Protectionist trends in cross-border mergers and acquisitions in Europe: national interest, FDI and other ingredients of the growing regulatory maze

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1. The larger framework: a trend towards protectionism already in the making, exacerbated by the Covid-19 crisis

February 2020 marks a radical change of circumstances in Europe and the world as a result of the Covid-19 crisis. This new paradigm in society, politics, law and international relations is widely perceived as a catalyser or accelerator of a shift to nationalism in trade and economics.[1] Even if the Covid-19 crisis has admittedly accelerated the process, the trend towards increased protection of the "national" interest and the shying away from more liberal approaches to international trade and policy had started earlier. For instance, the "trade war" between the US and China was already in the making for quite some time, dating back at least to the start of the Trump administration. Much of the current international relations environment can be explained by the growing Sino-US rivalry with a wide perception that China is a rising superpower in all fields, whereas the US is struggling to keep its pre-eminent status.[2] This state of affairs has spilled over to Europe to some extent, with a perception that some foreign powers (e.g., China) are using a mix of private and (predominantly) state resources to compete, and are appropriating assets in key industries. US pressure on its allies may also have reinforced this state of mind, as is the case with the well-known boycott of Huawei 5G technology.[3]

In Europe generally, well before the Covid-19 crisis, there was also mounting concern which anticipated a more cautious approach towards free trade and investment. The latter had taken the form of an increased interest in the screening of foreign direct investment in Europe, both at EU and at Member State level, interest which has (again) substantially accelerated after the Covid-19 crisis.

Perhaps the current trend is not one of strict protectionism, or at least it is not being depicted as such. Rather, it appears that the trend is based on a twofold notion of: (i) protecting industries perceived as associated with national security or interest—an interest which can be prima facie legitimate beyond mere protectionism or nationalism, and which of course has always been present; and that of (ii) "levelling the playing field" and making sure that foreign investment is subject to the same rules as those which apply to European companies.[4] Both notions are being expressly referred to by the public authorities in this context, and used as policy goals or bases, as nobody seems to be willing to be openly regarded as "protectionist"—perhaps because it is not politically correct to be viewed as such, but also perhaps because there are genuinely some legitimate interests at stake beyond any protectionist trend or intent. Ultimately of course, this trend is bound to amount to a disruption of free trade and investment as we have known it in prior decades.

In the area of mergers and acquisitions ("M&A") in particular, two significant legal developments in the year prior to the Covid-19 crisis embody well the rise of economic nationalism in Europe. First, the standoff between the European Commission (supported by the national competition authorities ("NCAs") of various Member States) on the one hand, and the national governments of France and Germany, on the other hand, around the *Alstom/Siemens* merger; secondly, the adoption by the Commission on 19 March 2019 of Regulation (EU) 2019/452 of the European Parliament and of the Council establishing a framework for the screening of foreign direct investments into the EU (Regulation 2019/452).[5] Another development worth taking into account is that of the European Commission White Paper on foreign subsidies, which suggests specific instruments connected with M&A. We analyse those in a bit more detail below.

The tsunami caused by the Covid-19 crisis, in terms of costs to human life, but also costs to the economy, has already had an enormous impact in politics and the law, and one can only attempt to foresee the longer term shockwaves likely to unfold. This impact includes a great deal of public expenditure from various sources and in various forms to alleviate the crisis and the consequent

[1] This view is shared in most other areas of analysis such as economics: "The Covid crisis' most enduring impact will be as an accelerant of existing trends", in S. Galloway, *Post Corona—From Crisis to Opportunity* (London: Penguin, 2020).
[2] See, e.g. the discussion about the US dollar's weakness and fears that at some point the US dollar may lose its international reserve currency status. FT Big Read, "US Economy—Greenback blues" *Financial Times*, 1 August 2020.
[3] L. Baker and J. Chalmers, "As Britain bans Huawei, US pressure mounts on Europe to follow suit" (14 July 2020) *reuters.com, https://www.reuters.com/article/us-britain-huawei-europe/as-britain-bans-huawei-u-s-pressure-mounts-on-europe-to-follow-suit-idUSKCN24F1XG* [Accessed 8 January 2020].
[4] That is precisely the expression used by the European Commission in its White Paper on levelling the playing field as regards foreign subsidies COM(2020) 253 final.
[5] [2019] OJ L179/1.

relaxation in the application of the budgetary and State aid rules.[6] In the particular area this article is concerned with, the Covid-19 crisis has triggered immediate change at national level in countries that took a hitherto completely liberal stance when it came to foreign investment.

In this account of the general background to the new wave of economic nationalism it is also necessary to remind ourselves that the protection of national interest in the framework of cross-border mergers has of course been present in law and policy since the foundation of the European Community, resting on various legal foundations. The tension between free trade (or European integration which can be equated to a desired freedom of circulation of goods, capital and services) on the one hand, and national interest on the other hand has been a constant, with varying degrees of intensity.

Foreign investment is key to the European economy.[7] In this regard, the current challenge seems to be one of striking the right balance between protecting the national or strategic interest, on the one hand, and not killing off the incentives to foreign investment in the EU, on the other.

We have divided this article into two parts. In this first part, we outline: (i) the general tools for protection of the public interest in the framework of mergers and merger control law, in particular the foreign direct investment ("FDI") screening framework in Europe after Regulation 2019/452 and the surge of national FDI screening systems; (ii) a comparison with the merger control requirements in international transactions; and (iii) a brief discussion of the (prospective) regulatory tools to tackle a "levelled playing field" using the Commission's terminology—as fairness-based rationale going beyond the protection of public interest.

In the upcoming second part we deal with the particulars of the national regime we are more familiar with (Spain), which provides an excellent example of the outlined trends from a country hitherto taking a completely open approach to foreign investment, shifting radically on the verge of the Covid-19 crisis towards a fully suited FDI screening regime which in its most recent version (it has been modified twice since its approval in the spring of 2020) has extended (on a temporary basis for the time being) the FDI screening mechanism also to EU nationals investing in Spain above given thresholds.

2. Public interest as justification of protectionist action by Member States. Traditional national law measures (ownership restrictions and "golden shares") aimed at protecting "strategic companies"[8]

2.1 The public interest exception under EU law

Under the Treaty on European Union ("TEU"), national security is a competence of Member States (art.4.2 TEU).

Public interest and national security are notions referred to in various instances by the Treaty on the Functioning of the European Union ("TFEU") where Member States are afforded a margin of discretion to derogate from the general application of EU law provisions. For instance, under the general and final provisions of the TFEU reference is made to the exception of Member States to share information the disclosure of which they consider as contrary to the essential interests of their security. Likewise, and using the same literal drafting, ample margin is left to Member States for the protection of the essential interests of their security in the area of weapons and war material (art.346 TFEU), with the only caveats that: (i) such exception cannot affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes (art.346.1(b) TFEU); and (ii) measures adopted by Member States for the protection of essential interests shall be subject to scrutiny by the Commission and the Member State concerned to adjust them to the rules in the Treaties (art.348 TFEU).

A reference to public security as grounds for derogation is found for instance in the framework of the economic freedoms of movement of goods (art.36 TFEU), workers (arts 45 and 202 TFEU), capital (art.65 TFEU) or establishment (art.52 TFEU). In all cases, Member State action in this area is subject to a proportionality test and to judicial review by the European Court of Justice.[9]

The "security interest" exception is also contemplated in international trade agreements (art.XXI GATT agreement).

In the context of merger control and mergers generally, EU law also deals with the issue of public interest and security. The protection of the "public interest" (along with its variants of national security or public order) as a (sometimes slippery) justification has been historically resorted to by national governments under multiple forms to prevent undesired mergers and acquisitions in Europe. Examples of this are the (in-)famous "golden shares" and other forms of ownership restrictions contained in national laws.

[6] For a first overview of the position by European Institutions in connection with expenditure and State aid policy, see the Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Investment Bank and the Eurogroup—Coordinated economic response to the COVID-19 Outbreak COM(2020) 112 final.

[7] The EU is the top global destination of foreign direct investment. Foreign direct investment stocks held by third-country investors in the EU amounted to €7.197 trillion at the end of 2018 (European Commission White Paper COM(2020) 253 final).

[8] This epigraph includes excerpts from my conference in the 2019 ABA Antitrust Spring Meeting on the topic of national and international instruments for the protection of public interest considerations in the framework of mergers and acquisitions.

[9] For instance, *Commission v Spain* (C-463/00) EU:C:2003:272; [2003] 2 C.M.L.R. 18.

The actual State measures based on broad notions of public interest seeking to interfere in economic concentrations have ranged from legislative provisions aimed at restricting ownership of specific companies or simultaneous holdings in companies acting in the same, or connected, markets (either by prohibiting ownership above given thresholds, or restricting economic or political rights in companies, or conditioning the acquisition to prior administrative authorisation), to ad hoc administrative action aimed at torpedoing specific merger transactions.

The legality of State measures seeking to interfere in mergers and acquisitions with community dimension is assessed under art.21 of Council Regulation 139/2004, on the control of concentrations between undertakings[10] ("EUMR"). This is further dealt with in Section 3 below.

2.2 Golden shares

The concept of national interest has often been associated with the protection of "national champions", with EU Member States repeatedly trying to protect and promote their own national companies and the maintenance of the national ownership of their "champions", therefore acting to prevent those companies from becoming foreign property. Many of these national champions are the inheritors of the monopoly systems effectively in force in Europe in many sectors, particularly prior to the liberalisation Directives in network industries such as telecoms and energy in the 1990s. Various large national telecoms industries, energy companies, but also financial or airlines (the national or "flag" carriers, Air France, Iberia, Alitalia, etc.), were treated as national champions, which (at least prior to the legal developments depicted below) had a perceived *plus* component of public or national interest on top of their purely business role, either because they operated in "strategic" sectors, because they represented an important component of the industrial and employment structures of a country, or simply because they embodied a national sense of pride.

The quintessential legislative measure protecting ownership of companies in strategic sectors has taken the form of statutory restrictions granting national governments legal rights to effectively veto undesired takeovers ("golden shares"), which consisted of an authorisation requirement for the acquisition of a given shareholding or a ceiling on the number of shares that can be acquired by investors. These golden shares were broadly declared illegal by a wave of European Court of Justice ("ECJ") decisions,[11] on the basis that they are contrary to the freedom of circulation of capitals and establishment in the EU. Even if arguably a thing from the past, authorisation-based, FDI (Commission-blessed) schemes, might achieve comparable results relying on the "strategic interest" justification.

2.3 Sector ownership and cross-ownership restrictions

A second justification to introduce ownership restrictions is based on the desire to limit concentration of economic power on various grounds ranging from competition and regulatory reasons to political plurality; for instance in economic sectors such as:

- telecommunications: on various grounds, including limitations to the ownership of simultaneous shareholdings in significant operators to avoid or minimise the risk of anti-competitive information exchanges;
- energy: on the same grounds of trying to minimise anti-competitive information exchanges, but also on the grounds of unbundling of activities or avoiding vertical integration between the various activities of the power generation/ transmission/distribution chain, by limiting shareholdings of the transmission grid company owned by power generation companies, for instance;
- media: where simultaneous holdings of radio and television operators have been limited across Member States on grounds of media plurality.

The public interest can be invoked as an exception to the fundamental freedoms when it seeks to protect public order, public security or public health. Generally, however, Member States are not completely free to establish ownership limitations based on the public interest. To the extent such limitations have the potential to clash with the mentioned economic freedoms of capital circulation and of establishment, Member States can be brought before the ECJ, who will generally apply a proportionality test to ascertain if the Member State measures are justified by a genuine threat to society which the public interest justification seeks to protect. The ECJ is ready to enter into the merits of the restrictive national legislation as shown by the recent judgment rendered in connection with the media ownership restrictions in Italy applied to an acquisition of shares of Mediaset by Vivendi.[12]

Likewise, the case law of the ECJ seeks to ensure that no discrimination based on nationality takes place when seeking to protect the public interest. Administrative authorisation requirements to acquire stakes in companies or assets (as opposed to minimum requirements on the operation of such companies or assets) have for instance

[10] Council Regulation (EC) 139/2004 on the control of concentrations between undertakings [2004] OJ L24/1.

[11] For instance, *Commission v Portugal* (C-367/98) EU:C:2002:326; [2002] 2 C.M.L.R. 48; *Commission v France* (C-483/99) EU:C:2002:327; [2002] 2 C.M.L.R. 49; *Commission v Belgium* (C-503/99) EU:C:2002:328; [2002] 2 C.M.L.R. 50; *Commission v Spain* EU:C:2003:272; *Commission v United Kingdom* (C-98/01) EU:C:2003:273; [2003] 2 C.M.L.R. 19.

[12] *Vivendi SA v Autorità per le Garanzie nelle Comunicazioni* (C-719/18) EU:C:2020:627.

been deemed disproportionate for the protection of public interest goals and therefore contrary to the fundamental economic freedoms discussed.[13]

Often, this kind of clash is concurrent with the debate under art.21 EUMR in the framework of merger control, as discussed further below.

3. Public interest as justification of protectionist action by Member States in the framework of European merger control

3.1 Member State intervention in mergers and acquisitions of European dimension under article 21 EUMR

The EUMR was not oblivious to the issue of national interest or security, as evidenced by art.21 EUMR, which regulates the one possibility afforded to Member States, within the (in principle) narrow circumstances of that legal provision, to meddle in the exclusive jurisdiction of the European Commission to review concentrations with European dimension.

Article 21 EUMR states that: (i) the EUMR is the sole regulation applying to mergers with European Community dimension, effectively granting the European Commission sole and exclusive jurisdiction to review mergers with a Community dimension (subject to judicial review by the ECJ and with the qualifications that may result from the streamlined referral system in the EUMR); (ii) Member States are precluded from applying national law to mergers with an EU dimension. The exception to this rule refers to State measures aimed at protecting "legitimate interests compatible with EU law, such as public security, media plurality and prudential rules"; (iii) any public interest on grounds other than the above must be communicated to the Commission by the Member State. The Commission must approve or reject the alleged public interest as legitimate interest within 25 working days.[14] Only in the latter circumstance (express Commission approval) can a Member State successfully invoke a legitimate interest to interfere in a merger with European Community dimension.

If a Member State does not notify an administrative measure based on a legitimate interest not expressly acknowledged in art.21 EUMR and aimed at introducing additional requirements to a merger with national dimension, such failure to notify amounts in itself to a breach of Community law, enabling the Commission to take legal action against the Member State responsible. In practice, even when the Member State concerned invokes one of the three "legitimate" interests listed in art.21 EUMR the Commission may dispute that the national measure can fit into the actual legitimate interest relied upon (see *Endesa*, below).

Examples of Member States attempting to meddle in mergers or acquisitions targeting national companies include the following:

- Toll motorways: In August 2006, Abertis, one of Spain's top infrastructure companies and operator of many toll motorways in various countries, including Spain and France, notified the European Commission of its projected acquisition of Autostrade. In September 2006 the European Commission cleared the transaction. From the very beginning, the Italian government regarded the takeover as undesirable and refused the sector authorisation for the merger, which was required on the basis of the national regulatory framework applicable to operation of toll motorways. At that stage the Commission intervened quickly and considered that the objections raised by Italy were not adequately motivated or could be easily addressed by the mechanisms contained in the concession held by Autostrade for the operation of toll motorways. Italy backed up initially, but a few months later, in October 2006, Italy approved an urgent reform of the toll motorway regulatory regime and granted ANAS (the Italian motorway regulatory Authority) wide powers to act upon concentrations such as the one between Abertis and Autostrade. The European Commission then initiated proceedings for breach of the EU rules on freedom of establishment and circulation of capitals, and gave Italy audience with a view to a possible Commission Decision declaring a breach of art.21 EUMR. On December 2006, in view of considerable uncertainty and given that the sector specific authorisation for the merger was not yet available, the parties abandoned the announced takeover offer. Though the Commission initially seemed to continue the procedure against Italy for breach of art.21 EUMR, it later lost interest as the Italian government made some changes to the toll motorway regulatory regime. Ultimately, the Commission decided to close art.21 EUMR proceedings against Italy in the fall of 2008.
The *Abertis/Autostrade* case is noteworthy because the companies ultimately seized the jurisdiction of the Community courts in what was the first known attempt by a private party to seek judicial redress on the

[13] *Commission v Spain* (C-207/07) EU:C:2008:428.

[14] Commission Decision of 5 December 2007 relating to a proceeding pursuant to Article 21 of Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (COMP/M.4685—*Enel/Acciona/Endesa*).

basis of art.21 EUMR. This was a difficult case on procedural grounds: the ECJ (in this case the lower court, the General Court or "GC") was confronted with the possibility of private litigants claiming on the basis of art.21 EUMR; but before deciding on the issue of locus standi of private litigants in this matter, the GC dealt with the question of the reviewable nature of a Commission Decision to abort art.21 EUMR proceedings. The GC decided on the basis of the factual point that the attempted acquisition of Autostrade by Abertis had been abandoned. In that regard, the GC notes that the Commission's powers under the EUMR depend on the conclusion of a merger; conversely, the Commission does not have decision powers under the EUMR from the moment the merger agreement is terminated, even if (the GC added) *the undertakings concerned continue negotiations with a view to concluding an agreement on a modified form*. Article 21 EUMR, the GC reminds us, fulfils the role of protecting the interests of the parties to a proposed merger with a view to ensuring legal certainty and speed. If there is no longer a proposed merger, there ceases to be any interest of the parties in relation to it pursuant to the reasoning of the GC (which is probably debatable). Consequently, the Commission was, after the abandonment of the merger by the parties, devoid of competence to adopt a Decision pursuant to art.21 EUMR. The Commission communication appealed by the parties, which was subsequent to the parties' abandonment of the merger had, according to the GC, no legal effects vis-à-vis the parties. The continuation of communications between the European Commission and the parties on the topic must be construed as the Commission having left the framework of art.21 EUMR and having entered the domain of art.258 TFEU (procedure for the declaration that a Member State has breached the law, in that case the provisions on freedom of establishment and movement of capitals). The failed *Abertis/Autostrade* transaction had a sequel when the reverse operation took place in 2018. At that time, Abertis was the object of a public takeover offer in the Madrid stock market by Atlantia (new denomination of Autostrade), followed by a competing offer by ACS, another Spanish motorway and infrastructure provider. The offers ended with an agreement for the joint acquisition of Abertis by Atlantia and ACS.

In that case the Spanish government was not keen on Atlantia taking over and expressed its intention to subject the merger to an authorisation by the Ministry of Infrastructures. Notably, however, the Spanish Securities and Exchange Commission ("CNMV") considered that no such authorisation was required, and there was a potential clash between the government and the CNMV (the latter taking perhaps a more orthodox approach under EU law). This matter did not prevent the acquisition of Abertis, probably because the Spanish Government was aware that it had little leeway to interfere in the merger under EU law after its prior experience with the *Endesa* deal, commented on below. The acquisition of the satellite division in the framework of this transaction (Hispasat) was also subject to (separate) approval by the government as far as it related to military use.

- Power utilities: One of the highest profile (and perhaps the most productive in terms of formal art.21 EUMR Decisions and ensuing litigation) merger transactions was the public takeover of Endesa, at the time Spain's largest utility. Gas Natural, a Spanish utility, launched a hostile takeover offer for Endesa, another Spanish utility in 2005, followed by a competing offer by E.ON of Germany. The Spanish Government preferred Endesa to remain national, so it altered the sector authorisation regime applicable to acquisitions of power generation companies in order to include non-Spanish companies (such as E.ON) in the scope of the required authorisation regime. The Commission issued a Decision under art.21 EUMR stating that Spain had breached its obligations under that provision by failing to notify beforehand the protective measure invoked. Spain retorted that security of supply was within the legitimate interests expressly named by art.21 EUMR, but the Commission declared that, pursuant to the case law, in the context of energy supply, public security refers to security of supply in times of energy shocks; furthermore, Member States must also notify measures if there are reasonable doubts that these measures are not aimed at genuinely protecting a recognised interest under art.21 EUMR or if the measures are disproportionate or discriminatory. The measures, clearly aimed at E.ON's offer, fell foul of the standard and the Commission considered that art.21 EUMR

had been breached.[15] The Commission also considered that Spain had breached the Treaty rules on freedom of establishment and free circulation of capitals and initiated proceedings against Spain for breach of the relevant TFEU provisions.[16]
Endesa was ultimately (jointly) acquired by Acciona (Spain) and ENEL (Italy), but also in that acquisition the Government imposed a number of conditions related to keeping the Spanish statehood of Endesa, obligations of purchase of national coal and limiting its ratios of debt and dividends, all of which were considered by the Commission as obligations not justified under art.21 EUMR (and which therefore formed the basis for yet another Commission Decision declaring those Government requirements to be illegal[17]).

- The Commission has also acted under art.21 EUMR in other sectors of the economy ranging from banking[18] to cement manufacturing.[19]

In the absence of a specific FDI screening regime (and perhaps for that reason), art.21 EUMR has been used by Member States as a device to frustrate, or attempt to frustrate, undesired acquisitions and takeovers of companies deemed to be strategic. Member States raised the need to gain a sector authorisation from the energy or motorways regulatory authorities on the grounds of public security, as illustrated by the examples of Spain and Italy discussed above. Article 21 EUMR continues to be in place as a basis for European Commission action (and correlative limitation to Member States' interventionist toolbox). The focus of the debate in times to come may shift to the area of FDI and the other intervention tools depicted below, though always on the basis that State measures would in principle be expected to be compliant with art.21 EUMR.

3.2 The European variant of the "national champion": the possible insertion of non-competition related decision mechanisms in EU merger control in the aftermath of the Siemens/Alstom drama

The possibility of using merger control as an instrument of industrial policy has also emerged as a variant of the national champion—the European (or world) champion. Notably the *Siemens/Alstom* merger has staged a clash between Germany and France, on the one hand, and the European Commission and some NCAs, on the other hand. Germany and France supported the merger with a general argument that the creation of a pan-European company should be allowed in order to compete in the world markets with powerful foreign companies notably from China (and its train maker, CRRF). The European Commission (supported by some other NCAs) expressed concerns of excessive economic concentration and ultimately loss of economic welfare within the EU, which led to the prohibition of the merger.[20]

The prohibition decision in the *Siemens/Alstom* merger sparked discussion of a possible merger control law reform in the EU, with a general argument that the EU has a strong competition policy but no strong industrial policy. For instance, the possibility has been raised that Member States voting together could have the power to overrule a Commission Decision prohibiting a merger. This power is already contemplated in national merger control laws such as those of Germany and Spain, where mergers which are either prohibited or subject to conditions are referred to the Government who can choose to overrule the prohibition or conditioned merger decision on the basis of a number of non-competition (i.e., general interest) grounds, that is: (a) defence and national security; (b) protection of the public security or health; (c) free circulation of goods and services; (d) protection of the environment; (e) promotion of research and development; or (f) safeguarding the goals of sector regulation. The idea to insert such a possibility of vetting European Commission merger decisions blocking or conditioning mergers is not prima facie either simple to articulate, nor necessarily functional in view of the political complexities of the EU. Moreover, it later seemed that at least the German government distanced itself from this specific idea, while at the same time continuing to advocate for competition law reform enabling the creation of European champions.[21] As recently as May 2020, Ms Merkel and Mr Macron have expressed that "South Korea and China have encouraged the emergence of global champions [… and Europe needs] to have the courage to create global champions". In that joint statement it was also made clear that both leaders still have their sights fixed on reforming EU competition law in the line already pointed out subsequent to the failed *Siemens/Alstom* merger, i.e., enabling European companies of sufficient size to be able to compete globally, shifting away the focus on solely consumer's rights, as Macron stated.[22]

[15] Commission Decision of 20 December 2006 relating to a proceeding pursuant to Article 21 of Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (COMP/M.4197—*E.ON/Endesa*), confirmed by *Commission v Spain* (C-196/07) EU:C:2008:146.
[16] Spain was formally condemned for the latter breach by *Commission v Spain* EU:C:2008:428.
[17] Commission Decision of 31 May 2007 [2007] OJ C130.
[18] Commission Decision of 20 July 1999 relating to a proceeding pursuant to Article 21 of Council Regulation 4064/89 of 21 December 1989 on the control of concentrations between undertakings (IV/M.1616—*BSCH/A. Champalimaud*).
[19] Case ultimately decided by the ECJ in favour of the Commission (*Portugal v Commission* (C-42/01) EU:C:2004:379; [2004] 5 C.M.L.R. 9).
[20] Commission Decision of 6 February 2019 declaring a concentration to be incompatible with the internal market and the functioning of the EEA Agreement (M.8677 *Siemens/Alstom*).
[21] Statement by Mr Altmeier, Germany's economy minister speaking at the 19th International Conference on Competition (Berlin, 14–15 March 2020).
[22] Coverage by Mlex (18 May 2020).

The European Commission, along with other NCAs, has continued to insist that changing competition law to foster the creation of "world champions" is inappropriate, and stated that it is a fallacy to think that there would be more EU champions but for merger control.[23] Some remarks by top national competition enforcement officials attempt to hit a middle ground by accepting the need for an industrial policy enabling the creation of EU champions, while acknowledging that enabling large companies in already concentrated markets would actually make the entry of Chinese rivals easier. Perhaps a balanced conclusion is that an industrial policy is required for Europe, which is not to say that competition policy must be sacrificed.[24]

The above shows that there is political will by France and Germany to push reform of the merger control laws so as to avoid or minimise the perceived risk of merger prohibitions such as that in the *Siemens/Alstom* case. However, there is little consensus, if not frank opposition on the need for that type of reform from top competition enforcement officials both at the European Commission and amongst national enforcers, some of whom view with some suspicion France and Germany's Governments' bold statements in favour of industrial policy as covert attempts to favour French and German companies.[25]

Right now the political and legislative efforts focus on more imminent aspects related to the Covid-19 pandemic and its shockwaves, as well as tackling the perceived issues around market power in digital markets. Only time will tell whether or not such strong will for the type of reform discussed around the *Siemens/Alstom* case will crystallise in the longer term. In the meantime, there may be other devices to achieve outcomes that are somewhat more flexible than the radical reform outlined above. Additional ideas include: (i) introducing changes to make it easier for the European Commission to approve mergers subject to behavioural remedies. These types of remedies have been used in the past and could provide creative and new possibilities for approving mergers. However, the European Commission has a known preference for structural remedies or divestments of entire, ongoing businesses having the potential to become sole-standing competitors on their own (this is the policy officially expressed by the European Commission on its Notice on remedies accepted under the EUMR[26]); or (ii) tweak the substantive merger assessment to better take account of potential competition, with focus on actual market shares but giving more weight to the notion of contestability.

4. Public interest as justification for protectionist action by Member States outside the merger control framework. EU Regulation 2019/452 and the proliferation of national FDI screening regimes

4.1 Regulation (EU) 2019/452 of the European Parliament and of the Council establishing a framework for the screening of FDI into the EU

On 19 March 2019, Regulation (EU) 2019/452 of the European Parliament and of the Council establishing a framework for the screening of FDI into the EU was formally adopted. The Regulation, which deals with a broad category of foreign investments which may affect security or public order, came into force on 19 April 2019 and was applicable from 11 October 2020. This legal framework includes:

- The creation of a co-operation mechanism where Member States and the Commission are able to exchange information and raise concerns related to specific investments.
- Empowering the Commission to issue opinions when an investment poses a threat to security of public order of more than one Member State or when an investment might undermine a project or programme of interest to the whole EU (e.g., Horizon 2020 or Galileo).
- Encouraging international co-operation on investment screening, best practices and information of issues of common concerns.
- Requirements for Member States who wish to maintain or adopt a screening mechanism at national level.

Regulation 2019/452 represents the EU's first attempt at co-ordinating national security reviews within its territory at a time of growing protectionism worldwide.[27] However, Regulation 2019/452 does not give the Commission or any other European institution the power to suspend or block foreign investments (the Commission may only issue non-binding opinions on certain FDIs). Likewise, Regulation 2019/452 does not require Member States to introduce or implement foreign investment screening mechanisms at national level, on the contrary, it relies on Member States having the will to put in place their own FDI screening regimes. Indeed, Regulation 2019/452 acknowledges this is a national competence.

[23] O. Guersent's remarks (Brussels, 1 July 2020), as reported by Mlex.

[24] French Competition Authority Vice President E. Combe speaking at the Industrial Policy and Competition Policy in the Post-Covid context, Concurrence Quarantine Webinar Series #6 (15 May 2020).

[25] Such is the case, for instance, of Sweden who, along with other smaller States (Czech Republic, Estonia, Finland, Ireland, Latvia, Lithuania and the Netherlands) asked Verstager to base any review of competition rules, including State aid rules, on "proven principles" to avoid harming consumers and the single market (Mlex report, 2 April 2020).

[26] Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 [2008] OJ C267/1, pp.1–27.

[27] As of May 2020, 13 out of 28 Member States have FDI screening mechanisms in place, differing widely in scope: Austria, Denmark, Germany, Hungary, Finland, France, Latvia, Lithuania, Italy, Poland, Portugal, Spain and the UK.

The Commission also relies on the rationale that foreign investment can have spill over effects well beyond the borders of the Member State that receives the investment.[28] On those foundations, Regulation 2019/452 sets standards of transparency, confidentiality or equal treatment obligations.

The screening system is based on the following principles:

- "Foreign investment" refers to investments stemming from third countries (non-EU States).
- The mechanism being regulated is one of co-operation between Member States and between them and the Commission.
- Member States may (not must) have national screening mechanisms for foreign investments in their territory, on the grounds of security or public order. When in place, national screening mechanisms must regulate the circumstances when they are activated and must not discriminate between third countries. Any national screening procedures must allow for comments by other Member States and the Commission.
- In determining whether a foreign direct investment is likely to affect security or public order, Member States and the European Commission *may* consider its potential effects on, inter alia:
  - — critical infrastructures (whether physical or virtual) including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, as well as sensitive facilities, and investments in land and real estate crucial for the use of such infrastructure;
  - — critical technologies and dual-use items as defines in art.2.1 of Regulation (EC) 428/2009, including artificial intelligence, robotics, semiconductors, cybersecurity, quantum, aerospace, defence, energy storage, nuclear technologies, nanotechnologies and biotechnologies;
  - — supply of critical inputs, including energy or raw materials, as well as food security;
  - — access to sensitive information including personal data, or the ability to control such information; and
  - — freedom and pluralism of the media.
- In determining whether or not a foreign investment is likely to affect security or public order, Member States and the Commission may also take into account that investor's prior involvement in activities affecting security; the State ownership or control of the foreign investor; and whether or not there is a risk that the foreign investor engages in illegal or criminal activities.
- Regulation 2019/452 establishes a co-ordination mechanism whereby Member States must inform in a detailed manner (ownership structure of foreign investor, value of investment, products/services affected, funding and its sources, time of the investment) the other Member States and the Commission of direct investments screened in their territory. The Commission and Member States may issue opinions and comments regarding the substantive assessment of foreign investments carried out in another Member State. Regulation 2019/452 assumes that the direct investment takes place in the territory of a Member State and that Member State is the one screening the investment. It also provides for co-ordination mechanisms in case a Member State or the Commission consider that a foreign investment being ignored by a Member State may affect security or public order.

4.2 Analogies with, and lessons to be extracted from, international merger control laws

Regulation 2019/452 and the proliferation of national FDI screening regimes come as an additional hurdle to free circulation of capital and free investment, seeking the protection of national interest by means of an alternative and specific regulatory regime. FDI screening perhaps adds the value of rendering the scrutiny of foreign investments on national security grounds more objective and detailed (at least in principle, since the margin of discretion of governments is likely to be wide in this area), making it subject to pre-established rules (not always the case in some of the art.21 EUMR cases examined where rules were made, even improvised, by Member States as transactions happened or depending on how they evolved,

[28] Point 2 of the Guidance to the Member States concerning foreign direct investment and free movement of capital from third countries and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (policy paper C(2020) 1981 final).

see discussion above). Furthermore, art.21 EUMR referred to mergers of European dimension, whereas FDI screening refers in principle to any concentration.

Recital 36 of Regulation 2019/452 refers explicitly to art.21 EUMR by stating that both sets of rules must be interpreted coherently:

> "to the extent that the respective scope of application of those two regulations overlap, the grounds for screening set out in Article 1 of this Regulation and the notion of legitimate interests within the meaning of the third paragraph of Article 21(4) of Regulation (EC) No 139/2004 should be interpreted in a coherent manner, without prejudice to the assessment of the compatibility of the national measures aimed at protecting those interests with the general principles and other provisions of Union law".

Recital 36 reminds us that, regarding mergers with Community dimension, legitimate interests such as public security etc invoked by Member States can only encroach upon such mergers when compliant with the requirements and case law of art.21 EUMR. In other words, the application of the FDI screening regime to a merger with Community dimension must be compatible with art.21 EUMR. This could afford some unexpected protection to companies in instances of foreign (non-EU) investment taking the form of a merger transaction with a European dimension, as national FDI screening rules would in such situations have to comply with the requirements of art.21 EUMR and applicable case law.

A second implication is that the case law and doctrine flowing from application of art.21 EUMR may serve as a tool for the interpretation of Regulation 2019/452 and, at least, be persuasive in connection with national FDI screening regimes (regarding their adequacy, proportionality, etc). The reference to the pre-existing art.21 EUMR case law is a starting point to develop some (much required) guidance in an area fertile for ample discretionary power and where judicial review is either national (against Member State FDI screening decisions which are arbitrary or disproportionate) or by the EU courts (if national laws on FDI screening go beyond the standard of strict protection of national interest).

Thirdly, the prior approval condition of transactions requiring FDI screening puts this legal regime in line with merger control clearance as a condition precedent for the closing of mergers and acquisitions and introduces legal risks akin to those of gun-jumping, particularly in jurisdictions that deprive the underlying transaction of civil effects if the need for FDI approval is breached. Acquirers and merging parties generally will have to factor in any FDI requirements when devising the calendar of the transaction where timing can be of the essence. The interaction between, for instance, FDI approval and public offers regulated under the securities laws are strategic matters in some instances which may still be unregulated, but which will need be carefully weighed.

Time management and the strategic importance of FDI screening authorisations to enable closing of transactions, plus the multijurisdictional implications of multiple national legal regimes potentially applying to a single transaction, are matters common to FDI screening and merger control law.

In fact there are some serious practical issues around FDI screening where the prior experience of merger control will be of relevance to provide tools and solutions. For instance, regarding jurisdictional thresholds the UK government can intervene in sensitive sectors where the target company realises revenue in excess of GBP 70 million (going down to GBP 1 million notably in businesses related to artificial intelligence and cryptographic authentication technology), or has a UK share of supply of 25 per cent or more. These are typical merger control thresholds. In other countries, turnover thresholds are introduced to exclude de minimis mergers from the review. Thresholds are another area where there is experience to be extracted from merger control, perhaps with the general comment that in the FDI screening area thresholds are devised/will be devised having different goals in mind, as the key matter is protection of the general or strategic interest, as opposed to merger control where thresholds are looking at size or relative size of the parties or the transaction.

Multi-jurisdictional filings and the issues of co-ordination and costs associated therewith are also amongst the points likely to arise in the area of FDI screening. Indeed, the proliferation of FDI screening regimes will also lead to an increase in transaction costs and time requirements derived from: (i) the initial hurdle of ascertaining the notification and approval requirements internationally; and (ii) the complexities and potentially substantial delay of the FDI authorisations required.

International merger control practitioners have over the last decades developed substantial know-how dealing with these matters. However, what legal practitioners can do to cope and find practical solutions is limited by the absence of a legal framework such as the EUMR which confers on the European Commission exclusive jurisdiction to review transactions with Community dimension benefitting from the "one stop-shop" (or the possibility to use the voluntary reasoned submission to request review by the European Commission of transactions which do not have Community dimension under art.4.3 EUMR).[29] The embryo of a common legal framework is Regulation 2019/452, which does provide some common criteria which Member States may apply. However, the fact acknowledged by Regulation 2019/452 is that FDI screening for public interest or national security reasons is a quintessentially national competence at the core of state sovereignty. This makes it impossible at the current stage of EU law to have a unified or EU

[29] Recital 8 EUMR.

legal instrument such as the EUMR. For business, it would no doubt be convenient to have the equivalent of an EUMR applicable to FDI screening, but that would require the willingness of EU Member States to give up sovereignty in a core area, a radical shift which does not seem likely in the foreseeable future.

Another area where the prior experience of merger control will be useful is that of the acquisition of control to determine when the prior notification and authorisation of the FDI has been breached (gun-jumping). In this regard it should be noted that, under the EUMR, a change of control is required for a reportable merger to arise. A requirement of change of control may not necessarily be present in an FDI screening context, where national idiosyncrasies prevail, much as under national merger control law (in various EU countries having adopted FDI screening regimes minority interests are covered, e.g. the UK and Germany; minority interest acquisitions are covered even in countries where minority acquisitions are immaterial in a merger control context, e.g. Spain). Likewise, it is arguably not necessary that an existing, ongoing business is acquired. Finally, Regulation 2019/452 includes in the definition of "foreign investment" any investment seeking to establish or maintain lasting and direct links between the foreign investor and the undertaking to which the capital is made available, including effective participation in management. Looking at Spanish law, for instance, it is enough that a foreign investment is made leading to acquisition of material influence of a company, which may in fact be a greenfield investment or start-up.

In the US, the Committee on Foreign Investment in the United States ("CFIUS") review follows the same approach, so that CFIUS authorisation can be required with minority stake acquisitions. Under CFIUS "control" is defined as the power direct or indirect, whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means to determine, direct, or decide important matters affecting an entity.[30] That is all a matter for national law to decide and the limit would seem to lie in the imagination of the national legislatures when seeking to protect the public or strategic interest—subject generally to a proportionality principle of minimum intervention or choosing the least invasive means possible to attain the goal desired. Looking for inspiration again in the US CFIUS review, even outbound technology transfer or IP licensing, without a requirement of actual control over a company or business, might be caught by the latest legal reforms in that country.[31] Those are areas worth looking at in today's world.

The merger control experience likely to find its way into an FDI screening context refers to the exercise of any act of control or material influence which may be deemed to be gun-jumping when happening in a merger control context (prior to having gained merger clearance); as well as any acts of pre-merger co-ordination, where the position under merger control and FDI screening may be comparable.

5. Prospective law: "levelling the playing field" as justification for European Commission and Member State intervention in mergers and acquisitions

At the beginning of this article reference was made to the European Commission White Paper on levelling the playing field as regards foreign subsidies.[32] The White Paper intends to initiate a discussion with stakeholders on a topic clearly inserted in the trends and dynamics identified in epigraph 1 above. Furthermore, the White Paper refers to a matter which is central to the discussion in this article, that is, mergers and acquisitions and, in particular, the perceived issue of foreign subsidies which ultimately serve the purpose of financing acquisitions of European companies.

The Commission identifies the following issues (leaving aside public pronouncement):

(a) General concern about foreign subsidies. EU State aid law regulates aid granted by EU Member States (art.107 TFEU). Neither merger control, trade law, nor FDI screening rules are suited to deal with this matter. The regulatory gap in the EU, therefore, seems to stem from the legal impossibility to apply State aid law to foreign State aid.

(b) Foreign subsidies in the context of acquisitions of EU companies.

Regarding point (a), the White Paper establishes a "module 1" which aims to deal with distortions caused by foreign subsidies to companies established (or functioning) in the EU. The White Paper considers that foreign subsidies below €200,000 are not distortive (by analogy with the de minimis rule in the State aid field), and then goes on to list a number of subsidies which are likely to be distortive. These include export financing subsidies; ailing undertakings subsidies, open-ended State guarantees, tax reliefs and, notably, foreign subsidies directly facilitating an acquisition. The latter (acquisition subsidies) presents a potential overlap with module 2 (see below), as the White Paper itself acknowledges that "module 1 would also include the possibility to review acquisitions facilitated by foreign subsidies".[33] Remaining

[30] See J. Wakely and A. Indorf, "Managing National Security Risk in an Open Economy: Reforming the Committee on Foreign Investment in the United States" (2018) 9(2) *Harvard National Security Journal*.
[31] Wakely and Indorf, "Managing National Security Risk in an Open Economy: Reforming the Committee on Foreign Investment in the United States" (2018) 9(2) *Harvard National Security Journal*.
[32] White Paper COM(2020) 253 final.
[33] White Paper COM(2020) 253 final at 4.1.2.1, at p.14.

subsidies are assessed on a number of criteria such as relative size of the subsidy and size of the beneficiary, situation of the market concerned (markets with excess capacity being more prone to distortion), market conduct and level of activity of the beneficiary in the internal market. Regard is also to be given to the potential monopoly (exclusive) or special rights of the beneficiary in the country of origin which could be leveraged into the EU market.

If a subsidy is found to be capable of distorting the market, it must then be counterbalanced against the positive impact of such subsidy in the internal market. Here the White Paper lists public goods such as employment, climate neutrality, environmental protection. Leaving aside other considerations, we focus now on the analogies of this (projected) procedure with merger control:

- two-step investigation to identify potentially distortive subsidy;
- third parties are invited to submit observations in the in-depth investigation phase;
- penalties for supplying false or incomplete information;
- possibility to grant authorisations subject to commitments.

In the latter point of commitments the inspiration in merger control, but also in State aid law, becomes obvious. On the one hand a reference is made to recovery, as reimbursement of the foreign subsidy to the foreign granting State. However, the Commission (undoubtedly inspired by its own EU experience on recovery which is mixed to say the least) acknowledges the practical difficulties with third States. On the other hand, reference is made to structural remedies (divestments) as well as prohibition of investments or acquisitions; and then a list is given of potential behavioural remedies.[34] Commitments can also be offered by the parties to mitigate the distortions found.

On this initial type of "module 1" review, the White Paper suggests that administrative authority is shared between the Commission and Member States. The White Paper mentions EU Regulation 1/2003 as a form of co-ordination with the Commission gaining exclusive jurisdiction once it starts an in-depth investigation.

Regarding point (b) (foreign subsidies in the context of acquisitions of EU companies), the concern relates to the fact that subsidies enable the subsidised acquirer to artificially raise the bidding price, thus distorting the adequate valuation of EU assets, preventing non-subsidised acquirers from carrying out those acquisitions and realising efficiency gains or access to technologies. While true, it can also be that subsidies occasionally enable the contrary effect, for instance by empowering a cashless and yet innovative company to acquire a highly synergetic technology start-up (which would otherwise have been acquired by the omnipresent technology giant who merely wanted to kill off the competitive threat). Moreover, such thinking does not seem compatible with the general principle under the TFEU that EU law is neutral regarding the nature of ownership (private or public), which underscores the deep suspicions of the European Commission when it comes to foreign, State-owned, companies. In terms of business economics, however, it would seem logical to generally assume that State subsidies negatively distort the competitive process as a matter of incentives.

The second rationale identified by the Commission to justify some control of foreign subsidies in mergers and acquisitions is once more in line with the desire to protect the national interest or security—even if under the shape of an "EU" security concept: "In some cases, the granting of foreign subsidies can also be driven by a strategic objective to establish a strong presence in the EU or to promote an acquisition and later transfer technologies to other production sites, possibly outside of the EU".[35] This includes a reference to critical infrastructure.[36]

Regarding proposed regulatory tools, the Commission addresses the issue of subsidisation in a merger context under "module 2".[37] This catches both subsidies granted with a view to a particular acquisition, as well as subsidies financially empowering a company to carry out acquisitions. The mechanism envisaged would require compulsory prior notification (much as under merger control and FDI screening) by acquirers having received foreign subsidies in the prior three years (or expecting to receive aid in the coming year). The investigation would be divided into a phase 1 and phase 2 or be "in-depth" (again resembling merger control). At the end of the "in-depth" investigation, the Authority could prohibit the transaction or accept commitments to remedy a distortion of the functioning of the internal market. The Authority could also order ex officio notification in the case of transactions which had not (but should have) been notified. Prohibition and (if required) unwinding are envisaged for distortive transactions.

A number of key concepts are defined by the White Paper including that of "acquisition", which would be wider than the mere acquisition of control under the EUMR and also cover minority acquisitions granting material influence. The target to which the acquisition refers or "EU target" would be a company established in the EU and meeting a turnover threshold, though alternative thresholds (likely future turnover in the EU) could also be envisaged. Clearly this is still a very open and embryonic point.

[34] Including licensing in FRAND terms, prohibition of specific market conduct linked to the foreign subsidy, publication of R&D results; third party access to assets or networks such as mobility apps; even redressive payments to the EU or Member States (White Paper COM(2020) 253 final at pp.19–20).
[35] White Paper COM(2020) 253 final at p.7.
[36] White Paper COM(2020) 253 final at p.8.
[37] Epigraph 4.2 of the White Paper COM(2020) 253 final at p.22.

The Commission itself acknowledges some of the potential difficulties of this prospective regulation; again past experiences under State aid and merger control law are very likely to help in many instances. As a new regulatory requirement applicable to mergers and acquisitions (if this becomes binding law at some point), based on prior notification and approval, the complexities and issues around gun-jumping etc will apply mutatis mutandis (see considerations regarding the interface between FDI screening and merger control, above). Indeed the White Paper itself refers to a "standstill period",[38] or regulated time period from the date of notification where transactions could not be closed. The possibility to open investigations for gun-jumping is foreseen as well. A further analogy with merger control refers to the possibility to clear transactions subject to remedies.

Regarding the substantive test, the Commission repeats in a rather circular manner the reference to a notion of distorted acquisition price, that is, a distortion of the internal market through facilitation of acquisitions on the basis of foreign subsidies. Unlike in a merger control framework, where information is in principle readily made available by the merging parties, and abundant, the same does not necessarily apply in connection with foreign subsidies where rather on the contrary (as the Commission rightly acknowledges) transparency may not be the rule. Because of this (perceived) information scarcity, the White Paper refers to a number of criteria as examples to determine the amount of the distortion.

A final point is that of the responsible Authority. The White Paper here considers that the administrative authority responsible for this clearance should be the Commission itself. It argues that sharing this between enforcers would make the procedure complex, possibly inconsistent across authorities and multiply transaction costs. However, the merger control system in Europe where the European Commission and national competition authorities have concurrent power seems to work fine (by resorting to co-ordination). The White Paper further considers that Member States could in any event still examine acquisitions ex officio below certain thresholds.

The White Paper amounts to an effort by the Commission to address a perceived gap, and the timing of the White Paper clearly also reflects on the larger landscape of the political/geopolitical moment.

Although there seems to be a general agreement in Europe that some legal framework is required in the direction pointed out by the White Paper, it is however not yet clear when or in what shape the White Paper will become binding law. The various comments received concerning the White Paper[39] by Member States seem to indicate that we are still far from reaching consensus on the shape, depth or severity of the measures envisaged by the Commission.

6. Conclusion

The first (clear and simple) conclusion is that cross-border mergers (particularly when they include foreign or non-EU investor elements) are going to experience a substantial increase in the regulatory requirements prior to closing. In this regard it is worthwhile noting that the trend towards increased economic nationalism can be perceived even within EU Member States as some of them (Italy, Spain) are introducing FDI screening regimes applying even to EU investors, therefore going beyond the scope of "foreign" or non-EU investments envisaged by Regulation 2019/452. Hence, not even the EU itself is likely to be a completely safe harbour, as investments taking place within the EU may be subject to some form of FDI screening depending on the country.

It also seems appropriate to underline that competition law is an appropriate tool to maximise economic welfare and efficiency. Lawmakers should not lose sight of that, so any future reform of the merger control laws should stay within strict competition law and economics parameters. Other industrial policy, social, promotion or support goals, as well as public security etc, could be considered under alternative legislative or regulatory tools.

FDI screening is a national competence, and there is nothing that can be done to minimise the number of authorisations in this regard (not even in the EU, in the current state of development of EU law, as discussed), though the Commission has attempted to streamline FDI screening EU-wide by means of Regulation 2019/452. However, if the Commission has the possibility to do so, it should strive not to increase the number of authorisations required for mergers. Hence, rather than contemplating what appears as likely burdensome module 1, 2 etc procedures (under the "levelling the playing field" White Paper), which would come on top of the applicable merger control and FDI screening procedures, the Commission should consider less intrusive or expensive measures. One of them, for instance, could be to insert the type of review referred to in the White Paper in connection with mergers in the framework of the merger control (either EU or national) notification process. Notification forms already contain some requirements regarding the financing of the concentration. Point 3.4 of the CO filing form, for instance, requests that the notifying party(-ies) "describe any financial or other support received from public authorities by any of the parties and the nature and amount of this support". Perhaps with far less intrusive legislative reform it could be possible to address the Commission's concerns in the framework of the merger control review with far less cost to companies and tax payers. Arguably in fact, to the extent that foreign aid can affect competition, and due to the fact that such aid is not caught by arts 107 and 108 TFEU, it should be possible for the Commission to take that aid into account in the merger control process.

[38] White Paper COM(2020) 253 final at p.28.
[39] *https://ec.europa.eu/competition/international/overview/foreign_subsidies.html* [Accessed 8 January 2021].

With or without Covid-19 and leaving aside ideological discussions of economic nationalism versus free trade, international competition for capital will continue unaltered, and authorities in Europe should strive to minimise transaction and administrative costs and keep authorisation regimes as clear and predictable as possible.