this to occur. It has been concluded that they are correct on

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<sup>84</sup> Commission Decision 03/08/1999: Relating to a Proceeding Pursuant to Article 21 of Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between (Case IV/M.1616 - BSCH/A. Champalimaud), p. 9–10.

<sup>85</sup> COM(2021)713, p. 3. *"All this calls for strong and effective competition policy and enforcement, to give the European economy the agility to mount the recovery path and meet its twin green and digital ambitions in a sustainable, socially and territorially inclusive manner. To achieve this in the European Union, the Commission works hand in hand with Member States' national competition authorities and under the scrutiny of Union Courts."*

a superficial level, but not necessarily on a deeper one. The merger rules are flexible enough to allow broader interpretation, which enables the Commission to consider evolving global markets when defining its scope. The same is true for when determining the timeframe – if anything else, the current wording is too broad in a way, which may lead to some legal uncertainty. A similar assessment is achieved by studying the EU Merger Regulation. Thus, a formation of a European champion is not technically prohibited – however, it is certainly hindered.

The Commission made a mistake in the Siemens/Alstom case when determining the geographical scope. It dismissed claims by Siemens and Alstom regarding a Chinese competitor CRRC, which against its prediction entered the European market. It is the opinion of this paper that this was not difficult to predict in light of the Chinese political initiatives and ambitions. This indicates that the Commission lacked the policy-level understanding that the advocates of the merger – such as France and Germany – had. The case law highlights that its interests are mostly economic in nature, which may make it liable to similar future mistakes. Thus, the wording should be changed to reflect the current competition policy goals and the CJEU's judgements. An extended entry timeframe for potential competition with a non-EU dimension should be considered. This would benefit foreign competitors as well, in the form of legal certainty. It could be justified in light of growing acquisitions and investment by these subsidized foreign businesses.<sup>86</sup>

It is the opinion of this paper that the proposed 'veto right' is impossible due to both the legal challenges and political opposition. It used a proposition by Alex Nourry and Dani Rabinowitz to formulate a less intrusive alternative using Article 21(4) as the basis. However, even this is unlikely to be implemented unless a common understanding is achieved on how the assessment is conducted. The Commission has rejected any inclusion of industrial policy so far, but such a strong stance seems counterproductive in light of the Union's current competition objectives. European champions can result in a more efficient competition and thus benefit consumer welfare.<sup>87</sup> Simultaneously, this approach of not considering the EU's industrial policy goals may be to the detriment of these same consumers. While the Commission has acknowledged

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<sup>86</sup> COM(2021)713, p. 3, "... Europe needs a strong and resilient Single Market that... enables businesses of all sizes to get the most out of Europe's scale and achieve scale themselves to better compete in a globalised economy. It needs to... meet demand of European businesses and consumer in a timely fashion".

<sup>87</sup> Mosconi 2022.

the global, somewhat unfair competition playing field, it has no solutions to the competition from outside of the internal market. There is no need to adopt the measures proposed by the Franco-German manifesto and its advocates if this were to change. The restrictive approach is in a way hindering the Union's competition goals and aims. By fostering European companies to become European champions, the Commission would gain powerful vehicles to push forward its objectives like sustainability and transparency. Currently, the worldwide market is dominated by Asian and US corporate giants that lack similar regulatory framework as in Europe. Fostering European champions to take on these behemoths would simultaneously benefit EU consumers and fulfil the Union's competitive objectives on a global scale.