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EU Merger Control under Attack – A Reality Check of the Proposals

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1. Introduction

EU merger policy is well into its 32nd anniversary. There is no doubt that it has been an astounding success, considering that it started out of nothing, substantively, procedurally and institutionally. Its broader impact was remarkable. It is fair to say that it transformed entirely competition policy in Europe. If it had not been for merger control, any talk of economic analysis and the effects-based approach would not have made much sense.[2] It was merger control that gave the inspiration and impetus to the European Commission to change its formalistic and legalistic approach in antitrust and to start integrating economics into the analysis, first in the area of Article 101 TFEU and later in Article 102 TFEU. Institutionally, the introduction of the Chief Economist Team was a product of the need created by merger control. From a competence perspective, the introduction of the one-stop-shop principle in merger control inspired similar changes in antitrust, which were put in effect with the 1999-2004 modernisation and decentralisation project. Regulation 1/2003[3] may not have gone as far as introducing a one-stop-shop principle, but introduced rules (e.g. in Articles 3 and 11) that were inspired by it.

Notwithstanding these accomplishments, EU merger control is currently under severe attack from two diametrically different sides:

A **first line of criticism**, which has echoes of the past, comes from "conservative" quarters. It is inspired by the long-standing *dirigiste* idea that EU competition policy (including merger policy) should not be "naïve" but rather take into account if not further industrial policy. This time, the focus on industrial policy does not appear as nationalistic as in the past, when it contained an anti-*communautaire* agenda. Instead, it has a pro-*communautaire* facet, supporting a true EU industrial policy and the strengthening of EU companies in their global competition, the creation of EU "champions". In the digital area, ideas about "digital sovereignty" can also be seen in that context.

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[2] See Carles Esteva Mosso, "Innovation in EU Merger Control", Remarks prepared for the 66th ABA Section of Antitrust Law Spring Meeting, Washington, 12 April 2018; Carles Esteva Mosso, "EU Merger Control: The Big Picture", Sixth Annual GCR Conference, Brussels, 12 November 2014; both available at https://ec.europa.eu/competition-policy/index_en.

[3] Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L [2003] 1/1.

The banner of this was the Franco-German Manifesto for a European industrial policy.[4] In a more recent joint statement by Germany, France and Poland, the respective Ministries of Economy invited the European Commission to consider, among other suggestions, to revisit its merger control rules and enforcement by taking into account foreign subsidies, the global nature of markets and protection of strategic common European interests. The joint statement also proposed strengthening the Council's input into decision-making.[5]

A **second line of criticism** comes from "progressive" quarters that broadly correspond to the political left (but not without sympathies also in the anti-globalisation political right). This critique focuses on what is perceived as "failures" of modern competition law enforcement. In particular, the increase of concentrated markets, the emergence of big "gatekeepers" in certain sectors, especially in the digital one, and the overall problem that economic power poses for democracy. The criticism against EU merger control is that it did not prevent the above phenomena, because it was too "technocratic" and focused on concepts such as "consumer welfare", which means that competition authorities neglected the loss of consumer choice, innovation, quality etc. and concentrated only on price.

Such line of thinking has been put forward by several experts.[6] Usually, the critics concentrate on specific cases, which were wrongly decided by the Commission, so the criticism goes. For example, the Commission has been criticised for being overly permissive in authorising acquisitions such as *Google/Fitbit*.[7] The critical voices go as far as suggesting the undoing of mergers which have *ex post* resulted in anti-competitive effects.[8]

Both sides believe that EU merger control is in need of fundamental changes. Revolutionary calls to arms are accompanied by more concrete proposals such as changing the "legal tests", the burden and standard of proof and the approach on market definition, as well as being stricter on remedies and prohibiting more mergers, especially horizontal ones.

2. Policy choices proposed and their reality check

The aim of this contribution is not to embark on a defence of EU merger enforcement of the last 30 years and we do not aim at proving the critics wrong. Others have already addressed this.[9] Instead, we categorise the various proposals and policy choices, in terms

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4 Ministries of Economy of France and Germany, *A Franco-German Manifesto for a European industrial policy fit for the 21st Century*, 19 February 2019.

5 Ministries of Economy of France, Germany and Poland, *Modernising EU Competition Policy*, 4 July 2019.

6 Cristina Caffarra and Fiona Scott Morton, "The European Commission Digital Markets Act: A Translation", *VOX*, CEPR Policy Portal, 5 January 2021; Cristina Caffarra and Tommaso Valletti, "*Google/Fitbit* Review: Privacy IS a Competition Issue", *VOX*, CEPR Policy Portal, 4 March 2020; Cristina Caffarra, Gregory Crawford and Tommaso Valletti, "How Tech Rolls: Potential competition and "reverse" killer acquisitions", *VOX*, CEPR Policy Portal, 11 May 2020; Cristina Caffarra, "What are we Regulating for?", *VOX*, CEPR Policy Portal, 3 September 2021.

7 Commission Decision of 17 December 2020 (Case M.9660 – *Google/Fitbit*).

8 Cristina Caffarra, "What are we Regulating for?", *VOX*, CEPR Policy Portal, 3 September 2021. On this question, see generally Pedro Caro de Sousa, "Applying Antitrust Rules to Consummated Mergers: Could it Happen Here?", On-Topic: Competition Policy in the Digital Economy, 2/2021 *Concurrences* 27.

9 See e.g. A. Douglas Melamed and Nicolas Petit, "The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets", 30 October 2018, available at SSRN: https://ssrn.com/abstract=3248140; Nicolas

of the mechanics for their introduction, and we perform a "reality check". In other words, are these proposals realistic and what would their introduction entail?

We believe that, in reality, there are **three different policy choices** that are, theoretically speaking, available to satisfy the critics:

A first possibility is to **change the approach**, i.e. leave the law (the EU Merger Regulation)[10] unchanged but instead change the way we apply that law, through the revisiting of soft law instruments, such as existing Guidelines, the adjustment of our theories of harm or the design of our remedies. As we will see, changing the approach is not straightforward. This means that it may be inevitable to change the law, in order to satisfy the critics.

A second possibility is to **change the law**, i.e. amend the venerable Merger Regulation. Some of the proposals aired by the critics could, indeed, only be implemented through an amendment of the Merger Regulation. However, opening this chapter would take time and may result in opening a Pandora's Box, bearing also in mind that an amendment of the Merger Regulation would necessarily rely on unanimity in the Council (Article 352 TFEU).

A third possibility is what we can call **"externalisation"**, i.e. to intervene outside the confines of competition law and the existing EU Merger Regulation and its overall system, in essence to resort to regulation. In other words, the idea would be to introduce legislation that would apply in parallel to competition law and merger control. This has already happened in some areas. However, again, this would not be simple, requiring an appropriate legal basis to introduce such a regime. In addition, such a system inevitably increases red tape.

2.1 Changing the approach

The first possibility relates to how the Commission can exercise its discretion in a number of different areas relating to (i) competence/procedure, and (ii) substantive analysis and remedies.

On the question of **competence**, a good example of changing the approach is the Commission's recent expansion of its ability to review the legality of a transaction falling under EU and national notification thresholds. The Merger Regulation provides for upward referrals in Article 22. The Commission traditionally discouraged national competition authorities from using Article 22 to refer cases that did not meet national thresholds. This used to guarantee that the Commission's efforts would be focused on

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Petit and David J. Teece, "Big Tech, Big Data, And Competition Policy: Favoring Dynamic Over Static Competition", 15 March 2021, available at SSRN: https://ssrn.com/abstract=3229180; Petit Nicolas, "A Theory of Antitrust Limits", 28 *George Mason Law Review* 1939 (2021); Richard Gilbert and A. Douglas Melamed, "Innovation: A Bridge to the New Brandeisians?", *Competition Policy International (CPI) Columns US & Canada*, 21 February 2022; Nicolas Petit and Thibault Schrepel, "Complexity-Minded Antitrust", 7 March 2022, available at SSRN: https://ssrn.com/abstract=4050536.

[10] Council Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings (Merger Regulation), OJ [2004] L 24/1.

transactions with a clear-cut impact on the internal market. National thresholds provided exactly that – a yardstick through which to evaluate a transaction's impact perimeter.

The new Guidance on Article 22 referrals,[11] shifted the Commission's priorities, welcoming referrals from Member States of concentrations falling below the national notification thresholds and otherwise not notifiable either nationally or at EU-level. The guiding principles to identify whether a transaction may be referred leave no doubt as to the purpose of the new approach to referrals. Paragraph 19 refers to cases in which the undertaking is a start-up with competitive potential, a significant innovator, a potential competitive threat etc. The Guidance also states that a factor may be the consideration paid by the acquirer.[12] In other words, the Guidance allows the Commission to assess the legality of the much-discussed "killer acquisitions" – through the use of informal thresholds bearing a striking resemblance to those adopted by the Bundeskartellamt and the Austrian Competition Authority.[13] And the Commission does not shy away from recognizing what this means in practice – catching transactions "*in the digital and pharma sectors*".[14]

In the digital sector, the new approach to referrals has to be seen in conjunction with the Digital Markets Act (DMA).[15] The DMA does not include any changes on merger control rules. However, Article 12 of the DMA does impose an obligation for gatekeepers to inform the Commission of any intended concentration. Thanks to the new approach to referrals, the Commission will be informed of any intended concentration, and then invite individual Member States to refer the transaction to it for review.[16] This would give a powerful tool to the Commission through the back door, i.e. without going through the ardent process of legislation, which for the EU Merger Regulation would be particularly uncertain because of the Article 352 TFEU legal basis, which requires unanimity in the Council.

On the question of **substance**, we can mention three examples of changing the approach: revisiting market definition, theories of harm and remedies.

The *Siemens/Alstom* case[17] has been the most significant milestone for those calling for a revised approach. In spite of Siemens and Alstom's repeated attempts to convince the Commission as to the competitive threat posed by Chinese suppliers in the relevant markets – the Commission stood its ground, blocking the transaction. It found not only that Chinese suppliers were not active in the EEA, but also that such suppliers would not pose a competitive constraint. The pressure by the French and German governments also

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[11] Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, 26 March 2021, C(2021) 1959 final.

[12] *Ibid*, para. 19.

[13] See Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35(1a) GWB and Section 9(4) KartG), joint paper by the German and Austrian competition authorities.

[14] Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, 26 March 2021, C(2021) 1959 final, para. 10.

[15] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), 15 December 2020, COM(2020) 842 final.

[16] See Alexandre de Streel and Pierre Larouche, "The European Digital Markets Act: A Revolution Grounded on Traditions", 12 JECLAP 542 (2021), p. 550.

[17] Decision of the Commission of 6 February 2019 (Case M.8677 – *Siemens/Alstom*).

proved unsuccessful.[18] While the narrative surrounding the *Siemens/Alstom* Decision will always be the (not-so-novel) debate on the necessity to create European champions,[19] there is also a more technical question – should the Commission's approach to geographic market definition evolve in line with increasingly global markets?

The pressure coming from politicised cases such as *Siemens/Alstom* and the ascension of digital giants and the growing presence of "ecosystems" has now led the Commission to take a deeper look into its own 1997 Notice on the Relevant Market,[20] recognising that it may not be sufficiently comprehensive to face the changes incurred across industries in the past 25 years.[21] An example of this review is the acknowledgement that the Commission's SSNIP test is not necessarily the only parameter to be taken into account when defining the relevant market – this being particularly true in the case of zero-priced services or products (where the product is available for free), bidding markets (where the ultimate price will depend on external factors such as the starting price set by the authority) and multisided markets. The likely result of all this will be the increased adoption of alternative tests – such as the small but significant non-transitory decrease in quality test (SSNDQ), a test already used by the Commission in its *Android* Decision,[22] which is currently under appeal.[23]

As to theories of harm, a point which critics seem to be particularly animated about,[24] once again, the Commission has shown its willingness to adopt an approach which takes context into account. For example, in its *Dow/Dupont* Decision,[25] the Commission focused on an innovation-based theory of harm – by zeroing in on the risk of low incentives for companies active in the internal market to invest in R&D and innovation as a result of a merger. Since *Dow/Dupont*, the shift in focus from short-term effects on prices to longer-term dynamic effects on innovation has become more commonplace.[26]

As to the rethinking of remedies, the Commission may not have co-signed the joint statement[27] by the German, Australian and UK competition authorities praising structural remedies to the detriment of behavioural ones, but its aversion towards behavioural remedies was clear from its *Siemens/Alstom* Decision. The Commission also has on

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18 Ministries of Economy of France and Germany, *A Franco-German Manifesto for a European industrial policy fit for the 21st Century*, 19 February 2019.

19 Nicholas Levy, David R. Little and Henry Mostyn, "European Champions – Why Politics Should Stay out of EU Merger Control", 2/2019 *Concurrences* 23.

20 Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ [1997] C 372/5.

21 Commission Staff Working Document - Evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law of 9 December 1997, SWD/2021/0199 final. The Staff Working Document essentially identifies six main areas which will require an adaptation / modernisation of the Notice: (i) the emergence of digital markets; (ii) the relevance of the SSNIP test as a proxy for substitutability; (iii) geographic markets in a globalized world; (iv) quantitative evidence used for market definition purposes (e.g. barriers to entry); (v) market share calculation (e.g. the absence of an appropriate tool where volume/value-based market shares are not an appropriate proxy – such as downloads etc.); and (vi) non-price considerations (e.g. innovation).

22 Decision of the Commission of 18 July 2018 (Case AT.40099 – *Google Android*).

23 Case T-604/18, *Google LLC and Alphabet Inc. v. Commission*, pending.

24 Cristina Caffarra, "Business Models, Incentives, and Theories of Harm", *CPI Antitrust Chronicle*, October 2019.

25 Decision of the Commission of 27 March 2017 (Case M.7932 – *Dow/DuPont*).

26 See also Decision of the Commission of 21 March 2018 (M.8084 – *Bayer/Monsanto*).

27 UK, German and Australian competition authorities, *Joint Statement on Merger Control Enforcement*, 20 April 2021.

numerous occasions clearly stated that structural remedies are always the preferred option, as opposed to behavioural remedies.[28]

However, if we are to perform a reality check, changing the approach is not always possible and carries inherent limitations and risks. Our impression is that the proponents of radical changes to merger control often speak out of context. They forget to mention **judicial review**. While merger enforcement relates to **policy**, at the same time, it constitutes enforcement of the **law**, leading to individual decisions – administrative acts that affect the legal position and rights and obligations of undertakings. Therefore, judicial review can be a serious limitation for the introduction of a stricter approach. Especially since the EU Courts have always been active in the merger control area in terms of annulling Commission decisions, much more than in other areas of EU competition law, such as Article 102 TFEU.[29] In 2002, prior to the reform of the Merger Regulation in 2004, cases such as *Airtours/First Choice*,[30] *Schneider/Legrand*,[31] and *Tetra Laval/Sidel*,[32] all stressed the importance of economic assessment under merger control. Such cases also produced very clear and stringent rules on the standard of proof.[33]

The recent *CK Telecoms* judgment[34] is particularly instructive. In that case, the General Court annulled the Commission's Decision[35] to block the acquisition of Telefonica UK by Hutchison 3G UK, primarily on the ground that the Commission failed to demonstrate that the implementation of the transaction would ultimately lead to a significant impediment to effective competition (SIEC). The Court found that the Commission limited itself to finding that a 4 to 3 merger would lead to a loss of competition, but failed to demonstrate that such a loss of competition would be a significant one. In other words, the Commission spotted an impediment to competition, but did not go sufficiently far in its reasoning to demonstrate that such an impediment was significant enough.

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28 Commission Notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ [2008] C 267/1, paras 17 and 61. See also Carles Esteva Mosso, "EU Merger Control: How to Remove Anti-competitive Effects?", Fifth Global Merger Control Conference, Paris, 8 December 2017.

29 Prior to 2017, when the *Intel* judgment was delivered (Case C-423/14 P, *Intel Corp. v. Commission*, ECLI:EU:C:2017:632), the EU Courts very rarely would annul a Commission's decision on abuse of dominance. According to one study, the Commission had a 98% success rate in Article 102 TFEU cases between 1962 and 2006 See Damien Neven, "Competition Economics and Antitrust in Europe", 21 *Economic Policy* 741 (2006), pp. 761-762, Table 4. Another study showed that 11 out of the 15 appeals before the General Court in the years 2000-2016 failed on all grounds. The Commission's decisions were partially annulled in a mere 25% of appeals, i.e. four cases, and there was no total annulment. See Frances Dethmers and Jonathan Blondeel, "EU Enforcement Policy on Abuse of Dominance: Some Statistics and Facts", 38 ECLR 147 (2017), p. 163 *et seq*.

30 Case T-342/99, *Airtours plc v. Commission*, ECLI:EU:T:2002:146.

31 Case T-310/01, *Schneider Electric SA v. Commission*, ECLI:EU:T:2002:254.

32 Case T-5/02, *Tetra Laval BV v. Commission*, ECLI:EU:T:2002:264.

33 See David Bailey, "Standard of Proof in EC Merger Proceedings: A Common Law Perspective", 40 CMLRev. 845 (2003); Bo Vesterdorf, "Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts", 1 ECJ 3 (2005).

34 Case T-399/16 *CK Telecoms UK Investments Ltd. v Commission*, ECLI:EU:T:2020:217.

35 Decision of the Commission of 11 May 2016 (Case M.7612 – *Hutchison 3G UK/Telefónica UK*).

The case is currently under appeal and has been criticised as introducing too high a standard of proof for the Commission,[36] since the Commission must now provide sufficient evidence to demonstrate with "*strong probability*" the existence of an SIEC.[37]

Irrespective of whether this criticism is justified or not, the reality remains that the Commission cannot change its overall approach without infringing the burden and standard or proof rules set by the EU judicature. Of course, such rules are not set in stone and can change over time, as the case law develops.[38] However, this is a developmental process that cannot give an answer to the very specific proposals of the critics, which demand a more radical and timely policy shift.

It is therefore clear that changing the approach has its limits and cannot amount to changing the law from the back door or changing the jurisprudential rules on the burden and standard of proof. Only the EU legislator can take such steps. Changing the approach without changing the law is not easy. A failure to do so because of judicial intervention would leave no other way but trying to change the law. Indeed, the legality of the Commission's change of approach in its new Article 22 Guidance, which is currently pending before the General Court in *Illumina/Grail*,[39] is a good example. It is telling that the Director General himself has recently stressed that if the Court were to find that the Commission exceeded its competences in assessing the *Illumina/Grail* transaction – the Commission would seek to amend the Merger Regulation to be able to review such transactions.[40]

2.2 Changing the law

The second possibility is none other than changing the law itself. Many of the reform proposals would, indeed, necessitate an amendment of the Merger Regulation. To use an example, the proposal to "reverse the burden of proof" in cases of horizontal mergers with significant market shares and require the merging parties to prove efficiencies would mean a complete reversal of the existing system of the Merger Regulation. Rather than having the Commission assessing the compatibility or not of a given concentration, this

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36 See generally Giorgio Monti, "EU Merger Control after *CK Telecoms UK Investments v. Commission*", 43 *World Competition* 447 (2020); Kyriakos Fountoukakos and Camille Puech-Baron, "Towards a Higher Standard of Proof and a More Interventionist Judicial Review in Antitrust Cases Involving Complex (Economic) Assessments Following *CK Telecoms*?", 11 JECLAP 460 (2020), p. 465. The judgment has been criticised not just by the European Commission but also from NCAs. See e.g. PaRR, "BKartA president says reform of German merger control standard may be needed", 29 April 2022.

37 Case T-399/16 *CK Telecoms UK Investments Ltd. v Commission*, ECLI:EU:T:2020:217, para. 118. The case law on the standard of proof in merger cases has fluctuated between requiring "*convincing evidence that in all likelihood*" the transaction would create or strengthen a dominant position (Case T-5/02, *Tetra Laval BV v. Commission*, ECLI:EU:T:2002:264, para. 153) and proving that the "*creation or strengthening of a dominant position is more likely than not*" (Case C-413/06 P, *Bertelsmann AG and Sony Corporation of America v. Independent Music Publishers and Labels Association (Impala)*, ECLI:EU:C:2008:392, para. 52).

38 See Andriani Kalintiri, "Has the Standard of Proof been Raised in Modern EU Competition Enforcement?", 4/2021 *Concurrences* 49, p. 56.

39 Case T-227/21, *Illumina Inc. v. Commission*, pending.

40 See PaRR, "*Illumina/Grail* court outcome could prompt EU merger rule changes, says official", ABA 2022, 7 April 2022.

would mean creating a presumption of incompatibility, which the parties would have to rebut by demonstrating to be incorrect.[41]

Amendments to the EU Merger Regulation would not be something new – there have been two reforms of the original Merger Regulation. In 1997, several aspects of the original Merger Regulation[42] were reformed. The main reason for this amendment was that the Commission found that a considerable number of mergers with cross-border effects were not benefitting from the one-stop-shop principle because they did not meet the thresholds. Thus, this reform incorporated new thresholds, which allowed the Commission to have jurisdiction to review a larger number of mergers.[43] In 2004, a major reform of the Merger Regulation entered into force. This came as a result of the ground-breaking cases handed down in 2002, mentioned above. In the words of former European Competition Commissioner Mario Monti, the 2004 reform was necessary to bring more "*transparency and efficiency of the commission's policy on merger-control analysis*" and to "*mak[e] sure that [...] investigations of proposed mergers are more thorough, more focused, and [...] more firmly grounded in sound economic reasoning*".[44]

Nevertheless, every amendment of the venerable Merger Regulation is rather dramatic and time-consuming exercise. The original 1989 Regulation and the 1997 and 2004 amendments were always based on Article 352 TFEU. This provision provides for the Council to adopt measures, upon a proposal from the Commission – **acting unanimously**. Historically, Article 352 TFEU has served as a subsidiary catch-all tool for the European Union to adopt the measures for the proper functioning of the internal market – to which the Merger Regulation has always appeared as closely linked.[45]

The Article 352 TFEU legal basis would clearly create immediate roadblocks to any proposed changes to the Merger Regulation and may order a Pandora's Box. First, the European Union in 1997 and in 2004 was significantly different than that of today. Achieving unanimity in a Council of 14 Member States is a significantly less arduous task than getting 27 Member States to agree. Second, as explained above, there are two diametrically opposed camps demanding changes in European merger control. On the one hand proponents of stricter enforcement. And on the other, proponents of a system which would allow European Champions to foster. If an amendment of the Merger Regulation were pursued under Article 352 TFEU, we can be sure that some Member States would insist on introducing a veto right for the Council to second-guess the Commission, when

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[41] Such a radical reform would obviously necessitate repealing Article 10(6) of the Merger Regulation, which provides: "*Where the Commission has not taken a decision in accordance with Article 6(1)(b), (c), 8(1), (2) or (3) within the time limits set in paragraphs 1 and 3 respectively, the concentration shall be deemed to have been declared compatible with the common market [...]*".

[42] Council Regulation 1310/97 of 30 June 1997 amending Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, OJ [1997] L 180/1.

[43] European Commission, *XXVIIth Report on Competition Policy*, 1998, paras. 150-152.

[44] Mario Monti, "A Reformed Competition Policy: Achievements and Challenges for the Future", 2004(3) *Competition Policy Newsletter* 1.

[45] Some commentators have argued that Article 114 TFEU should be the legal basis for amending the Merger Regulation. See Jens-Uwe Franck, Giorgio Monti and Alexandre de Streel, *Legal Opinion Concerning Article 114 TFEU as a Legal Basis for Strengthened Control of Acquisitions by Digital Gatekeepers*, commissioned by the Federal Ministry for Economic Affairs and Energy, Berlin, 20 September 2021. According to the authors, originally, Article 114 TFEU served as a basis for the harmonisation of national laws affecting the establishment of the internal market. However, over time, its scope seems to have broadened.

the latter adopts a prohibition decision (akin to the *Ministererlaubnis* system in German merger control).[46] That would introduce an intolerable element of politicisation into merger control.

In conclusion, it is difficult to see how one could find the right common ground between these two camps while preserving the integrity of the internal market. A full amendment of the Merger Regulation is therefore a Pandora's Box that had better be kept closed, for the time being.

2.3 Externalisation

The final possibility to accommodate the critical voices is that of full "externalisation". We use the word "externalisation" in the sense of removing the specific issue from the ambit of competition law and merger control and relegating it to a *sui generis* regime to be introduced by secondary legislation. Such could be a **general** or a **sectoral** regime.

General authorisation regimes have recently been introduced or are being proposed for foreign direct investment and foreign subsidies, respectively. Foreign direct investment regimes have been introduced in a number of Member States and an EU Regulation promotes cooperation, information sharing and certain transparency requirements as between the European Commission and Member States.[47] On the foreign subsidies side, a Proposal for a Regulation on Foreign Subsidies was put forward in 2021.[48] The objective is to limit foreign subsidies which provide the recipients with unfair advantages to acquire EU companies to the detriment of fair competition. The proposal includes a notification-based tool to investigate concentrations involving a financial contribution by a non-EU government. A sectoral authorisation regime would be a novelty. In reality, if the digital sector were to be the focus, we would be talking of a DMA equivalent for merger control.

Aside from the difficulty in introducing a special regulatory regime (not to forget the problem of legal basis), externalisation has positive and negative elements. On the positive side, merger control is left intact and there is no politicisation of merger enforcement. In other words, the "orthodoxy" of merger control is not affected. On the negative side, however, introducing new laws on notification of transactions increases bureaucracy and amounts to an additional limitation of fundamental rights, including the freedom to conduct a business, which is enshrined in Article 16 of the Charter of Fundamental Rights.[49]

3. Concluding thoughts

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[46] See Section 42 GWB.

[47] Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ [2019] L 79I/1.

[48] Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, 5 May 2021, COM(2021) 223 final.

[49] Charter of Fundamental Rights of the European Union, OJ [2012] C 326/391.

It is not by any means easy to accommodate all these – often inconsistent – proposals within the confines of the current legislative regime. Changing the approach in EU merger control would not necessarily be easy or risk-free. Certainly, that would be the case for radical changes in the very short term. Developmental changes in the approach, which can only be achieved through case law, would take too much time and would therefore not satisfy the critics. Changing the law itself is possible, since the respective rules are contained in secondary and not in primary EU law, which would have required possibly an amendment of the Treaty. However, the legal basis of Article 352 TFEU requires unanimity in the Council and this makes it an arduous and risky exercise. Opening such a Pandora's Box would be a high stakes decision. As for full "externalisation", i.e. the adoption of regulatory notification regimes of general or special scope, which would apply in parallel to merger control, that would be a rather dramatic step to take, which will not be immune from the risks identified above with reference to changing the EU Merger Regulation.