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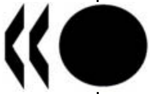

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development **13-Feb-2009**

English - Or. French

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/GF/WD(2009)20
Unclassified

Cancels & replaces the same document of 04 February 2009

Global Forum on Competition

COMPETITION POLICY, INDUSTRIAL POLICY AND NATIONAL CHAMPIONS

Contribution from France

-- Session I --

This contribution is submitted by France under session I of the Global Forum on Competition to be held on 19 and 20 February 2009.

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JT03259635

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English - Or. French

THE RELATIONSHIP BETWEEN COMPETITION POLICY, INDUSTRIAL POLICY AND NATIONAL CHAMPIONS

--France[1]--

1. Until about the early 1990s, industrial policy could still be defined as an instrument of economic policy wielded by government with the aim of promoting certain sectors of activity for reasons of national independence, technological autonomy or regional balance. De facto, for over 15 years now the French government's main priority on the industrial front has been to encourage innovation rather than any particular sector, even if that has meant promoting the most promising generic technologies, especially the knowledge-based society and ICT, health and biotechnology, materials and nanotechnologies.

2. Likewise, industrial policy can no longer be simply defined as all vertical policies as opposed to cross-cutting policies, such as competition policy. Innovation policies are broadly cross-cutting, as are policies relating to intellectual property, business-oriented higher education, entrepreneurship, the small business environment, design, the adaptation of the productive system to geopolitical changes in world demand, sustainable development and the green industries needed to reduce greenhouses gases, business tax breaks, etc.

3. Vertical policies are not therefore structural policies designed to influence industrial rationalisation and concentration and concerned merely to coordinate the different players within the same sector, as in the 1970s. To give an example, industries as "traditional" as steelmaking advance not by "coordinating the different players within the same sector" but through a combination of the gradual percolation of technologies from outside the industry, such as ICT, and the spread of new technologies in ferrous materials in other industries (special steels in car making, building, the railways, shipbuilding, etc.) in partnership with them.

4. Industrial policy objectives may sometimes involve forming or developing large groups supported by the state. These are national, or in some cases European champions, as we shall see in Section I. But when concentration in a given industry is relatively high, the question arises of the link between increased value resulting from size and concentration and the drawbacks resulting from less competition. This is compounded by the now constant issue of relevant markets on a global scale and the regional strategies of various major players, typically the US, the EU and China.

5. It is important not to give in to the temptation of economic nationalism, but there is no reason to be dogmatic either. When there is a limited number of operators, especially at European level, and the same applies in the United States or China, with laws that favour those operators, sometimes in a discriminatory fashion in relation to WTO rules (as is patently the case with TRIMs in China, for example), it is essential to have a genuine capacity for negotiation in order to reduce the main distortions of competition at the level where they occur. In very many cases, that now means at global level. It may involve concentrations on a continental scale or, in some cases involving a defence element in particular, on a smaller scale. The issue then is to ensure that the framing of industrial policy and competition policy is sufficiently neutral fashion for them to be implemented in a complementary way to ensure greater competitiveness and overall efficiency. This will be the subject of Section II.

[1] This paper is inspired by the competition workshops organised by DGCCRF (the French competition watchdog) on 20 April 2005 on the subject of national champions and competition law.

1. What is a champion?

1.1. How the idea of champions developed in France

6. France has a long-standing tradition of central support for industry that dates back at least as far as the royal manufactories, private enterprises under royal control granted privileges in return. An industrial policy is entirely consistent with the existence of private enterprise, as the industrial revolutions in Europe, North America and Asia have shown. The wave of nationalisations during the 1930s in reaction to the Great Depression and then in the post-war period (1945-60) can also be regarded as reflecting government's desire to create big national firms under the aegis and direct control of the state alongside a larger private sector. It was thus supply-side policies, not Keynesian demand-oriented policies, that endowed France with large-scale networks for post-war reconstruction.

7. The French tradition from the start of the 19th century until the early 1960s – and beyond, if the political narrative is to be believed – has consistently been to take the side of Davids against Goliaths, as in the retail sector. Laws were passed in the 19th century to defend small shopkeepers against "chain stores" and were stepped up under the Popular Front (1936-38) against "dollar stores".

8. The policy of "national champions" has had two main strands.

- The "de Gaulle" strand
  This is the strand of the great industrial and technological projects of the 1960s and 70, almost all in the hands of a public firm or group, which resulted in the creation of Concorde during the presidency of Charles de Gaulle, then of Airbus under Georges Pompidou and the telecommunications plan under Valéry Giscard d'Estaing.

- The "New Society" strand during the Pompidou presidency
  This strand involved State support for concentrations in the private sector, which either attracted benevolent attention (especially in the form of tax sweeteners) or sprang from a desire not to hinder firms' growth, even after the adoption of merger control legislation (Act 77-806 of 19 July 1977).

9. The Conseil d'État initially lent its weight to the idea that it can be in the general interest to concentrate state support on a single firm. In a judgment of 29 June 1951, *Syndicat de la raffinerie de soufre française* (Rec. p.377), it held that the administration can grant preferential terms to a single firm "when it deems it to be in the national interest to favour the expansion of a given firm".

10. In another even more significant case, involving two French companies competing with each other to sell equipment for sugar refineries on San Domingo, the French government deliberately thwarted the efforts of one firm and favoured the other so that it could be competitive against rival foreign firms: "The investigation shows that competition between the two French groups in the face of offers from third countries was likely to be detrimental to French interests; the measures about which the plaintiff complains were therefore justified by the general interest" (CE 13 July 1963, Aureille, RDP 1964 p.205).

11. The case law also meant, for example, that no obstacle was placed in the way of the development of the Elf brand, deliberately encouraged by the French government. A decree had been issued restricting the expansion of oil firms already operating in France, stating that no new petrol station could be created within 40 kilometres of another petrol station of the same brand. An appeal by Shell was dismissed on the grounds that a law dating back to 1928, which governed the importation of oil products and the requirement to constitute reserves, allowed the regulatory authority to regulate all aspects of such firms' business (CE 19 June 1964, *Sté des pétroles Shell Berre et autres*, Rec.334; RDP 1964 p. 1019 concl. Mme

Questiaux; D. 1964 J. p. 438 note A. de Laubadère). Commentators on the judgment were not slow to point out that this conclusion gave a certain comfort to the industrial policy of the day.

1.2. Current practices and rules relating to the protection of national interests

12. Some practices and rules favour the defence of national interests, but nowadays competition policy served by industrial policy has largely given way to industrial policy channelled by competition law. However, that does not mean that industrial policy and competition policy are in conflict: industry prospers through and draws strength from competition, and in Schumpeterian theory industrial policy as a whole includes competition issues. In fact, industrial policy may be said to be one of the main motive forces behind the very existence of competition (see e.g. the 2000 CAE report on industrial policies in Europe, Lorenzi, Cohen et al.).

1.2.1. The defence of national interests channelled by Community competition law

13. The control exercised by the European Community concerns compliance with the principles of non-discrimination and proportionality: it does not rule out all protection of certain legitimate national interests. In fact, some provisions of Community law allow for the defence of such interests.

14. In France, Article L. 153-1 I of the Monetary and Financial Code states that "Prior authorisation by the minister of the economy is required for any foreign investment in an activity in France which, even on an occasional basis, involves the exercise of public authority or falls within one of the following domains: a) Activities liable to be detrimental to public order, public safety or the interests of national defence; b) Research into and the production and marketing of weapons, munitions and explosives".

15. A decree of 31 December 2005, codified at Articles R.153-1 to R.153-5 and adopted on the basis of that article, gives a list of strategic sectors to be protected from foreign investment. The list includes seven sectors if the investment stems from an EU country (private security, communications interception equipment, data security, dual-use goods and technologies, etc.) and eleven sectors if the investment stems from a third country (cryptology, research into and production of weapons and explosives, studies and procurement for the defence ministry, etc.).

16. The minister of the economy can therefore seek certain guarantees from foreign investors wishing to acquire French companies in these so-called sensitive sectors, such as assurances about the long-term future of the activities and of industrial capacity.

17. Publication of this decree (no. 2005-1739) on 30 December 2005 led the European Commission to question whether it was consistent with the principles of the free movement of capital and the freedom of establishment It therefore sent France a request for information on 20 January 2006, a letter of formal notice on 4 April 2006 and a reasoned opinion on 12 October 2006 to which the French government responded on 11 December 2006, indicating that the review could result in the investment not being blocked by asking the investor for "assurances limited solely to the establishment concerned". No case has been brought before the European Court of Justice on the grounds of the decree. However, the issue has still not been formally settled.

18. The French decree is not the only one of its kind, since other economic powers have similar rules:

- In Germany, certain types of foreign investment are restricted under the Foreign Trade Act of 6 May 2004 and its implementing regulations of July 2004 and September 2006. On 20 August 2008, the federal government adopted a bill extending these restrictions, under the pressure of concerns relating to the possible actions of certain sovereign wealth funds (those of China and oil

states in particular) in a context of falling stock prices and competitive asymmetry arising from those countries' business law.

- The United States have the Exon Florio Act, passed in 1988, amended by the Foreign Investment and National Security Act of 2007. An implementing regulation under the Defense Production Act of 1950 and the Foreign Investment and National Security Act was issued on 14 November 2008. Under the Webb-Pomerene Act of 1918, supplemented by the Export Trading Company Act of 1982, associations of American firms engaged in exporting[2] are exempted from US antitrust laws, especially the ban on cartels, provided they do not hinder the exports of their American competitors and do not lead to price changes or practices that restrict competition on the American market. The purpose of the legislation is therefore to favour American exporters.
- Japan has a 1949 Foreign Trade Act, amended in 1992 and 1998. A ministerial order of 7 September 2007 supplements the legislation and the list of sectors for which prior authorisation is required.
- China, above all, has 67 "strategic" sectors in which foreign investment is restricted (in particular to minority shareholdings) and 34 in which it is prohibited. It tightened up the rules on 1 August 2008 in a discretionary manner.

1.2.2. Community rules allowing the defence of certain legitimate interests under European Commission oversight

a) Article 21 of the Merger Control Regulation

19. The enforcement of European rules is sometimes accused of stymying any political strategy in the industrial sphere because it entails exercising strict control over the granting of state aid or ensuring that mergers, even when they enable the formation of a "national champion", do not lead to the creation of a dominant position. In fact, the contradiction is not as frequent as all that and the number of cases where the Commission prohibits a merger is still very small.

20. Under Article 21 of Regulation no. 139/2004 of 20 January 2004 on the control of concentrations between undertakings, the Commission has sole jurisdiction to take decisions relating to mergers with a Community dimension.

21. However, Article 21.4 states:

> "Member States may take appropriate measures to protect legitimate interests other than those taken into consideration by this Regulation and compatible with the general principles and other provisions of Community law.
>
> **Public security**, **plurality of the media** and **prudential rules** shall be regarded as legitimate interests within the meaning of the first subparagraph.
>
> Any other public interest must be communicated to the Commission by the Member State concerned and shall be recognised by the Commission after an assessment of its compatibility with the general principles and other provisions of Community law before the measures referred to above may be taken. The Commission shall inform the Member State concerned of its decision within 25 working days of that communication."[3]

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[2] The Export Trading Company Act of 1982 relaxed the provisions of the Webb-Pomerene Act: exemption is no longer available only to associations exclusively engaged in exporting; however, the exemption applies only to exporting. In addition, exporting activities include not only goods but also services and technology transfers.

[3] OJEC L 24 of 29 January 2004, p. 1–22.

This provision was also contained in the previous regulation, no. 4064/89 of 21 December 1989.

22. The notion of public security referred to in Article 21 is relatively broad, insofar as it includes not only national defence and internal security but also the secure sourcing of a product or service of vital importance for a country's existence (CJEC, 10 July 1984, *Campus Oil Limited et al. v. Minister for Industry and Energy et al.*:

> "Petroleum products, because of their exceptional importance as an energy source in the modern economy, are of fundamental importance for a country's existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them. An interruption of supplies of petroleum products, with the resultant dangers for the country's existence, could therefore seriously affect the public security that Article 36 (new Article 30) of the Treaty allows States to protect.")

23. Nonetheless, "public security may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society" (European Commission, *E.ON v Endesa*, Case M. 4197, §61).

24. If the interests of public security or plurality of the media or prudential rules are invoked, the Commission checks not only that there is a threat to a legitimate public interest but also that the country in question complies with the principles of proportionality and non-discrimination and chooses the objectively least restrictive measure to achieve the desired aim. If that is not the case, it may refer the matter to the European Court of Justice on the grounds of Article 226 of the EC Treaty, having first issued preliminary conclusions.

25. The Commission takes a strict line on disproportionate government measures designed to prevent cross-border mergers, especially as a European industrial policy is gaining ground, with the idea of "European champions".

b) Article 87 of the EC Treaty and State aid

26. Community policy on State aid is also designed to prevent distortions of competition in the single market. Governments may be responsible for restricting competition when they grant State aid to economic operators.

27. Under Article 87 of the EC Treaty "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market".

28. Any advantage granted by a state or using state resources is deemed to constitute state aid when:

- it confers an economic advantage on the beneficiary;
- it is granted selectively to certain undertakings or for the production of certain goods;
- it could distort competition;
- it affects trade between Member States.

29. Only aid notified to the European Commission and expressly authorised by the European Union can be exempt from this ban.

30. State aid is governed by three Community regulations[4] and the Commission assesses the measures notified to it according to guidelines which, while they have no regulatory force, inform Member States of the Commission's assessment criteria for each category of aid.

c) From national to European champions?

31. In practice, over-strict enforcement of Community competition rules may prevent the emergence of "European champions" while indirectly favouring the creation of non-European rivals (cf. withdrawal of the Pechiney/Alcan merger on account of the assurances demanded by the Commission, which was followed by the Alcan/Pechiney merger to the detriment of a major European firm).

32. However, the European Commission tends to understand the importance of not setting industrial strategy and common market rules against each other in the context of a globalised economy.

33. At a competition policy meeting between Japan and the European Union at Tokyo on 7 March 2006, Competition Commissioner Neelie Kroes declared: "National champions are outdated […] The borders are gone. It is all about European champions, and global champions."

34. In another speech the same year, she said that cross-border mergers within the EU were " more likely to create strong European groups able to win on global markets and at the same time provide better choice and value to European industrial and domestic consumers" (Challenges to the Integration of the European Market: Protectionism and Effective Competition Policy, 12 June 2006).

35. Viviane Reding, Commissioner for Information Society and Media said at the Rencontres du Cercle des Européens-L'Express on 7 March 2008 that "making Europe successful is a matter of building not national champions but European champions, which alone offer the capacity for development to cope with the challenges of a global economy".

36. This line of reasoning is not far removed from that of national champions, insofar as it sees itself as a defence against global competition. In her speech, talking about the need for European champions, Viviane Reding went on to say that the common market is both "a bulwark against globalisation and a driving force so that European firms can assert themselves as world leaders".

37. The logic of national or European champions is not in contradiction with competition policy. Both are instruments of public policy that can be made to work in concert to promote greater competitiveness. The issue today is how to link them better.

2. The complementary nature of industrial and competition policy

2.1. The importance of industry

38. Industry is the main locus of technological innovation and productivity gains. It can also play a strategic role in terms of independence and competitiveness.

[4] Council Regulation no. 659/1999 supplemented by Commission Regulation no. 84/2004,
Council Regulation no. 994/98 authorising category exemptions and Commission Regulation no. 800/2008 on category exemptions,
Commission Regulation no. 1998/2006 on de minimis aid.

2.1.1. The French example

39. The Beffa report, *For a New Industrial Policy*, summarises the essential role industry plays in economic growth.

> "Even if the share of services in the economy is growing, a solid manufacturing base is necessary for a virtuous trade balance and for growth. There is still considerable demand for manufactured goods in developed countries because it ensures their core standard of living. If the goods are not produced domestically, they have to be bought from other countries. What services can be exported to pay for manufactured goods bought abroad? In one scenario envisaged by some commentators, France could become a predominantly agricultural and tourist economy, buying its goods from other countries that specialise in manufacturing. This shift in specialisation towards low value-added sectors would make France poorer and weaken its position in international trade.
>
> Moreover, the opposition between services and manufacturing is becoming increasingly meaningless. Growth in services is driven mainly by business services, which are growing much faster than private services (INSEE Première no. 972, June 2004). Growth in manufacturing and growth in services should therefore be regarded as complementary and not as substitutable.
>
> More generally, manufacturing is still one of the main drivers of the economy in terms of added value and jobs. It exerts a powerful stimulus on the entire economy, especially through intermediate consumption: manufacturing consumes €0.7 of intermediate products for every €1 of output, compared with €0.4 for services (DATAR, 2004). So the importance of manufacturing should be assessed in terms that correspond to the extent of its true economic impact. Manufacturing represented 41% of French GDP and 51% of market-sector jobs in 1998. Thus, the fall in direct manufacturing employment is meaningful only if account is also taken of the almost doubling of temporary employment in manufacturing in the 1990s and the extensive outsourcing of a certain number of functions to the service sector. In addition, manufacturing has a highly structural effect on the spread of technological innovations to the economy as a whole, and as a result on its overall productivity."[5]

2.1.2. At European level

40. Industry is a decisive factor in the European economy. Manufacturing accounts for 20% of total EU output, 75% of exports and over 80% of private-sector spending on research and development (R&D).

41. Productivity growth is almost twice as high in manufacturing as in the rest of the economy. Employing nearly 50 million people in the European Union, industry also acts as a driving force through its link with services, which are widely used by the manufacturing sector. Growth in services is also stimulated by industrial innovation.[6]

42. Following the European Council meeting in Lisbon in March 2000, which set itself the goal of making the European Union "the most competitive and dynamic knowledge-based economy in the world" by 2010, the European Commission laid the foundations for a Community industrial policy because of the manufacturing industry's importance in the European economy. The policy guidelines are contained in a set

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[5] Beffa report to the President of the Republic, *For a New Industrial Policy*, La Documentation Française, 2005.

[6] JF Jamet, *The European Union's Industrial Policy*, Fondation Robert Schuman, European Issues no. 15, 16 January 2006.

of texts that include the Innovation and Competitiveness Framework Programme[7], the Communication on Manufacturing,[8] the Communication on Implementing the Community Lisbon Programme on Research and Innovation [9] and the Seventh Research Framework Programme.[10]

2.2. The economic analysis of industrial champions: industrial policy as a factor of competitiveness

43. The Harvard school and the Chicago school are the two dominant schools of thought in industrial economy. According to the Harvard school, the structure of the market determines how firms behave, which in turn determines their performance.

44. The Chicago school turns it the other way round: firms' performance determines how they behave, which in turn determines the structure of the market. Different chains of causality naturally give rise to radically different terms of public intervention.

45. According to the Chicago school, once it is possible to enter and invest in a market where there are no barriers to entry, competition authorities should not seek to regulate the market. Because it is firms' performance that structures the market, there is no point trying to influence the structure.

46. Conversely, from the Harvard school standpoint, influencing the structure of the market may be the optimum course of action. Industrial policy, and a policy of national champions in particular, may be relevant if the idea is accepted that minimum size on certain markets leads to a certain degree of efficiency in terms of production costs and innovation. The aim in that case is to favour better performance through two main factors, namely productivity and innovation. However, this only pertains at a certain level of competition.

2.2.1. Productivity

47. The first argument in favour of industrial policy is that globalisation increases market size. It thus encourages the formation of large firms in order to benefit from greater economies of scale.

48. However, there is little empirical proof of a positive correlation between concentration and higher productivity. In contrast, in a paper published in 1996 Nickell studied the link between various indicators of competition and factor productivity growth and concluded that greater competition led to an acceleration of overall factor productivity, which slowed with higher levels of concentration and higher profits.

2.2.2. Innovation

49. Innovation is a driver of growth. Defenders of industrial policy argue that a national champion can in some cases be used to stimulate innovation.

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[7] Proposal for a decision of the European Parliament and of the Council establishing a Competitiveness and Innovation Framework Programme (2007-2013), COM (2005) 121.

[8] Communication from the Commission: Implementing the Community Lisbon Programme: A policy framework to strengthen EU manufacturing - towards a more integrated approach for industrial policy, COM (2005) 474.

[9] Communication from the Commission: More Research and Innovation - Investing for Growth and Employment: A Common Approach, COM (2005) 488.

[10] Proposal for a decision of the European Parliament and of the Council concerning the seventh framework programme of the European Community for research, technological development and demonstration activities (2007-2013), COM (2005) 119.

50. The issue dates back to Schumpeter. According to the Harvard school paradigm, a large firm will innovate more because it can, because it has the resources to take risks.

51. The Beffa report[11] recommends a return to national programmes, each one being coordinated by a leader or national champion. Behind this defence of innovation lies the idea that research and development by large firms trickles down to the rest of the economy, as has been the case in the telecoms sector in France.

52. Schumpeter argues that R&D is an activity in which there are returns of scale. In addition, innovation will be more easily spread in a large firm. Furthermore, less competition on the product market will favour the creation of rents, which will in turn encourage other firms to enter the market by innovating. Consequently, the leading firm will be encouraged to innovate more in order to preserve its position.

53. This argument can be backed up by a "race to innovate" argument. Where there is a race to innovate between a monopoly and a competitor, the former will keep its monopoly power if it is the first to innovate. If the potential rival is the first to innovate, the market becomes a duopoly. The monopoly therefore has more to lose by not innovating than its rival.

54. Another argument is based on risk diversification. R&D is a risky business. A large firm with a range of activities will spread the risk of failure among all its activities. The state can also play this risk-spreading role in the framework of major programmes.

55. The last argument concerns funding. Since financial markets are imperfect, firms need to finance their R&D spending partly from their own resources. Large firms, which have more such resources, are therefore more capable of innovating than smaller firms.

56. Conversely, there is a replacement effect theory according to which innovation is a process of "creative destruction". Each innovation will create a negative externality for the owner of the destroyed innovation. A monopoly that innovates is therefore obliged to destroy its previous innovation. Consequently, it will be less inclined to innovate unless the competitive nature of the market encourages it to do so.

57. However, the creative destruction process will favour skilled employment generated by the innovation.

58. In conclusion, the existence of a national champion can enhance both the incentive to innovate and productivity provided that a certain degree of competition exists on the market. Ultimately, however, everything depends on the size of the market.

59. Industrial policy and competition policy thus go hand in hand in making the economy more efficient and more competitive.

2.3. The complementary nature of industrial and competition policy

60. For the supporters of economic nationalism, industrial policy makes up for the adverse effects of a competition policy that favours opening up frontiers and capital ownership. In particular, they start from the assumption that the nationality of a firm's owners and the place where it has its headquarters influence

[11] Op. cit.

the location of its activities and, above all, the protection of national jobs. Economic nationalists see proof of this theory in the few examples that bear it out.[12]

61. Yet there is no proof that changes in the ownership of firms systematically affect the location of their activities and no proof that, even if such effects exist, they are due to the fact that the new owner is foreign. It is true that foreign firms are "less susceptible to pressure from unions, the media, politicians and even governments",[13] but any job cuts they may make could simply be rational in economic terms. In a global economy, the strategic choice of where to locate production depends to a great extent on the availability of skilled labour. The European Union must face the challenge of growing competition, in particular from emerging countries. Current trends carry a risk of disindustrialisation in Europe, reflected in the relocation of a significant number of production centres to third countries.

62. Industrial policy and competition policy are not mutually exclusive: on the contrary, insofar as their goal is greater competitiveness and a healthy economic situation, they are complementary in the long term. Action in the name of industrial policy can be lastingly meaningful and effective only if the firms that benefit are exposed to genuine competition in a context of fair and sound international trade.

63. Moreover, competition policy is not in contradiction with the industrial policies implemented at national and/or European level. It does not prohibit the formation of industrial champions. It could merely entail the prohibition of mergers that irremediably distort competition.

64. Mario Monti, then European Competition Commissioner, said at a hearing of the Senate Economic Affairs Committee on 8 June 2004 that European competition rules, far from hindering the emergence of industrial champions, in fact encouraged them, partly because of the size of the European market and partly because of the one-stop shop and the uniformity of Community competition rules. He pointed out that very few mergers were ever rejected, allowing for the formation of large groups that were competitive on a global scale.

65. The report *A European Strategy for Globalisation* of the "Europe and Globalisation" mission chaired by Laurent Cohen-Tanugi, published in April 2008 for the French presidency of the Council of the European Union, said that the Commission "had prevented only about thirty European mergers and acquisitions in the last twenty years (out of over 3,000 notified transactions), allowing for […] the creation of a large number of European and national champions".[14]

66. Competition can therefore go hand in hand with an effective industrial policy. Greater competition in the telecoms sector, for example, has led to the emergence of European champions like Ericsson and Siemens. "Competition policy should not be seen as serving solely to defend competition but rather as a means of achieving economic efficiency."[15]

67. Recognising the goals of industrial policy does not necessarily imply lowering the sights and the resources of competition policy, contrary to the ideas of certain economists who assert that the notion of industrial champion is in complete contradiction with the atomicity criterion of the pure and perfect

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[12] Closure of plants in France when Alcan acquired Pechiney.

[13] Augustin Landier and David Thesmar, "*Quel patriotisme économique au XXIe siècle?*" in Problèmes Economiques, La Documentation Française, 5 July 2006 (no. 2.903), p.29.

[14] *A European Strategy for Globalisation,* L. Cohen-Tanugi, p. 152. The report can be consulted (in French) at www.euromonde2015.eu

[15] D. Encaoua and R. Guesnerie, *Politiques de concurrence*, Report by the Conseil d'Analyse Economique, 2006 (no. 60), La Documentation Française, p.109.

competition model. Every economy needs operators to compete with other economies, and operators need to achieve a size that enables them to survive, grow and innovate on increasingly extended geographical markets.

68. The Commission takes these things into account when it assesses the impact of mergers, acquisitions and abuses of dominant position. In doing so, it uses a definition of relevant markets that "includes their geographical scope and increased globalisation".[16]

69. In their report on competition policy,[17] David Encaoua and Roger Guesnerie say not only that "competition is only one factor of innovation and technological progress", but also "our conviction is clear: competition is a necessary but insufficient condition for the European Union to return to the path of growth and competitiveness".

70. In conclusion, competition policy and industrial policy share the same objective of economic efficiency and competitiveness and must be framed and implemented in a complementary and coordinated manner.

71. On this point, the competition policy report mentioned above[18] recommends closer cooperation between DG Competition, DG Enterprise and Industry and DG Research, especially for the assessment of mergers that involve significant industrial competitiveness issues.

72. Under Article L. 430-7-1 II of France's Commercial Code these issues can be taken into account since the minister of the economy can include industrial policy criteria in merger decisions. In contrast, the Competition Authority's assessment is based strictly on competition criteria.

2.4. International competition issues in Community policies

73. Competition policy and industrial policy theoretically share the twin goal of making firms more efficient and better preparing them for domestic and international competition. The legal foundations for Community competition policy are laid at Articles 81 to 87 of the EC Treaty. The legal basis for Community industrial policy is provided by Article 157, which states that all policies should contribute to the objectives of industrial policy but also that "this title shall not provide a basis for the introduction […] of any measure which could lead to a distortion of competition". In practice, as we have seen, these two approaches can give rise to diverging or even conflicting interpretations.

2.4.1. Public action to favour the emergence of innovative firms

74. Encouraging firms to increase their spending on R&D and innovation must not of course disturb the normal operation of the market and of competition. Public intervention is designed to remedy the shortcomings of the market in compliance with Community rules on state aid. Some R&D and innovation projects do not come to fruition for various reasons:

- innovative small businesses do not have sufficient resources of their own and either cannot raise money from banks or can do so only on harsh terms;

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[16] L. Cohen-Tanugi, op. cit., p.152.

[17] Op. cit.

[18] D. Encaoua and R. Guesnerie, *Politiques de concurrence*, Report by the Conseil d'Analyse Economique, 2006 (no. 60), La Documentation Française.

- firms are naturally disinclined to cooperate with each other even when a subject of research cannot be envisaged other than in partnership;
- the costs and risks are too great, even though substantial benefits for society could result.

75. In such situations, governments have over time developed complementary approaches to meet operators' varying needs. Such actions have been authorised by the European Commission after ensuring that there are good reasons for them and they do not have adverse effects on intracommunity competition

76. Community control of aid for R&D and innovation is designed to forestall the adverse effects of aid on competing firms in Member States. But this line of reasoning, though legitimate with regard to the objectives of strengthening the common market, is not always satisfactory. The restrictive definition of research activities eligible for aid, the setting of maximum intensities, the institution of a long and cumbersome review procedure for the biggest projects at Community level, after a lengthy national procedure, are restrictions that exist only within the European Union. **Yet competition in research is global.**

77. It now seems essential to ask questions about the impact of these restrictions, of this control of R&D and innovation aid on European firms' competitiveness in a context of open and global competition.

78. The aim is not to dispense with all Community control of aid, which is one of the foundations on which the common market is built, but to reassert that the basis for controlling aid is the construction and strengthening of the common market in a changing international environment. It is an aim that concurs with the approach endorsed by the Commission itself in its action plan 2005-2009 adopted on 15 July 2005: "State aid policy […] must contribute by itself and by reinforcing other policies to making Europe a more attractive place to invest and work, building up knowledge and innovation for growth and creating more and better jobs".

79. Reinforcing policies for supporting R&D and innovation involves taking more account of international competition in internal Community policies. The emergence of European champions also involves developing high-risk projects that the market sometimes seems unwilling to finance itself.

80. A consideration of the strategic importance of projects and not merely of market shortcomings and the effect on competition should become an element of competition policy if Europe wants to see more European champions emerge. It is already the rule in the United States and Japan.

2.5. Introducing industrial policy criteria into the application of competition law: a recent French example

81. Following the recent reform of the French merger control system, the Competition Authority cannot take industrial policy considerations into account when assessing proposed mergers, though it may where appropriate include gains in economic efficiency that make up for restrictions of competition (see Section 2.3 above). However, the minister of the economy can take account of industrial policy considerations more broadly after the procedure is complete.

82. The Economic Modernisation Act (Act 2008-776 of 4 August 2008) reformed the competition aspect of market regulation in France, especially the rules on merger control. The Competition Authority will examine merger requests from a competition standpoint.

83. The minister of the economy retains a right of pre-emption (*évocation*) at the end of phase 2. Article L. 430-7-1 II of the Commercial Code states that "the minister of the economy may pre-empt the

matter and rule on the transaction at issue **on general interest grounds other than the maintenance of competition** and, where appropriate, making up for the anti-competitive effects of the transaction."

84. It goes on to say that "**the general interest grounds other than maintenance of competition** that may cause the minister of the economy to pre-empt the matter include in particular industrial development, the competitiveness of the undertakings concerned with regard to international competition and the creation or preservation of jobs".

85. Granting this right of pre-emption is justified by the need to allow for an overall assessment of mergers deemed to be strategic, where the authorities consider it essential that they should be allowed to continue to reconcile the requirements of regulating competition with those of other public policies. A minister who pre-empts a decision taken by the Competition Authority must take a reasoned decision which may be conditional on the fulfilment of undertakings (Article L. 430-7-1 II, paragraph 3).

86. The minister has considerable scope, since he or she may not only ignore a refusal but also veto a transaction authorised by the Competition Authority.

87. Similar procedures exist in other European countries:

- under Article 42 of Germany's antitrust law, the federal government may authorise a merger prohibited by the competition authority (though not vice versa). Since the system was introduced in 1973, the German government has authorised a merger in 11 of the 170 cases where the proposed transaction was refused by the Federal Cartel Office;
- in the United Kingdom, under the Enterprise Act which came into force in June 2003, the government can ask the Competition Commission to conduct a detailed examination of mergers where a specific public interest is at stake (plurality of the media, water supply, defence procurement). The government can prohibit a merger authorised by the Competition Commission.

88. The procedure means that specific sectoral factors can be taken into account when competition policies are analysed, a measure that the competition policy report mentioned earlier[19] regards as necessary.

89. By promoting greater competitiveness and greater overall efficiency, competition policy and industrial policy are thus entirely complementary.

[19] CAE report, op. cit.