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Opening the window for merger policy: What drives a reform?

by

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## About the author

After graduating in European Business Law from the University of Paris II Panthéon-Assas (Master 2, 2019) and the Ludwig-Maximilians-Universität of Munich (LL.M., 2019), and in European Governance from the Institut d'Etudes Politiques de Grenoble (MA, 2019), Judith Nayberg attended the College of Europe in Bruges (2019-2020). She followed the European Public Policies Analysis (EPPA) track and graduated from the European Political and Governance Studies Master programme (MA, 2020) where she was awarded the Valéry Giscard d'Estaing prize (2020) for her proposals to relaunch European integration. Specialised in European Business and Competition Law, Ms Nayberg is currently a student lawyer at the Ecole de Formation des Barreaux de Paris. She has completed various internships in law firms in Paris and Munich, as well as at the Representation of the Free State of Bavaria to the European Union in Brussels.

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## **Abstract**

A lively debate on reforming merger control policy is currently happening. Stakeholders disagree on the need for a reform to take place and the scope of this potential reform. The debate pits the advocates of a strong European Industrial Policy in the context of globalisation against the defenders of a rigid competition law capable enabling the Union to cope with the rise of new technologies in our digitalised area. This research shows that the European Commission, even if it is a key actor, is not the only policy entrepreneur. The degree of influence of each actor is analysed through a comparison between the 2004 reform and the ongoing discussion on the future of the European Communities Merger Regulation using the multiple streams framework. The role of three different actors is studied to answer this question: the Member States, the economic stakeholders and the experts, and the European Court of Justice. It emerges from the study that a policy change cannot occur without the support of most of the stakeholders involved. The wider and more uniform the coalition of policy entrepreneurs and the broader the window of opportunity, the higher the probability that this coalition will trigger and influence the policy change. The European Commission, although it remains the leading policy entrepreneur, needs the widest possible support from the actors to seize a window of opportunity and couple the three streams of the multiple streams framework. The differences between the situation in the early 2000's and the ongoing one enable us to grasp the factors that must be met to have a policy change. The political character of the current debate and the technical aspect of the 2004 reform are crucial elements in building a coalition. The analysis highlights that the degree of influence of the economic stakeholders depends on the technical aspects of the debate.





## **Introduction**

In the last few years, the merger control policy has been subject to many debates among stakeholders. Today, the question is whether the European Communities Merger Regulation (ECMR), as amended in 2004, is still relevant in an increasingly globalized world. In the ongoing situation, the questions concern more the compatibility of the EMCR with industrial policy than problems of procedure and economic analysis, as it was the case in 2004. The new criticisms towards merger control policy emerged with the refusal by the European Commission of the proposed merger between Alstom and Siemens in February 2019.<sup>1</sup> This refusal is the symbol of the contradiction between the objectives of competition policy and the ones of industrial policy.

This tension is particularly interesting in the sense that it represents a change in paradigm. The competition policy has prevailed over the industrial policy since the 1980s.<sup>2</sup> This questioning is, therefore, a challenge to this paradigm. Depending on the outcome of this debate, the role and the place of the competition policy would either be reinforced or would lose its predominance.

For the moment things have not really changed, and we are still in the phase of a debate between the different actors. Right after the Alstom/Siemens merger refusal, many voices were raised, especially from some of the Member States. The Commission, however, defended its decision, and it has been reluctant to any kind of change. One year onwards, the situation seems to have changed a bit, mainly with the announcement of the review of the relevant market

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<sup>1</sup> Commission decision of 6.2.2019 declaring a concentration to be incompatible with the internal market and the functioning of the EEA Agreement, C(2019)921 final, Case M.8677 Siemens/Alstom.

<sup>2</sup> Combe, Emmanuel, Jacky Fayolle et Françoise Milewski, 'La politique industrielle communautaire', *Observations et diagnostics économiques : revue de l'OFCE*, no. 43, 1993, pp. 4-10.

definition which would involve a change in a Commission's notice of 1997.<sup>3</sup> Nevertheless, further changes, including the amendment of the ECMR, are not yet on the table.

The aim of this research is to understand why there was a reform in 2004 and why, now, the reform is not on its way, even if some actors are strongly pushing for it. The research will exclusively be focused on the merger control policy and the impact of the timing and the general context on the existence or absence of a policy change. The comparison between the 2004 reform and the ongoing situation will help to grasp why a change occurred in 2004 and why nothing is changing now by confronting the similarities and the differences between those two situations. The idea is to identify the main drivers and the main obstructions to a policy change. The role of the Commission is often put forward to explain a policy change. It means that when the Commission pushes for it, it happens. This research tries to nuance this observation by studying the role of other actors involved in the European decision-making process. Without their support, the Commission cannot be seen as an all-powerful actor.

The first section is dedicated to the research design. The second section will focus on the analytical part, with each sub-section designed to answer one of the three hypotheses. The conclusion answers research questions presented as well as the confirmation or rejection of each of the hypotheses.

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<sup>3</sup> Commission Notice of December 9, 1997, on the definition of relevant market for the purposes of Community competition law [1997] O.J. C372/5.

## Theoretical framework

The existence or the absence of change are two events which are not always easy to understand. A status quo is sometimes as complex as a change in policy. One wonders why some issue are put on the top of the agenda while some are neglected.<sup>4</sup> This idea is to understand what are the driven factors that lead to a change in policy.

In an attempt to give an answer to this question, the multiple streams framework has been chosen. This theory is based on the following mechanism: a policy entrepreneur must try to bring together the three streams (problem, policy and politics) to seize a window of opportunity which gives space for a policy change.<sup>5</sup> This coupling is a central element in the multiple streams framework.

The first of the three streams is the problem stream. A problem stream exists when the issue is noticed as a problem by the policy-makers.<sup>6</sup> The policy stream can be defined as the ‘policy primaeval soup’.<sup>7</sup> It is the set of solutions and alternatives that are proposed to respond to the problems that have been identified in the first stream.<sup>8</sup> Finally, the last stream is the political one. This stream is the broadest in the sense that it encompasses “such things as public mood, pressure group campaigns, election results, partisan or ideological distributions [in Parliament] and change of administrations”.<sup>9</sup>

The first key notion of this theoretical framework is the *window of opportunity*. The three above-defined streams must converge so that a window of opportunity comes to light. The reasoning is done in terms of probability: the chances to reach a policy change are higher.

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<sup>4</sup> John W., Kingdon, *Agendas, alternatives and public policies*, Pearson new international edition, 2014, 2nd ed., p. 15.

<sup>5</sup> Fabien Terpan and Sabine Saurugger, ‘Do crises lead to policy change? The multiple streams framework and the European Union’s economic governance’, *Policy Sciences*, vol. 49, 2016, p. 36.

<sup>6</sup> Kingdon, *loc. cit.*

<sup>7</sup> Kingdon, *op. cit.*, p. 116.

<sup>8</sup> *Ibid.*, p. 117.

<sup>9</sup> *Ibid.*, p. 145.

Kingdon defines this concept as “an opportunity for advocates of proposals to push their solution, or to push attention to their special problems”.<sup>10</sup> The concept of window of opportunity is about the right timing, about “periods of greater receptivity of political actors”.<sup>11</sup> According to the size of these windows, the opportunity is broader. It means that the bigger the window of opportunity, the more likely the policy change.<sup>12</sup>

The second key notion of the multiple streams framework is the *policy entrepreneur*. The use of the window of opportunity relies on the action of one or many policy entrepreneurs. A window of opportunity is more likely to occur when “all the three streams are coupled through strategic manipulation by skillful, resourceful and well-positioned policy entrepreneur”.<sup>13</sup> Kingdon has defined policy entrepreneurs as “advocates who are willing to invest their resources – times, energy, reputation, money – to promote a position in return for anticipated gain in the form of material, purposive, or solidary benefits”.<sup>14</sup>

The interaction between the different policy entrepreneurs are a central aspect in this research, and more precisely, the possible formation of coalitions among them.

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<sup>10</sup> Kingdon, *op. cit.*, p. 166.

<sup>11</sup> Terpan, *loc. cit.*

<sup>12</sup> Robert Ackrill, Adrian Kay and Nikolaos Zahariadas, ‘Ambiguity, multiple streams and EU policy’, *Journal of European Public Policy*, vol. 20, no. 6, 2013, p. 877.

<sup>13</sup> Terpan, *loc. cit.*

<sup>14</sup> Kingdon, *op. cit.*, p. 179.

## **The multiple streams framework in the context of the merger control policy**

### *The supposed prominent role of the Commission*

In the competition policy field, the literature is dominated by the legal experts and the economists.<sup>15</sup> Some authors mourn that this area “suffers from a chronic shortage of contributions from political scientists and public scholars”.<sup>16</sup> Nevertheless, some conclusions can be drawn about the role of the policy entrepreneurs in the merger control policy.

Scholars seem to be unanimous regarding the Commission as the key actor in this field. Competition policy is an area which is to a large extent supranational.<sup>17</sup> It explains why the role of the Commission and its willingness to act is essential. With this in mind, the Commission is often seen in this area as an institution that pushes for policy change to expand its own competences, as Young explained.<sup>18</sup> Horner underlined this aspect in the review of the European Communities Merger Regulation of 2004, arguing that the Commission pushes for the revision in order to secure its powers.<sup>19</sup> He underlined this aspect by showing that the introduction of a new test to replace the old dominance test enabled the Commission to scrutinize more cases than before.<sup>20</sup> Blauburger and Toller qualify this review as “a clever attempt by the Commission to increase its own powers”.<sup>21</sup> The Commission and especially the DG COMP have also been studied in light of the multiple stream framework and, for instance,

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<sup>15</sup> Hubert Buch-Hansen and Angela Wigger, ‘Chapter 7. EU competition rules and the European integration project’, in: Laurie Buonanno and Nikolaos Zahariadis, *The Routledge Handbook of European public policy*, New-York, Routledge, 2018, p. 78.

<sup>16</sup> *Ibid.*

<sup>17</sup> Alasdair R. Young, ‘Competition policy: defending the economic constitution’, in: Mark A. Pollack, Helen Wallace and Alasdair R Young, *Policy-making in the European Union*, Oxford, Oxford University press, 7th ed., p. 143.

<sup>18</sup> *Ibid.*

<sup>19</sup> Neil Horner, ‘Unilateral Effects and the EC Merger Regulation – How the Commission Had its Cake and Ate it Too’, *Hanse Law Review: The E-Journal on European, International and Comparative Law*, vol.2, no. 1, 2006, p. 23.

<sup>20</sup> *Ibid.*

<sup>21</sup> Michael Blauburger and Annette Elisabeth Toller, ‘Competition policy’, in: Hubert Heinelt and Michèle Knodt, *Policies within the EU multi-level system: instruments and strategies of European governance*, Baden-Baden, Nomos, 201, p. 125.

Ackrill asserts that the role played by the Commission as policy entrepreneur within the politics stream is often acknowledged.<sup>22</sup> The prominent view among scholars is then that the review of merger policy, as well as antitrust rules, is the outcome of a battle between the Commission and the Member States “from which the Commission emerged triumphant”.<sup>23</sup>

It appears from this literature review that the dominant view is to consider the Commission as the leading policy entrepreneur in the merger control policy. We try to challenge this view in this paper, by showing the role of the other actors as policy entrepreneurs.

### *Research problem and research question*

The combined influences of all the pertinent actors enable us to understand why a policy changes. This reasoning also applied to the merger policy control, where some scholars estimated that the ECMR review was the outcome of “complexity and compromise, as well as the influence of other actors other than the Commission”.<sup>24</sup> Factors that must be taken into consideration are multiple and much broader than only the Commission’s willingness. The list of those factors in the context of regulatory policies is endless: “the ECJ [European Court of justice] and the EC’s legal framework, decisions made by national governments, national regulatory inadequacies, interest groups and increase transnational trade, the dynamics of EC policy-making”.<sup>25</sup>

Besides the fact that the Commission is not the only actor having influence over policy changes, it is also interesting to note that it is not a unitary actor.<sup>26</sup> It means that the Commission cannot be considered as a whole, even if, to some officials, this situation must be nuanced to

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<sup>22</sup> Ackrill, *op. cit.*, p. 875.

<sup>23</sup> Hussein Kassim and Kathryn Wright, ‘Bringing regulatory processes back in: the reform of EU antitrust and merger control’, *West European Politics*, vol. 32, no. 4, 2009, p. 738.

<sup>24</sup> Kassim, *op. cit.*, p. 748.

<sup>25</sup> Mark Thatcher, ‘Chapter 13. European regulation’, in: Sonia Mazey and Jeremy Richardson, *European Union: Power and policy-making*, New-York, Routledge, 2015, 4th ed., p. 310.

<sup>26</sup> Blauburger, *op. cit.*, p. 145.

the extent that the DG COMP has its own culture and is relatively homogenous in its thinking.<sup>27</sup> The fact remains, however, that the DG COMP is made up of different units, each of which has its own interests and problems.<sup>28</sup> For instance, regarding the merger control policy, the digital unit currently has specific issues with all the trends towards more digitalization.<sup>29</sup> All the units are dealing with different markets, which have their own issues. Therefore, opposite views within the DG COMP can be explained by belonging to a given unit.<sup>30</sup> That being said, the common position of the DG COMP is harmonised thanks to the policy unit that aggregates the positions of all of them.

The purpose of this research is to explain that other actors than the Commission can be seen as a policy entrepreneur and that even the Commission itself cannot always be seen as a homogenous policy entrepreneur. This idea is particularly true in the European context, in which, because of the complex decision-making process involving many different actors, policy entrepreneurs must create the broadest possible coalitions to achieve policy changes.

For the sake of the research, I chose to compare two different moments in the merger control policy history (the 2004 reform and the ongoing situation) where policy entrepreneurs were and are asking for a change. However, both these situations, as it is now, did not lead to the same result. The objective is thus to understand what the common points and the differences in the actions and positions of the policy entrepreneurs towards the considered policy change are. My research question is the following one:

*Why did the 2004 and the ongoing situations regarding the merger control policy not lead to the same reform results, even though they are similar in many aspects?*

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<sup>27</sup> Interview with a Commission official, DG Comp, European Commission.

<sup>28</sup> Interview with a Head of unit, DG Comp, European Commission, Bruges (phone call), 2 April 2020.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

The main hypothesis is that the more the Commission builds broad coalitions with other actors, the greater its degree of influence is. The idea is that, without broad coalitions, the European Commission cannot couple the three streams alone to create a window of opportunity. It means that the degree of influence exerted by the Commission to trigger a policy change depends on how wide the coalition is, in other words, on “the coherence of the understanding policy entrepreneurs have of the situation”.<sup>31</sup>

**H.** The wider and more uniform the coalition of policy entrepreneurs and the broader the window of opportunity, the higher the probability that this coalition will trigger and influence policy change.

It can be divided into sub hypotheses to understand in detail the specific role of each policy entrepreneur. The first sub hypothesis concerns the role of the Member States as policy entrepreneurs. Those actors also have an influence on the size of the window opportunity.

**H1.** The bigger the political consensus among Member states, the broader the window of opportunity for the Commission.

In addition to the role played by the Member States, the economic stakeholders and ‘hidden participants’ also have a say and can influence the size of the window of opportunity. The latter can be defined as a “community of specialists that generate alternatives, proposals and solutions”.<sup>32</sup> This category encompasses “academics, consultants, career bureaucrats [...] and analysts who work for interest groups”.<sup>33</sup>

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<sup>31</sup> Terpan, *op. cit.*, p. 50.

<sup>32</sup> Kingdon, *op. cit.*, p. 200.

<sup>33</sup> *Ibid.*



**H2.** The more technical the issues raised are, the more economic stakeholders and ‘hidden participants’ can influence and participate in widening the window of opportunity.

The last sub hypothesis refers to the role played by the European Court of Justice (ECJ) in this process. The rulings delivered by the ECJ can exert pressure on the Commission to push to change its position or, conversely, to support the position defended by the Commission.

**H3.** The more the ECJ’s rulings convergent with the Commission’s position are, the more they fuel the Commission’s action in the merger control field.

### **Analytical focus: the choice of 2 moments and different actors**

The choice was quite straightforward in that the merger control policy has known only one big reform throughout its existence. This is highlighted by Young in the book *Policy-making in the European Union*.<sup>34</sup> The 2004 review is considered as significant,<sup>35</sup> especially for the procedural aspect of the control with the introduction of an *ex-ante* notification.<sup>36</sup> The changes “introduced greater flexibility to the notifications and the review process”.<sup>37</sup> The most significant amendment to the ECMR was the change in the test applied to control the risk of dominance in a relevant market. One of the main characteristics of this reform is the introduction of more economic analysis in the appreciation of mergers.<sup>38</sup> The most meaningful symbol of this shift is the creation of a Chief Economist who ensures the quality of the economic analyses of the decisions delivered by the Commission.<sup>39</sup>

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<sup>34</sup> Young, *op. cit.*, p. 147.

<sup>35</sup> Kassim, *op. cit.*, p. 743.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> Adriaan Dierx and Fabienne Ilzkovitz, ‘60 ans de politique de concurrence européenne’, *Revue du droit de l’Union européenne*, no.3, 2018, p. 39.

<sup>39</sup> *Ibid.*

The second period analysed is the ongoing situation in the merger control area. Since the refusal of the Alstom/Siemens merger by the European Commission in February 2019,<sup>40</sup> and even before that, many voices are calling for a reform of the merger control rules. Right after the publication of the refusal, Commissioner Vestager has explained that this decision was not a reason to review the merger regulation. However, the situation has evolved since then. In her hearings in front of the European Parliament, candidate-Commissioner Vestager stated: “It will therefore be one of my priorities to examine whether the current merger rules allow us to sufficiently catch all important deals” that can undermine free competition.<sup>41</sup> One of the awaited events was the publication of the ‘New Industrial Strategy for a green and digital Europe’ in March 2020.<sup>42</sup> It states that “the Commission is currently reviewing the EU competition framework” and specifies that “the ongoing evaluation of merger control [...] is also part of this review”.<sup>43</sup> Even if it shows a change in the Commission’s position, this formula remains very unclear and commentators do not really know what it encompasses.<sup>44</sup> Moreover, Commissioner Vestager declared that this review should not be seen as an answer from the Commission to the critics that raised against the current merger control rules since the Alstom/Siemens refusal.<sup>45</sup>

It is necessary to set the framework for the latest announcements made by the Commission regarding the merger rules. Firstly, it is worthy to note that an evaluation of the

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<sup>40</sup> Commission decision of 6.2.2019 declaring a concentration to be incompatible with the internal market and the functioning of the EEA Agreement, C(2019)921 final, Case M.8677 Siemens/Alstom.

<sup>41</sup> Answers to the European Parliament questionnaire to the Commissioner-designate Margrethe Vestager, Executive Vice-President-designate for a Europe fit for the Digital Age, Brussels, 8 October 2019.

<sup>42</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: a new industrial strategy for Europe, COM(2020) 102 final, 10 March 2020.

<sup>43</sup> *Ibid.*, pp. 5-6.

<sup>44</sup> Bjarke Smith-Meyer and Christian Olivier, ‘Europe vows to finally deliver its unloved industrial strategy’, POLITICO Pro, 28 January 2020; retrieved 16 March 2020, <https://www.politico.eu/article/europe-vows-to-finally-deliver-on-its-unloved-industrial-strategy-competition-china-united-states-commission/>

<sup>45</sup> *Ibid.*

merger regulation was launched in 2016<sup>46</sup> and the results are expected by the end of the year.<sup>47</sup> Besides this evaluation that started before the Alstom/Siemens refusal, the European Commission is currently reviewing the definition of the ‘relevant market’, which is a central notion both in merger control and antitrust. Commissioner Vestager announced the starting of the review in December 2019 and there has been a roadmap published on the 3<sup>rd</sup> of April 2020.<sup>48</sup> This review is welcomed by most of the main actors dealing with mergers, Commission included, who note that “the current notice<sup>49</sup> comes from a time when digital markets played hardly any role at all”.<sup>50</sup> It has been seen as “a good time to take stock and review whether these changes require amending the notice on market definition”.<sup>51</sup>

Through the recent developments we can see that the current merger regulation is put into question. The issue at stake is whether to make a reform as significant as the one from 2004 or whether to simply adjust at the margin.<sup>52</sup> The actors involved in merger control wonder whether the 2021 reform will just be a review of the definition of the relevant market or whether a bigger reform is embedding numerical issues.<sup>53</sup>

The Commission is subject to external and internal constraints, and its “autonomy is only relative”.<sup>54</sup> As external constraints, we focused in this research on the Member States, the economic stakeholders and ‘hidden participants’ and finally, the European Court of Justice.

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<sup>46</sup> Evaluation of procedural and jurisdictional aspects of EU merger control, led by DG COMP-A2.

<sup>47</sup> Interview with a Commission official, DG Comp, European Commission, *op. cit.*

<sup>48</sup> Roadmap for the Evaluation of the Commission Notice on the definition of relevant market for purposes of Community competition law, led by DG COMP-A1 and A2, 2020.

<sup>49</sup> Commission Notice of December 9, 1997, on the definition of relevant market for the purposes of Community competition law [1997] O.J. C372/5.

<sup>50</sup> Madero Villarejo, Cecilio, Deputy Director-General Mergers, European Commission, European Law Workshop, Brussels, 14 January 2020.

<sup>51</sup> *Ibid.*

<sup>52</sup> Interview with Jérôme Vidal, Chef du secteur Concurrence et Aides d’Etat au Secrétariat général des affaires européennes (SGAE), Bruges (phone call), 8 April 2020.

<sup>53</sup> *Ibid.*

<sup>54</sup> Kassim, *op. cit.*, p. 739.

Thus, the major absence from this paper is the European Parliament. It does not play the main role in competition policy.<sup>55</sup>

This paper is based on a qualitative approach: desk research and semi-structured interviews were used to collect data to verify the hypotheses.

### **The role of the Commission depending on the position of the Member States**

Policy change in merger control policy cannot be reduced to a “dualistic struggle between the Commission and member governments”,<sup>56</sup> as it is sometimes depicted in the literature. This view is a bit simplistic and does not allow one “to capture the complexity of the negotiations, the nature of the debate or the interaction between the Commission and member governments”.<sup>57</sup> It is important to note that the Member States cannot be considered as a homogenous category, and this for two reasons. On the one hand, there are often contradictory positions among them as the negotiations in the Council illustrate it.<sup>58</sup> On the other hand, besides the heterogeneity among the Member States, even within a Member State, it is not always easy to adopt a common position. Sometimes governments and national competition authorities do not have the same approach of competition (policy v. law), for instance.<sup>59</sup>

#### *The 2004 reform*

Since the introduction of the ECMR in 1989, the Commission has taken on more and more weight and “gained confidence”.<sup>60</sup> With the support of the DG COMP, which is often considered as one of the most supranational Directorate-General at the Commission, it “became gradually more interventionist”.<sup>61</sup> The reform proposed by the Commission in the early 2000s

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<sup>55</sup> Blauberger, *op. cit.*, p. 147.

<sup>56</sup> Kassim, *op. cit.*, p. 745.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*

<sup>59</sup> Interview with Jérôme Vidal, *op. cit.*

<sup>60</sup> Young, *op. cit.*, p. 157.

<sup>61</sup> *Ibid.*

did not raise too many concerns among the Member States for different reasons. The need for reform was seen as necessary by the majority of the Member States.<sup>62</sup> It was essential to participate in the completion of the internal market.<sup>63</sup>

However, even if all Member States agreed on the need to reform the ECMR, they were not always on the same page when it came to the content and the scope of the reform. The first point of contention that concerned the content was, as already mentioned above, the test used to control the effect of mergers on the market and on the other competitors. The second sticking point concerned the scope of the reform, meaning from which threshold mergers must be controlled by the Commission and not by the National Competition Authorities (NCAs). The question of the scope is very sensitive for the Member States that still want to keep their competencies for mergers that only concern their jurisdictions. The question of the nature of the test, which was to choose between the dominance test (DT)<sup>64</sup> used since 1989 by the Commission and the substantial lessening of competition test (SLC), was linked to the choice of the most relevant economic analysis. This issue was discussed for two and a half years in the Council during each meeting.<sup>65</sup> The frequency of these discussions shows the importance attached by the Member States to this subject. They were acting on the policy streams, by proposing and discussing the possible solutions. In addition to the frequency of these negotiations, the timing is also crucial. It was “well before the Commission submitted its own proposal in 2002”.<sup>66</sup><sup>67</sup> This proposal, which was well-received in principle, triggered some tensions between two groups of Member States within the Council.

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<sup>62</sup> Michelle Cini and Lee McGowan, ‘Chapter 6. Merger Policy’, in: Michelle Cini and Lee McGowan, *Competition policy in the European Union*, New York, Palgrave Macmillan, 2009, 2<sup>nd</sup> ed., p. 150.

<sup>63</sup> *Ibid.*

<sup>64</sup> The dominance test (DT) is based on whether after the merger the new-created firm acquires a dominant position on its market. The reasoning is therefore in terms of market share.

<sup>65</sup> Kassim, *op. cit.*, p. 748.

<sup>66</sup> European Commission, Proposal for a Council Regulation on the control of concentrations between undertakings, COM (2002) 711 final, O.J. C20/4.

<sup>67</sup> Kassim, *loc. cit.*

The first group was led by Germany, which had the support of Luxembourg and Italy, and wanted to promote the dominance test.<sup>68</sup> Conversely, France and Spain, followed by the rest of the Member States, wanted to introduce a test like the SLC one.<sup>69</sup> The final agreement mainly relies on the SLC proposal, with the introduction of the Significant Impediment to Effective Competition test (SIEC).<sup>70</sup> It clearly appears that the Member States play an important role in the choice of the test used because in its proposal, the Commission wanted to keep the dominance test as it was before: it “proposes to insert a new Article 2(2) into the Merger Regulation, which aims to clarify the concept of dominance under the Merger Regulation”.<sup>71</sup> Member States succeeded, thanks to a large coalition amongst them, to introduce a change in the test used to assess mergers economically. This outcome was possible thanks to a “last-minute high-level political agreement between Commissioner Monti and the German minister”<sup>72</sup> to get Germany on board. The deal was to include a recital 25,<sup>73</sup> where it was explicitly written that the DT remains a key element of a merger assessment completed by the SIEC test. The two approaches are considered, thanks to this recital, as complementary even if the SIEC test is henceforth the preeminent one.

This example permits us to see that, even when Member States are not speaking with one voice, intergovernmental bargaining can lead to a consensus which lays the foundations for a policy change. Compromises and coalitions broaden the window of opportunity for the Commission, which sees its proposal advance in the decision-making process.

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<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> Article 2(3) of Council Regulation (EC) 139/2004 of 29 January 2004, on the control of concentration between undertakings, [2004] O.J. L24/1.

<sup>71</sup> Recital 55 of the Proposal for a Council Regulation on the control of concentrations between undertakings, COM (2002) 711 final, O.J. C20/4.

<sup>72</sup> Kassim, *loc. cit.*

<sup>73</sup> Recital 25 of Council Regulation (EC) 139/2004 of 29 January 2004, on the control of concentration between undertakings, [2004] O.J. L24/1.

An important event which played a role in the common position of the Member States in favour of a review of the ECMR, without speaking of the exact content of this one, was the prospect of ten new states joining the EU in 2004. It was “the motive for many of the changes being mooted for EU institutions”.<sup>74</sup> This event has definitely broadened the window of opportunity for the Commission. It has provoked a change in the political stream. DG COMP has had to take this into account because of the sudden increase in the caseload caused by the accession of ten new States.<sup>75</sup> Thus, the coherent understanding of the problems among the Member States helped to lead to a policy change. This consensus situation is far from being the ongoing one.

### *The ongoing situation*

There is neither a consensus in favour of a reform, nor even a consensus on the content that it should contain. Different issues are currently at stake, especially the definition of the relevant market as well as the question of the large digital companies. Regarding the notion of the relevant market, Commissioner Vestager announced that a consultation will be held in summer 2020 to evaluate the current definition of a ‘relevant market’.<sup>76</sup> The results of this consultation have not yet been published. This notion has crystallised the debate in the case Siemens/Alstom. The point, seen as problematic by some Member States, is that the Commission considered that the appreciation of the merger in question should be limited to the European market because the main competitor, a Chinese company called CRRC, generated

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<sup>74</sup> Bruce R. Lyons, ‘Reform of European Merger Policy’, *Review of International Economics*, vol.12, no. 2, 2004, p. 251.

<sup>75</sup> *Ibid.*

<sup>76</sup> Thibault Larger, Giorgio Leali, Paola Tamma and Simon Van Dorpe, ‘Jack’s last chapter – SME strategy – Market definition’, POLITICO Pro Fair Play, 3 March 2020, retrieved 16 March 2020, <https://www.politico.eu/article/politico-pro-fair-play-jacks-last-chapter-sme-strategy-market-definition/>

more than 90% of its revenues in China.<sup>77</sup> Apart from the announcement of this evolution of the ‘relevant market’ definition, things do not change for the moment.

In this process, Member States play a key role.<sup>78</sup> They have initiated the debate about the relevance of the current merger rules, especially France and Germany.<sup>79</sup> Some of them advocate for a policy change, whereas others want to keep the rules as they are. The reflection is currently going on and, to grasp the intricacies of this debate, it is important to differentiate discussions about antitrust and discussions about mergers.<sup>80</sup> In the framework of this research, only the latter one is addressed.

Merger regulation has been discussed and criticized many times since its creation in 1989.<sup>81</sup> However, it must be noted that since the Alstom/Siemens decision, the debate is more frequent. In this perspective, this decision can be seen as a triggering event that initiated a wide-ranging debate.<sup>82</sup>

Some of the Member States are advocating for more lenient rules in merger control. This request is motivated by a questioning of the primacy of competition policy over industrial policy.<sup>83</sup> Competition policy has been considered as more important as the economic patriotism because it was seen as an efficient way to ensure the creation of ‘national champions’ through free and fair competition.<sup>84</sup> The problem is that this situation has led to a quasi-abandonment of industrial policy at the European level since the 1980s and it has caused a fragmentation of the European market that undermines the creation of European champions able to compete with

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<sup>77</sup> Elie Cohen, ‘Alstom-Siemens, politique de la concurrence ou politique des champions européens’, *Telos*, 5 février 2019, retrieved 2 March 2020, <https://www.telos-eu.com/fr/economie/alstom-siemens-politique-de-la-concurrence-ou-poli.html>

<sup>78</sup> Interview with a Head of unit, DG Comp, *op. cit.*

<sup>79</sup> *Ibid.*

<sup>80</sup> Interview with a Commission official, DG Comp, *op. cit.*

<sup>81</sup> Interview with a Head of unit, DG Comp, *op. cit.*

<sup>82</sup> *Ibid.*

<sup>83</sup> Combe, *loc. cit.*

<sup>84</sup> OECD Global Forum on Competition, Roundtable on Competition Policy, Industrial Policy and National Champions, DAF/COMP/GF(2009), 19 October 2009.



the American, Chinese and others rivals. The exacerbation of international competition has therefore led to a questioning of the absolute primacy of competition.

Right after the Commission's decision to refuse the merger between Alstom and Siemens, France and Germany published 'A Franco-German Manifesto for a European industrial policy fit for the 21st Century'.<sup>85</sup> In this manifesto, they both advocate for a reform of the ECMR.<sup>86</sup> They also proposed something which is quite innovative: "a right of appeal of the Council which could ultimately override Commission decisions could be appropriate in well-defined cases, subject to strict conditions".<sup>87</sup> This *Ministererlaubnis*,<sup>88</sup> however, has been under a lot of criticisms, even from top officials of the European Commission. This mechanism is criticised because Ministries do not benefit from the same expertise in the field as legal experts from the Commission do.<sup>89</sup> This idea, that has been discussed among experts is, for the moment, not anymore on the table of the negotiations.<sup>90</sup>

Other public statements coming from Member States have supported the ideas developed in the Franco-German Manifesto. France, Germany, and Poland published jointly a public statement called 'Modernizing EU competition policy'.<sup>91</sup> In this proposal, they notably advocate for the introduction in the definition of a relevant market of "more flexibility, better take into account competition at global level and protect strategic common European

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<sup>85</sup> Joint Manifesto from the French Ministry of Economy and its German counterpart, 'A Franco-German Manifesto for a European industrial policy fit for the 21st Century', 19 February 2019.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> German word meaning 'ministerial authorisation'.

<sup>89</sup> Johannes Laitenberg, Director-General for Competition, 'Aktuelle Entwicklungen und Probleme des EU Kartellrechts: Anmerkungen zu den Fusionskontrollentscheidungen der Europäischen Kommission in den Fällen Wieland/Aurubis und Siemens/Alstom', Brüsseler Arbeitssitzung der Studienvereinigung Kartellrecht, Brussels, 15 February 2019.

<sup>90</sup> Interview with Jérôme Vidal, *op. cit.*

<sup>91</sup> Proposal to 'Modernize EU Competition Policy' Ministries from France, Germany and Poland, 4 July 2019.

interest”.<sup>92</sup> According to the French Minister of Economy, this statement aims at triggering a debate at the European level and between the Commission and the Member States.<sup>93</sup>

French Minister of Economy Bruno Lemaire expressed himself in strong terms after the Alstom/Siemens merger refusal, qualifying the decision as an “economic error” that will “serve the Chinese interests”.<sup>94</sup> France has a particular weight in competition law which makes it easier for it to make its voice heard. In this process, the French Permanent Representation plays an important role, as an intermediary between the French authorities and the European Commission.<sup>95</sup> It is particularly true for the merger control policy and can be explained by the fact that the merger control, under the European threshold, is a national matter that is not harmonised. Nevertheless, the model used by French competition authority for mergers at the national scope is very similar to the one used at the European level. It then has the advantage of being more listened to when there are discussions at the supranational level (within the European Competition Network).<sup>96</sup> This legal specificity linked to the French legal culture gives weight to this State at the negotiations table.<sup>97</sup>

As France, Germany wants to insist on the importance of creating an industrial policy at the European level. Germany asserted this at the national level a bit before the Alstom/Siemens decision: German Minister of Economy Peter Altmaier released the ‘National Industry Strategy 2030’.<sup>98</sup> This implication in the development of a more coherent and efficient

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<sup>92</sup> *Ibid.*

<sup>93</sup> Mathew Heim, ‘Modernising European Competition Policy: A Brief Review of Member States’ Proposals’, Blog post Bruegel, 24 July 2019, retrieved 10 April 2020, <https://www.bruegel.org/2019/07/modernising-european-competition-policy-a-brief-review-of-member-states-proposals/>

<sup>94</sup> Jean Quatremer, ‘Alstom-Siemens: une “erreur économique” au bénéfice de la Chine’, Blog Couillises de Bruxelles, Libération, 11 février 2019, retrieved 2 March 2020, <http://bruxelles.blogs.liberation.fr/2019/02/11/alstom-siemens-une-erreur-economique-au-benefice-de-la-chine/>

<sup>95</sup> Interview with Jérôme Vidal, *op. cit.*

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> Bundesministerium für Wirtschaft und Energie, Referat Öffentlichkeitsarbeit, Nationale Industriestrategie 2030. Strategische Leitlinien für eine deutsche und europäische Industriepolitik’, February 2019.

industrial policy is motivated by the fact that Germany wants to protect its *Mittelstand*,<sup>99</sup> which is the motor of its economy.<sup>100</sup> This affirmation is repeated in the Franco-German Manifesto.<sup>101</sup> It is interesting to note, in the framework of our analysis that aims at studying the possible coalitions between the Member States, that this manifesto is only a Franco-German approach and not a European one.<sup>102</sup> It cannot thus be seen as a signal of an important coalition between Member States towards the merger rules. The reasoning is the same for the joint statement from France, Germany and Poland.

Another interesting nuance in understanding how Member States can build coalitions to expand the window of opportunity of a merger control policy change is to focus on who we are talking about when we talk about France, Germany or any other state. As said earlier, a State is not a unitary actor. This conception is also true when it comes to merger regulation. There are two important authorities in this area: the national NCA that is independent and the Ministry of Economy. For instance, in France, there is an authority which is in charge of coordinating the point of view of these entities on behalf of the French authorities. It is nevertheless interesting to bear in mind that these are sources of possible internal divergences. This function of coordination is important because it means that, already at the national level, some amendments could be done at the position presented at the European Commission.

Now that we have studied the first group of Member States, it is necessary to have a look on the opposite side, those Member States which are in favour of more stringent rules. These countries are calling for a better enforcement of the current ECMR, especially regarding

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<sup>99</sup> German word meaning Small and Medium Enterprises (SME).

<sup>100</sup> Claire Stam, 'Paris et Berlin réclament une refonte des règles de concurrence après le camouflet Alstom-Siemens', Euractiv.com, 20 February 2019, retrieved 2 March 2020, <https://www.euractiv.fr/section/concurrence/news/france-germany-call-for-a-change-of-european-regulatory-rules/>

<sup>101</sup> Joint Manifesto from the French Ministry of Economy and its German counterpart, 'A Franco-German Manifesto for a European industrial policy fit for the 21st Century', 19 February 2019.

<sup>102</sup> Clemens Fuest et al., 'Zäsur in der europäischen Wettbewerbs- und Industriepolitik: Freie Fahrt für europäische Champions?', *ifo Schnelldienst*, ifo Institute - Leibniz Institute for Economic Research at the University of Munich, vol. 72, no. 8, 2019, p. 13.

the increasingly important topic of digitalisation. They are particularly concerned about the increasing concentration of companies in specific sectors such as the digital one.<sup>103</sup> Many legal experts and practitioners argue that “EU merger control should be tougher, at least in the digital sector”.<sup>104</sup> The Commission released a report ‘Competition policy for the digital era’<sup>105</sup> to assess the relevance of the current rules and their abilities to deal with the rise of digital giants. This report calls for “competition law to take a tough stance when dominant digital platforms protected by high and non-transitory barriers to entry reinforce those barriers”.<sup>106</sup>

Member States started a dialogue using public statements and manifestos. For instance, in a joint article written by Directors of the Nordic NCAs, the authors explain why they are against the Franco-German manifesto pleading for more lenient rules in merger control policy.<sup>107</sup> They recall that “relaxing merger control in line with the proposal would come at the cost of weakened competition within the European as well as the domestic markets”.<sup>108</sup> Austria does not consider that “the creation of what are known as national and European champions, and the measures proposed in the *Manifesto* will achieve the desired results”.<sup>109</sup> The Austrian NCA is, however, encouraging the dialogue about this topic to know whether the ECMR must be reformed.<sup>110</sup>

In the ongoing situation, it is worth considering that Member States, from both sides, tried to collaborate, through joint statements instead of individual ones to give more weight to

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<sup>103</sup> Interview with Jérôme Vidal, *op. cit.*

<sup>104</sup> Jay R. Modrall, ‘EU merger control reform: a look ahead to 2020’, *The M&A Lawyer*, vol. 23, no. 10, 2019, p. 16.

<sup>105</sup> European Commission report written by Cremer, Jacques, Yves-Alexandre de Montjoye and Heike Schweitzer, ‘Competition policy for the digital era’, 2019.

<sup>106</sup> *Ibid.*, p. 16.

<sup>107</sup> Joint Article written by the Directors of the Nordic Competition Authorities, Rikard Jermsten, Sweden, Jakob Hald, Denmark, Kirsi Leivo, Finland, Páll Gunnar Pállsson, Iceland and Lars Sørgard, Norwa, ‘The Nordic Competition Authorities support a strict merger control regime’, 26 June 2019.

<sup>108</sup> *Ibid.*

<sup>109</sup> Österreichische Bundeswettbewerbsbehörde, Position Paper on National and European Champions in Merger Control, 2019, p. 1.

<sup>110</sup> *Ibid.*

their voice.<sup>111</sup> The coordination between the different Member States' positions takes place at two different levels: at the ministerial, sometimes level through the action of the Permanent Representations, and at the level of the NCAs. The European Competition Network (ECN), which brings together representatives of each national NCA, is an interesting place to exchange ideas.<sup>112</sup> There is a group dedicated to those questions, the merger working group. Coordination between Member States with similar positions can be done at this level.<sup>113</sup>

At this stage of analysis, it is interesting to compare the degree of politicisation of the situation between the 2004 reform and the ongoing discussions. There is now a real political will emerging around what merger rules should look like, regardless of which side is concerned. This aspect is a huge difference with the 2004 reform. The 2004 reform was a technical one concerning more the procedure than the content itself.<sup>114</sup> A good example of the increasing politicisation, even if it is not currently considered as a credible proposal, is the so-called *Ministererlaubnis*. It shows that the implication of political authorities in the merger policy debate is present. The consequence is that it is more difficult for Member States to build big coalitions in the ongoing situation because of the political oppositions among them.

The European Commission is willing to take into account all the different points of views expressed by the Member States.<sup>115</sup> According to the officials interviewed in the framework of this research, discussions are open, and the institution tries to monitor the different inputs to the debate and to assess different arguments brought.<sup>116</sup> Even if the exact

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<sup>111</sup> Interview with Jérôme Vidal, *op. cit.*.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

<sup>114</sup> Interview with a Head of unit, DG Comp, *op. cit.*

<sup>115</sup> Interview with a Head of unit, DG Comp, *op. cit.*

<sup>116</sup> Interview with a Head of unit, DG Comp, *op. cit.*, Interview with Commission official, DG Comp, *op. cit.*

influence of the Member States is challenging to evaluate, “there are some political interference in DG COMP”.<sup>117</sup>

The Commission’s position seems to have evolved between the first mandate of Vestager and the second one she recently began. She has shown “a visible shift in position by indicating that she would seek to balance French and German views with those of others, and protect European champions from unfair trade from outside Europe”.<sup>118</sup> This is clearly a shift regarding her position right after the Alstom/Siemens case where she clearly announced that the ECMR would not be reviewed.

The main position of the Commission, which seems to evolve even if it is still unclear to what extent, is to assert that merger rules do not prevent as such the creation and the development of European champions.<sup>119</sup> To support its argument, the Commission likes to point out the refusals of mergers statistics which show that the ECMR is not undermining many envisioned mergers. It recalls that merger rules constitute an incentive to be innovative and help them to become more competitive that way.<sup>120</sup> The European Union cannot “build those champions by undermining competition”.<sup>121</sup>

It therefore appears that, while the Commission is rather in favour of the status quo, as a result of pressure exerted by the Member States, it is beginning to open its position slightly. It is now showing that it is ready to study the proposals that have been put on the table by the Member States, whatever their position.

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<sup>117</sup> Tommaso Valletti, Podcast ‘Being DG Comp’s Chief Economist?, Competition Lore, Episode 38, 23 October 2019.

<sup>118</sup> Nourry, *op. cit.*, p. 124.

<sup>119</sup> Interview with a Head of unit, DG Comp, *op. cit.*

<sup>120</sup> *Ibid.*

<sup>121</sup> Margrethe Vestager, Commissioner for Competition, ‘The champions Europe needs’, WELT Economic Summit, Berlin, 9 January 2019.

It emerges from these developments that the situation in 2004 and today are not the same. There is currently no political consensus neither on the need for a reform nor on its content. In 2004, all the Member States agreed on the need for a reform and they could find a consensus between their positions to adapt the procedure. This consensus broadened the window of opportunity for the Commission. It was easier for it to couple the different streams with the support of the Member States. Conversely, the smaller political consensus nowadays among Member States, even though most of them are very active on the subject and can be qualified as policy entrepreneurs, explains that the window of opportunity for the Commission is narrower. It is harder for the Commission to couple all the streams.

### **The role of the Commission depending on the position of the economic stakeholders and the ‘hidden participants’**

Since the creation of the ECMR in 1989 and even before, economic stakeholders have tried to influence the decision-making process by making their concerns heard. Political scientists acknowledge that “corporate lobbying has had a great influence on the development of merger policy”.<sup>122</sup>

The other interesting actors, who sometimes have the same method than the experts in the field, or at least similar ones, are the ‘hidden participants’. To build a regulatory policy, some expertise is needed. It is interesting to recall that Majone argued that “regulations do not need to be legitimised by control through the institutions of popular democracy but can be legitimised through debate and deliberation among experts”.<sup>123</sup>

#### *The 2004 reform*

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<sup>122</sup> Buch-Hansen, ‘EC competition regulation at the dawn of the century: modernization, contestation and crisis’, *op. cit.*, p. 113.

<sup>123</sup> *Ibid.*

In the 2004 reform, the role of the economic stakeholders had been put into the spotlight by many scholars. Buch-Hanser and Wigger considered that those actors “backed up” the initiative taken by the Commission in the merger policy field.<sup>124</sup> When the Commission made its proposal in 2002,<sup>125</sup> Mario Monti, who was Commissioner for Competition at the time, pointed out “the business-friendly character of the proposal”.<sup>126</sup>

To exert a more significant influence on the Commission, economic stakeholders tried to work together to create a coalition. UNICE<sup>127</sup> and the ERT have joined forces in this campaign in addition to individual actions.<sup>128</sup> On the 6<sup>th</sup> of October 2003, UNICE wrote a letter to all its members warning “that the SLC test widened the scope of the present merger control system to an unacceptable extent”.<sup>129</sup> In the same spirit, “on 21 November 2003, Alain Joly, CEO of Air Liquide, and Wolfgang Kopf, the convenor of the ERT’s competition policy working group, wrote a letter to Commissioner Monti”.<sup>130</sup> The economic stakeholders multiplied their actions to mobilise a maximum of companies behind them and reach the Commission. Even if the economic stakeholders did not necessarily impose the exact economic test they were lobbying for, “the importance of the capitalist class and notably the transnational capital fraction as a driving force”<sup>131</sup> in the 2004 reform is undoubted.

This importance of economic actors, as mentioned above, is due to the limited powers and more precisely limited resources of the Commission. DG COMP is particularly in demand

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<sup>124</sup> Buch-Hansen, ‘EC competition regulation at the dawn of the century: modernization, contestation and crisis’ *op. cit.*, p. 114.

<sup>125</sup> European Commission, Proposal for a Council Regulation on the control of concentrations between undertakings, COM (2002) 711 final, O.J. C20/4.

<sup>126</sup> Buch-Hansen, ‘EC competition regulation at the dawn of the century: modernization, contestation and crisis’ *op. cit.*, p. 112.

<sup>127</sup> Former name of Business Europe.

<sup>128</sup> Buch-Hansen, ‘EC competition regulation at the dawn of the century: modernization, contestation and crisis’ *op. cit.*, p. 113.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*



of various external resources when it comes to investigation.<sup>132</sup> Technical input brought by the economic stakeholders, but also by the ‘hidden participants’, is essential for the institution. Kassim and Wright underlined the fact that “the Commission is [...] constrained by the employment of the classic techniques of regulatory control management”.<sup>133</sup> It means that the debate is not solely an exchange of ideas and arguments between the Commission and the political position of the Member States but that the discussion is predominantly between the technical experts.<sup>134</sup> The power struggle only comes in a second step.<sup>135</sup> The expert community played an important role in the 2004 reform, especially in the problem stream, by identifying the lack of economic assessment of the mergers, and in the policy stream as well, by proposing solutions to remedy this problem. These inputs are a way for the Commission to base its argumentation and its proposals on the technical expertise that it does not have otherwise because of its limited means.<sup>136</sup> It seems clear that the 2004 reform was “influenced by an international expert community, and that the outcome was shaped by classic techniques of regulatory conflict management”.<sup>137</sup>

### *The ongoing situation*

As explained earlier, the ongoing situation is much more political than the one in 2004. However, this politicisation must be nuanced by the fact that companies, federations, and legal experts are trying to bring the debate back to a technical level.

The economic stakeholders seem to be cautious about the need for a reform. Markus J. Beyer, the Directorate-General of Business Europe, sent a letter to Commissioner Vestager on the 25<sup>th</sup> of September 2019.<sup>138</sup> This letter affirms that “the existing legislative framework gives

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<sup>132</sup> Kassim, *op. cit.*, p. 740.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*, p. 740.

<sup>138</sup> Business Europe position paper, ‘Improving EU competition and state aid policy’, 4 September 2019.

the Commission enough discretion to [...] identify all competitive constraints that firms face”.<sup>139</sup> It only suggests that “small adjustments [are] necessary in EU Competition policy so it can function effectively, encouraging growth and preventing damage to businesses in the wider economy”.<sup>140</sup> The main proposal concerning the ECMR is to review “in a realistic way” the relevant market definition.<sup>141</sup> This public letter represents the economic stakeholders’ interests well. They do not want to change the rules as proposed by France and Germany, introducing more uncertainty in the process and taking the risk to undermine the free and fair competition between firms for the sake of the industrial policy. They are quite critical about the movement provoked by the Alstom/Siemens merger refusal that aims at changing and softening the rules. They exposed their recommendations in a position paper published on the 4<sup>th</sup> September 2019.<sup>142</sup> They are in favour of more consideration for the global competition, which lacks in the Alstom/Siemens case.

In addition to the public statements, companies and federations also try other methods to reach out to the Commission and voice their concerns at the highest level. The business community organise meetings with high officials from DG COMP and sometimes even with the Commissioner Vestager herself to present their ideas and defend their interests. Thanks to the transparency register, those meetings must be notified, including the date, the persons involved as well as the topic discussed. For the sake of this research, this tool was used to observe the interaction between the ERT and the Commission between the Alstom/Siemens refusal and the end of the year 2019. Two meetings are mentioned in the Transparency register for the Commission:<sup>143</sup>

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<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*

<sup>142</sup> Business Europe position paper, ‘Improving EU competition and state aid policy’, 4 September 2019.

<sup>143</sup> European Commission, Transparency register, retrieved 13 April 2020, <https://ec.europa.eu/transparencyregister/public/consultation/search.do?locale=en&reset=>

- 14 March 2019: Meeting with Linsey McCallum, Deputy Head of Cabinet for Margrethe Vestager, about competition policy.
- 30 September 2019: Meeting with Margrethe Vestager to present the ERT position paper on competition policy.

It is interesting to observe that two meetings in six months with one of the highest officials from Vestager's cabinet and the Commissioner herself is a lot compared to the other companies. Even if, for the meeting of the 14<sup>th</sup> March 2019, the exact topic of the meeting is not specified and it is only mentioned as 'competition policy', regarding the timeframe, it takes place one month after the Alstom/Siemens refusal and so it is safe to say that it had something to do with merger law. As it appears on the label of the second meeting, the ERT published a position paper called 'Competing at Scale. EU Competition Policy fit for the Global Stage'<sup>144</sup> for the new Commission on the 7<sup>th</sup> of October 2019. The ERT is against a "greater political involvement in merger control decisions, or that merger control decisions by DG Competition should be referred to other bodies".<sup>145</sup> It supports the implementation of "a smarter, leaner merger control regime".<sup>146</sup> Like Business Europe, the ERT advocates an adjustment on the margin of the ECMR.

Officials from the Commission acknowledge that both these actors have more meetings with the Commission than other groups because of their weight in the business community.<sup>147</sup> That being said, it is hard to assess the precise impact of these actions and the degree of influence these actors have.<sup>148</sup>

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<sup>144</sup> ERT position paper, 'Competing at Scale. EU Competition Policy fit for the Global Stage', 7 October 2019.

<sup>145</sup> *Ibid.*, p. 6.

<sup>146</sup> *Ibid.*

<sup>147</sup> Interview with a Head of unit, DG Comp, *op. cit.*

<sup>148</sup> Interview with Jérôme Vidal, *op. cit.*

It is interesting to underline, at this stage of the analysis, the resistance coming from the business community to the proposals emanating from a part of the Member States. Unlike the situation in the early 2000s and since the Alstom/Siemens merger refusal, one of the main developments “has been the opposition from the business community toward political interference in the merger control process”<sup>149</sup> promoted by some Member States. It means that these two groups are not at all on the same page. This situation can be explained by the politicization of the debate. The economic actors, even if, at least for the bigger, they have privileged contacts with the Commission, their influence is more limited when the proposals on the table are very political.

Regarding ‘the hidden participants’, as for the Member States, they are divided on the topic. Some of them underline that the existing rules leave sufficient place to public interventions helping the development of an industrial strategy.<sup>150</sup> It means that rules allow sufficient actions to promote a European industrial policy. Many economists were against a review of the ECMR in the sense that it was proposed by France and Germany. More than 40 European industrial economists, led by Massimo Motta who is the former European Commission Chief Competition Economist, wrote an open letter to defend the competition in the European market.<sup>151</sup> They stated that: “Europe needs more efficient, competitive, and innovative firms” and that “sponsoring mergers which remove competition would achieve the opposite”.<sup>152</sup> On the opposite side, others are advocating for a great change in the existing rules, as it is proposed in the Franco-German Manifesto, for instance. Since the Alstom/Siemens case, experts have intervened many times in specialized review and sometimes in the general press.

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<sup>149</sup> Nourry, *op. cit.*, p. 122.

<sup>150</sup> Frédéric Marty, ‘Concurrence et politique industrielle : analyse de logiques distinctes’, in: Viviane de Beaufort, *Entreprises stratégiques nationales et modèles économiques européens*, Bruylant, Paris, 2012, p. 144.

<sup>151</sup> Open letter by Massimo Motta and more than 40 European industrial economists on ‘champions’ and merger enforcement, February 2019.

<sup>152</sup> *Ibid.*

It appears then that, once again, the position of the business community and the legal and economic experts nowadays do not match with the one of 2004. Most of the economic stakeholders and ‘hidden participants’ are against the proposals made by the Member States’ group led by France and Germany. It seems that the debate takes place at another level, the States level. This is an important difference with the 2004 reform, which was very technical and where the economic stakeholders and the ‘hidden participants’ were supporting the Commission in its move. This had for effect to broaden the window opportunity of the Commission. This scheme does not seem to be reproduced in the ongoing situation, because, even if most of the business community is in line with the Commission, things started changing when we look at the recent announcements made by the Commission. The term ‘change’ is, however, a bit premature, because, for the moment, the Commission is only assessing the existing rules supported by the economic stakeholders. The change of mind from the Commission, which questions the status quo supported by the business community, can be seen as an inflection of the Commission in the face of groups of Member States and some of the ‘hidden participants’ wishing to reform the rules.

### **The role of the Commission depending on the position of the European Court of Justice**

Since the 1990s, the idea was developed that the ECJ is not only the voice of the law but also a political actor that can influence the political system of the European Union.<sup>153</sup> Some academics qualify the action of the ECJ by the concept of ‘judicial activism’.<sup>154</sup> It means that the ECJ shaped the political system at different levels, legislative or constitutional.<sup>155</sup> In this specific

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<sup>153</sup> Sabine Saurugger and Fabien Terpan, ‘La Cour de Justice au coeur de la gouvernance européenne’, *Pouvoirs*, vol. 2, no. 149, 2014, p. 61.

<sup>154</sup> *Ibid.*, p. 62.

<sup>155</sup> *Ibid.*

area of regulatory policies, the ECJ played a role by helping the Commission to expand the regulation adopted.<sup>156</sup>

### *The 2004 reform*

The role of the ECJ in the 2004 reform has been studied by different scholars. Lyons even qualified it as a main driver for the reform.<sup>157</sup> The ECJ has delivered three important rulings in 2001 and 2002 which “have been a substantial shock to DG COMP”.<sup>158</sup> It had a direct effect on the “self-confidence” of the Commission.<sup>159</sup> In the 2004 reform case, this policy “reform has been a panic response to a series of high-profile reverses in the European Court of First Instance (CFI)”.<sup>160</sup> These reverses made clear what was not going well in merger policy, especially concerning “inadequate economic analysis and procedural weaknesses”.<sup>161</sup> In this paper, we go through the three rulings delivered by the CFI, as well as one of the Commission’s decisions that, even if it was confirmed by the CFI in 2005,<sup>162</sup> also had an impact on the review of ECMR.

This decision is the prohibition of the General Electric and Honeywell merger pronounced by the European Commission on the 3<sup>rd</sup> of July 2001.<sup>163</sup> However, even if it was confirmed, the CFI acknowledged that the Commission made several mistakes in the economic assessment of the merger.<sup>164</sup> The interesting aspect of this refusal is that two American companies were involved in it. The reactions took the form of “a torrent of criticism from the US accusing the Commission of arrogance, poor economics, outdated thinking and incompetent

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<sup>156</sup> Thatcher, *op. cit.*, p. 311.

<sup>157</sup> Lyons, ‘Reform of European Merger Policy’, *op. cit.*, p. 248.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*, p. 249.

<sup>160</sup> *Ibid.*, p. 248.

<sup>161</sup> *Ibid.* p. 249.

<sup>162</sup> Judgement of the Court of First Instance of 14 December 2005, Honeywell v. Commission and General Electric v. Commission, Cases T-209/01 and T-210/01, CJE/05/109.

<sup>163</sup> Commission decision of 03.07.2001 declaring a concentration to be incompatible with the internal market and the functioning of the EEA Agreement, Case No. COMP/M.2220 – General Electric/ Honeywell.

<sup>164</sup> Young, *op. cit.*, p. 151.

analysis”.<sup>165</sup> This refusal was denounced by the US Department of Justice Assistant Attorney William Kolasky on 17 October 2001.<sup>166</sup> This external pressure exerted on the Commission, coming from the United States and initiated by the ruling of the ECJ, certainly played a role in the process towards a review of the ECMR.

The first ruling that had an impact on the reflection around the ECMR is the case *Airtours*,<sup>167</sup> where the Commission’s decision of prohibiting a merger was overturned by the CFI. It was the first time that the DG COMP lost an appeal when it has prohibited a merger.<sup>168</sup> The second and third ones are the *Schneider Electric*<sup>169</sup> and *Tetra Laval*<sup>170</sup> cases.

It first pushed for a better consideration of the economic approach.<sup>171</sup> The CFI had sanctioned the Commission because of its weak economic analysis in those three rulings. It led to the creation of Chief Economist, which can be interpreted as the result of the fact that “the Commission’s methodology came under close scrutiny with the success of three appeals before the Court of First Instance”.<sup>172</sup> The CFI rulings “highlighted the need [...] for the Commission to bolster its economic capacity and thereby to bring it in line with the increasing use of economic analysis”.<sup>173</sup> This change was crucial because of the increased use of economic assessment everywhere “to inform competition decisions across the globe”.<sup>174</sup>

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<sup>165</sup> *Ibid.*

<sup>166</sup> ‘EU and US clash over GE-Honeywell merger ban’, Euractiv.com, 18 October 2001, retrieved 11 April, <https://www.euractiv.com/section/trade-society/news/eu-and-us-clash-over-ge-honeywell-merger-ban/>

<sup>167</sup> Judgement of the Court of First Instance of 6 June 2002, *Airtours v. Commission of the European Communities*, Case T-342/99, [2002] ECR II-2585.

<sup>168</sup> Young, *loc. cit.*

<sup>169</sup> Judgement of the Court of First Instance of 22 October 2002, *Schneider Electric v. Commission of the European Communities*, Case T310/01.

<sup>170</sup> Judgement of the Court of First Instance of 25 October 2002, *Tetra Laval v. Commission of the European Communities*; Case T-5/02.

<sup>171</sup> Buch-Hansen, ‘EC competition regulation at the dawn of the century: modernization, contestation and crisis’, *op. cit.*, p. 111.

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*

<sup>174</sup> Bruce R. Lyons, ‘An economic assessment of EC Merger Control: 1958-2007’, Centre for Competition policy, Working Paper 08-17, 2008, p. 18.

These judgements were widely covered by the press.<sup>175</sup> The media coverage was similar to the one that the Alstom/Siemens case caused. The fact that this has been discussed a lot in the media led the “Commission to conduct a swift review of the underlying weakness in its application of the Merger Regulation”.<sup>176</sup> Unlike the vision of the Commission as ‘self-interested actor’ that is spread in the literature, those rulings show that it is not always in the position of imposing what it wants when it wants.<sup>177</sup> It was exposed to external pressures, coming notably from the ECJ, which plays a real role of policy entrepreneur in the ECMR’s reform.<sup>178</sup>

However, this conclusion must be nuanced. It is not true to entirely “attribute the reform to the CFI reverses of 2002”.<sup>179</sup> It is necessary to replace the rulings in the more general context of the ECMR’s reform. They took place before the Commission issued its proposal for reform,<sup>180</sup> but after the Green Paper that was published by the Commission in 2001<sup>181</sup> as well as after the consultation period. It is then ambitious to attribute all the ‘merits’ to the CFI, and it is more accurate to state that “the CFI hastened and sharpened the reforms, but a change was already on the way”.<sup>182</sup> The review of the ECMR has been well thought out before the CFI’s rulings and that most likely is that the CFI influenced, not the idea of a reform, but the detail of this reform.<sup>183</sup>

It emerges from this development that the CFI played a role as policy entrepreneur in the reform even if it cannot be considered as the main entrepreneur of it. It for sure broadened

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<sup>175</sup> Nicholas Levy, ‘EU Merger Control: From Birth to Adolescence’, *Kluwer Law International*, vol. 26, no. 2, 2003, p. 212.

<sup>176</sup> *Ibid.*

<sup>177</sup> Kassim, *op. cit.*, p. 746.

<sup>178</sup> *Ibid.*

<sup>179</sup> Lyons, ‘An economic assessment of EC Merger Control: 1958-2007’, *loc. cit.*

<sup>180</sup> European Commission, Proposal for a Council Regulation on the control of concentrations between undertakings, COM (2002) 711 final, O.J. C20/4.

<sup>181</sup> European Commission, Green Paper on the review of the Council Regulation (EEC) No. 4046/89, COM(2001) 745/6, 11 December 2001.

<sup>182</sup> Lyons, ‘An economic assessment of EC Merger Control: 1958-2007’, *loc. cit.*

<sup>183</sup> Lyons, ‘Reform of European Merger Policy’, *loc. cit.*



the window of opportunity for the Commission, which was already in the process for the review of the ECMR.

### *The ongoing situation*

The role of the ECJ in the ongoing situation can be better qualified as role of absence. Unlike the situation in the early 2000's, the ECJ did not intervene in the current situation. This absence of intervention is, however, an interesting fact. The Alstom/Siemens merger refusal could have made the object of an appeal emanating from one of the two companies or both. Nevertheless, it did not happen. They did not appeal because they knew that the Commission's decision was grounded in law.<sup>184</sup> It shows that the conflict was not concerning the application of the existing rules but the review of those rules depending on political considerations, as we have seen in the section describing the Member States' actions. The non-solicitation of the European Court of Justice is a further indication of the very political nature of the debate. However, the absence of intervention from the ECJ does not permit to verify the third hypothesis for the ongoing situation.

### **Conclusion**

The idea of this research was to show that the Commission, even if it is a key actor, is not the only policy entrepreneur. The Commission evolves in a very complex landscape where many actors intervene to influence the process. In the case of the merger control policy three different types of actors have caught the attention to be observed: The Member States, the economic stakeholders and 'hidden participants', and the European Court of Justice. The degree of influence of each actor was analysed thanks to a comparison between the 2004 reform and the ongoing situation. Thanks to the comparative method, it was possible to detect the factors that play in favor or obstruct a policy change in this field. We have proven, that the Commission

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<sup>184</sup> Interview with Jérôme Vidal, *op. cit.*

was not the sole policy entrepreneur in this field, despite a part of the literature that believes so. The Commission needs a large support base coming from the other actors in order to be able to trigger a policy change. This research has permitted to define which criteria must be met to have the highest probability that a policy change occurs. It then answered the following research question: *Why did the 2004 and the ongoing situations regarding the merger control policy not lead to the same reform results, even though they are similar in many aspects?*

To be able to confront the main hypothesis of the research, three sub-hypotheses were built on the multiple streams framework to better understand the role of the different actors.

The first studied actors were the Member States. It was demonstrated that the main difference between the early 2000's and nowadays is that in the first case Member States were on the same page regarding the need of reform, whereas now, they are clearly divided into two groups. The ongoing debate is very political, and thus led to no consensus has been found so far. The political consensus among them is then smaller nowadays than what it was in 2004. This is a main argument to explain the absence of a real proposal for reform by the Commission since the beginning of the discussions in 2019 with the Alstom/Siemens merger refusal. It then appears that the first hypothesis (**H1.**) is confirmed by this research. It means that the Member States do influence the size of the window of opportunity because the bigger the political consensus among Member states, the broader the window of opportunity for the Commission.

The second actors analysed that influence the size of the window of opportunity are the economic stakeholders and the 'hidden participants'. Given the political aspects of the debate that is taking place nowadays, the intervention of those actors does not really broaden the window of opportunity for the Commission. Conversely, in 2004, the reform was much more technical and they were totally in line with the Commission, providing expertise on the economic part. In the ongoing situation, the economic actors do not support a policy change because it is not necessarily in their interest to introduce more space for industrial policy. It is

only partially possible to confirm the second hypothesis which was that the more technical the issues raised are, the more economic stakeholders and ‘hidden participants’ can influence and participate in widening the window of opportunity (**H2.**). On the one hand, this hypothesis makes sense because for the 2004 reform the stakeholders pushed for a change and then obtained it, mainly because they brought expertise facilitating this change. It then confirms the hypothesis for the 2004 case. However, in the ongoing situation, they called for a status quo and, for the moment, this is what they got, even if there is still a political debate. It would mean that they can also influence a policy change or more precisely the absence of policy change in a political debate. However, both situations, as explained, are too different to assess the veracity of this hypothesis. There are too many variables that change. Indeed, pushing for a policy change and defending a status quo cannot be compared to assess the second hypothesis. To sum up, even if the influence of those actors was more significant in 2004, it is not clear to know whether this is due to the technical aspect of the 2004 reform or to the fact that they are more efficient to push for a policy change than to defend a status quo. Nevertheless, their influence seems reduced in the ongoing situation, where the Member States are in the limelight.

The third and last actor is the European Court of Justice. The rulings delivered by the ECJ can exert pressure on the Commission to push to change the Commission’s position or, conversely, support the position defended by the Commission. The third hypothesis is then confirmed in the 2004 reform case. This hypothesis was that the more the ECJ’s rulings converge with the Commission’s position, the more they fuel the Commission’s action in the merger control field (**H3.**). It was shown that in the early 2000s the rulings overturning the Commission’s decisions played an important role, not on triggering of the reform, but on the content of the latter. In the ongoing situation, the role played by the ECJ cannot be assessed. If the hypothesis is confirmed, it can also be rephrased as follows: the more the ECJ’s rulings

diverge with the Commission's positions, the more they push the Commission to adopt a new move in the merger control policy field.

Given all these confirmations, or at least partial confirmations, it can be asserted that the most important factor to favour a policy change is to have a coalition of policy entrepreneurs as broad as possible, which are in capacity to influence the decision-making process. It was demonstrated for the Member States and the economic actors that a division among them, as it is now, prevents a policy change. The global hypothesis is then confirmed: the wider and uniform the coalition of policy entrepreneurs and the broader the window of opportunity, the higher the probability that this coalition will trigger and influence policy change **(H)**. It means that when the Commission calls for a policy change and gets all the main actors on board, the probability that the policy change occurs is very high. However, it also means that, when the Commission does not advocate for a policy change, as it is now, if the other actors build strong and broad enough coalitions, they can influence the position of the Commission and trigger a policy change.

To cut a long story short, we can say that there are many differences between the 2004 reform and the ongoing situation. It emerges from this research that the actors currently involved in merger policy, for those in favour of reform, did not succeed in building a coalition wide enough to force the Commission to propose a policy change. Without the Commission on board, it is not possible to couple all the streams to trigger policy change. The multiple streams framework used in a comparative way permitted to analyse which elements are still missing to improve the probability to have a policy change. It is important to recall that this theory only makes it possible to reason in terms of probability. There is always a part that cannot be explained with this theory.

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