

At a Crossroads in EU Merger Control: Can a Rethink on Foreign Takeovers Address the Imbalances of Globalisation?

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In the face of momentous change in global politics – which has already begun to usher in a new age of nationalism, populism and protectionism – the European Commission continues to afford primacy to its competition-based approach to merger assessment. However, the Commission is facing increasing pressure from some EU Member States to respond to the emerging challenges of globalisation by adopting a more protectionist industrial strategy that would shelter strategic industries from ‘unwanted’ foreign takeovers. Not since the global financial crisis has the ‘pressure to protect’ been so palpable, and this renewed scrutiny will test the Commission’s resolve to continue enforcing its strict competition-based approach. This article reflects on the recent developments that have left EU merger control at a crossroads in terms of how it proceeds to react to anti-globalisation sentiment. It also examines a radical proposal to task the Commission with the role of analysing foreign takeovers that arise in the EU’s strategic sectors. It finds compelling evidence to suggest that the existing regime provides a legal basis for the Commission to afford greater consideration to public interest factors in merger cases, which would allow it to undertake this task in lieu of legislative reform.

I. Introduction

By any measure, 2016 was a remarkable year in global politics and one that has the potential to usher in a sea change across the worldwide competition policy community. The first major ‘shock’ was that of the UK’s ‘Brexit’ decision in June, which sees the UK set to relinquish its EU membership by the end of March 2019 – thereby creating a number of new freedoms for the country to exercise in terms of redesigning its competition laws; including, imposing greater scrutiny on foreign takeover bids.¹ Next came the US presidential election in November and a result that few political commentators anticipated: a victory for Donald J Trump, who campaigned vehemently on the basis of an ‘America First’ foreign policy

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¹ Bruce Lyons, David Reader and Andreas Stephan, ‘UK competition policy post-Brexit: taking back control while resisting siren calls’ (2017) 5(3) *Journal of Antitrust Enforcement* (forthcoming).

pledge, which included a number of proposals to renegotiate a series of supposedly ‘terrible’ trade deals and to increase import tariffs on Chinese goods.²

These momentous events suggest that change is afoot in terms of how the UK and US assess mergers and acquisitions (M&A) and, in particular, how they proceed to scrutinise foreign takeovers of domestic firms. There has been suggestion that these countries may begin to relax their competition-based approach to merger control and, instead, afford greater emphasis to ‘public interest’ considerations that would enable them to block foreign takeovers that are not deemed to be in their national interest.³ This is reflective of a rising anti-globalisation sentiment that has aggravated traditional scepticisms towards foreign direct investment (FDI),⁴ and has also acted to fuel anxieties within some EU Member States, who fear that the EU’s openness to foreign investment is not being reciprocated by other major economies.⁵ As a result, some of these Member States have put pressure on the European Commission to also depart from its strict competition-based approach to merger control and to enforce a more protectionist industrial strategy.⁶ A protectionist approach to merger control could entail the Commission taking steps to nurture European champions as part of its evaluation of mergers,⁷ or to allow Member States to assume the jurisdiction to rule on a greater number of EU-level mergers in order to promote national champions.⁸ But of

² Gideon Rachman, ‘Donald Trump and the dangers of America First’ *Financial Times* (9 November 2016) <www.ft.com/content/b51c47bc-a66e-11e6-8b69-02899e8bd9d1> accessed 25 June 2017.

³ See eg Lyons, Reader and Stephan (n 1) 7-8; Global Competition Review, ‘Tie-ups after the break-up’ (GCR Brexit Supplement, 2016) 4 <<http://lbresearch.com/gcr/brexit-special>> accessed 25 June 2017.

⁴ These include often unsubstantiated concerns about the risks posed by FDI, including: reduced innovation, low environmental standards, industrial espionage and the opportunity costs of selling-off strategic national assets; Andreas Heinemann, ‘Government Control of Cross-Border M&A: Legitimate Regulation or Protectionism?’ (2012) 15(3) *Journal of International Economic Law* 843, 862.

⁵ In the immediate wake of the Brexit decision, for example, the then French President François Hollande suggested a need to consider adapting EU competition laws in order to promote ‘global leaders’; Lewis Crofts, ‘Hollande says competition rules need ‘adapting’ under new post-Brexit priorities’ (*MLex*, 29 June 2016) <<https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/europe/hollande-says-competition-rules-need-adapting-under-new-post-brexit-priorities>> accessed 25 June 2017.

⁶ For example, Section II details efforts by France and Germany in June 2017 to convince fellow European Council members to support a proposal for the Commission to screen foreign takeovers in strategic sectors.

⁷ Johnson foresaw the potential for this type of pressure to be exerted as a result of the Brexit decision; Paul Johnson, ‘Brexit: the implications for EU and UK merger control’ (2016) *Competition Law Journal: Brexit Special Online Edition* 10, 16

<www.jordanpublishing.co.uk/system/froala_assets/documents/1340/CLJ_2016_BrexitSpecial.pdf> accessed 25 June 2017.

⁸ There already exists a legal basis for the Commission to grant jurisdiction to Member States where a merger impacts upon their legitimate national interests; Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EU Merger Regulation) [2004] OJ L24/1, art 21(4). As the focus of this article is on the Commission’s substantive approach, this provision will not be addressed, but a useful overview can be found in Alison Jones and John Davies, ‘Merger Control and the Public Interest: Balancing EU and National Law in the Protectionist Debate’ (2014) 10(3) *European Competition Journal* 453, 485-491.

particular significance in the EU context has been an emerging aspiration to introduce new safeguards that would protect strategically important EU firms from ‘unwanted’ foreign takeovers. A commonality of each of these approaches is that adopting them would require the EU to take a definitive step back from the rationale of its strict competition-based approach. To do so would represent an enormous procedural shift in the Commission’s enforcement policy and could also bring about any one of the numerous substantive pitfalls associated with protectionism.⁹

This article seeks to reflect on recent developments within EU Member States and institutions that have resulted in the EU merger regime arriving at a crossroads, at which it must now decide which direction to take in order to address the growing anti-globalisation sentiment within Europe. Section II charts the emergence of this sentiment in the EU, reflecting on the role played by scepticism directed at Chinese FDI, the takeover reforms proposed by French President Emmanuel Macron in May 2017, and the conclusions relating to FDI that were adopted by the European Council in June 2017. Section III examines a radical proposal to assign a new responsibility to the Commission which would see it analyse foreign takeovers in the EU’s strategic sectors on public interest grounds. It finds evidence that the existing regime provides a legal basis for the Commission to afford greater consideration to public interest factors in merger cases, which may allow it undertake this task in lieu of legislative reform. Section IV provides some concluding remarks.

II. Prospects of a Protectionist Approach to EU Merger Control

1. An Emerging Scepticism towards Chinese FDI

Is there a credible possibility that EU merger control will veer towards a protectionist stance in the foreseeable future? Events in the aftermath of the ‘Brexit decision’ and the ‘Trump election’ afford greater plausibility to this prospect than at any point since the Global Financial Crisis of 2007-08, where Member States were doubting the ability of competition to

⁹ These include the suggestion that firms that have been artificially sheltered from competition will struggle to compete effectively in global markets; Massimo Motta, *Competition Policy: Theory and Practice* (CUP 2004) 29.

guide the EU away from economic turmoil,¹⁰ let alone its ability to create and sustain economic prosperity.¹¹ But while the Brexit and Trump events have certainly played their part in the recent wave of protectionist rhetoric in the EU, most noteworthy has perhaps been the emerging scepticism that some Member States have directed towards the sharp increase in the number of European acquisitions by Chinese firms.¹² Chinese M&A activity in the EU was reported to have been twice as high in 2016 compared to the previous year,¹³ while overall Chinese investment in the EU was said to have risen by 77% to over €35bn in the same period.¹⁴ In contrast, EU direct investment in China fell for a second consecutive year to €7.7bn in 2016,¹⁵ indicating a notable imbalance that some analysts suspected was ‘fuelling European perceptions of a fundamental lack of ‘reciprocity’ between the EU and China’.¹⁶ This perception was most apparent in Germany, where in October 2016 – following a succession of high-profile Chinese acquisitions of German high-tech firms – the government revealed its intentions to seek new EU rules that would enable Member States to investigate and, in exceptional circumstances, block foreign takeovers ‘when it is clear that they are driven by industrial policy or to enable technology transfers’.¹⁷

By February 2017, Germany’s proposals had received the endorsement of the French and Italian governments, prompting the Economics Ministers of all three Member States to send a

¹⁰ Neven suggests that ‘[a]dopting a lax approach towards competition policy is at best an indirect and at worst a counterproductive response’ to market failures; Damien Neven, Robin Nuttall and Paul Seabright, *Merger in Daylight: The Economics and Politics of European Merger Control* (Centre for Economic Policy Research 1993) 12.

¹¹ See eg Jesse W Markham Jr, ‘Lessons for Competition Law from the Economic Crisis: The Prospect for Antitrust Responses to the ‘Too-Big-To-Fail’ Phenomenon’ (2010) University of San Francisco Law Research Paper No 2011-15.

¹² The rate of Chinese takeovers of EU firms has grown rapidly in the post-Crisis era, partly due to undervalued assets arising from the Eurozone debt crisis and due to the open investment environment; Yuan Ma and Henk Overbeek, ‘Chinese foreign direct investment in the European Union: explaining changing patterns’ (2015) 1(4-5) *Global Affairs* 441.

¹³ Tim Wallace, ‘China’s global takeover deals even scare the Chinese government’ *The Telegraph* (1 February 2017) <www.telegraph.co.uk/business/2017/02/01/chinas-global-takeover-deals-even-scare-chinese-government> accessed 25 June 2017.

¹⁴ Andreas Rinke and Andrea Shalal, ‘Chinese foreign investments up 40 percent to record in 2016: study’ *Reuters* (11 January 2017) <www.reuters.com/article/us-china-investment-europe-idUSKBN14V28P> accessed 25 June 2017.

¹⁵ Tom Mitchell, Guy Chazan and Don Weinland, ‘Chinese investment in EU dwarfs flow the other way’ *Financial Times* (10 January 2017) <www.ft.com/content/79e3a2b2-d6f7-11e6-944b-e7eb37a6aa8e?mhq5j=e2> accessed 25 June 2017.

¹⁶ Thilo Hanemann and Mikko Huotari, ‘Record Flows and Growing Imbalances: Chinese Investment in Europe in 2016’ (2017) MERICS Paper on China No 3, 5 <http://rhg.com/wp-content/uploads/2017/01/RHG_Merics_COFDI_EU_2016.pdf> accessed 25 June 2017.

¹⁷ A quote from Matthias Machnig, the Deputy Minister for Economic Affairs and Energy; Guy Chazan and Stefan Wagstyl, ‘Berlin pushes for EU-wide rules to block Chinese takeovers’ *Financial Times* (28 October 2016) <www.ft.com/content/1b892ae4-9cd6-11e6-8324-be63473ce146?mhq5j=e2> accessed 25 June 2017.

joint-letter to the European Commissioner for Trade, stating that they were ‘worried about the lack of reciprocity and about a possible sell-out of European expertise’ to non-EU companies,¹⁸ with Chinese state-owned enterprises (SOEs) representing a particular concern.¹⁹ In the letter, the ministers suggest that these concerns could not be addressed by the current legal instruments available to the Member States and, as such, there was a pressing need for the issue to be discussed at a European level. Attached to the letter was a ‘common paper’ that reportedly details a number of proposals but which, at the time of writing, has yet to enter into the public domain. However, a number of media sources have shed light on its contents. *Handelsblatt Global*, for example, reported that the paper contains a list of suggestions which includes: (a) introducing a power that would enable the Commission to block takeovers by non-EU SOEs in strategic sectors, and (b) a requirement that non-EU firms ‘should only have the right to invest in the European Union based on the principle of reciprocity’.²⁰ Moreover, a report by Reuters suggests the paper also includes a proposal to create an instrument (based on ‘economic criteria’) that would broaden the grounds on which Member States are permitted to block (or impose conditions on) foreign takeovers.²¹ The Commission’s response to the Member States’ letter was a pragmatic one. It acknowledged that such proposals were ‘worth discussing’ as a potential means of addressing imbalances and the challenges of globalisation, but only provided that new measures were compatible with the EU’s international commitments and its treaties.²² For one newly-elected leader, the Commission’s positive response represented an ideal opportunity to once again place foreign takeover review at the very heart of the EU agenda.

¹⁸ Letter from Brigitte Zypries, Michel Sapin and Carlo Calenda to Cecilia Malmström (10 February 2017) <www.bmwi.de/Redaktion/DE/Downloads/S-T/schreiben-de-fr-it-an-malmstroem.pdf?__blob=publicationFile&v=5> accessed 25 June 2017.

¹⁹ Guy Chazan, ‘EU capitals seek stronger right of veto on Chinese takeovers’ *Financial Times* (14 February 2017) <www.ft.com/content/8c4a2f70-f2d1-11e6-95ee-f14e55513608> accessed 25 June 2017.

²⁰ Klaus Stratmann, ‘Push for E.U. Powers to Block Strategic Investors’ *Handelsblatt Global* (14 February 2017) <<https://global.handelsblatt.com/companies-markets/germany-italy-and-france-push-for-e-u-powers-to-block-strategic-investors-704844>> accessed 25 June 2017.

²¹ Yann Le Guernigou and Leigh Thomas, ‘France, Germany, Italy urge rethink of foreign investment in EU’ *Reuters* (14 February 2017) <www.reuters.com/article/uk-eu-trade-france-idUKKBN15T1ND?il=0> accessed 25 June 2017.

²² Daniel Rosario, ‘EC Midday Press Briefing’ (Commission Briefing, Brussels, 15 February 2017) <<http://ec.europa.eu/avservices/video/player.cfm?sitelang=en&ref=I133710>> accessed 25 June 2017. The relevant question and response can be found between 11:40-13:20.

2. Enter Macron: A Vision of a ‘Protective Europe’

Following the dramatic shifts in the global political landscape in 2016, some commentators predicted that the amount of pressure the Commission will be under to adopt a more protectionist approach could hinge on the performance of Eurosceptic parties at general elections in France and Germany in 2017.²³ But this is by no means to say that a Eurosceptic party need be in power for protectionist pressure to materialise. Emmanuel Macron, a centrist candidate elected as President of France in May 2017 on a pro-EU mandate, was quick to seek the support of German Chancellor Angela Merkel on plans to press the EU towards adopting a ‘tougher stance’ on foreign takeovers (a move that would have gone some way towards appeasing the many French citizens whom voted for Macron’s election opponent, the far-right Eurosceptic Marine Le Pen).²⁴ Indeed, Macron’s election manifesto itself contained an explicit pledge to seek a new mechanism that would allow the EU to control FDI in order to preserve strategic sectors;²⁵ so giving rise to the oft-quoted concept of Macron’s ‘protective Europe’.²⁶ His election victory also coincided with a Reflection Paper published by the Commission, in which it spelled out its intention to ‘continue to develop a balanced, rules-based and progressive trade and investment agenda’ that opens markets,²⁷ while addressing concerns of a lack of reciprocity with ‘careful analysis and appropriate action’.²⁸ Indeed, although it rejects any notion of the EU adopting a protectionist approach, the paper has been seen as the Commission’s reaction to the growing public support for populist movements within Member States, even though parties such as Le Pen’s National Front had fallen short of taking power.²⁹ Yet, the paper failed to explicitly acknowledge the aforementioned proposals by Germany, France and Italy to introduce new powers for the

²³ Rachel Brandenburger et al, ‘Changing Times? The Outlook for Antitrust Enforcement in the EU and the US’ (2017) 1(2) CPI Antitrust Chronicle.

²⁴ Anne-Sylvaine Chassany, ‘Macron wants tougher EU on trade and foreign investment’ *Financial Times* (11 May 2017) <www.ft.com/content/38e98f94-359b-11e7-99bd-13beb0903fa3> accessed 25 June 2017.

²⁵ En Marche!, ‘Retrouver notre esprit de conquête pour bâtir une France nouvelle’ (Presidential manifesto of Emmanuel Macron, 2017) 21 <<http://storage.googleapis.com/en-marche-fr/COMMUNICATION/Programme-Emmanuel-Macron.pdf>> accessed 25 June 2017.

²⁶ Hannah Murphy, ‘Policies of France’s leading presidential candidates’ *Financial Times* (20 March 2017) <www.ft.com/content/7fa14c80-fdd1-11e6-96f8-3700c5664d30?mhq5j=e2> accessed 25 June 2017.

²⁷ Commission, ‘Reflection Paper on Harnessing Globalisation’ COM (2017) 240 final, para 3.2. This paper acted to expand on the Commission’s White Paper on the future of the EU27 in the lead up to 2025; Commission, ‘White paper on the future of Europe: Reflections and scenarios for the EU 27 by 2025’ COM (2017) 2025 final.

²⁸ *ibid* ch III, art 3.

²⁹ Arthur Beesley, ‘EU wants tougher global trade rules to fend off populist threat’ *Financial Times* (10 May 2017) <www.ft.com/content/63a20fea-34c4-11e7-bce4-9023f8c0fd2e?mhq5j=e1> accessed 25 June 2017.

Commission or Member States to intervene in foreign takeovers in strategic sectors;³⁰ an omission that President Macron would attempt to address at his European Council debut.

This article goes to press in the immediate aftermath of the 183rd Meeting of the European Council – which acts to set the EU’s political agenda – where President Macron made the bold move of tabling a draft communiqué that called on EU leaders ‘to screen foreign investments where necessary in order to mitigate risks to national security’.³¹ Early reports had suggested that the proposals would be met with strong opposition from pro-free trade Member States (including the Nordic and Baltic countries, as well as the Netherlands),³² and from smaller Member States (such as Hungary and Greece) which have a greater dependency on inward investment from China.³³ The proposals also evoked the disapproval of the former Internal Market Commissioner, Frits Bolkestein, who suggested the plans undermined the procedural simplification that the EU Merger Regulation (EUMR) seeks to provide and even went so far as to suggest that the Commission should use its enforcement powers to ‘issue a sharp reminder’ to any Member States that attempt to incorporate any similar protective measures.³⁴

What arose from the European Council meeting has been described as a ‘watered down’ version of President Macron’s original proposal.³⁵ Rather than calling on the Commission to introduce a screening mechanism for foreign takeovers, the conclusions adopted by the Council directed the Commission to continue in its fight against protectionism and to promote open markets.³⁶ However, the Council recognised the pressing need for further discussions regarding reciprocity between jurisdictions in the context of investment, calling

³⁰ Rochelle Toplensky, ‘Brussels sidesteps calls to block unwanted foreign takeovers’ *Financial Times* (10 May 2017) <www.ft.com/content/a31113c4-300f-11e7-9555-23ef563ecf9a> accessed 25 June 2017.

³¹ Arthur Beesley, ‘Macron and allies head for EU clash on foreign takeovers’ *Financial Times* (15 June 2017) <www.ft.com/content/73aad3a-5118-11e7-bfb8-997009366969?mhq5j=e3> accessed 25 June 2017.

³² *ibid.*

³³ Robin Emmott and Gabriela Baczynska, ‘EU to resist Macron’s call to curb Chinese takeovers - diplomats’ *Reuters* (21 June 2017) <<http://uk.reuters.com/article/uk-eu-summit-china-idUKKBN19C23D>> accessed 22 June 2017.

³⁴ Frits Bolkestein, ‘Don’t let France ruin the single market’ *Politico* (22 June 2017) <www.politico.eu/article/opinion-dont-let-france-ruin-the-single-market-emmanuel-macron-frits-bolkestein> accessed 25 June 2017.

³⁵ One diplomatic source described the Council’s conclusions as having ‘downgraded’ Macron’s original proposal; Adam Fleming, ‘Emmanuel Macron’s charm offensive in Brussels debut’ (*BBC News*, 23 June 2017) <www.bbc.com/news/world-europe-40383080> accessed 25 June 2017.

³⁶ European Council, ‘European Council meeting (22 and 23 June 2017 – Conclusions)’ (Conclusions adopted at 183rd Meeting of the European Council, EUCO 8/17, 23 June 2017), para 16 <<http://data.consilium.europa.eu/doc/document/ST-8-2017-INIT/en/pdf>> accessed 25 June 2017.

on the Commission and the Council itself to take this debate forward and to revert to the issue again at a future meeting.³⁷ Significantly, the Council also endorsed the Commission's Reflection Paper and welcomed its initiative to 'analyse investments from third countries in strategic sectors, while fully respecting Members States' competences'.³⁸ Precisely what 'analysing investment' entails in this context is unclear, but it seems likely to amount to a 'watering down' of Macron's ambitions of a new screening mechanism that would allow the Commission to intervene in foreign takeovers. Speaking at the Council's post-meeting press conference, the President of the Commission, Jean-Claude Juncker, said that the Commission would publish a report that provides more details of what this analysis will consist of, building on proposals that had earlier been included in its Reflection Paper.³⁹ But Juncker also responded to a question from the Press where he emphasised a desire for 'a Europe which is open, but which is not offered', that he was entirely in agreement with the proposals of President Macron and, furthermore, that other members of the Commission were broadly aligned to Macron's thinking.⁴⁰

This leaves the EU in an intriguing situation with regards to how it will approach foreign takeovers going forward. While Macron's proposals failed to achieve a consensus within the Council, the Council's conclusions make it clear that the Member States are at least keen to see the Commission afford consideration to the motives of foreign investment in strategic sectors and, most certainly, to retain foreign investment as a topic at the heart of the EU agenda. Moreover, it appears that there is a consensus within the Commission itself that more positive steps, such as those put forward by Macron, should be taken in order to overcome the concerns posed by FDI in strategic sectors. Macron himself defended his proposals in the wake of the Council meeting, noting that Europe would not be naïve in thinking that all jurisdictions adhere to the multilateral rules on free trade; rather, there was a need to

³⁷ *ibid* para 17.

³⁸ *ibid*.

³⁹ Jean-Claude Juncker, 'Press Conference – Part 2' (Council Press Conference, Brussels, 23 June 2017) <<https://tvnewsroom.consilium.europa.eu/event/european-council-june-2017-day-2-17337/press-conference-part-2-17a48>> accessed 25 June 2017.

⁴⁰ Jean-Claude Juncker, 'Press Conference – Part 4 (Q&A)' (Council Press Conference, Brussels, 23 June 2017) <<https://tvnewsroom.consilium.europa.eu/event/european-council-june-2017-day-2-17337/press-conference-part-4-qa-17b8e>> accessed 25 June 2017.

overcome the ‘laws of the jungle’ by ensuring reciprocity and establishing better controls for strategic investment.⁴¹

3. ‘As You Were’ or a New Direction for EU Merger Control?

An important detail that the Council’s conclusions and the Commission’s Reflection Paper are silent on is *who* within the Commission would be tasked with analysing foreign takeovers in strategic sectors. For example, if the Commission’s Directorate-General for Competition (DG Comp) was assigned this task, it would presumably be required to investigate the ‘merger element’ of a transaction according to competition criteria, in addition to analysing the intricacies of the ‘foreign takeover element’ on non-competition grounds. Alternatively, the task could be delegated to a separate wing of the Commission, such as the Directorate-General for Trade (DG Trade), which would conduct a parallel assessment of the FDI issues alongside DG Comp’s competition assessment.

On this institutional point, it is worth noting that the 183rd Meeting of the European Council was certainly not the first time that efforts have been made to convince the EU to consider non-competition interests when assessing mergers involving foreign acquirers. In 2011, following a wave of investment into the EU from Chinese and Russian SOEs, two EU Commissioners, Antonio Tajani and Michel Barnier,⁴² wrote a joint-letter to Commission President José Manuel Barroso recommending that the EU establishes a body to vet FDI in a similar vein to the Committee on Foreign Investment in the United States (CFIUS), which scrutinises inward investment into the US on national security grounds.⁴³ A similar proposal was put forward by the European Parliament in 2012, calling on the Commission and Member States to work together to set up such a body.⁴⁴ Calls for the establishment of an EU equivalent to the CFIUS – a CFIEU, if you will – were ultimately rejected in favour of a soft law approach, where the Commission sought to promote good governance and transparency

⁴¹ See discussion between 06:00-07:04 in Emmanuel Macron and Angela Merkel, ‘Joint Press Conference at EU Summit’ (Council Press Conference, Brussels, 23 June 2017) <www.youtube.com/watch?v=YoqQ1TyI3-4> accessed 25 June 2017.

⁴² The Commissioner for Industry and Entrepreneurship and the Commissioner for the Internal Market respectively.

⁴³ Sophie Meunier, ‘Divide and conquer? China and the cacophony of foreign investment rules in the EU’ (2014) 21(7) *Journal of European Public Policy* 996, 1010.

⁴⁴ European Parliament, ‘Report on EU and China: Unbalanced Trade?’ (Resolution, Strasbourg, 20 April 2012), para 25.

in mergers involving foreign bidders, SOEs and Sovereign Wealth Funds.⁴⁵ Although, more recent academic literature suggests that it may well be time to revisit the prospect of a CFIEU which, in a similar way to DG Comp's merger competences, would act as a 'one-stop-shop' for large or 'sensitive' foreign takeovers in the EU.⁴⁶ A rationale for introducing such a body is that it would create a centralised procedure for assessing foreign takeovers on pre-defined public interest grounds, which reduces the risk of protectionism by facilitating a transparent and predictable regime that is less readily achieved in a system that conducts FDI review at the Member State level.⁴⁷

Is it therefore feasible that a CFIEU-type arrangement could be adopted by the EU in light of the European Council meeting? Several factors suggest the chances are slim. Firstly, given the political sensitivities of foreign takeover review and the contrasting political and economic interests of individual Member States (including their own perceptions towards FDI),⁴⁸ it is unlikely that States will readily cede authority to an EU body.⁴⁹ Second, the EU has committed to the Commission's 'Investment Plan for Europe' (the so-called 'Juncker Plan'), the third strand of which seeks to boost investment in the EU by simplifying the regulatory regime and removing investment barriers,⁵⁰ an aim that seems incompatible with an additional screening of foreign takeovers by a CFIEU body. Thirdly, the Commission has already invested a large amount of time and resources into negotiating bilateral investment agreements (BIAs) with major economies, with the aim of facilitating reciprocity of investment procedures between jurisdictions.⁵¹ For example, the Commission has made a bilateral investment agreement between the EU and China a 'top priority',⁵² and – as of May 2017 – had completed a thirteenth round of negotiations with Chinese representatives.

⁴⁵ Heike Schweitzer, 'Sovereign Wealth Funds - Market Investors or 'Imperialist Capitalists'? The European response to direct investments by non-EU state-controlled entities' in Ulf Bernitz and Wolf-Georg Ringe (eds), *Company Law and Economic Protectionism: New Challenges to European Integration* (OUP 2010) 264-265.

⁴⁶ Timothy RW Cowen, 'Protectionism in Merger Control: Is the Process of Merger Control Adequate to Consider Wider Public Interest Issues? Is it Now Time for CFIEU?' (2014) 10 CPI Antitrust Chronicle.

⁴⁷ *ibid* 10-11.

⁴⁸ Jones and Davies (n 8) 456.

⁴⁹ Angela Huynh Zhang, 'Foreign Direct Investment from China: Sense and Sensibility' (2014) 34(3) *Northwestern Journal of International Law & Business* 395, 435.

⁵⁰ Commission, 'An Investment Plan for Europe' (Communication) COM (2014) 903 final, ch 4; as approved by European Council, 'European Council (18 December 2014) – Conclusions' (Conclusions adopted at 165th Meeting of the European Council, EUCO 237/14, 18 December 2014).

⁵¹ Scholars note that, while BIAs can act to facilitate a degree of reciprocity between states, they provide limited scope for restricting investment in strategic sectors. Indeed, this has been the undoing of many a would-be BIA; Heinemann (n 4) 852-856.

⁵² Commission, 'Trade for All: Towards a more responsible trade and investment policy' (Communication) COM (2015) 497 final, para 5.2.2.

Although, having commenced negotiations in late-2013, it is clear that the process of striking an agreement is far from straightforward, with the two sides struggling to agree on intricate matters of sustainable development and environmental protection,⁵³ and a plethora of issues regarding market access in China.⁵⁴ Nonetheless, the Commission remains confident of reaching an agreement in the foreseeable future.

If a parallel FDI analysis by a separate body is implausible at this current time, we might return to the possibility of DG Comp undertaking a dual assessment of the competition aspects of a merger and the public interest implications of foreign takeovers. Zhang considers this to be a more feasible approach than the establishment of a CFIEU, as Member States have already ceded jurisdiction to DG Comp to rule on mergers with an EU dimension.⁵⁵ Indeed, Zhang is among a number of scholars to observe a previous period where DG Comp undertook a dual assessment in cases involving Chinese SOEs in 2011; namely, where the Commission completed its default competition analysis before proceeding to make a counterfactual assessment of how competition would fare if all Chinese SOEs in the market were treated as a single economic entity.⁵⁶ In practice, there was no case where the Commission's counterfactual finding differed from its findings in relation to the default competition assessment,⁵⁷ but Zhang criticises this 'worst case scenario' approach as having the potential to have a deterrent effect on all Chinese investment in the EU.⁵⁸ Nevertheless, this observation of DG Comp's past practice is at least indicative of a willingness to consider the concerns posed by SOEs that acquire EU firms, namely by applying its strict competition-based approach to separate counterfactual assessments. What it does not tell us is whether the Commission would be prepared to go a step further by considering public interest criteria as part of the FDI analysis role. This would appear to be incompatible with the Commission's previous rhetoric, which has – for many years – been unrelenting in its commitment to a strict competition-based approach to merger control, and equally unyielding to the temptations of protectionism.

⁵³ Meunier (n 43) 1008.

⁵⁴ Insa Ewert, 'The EU-China Bilateral Investment Agreement: Between High Hopes and Real Challenges' (2016) Egmont Institute Security Policy Brief No 68, 2-3 <www.egmontinstitute.be/wp-content/uploads/2016/02/SPB68-Ewert.pdf> accessed 25 June 2017.

⁵⁵ Zhang (n 49) 435.

⁵⁶ *ibid*; Odd Stemsrud, "'China Inc" under Merger Regulation review: the Commission's approach to acquisitions by Chinese public undertakings' (2011) 32(10) *European Competition Law Review* 481, 484.

⁵⁷ Stemsrud (n 56) 485.

⁵⁸ Zhang (n 49) 436. She also suggests that the Commission may have been influenced to adopt this approach on the basis of an alarmist bias emanating from undue public fears towards Chinese FDI.

Indeed, successive Commissioners for Competition have been very much on-message in this regard. Mario Monti stressed the need to place a competition-based test at the centre of merger assessments and insisted that, above all else, merger control should not become a tool for protectionism and for promoting national champions.⁵⁹ Neelie Kroes said it would be irresponsible to concede to protectionism and that the Commission was in a unique position to prevent protectionist interventions by Member States by acting as a neutral arbiter.⁶⁰ Joaquín Almunia routinely reiterated his belief that competition alone should dictate the assessment of mergers at EU level and that it was ‘crucial to keep our merger review immune from non-competition considerations’.⁶¹ He also drew attention to the Commission’s stance of resisting and indeed ‘fighting’ global protectionism during his tenure,⁶² which he described as being among the Commission’s ‘first orders of business’.⁶³ Closer to home, he also expressed alarm at the ‘worrying signals of protectionist threats’ among EU Member States, reserving particular pessimism for measures introduced by the French government to protect its strategic interests during the *GE/Alstom* deal.⁶⁴ More recently, the incumbent Commissioner Margrethe Vestager has expressed the need to be vigilant in the face of protectionism, citing its potential to trigger long-term adverse effects and its potential to ‘poison the well’ of international antitrust cooperation.⁶⁵

⁵⁹ Mario Monti, ‘Analytical Framework of merger review’ (ICN Inaugural Conference, Naples, 28 September 2002) <http://europa.eu/rapid/press-release_SPEECH-02-473_en.htm?locale=en> accessed 25 June 2017.

⁶⁰ Kroes suggested that by permitting Member State to conduct a protectionist act, it would prompt other Member States to engage in similar behaviour; Neelie Kroes, ‘European competition policy facing a renaissance of protectionism – which strategy for the future?’ (St Gallen International Competition Law Forum, St Gallen, 11 May 2007) <http://europa.eu/rapid/press-release_SPEECH-07-301_en.pdf> accessed 25 June 2017.

⁶¹ Joaquín Almunia, ‘EU merger control has come of age’ (‘Merger Regulation in the EU after 20 years’, Brussels, March 2011) <http://europa.eu/rapid/press-release_SPEECH-11-166_en.htm?locale=en> accessed 25 June 2017.

⁶² Almunia suggests that the International Competition Network (ICN) could play an important role in the fight against protectionism; see Joaquín Almunia, ‘A new decade for the International Competition Network’ (10th Annual Conference of the ICN, The Hague, 18 May 2011) <http://europa.eu/rapid/press-release_SPEECH-11-346_en.htm?locale=en> accessed 25 June 2017.

⁶³ Joaquín Almunia, ‘Some highlights from EU competition enforcement’ (IBA 18th Annual Competition Conference, Florence, 19 September 2014) <http://europa.eu/rapid/press-release_SPEECH-14-608_en.htm> accessed 25 June 2017.

⁶⁴ Joaquín Almunia, ‘Is EU competition policy fit for a globalised world?’ (Allianz-CER European Forum Dinner, Brussels, 23 June 2014). A good overview of the French measures and their observable effects can be found in Nicolas Petit, ‘State Created Barriers to Exit: The Example of the Acquisition of Alstom by General Electric’ (2015) 11(1) *Competition Policy International* 96.

⁶⁵ Margrethe Vestager, ‘Enforcing competition rules in the global village’ (NYU Law Address, New York, 20 April 2015) <https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/enforcing-competition-rules-global-village_en> accessed 25 June 2017.

Yet despite the defiance that the Commission has so far shown in continuing to pursue a strict competition-based approach in a highly-pressurised political environment, recent events and the conclusions of the European Council meeting suggest that now could be the time that the Commission begins to relax its stance.⁶⁶ With Member States also seeking an immediate response to the challenges of globalisation, there is every chance that merger control, rather than a new and separate foreign investment review mechanism, will be the Commission's tool of choice.⁶⁷ To rely on merger control as a means by which to serve a protectionist strategy – no matter how mild it may be – would require a move towards the pursuit of 'non-competition' or so-called public interest objectives. The extent to which public interest objectives can be said to influence merger investigations under the current EU regime is a live issue. On the one hand, the modernisation of EU competition law has attributed priority to pursuing a 'consumer welfare' objective,⁶⁸ rather than any specific public interest goals. On the other hand – and as Section III will reveal – there appears to be legislative scope and, arguably, even a constitutional requirement for public interest goals to be considered by the Commission by virtue of the EUMR, as well as the Treaty on the Functioning of the European Union (TFEU) itself.⁶⁹ This latter interpretation is significant, as it implies that existing EU law may afford the Commission a constitutional basis on which to apply public interest criteria in the pursuit of a protecting strategic EU firms from foreign takeovers, subject to the fundamental freedoms of the EU.⁷⁰

⁶⁶ Indeed, the Commission may face an imminent decision on whether or not to alter its approach, given that the UK's departure from the EU will see the loss of a strong voice against protectionism and 'watered down' antitrust at EU level; Jim Brunsten and Duncan Robinson, 'Brexit set to give more protectionist EU states clout' *Financial Times* (26 June 2016) <www.ft.com/content/235ff2da-3bbe-11e6-9f2c-36b487ebd80a> accessed 25 June 2017.

⁶⁷ Merger control affords the opportunity to directly alter or maintain the structure of markets. Moreover, academics have noted that the ex ante nature of merger control renders it particularly advantageous when seeking to pre-empt harmful outcomes; D Daniel Sokol and William Blumenthal, 'Merger Control: Key International Norms and Differences' in Ariel Ezrachi, *Research Handbook on International Competition Law* (Edward Elgar 2012) 320.

⁶⁸ Although consumer welfare is not the only goal of EU competition law, Regulation 1/2003 has increased the attention that is now afforded to it in practice; KJ Cseres, 'The Impact of Regulation 1/2003 in the New Member States' (2010) 6(2) *Competition Law Review* 145, 160.

⁶⁹ Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C83/47.

⁷⁰ For the present discussion, the freedom of establishment (ibid art 49) and the free movement of capital (ibid art 63) are most relevant in the context of merger control.

III. A Role for Public Interest in the Commission's Assessment Process

1. The 'Smallest Nod' to Public Interest under the EUMR

The foundation of the Commission's strict competition-based approach to merger control is the substantive test it applies under the EUMR; namely, the 'significant impediment to effective competition' (SIEC) test contained under Article 2. Indeed, with a cursory glance of the EUMR, it is difficult to identify the slightest reference to anything other than the competition or economics-based measures that guide the Commission's approach.⁷¹ Scratch a little deeper, however, and one finds that public interest considerations are afforded scope via the EU's underlying Treaty objectives. Article 7 TFEU imposes a requirement on the EU to 'ensure consistency between its policies and activities, taking all of its objectives into account'. At face value, this would appear to confer a duty upon the Commission to consider the EU's wider policy goals when pursuing each of its individual policies, including competition policy. The essence of Article 7 is given effect to by the numerous cross-sectional or policy-linking clauses featured under the Treaty and other instruments of EU law, including those relating to, inter alia, employment,⁷² environmental protection,⁷³ national security⁷⁴ and industrial policy.⁷⁵ These policy-linking clauses act to elaborate on the premise of Article 7 by indicating the individual factors that should be borne in mind when examining any individual policy area. Read alongside Article 7, the policy-linking clauses may actually – in theory – place public interest concerns at the forefront of the Commission's decision-making process. Indeed, while cautious of reading too much into the comment by former Commissioner Almunia – that it was crucial to maintain EU merger control's immunity from non-competition considerations⁷⁶ – the very fact that Almunia felt the need to make this comment suggests he acknowledges that scope exists for public interest considerations to enter the assessment under the EUMR.

⁷¹ Jones and Sufrin suggest that any attempt to infer the relevance of public interest criteria under art 2 would require a teleological interpretation; Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (6th edn, OUP 2016) 1190.

⁷² TFEU, arts 9 and 147; Treaty on European Union [2010] OJ C83/13 (TEU), art 3(3).

⁷³ TFEU, arts 11 and 191.

⁷⁴ *ibid* art 346; EUMR, recital 19.

⁷⁵ eg Commission, 'Communication from the Commission to the European Parliament, the Council, the Council, the European Economic and Social Committee and Committee of the Regions: An integrated industrial policy for the globalisation era – putting competitiveness and sustainability at centre stage' COM (2010) 614 final.

⁷⁶ Almunia (n 61).

The proposed legal basis on which the Commission may consider public interest goals as part of its assessment is derived under Recital 23 EUMR,⁷⁷ which reads:

It is necessary to establish whether or not concentrations with a [Union] dimension are compatible with the common market in terms of the need to maintain and develop effective competition in the common market. *In doing so, the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in [Article 3 of the TEU].*⁷⁸

Lord Brittan, Commissioner for Competition at the time when the original EC Merger Regulation was enacted, referred to this provision as the ‘smallest nod’ that the Regulation directed at anything other than a competition-based test.⁷⁹ The EU’s fundamental objectives, as featured under Article 3 of the Treaty on European Union (TEU), are broadly drafted to include such aims as: the promotion of peace, the wellbeing and security of citizens, full employment and social progress, the protection and improvement of the environment and various other aims. On this basis, Recital 23 might be seen to offer the potential for public interest goals to be considered by the Commission during an assessment under the EUMR. Yet most commentators suggest the provision should be interpreted as having a restricted application;⁸⁰ imposing a non-binding duty on the Commission to reach a decision that is largely compatible with the fundamental objectives of the EU, rather than requiring the Commission to afford express consideration to each and every fundamental objective during its assessment process. The General Court in *Vittel* appeared to adopt a similar interpretation in the context of employment considerations within an EU merger assessment,⁸¹ concluding that Recital 23 imposed a requirement on the Commission to examine the merger’s impact on employment. But the Court’s judgment proceeded to suggest – without elaboration – that ‘certain cases’ would arise where it would be necessary, by virtue of Recital 23, for the

⁷⁷ Formerly, Recital 13 of the 1989 ECMR.

⁷⁸ *Emphasis added.*

⁷⁹ Lord Brittan, ‘The Early Days of EC Merger Control’ in European Commission, *EC Merger Control: Ten Years On* (International Bar Association 2000) 3. Other ‘small nods’ came in the form of Recital 4 and art 2(1)(b), see Damien Geradin and Ianis Girgenson, ‘Industrial Policy and European Merger Control - A Reassessment’ (2011) TILEC Discussion Paper No 2011-053; Damien Geradin and Ianis Girgenson, ‘Industrial Policy and European Merger Control - A Reassessment’ (2011) TILEC Discussion Paper No 2011-053 <<https://ssrn.com/abstract=1937586>> accessed 25 June 2017.

⁸⁰ See eg Mark Furse, *The Law of Merger Control in the EC and the UK* (Hart 2007) 119-120.

⁸¹ Case T-12/93 *Comité Central d’Entreprise de la Société Anonyme Vittel and others v Commission* [1995] ECR II-2147, para 38.

Commission to afford explicit consideration to the wider public interest issues at play in the merger.⁸²

This broader interpretation of Recital 23 by the General Court was foreseen by Portwood, who articulates the provision as conferring on the Commission both a ‘negative’ and a ‘positive’ duty.⁸³ The ‘negative’ duty requires the Commission to avoid infringing the EU’s fundamental objectives and, where competition is in conflict with a fundamental objective, Portwood suggests that the fundamental objective should take precedence. The ‘positive’ duty suggests that, even where there is no conflict, ‘the achievement of the fundamental objectives must always inform the application of the competition rules’.⁸⁴ Despite the Court’s judgment, it is understandable that the majority of scholars have deemed the ‘negative’ interpretation to be most credible in practice, mainly given that would it detract less from the Commission’s competition-based approach on the basis that it would only be invoked in exceptional circumstances.⁸⁵

2. A Rise and Fall of Public Interest Considerations in the Commission’s Practice?

Intriguingly, exceptional circumstances may very well have been present in two notable merger cases in the aviation sector, where the Commission’s assessments appear to encompass a consideration of how the decision will impact upon wider EU goals. In the *Air France/KLM* joint venture,⁸⁶ the Commission chose to clear the transaction – subject to remedies – despite the merger creating a 60% share in routes at two prominent European airports and, moreover, creating the largest airline in Europe.⁸⁷ This is one occasion where, in addition to considering the effect that the merger was likely to have on competition, DG Comp sought to align its policy approach with that of the then Directorate-General for Energy

⁸² For a good account of this judgment, see Jacques Bourgeois and Cormac O’Daly, ‘Hard Times: Employment Issues in EU Merger Control’ in Małgorzata Krasnodębska-Tomkiel, *Changes in Competition Policy over the Last Two Decades* (Office of Competition and Consumer Protection 2010).

⁸³ Timothy Portwood, *Mergers under EEC Competition Law* (The Athlone Press 1994) 92.

⁸⁴ *ibid.*

⁸⁵ The ‘negative’ interpretation would also correspond with Banks’ 1996 interview with a member of DG Comp, who revealed that ‘issues concerning [Recital 23] have not really arisen in practice’; David Banks, ‘Non-competition factors and their future relevance under European merger law’ (1997) 18(3) ECLR 182, 184.

⁸⁶ *Air France/KLM* (Case COMP/M.3280) [2004] OJ C60/5.

⁸⁷ Dawna L Rhoades, *Evolution of International Aviation* (3rd edn, Ashgate 2014) 156.

and Transport (DG Tren),⁸⁸ thereby taking account of the likely benefits that would ensue from the consolidation of European carriers.

In the *Boeing/McDonnell Douglas* case,⁸⁹ involving the mega-merger of two American multinational aerospace companies, the transaction was met with strong opposition from the Commission on both competition grounds and, allegedly, on the grounds that the merger would be contrary to the Article 3 EC objective of strengthening ‘economic and social cohesion’ within the EU.⁹⁰ Although the merger was ultimately afforded clearance in the EU, it has been suggested that the Commission’s initial opposition was a direct attempt to strengthen or preserve the European civil aviation industry, namely by considering the competitive effects that the merger would exert on Airbus.⁹¹

Both of these cases appear to corroborate the interpretation that Recital 23 imposes a ‘negative’ duty on the Commission to ensure its merger decisions are compatible with the goals of the EU. However, as both cases involved competition concerns, they shed little light on whether the Commission sees itself as being under an additional ‘positive’ duty to consider the fundamental objectives of the EU, even in mergers that do not raise competition concerns. Even so, it would be premature to conclude that the *Air France/KLM* and *Boeing/McDonnell Douglas* cases provide conclusive evidence that the ‘negative’ duty has taken hold of the Commission’s decision-making. Both cases predate the respective arrivals of Commissioner Almunia and Commissioner Vestager, arguably two of the most vehement champions of the strict competition-based approach to have ever overseen DG Comp. In a ‘mission letter’ sent to Vestager by President Juncker upon her appointment, he requested that DG Comp continue to develop ‘an economic as well as a legal approach to the assessment of competition issues’ and to continue taking steps towards ‘promoting a competition culture in the EU’.⁹² Indeed, from her public addresses, Vestager appears unyielding in her pursuit of a strict competition-based approach to all enforcement areas, and

⁸⁸ Peter Alexiadis and Daniel Kanter, ‘The European Commission Consents to the Consolidation of Europe’s Skies: The Air France/KLM Merger’ (2005) 14(1) Utilities Law Review 1.

⁸⁹ *Boeing/McDonnell Douglas* (Case No IV/M.877) Commission Decision 97/816/EC [1997] OJ L336/16.

⁹⁰ Amy Ann Karpel, ‘The European Commission’s decision on the Boeing-McDonnell Douglas merger and the need for greater US-EU cooperation in the merger field’ (1998) 47(4) American University Law Review 1029, 1060.

⁹¹ *ibid.*

⁹² Letter from Jean-Claude Juncker to Margrethe Vestager (1 November 2014) 4 <http://ec.europa.eu/commission/sites/cwt/files/commissioner_mission_letters/vestager_en.pdf> accessed 25 June 2017.

has stated that – for the sake of legal certainty – the Commission would not cave in to pressure to consider non-competition interests from Member States and other governments.⁹³

However, a change of approach may be taking place under the Vestager administration in the context of telecoms consolidation in the EU. During the course of their terms as Commissioner for Competition, both Almunia and Vestager routinely refused requests from Member States to reassign competence to national competition authorities under Article 9 EUMR,⁹⁴ citing the importance of dealing with telecoms mergers at an EU level. During Almunia’s tenure, it was not uncommon for the Commission to permit ‘four to three’ mergers in the telecoms sector,⁹⁵ owing to the fact that such mergers were conducive towards achieving the EU’s objective of creating a pan-EU telecoms market.⁹⁶ This is one stark illustration of Almunia’s willingness to allow wider EU public interest goals to influence the Commission’s assessment process, even where competition concerns arise. In contrast, Vestager appears to adopt an altogether more competition-based methodology, or so the Commission’s approach at the start of her term would indicate.

For example, Vestager expressed scepticism towards the *TeliaSonera/Telenor* transaction in 2015, a joint venture between the Danish operations of two Scandinavian telecoms companies,⁹⁷ which the parties abandoned after the Commission requested substantial remedies to address significant competition concerns.⁹⁸ Shortly after the parties announced their decision to withdraw from the merger, Vestager distanced herself from any requirement to consider the benefits that the merger could create for a pan-EU telecoms market, instead reemphasising the Commission’s task of ‘ensuring that markets are competitive’.⁹⁹ This

⁹³ Margrethe Vestager, ‘Independence is non-negotiable’ (Chatham House conference on ‘Politicization of Competition Policy: Myth or Reality?’, London, 18 June 2015) <http://ec.europa.eu/commission/2014-2019/vestager/announcements/independence-non-negotiable_en> accessed 25 June 2017.

⁹⁴ Among other things, art 9 allows national competition authorities to apply for jurisdiction to rule on mergers that are likely to have a particularly significant impact on competition in their domestic markets.

⁹⁵ Craig Pouncey, Kyriakos Fountoukakos and Julia Tew, ‘EU merger control in 2014/5: business as usual?’ in *Global Competition Review, The European Antitrust Review 2016* (GCR 2015) 32.

⁹⁶ For an outline of the Commission’s pan-EU telecoms market objective, see Commission, ‘Commission adopts regulatory proposals for a Connected Continent’ (European Commission Press Release, 11 September 2013) <http://europa.eu/rapid/press-release_MEMO-13-779_en.htm> accessed 25 June 2017.

⁹⁷ *TeliaSonera/Telenor/JV* (Case M.7419) [2015] OJ C119/1.

⁹⁸ Margrethe Vestager, ‘Competition in telecom markets’ (42nd Annual Conference on International Antitrust Law and Policy, New York, 2 October 2015) <http://ec.europa.eu/commission/2014-2019/vestager/announcements/competition-telecom-markets_en> accessed 25 June 2017.

⁹⁹ DG Competition, ‘Statement by Commissioner Vestager on announcement by Telenor and TeliaSonera to withdraw from proposed merger’ (European Commission Press Release, 11 September 2015) <http://europa.eu/rapid/press-release_STATEMENT-15-5627_en.htm> accessed 25 June 2017.

policy stance has prompted some to conclude that Vestager's stewardship will continue to prioritise competition above any further consolidation towards an integrated EU telecoms market.¹⁰⁰ A similar rhetoric can be observed in the *Hutchinson/Telefonica* case,¹⁰¹ where the Commission refused an Article 9 request from the UK Competition and Markets Authority (CMA), citing that its experience of dealing with mergers in the telecoms industry meant it was 'better placed' to deal with the transaction.¹⁰² Interestingly, the case also saw the then Chief Executive of the CMA, Alex Chisholm, submit a written plea to Vestager, asking the Commission to block the merger on competition grounds,¹⁰³ a decision that the Commission ultimately drew. If one were to analogise these cases in the telecoms sector with the approach that the Commission adopts in other markets, the inference is that the Commission under Vestager is moving even further towards a strict competition-based approach, and further away from an adherence to a 'negative' duty under Recital 23 to ensure alignment with wider Treaty goals.

IV. Concluding Remarks

With populist and nationalistic sentiment on the rise across the world, and with the rhetoric of many prominent world leaders becoming increasingly centred on protectionism and anti-globalisation, these are worrying times for the competition purist. It is also a time when the future of the Commission's adherence to a strict competition-based approach to merger control is as uncertain as any point since the Global Financial Crisis of 2007-08. But it is worth recalling the Commission's reaction to the crisis; how it resisted multiple calls from Member States to adopt a more lenient approach to competition policy,¹⁰⁴ as well as pleas to install protectionist measures in an effort to soften the blow of the crisis in the Eurozone.¹⁰⁵ This speaks volumes about Commissioner Almunia's commitment to maintaining a

¹⁰⁰ Daniel Thomas, 'EU favours competition over deals in telecoms sector' *Financial Times* (22 October 2015) <www.ft.com/content/ed4fc186-773a-11e5-933d-efcdc3c11c89#axzz4AWL20A2U> accessed 25 June 2017.

¹⁰¹ *Hutchinson 3G UK/Telefonica UK* (Case M.7612) [2016].

¹⁰² DG Competition, 'Mergers: Commission continues investigation of Hutchinson 3G / Telefónica UK merger without referral to UK' (European Commission Press Release, 4 December 2015) <http://europa.eu/rapid/press-release_IP-15-6251_en.htm> accessed 25 June 2017.

¹⁰³ Letter from Alex Chisholm to Margrethe Vestager (11 April 2016) <www.gov.uk/government/publications/proposed-hutchisontelefonica-merger-cma-letter-to-european-commission> accessed 25 June 2017.

¹⁰⁴ Almunia (n 61).

¹⁰⁵ Joaquín Almunia, 'The role of competition policy in times of crisis' (29th Annual AmCham EU Competition Policy Conference, Brussels, December 2012) <http://europa.eu/rapid/press-release_SPEECH-12-917_en.htm> accessed 25 June 2017.

competition-based approach at the heart of EU merger control. It also offers hope to the purist, who can take comfort from the similarly strict approach that the Commission has taken under Commissioner Vestager's guidance. It is impossible to say if the strict competition-based approach will finally succumb to this latest wave of protectionist sentiment and much may depend on how the populist movement in the EU develops over the coming months and years.

The pragmatic response that senior members of the Commission have afforded to President Macron's proposals for screening foreign investment at EU level is a sign that they too are wary of the need for a major initiative to address the imbalances created by a lack of investment reciprocity with countries such as China. With negotiations ongoing on a BIA with China, the EU lacks a formal mechanism for enforcing reciprocity. Introducing a new responsibility for the Commission to 'analyse investments from third countries in strategic sectors' could go some way towards addressing these imbalances, but it is likely that this responsibility will only be supported with investigatory powers, rather than a power for the Commission to intervene in order to block or impose conditions on a foreign takeover. Moreover, if DG Comp – like senior members of the Commission – is open-minded to the possibility of foreign investment review mechanisms being introduced at an EU level, it may more prepared to depart from its strict competition-based approach. Indeed, although DG Comp's recent merger cases appear to have been assessed purely on competition grounds, there is compelling evidence to suggest that Recital 23 EUMR permits the Commission to consider wider Treaty goals as part of its substantive assessment. If we interpret Recital 23 as imposing a negative duty, DG Comp would initially be able to conduct its default merger assessment on competition grounds, before proceeding to assess whether its decision is compatible with Treaty goals relating to eg industrial policy, employment or environmental protection.¹⁰⁶

¹⁰⁶ Incompatibility with any one of these Treaty goals could conceivably permit DG Comp to block or impose undertakings on a foreign takeover in a strategic sector; presuming, of course, that DG Comp is given the power to intervene.