COMPETITION COMMITTEE



Competition Policy, Industrial Policy and National Champions

Series Roundtables on Competition Policy

N° 96

OECD

2009

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

19-Oct-2009

English, French

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/GF(2009)9
Unclassified

Global Forum on Competition

ROUNDTABLE ON COMPETITION POLICY, INDUSTRIAL POLICY AND NATIONAL CHAMPIONS

JT03272221

Document complet disponible sur OLIS dans son format d'origine
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English, French

FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Competition Policy, Industrial Policy and National Champions held by the Global Forum on Competition in February 2009.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur la Politique de la concurrence, politique industrielle et champions nationaux qui s'est tenue en février 2009 dans le cadre du Forum mondial sur la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

By the Secretariat

1. Considering the discussion at the roundtable of the 2009 Global Forum on Competition, the country submissions, and the background paper, a number of key points emerge:

Industrial policy can involve more than simply providing state aid or subsidies, and does not necessarily encompass a national champions policy.

2. A wide variety of different instruments may be used for the purpose of implementing industrial policy, including government procurements, exemptions from antitrust laws, regulatory barriers to competition, access to credit, arranged mergers and acquisitions, control of acquisitions of national companies by foreign investors, easy access to commodity resources and the products of monopolist companies. National champions may be created or protected in a number of ways, such as by the granting of state aid, the encouragement of domestic mergers, or the opposition to a takeover of a domestic company by a foreign company.

3. Countries may adopt industrial policies for many different reasons, such as to correct market failures, to foster economic development or to incorporate wider strategic considerations. Where these endeavours are consistent with enhancing long-term consumer welfare and efficiency, there will be rarely be a conflict with competition policy.

4. Industrial policy is not inevitably tied to a national champions policy. Indeed, by conceptualising industrial policy as a policy that aims to improve the competitiveness of domestic industry, to intensify the innovative drive, and to make industry more knowledge intensive, one can distinguish it from a national champions policy and ensure that it pursues the same objective as competition policy, namely the maximisation of consumer welfare.

Industrial policy is frequently rationalised as method of correcting market failures. That said, in some countries factors other than the correction of market failures may be the driving force behind industrial policy.

5. For a number of jurisdictions, industrial policy is motivated by a desire to correct market failures. In such a case, one acknowledges that profitable private production may not be achievable and that government intervention can address this problem in a manner that is welfare maximising. Such a policy does not allow for the granting of funds if such funds could be achieved from the free market. Some jurisdictions, however, accept a wider function for industrial policy. An important feature of industrial policy in Uzbekistan, for example, is to foster exports, decrease the dependence of imports, and create employment. Other jurisdictions do not have an industrial policy as such and articulate one of free competition and vigorous antitrust enforcement.

6. The state of development of a given country may be relevant to its industrial policy. It is argued, for example, that for a country producing agricultural commodities to become an industrial or technologically advanced country, government intervention (in the form of state aid, protection or government procurement, for example) would be necessary.

Where and when industrial policy co-exists with competition policy, industrial policy should be respectful of sound competition principles.

7. There is not necessarily always a conflict between a properly defined industrial policy and competition policy. There are at least three principles that help ensure that competition policy and industrial policy are more complementary than contradictory. The first is that industrial policy support should be as far from the market as possible. The provision of generic capabilities can fit comfortably with competition policy and be completely non-distortionary; the closer one gets to providing support to selected sectors and firms, however, the more difficult it is for industrial policy and competition policy to co-exist. The second principle is that support for industrial policy and competition policy should not translate into a competition policy that is perceived to be opposed *a priori* to large firms. A third principle expressed is that, without compromising their own approach, competition policy enforcers can espouse prioritisation principles or apply prosecutorial discretion in a way which supports the industrial and social policy objectives of government. For example, the South African Competition Commission has articulated a strategy which prioritises the prosecution of bid rigging in large public investment tenders because public investment is the key driver of South Africa's economic growth and development strategy. Here there is clearly no conflict between industrial policy and competition policy.

The importance both of the free market and of the protective role of the competition authorities as regards the free market should prevail, even in times of severe economic crisis. In fact, in turbulent times, competition itself can play a considerable role in helping to steady 'economic nerves'; competition law and policy, as instruments that protect competition, are therefore of significant value.

8. It is axiomatic that political concerns are capable of influencing proposed solutions to a given economic crisis. Consequently, such solutions may be formulated in a manner that does not respect the pro-competitive principles of the free market. At all times though, policy makers should recognise the fact that robust competition policy is essential in order to prevent long-run harm to the global economy in the period following the stabilisation of economic conditions.

9. In dealing with the current crisis one must ensure that competition law and policy continue to apply to, and to be respected in, all sectors of the economy, including the financial sector. While it is true that state interventions may be both necessary and appropriate, any policy instrument used should be neutral and be applied across the board. Importantly, a well-designed competition policy will display sufficient flexibility to allow for the achievement of other policy objectives.

10. It should also be remembered in this context that competition policy is capable of addressing many of the concerns that are usually offered in support of industrial policy:

- First, strong competition ensures that inefficient firms leave the market and that production is rationalised without requiring government-sponsored mergers. In contrast, in times of distress the creation of national champions with market power is often at odds with merger control policy; alternatively, governments sometimes attempt to bend the merger control process to further industrial policy goals or to prevent the takeover of a national champion by a foreign firm. Recent cases have displayed this tension between industrial and competition policy, as several governments, especially in Europe, have expressed concerns over cross-border mergers in politically sensitive sectors such as banking and energy, and attempted to create or protect their national champions. It can be argued that their economies would have been better served over the long term by a competition policy approach, rather than one favouring industrial policy goals. In particular, research and practical experience has shown that the main assumptions which underpin the rationale for creating national champions - through merger or other methods - are actually weak, or evidence supporting them is mixed at best (see also para 17 below).

- Second, competition can restrain exploitative pricing by foreign firms that possess market power and can facilitate entry into sectors dominated by a few foreign firms. The struggle against exploitative pricing, particularly in a crisis, involves an obvious choice that governments have to make between competition policy and industrial policy. Competition policy is probably a superior answer because it is far less costly. Research has shown for example that the annual total cost of implementing American antitrust policy was less than the annual deadweight loss induced by just the vitamins cartel, and that only in the United States. Also, implementing competition policy does not give rise to all the difficulties and risks associated with promoting national champions, including productive inefficiency (due to the wasteful duplication of fixed costs for example).

- Finally, intense competition ensures that companies are more efficient: it provides managerial incentives to reduce waste and increases incentives to innovate. An important point for policy purposes is that competition policy generates benefits domestically and internationally. When a competition authority prohibits a merger or an exclusionary practice and thus protects competition, this benefits all customers in the affected market, including abroad. In the case of cartels, there is less cross-country complementarity because firms may decide to collude only in countries with a weak competition policy. However, even in the case of cartels, there are some cross-country positive externalities because companies can more easily cartelise an industry when they interact in many countries, since multi-market contact facilitates collusion. These considerations imply that the case for competition policy is even stronger than would appear on the basis of a country-by-country analysis.

The recent financial crisis poses a serious risk to the progress that has been made in international coordination and convergence of competition rules and practices. A number of negative consequences may yet be registered which will bring to the fore the debate on competition policy and industry policy. This is not to say however that competition policy has been, or will be, rendered irrelevant.

11. Potential negative consequences due to the financial crisis include an increased mistrust toward market-based solutions, an increased acceptance of public interference in free markets, a cooling-off in the international convergence of competition policy, the politicisation of competition policy, and an increased desire to promote national champions.

12. If market intervention (in the form of, e.g., rescue funds) is deemed to be necessary due to the current financial crisis, it should be limited to those firms that are essential to the functioning of the system. If aid is not limited in this manner, high costs to the taxpayer and a serious distortion of competition may well result. It is imperative that any restriction of competition during this critical period be thought out carefully, be temporary and be monitored.

13. When the current (temporary) crisis abates, efforts to encourage globalisation will likely continue as steadily as before. The following question in relation to industrial policy therefore needs to be considered at present: is the promotion of national champions - a policy not without its drawbacks, particularly for competition, as noted below - an appropriate long-term solution to the short-run crisis?

14. The current economic crisis attracts those who advocate a leading role for the state in the attainment of economic objectives. In recognition of this fact, competition authorities should use their advocacy tools and public profile to underline the dangers of undermining market processes and of employing a distorted interpretation of the concept of market failure.

15. Notwithstanding the potential negative consequences identified, it is not accurate to claim that one is facing the onset of a ‘competition night’, as a number of recent developments have in fact been

positive. For example, France has introduced a new, and single, competition authority; and recently in the United States there has been a far-reaching debate about the use of a more active competition enforcement policy.

One of the main challenges currently facing those governments adopting emergency measures to deal with the impact of the crisis on the real economy relates to the issue of national champions. In dealing with the current crisis one should never lose sight of the underlying principles of sound competition, and in particular one should be conscious of the major drawbacks in this context of an industrial policy that encourages the creation and maintenance of national champions. Empirical evidence suggests that the case in favour of national champions is weak.

16. A number of clear disadvantages are, however, recognised concerning the creation and maintenance of national champions. For a start, the social cost of supporting specific industries can be significant. It can be argued here that the real solution should aim to address the skill requirements and transition costs for the affected workers and not to support the specific industries themselves. A second disadvantage is that subsidies and protection for a national champion may beget retaliation in other countries. In other words, by creating and maintaining national champions one risks escalating global protectionist measures and beggar-thy-neighbour responses. It is also argued that (a) by protecting domestic firms from foreign competition, one actually harms the productivity and the competitiveness of the domestic economy; and (b) the protection of incumbents and ailing firms is likely to dampen growth in both developing and developed countries. Finally, it is argued that champion companies should result from their superior competitive performance and market forces and that one should not take it for granted that the government will actually choose the right firms and therefore avoid inefficiency-related mistakes. Interventionist industrial policies that favour incumbents and seek to pick winners or to reward losers should therefore be avoided.

17. Empirical evidence does not provide sufficient support for a national champions policy. First, the case in favour of creating national champions is weak. The assertion that there is a positive correlation between firm size and competitive advantage is undermined by the mixed record of many mergers, a fact which calls into question the government's ability to efficiently pick – let alone create - winners. It is also true that there is no evidence that foreign-owned companies generate fewer benefits to their countries than domestic companies. Second, the case in favour of protecting existing champions is also weak. There is a growing body of evidence which supports the view that a large share of productivity increases results from inter-firm reallocations, from less- to more productive firms, and that many innovations come from entrants, so that a systematic protection of existing market operators is likely to have a negative effect on growth. This is the case for both developed and developing countries. Third, while there is no universal policy prescription, the evidence that is available suggests that efficient industrial policies should aim to develop new activities rather than to support well-established national champions. Finally, industrial policy is prone to rent-seeking, and the evidence of rent-seeking behaviour implies that governments should favour neutral, across-the-board policy instruments.

18. It is clear however that, in spite of the drawbacks identified, in the current climate governments may nonetheless decide to adopt emergency measures in order to favour individual companies and national champions. In these cases, one should strive to emphasise the temporary nature of the support for financial and industrial firms. Where possible, rationalisation should accompany any support provided: measures should be consistent with long-term goals and should not lay the foundations for future structural problems.

While a number of strong arguments against an industrial policy that advocates the creation and maintenance of national champions are recognised, such a policy may not necessarily always be welfare reducing. In fact, in certain circumstances such a policy can perhaps be supported by pro-competitive

arguments. It is therefore argued by some that if consumer welfare is to be maximised, pragmatism and flexibility on this issue is required.

19. Arguments in favour of national champions are usually based on one or more of the following propositions: (a) in certain industries infant companies need specialized knowledge, experience, and support in relation to start up costs; (b) subsidies can attract internationally mobile researchers; (c) the promotion of agglomeration of clusters can help participants to become more innovative and competitive; (d) government investments can supplement large companies' investments in plant and equipment, thereby enhancing their productivity; (e) governments may need to correct short-term market failures; and (f) one may wish to rescue failing companies or industries to prevent a slow down and the consequent job losses.

20. For some, then, a national champions policy may not be without its merits. Furthermore, while arguments against the adoption of a national champions policy can certainly be advanced, it is not correct to state that the emergence of a national champion necessarily leads to reductions in consumer welfare. Indeed, EC competition policy – to take just one example – is expressly cognisant of this fact: there is no *per se* objection to national champions provided that their status is achieved as a result of the operation of free-market competition.

21. Given the existence of both pros and cons concerning a national champions policy, some have argued that what is needed in this context is pragmatism and flexibility. Indeed, instead of having an active policy in favour of national champions, one should try to manage the interaction between the need to create and protect important industrial clusters and the respect for the main competition principles. All kinds of policies (including industrial policy) require a careful assessment of competitive costs. If a restriction on competition is deemed necessary, its scope and duration must be proportionate. Furthermore, if help is to be given, it should always be motivated by a long-term policy and not merely by short-term considerations.

22. To reduce the potential for conflict between industrial policy and competition policy one can adopt an industrial policy that promotes national champions only in those sectors where it is justified and necessary for enhancing the competitiveness of the economy in question. A competition policy promoting national champions can be a viable and effective option in this context provided: (i) that a market failure actually exists; (ii) that the aid is necessary and proportionate to remove it; and (iii) that these positive effects are not outweighed by the negative ones deriving from the distortion of competition. Any such measures adopted according to such a policy must be transparent and temporary.

Since the creation or protection of national champions may be too costly or risky in terms of competitiveness, other means may be successfully pursued in order to generate wealth in a globalising market.

23. Creating a framework that is beneficial in general for economic activity and competition allows one to increase the wealth of a country without running the risk of suffering the potential setbacks of a policy that creates or protects national champions. This framework could be established by: (a) introducing a low general tax level for all companies; (b) removing unnecessary administrative burdens on all companies; (c) developing a flexible labour market; (d) providing training and education to the unemployed; and (e) contributing to non-sector specific research and development. It is argued by some, e.g. Switzerland, that such an approach would be economically more successful than the pursuit of a targeted industrial policy. This approach to industrial policy has been adopted recently in Korea, a country that initially experienced exceptional economic growth by nurturing specific industries. It is important to note in this context that the original Korean policy also created distortions of competition which eventually undermined the fundamentals of the Korean economy.

An appropriately designed and effectively enforced competition policy should be pursued in small and developing economies as well as in medium/large and developed economies. An industrial policy that is in conflict with such a competition policy would be no more in the interest of the small or developing nation than it would be for a large or developed nation.

24. By allowing new entrants and by fully opening up their markets to competing foreign products, small and developing economies improve the competitiveness of their markets. This competitiveness results in increases in consumer welfare, including increases in consumer choice. Liberalisation alone, however, does not represent a substitute for an actively enforced competition policy. Competition policy is still required as it ensures that operators do not re-erect private barriers to trade to protect themselves from foreign competition. Furthermore, in some sectors, due to the small size of the market and the heavy investments involved, only one or two operators will be viable; competition policy ensures that these operators do not abuse their dominance to the detriment of consumers.

25. A competition policy designed for small and developing economies should address market failures and promote efficiencies. In doing so, they should be acutely aware that: (a) in some sectors viability may only extend to one or two market participants; and (b) a high level of concentration in a given market may lead to conduct that reduces welfare.

26. Some commentators argue that a distinction needs to be drawn in this context between economies that are only just emerging and mature economies. With the former, industrial policies would be appropriate where one needs to change a country's specialisation. The strategies applicable at the stage of economic take-off though are not those that apply to mature economies, where competition policies are even more important.

27. Case studies in small and developing economies have shown however that damage can occur if national champions are created or encouraged by the authorities. So it can be argued that for such economies it would not be beneficial to permit a lax competition policy or to encourage national champions: countermeasures may be adopted by other countries and thus domestic firms would be less efficient due to the distortion of competition. In any case, empirical evidence shows that, in a globalised world, emerging firms grow better by first competing at home without state support, and thus prepare themselves better to compete on international markets. Indeed, intense rivalry between firms and the permanent threat to incumbents posed by innovative entrants are a far better engine of growth than industrial policies run by bureaucrats who are not subject to market discipline, but are capable of being captured by vested interests. There is also ample evidence of the failure of many national champions, which can often be ascribed to a lack of accountability, and to economically irrational decisions resulting from politicised governance.

SYNTHÈSE

Par le Secrétariat

28. Un certain nombre de points clés se dégagent des débats de la table ronde du Forum mondial 2009 sur la concurrence, des contributions soumises par les pays et du document de référence :

La politique industrielle ne se résume pas uniquement à l'octroi d'aides ou de subventions d'État et ne comprend pas nécessairement une politique de champions nationaux.

29. Un large éventail d'instruments différents peut servir à mettre en œuvre la politique industrielle, parmi lesquels figurent les marchés publics, les exemptions vis-à-vis du droit de la concurrence, les barrières réglementaires à la concurrence, l'accès au crédit, les fusions et les acquisitions, le contrôle du rachat des entreprises nationales par des investisseurs étrangers, les facilités d'accès aux matières premières et les produits des entreprises monopolistiques. La création ou la protection de champions nationaux peut s'opérer de diverses façons, par exemple en accordant des aides d'État, en encourageant les fusions nationales ou, à l'inverse, en s'opposant au rachat d'une entreprise nationale par une entreprise étrangère.

30. Les pays peuvent adopter des politiques industrielles pour des motifs nombreux et variés – par exemple pour remédier à des défaillances du marché, stimuler le développement économique ou prendre en compte des considérations stratégiques plus larges. Lorsque ces mesures sont compatibles avec un renforcement du bien-être à long terme des consommateurs et de l'efficience, il est rare qu'elles entrent en conflit avec la politique de la concurrence.

31. La politique industrielle n'est pas indissociable d'une politique de champions nationaux. En effet, si la politique industrielle est conçue pour améliorer la compétitivité de l'industrie nationale, intensifier l'effort d'innovation et accroître la technicité de l'industrie, alors on peut la distinguer de la politique de champions nationaux et faire en sorte qu'elle poursuive le même objectif que la politique de la concurrence, à savoir maximiser le bien-être des consommateurs.

On justifie fréquemment la politique industrielle par la nécessité de remédier à des défaillances du marché. Cela étant, dans certains pays, elle peut obéir à d'autres considérations.

32. Dans un certain nombre de pays, la politique industrielle obéit à la volonté de remédier à des défaillances du marché. En pareil cas, on admet que la production privée puisse ne pas être rentable et que l'intervention des pouvoirs publics puisse apporter une solution au problème de façon à maximiser le bien-être des consommateurs. Dans le cadre de cette politique, les financements publics ne sont pas autorisés dès lors que les fonds peuvent être obtenus par le jeu du marché. Certains pays acceptent toutefois que la politique industrielle ait une fonction plus large. Ainsi, en Ouzbékistan, elle a notamment pour objet de favoriser les exportations, de réduire la dépendance à l'égard des importations et de créer des emplois. D'autres pays n'ont pas à proprement parler de politique industrielle ; leur politique générale s'articule autour d'une politique de libre concurrence et de mesures antitrust vigoureuses.

33. La politique industrielle peut dépendre de l'état de développement d'un pays donné. On considère par exemple que sans l'intervention des pouvoirs publics (au moyen d'aides d'État, de mesures

de protection ou de marchés publics), un pays agricole ne peut devenir un pays industriel ou un pays technologiquement avancé.

Lorsque la politique industrielle coexiste avec la politique de la concurrence, il lui faut respecter les principes de concurrence.

34. Il n'y pas toujours conflit entre politique industrielle bien conçue et politique de la concurrence ; trois principes au moins peuvent faire en sorte que la politique de la concurrence et la politique industrielle se complètent plus qu'elles ne s'opposent. Le premier de ces principes veut que le soutien apporté par la politique industrielle intervienne le plus en amont possible du marché. L'octroi de capacités génériques peut, sans la moindre difficulté et sans aucun risque de fausser la concurrence, s'accorder avec la politique de la concurrence. Cependant, plus le soutien est ciblé sur des secteurs et des entreprises déterminés, plus la politique industrielle et la politique de la concurrence auront du mal à coexister. Selon le deuxième principe, il ne faut pas, à vouloir conjuguer politique industrielle et politique de la concurrence, aboutir à une politique de la concurrence paraissant *a priori* opposée aux grandes entreprises. Le troisième principe exprimé veut que sans abandonner pour autant leur démarche propre, les autorités de la concurrence puissent valider des principes de hiérarchisation ou jouir dans leurs poursuites d'une marge de manœuvre servant les objectifs de la politique industrielle et sociale des pouvoirs publics. Par exemple, la Commission de la concurrence sud-africaine a mis en place une stratégie privilégiant la sanction des soumissions concertées dans de grands marchés publics car l'investissement public est le premier moteur de la stratégie de croissance économique et de développement de l'Afrique du Sud. À l'évidence, il n'y a pas là de conflit entre la politique industrielle et la politique de la concurrence.

L'importance de l'économie de marché et du rôle protecteur que jouent les autorités de concurrence à son égard devrait prévaloir – même en temps de grave crise économique. D'ailleurs, dans une période de turbulences, la concurrence elle-même peut fortement contribuer à lisser les à-coups économiques ; le droit et la politique de la concurrence, en tant qu'instruments de protection de celle-ci, revêtent donc une valeur non négligeable.

35. Par définition, les préoccupations politiques sont susceptibles de peser sur les solutions proposées face à une crise économique donnée, incitant à formuler ces solutions sans tenir compte des principes proconcurrentiels de l'économie de marché. Mais les responsables des politiques publiques doivent en toutes circonstances tenir compte du fait qu'une solide politique de la concurrence est indispensable pour éviter d'endommager durablement l'économie mondiale pendant la période suivant la stabilisation des conditions économiques.

36. Le traitement de la crise actuelle ne doit pas faire oublier la nécessité d'appliquer et de faire respecter le droit et la politique de la concurrence dans tous les secteurs de l'économie, secteur financier compris. Quoique peut-être nécessaires tout autant qu'appropriées, les mesures mises en place devraient être à la fois neutres et génériques. Fait important, une politique de la concurrence bien conçue affichera suffisamment de souplesse pour autoriser la réalisation d'autres objectifs de l'action publique.

37. Il convient également de rappeler dans ce contexte que la politique de la concurrence est en mesure de répondre à nombre des préoccupations habituellement traitées dans le cadre de la politique industrielle :

- Tout d'abord, l'existence de mesures privilégiant fortement la concurrence garantit la disparition des entreprises inefficientes du marché et la rationalisation de la production sans recours à des fusions parrainées par l'État. À l'inverse, en temps de crise, la création de champions nationaux influents sur le marché se trouve souvent en porte-à-faux avec la politique de contrôle des fusions ; parfois aussi, la puissance publique tente d'infléchir le processus de contrôle des fusions

en fonction des objectifs de la politique industrielle, ou d'empêcher la reprise d'un champion national par une firme étrangère. Plusieurs cas récents ont témoigné de ces tensions entre la politique industrielle et la politique de la concurrence : différents gouvernements, notamment européens, ont exprimé leurs préoccupations quant à des fusions internationales programmées dans des secteurs politiquement sensibles tels que la banque et l'énergie, et ont voulu créer ou protéger leurs champions nationaux. On peut considérer que leurs économies, sur le long terme, auraient davantage profité d'une démarche faisant la part belle à la concurrence que d'une approche privilégiant des objectifs de politique industrielle. En particulier, les recherches et l'expérience pratique montrent que les principales hypothèses sous-tendant la logique de création de champions nationaux (par des fusions ou d'autres techniques) sont en fait fragiles, ou que les données les étayant sont au mieux ambivalentes (voir aussi le paragraphe 17 ci-après).

- En deuxième lieu, la concurrence peut limiter les prix abusifs pratiqués par une entreprise étrangère détenant un pouvoir de marché et faciliter l'entrée dans les secteurs dominés par quelques entreprises étrangères. La lutte contre les prix abusifs, notamment en temps de crise, oblige à l'évidence les gouvernements à privilégier soit la politique de la concurrence, soit la politique industrielle. La politique de la concurrence est probablement un meilleur choix car elle est bien moins coûteuse. Des recherches montrent par exemple que le coût annuel total de mise en œuvre de la politique de la concurrence aux États-Unis est inférieur à la perte annuelle d'efficience due au cartel des vitamines rien qu'aux États-Unis. Par ailleurs, la mise en œuvre de la politique de la concurrence ne suscite pas toutes les difficultés et tous les risques qu'entraînent les mesures en faveur des champions nationaux, notamment en termes d'inefficience productive (due par exemple au gaspillage par duplication des coûts fixes).

- Enfin, la concurrence, par sa vigueur, renforce l'efficience des entreprises, en incitant leurs dirigeants à réduire les gaspillages et innover. Fait important pour un responsable de l'action publique, la politique de la concurrence présente des avantages sur le plan tant intérieur qu'international. Lorsqu'une autorité de la concurrence interdit une fusion ou une pratique d'exclusion et protège ainsi la concurrence, son action profite ainsi à tous les clients – y compris étrangers – du marché concerné. En cas d'entente, la complémentarité internationale est moindre car les entreprises peuvent décider de ne s'entendre que dans les pays où la politique de la concurrence est peu affirmée. Néanmoins, même lorsqu'il y a entente, on observe certaines externalités positives internationales car les entreprises peuvent plus facilement phagocyter un secteur si elles sont en relation dans de nombreux pays, puisque la multiplicité des marchés où elles sont en contact facilite la collusion. Ces éléments de réflexion justifient la politique de la concurrence encore plus que ne le ferait une analyse pays par pays.

La récente crise financière constitue une menace sérieuse pour les progrès réalisés dans le domaine de la coordination et de l'harmonisation internationales des règles et des pratiques en matière de concurrence. Un certain nombre de conséquences négatives de la crise risquent encore de se manifester et de raviver le débat sur la politique de la concurrence et la politique industrielle. Il serait toutefois erroné d'en déduire que la politique de la concurrence ne présente plus aucun intérêt ou n'en présentera plus à l'avenir.

38. Parmi ses éventuelles conséquences négatives, la crise financière peut notamment aboutir à une plus grande méfiance à l'égard des solutions fondées sur le marché, susciter un accueil plus favorable à l'intervention des pouvoirs publics dans l'économie de marché, provoquer une stagnation de la convergence internationale des politiques de la concurrence, politiser la politique de la concurrence et conforter la volonté de favoriser les champions nationaux.

39. Toute intervention des pouvoirs publics sur le marché (sous la forme par exemple d'un fonds d'intervention) qui serait jugée indispensable pour pallier les effets de la crise financière actuelle devrait être réservée aux entreprises qui sont essentielles au fonctionnement du système. À défaut, l'intervention risquera de coûter cher au contribuable et de fausser gravement la concurrence. Il faut absolument penser avec soin, éviter de pérenniser et surveiller les éventuelles restrictions de la concurrence mises en place durant cette période critique.

40. Dès que la crise financière actuelle (passagère) sera enrayée, les efforts en faveur de la mondialisation ont toutes les chances de reprendre avec la même constance et la même vigueur qu'auparavant. C'est pourquoi il faut dès à présent se demander si une politique industrielle de création et de soutien de champions nationaux qui, comme on le verra plus loin, n'est pas sans présenter des inconvénients, en particulier pour la concurrence, constitue une solution de long terme appropriée à cette crise passagère.

41. La crise économique actuelle conforte ceux qui estiment que l'État doit jouer un rôle prépondérant dans la réalisation des objectifs économiques. C'est pourquoi il est souhaitable que les autorités de la concurrence utilisent leurs moyens de persuasion et leur notoriété pour attirer l'attention sur les dangers liés à l'altération des mécanismes du marché et au recours à une interprétation fallacieuse de la notion de défaillance du marché.

42. En dépit des conséquences négatives éventuelles que l'on a évoquées, il est faux de prétendre que le « glas de la concurrence » a sonné, puisqu'un certain nombre de développements positifs se sont au contraire produits récemment. Ainsi la France vient-elle de mettre en place une nouvelle autorité unique de la concurrence, cependant qu'aux États-Unis se tenait un débat de grande portée sur l'opportunité de mettre en œuvre une politique plus active d'application du droit de la concurrence.

La question des champions nationaux est l'un des grands défis auxquels se heurtent actuellement les gouvernements qui adoptent des mesures d'urgence face à l'impact de la crise sur l'économie réelle. Le traitement de la crise ne doit jamais faire perdre de vue les principes fondamentaux d'une saine concurrence ; il faut en particulier rester conscient des lourds inconvénients que présente dans ce contexte une politique industrielle encourageant la création et le maintien de champions nationaux. Selon des données empiriques, les arguments en faveur de ces derniers sont faibles.

43. On admet que la création et le maintien de champions nationaux présentent un certain nombre d'inconvénients patents. En premier lieu, le soutien de secteurs déterminés peut avoir un coût social très élevé. On peut estimer que la vraie solution devrait chercher à doter les travailleurs concernés des compétences requises et à s'attaquer aux coûts que présente pour eux la transition, et non à soutenir tel ou tel secteur en tant que tel. Un deuxième inconvénient tient au fait que l'octroi de subventions et la protection d'un champion national peuvent conduire les autres pays à prendre des mesures de rétorsion. Autrement dit, en créant et en maintenant des champions nationaux, on risque une escalade de mesures et de réactions protectionnistes. D'aucuns estiment par ailleurs qu'en protégeant les entreprises nationales de la concurrence étrangère, on nuit en fait à leur productivité et à leur compétitivité sur le marché national, et que la protection des entreprises en place et des entités malades a de fortes chances de grever la croissance dans les pays tant développés qu'en développement. Enfin, on affirme que les entreprises doivent tirer leur statut de champion national de leurs performances concurrentielles et du jeu du marché, et qu'il ne saurait être tenu pour acquis que les pouvoirs publics choisiront effectivement les « bonnes » entreprises, s'évitant ainsi des erreurs qui sont sources d'inefficience. Il convient donc de ne pas opter pour des politiques industrielles interventionnistes qui favorisent les entreprises déjà en place et cherchent à sélectionner les meilleurs ou à récompenser les perdants.

44. Les données empiriques disponibles militent insuffisamment en faveur d'une politique de champions nationaux. Tout d'abord, les arguments plaidant pour la création de ces derniers sont faibles : l'affirmation d'une corrélation positive entre taille de l'entreprise et avantage concurrentiel est mise à mal par les résultats mitigés de nombreuses fusions, résultats qui conduisent d'ailleurs à douter de l'aptitude des pouvoirs publics à choisir de manière efficace les gagnants – sans parler même d'en créer. Il faut également pointer l'absence de données tendant à prouver que les entreprises à capitaux étrangers rapportent moins de bénéfices à leur pays que les entreprises nationales. En second lieu, les arguments incitant à protéger les champions existants sont eux aussi faibles. Des faits de plus en plus nombreux semblent indiquer qu'une grande partie des hausses de productivité provient de réallocations des entreprises les moins productives vers les entreprises les plus productives, et que les innovations sont souvent le fait de nouveaux entrants sur le marché, de sorte que la protection systématique des opérateurs existants risque fort de peser négativement sur la croissance. Il en va ainsi pour les pays développés comme pour les pays en développement. Troisièmement, sans qu'il existe pour autant de recette universelle, les données disponibles laissent entendre qu'une politique industrielle efficiente doit chercher à développer des activités nouvelles plutôt qu'à soutenir des champions nationaux bien établis. Enfin, la politique industrielle étant encline à rechercher des rentes, les pouvoirs publics, compte tenu de l'existence de comportements de cette nature, devraient privilégier des instruments d'action neutres et génériques.

45. Il est clair toutefois qu'en dépit des inconvénients susmentionnés, les autorités peuvent, dans le climat actuel, décider de recourir à des mesures d'urgence susceptibles de favoriser les champions nationaux et telle ou telle entreprise. Lorsqu'une situation de ce type se présente, il leur faudrait s'efforcer d'insister sur le caractère temporaire du soutien apporté aux entreprises financières et industrielles. Chaque fois que cela est possible, ce soutien devrait s'accompagner d'une volonté de rationalisation : les mesures prises devraient rester compatibles avec les objectifs à long terme et éviter de porter en germe de futurs problèmes structurels.

S'il est vrai qu'un certain nombre d'arguments de poids militent contre une politique industrielle visant à créer ou maintenir des champions nationaux, pareille politique ne diminue pas nécessairement le bien-être. De fait, dans certains cas, elle peut même trouver à s'appuyer sur des arguments en faveur de la concurrence. D'aucuns estiment donc que pragmatisme et souplesse doivent être les maîtres mots en la matière si l'on veut maximiser le bien-être des consommateurs.

46. Les arguments favorables aux champions nationaux reposent généralement sur une ou plusieurs des affirmations suivantes : (a) dans certains secteurs, les entreprises naissantes ont besoin de connaissances spécialisées, d'expérience et d'un soutien pour faire face aux frais de démarrage ; (b) l'octroi de subventions est susceptible d'attirer des chercheurs optant pour la mobilité à l'échelle internationale ; (c) le fait de favoriser l'agglomération de pôles peut aider les acteurs du marché à devenir plus innovants et plus compétitifs ; (d) les investissements publics peuvent venir compléter les investissements en installations et équipements des grandes entreprises et par là-même accroître leur productivité ; (e) les pouvoirs publics peuvent être appelés à remédier aux défaillances à court terme du marché ; et (f) on peut souhaiter sauver des entreprises ou des secteurs en difficulté pour éviter un ralentissement économique et son cortège de suppressions d'emplois.

47. Ainsi, pour certains, une politique de champions nationaux peut présenter certains avantages. En outre, si l'on peut certes avancer des arguments militant en défaveur d'une telle politique, il est toutefois inexact de prétendre que l'émergence d'un champion national emporte nécessairement une diminution du bien-être des consommateurs. La politique de la concurrence de la Commission européenne – pour prendre ce seul exemple – en tient expressément compte : elle ne s'oppose pas *per se* à l'idée de champions nationaux, à condition toutefois que leur statut résulte du jeu de la libre concurrence sur le marché.

48. Une politique de champions nationaux comportant ainsi des avantages et des inconvénients, certains ont prôné pragmatisme et souplesse en la matière. En effet, au lieu de promouvoir activement des champions nationaux, il faudrait essayer de concilier la nécessité de créer et de protéger des pôles industriels importants et le respect des principes essentiels de la concurrence. Toutes les politiques quelles qu'elles soient (y compris la politique industrielle) exigent une évaluation minutieuse de leurs coûts en termes de concurrence. Si une restriction de la concurrence est jugée nécessaire, sa portée et sa durée doivent être proportionnées au but poursuivi. De surcroît, toute aide éventuellement accordée devrait se justifier par une stratégie de long terme, sans se limiter à de simples considérations à court terme.

49. Pour atténuer les conflits éventuels entre politique industrielle et politique de la concurrence, on peut adopter une politique industrielle favorisant des champions nationaux dans les seuls secteurs dans lesquels il est justifié et nécessaire d'accroître la compétitivité du pays concerné. Une politique de la concurrence favorable aux champions nationaux peut être une option viable et efficace à cet égard, à condition cependant : (i) qu'il existe effectivement une défaillance du marché ; (ii) que l'aide soit nécessaire et proportionnée à la volonté de remédier à cette défaillance ; et (iii) que ces effets positifs ne soient pas annihilés par les effets négatifs résultant de la distorsion de concurrence. Toute mesure adoptée en vertu de pareille politique doit être transparente et temporaire.

D'autres moyens peuvent être utilement mis en œuvre pour générer de la richesse dans un marché en voie de mondialisation, car la création ou la protection des champions nationaux peut s'avérer trop coûteuse ou risquée pour la compétitivité.

50. Mettre en place un dispositif qui profite à l'activité économique et à la concurrence en général permet à un pays d'augmenter sa richesse sans pour autant s'exposer au risque de subir les écueils d'une politique qui crée ou protège les champions nationaux. On peut y parvenir : a) en soumettant toutes les entreprises à un faible niveau d'imposition général ; (b) en supprimant les charges administratives inutiles qui pèsent sur toutes les entreprises ; (c) en introduisant davantage de flexibilité dans le fonctionnement du marché du travail ; (d) en assurant l'instruction et la formation des personnes sans emploi ; et (e) en apportant son concours à la recherche-développement en général, sans se limiter à tel ou tel secteur. Certains, dont la Suisse, considèrent que cette approche donnerait de meilleurs résultats économiques que la mise en œuvre d'une politique industrielle sectorielle. La Corée qui, au départ, a connu une croissance économique exceptionnelle en favorisant des secteurs déterminés a récemment fait sienne cette conception de la politique industrielle. On notera que la politique initiale de la Corée a également été à l'origine de distorsions de concurrence dont il n'est pas exclu qu'elles aient porté préjudice aux paramètres fondamentaux de l'économie coréenne.

Une politique de la concurrence bien conçue et effectivement mise en œuvre est nécessaire aussi bien dans les économies petites ou en développement que dans les économies développées grandes ou moyennes. Une nation petite ou en développement n'a pas plus intérêt qu'une grande nation ou une nation développée à ce que sa politique industrielle et une telle politique de la concurrence soient conflictuelles.

51. En admettant de nouveaux entrants et en ouvrant complètement leur marché aux produits étrangers concurrents, les petites économies et les économies en développement améliorent la compétitivité de leurs marchés. Ce surcroît de compétitivité a pour effet d'améliorer le bien-être des consommateurs, en particulier leur liberté de choix. La libéralisation ne remplace pas à elle seule une politique de la concurrence activement mise en œuvre. La politique de la concurrence reste nécessaire car elle seule peut garantir que les opérateurs économiques n'érigent pas de nouveaux obstacles privés aux échanges pour se protéger de la concurrence étrangère. La politique de la concurrence permet en outre, dans les secteurs comptant seulement un ou deux opérateurs viables du fait de la taille réduite du marché et des

investissements très lourds qu'ils exigent, d'éviter que ces opérateurs n'abusent de leur position dominante au détriment des consommateurs.

52. Une politique de la concurrence conçue pour les petites économies et les économies en développement devrait viser à remédier aux défaillances du marché et à favoriser l'efficience. Ce faisant, elles devraient être pleinement conscientes (a) que, dans certains secteurs, seuls un ou deux intervenants sur le marché seront viables et (b) qu'une forte concentration sur un marché donné peut générer des comportements ayant pour effet de réduire le bien-être.

53. Certains observateurs considèrent qu'il faut opérer une distinction à cet égard entre les économies tout juste naissantes et les économies déjà mûres. Les mesures de politique industrielle conviendraient aux premières lorsqu'il y a lieu de changer la spécialisation d'un pays. Toutefois, les stratégies applicables dans la phase de décollage économique ne sont pas celles qui correspondent à des économies parvenues à maturité, dans lesquelles la politique de la concurrence a plus d'importance encore.

54. Les études de cas menées dans les petites économies et les économies en développement ont montré que la création de champions nationaux – ou leur soutien – par les pouvoirs publics pouvait s'avérer préjudiciable. On peut donc considérer qu'il ne serait pas bénéfique pour de telles économies d'autoriser une politique de la concurrence laxiste ou de favoriser les champions nationaux. En effet, les autres pays risquent alors de prendre des mesures de représailles qui rendraient les entreprises nationales moins compétitives du fait des distorsions de concurrence. De toute façon, les données empiriques montrent que dans le contexte de la mondialisation, les entreprises émergentes affichent une meilleure croissance lorsqu'elles se battent d'abord sur leur marché intérieur sans aides de l'État, ce qui les prépare mieux à la concurrence des marchés internationaux. De fait, l'intense rivalité des entreprises et la menace permanente que les entrants innovants font peser sur les entités déjà implantées sont des moteurs de la croissance bien plus efficaces que les politiques industrielles administrées par des bureaucrates qui, d'une part, ne sont pas soumis à la discipline de marché et, de l'autre, peuvent se montrer sensibles à certaines chasses gardées. Les cas d'échec de champions nationaux sont par ailleurs loin d'être rares, pour des raisons tenant bien souvent à l'irresponsabilité et à l'irrationalité économique qui entachent les décisions résultant d'une gouvernance politisée.

BACKGROUND NOTE[1]

1. Introduction

1. The expression "industrial policy" means different things to different people. According to the context, it may refer to government interventions influencing business decisions, from general measures such as across-the-board investment incentives to more targeted, sector-specific incentives, or "nationalist" policies such as domestic content requirements for public procurement, the direct or indirect subsidisation of specific companies, or dirigiste policies such as the creation of national champions and their protection from competitors and foreign acquirers.

2. Whatever its meaning, industrial policy is invariably rationalised as a means to correct market failures, while competition policy is a means to ensure that market mechanisms are not hindered by anticompetitive behaviour. Therefore, at first glance, there seems to be a contradiction between the underlying principles of industrial policy and those of competition policy. In practice however, this impression must be qualified because many government interventions that could be labelled as industrial policy do not interfere with competition policy.

3. However, one of the main tools of industrial policy, the creation, support or protection of "national champions", is indisputably at odds with competition policy. The faith in national champions rests on several possible premises. One premise that is often articulated is that private initiative alone is often insufficient to foster the development of new sectors that could prove highly profitable, and that a temporary helping hand from governments is needed in order to speed up development and sectoral diversification. Another argument in favour of national champions is that size and market power are the main drivers of productivity and growth, and that the nationality of companies has an impact on the contributions they make to the countries in which they operate – such as increasing the overall skills of the work force, or generating complementary activities, for instance through their purchases from local suppliers. The advocates of sector-specific industrial policies and national champions can point to several striking successes. In Brazil, Embraer was created in 1969 as a government-owned company (it was privatised in 1994) and was supported through its early development (by means of subsidies and preferential procurement rules) before becoming a successful global player in the aeronautics sector, to the point that aircraft are now Brazil's top export product. The Hyundai conglomerate in Korea was subsidised, and occasionally shielded from foreign competition by the government at every step of its diversification. Similarly, the Mexican government's decision to develop its automobile industry, by conditioning the operation of foreign firms' plants (attracted by the relatively low level of wages and the proximity to the US market) on strict domestic content requirements led to a remarkable performance, and the automotive sector is now Mexico's top export sector. In line with this view, many developing countries have followed and are still following policies which aim to encourage the development of specific sectors

[1] This paper was drafted as a Background Note by David Spector (Centre National de la Recherche Scientifique, Paris School of Economics, and MAPP), Antoine Chapsal (University Pompeu Fabra and MAPP) and Laurent Eymard (MAPP). It does not necessarily represent the views of the OECD Secretariat or those of its Member countries.

ranging from mining to tourism (in several Latin American countries), to software (in China and India, in particular) and shipping.

4. In contrast, those who claim that "competition policy is the best possible industrial policy" stress that intense rivalry between firms and the permanent threat posed by innovative entrants to incumbents are a far better engine of growth than bureaucratic industrial policies fraught with rent-seeking by vested interests. This sceptical view is often backed with evidence about the striking failure of many national champions, which can often be ascribed to a lack of accountability, and to economically irrational decisions resulting from politicised governance.

5. In practice, the creation of national champions endowed with a lot of market power is often at odds with merger control policy; conversely, governments sometimes attempt to bend the merger control process towards the furtherance of industrial policy goals in order to prevent the takeover of a national champion by a foreign firm.

6. Recent cases have made this tension between industrial and competition policy topical, as several governments, especially in Europe, expressed concerns over cross-border mergers in politically sensitive sectors such as banking and energy, and attempted to create or protect their national champions. In order to contribute to this debate, the present paper discusses the pros and cons of industrial policy and competition policy, in the light of the available empirical research. The main conclusions are as follows.

- The case in favour of creating national champions is weak. On the one hand, the view that size brings decisive competitive advantages is belied by the mixed record of many mergers, which casts doubt on governments' ability to efficiently pick winners, let alone create them. On the other hand, there is no evidence that foreign-owned companies generate fewer benefits to their home countries than domestic companies.

- The case in favour of protecting existing champions is weak as well. A growing body of evidence suggests that a large share of productivity increases results from inter-firm reallocations, from less- to more productive firms, and that many innovations come from entrants, so that a systematic protection of incumbents is likely to dampen growth, both in developed and developing countries.

- The existence of positive externalities induced by sector-wide economies of scale and agglomeration effects has been documented empirically. In particular, informational externalities seem to be strong in developing countries, since there is a lot of uncertainty as to the prospects of success in new sectors, which may deter private initiative. Government policies encouraging new activities may therefore help private agents to learn which sectors are promising and can speed up development and diversification. However, delineating proper policies to address these externalities is complex. While there is no universal policy prescription, the available evidence suggests that efficient industrial policies should be targeted towards the development of new activities rather than towards supporting well-established national champions.

- Like all government interventions, industrial policy is prone to rent-seeking. The evidence of rent-seeking behaviour implies that governments should favour policy instruments that do not endow them with the power to favour individual companies and should focus on more neutral, across-the-board instruments.

- Competition policy can address many of the concerns that are usually mentioned in support of industrial policy. Intense competition leads to the exit of inefficient firms and the rationalisation of production without the need for government-sponsored mergers. It can limit exploitative

pricing by foreign firms possessing market power and facilitate entry into sectors dominated by a few foreign firms – these two effects are especially relevant to developing countries. Last but not least, competition makes companies more efficient by sharpening managerial incentives to reduce slack and, according to some studies, by increasing incentives to innovate.

- There is little conflict between a properly defined industrial policy and competition policy. There may be some tension regarding the treatment of synergies in merger control, but it should be amenable to compromise.

2. The creation of national champions through mergers: theory and evidence

7. One of the main types of government interventions usually considered as constituting industrial policy is the creation of national champions, either created ex nihilo, or, more often, resulting from the merger of smaller pre-existing firms. Governments may create national champions directly, by acquiring several private firms and merging them into a single government-owned company, as the UK government did for example in 1967 when it acquired the largest fourteen domestic steel companies so as to create the British Steel Corporation; or by having a government-owned company merge with a private firm – as happened in France recently when GDF merged with Suez in order to form a national champion in energy, thereby fending off a bid from an Italian company. Governments may also act indirectly, by using their influence over companies (which may result from government control over credit, procurement decisions, or taxes and subsidies, inter alia) in order to encourage them to merge. For instance, as part of the Industrial Expansion Act of 1968, the British government presided over the creation of a national champion in the sector of computers, ICL, through the merger of several domestic firms, by granting subsidies to various R&D programs[2]. Governments lacking direct control over firms may still attempt to favour certain mergers and deter some others in order to bring about the creation of a national champion - as the Spanish government did in 2006 when it supported (in vain) a merger between Gas Natural and Endesa in order to prevent Endesa's takeover by a foreign utility.

8. Even though this type of heavy-handed government intervention aiming to shape entire sectors is now less frequent than in the past, many governments still consider that they should retain some authority over merger control policy in order to allow industrial policy concerns to occasionally override competition concerns: in many jurisdictions, the ministry of finance may decide against the recommendation of the domestic competition authority.

9. The claim that governments should foster the creation of national champions by merging smaller domestic firms is often motivated by the view that mergers allow firms to realise economies of scale, to reallocate production towards the most efficient plants, and more generally to benefit from various synergies, ultimately leading to expanded output, better quality and more product innovation.

10. In order to assess the merits of this argument, it is helpful to decompose it into several building blocks. It relies on the following four assumptions.

(i) Assumption 1: "big is beautiful", i.e., when firms become larger, they tend to become more efficient.

(ii) Assumption 2: market mechanisms by themselves fail to lead to large enough firms, i.e., the fact that more efficient firms tend to gain market share, invest more, and become larger, does not suffice to bring about all the gains that are associated to size.

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2 Stephen Young et A. V. Lowe, Intervention in the Mixed Economy: The Evolution of British Industrial Policy

(iii) Assumption 3: firms' incentives to merge are insufficient relative to the social gains resulting from mergers. A milder version of this assumption is that the problem lies with merger control policies rather than with firms' incentives.

(iv) Governments are able to identify which "champions" should be created and supported.

11. As is explained below, the theoretical and empirical support for each of these assumptions is weak and a systematic presumption in favour of a policy of creation of and support to national champions would be unwarranted. This is not to say that policies aiming to create national champions are never justified. But these results suggest that such policies should be the exception rather than the norm and that the burden of proof should rest squarely upon the governments proposing them rather than upon the sceptics.

2.1. The rationalisation of plant utilisation is an unconvincing justification for the creation of national champions through mergers

12. There is no point denying that merging several smaller firms in order to form a larger one often leads to rationalisation and lower production costs. This may be the case for a series of reasons: fixed cost duplication may be eliminated, by concentrating all production activities within a single plant; high-cost plants may be shut down as their production is shifted towards low-cost plants; merging firms can pool their technologies and know-how, thus ending up with lower costs than either firm pre-merger; large firms with complementary customer bases may reach a scale that renders profitable cost-reducing or quality-enhancing innovations, as well as the creation of new products.

13. There is no single unified theory of the efficiency gains from mergers. However, economic theory has focused extensively on one particular type of efficiency gains, namely, those resulting from the ability of larger firms to rationalise production by shifting it to the most efficient plants and reaping the benefits of economies of scale. The main theoretical analysis of this issue is Farrell and Shapiro (1990)[3]. Their model considers a highly stylised market in which all firms produce homogeneous goods and compete in quantities. Farrell and Shapiro's main result is that mergers that are only justified by the rationalisation of production (i.e., the reallocation towards low-cost plants and the avoidance of fixed cost duplication) necessarily lead to a lower output and a higher price level, even though they may raise total welfare. The reason behind this striking result is quite intuitive. In competitive enough markets, rationalisation takes place spontaneously, since high-cost firms cannot compete against their more efficient rivals. Whatever rationalisation is left for mergers to realise (as opposed to market-generated reallocation) in some sense reflects the weakness of competition, which allows relatively inefficient firms to remain active in the first place. But if this is the case, then a merger is likely to reduce competition in a market already lacking competition, which explains why it necessarily leads to higher prices and a lower level of output. In a related paper, Spector (2003)[4] showed that this result carries over to the case where entry is possible as a response to a merger-induced increase in prices: even with free entry, profitable mergers not generating any synergies other than those resulting from the rationalisation of the use of existing plants lead to higher prices and lower levels of input.

14. These results are not sufficient by themselves to rule out the possibility that mergers leading to national champions might be desirable. Like all theoretical results, they rely on highly stylised modelling

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3 J. Farrell and C. Shapiro, "Horizontal Mergers: An Equilibrium Analysis", *American Economic Review*, vol. 80(1), 107-126, 1990. See also, J. Farrell and C. Shapiro, "Scale Economies and Synergies in Horizontal Merger Analysis", *Antitrust Law Journal*, vol. 68(3), 2001.

4 D. Spector, "Horizontal Mergers, Entry, and Efficiency Defence", *International Journal of Industrial Organisation*, vol. 21(10), 1591-1600, 2003.

of the economy. More importantly, they do not investigate all kinds of synergies, such as those resulting from the pooling of know-how or the possible strengthening of incentives to innovate thanks to the possibility of spreading innovation costs over larger volumes. However, they imply that there is no prima facie case in favour of national champions on the grounds of scale economies alone.

2.2. The evidence about the impact of mergers on efficiency is mixed

15. In order to have a more precise view of the claim that "big is beautiful" it is necessary to look at the empirical evidence on the impact of mergers. The existing studies break down into three categories. A first group of studies focuses on the impact of mergers on firms' performance, measured by profits or return to shareholders. A second group focuses on the impact of mergers on markets shares and outsiders' share prices, in order to distinguish between market power and efficiency effects. Finally, a third group of studies examines directly whether mergers tend to make firms more efficient[5].

16. The evidence about the impact of mergers on firm profitability is mixed. Studies of mergers that took place in Europe, the United States, and Japan from the 1960s to the 1990s find little evidence that mergers on average create a lot of value, and conclude that many mergers actually destroyed value, especially those involving large companies[6]. More recent studies focused on the impact of merger announcements on the combined stock market value of the merging firms. The underlying assumption is the "efficient market hypothesis", i.e., the view that stock market prices accurately reflect all available information about the expected flow of future profits. On balance, these studies do not provide overarching evidence that mergers make firms more profitable. Like all empirical studies, the abovementioned ones raise a number of methodological issues. The older ones, which focused on profits before and after mergers, relative to other firms in the same sectors, failed to take into account the fact that mergers are endogenous. If mergers are more frequent when one of the merging firms faces particularly unfavourable prospects, then considering other firms as a benchmark is unjustified. Event studies focusing on the evolution of stock prices shortly before and shortly after a merger is announced are immune to this criticism, but they rely on the efficient market assumption, which one may consider unrealistic.

17. These results are relevant to the discussion of industrial policy because they go against one of the oldest and most frequent arguments in favour of national champions. The fact that, contrary to shareholders' hopes, many mergers do not significantly increase profitability, or at least that shareholders have it wrong in many cases, means that the impact of mergers is quite uncertain *ex ante*. Governments willing to create national champions thus face a significant informational problem, which is more acute than the problem facing shareholders since they are likely to possess less firm-specific information. Even if one does not take into account the other problems associated with government intervention, such as rent-seeking or the lack of adequate incentives, this informational problem alone invites caution.

18. Second, even if they did not make firms more efficient, one would expect mergers creating market power to be profitable. The absence of unequivocal evidence in this direction thus justifies some

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5 Part of this section is based on Röller, Lars-Hendrik, Johan Stennek and Frank Verboven (2001). "Efficiency Gains from Merger." *European Economy*, No 5, 31-128.

6 See, e.g. Lubatkin, M., Srinivasan, N. and Merchant, H. (1997), "Merger strategies and shareholder value during times of relaxed antitrust enforcement: the case of large mergers during the 1980s", *Journal of Management*, 23, 59-81; Sirower, M. L. (1997). *The Synergy Trap: How Companies lose the Acquisition Game*.
New York: The Free Press; T he effects of mergers: an international comparison; K. Gugler, D. Mueller, B. Yurtoglu, and C. Zulehner, "The Effects of Mergers: An International Comparison", *International Journal of Industrial Organization*, vol. 21, 625-653, 2003.

scepticism regarding the claim that size by itself makes firms more efficient and that a sound industrial policy requires a more lenient merger control so as to achieve merger-generated efficiencies.

19. In order to disentangle the impact of mergers on market power from their impact on efficiency, some studies have examined how mergers affect market shares. The underlying idea is that mergers increasing market power should reduce the merged firms' market share (as a consequence of the increase in their prices), while mergers primarily making firms more efficient (in terms of costs or product quality) should have the opposite effect. Another way to assess whether the main effect of mergers is to make firms more efficient or rather to endow them with more market power is to look at their impact on non-merging rivals' share prices. If the main effect of a merger is expected to increase the merging firms' market power and thus the prices they charge, this should benefit their competitors. On the contrary, if the main effect is to make the merging firms more efficient, this should be detrimental to competitors and their share price should fall. According to the existing literature, mergers were followed on average by declines in the merging firms' market shares and/or increases in rivals' stock market prices, which is consistent with the view that on average, the efficiency gains, if any, were not large enough to offset the decrease in competitive intensity[7]. Another study[8], looking directly at the impact of mergers on costs in the banking sector finds that the mergers on average did not increase cost efficiency, and that there was a lot of variation in that some mergers led to large efficiency gains and some other to large efficiency losses.

20. All in all, these studies show that while some mergers create large efficiencies, there should be no presumption that this is systematically the case. Even informed, profit-maximising decision makers often undertake mergers that create few if any efficiencies. This observation, together with the failure of many national champions (such as the UK's ICL, France's Bull, and Italy's Olivetti, which were supposed to challenge IBM's dominance of the computer market) should dampen the enthusiasm for government-sponsored policies aiming to create national champions on the assumption that size alone is a panacea, even though one can also point to success stories such as Brazil's Embraer.

2.3. Accounting for synergies: the scope for tension between industrial and competition policy

21. Even though the overall evidence is mixed, some mergers undisputedly create efficiencies, and the treatment of these efficiencies in the merger control process may be at odds with perfectly legitimate industrial policy concerns. In almost all jurisdictions, the aim of competition policy is to protect consumers. Accordingly, the main principle of merger control is that mergers benefitting consumers (because they lead to lower prices or improved products) should be authorised, while mergers harming consumers should be prohibited. This criterion is by no means the only one making economic sense. One could also want to clear all the mergers increasing total welfare, i.e., the sum of consumer welfare and firm profits. The divergence between these two sensible criteria is not simply the subject for an academic, theoretical debate. What is at stake is the way fixed cost savings generated by mergers are taken into account. According to textbook microeconomic models, prices are affected by changes in variable costs but not by changes in fixed costs. Competition authorities thus consider that fixed cost savings brought about by mergers cannot be considered an efficiency defence when mergers also arouse competition concerns. They may therefore prohibit mergers that vastly increase productive efficiency by suppressing fixed cost duplication, on the grounds that the ensuing gain will be appropriated by the merging firms rather than by consumers. In addition, the standard of proof required by most competition authorities in

7 See, e.g., J. Clougherty and T. Duso, "The Impact of Horizontal Mergers on Rivals: Gains to Being Left Outside a Merger", WZB Discussion Paper SP II 2008-17.

8 Berger, Allen N. and David B. Humphrey, The effects of Megamergers on Efficiency and Prices: Evidence from a Bank Profit Function, Review of Industrial Organization, 1997, 12, 95-139.

order to clear mergers on efficiency grounds is prohibitively high, so that in practice almost no merger case was ever decided on the basis of efficiency claims[9].

22. The conflict between competition policy, as it is implemented in most jurisdictions, and legitimate industrial policy concerns, is thus twofold. First, the consumer welfare criterion (as opposed to the alternative total welfare criterion), which is the compass of competition policy, may lead competition authorities to prohibit efficiency-enhancing mergers. Second, the merger control process, like all legal processes, requires a high enough standard of proof, because decisions must withstand scrutiny before courts in case they are challenged. Since it is difficult to document future efficiencies, which are by nature uncertain, this may bias merger control towards making too little room for efficiencies. On the contrary, industrial policy decisions, like all government decisions, leave room for some discretion and trial-and-error processes. Beyond the choice of the criterion underlying merger control, the very principle of merger control as a legal process in which each decision can be challenged in court can thus be seen as a straitjacket potentially preventing some useful industrial policies from being implemented.

2.4. Supporting existing champions may harm growth

23. One of the most heated debates about industrial policy revolves around the question of whether governments should provide support to large companies. In other words, should governments support national champions after assisting in their creation? Is the answer to this question the same for developed and developing countries?

24. Those who argue in favour of supporting existing champions put forward the following arguments: by virtue of their size, and lesser exposure to risk (especially in the case of conglomerates), large firms have greater incentives to innovate than smaller firms; they lie at the centre of a nexus of suppliers to whom they provide stable expectations (and thus incentives to invest and innovate) as well as technological spillovers; they are a way for developing countries to reach a critical mass (in terms of scale and scope of products) without which a sector cannot take off because of the presence of sector-wide economies of scale. Therefore, they should be supported whenever in trouble, and they should be involved in industrial policy programs, such as public-private R&D programs. In his analysis of Korean industrial policy, Rodrik (1995)[10], for instance, commends President Park's decision in 1975 to force Korean oil refineries to ship oil in Korean-owned tankers in order to support Hyundai's shipbuilding activity, which was then hurt by a global shipping slump.

25. Policies to support large ailing firms are in fact pervasive, though probably less now than in the past. For instance, there is hardly a government that did not put large amounts of money into the national flagship air carrier. In the UK, government contributions to civil aircraft and engine development from 1945 to 1974 totalled 1.5 billion pounds at 1974 prices and produced receipts of 0.14 billion pounds[11]. According to a study of British industrial policy in the 1960s and 1970s, "what was described as 'picking winners' appeared in practice to amount to spending huge sums shoring up ailing companies." Such support to declining industries is a clear example of misplaced industrial policy[12]. It highlights one of the pitfalls of industrial policy, namely the capture of government by the vested interest of large incumbents

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9 D. Spector, "Will efficiencies ever matter in merger control?" *Concurrences*, vol. 4-2007.

10 D. Rodrik, "Getting Interventions Right: How South Korea and Taiwan Grew Rich", *Economic Policy*, vol. 10(20), 1995.

11 Gardner, N. (1976), "The Economics of Launching Aid", in A. Whiting (ed.), The Economics of Industrial Subsidies. London: HMSO.

12 Morris and Stout, p.873 "Industrial Policy", in D. J. Morris (ed.), *The Economic System in the UK*, Oxford: Oxford University, 1985.

which possess the resources and knowledge required to twist public intervention in their favour (see below).

26. Even among the proponents of an interventionist industrial policy, there are now few advocates of massive support to ailing firms. But the debate about the usefulness of supporting large companies goes far beyond the issue of supporting losers. For instance, in the European Union, aid for the rescue and restructuration of companies represented only 4% of total state aid in 2005-2007. The bulk of the aid, which accounted for 0.53% of GDP (most of which benefitted large companies), was aimed to further other industrial policy goals. The debate about whether industrial policy should target large established companies can be illustrated by the recent twists and turns of French policy toward industrial innovation. The French government created in 2005 an "Agency for Industrial Innovation" that was supposed to provide public funds to technological R&D projects, each of which was to be led by a large industrial company (with some involvement of smaller firms as well). In 2007 however, this approach was reversed as this agency was merged with another one providing 100% of its support to small and medium-size companies, reflecting the view that industrial policy should rather focus on the development of small, innovative companies.

27. This view can be traced back to Schumpeter's idea that growth is a process of creative destruction in which new firms displace older incumbents, so that a sound industrial policy should foster the development of small, innovative firms rather than help incumbents. A growing body of empirical evidence, both in the case of developed and developing countries, supports this approach. Anecdotal evidence about the computer, software and internet industry highlights the importance of creative destruction: in the early 1980s, IBM failed to understand the strategic importance of operating systems and its market leadership was thus shattered by Microsoft; Microsoft in turn was slow to realise the importance of the internet in the 1990s. In spite of its undisputed leadership in operating systems and the corresponding profits, it could not prevent new, highly innovating firms such as Google and Sun Microsystems from gaining prominence in the new markets brought about by the development of the internet. The most frequently piece of anecdotal evidence cited against shoring up large incumbents is precisely the contrast between this phenomenon of renewal of corporate giants in the United States, which seems to go together with a high pace of innovation, and the relative stability observed in Europe. This contrast is general and by no means limited to high-technology sectors: only 3 European firms belonging to the global "Top 500" in 2007 were created after 1976, against 51 in the United States (and 46 in emerging countries); conversely, small innovative firms grow much more quickly in the United States. It has become customary to relate the relative inertia of the corporate structure in Europe to its innovation deficit relative to the United States, especially (but not only) in high-technology sectors[13].

28. Such anecdotal evidence has been confirmed by several empirical studies using different methodologies. In their micro-econometric study of productivity growth in the United States, Foster et al. (2000)[14] find for instance that one-third to one-half of total productivity growth is caused by the reallocation of production from less efficient to more efficient firms (including through the disappearance of old firms and birth of new ones) rather than by the realisation of within-firm productivity gains. This suggests that while many old incumbents are highly efficient, governments should not prevent less efficient ones from being destabilised by new competitors.

29. It is sometimes argued that the creative destruction process is an important one in developed countries that are close to the technological frontier, since for them growth is mostly related to innovation, while developing countries should focus on catching up with richer countries by applying existing

13 T. Philippon and N. Véron, "Financing Europe's Fast Movers", Bruegel Policy Brief, 2008/01.

14 L. Foster, C. Haltiwanger and C. Krizan, "Aggregate Productivity Growth: Lessons from Microeconomic Evidence", NBER Working Paper N° 6803, 2000.

technologies, which could be achieved through national champions. According to this theory, economic development would require national champions in a first phase, when a country simply applies pre-existing "recipes" and should focus on the realisation of economies of scale; and creative destruction would become an important engine of growth only at a later stage.

30. However, a study by Fogel, Morck and Yeung (2006)[15] suggests that the benefits of creative destruction are tangible in the developing world as well as in developed countries. They measure "big business stability" in a sample of 44 developed and developing countries, defined by the fraction of the top 10 businesses in 1975 that (i) either were still in the "top 10" in 1996, or (ii) had their labour force growing at least as quickly as domestic GDP between 1975 and 1996. Based on this index, they run many different cross-country regressions in order to test the relationship between big business stability between 1975 and 1996 on the one hand and growth between 1990 and 2000 on the other hand. Their main finding is that turnover at the top appears to "cause growth": countries where the largest firms in 1975 did not prosper as well as the overall economy did better on average, and this finding holds for both developed and developing countries. This result implies that independently of the pace of development of new companies, helping less efficient established companies to prosper entails a large cost in itself. While the precise underlying mechanism has not yet been the focus of detailed empirical work, one may assume that supporting established companies deprives newer ones from access to the inputs (especially skilled labour) and markets that they would need in order to prosper.

31. These findings invite caution regarding policies that leave room for precisely targeted help to individual companies, because large established firms are likely to be the prime beneficiaries of such policies due to their comparative advantage in rent-seeking. They also suggest that governments wishing to pick the new technologies or firms worthy of support face severe informational problems. Since even large incumbents often fail to make the right strategic decisions - which is why they end up being destabilised by smaller firms - how could governments make informed choices? Philippon and Véron (2008) conclude that the best industrial policy is one that helps small innovative firms grow faster, not by picking the ones looking most promising, but by creating a favourable environment and facilitating their financing. They advocate "horizontal" measures such as simplifying securities regulation (to facilitate the issuance of shares by small companies), changes in insolvency legislation, the removal of distortions in the tax treatment of equity and debt, and, last but not least, increased competition in financial markets. Finally, the abovementioned results point towards the usefulness of decreasing the costs of entry for new businesses, which are still high in many countries: according to Djankov et al. (2001)[16], the cost of creating a new firm varied in 1999 from 1.7% of per capita GDP in New Zealand to 495% of per capital GDP in the Dominican Republic, with a world average of 66%.

2.5. Should champions be national?

32. Policies aiming to foster and protect national champions rely on the assumption that the nationality of the main shareholders of a company and the location of its headquarters have an important impact on its contribution to the countries where its activity takes place. This belief is expressed in most countries whenever a large domestic firm is acquired by a foreign one. Such "economic patriotism" concerns have been voiced lately in many developed countries and have led to the enactment or strengthening of legislation controlling foreign investment (such as the Foreign Investment and National Security Act of 2007, which extended the scope of the Exon-Florio amendment of 1988 in the United States). Several European countries have legislation restricting foreign takeovers; additionally, several

15 K. Fogel, R. Mork and B. Yeung, "Big Business Stability and Economic Growth: is what's good for General Motors good for America?" NBER Working Paper N°12394.

16 S. Djankov, R. La Porta, F. Lopez-de-Silanes, and A. Shleifer, « The Regulation of Entry ». Quarterly Journal of Economics, 2002, vol. 107.

European governments recently attempted to discourage cross-country takeovers, in sectors ranging from energy to air transportation and food. More generally, the increased frequency of acquisitions based in developed countries by companies based in developing countries (such as Lenovo's acquisition of IBM's PC division or Mittal's acquisition of Arcelor), and the continuing pattern of acquisition the other way round (such as the acquisition of Shin Corp, the Thai telecommunications "national champion", by Temasek, the Singaporean sovereign fund, or of Ranbaxy, the Indian generic drug maker, by the Japanese company Daiichi Sankyo) have made public opinion and governments highly sensitive to the nationality of firms. One exception is the UK, which let foreign firms acquire its entire automotive industry and large parts of the water distribution and energy sector, sectors that are politically sensitive in many countries.

33. The example of the British automotive industry is interesting, because the end of national champions (after their acquisition by foreign firms) did not spell the end of the industry: total production was greater in 2005 than in 1995, and, quite strikingly, car exports from the UK increased from 837,000 to 1,315,000 vehicles per year[17].

34. Several recent empirical studies confirm that foreign takeovers do not harm host countries, for several reasons. First, the synergies generated by takeovers (cross-border or not) on average accrue to shareholders of acquired firms, while those of the acquiring firms appropriate a very small share of it, or even lose money[18]. If that is the case, then foreign takeovers can be seen as a transfer of wealth from foreign to domestic shareholders – little to fret about. Second, several empirical studies find that foreign takeovers have a large and positive impact on productivity and little impact on total employment on average. This result has been found in the case of the UK[19], Sweden (with some caveats)[20] and the United States[21]. Moreover, there is evidence that foreign direct investment generates benefits to other firms in the same sector or in vertically related ones (i.e., suppliers or customers). This evidence is so far more abundant in the case of developed countries. In the case of developing or transition economies, there is a (still admittedly small) body of evidence showing that the presence of affiliates of foreign-owned firms tends to increase the productivity of their local suppliers. For instance, "*after a Czech producer of aluminium alloy castings for the automotive industry signed its first contract with a multinational customer, the staff from the multinational would visit the Czech firm's premises for two days each month over an extended period to work on improving the quality control system. Subsequently, the Czech firm applied these improvements to its other production lines (not serving this particular customer) and reduced the number of defective items produced.*"[22] Beyond anecdotal evidence, an econometric study of foreign firms in Lithuania also found such an effect: contacts with the local affiliates of foreign-owned firms tend to make local suppliers more efficient as a result of technological spillovers, and that the effect may be large: a 4% increase in foreign ownership is associated with a 15% increase in supplier productivity. However, it must be acknowledged that in contrast to such supply-chain linkages, several

17 http://www.autoindustry.co.uk/statistics/production/uk/index

18 See, e.g. Andrade, G., Mitchell, M. and Stafford, E. (2001). "New evidence and perspectives on mergers", *Journal of Economic Perspectives*, 15, 103-120.

19 Griffith and Simpson, «Characteristics of Foreign Owned Firms in British Manufacturing», NBER Working Paper n° 9573.

20 Heyman, Sjöholm and Gustavsson «Is There Really a Foreign Ownership Wage Premium? Evidence from Matched Employer Employee Data», *Journal of International Economics*, Elsevier, vol. 73(2), pages 355-376, 2007.

21 Bernard and Jensen, «Firm Structure, Multinationals and Manufacturing Plant Deaths», *Review of Economics and Statistics*, vol. 89(2), 2007.

22 B. Javorcik, "Does Foreign Direct Investment Increase the Productivity of Domestic Firms? In Search of Spillovers through Backward Linkages", *American Economic Review*, 2004, vol. 94(3).

studies on Morocco, Venezuela, and the Czech Republic failed to find evidence of positive intra-sectoral spillovers specifically associated to foreign ownership[23]. Nevertheless, even the absence of spillovers is consistent with foreign acquisitions having a positive impact by raising labour productivity and making the acquired firm more efficient.

35. Overall, the available evidence provides little support for the claim that the nationality of a "champion" matters for productivity, innovation or employment. Nor does it seem to have an impact on the location of R&D. This finding weakens the case for national champions.

3. Industrial policy and externalities

36. Another frequently mentioned rationale for industrial policy is the idea that some firms generate positive externalities that government intervention should reward since market mechanisms fail to do so.

37. The debate revolves around two broad types of externalities: competition creation and sector-wide scale economies or agglomeration effects (also known as "cluster effects"). Before addressing each of them, a general theoretical remark must be made. When the decision by a firm to locate a plant in a given country may generate positive externalities locally, one may be tempted to jump to the conclusion that the provision of subsidies to attract that plant is justified. This reasoning fails to take into account, however, the possible negative cross-country externalities. If the positive local externalities are the same irrespective of where the plant is located, and the only impact of a subsidy is to shift a plant from one place to the other, then each country's gain is another country's loss and industrial policy does not generate any global benefits. When taking into account the fact that public funds have a deadweight cost, such subsidies end up decreasing global surplus, even though they may be rational from each country's individual viewpoint. This remark is probably relevant to some cases of short-sighted industrial policy. For instance, the available literature about the United States, where aid is not prohibited, lends support to a rather negative view of competition across states to attract firms. States seem to engage into costly competition in order to shift activities from neighbouring states towards themselves, without much creation of new activities[24]. This destructive cross-state competition also seems to have intensified lately[25], and this has prompted some American authors to recommend a federal control over State aid[26].

38. However, if the positive externalities vary a lot according to the location of a plant, competition between governments offering subsidies to attract it to their territory may lead to efficient outcomes.

3.1. The "competition creation" argument

39. According to the "creation of competition" argument, in the presence of large fixed costs, private incentives to enter in a given sector are insufficient because the private gain from entry is often lower than

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23 Javorcik (2004).

24 R. Tannenwald, Are State and Local Revenue Systems becoming Obsolete? *National Tax Journal*, vol. 55 (2), Sept. 2002, p. 467.

25 K. Chi and D. Leatherby, State Business Incentives: Trends and Options for the Future, Lexington, Kentucky: Council of State Governments, 1997.

26 P. Enrich, "Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business", *Harvard Law Review*, vol. 110 (2), 1996, p. 377. Notice however that if the positive externalities vary a lot according to the location of a plant, competition between governments offering subsidies to attract it to their territory may lead to efficient outcomes (W. Tiebout, A pure theory of local expenditures, *Journal of Political Economy*, vol. 64 (5), 1956, p. 416; T. Besley and P. Seabright, "The Effects and Policy Implications of State aids to Industry: an Economic Analysis », *Economic Policy*, 1999, p. 15-53).

the social gain. The private gain is limited to the entrant's profit, while the social gain also includes the benefit to customers resulting from more intense competition. In practice, this argument has been mentioned in the context of industrial policy aiming to create national champions in markets where only a very small number of foreign producers were previously active. Examples of such industrial policy include the abovementioned unsuccessful attempts by several European governments to create domestic competitors of IBM in the 1960s and 1970s, and Europe's successful challenge of Boeing's dominance in the aircraft manufacturing industry, through Airbus.

40. From a theoretical viewpoint, this type of justification of industrial policy is reminiscent of "strategic trade policy" by which governments attempt to shift rents from foreign producers to domestic ones[27]. A well-known caveat when assessing such policies is that they involve large cross-country externalities. The sign of these externalities cannot be known a priori. On the one hand, supporting a national champion benefits all customers, including those abroad (unless the increase in competition is offset by a large overall cost increase resulting from the lack of exploitation of scale economies), and governments' failure to take foreign customers into account might in theory lead to too little aid being granted. On the other hand, governments fail to internalise the losses to foreign competitors, which may lead to excessive aid levels. Recent papers by David Collie[28] show that if the deadweight cost of taxation is high and the market considered is one of highly homogeneous products, then industrial policy may result into inefficient subsidy races leading to a waste of public funds, even if each government acts rationally and attempts to maximise its country's surplus.

41. As it is often, the empirical evidence on this subject is mixed. First, several cases of industrial policies motivated by the attempt to increase competition failed dramatically, notably in the computer sector. Second, an existing estimation of the impact of the launch of Airbus with the support of several European governments illustrates the magnitude of the negative externalities. On the one hand, the creation of Airbus was beneficial for Europe as a whole because it shifted some rents away from American aircraft producers towards Airbus, and it also contributed to a decrease in (quality-adjusted) prices. However, the creation of Airbus was detrimental to global welfare, because the losses to American manufacturers were large, as the creation of Airbus reduced their ability to recoup fixed costs over large volumes of sales. In that sense, the creation of Airbus made the worldwide production of aircraft less efficient because it led to the wasteful duplication of fixed costs[29]. The assessment of the Airbus case is thus twofold. On the one hand it is an example of an efficiently run industrial policy that delivered clear benefits to the participating countries, showing that the problems associated with government intervention in industry, such as rent-seeking or lack of accountability, can be overcome. On the other hand, it would be wrong to view such policies as an example for global growth-promoting strategies since they may decrease global welfare – even when successful.

3.2. Externalities, spillovers, clusters and national champions

42. Lately, the main argument of the advocates of interventionist industrial policies relies on the need for governments to correct markets' failure to reward the local externalities generated by the regional

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27 J. Brander and B. Spencer, Export Subsidies and International Market Share Rivalry, *Journal of International Economics*, vol. 18, 1985, p. 83.

28 D. Collie, State aid in the European Union: The prohibition of subsidies in an integrated market, *International Journal of Industrial Organization*, vol.18, 867-884; 1998; D. Collie, Prohibiting State aid in an Integrated Market, *Journal of Industry, Competition and Trade*, vol. 2 (3), 2002, p. 215; D. Collie, State aid to Investment and R&D, European Economy, *Economic Papers*, vol. 231, 2005, p. 1. See also J.-A. Garcia and D. Neven, State aid and Distortion of Competition, a Benchmark Model, HEI Working Paper No. 06/2005.

29 D. Neven and P. Seabright, European Industrial Policy: the Airbus Case, *Economic Policy*, 1995.

concentration of firms in specific sectors. The most common version of this argument is that the concentration of firms in a given region generates three types of externalities, each of which can be seen as a specific instance of sector-wide economies of scale. The first is input sharing: the concentration of firms in the same sector in a given area attracts input suppliers, which lowers all firms' costs. The second is labour market pooling: a concentration of firms attracts a large pool of workers with the requisite sector-specific skills, leading to reduced search costs for both workers and firms. The third is knowledge spillovers: a company's R&D efforts may benefit other companies because new knowledge diffuses outside the company undertaking R&D, through social and business interaction (for instance between suppliers and customers), or as a consequence of employees moving across companies. A variant of these arguments, especially relevant to developing economies, involves informational externalities: whenever a firm is established in a new sector, other agents observe its performance and learn about the prospects in that sector. According to Rodrik (2004)[30], this discovery process generates positive information externalities and therefore warrants a government intervention aiming to identify promising sectors and to encourage firms to enter them.

43. The empirical evidence is twofold. On the one hand, there is a lot of evidence that positive agglomeration externalities exist, thereby making the theoretical claim for industrial policy reasonable. On the other hand, the evidence on governments' attempts to emulate the Silicon Valley or to jump start activity in a new sector is mixed. Many such attempts failed, and several success stories appear to owe little to governments; however, in some instances, especially in developing countries, government intervention played a key role in the successful development of entirely new sectors

44. The importance of agglomeration effects and sector-wide economies of scale has been substantiated by a series of convergent studies. Their magnitude is likely to be quite large: for instance, according to a recent study, a doubling in the regional scale of an industry leads on average, in Japan, to a 4.5% increase in productivity[31]. As opposed to intra-firm economies of scale, such intra-sectoral economies of scale in theory justify public intervention in order to help industries reach a large enough scale. The various underlying mechanisms have been measured as well. The input sharing assumption has received empirical confirmation: the more firms are concentrated in an area, the more outsourcing one observes, which reflects the greater availability of outside inputs[32]. The best-documented type of local externality is knowledge spillovers. For instance, Agrawal et al (2006) showed, by studying patent citations, that the knowledge created by an inventor is applied disproportionately in locations where the inventor lived previously, which can be explained only by the importance of personal connections[33], and Audrestch and Feldman (1996) highlighted the geographic concentration of innovations[34].

45. There is evidence that many developing countries' specialisations owes more to the development of sectors in which there was an initial presence, because of agglomeration and informational externalities,

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30 D. Rodrik, "Industrial Policy for the twenty-first century", Harvard Kennedy School Working Paper 04-047.

31 R. Nakamura, "Agglomeration economies in urban manufacturing industries: a case of Japanese cities," *Journal of Urban Economics*, vol.17, 108-124, 2005.

32 Holmes, T. J. (1999), "Localisation of Industry and Vertical Disintegration," *Review of Economics and Statistics*, Vol. 81(2): 314-25.

33 A. Agrawal, I. Cockburn and J. McHale, Gone But Not Forgotten: Knowledge Flows, Labour Mobility, and Enduring Social Relationships, *Journal of Economic Geography*, vol. 6(5), 2006; see also E. Moretti, Workers' Education, Spillovers and Productivity: Evidence from Plant-Level Production Functions, *American Economic Review*, vol. 94(3), 2004.

34 D.B. Audretsch and M. Feldman, R&D Spillovers and the geography of innovation and production, *American Economic Review*, vol. 86, 630-664, 1996.

than to genuine comparative advantage. For instance, as Hausman and Rodrik (2003)[35] note, countries with nearly identical resource endowments end up with very different specialisations: Korea exports microwave ovens but no bicycles, while Chinese Taipei exports bicycles but almost no microwave ovens; Bangladesh is one of the main exporters of hats worldwide while Pakistan exports almost none. Thee findings suggest that specialisation patterns are largely explained by random events occurring at the initial stage of development, i.e., on random attempts by lone entrepreneurs, which then give rise to self-reinforcing dynamics. If that is the case, then the argument against industrial policy based on the claim that governments should not pick winners loses some of its strength. If the lack of development of a given sector is simply caused by the fact that no entrepreneur happened to make an attempt in the past – partly for fear that, in case of success, it would be emulated by many domestic competitors and would not reap the benefits of its initial risk-taking – then there is case for governments to actively favour the development of new activities. This could allow countries to diversify, which is part of the development process[36].

46. Interestingly, there is some evidence pointing towards the fact that positive local spillovers (adjusting for firm size) are less important when a large firm settles in a region than when a small firm does[37]. This is probably because large firms have less need for interaction with outsiders. However, there also is some anecdotal evidence in the other direction, pointing to the importance of large firms in the success of some innovative clusters (like Nokia in Finland)[38].

47. In contrast to the accumulation of knowledge about the nature and magnitude of agglomeration externalities, the evaluation of the public policies supposed to stimulate them yields mixed results. Many governments' attempts to emulate the Silicon Valley have proved inconclusive, even in the United States where first-hand, detailed information was available. A comprehensive study of innovative clusters by the OECD highlights the diversity of the mechanisms that allowed some clusters to flourish and concludes that (i) it is very difficult to measure the contribution of public policy to the success of some of these clusters, and (ii) there is no single, one-size-fits-all policy prescription. Tellingly, one of the most successful technological clusters in the developing world, in the Bangalore region, appears to have been caused by a series of serendipitous events (such as IBM's refusal to let Indian shareholders purchase 60% of its Indian subsidiary, which led IBM to leave India and forced Indian software professionals to turn towards open platforms, thereby acquiring the skills that would prove highly valuable more than ten years later)[39].

48. Conversely, Rodrik (2004)[40] argues that some industrial policies followed in Latin America and East Asia succeeded in taking into account informational externalities and fostering the development of entirely new sectors. For instance, in Chile, the public agency Fundación Chile started to experiment with salmon farming in the 1970s. Whereas this industry was inexistent in Chile prior to this policy, Chile is now one of the main exporters of salmon. Similarly, Rodrik argues that the launch of orchid production by government firms in Chinese Taipei is a good way to reveal the profitability of this sector in order to stimulate private investment and the development of a new sector. According to Rodrik (1995), the case of

35 R. Hausman and D. Rodrik, "Economic Development as Self-Discovery", *Journal of Development Economics*, vol. 72, 2003.

36 J. Imbs and R. Wacziarg, "Stages of Diversification", *American Economic Review*, vol. 93(1), 2003.

37 Rosenthal, S. S. and W. C. Strange (2003), "Geography, Industrial Organisation, and Agglomeration," *Review of Economics and Statistics* 85 (2), May 2003. 377-393.

38 See the chapter on Finland in OECD, Innovative Clusters, 2001.

39 H. Pack and K. Saggi, "Is There a Case for Industrial Policy? A Critical Survey", *The World Bank Research Observer*, vol. 21(2), 2006.

40 D. Rodrik, "Industrial Policy for the twenty-first century", Harvard Kennedy School Working Paper 04-047.

the Korean conglomerate Hyundai is a stunning illustration of the usefulness of a properly implemented policy targeting a national champion. On the one hand, government support to diversification allowed Hyundai to internalise labour market externalities, as managers who had acquired skills in the cement and construction industry could then apply them to other sectors, as Hyundai developed new activities, such as car manufacturing and shipbuilding. On the other hand, the government's direct and indirect subsidisation (including in the form of implicit purchase guarantees for the ship building division, as explained above) encouraged Hyundai to catch up with foreign incumbents in terms of efficiency.

49. However, Rodrik stresses the limitation of such policies. Unless subsidies to investors in new sectors are strictly limited in their scope (with a restriction to really new sectors) and duration (long enough for discovery to occur, but not longer) and made conditional on some market-based measure of performance, they may well be inefficient. In addition, in the case of Korea, Rodrik (1995) stresses the importance of President Park's personal interventions: "President Park, in particular, was famous for his daily involvement in the implementation of his economic policies, and his willingness to override the bureaucracy at a moment's notice when businessmen had legitimate complaints." This interpretation of the Korean success as being attributable to a large extent to a single man's influence and wise decisions makes it quite difficult to derive from it general policy prescriptions, in particular as regards the avoidance of rent-seeking. Also, it must be noted that there is considerable disagreement as to the decisiveness of Korean Industrial Policy in the overall Korean performance. Some authors argue that other factors, such as the high investment rate, the educational level of the Korean population, and the relatively equal wealth distribution were the main factors[41].

50. The general implication of the empirical literature on agglomeration effects is that while they are important, the appropriate policy tools to deal with them are complex and not yet fully understood. In particular, while some kind of industrial policy is likely to be helpful, there seem to be good reasons to focus them on smaller firms at an early stage of development rather than on existing champions (the Korean example notwithstanding), because the various abovementioned externalities are likely to be more acute in the case of small firms.

4. Rent-seeking and the political economy of industrial policy

51. One of the criticisms most frequently levelled at industrial policy, especially when it takes the form of subsidies to specific firms, is that even if such policies make sense in principle, in practice private interests engaging in rent-seeking are likely to capture governments and tilt industrial policies in their favour.

52. One can find many examples of industrial policies that obviously made no sense from a collective interest viewpoint and can be better explained by rent-seeking or political motives - an extreme example is aid granted in the 1990s by the State of Michigan to various firms on job-creation grounds at a cost more than 2 million dollars per job[42]. More generally, the ability of private interest groups to distort economic policy in their favour has been amply documented[43], just as the impact of firms' political connections on business outcomes, both in developed and developing countries[44]. For example, the degree

41 See G. Grossman and V. Norman's discussion at the end of Rodrik (1995); and Pack and Saggi (2006).

42 See R. Tannenwald, Are State and Local Revenue Systems becoming Obsolete? *National Tax Journal*, vol. 55 (2), Sept. 2002, p. 467.

43 Cf. T. Persson and G. Tabellini, *Political Economics: Explaining Economic Policy*, MIT Press, 2000.

44 Brian Roberts "A Dead Senator Tells No Lies: Seniority and the Distribution of Federal Benefits." *American Journal of Political Science*, February1990, 34(1), 31–58; Fisman, Ray, (2001), "Estimating the Value of Political Connections", *American Economic Review*, September, 2001.

of tariff protection enjoyed by various industries in the United States is directly correlated to the level of donations to political parties[45]. There is also evidence that sector- or firm-specific public policy (for instance trade policy) is in general tilted in favour of declining industries. This is a quite general pattern. It can be observed both in US trade policy[46], and in European state aid policy: for instance, many European governments spent billions of Euros trying to keep inefficient coal mines afloat, only to delay their closure by a few years.

53. A recent econometric study of state aid in Europe[47] finds that the more a country's political system makes the provision of targeted aid politically profitable (e.g., in countries with small electoral constituencies, little ideological distance between parties, and little party unity), the greater the share of aid to firms that is indeed targeted ("sectoral", in EU parlance), as opposed to "horizontal". This suggests that the provision of support to specific sectors is based, to some extent, on electoral considerations – despite strict control by the European Commission.

54. An econometric study spanning 32 developed and developing countries suggests that there exists a close relationship between the presence of industrial policy geared towards national champions and the level of corruption[48]. Everything else being equal, the existence of procurement policies favouring national champions, or of preferential fiscal treatment, is associated with a large increase in corruption, and the relationship is statistically significant. While this study suffers from the same methodological limitations as all cross-country studies, it suggests that industrial policy, especially when it is focused on individual firms, is largely captured by private interests.

55. These findings have two consequences. First, rent-seeking and politically motivated decisions may affect the quality of industrial policy and lead to an inefficient use of public funds and to productive and allocative inefficiencies. In addition, the more industrial policy lends itself to capture by private interests, the more companies are likely to invest in rent-seeking activities, which represents a waste of resources: according to various estimates, the cost of rent-seeking activities is very high[49].

56. Industrial policy sometimes creates new vested interests that engage in rent-seeking, for instance by pursuing the perpetuation of industrial policies which should in fact be interrupted because of changing

45 P. Goldberg and G. Maggi, Protection for Sale: An Empirical Investigation, *American Economic Review*, vol. 89 (5), 1999, p. 1135.

46 G. Hufbauer and H. Rosen *Trade Policy for Troubled Industries*, Policy Analyses in International Economics 15, Institute for International Economics Washington, D.C., 1986 ; G. Hufbauer, Gary, D. Berliner and K. Elliot, Trade Protection in the United States: 31 Case Studies, Institute for International Economics, Washington, D.C., 1986 ; Ray, E . (1991). "Protection of manufactures in the US," in D. Green, *Global Protectionism: Is the US playing on a level field*? Macmillan, London.

47 U. Aydin (2007). "Politics of State Aid in the European Union: Subsidies as Distributive Politics", University of Washington, Political Science Department, unpublished.

48 National Champions and Corruption: Some Unpleasant Interventionist Arithmetic. Alberto Ades; Rafael Di Tella. *The Economic Journal*, Vol. 107, No. 443, 1997

49 In the United States, total expenditures on transfer activity have been estimated at 25% of GDP (D. Laband and J. Sophocleus, An Estimate of Expenditures on Transfer Activity in the United States, *Quarterly Journal of Economics*, vol. 107(3), 959-983, 1992). Other estimates, based on regressions of gross national output on the relative number of lawyers (supposed to be a proxy for the magnitude of rent-seeking activities) and physicians or engineers (supposed to be a proxy for the magnitude of productive activity) point to similar or even higher costs of rent-seeking (S. Magee, W. Brock and L. Young, *Black Hole Tariffs and Endogenous Policy Theory: Political Economy in General Equilibrium*. Cambridge: Cambridge University Press, 1989; K. Murphy, A. Shleifer and R. Vishny, The Allocation of Talent: Implications for Growth, *Quarterly Journal of Economics*, vol. 106(2), 503-530, 1991).

circumstances. The Concorde project, sponsored by the British and French governments, illustrates this point[50]. The launch of a supersonic plane made sense in the cheap oil world of the 1960s, but the project lost its economic rationale after the oil shock of 1973. However, its advanced stage implied that the large group of civil servants and businessmen with a stake in the Concorde project had a strong interest in the continuation of the project. Ultimately, this group prevailed over market signals and the project went ahead, at a considerable cost to both governments.

57. According to Rodrik (1995), industrial policy in East Asian countries in the last decades was relatively immune to rent-seeking, unlike what was observed in most developing and many developed countries. Also, as Rodrik (2004) points out, the presence of rent-seeking does not suffice to conclude against industrial policy, no more than rent-seeking in education justifies an end to the public provision of education. However, these findings plead against policies that endow governments with tools allowing them to arbitrarily pick winners and reward specific firms. More across-the-board instruments, or aid targeted to new firms and new activities, on a temporary basis, would probably limit the scope for rent-seeking.

5. Competition policy as a tool to achieve industrial policy goals

58. This section discusses the extent to which competition policy may address the concerns that are often mentioned to justify industrial policy. The topics considered below are the realisation of scale economies, the limitation of exploitative pricing by foreign monopolists, the facilitation of entry into new sectors, and firm efficiency.

5.1. Competition and the rationalisation of production

59. Some abovementioned theoretical results suggest that market mechanisms alone suffice to reallocate production to the most efficient plants: while mergers may further rationalise production, most of the rationalisation results spontaneously from market mechanisms and this is all the more the case that competition is intense. Several studies focusing on the impact of exposure to trade (which operates by increasing competition) confirm this. As Melitz (2003) recalls, "*Aw, Chung and Roberts (2000) […] find evidence suggesting that exposure to trade forces the least productive firms to exit. Pavcnik finds […] that [market share] reallocations significantly contribute to productivity growth in the tradable sector. In a related study, Bernard and Jensen (1999) find that within-sector market share reallocations towards more productive exporting plants accounts for 20% of U.S. manufacturing productivity growth.*"[51] This confirms that competition policy, by targeting cartels and entry-deterring strategies, contributes to productive efficiency.

5.2. Competition policy as a tool to fight exploitative pricing

60. According to Jonathan Baker[52], the cost of imperfect competition to the economy is about 1% of GDP; other sources estimate the damage caused by cartels to be larger because cartel overcharges are estimated to be on average in the 20%-30% range[53] and most cartels are considered to be undetected[54].

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50 D. Myddlteon, *They Meant Well: Government Project Disasters*, Institute of Economic Affairs Monographs, Hobart Paper No. 160, 2007.

51 M. Melitz, "The Impact of Trade on Intra-Industry Reallocations and Aggregate Industry Productivity", Econometrica, vol. 71 (6), 2003.

52 Jonathan Baker, "The Case for Antitrust Enforcement", *Journal of Economic Perspectives*, 2003.

53 Connor J. (2004), «Price Fixing Overcharges: Legal and Economic Evidence», Working Paper American Antitrust Institute, n°04-05.

Competition policy is thus a way to fight exploitative pricing by firms operating in market lacking competition – and this applies even more forcefully to developing countries. According to Levenstein et al. (2003)[55], 2.9% of all developing countries' imports in 1997 were in industries found to be internationally cartelised by European and/or American competition authorities. This implies that developing countries can use competition policy as a tool limiting their exploitation by developed countries' companies - but its effectiveness depends on an aggressive enough enforcement, in order to increase deterrence and the probability of detection of anticompetitive behaviour.

61. Facing a market with an insufficient degree of competition, one answer is to try and create an additional, domestic competitor (a "national champion"); and another is to make the market more competitive using competition policy. The struggle against exploitative pricing involves an obvious substitutability between competition policy and industrial policy.

62. Competition policy is probably a superior answer because it is far less costly. According to Baker (2003), the annual total cost of implementing American antitrust policy was less than the annual deadweight loss induced by the vitamins cartel alone in the United States. In addition, implementing competition policy does not give rise to all the difficulties and risks associated to the promotion of national champions, including productive inefficiency (due to the wasteful duplication of fixed costs and to the possible cost advantage of foreign incumbents relative to the national champion).

63. An important point for policy purposes is that competition policy generates cross-country positive externalities. When a competition authority prohibits a merger or an exclusionary practice and thus protects competition, this benefits all customers in the affected market, including abroad. In the case of cartels, there is less complementarity because firms may decide to collude only in countries with a weak competition policy. However, even in the case of cartels, there are some cross-country positive externalities because companies can more easily cartelise an industry when they interact in many countries, since multi-market contact facilitates collusion. These considerations imply that the case for competition policy is even stronger than would appear on the basis of a country-by-country analysis.

5.3. Competition policy as a tool to facilitate the development of new firms and new sectors

64. One branch of competition policy is the repression of exclusionary strategies by dominant firms. Competition authorities can thus facilitate entry in sectors previously dominated by a small number of firms wielding a lot of market power. One example is the telecommunications sector. It is widely considered that in Europe, competition authorities' and regulators' decisions forcing incumbents to provide access to their infrastructures on reasonable terms contributed to the rapid development of residential broadband access, as it facilitated the entry of non-integrated companies that launched innovative services such as "triple play" (TV, internet and telephone services).

65. The pharmaceutical sector offers an example of competition policy facilitating the entry and the development of a "national champion" from a developing country (India) by weakening barriers to entry. Econometric studies have shown that pharmaceutical incumbents sometimes engage into entry-deterring strategies prior to or immediately after patent expiration, in order to discourage entry by generic drug

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54 Bryant P., Eckard E. (1991), "Price Fixing: The Probability of Getting Caught", Review of Economics and Statistics, vol. 73, pp. 531-536; W. Wils (2005), "Is Criminalisation of EU Competition Law the Answer?", *Revue Lamy de la concurrence*, n°4.

55 M. Levenstein, V. Suslow, and L. Oswald, "Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy", *Antitrust Law Journal*, vol. 71, pp. 801-852, 2003.

producers[56]. Some of these strategies, like predatory pricing, contravene competition law and can be repressed by competition authorities. There is indeed a large body of case law regarding predatory strategies by pharmaceutical companies that were trying to deter or delay the entry of generic drugs. Competition policy thus allows governments to prevent pharmaceutical companies from trying to enjoy monopoly power after patent expiration. This is of high value to generic drug makers, some of which (like India-based Ranbaxy) originate from developing countries. Competition policy can remove entry barriers for generic drug companies from developing countries by ensuring that when patents are supposed to expire, they cease to protect incumbents in practice and not only in theory. While developing and developed countries for a long time could not agree on the scope of patent protection in the pharmaceutical sector, competition policy offers a middle way.

5.4. The impact of competition on firms' efficiency and innovativeness

66. Competition can affect firms' efficiency in mainly two ways: first, by altering the incentives to innovate, and second, by altering managers' incentives to run firms efficiently (this second effect is about the extent of "X-inefficiencies", i.e., inefficiencies resulting from a firm's failure to exploit its own technological possibilities.

67. Theoretical research has highlighted the ambiguous effects of competition on innovation. On the one hand, very intense competition reduces post-innovation rents because it reduces the expected time during which a successful innovator can reap the benefits of its innovation; on the other hand, a monopolist's incentives to innovate are dampened by the fact that any new product it offers displaces its own older products, rather than competitors'. This has led some economists to argue, on theoretical grounds, that innovation is maximised for intermediate levels of competition. Furthermore, a recent paper by Aghion et al. (2005)[57] claims to find evidence of such an inverted U-shape relationship. However, Aghion et al.'s result is based on a cross-industry comparison, leaving some uncertainty as to the existence of a causal relationship between competition and innovation[58]. Other studies, comparing the same industries across countries and investigating the impact of different evolutions in the degree of competition, consistently find that competition stimulates innovation. For instance, technological innovation in the tobacco industry in the UK and the United States was more intense during more competitive periods (as opposed to periods when tobacco was subject to a national monopoly)[59].

68. Focusing on innovation only would however be short-sighted. Another potential impact of competition on firms' efficiency is through its impact on managerial incentives. The intuition that more intense competition induces managers to exert more efforts and eliminate slack (or "X-inefficiencies") has been reformulated by economic theory in terms of the provision of incentives to managers. Several mechanisms have been put forward[60]. They are all related to the idea that the more competitive a market is, the easier it is for shareholders to accurately measure and monitor manager performance. For instance,

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56 G. Ellison and S.F. Ellison, "Strategic Entry Deterrence and the Behavior of Pharmaceutical Incumbents Prior to Patent Expiration", NBER Working Paper No. 13069.

57 Aghion P, Bloom N., Blundell R., Griffith R., Howitt P., "Competition and Innovation: An Inverted-U Relationship", *The Quarterly Journal of Economics*, vo. 120(2), 701-728, 2005.

58 For a critical appraisal, see J. Baker, "Beyond Schumpter vs. Arrow: How Innovation Fosters Innovation", American Antitrust Institute Working Paper No. 07-04, 2007.

59 E. Zitzewitz, "Competition and Long-Run Productivity Growth in the U.K. and U.S. Tobacco Industries, 1879-1939", *Journal of Industrial Economics*, 2003.

60 B. Holmstrom, "Moral hazard in teams", *Bell Journal of Economics* vol. 13(2), 324–340, 1982; B. Nalebuff and J. Stiglitz, "Information, Competition, and Markets", *American Economic Review*, vol. 73(2), 278-283, 1983.

in a highly competitive market, a firm's profitability depends mainly on the difference between its (quality-adjusted) costs and its rivals'. Conditioning pay on profits thus makes sense in such markets because it amounts to rewarding efforts rather than luck. In contrast, profits in weakly competitive markets are largely driven by sector-wide demand and cost shocks, which are independent of managers' actions. Also, competition facilitates benchmarking and thus the measurement of manager performance.

69. This positive relationship between competition and X-efficiency has received a striking empirical confirmation in some industries. For instance, Ng and Seabright (2001)[61] study the airline industry in the Unites States and Europe between 1982 and 1995 and compare airlines' costs according to many factors, including the fraction of international routes on which they are in a monopoly or duopoly position. They find that an increase of 1% of this fraction is associated to a 2% increase in costs.

70. Similarly, a study on Bulgaria highlights some mechanisms through which market pressures increase corporate efficiency: productivity is found to have increased more quickly in sectors that experienced rapid de-concentration after the introduction of market mechanisms[62].

71. Finally, a comparison of the export performance of various Japanese industries in the 1980s reveals that the sectors in which domestic competition was more intense (as measured by market share instability) exported more than those in which competition was more muted[63]. This directly contradicts one argument in favour of national champions, namely, the idea that shielding large firms from competition at home strengthens them globally. Ironically, this argument has often been backed by references to Japan, since the global success of many Japanese companies has often been attributed to the supposed lack of competition within Japan, which allowed national champions to prosper. The abovementioned evidence implies that this interpretation of the Japanese experience is probably incorrect.

72. All in all, when considering all dimensions of firms' efficiency, the available evidence consistently points towards a positive relationship between competition and efficiency. Also, since the reduction of X-inefficiencies seems to be an important part of the mechanism, there is no reason to consider that competition matters only for developed countries focusing on high-technology sectors, while developing countries should concentrate on catching up and applying pre-existing technologies, without competition being an important ingredient. On the contrary, competition seems to matter beyond innovation and high-technology sectors.

6. Conclusion: is there a conflict between industrial policy and competition policy?

73. In the light of the abovementioned evidence, many advocates of industrial policy agree on the features that industrial policy should not have: industrial policy should not favour incumbents but rather foster entry; it should not pick winners but create conditions for innovation to take place; it should even less reward losers, but it should rather include monitoring mechanisms taking market performance into account. In other words, while it is difficult to describe what a proper industrial policy should be, no advocate of an active industrial policy considers that it should be about creating and supporting national champions[64].

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61 C. Ng and P. Seabright, "Competition, Privatisation and Productive Efficiency: Evidence from the Airline Industry", *Economic Journal*, 2001.

62 S. Djankov and B. Hoekman, "Market discipline and corporate efficiency: evidence from Bulgaria", *Canadian Journal of Economics*, vol. 33(1), 2000.

63 Sakakibara, Mariko and Michael E. Porter. "Competing at Home to Win Abroad: Evidence from Japanese History," *The Review of Economics and Statistics* vol. 83(2), 2001.

64 See, e.g., Rodrik (2004).

74. There is therefore probably less conflict between industrial policy and competition policy than is often believed. Competition policy is an efficient way to address many of the concerns that traditionally gave rise to interventionist industrial policies, and the tools needed to address the issues that competition policy cannot solve (such as taking into account sector-wide economies of scale and agglomeration externalities) do not, for the most part, conflict with competition policy.

75. However, one issue may leave room for some tension: the treatment of efficiency gains in merger controls. The focus of merger control policy on consumer welfare, in most countries, requires competition authorities to take into account merger-generated synergies only if they can be demonstrated with a high enough degree of confidence and they can be expected to be passed on to consumers to an extent sufficient to offset the potential price increases resulting from increased market power. In practice, this standard makes it almost impossible for firms to have a merger cleared on efficiency grounds. This may result into the prohibition of mergers that would generate large efficiencies, countering legitimate industrial policy concerns. However, this issue is relatively novel in most jurisdictions: for instance, in the European Union, synergies have taken into account only since 2004. On this front, there is therefore some room for competition policy to evolve and take into account industrial policy objectives.

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NOTE DE RÉFÉRENCE[1]

1. Introduction

1. L'expression « politique industrielle » peut être interprétée différemment. Selon le contexte, elle peut désigner toute intervention des pouvoirs publics influant sur les décisions des entreprises, depuis le mesures générales comme les avantages pour l'investissement accordées à toutes les entreprises jusqu'aux incitations plus spécifiques à caractère sectoriel en passant par les mesures « nationalistes », notamment l'obligation d'intégration locale pour les marchés publics, le subventionnement direct ou indirect de certaines entreprises, ou les mesures plus dirigistes comme la création de champions nationaux et leur protection contre les concurrents et acquéreurs étrangers.

2. Quelle que soit sa signification, on justifie invariablement la politique industrielle par la nécessité de remédier à des défaillances du marché, alors que la politique de la concurrence est un moyen de faire en sorte que les mécanismes du marché ne soient pas entravés par des pratiques anticoncurrentielles. Il semble donc y avoir à première vue contradiction entre les principes de base de la politique industrielle et ceux de la politique de la concurrence, mais, concrètement, il faut nuancer cette impression, parce qu'un grand nombre d'interventions des pouvoirs publics qui peuvent être considérées comme relevant de la politique industrielle n'interfèrent pas avec la politique de la concurrence.

3. Pourtant, l'un des principaux instruments de la politique industrielle, la création, le soutien ou la protection de « champions nationaux » est indéniablement en contradiction avec la politique de la concurrence. Le credo des défenseurs des champions nationaux repose sur plusieurs prémisses possibles. L'une d'entre elles est souvent invoquée : l'initiative privée ne suffit pas à elle seule pour promouvoir le développement de nouveaux secteurs pouvant se révéler très rentables, et une aide publique temporaire est nécessaire pour accélérer ce développement et assurer une diversification sectorielle. Un autre argument est mis en avant pour légitimer le soutien de champions nationaux : la taille et le pouvoir de marché sont les principaux moteurs de la productivité et de la croissance, et la nationalité des entreprises a un impact sur leur contribution à l'économie du pays où elles opèrent — notamment par l'amélioration du niveau général de qualification des travailleurs, ou par la création d'activités complémentaires, par exemple via leurs approvisionnements auprès de fournisseurs locaux. Les partisans de mesures sectorielles de politique industrielle et d'une politique de champions nationaux peuvent citer à cet égard plusieurs succès retentissants. Au Brésil, Embraer a été créé en 1969 avec le statut d'entreprise publique (elle a été privatisée en 1994) et elle a bénéficié au début de son développement d'un soutien qui a pris la forme de subventions et d'un régime préférentiel pour les marchés publics, avant de devenir un acteur mondial majeur dans le secteur de l'aéronautique, à tel point que l'aéronautique se situe aujourd'hui au premier rang des exportations brésiliennes. En Corée, le conglomérat Hyundai a été subventionné, et protégé occasionnellement de la concurrence étrangère, à chaque étape de sa diversification. De même, la décision prise par les autorités mexicaines de développer l'industrie automobile en imposant aux entreprises

[1] Cette note de référence a été rédigée par David Spector (Centre national de la recherche scientifique, École d'économie de Paris et MAAP), Antoine Chapsal (Université Pompeu Fabra et MAAP) et Laurent Eymard (MAAP). Elle ne représente pas nécessairement l'avis du Secrétariat de l'OCDE ou des pays membres de l'Organisation.

étrangères (attirées par le niveau relativement faible de salaire et par la proximité du marché des États-Unis) de strictes obligations d'intégration locale a été couronnée de succès, et l'automobile est aujourd'hui le premier secteur exportateur du Mexique. Un grand nombre de pays en développement ont appliqué et appliquent encore cette politique, afin de favoriser le développement de certains secteurs, par exemple les industries extractives et le tourisme (plusieurs pays d'Amérique latine) ou les logiciels (Chine et Inde en particulier) ainsi que les transports maritimes.

4. En revanche, ceux pour qui « la politique de la concurrence est la meilleure politique industrielle possible » soulignent qu'une intense rivalité entre entreprises et la menace permanente que représentent les entrants innovants pour les entreprises en place constituent un moteur plus efficace de la croissance que les mesures administratives de politique industrielle, que vient dénaturer la recherche de rentes par les intérêts en place. Ce scepticisme s'appuie souvent sur les échecs cuisants d'un grand nombre de champions nationaux, souvent imputables à un phénomène de déresponsabilisation et à des décisions économiquement irrationnelles, fruit d'une gouvernance politisée.

5. Dans la pratique, la création de champions nationaux bénéficiant d'un substantiel pouvoir de marché est souvent en contradiction avec la politique de contrôle des fusions ; d'un autre côté, les gouvernements cherchent parfois à infléchir la procédure de contrôle des fusions dans le sens de la réalisation d'objectifs de politique industrielle afin d'empêcher le rachat d'un champion national par une entreprise étrangère.

6. Une série d'affaires récentes ont mis en lumière cette tension entre la politique industrielle et la politique de la concurrence ; en effet, plusieurs gouvernements, surtout en Europe, inquiets devant la perspective d'une fusion transnationale dans des secteurs politiquement sensibles comme la banque et l'énergie, se sont efforcés de créer des champions nationaux ou de protéger ceux qui existaient déjà. Pour contribuer à ce débat, on examinera dans le présent document les avantages et les inconvénients de la politique industrielle et de la politique de la concurrence au vu des résultats des recherches empiriques. Les principales conclusions sont les suivantes :

- La création de champions nationaux n'a guère de justifications. D'une part, l'idée que la taille s'accompagne d'avantages concurrentiels décisifs est démentie par le bilan contrasté d'un grand nombre de fusions, qui fait douter que les gouvernements soient capables de sélectionner efficacement les gagnants, voire de les créer. D'autre part, rien de prouve que les entreprises à capitaux étrangers aient moins de retombées bénéfiques sur leur pays d'accueil que les entreprises nationales.

- La protection des champions existants n'a, elle non plus, guère de justifications. Comme on peut le constater, une forte proportion des gains de productivité tient aux réaffectations qui s'opèrent entre les entreprises (entre les moins productives et les plus productives), et un grand nombre d'innovations sont dues aux nouveaux entrants ; c'est pourquoi une protection systématique des entreprises en place est de nature à freiner la croissance, aussi bien dans les pays développés que dans les pays en développement.

- De nombreuses études empiriques démontrent l'existence d'externalités positives induites par les effets d'économies d'échelle et d'agglomération au niveau sectoriel. En particulier, les externalités d'information semblent être fortes dans les pays en développement ; en effet, les perspectives de succès dans de nouvelles activités sont très incertaines, ce qui peut être extrêmement dissuasif pour l'initiative privée. Par conséquent, les mesures prises par les pouvoirs publics pour favoriser de nouvelles activités peuvent aider les agents économiques privés à mieux connaître les secteurs qui sont prometteurs et qui peuvent accélérer le développement et la diversification. Mais définir la politique la plus adéquate pour prendre en compte ces externalités

est loin d'être aisé. Il n'y a pas de recette universelle, mais les données disponibles montrent qu'une politique industrielle efficiente doit être axée sur le développement de nouvelles activités, et pas sur le soutien de champions nationaux bien établis.

- Comme toutes les interventions des pouvoirs publics, la politique industrielle se prête à la recherche de rentes. Ce phénomène de comportement de recherche de rentes implique que les gouvernements devraient préférer les instruments d'action qui ne leur donnent pas le pouvoir d'avantager certaines sociétés, et qu'ils devraient s'en tenir à des instruments d'action plus neutres et plus généraux.

- La politique de la concurrence peut remédier à de nombreuses préoccupations habituellement invoquées pour justifier la politique industrielle. Une vive concurrence provoque la sortie des entreprises inefficientes et la rationalisation de la production, sans qu'il soit besoin de procéder à des fusions sous l'égide des pouvoirs publics. Elle peut limiter les prix abusifs pratiqués par une entreprise étrangère détenant un pouvoir de marché et faciliter l'entrée dans les secteurs dominés par quelques entreprises étrangères, ces deux effets concernant tout particulièrement les pays en développement. Enfin, la concurrence renforce l'efficience des entreprises en incitant davantage leurs dirigeants à réduire le sous-emploi des ressources et, selon certaines études, en les incitant davantage à innover.

- Il n'y a guère de conflits entre une politique industrielle correctement définie et la politique de la concurrence. Il peut y avoir certaines tensions en ce qui concerne le traitement des synergies pour le contrôle des fusions, mais des compromis devraient être possibles sur ce point.

2. La création de champions nationaux par voie de fusion : théorie et constats

7. L'un des principaux types d'intervention des gouvernements habituellement considérés comme relevant de la politique industrielle est la création de champions nationaux, soit ex nihilo, soit, plus souvent, par fusion d'entreprises préexistantes. Les gouvernements peuvent créer des champions nationaux directement, par l'acquisition de plusieurs entreprises privées et leur fusion en une seule entreprise à capitaux publics, comme l'a fait, par exemple, le gouvernement du Royaume-Uni en 1967 lorsqu'il a acquis les douze plus grandes entreprises sidérurgiques du pays pour créer British Steel Corporation ; ou en fusionnant une entreprise à capitaux publics et une entreprise privée, comme cela s'est produit en France récemment avec la fusion GDF-Suez, pour créer un champion national dans le secteur de l'énergie, de façon à contrecarrer une OPA italienne. Les gouvernements peuvent aussi agir indirectement en usant de leur influence sur certaines entreprises (notamment à travers l'encadrement du crédit, les marchés publics, la fiscalité ou les subventions) afin de les inciter à fusionner. Par exemple, dans le cadre de la loi de 1968 concernant le développement industriel, le gouvernement du Royaume-Uni a chapeauté la création d'un champion national dans l'informatique, ICL, par fusion de plusieurs entreprises nationales, en accordant des subventions par le biais de divers dispositifs d'encouragement de la R-D[2]. Les pays où l'État n'exerce pas un contrôle direct sur les entreprises peuvent néanmoins essayer de favoriser certaines fusions et d'en défavoriser d'autres, afin d'obtenir la création d'un champion national ; c'est ce que le gouvernement espagnol a fait en 2006 lorsqu'il a soutenu (en vain) une fusion entre Gas Natural et Endesa afin d'empêcher le rachat d'Endesa par une entreprise étrangère.

8. Même si les lourdes interventions de ce type visant à configurer la totalité d'un secteur sont maintenant moins fréquentes que dans le passé, de nombreux gouvernements considèrent néanmoins qu'ils doivent conserver un certain pouvoir dans le domaine du contrôle des fusions afin qu'occasionnellement

[2] Stephen Young et A. V. Lowe, Intervention in the Mixed Economy: The Evolution of British Industrial Policy, 1964-1972 (London : Croom Helm, 1975)

les préoccupations de politique industrielle puissent primer sur les préoccupations de politique de la concurrence : dans de nombreux pays, le ministère des Finances peut prendre une décision contraire aux recommandations de l'autorité nationale de la concurrence.

9. Un argument est souvent invoqué pour justifier la création de champions nationaux par fusion de petites entreprises nationales sous l'égide des pouvoirs publics : une fusion permet aux entreprises de dégager des économies d'échelle, de réaffecter leur production à leurs unités les plus efficientes et, plus généralement, de tirer parti de diverses synergies ; il sera ainsi possible en définitive d'accroître la production, d'améliorer la qualité des produits et d'innover davantage.

10. Si l'on veut se prononcer sur le bien-fondé de cet argument, il est utile de le décomposer en plusieurs éléments. Il s'appuie sur les quatre hypothèses suivantes :

i) Hypothèse 1 : « ce qui est grand est beau » ; plus une entreprise se développe, plus elle a tendance à se montrer plus efficiente.

ii) Hypothèse 2 : les mécanismes du marché ne permettent pas à eux seuls l'apparition d'entreprises de taille suffisante ; autrement dit, le fait que les entreprises plus efficientes gagnent généralement des parts de marché, investissent davantage et se développent ne suffit pas pour procurer tous les gains qui sont liés à la taille.

iii) Hypothèse 3 : l'incitation des entreprises à fusionner est insuffisante par rapport aux gains sociaux découlant d'une fusion. Une autre variante édulcorée de cette hypothèse est que le problème tient aux mesures de contrôle des fusions et pas aux incitations des entreprises.

iv) Hypothèse 4 : les gouvernements sont capables d'identifier les « champions » à créer et à soutenir.

11. Comme on le verra ci-après, la validité théorique et empirique de chacune de ces hypothèses est faible et une présomption systématique en faveur d'une politique de création et de soutien de champions nationaux ne saurait être admise. Cela ne veut pas dire que les mesures qui visent à créer des champions nationaux ne soient jamais justifiées. Ces résultats laissent toutefois penser que ces mesures ne doivent pas être la norme, mais l'exception, et que la charge de la preuve devrait entièrement incomber aux gouvernements qui prennent ces initiatives, et pas à ceux qui les mettent en doute.

2.1. La rationalisation de l'utilisation des installations de production n'est pas une justification convaincante pour la création de champions nationaux par voie de fusion

12. Indéniablement, la fusion de plusieurs petites entreprises pour former une entreprise de plus grande dimension permet souvent une rationalisation et une baisse des coûts de production, et cela pour plusieurs raisons : on peut éliminer la duplication de coûts fixes en concentrant l'ensemble des activités de production sur un seul site ; on peut fermer les installations à coût élevé en redéployant leur production vers les installations à faible coût ; en fusionnant, les entreprises peuvent mettre en commun leurs technologies et leur savoir-faire, de sorte que les coûts seront plus bas qu'ils ne l'étaient dans chaque entreprise avant la fusion ; les grandes entreprises dont les clientèles sont complémentaires peuvent atteindre une échelle à laquelle les innovations de réduction des coûts ou d'amélioration de la qualité deviennent rentables et à laquelle le lancement de nouveaux produits le devient également.

13. Il n'y a pas de théorie unique pour ce qui est des gains d'efficience découlant d'une fusion. La théorie économique a néanmoins étudié de façon approfondie un type particulier de gains d'efficience, à savoir ceux qui résultent de la possibilité qu'ont les entreprises de plus grande dimension de rationaliser leur production en la réaffectant aux sites les plus efficients et en tirant parti des économies d'échelle.

Farrell et Shapiro (1990) ont proposé le principal cadre d'analyse théorique. Leur modèle prend en compte un marché très stylisé sur lequel toutes les entreprises produisent des biens homogènes et se livrent concurrence sur les quantités[3]. Le principal résultat de ce modèle est que les fusions qui sont uniquement justifiées par la rationalisation de la production (c'est-à-dire la réaffectation au profit des installations à faible coût et la suppression des duplications de coûts fixes) se traduisent nécessairement par une diminution de la production et un niveau de prix plus élevé, même si elles peuvent améliorer le bien-être total. La raison de ce résultat surprenant est tout à fait intuitive. Sur les marchés suffisamment concurrentiels, la rationalisation intervient spontanément, puisque les entreprises à coûts élevés ne peuvent pas être concurrentielles à l'égard de leurs rivales plus efficientes. La rationalisation qui reste à réaliser par voie de fusion (par rapport au redéploiement induit par le marché) reflète en quelque sorte la faiblesse de la concurrence, qui permet principalement aux entreprises relativement inefficientes de rester en activité. Mais, dans ce cas, une fusion est de nature à réduire la concurrence sur tout marché qui n'est pas déjà suffisamment concurrentiel, ce qui explique pourquoi elle aboutit nécessairement à des prix plus élevés et à une plus faible production. Dans une étude consacrée à cette question, Spector (2003)[4] a montré que ce résultat vaut également lorsque l'entrée est possible en réaction à une hausse des prix due à une fusion : même lorsque l'entrée est libre, les fusions rentables qui ne dégagent aucune synergie autre que celles découlant de la rationalisation de l'utilisation des installations existantes de production se traduisent par une hausse des prix et une baisse de la production.

14. Ces résultats ne suffisent pas en eux-mêmes pour écarter la possibilité de fusions créant des champions nationaux qui soient souhaitables. Comme tous les résultats théoriques, ils s'appuient sur une modélisation très stylisée de l'économie. Surtout, ils ne prennent pas en compte tous les types de synergies, notamment celles qui tiennent à la mise en commun du savoir-faire ou à l'éventuel renforcement de l'incitation à innover grâce à la possibilité d'étalement des coûts de l'innovation sur de plus gros volumes. Ces résultats impliquent néanmoins qu'on ne peut justifier a priori une politique de création de champions nationaux en invoquant uniquement les économies d'échelle.

2.2. Les données empiriques sont ambivalentes en ce qui concerne l'impact des fusions sur l'efficience

15. Pour élucider l'argument selon lequel, « ce qui est grand est beau », il faut examiner les données empiriques concernant l'impact des fusions. Les études réalisées jusqu'à présent peuvent être subdivisées en trois catégories. Un premier groupe s'attache à l'impact des fusions sur la performance des entreprises, mesurée par les bénéfices ou par la rentabilité pour les actionnaires. Un deuxième groupe examine surtout l'impact des fusions sur les parts de marché et le cours des actions des entreprises extérieures à la fusion, afin de distinguer entre les effets de pouvoir de marché et les effets d'efficience. Enfin, un troisième groupe s'efforce de répondre directement à la question suivante : les fusions ont-elles tendance à accroître l'efficience des entreprises[5] ?

16. Les données concernant l'impact des fusions sur la rentabilité des entreprises sont contrastées. Les études consacrées aux fusions qui ont eu lieu en Europe, aux États-Unis et au Japon dans les années 60 et 70 montrent qu'en moyenne les fusions ne sont guère créatrices de valeur, et elles concluent que de

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3 J. Farrell et C. Shapiro, « Horizontal Mergers : An Equilibrium Analysis », *American Economic Review,* vol. 80(1), 107-126, 1990. Voir également J. Farrell et C. Shapiro, « Scale Economies and Synergies in Horizontal Merger Analysis », *Antitrust Law Journal,* vol. 68(3), 2001.

4 D. Spector, « Horizontal Mergers, Entry, and Efficiency Defense », *International Journal of Industrial Organization,* vo. 21(10), 1591-1600, 2003.

5 Cette section s'appuie en partie sur Röller, Lars-Hendrik, Johan Stennek et Frank Verboven (2001), « Efficiency Gains from Merger ». *European Economy*, No 5, 31-128.

nombreuses fusions ont été en fait destructrices de valeur, surtout celles entre grandes entreprises[6]. Les études les plus récentes ont surtout concerné l'impact de l'annonce de la fusion sur la capitalisation boursière totale des entreprises qui fusionnent. L'hypothèse de base est celle de « l'efficience des marchés », les cours de bourse étant censés refléter exactement toutes les informations disponibles sur le flux attendu de bénéfices futurs. Au total, ces études ne démontrent pas de façon convaincante que les entreprises accroissent leur rentabilité avec une fusion. Comme toutes les études empiriques, celles qu'on vient de citer soulèvent plusieurs problèmes méthodologiques. Les plus anciennes, qui mettent l'accent sur les bénéfices avant et après fusion par rapport aux autres entreprises du même secteur, ne prennent pas en compte le caractère endogène des fusions. Si les fusions sont plus fréquentes lorsqu'une des entreprises parties à la fusion se trouve confrontée à des perspectives particulièrement défavorables, rien ne justifie qu'on prenne comme référence les autres entreprises. Les études événementielles qui s'attachent à l'évolution des cours de bourse peu avant et peu après l'annonce d'une fusion échappent à cette objection, mais elles se fondent sur l'hypothèse d'efficience des marchés, qu'on peut juger irréaliste.

17. Ces résultats sont à prendre en compte dans le débat sur la politique industrielle, parce qu'ils vont à l'encontre d'un des arguments les plus anciens et les plus fréquemment invoqués en faveur des champions nationaux. Le fait que, contrairement à ce que pouvaient espérer les actionnaires, un grand nombre de fusions n'améliorent pas sensiblement la rentabilité, ou au moins que les actionnaires se trompent très souvent, signifie que l'impact des fusions est tout à fait incertain ex ante. Par conséquent, les gouvernements qui veulent créer des champions nationaux font face à un sérieux problème d'information, plus aigu que celui qui se pose aux actionnaires puisqu'ils disposeront probablement de moins d'informations spécifiques à l'entreprise. Même si on laisse de côté les autres problèmes liés à l'intervention des pouvoirs publics, notamment la recherche de rentes ou l'absence d'incitations correctes, ce problème d'information invite à lui seul à la circonspection.

18. Par ailleurs, même si une fusion n'améliore pas l'efficience des entreprises concernées, on pourrait penser qu'elle sera rentable si elle crée un pouvoir de marché. Or, l'absence de preuves non équivoques allant dans ce sens justifie une attitude sceptique à l'égard de l'argument selon lequel la taille en elle-même rend les entreprises plus efficientes et une bonne politique industrielle exige un contrôle plus souple des fusions afin d'obtenir l'efficience qu'on peut en attendre.

19. Pour dissocier l'impact des fusions sur le pouvoir de marché et leur impact sur l'efficience, plusieurs études ont examiné les effets des fusions en termes de part de marché. L'idée est que les fusions qui renforcent le pouvoir de marché devraient réduire la part de marché des entreprises fusionnées (en conséquence de la hausse de leurs prix), alors que les fusions qui se traduisent essentiellement par une plus grande efficience (en termes de coûts ou de qualité des produits) des entreprises devraient avoir l'effet inverse. Un autre moyen d'évaluer si le principal effet des fusions est d'accroître l'efficience des entreprises ou de renforcer leur pouvoir de marché consiste à examiner l'impact des fusions sur les cours des actions des concurrents extérieurs à la fusion. Si le principal effet d'une fusion doit être un renforcement du pouvoir de marché des entreprises qui fusionnent, et donc une hausse des prix qu'elles pratiqueront, cela devrait être bénéfique pour leurs concurrentes. Au contraire, si le principal effet d'une fusion est d'accroître l'efficience des entreprises qui fusionnent, cela devrait être nocif pour les entreprises concurrentes et le cours de leurs actions devrait baisser. À en juger par les études disponibles, les fusions

6 Voir, par exemple, Lubatkin, M., Srinivasan, N. et Merchant, H. (1997), « Merger strategies and shareholder value during times of relaxed antitrust enforcement : the case of large mergers during the 1980s », *Journal of Management*, 23, 59-81 ; Sirower, M. L. (1997). *The Synergy Trap: How Companies lose the Acquisition Game*.
New York: The Free Press; The effects of mergers: an international comparison; K. Gugler, D. Mueller, B. Yurtoglu et C. Zulehner, « The Effects of Mergers: An International Comparison », *International Journal of Industrial Organization*, vol. 21, 625-653, 2003.

ont été suivies en moyenne d'une diminution des parts de marché des entreprises parties à la fusion et/ou d'une hausse du cours des actions des sociétés concurrentes, ce qui veut dire qu'en moyenne les gains d'efficience, s'il y en a eu, n'ont pas été suffisants pour compenser la perte d'intensité de la concurrence[7]. Une autre étude[8], analysant directement l'impact des fusions sur les coûts dans le secteur bancaire, conclut qu'en moyenne les fusions n'ont pas amélioré l'efficience-coût et que les situations sont très variables, certaines fusions se traduisant par de substantiels gains d'efficience et d'autres par de fortes pertes d'efficience.

20. Au total, ces études montrent que certaines fusions sont très bénéfiques en termes d'efficience, mais rien ne permet de présumer que tel sera systématiquement le cas. Même les décideurs bien informés et agissant dans une optique de maximisation du profit se lancent souvent dans des fusions qui n'améliorent guère l'efficience, voire n'ont aucun effet sur ce plan. Cette observation, à laquelle il faut ajouter l'échec d'un grand nombre de champions nationaux (notamment ICL au Royaume-Uni, Bull en France et Olivetti en Italie, censés contester la domination d'IBM sur le marché des ordinateurs), devrait tempérer l'engouement pour les initiatives des pouvoirs publics qui visent à créer des champions nationaux en présumant que la taille est à elle seule la panacée, même s'il faut signaler des réussites comme celle d'Embraer au Brésil.

2.3. Prise en compte des synergies : les tensions entre politique industrielle et politique de la concurrence

21. Bien que le bilan soit au total contrasté, certaines fusions sont indéniablement créatrices d'efficience et la façon dont cette efficience est prise en compte lors du contrôle des fusions peut ne pas répondre aux préoccupations parfaitement légitimes de politique industrielle. Presque partout, la politique de la concurrence a pour but de protéger les consommateurs. En conséquence, le grand principe du contrôle des fusions est que les fusions bénéfiques pour les consommateurs (en se traduisant par une baisse des prix ou une amélioration des produits) doivent être autorisées, tandis qu'il faut interdire les fusions préjudiciables aux consommateurs. Ce critère n'est aucunement le seul qui soit économiquement rationnel. On pourrait aussi choisir d'autoriser toutes les fusions qui accroissent le bien-être total, c'est-à-dire la somme du bien-être des consommateurs et des bénéfices des entreprises. La divergence entre ces deux critères sensés ne relève pas uniquement du débat académique théorique. Ce qui est en jeu, c'est la façon de prendre en compte les économies sur les coûts fixes rendues possibles par une fusion. Selon les modèles microéconomiques classiques, les prix sont affectés par les modifications des coûts variables, et pas par celles des coûts fixes. Les autorités de la concurrence considèrent donc que les économies sur coûts fixes induites par une fusion ne peuvent être valablement invoquées au titre des gains d'efficience lorsque la fusion soulève également des problèmes de concurrence. Elles pourront donc interdire des fusions qui améliorent nettement l'efficience productive en éliminant des duplications de coûts fixes, l'argument étant que ce sont les entreprises parties à la fusion, et pas les consommateurs, qui s'approprieront les gains en découlant. En outre, la plupart des autorités de la concurrence, pour autoriser une fusion justifiée par l'efficience, imposent une norme de preuve excessivement rigoureuse, de sorte qu'en pratique presque aucune affaire de fusion n'a été tranchée sur le fondement de l'argument d'efficience[9].

22. Le conflit entre la politique de la concurrence, telle qu'elle est mise en œuvre dans la plupart des pays, et les préoccupations légitimes de politique industrielle, est donc double. Premièrement, le critère du

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7 Voir, par exemple, J. Clougherty et T. Duso, « The Impact of Horizontal Mergers on Rivals: Gains to Being Left Outside a Merger », WZB Discussion Paper SP II 2008-17.

8 Berger, Allen N et David B. Humphrey, The Effectiveness of Megamergers on Efficiency and Prices: Evidence from a Bank Profit Function, Review of Industrial Organization, 1997, 12, 95-139.

9 D. Spector, « Will efficiencies ever matter in merger control? », *Concurrences*, vol. 4-2007.

bien-être des consommateurs (à la différence du bien-être total, autre critère possible), point de repère de la politique de la concurrence, peut conduire les autorités de la concurrence à interdire des fusions qui améliorent l'efficience. Deuxièmement, la procédure de contrôle des fusions, comme toute procédure de type juridictionnel, exige une norme de preuve suffisamment stricte, parce que les décisions, en cas de contestation, doivent résister à l'examen des tribunaux. Puisqu'il est difficile de justifier une efficience future, par nature incertaine, cela peut fausser le contrôle des fusions dans un sens qui laisse trop peu de place à l'efficience. En revanche, les décisions de politique industrielle, comme toutes les décisions des pouvoirs publics, laissent place à une certaine latitude et à des tâtonnements. Au-delà du choix du critère de contrôle des fusions, le principe même du contrôle des fusions en tant que procédure juridique dont chaque décision est susceptible d'être contestée devant les tribunaux peut donc être considéré comme un carcan pouvant empêcher de mettre en œuvre certaines mesures utiles de politique industrielle.

2.4. Soutenir les champions existants peut être nocif pour la croissance

23. L'un des plus vifs débats que suscite la politique industrielle porte sur la question de savoir si les pouvoirs publics doivent soutenir les grandes entreprises. Autrement dit, doivent-ils soutenir les champions nationaux après avoir aidé à leur création ? La réponse à cette question est-elle la même pour les pays développés et pour les pays en développement ?

24. Les partisans du soutien des champions existants invoquent les arguments suivants : grâce à leur taille, et aussi parce qu'elles courent moins de risques (surtout dans le cas d'un conglomérat), les grandes entreprises sont davantage incitées à innover que leurs homologues de plus petite taille ; elles sont au cœur d'un réseau de fournisseurs auxquels elles assurent des anticipations stables (d'où l'incitation à investir et à innover) et des retombées technologiques ; elles offrent aux pays en développement un moyen d'atteindre une masse critique (en termes d'échelle de production et de gamme de produits) sans laquelle un secteur ne peut pas décoller faute d'économies d'échelle. Les grandes entreprises doivent donc être soutenues lorsqu'elles sont en difficulté et il faut les faire participer aux programmes de politique industrielle, et notamment aux programmes favorisant la R-D en partenariat public/privé. Dans son analyse de la politique industrielle coréenne, Rodrik (1995)[10] juge par exemple très judicieuse la décision prise en 1975 par le Président Park d'obliger les raffineries de pétrole coréennes à transporter leurs produits dans des pétroliers coréens pour aider les activités de construction navale de Hyundai, entreprise alors victime du marasme mondial qui sévissait dans les transports maritimes mondiaux.

25. Les mesures de soutien des grandes entreprises en difficulté sont en fait très présentes, même si elles le sont probablement moins que dans le passé. Par exemple, il n'y a guère de gouvernements qui n'aient pas injecté énormément d'argent dans la compagnie aérienne nationale. Au Royaume-Uni, la contribution de l'État à la construction aéronautique civile entre 1945 et 1974 a atteint au total 1.5 milliard £ aux prix de 1974, en rapportant 0.14 milliard £[11]. Selon une étude consacrée à la politique industrielle au Royaume-Uni dans les années 60 et 70 « ce qui était qualifié de 'sélection des gagnants' revenait en pratique à dépenser des sommes considérables pour soutenir des entreprises en difficulté ». Cette aide aux industries en déclin est une parfaite illustration d'une politique industrielle erronée[12]. Elle met en lumière l'un des écueils de la politique industrielle, la captation de l'autorité publique par les

10 D. Rodrik, « Getting Interventions Right: How South Korea and Taiwan Grew Rich », *Economic Policy,* vol. 10(20), 1995.

11 Gardner, N. (1976), « The Economics of Launching Aid », dans A. Whiting (dir. publ.), The Economics of Industrial Subsidies. London: HMSO.

12 Morris et Stout, p.873 « Industrial Policy », dans D. J. Morris (dir. publ.), The Economic System in the UK. Oxford: Oxford University, 1985.

entreprises en place, qui ont les ressources et le savoir-faire nécessaires pour fausser à leur profit les interventions publiques (voir ci-après).

26. Même parmi les partisans d'une politique industrielle interventionniste, rares sont aujourd'hui ceux qui préconisent une aide massive aux entreprises en difficulté. Mais le débat sur l'utilité de l'aide aux grandes entreprises va bien au-delà de la question du soutien à accorder aux « perdants ». Par exemple, dans l'Union européenne, les aides consacrées au sauvetage et à la restructuration des entreprises n'ont atteint entre 2005 et 2007 que 4 % du total des aides d'État. Représentant 0.53 % du PIB (et surtout octroyées aux grandes entreprises), les aides de l'État ont été consacrées pour l'essentiel à d'autres objectifs de politique industrielle. Le débat sur le point de savoir si la politique industrielle doit bénéficier aux grandes entreprises en place peut être illustré par les récents revirements de la politique de la France en matière d'innovation industrielle. Le gouvernement français a créé en 2005 une Agence pour l'innovation industrielle, dont la mission était d'attribuer des financements publics à des projets de R-D technologique devant être pilotés par une grande entreprise industrielle (avec également la participation d'entreprises de plus petite taille), mais cette démarche a été abandonnée en 2007, cette agence ayant été fusionnée avec un autre organisme dont 100 % des aides étaient accordées aux petites et moyennes entreprises, l'idée étant que la politique industrielle devait désormais être axée sur le développement des petites entreprises innovantes.

27. On peut faire remonter cette conception à la vision de Schumpeter, selon laquelle la croissance est un processus de destruction créatrice, de nouvelles entreprises venant remplacer les entreprises existantes ; dès lors, une politique industrielle saine doit favoriser le développement des petites entreprises innovantes, et pas venir en aide aux entreprises en place. Les données empiriques sont de plus en plus nombreuses à justifier cette solution, aussi bien pour les pays développés que pour les pays en développement. Les données factuelles concernant les secteurs des ordinateurs, des logiciels et d'Internet révèlent toute l'importance de la destruction créatrice : au début des années 80, IBM n'a pas saisi l'importance stratégique des systèmes d'exploitation et sa domination a été remise en cause par Microsoft. À son tour, Microsoft a été lent à se rendre compte du rôle d'Internet dans les années 90. Tout en occupant une position de leader dans les systèmes d'exploitation, et en réalisant les profits correspondants, Microsoft n'a pu empêcher des entreprises extrêmement innovantes comme Google et Sun Microsystems de s'imposer sur les nouveaux marchés qui se sont créés avec le développement d'Internet. L'élément factuel qu'on invoque le plus fréquemment à l'encontre d'une aide aux grandes entreprises en place est précisément le contraste entre ce phénomène de renouvellement des méga-entreprises aux États-Unis, qui semble aller de pair avec un rythme rapide d'innovation, et la relative stabilité observée en Europe. Ce contraste est généralisé et ne se limite en aucun cas aux secteurs de haute technologie. Seulement trois entreprises européennes se classant au « Top 500 » mondial en 2007 ont été créées après 1967, contre 51 aux États-Unis (et 46 dans les pays émergents) ; les petites entreprises innovantes connaissent une croissance bien plus rapide aux États-Unis. Il est maintenant usuel d'établir un lien entre la relative inertie de la structure des entreprises en Europe et son déficit d'innovation par rapport aux États-Unis, surtout (mais pas uniquement) dans les secteurs de haute technologie[13].

28. Ces éléments factuels sont confirmés par plusieurs études empiriques s'appuyant sur des méthodologies différentes. Dans leur étude micro économétrique de la croissance de la productivité aux États-Unis, Foster *et al.* (2000)[14] constatent, par exemple, que les gains de productivité totale s'expliquent, dans une proportion allant du tiers à la moitié, par le redéploiement de la production au profit des entreprises les plus efficientes (y compris par disparition d'entreprises existantes et création de nouvelles entreprises), plutôt que par une amélioration de la productivité intra-entreprise. On voit donc que, même si

13 T. Philippon et N. Véron, « Financing Europe's Fast Movers », Bruegel Policy Brief, 2008/01.

14 L. Foster, C. Haltiwanger et C. Krizan, « Aggregate Productivity Growth: Lessons from Microeconomic Evidence », NBER Working Paper N° 6803, 2000.

un grand nombre d'entreprises anciennes sont très efficientes, les gouvernements ne doivent pas empêcher que les moins efficientes d'entre elles soient déstabilisées par de nouvelles concurrentes.

29. On considère souvent que le processus de destruction créatrice est important dans les pays développés qui sont proches de la frontière technologique, car dans ce cas la croissance est essentiellement liée à l'innovation, alors que les pays en développement devraient surtout s'employer à rattraper les pays plus riches en mettant en œuvre les technologies existantes, ce rattrapage pouvant se faire grâce à la création de champions nationaux. Selon cette théorie, le développement économique nécessiterait des champions nationaux dans une première phase, celle où le pays applique tout simplement les « recettes » déjà connues et s'efforce de tirer parti des économies d'échelle ; dans ce cas, la destruction créatrice ne sera un moteur essentiel de la croissance qu'à un stade ultérieur.

30. Une étude de Fogel, Morck et Yeung (2006)[15] montre néanmoins que les effets bénéfiques de la destruction créatrice sont tangibles non seulement dans les pays développés, mais aussi dans les pays en développement. Ces auteurs mesurent la « stabilité des grandes entreprises » sur un échantillon de 44 pays développés et en développement ; cet indicateur est défini par la fraction des dix plus grandes entreprises en 1975 qui (i) se classaient encore parmi les dix premières en 1996 ou (ii) ont enregistré entre 1975 et 1996 une croissance de leurs effectifs au moins aussi rapide que celle du PIB. À partir de cet indice, ils procèdent à un grand nombre de régressions différentes prenant en compte l'ensemble des pays afin de déterminer la relation entre la stabilité des grandes entreprises entre 1975 et 1996, d'une part, et la croissance entre 1990 et 2000 d'autre part. Leur principale conclusion est qu'une rotation dans la partie supérieure du classement paraît être créatrice de croissance : les pays où les plus grandes entreprises en 1975 n'ont pas prospéré autant que l'ensemble de l'économie se sont montrés en moyenne plus performants, ce constat valant tout autant pour les pays développés que pour les pays en développement. Cela veut dire qu'indépendamment du rythme de développement des nouvelles entreprises, il est en soi très coûteux d'aider les entreprises en place les moins efficientes. Le mécanisme précis à l'origine de ce résultat n'a pas encore fait l'objet de travaux empiriques approfondis, mais on peut partir de l'idée que soutenir les entreprises établies prive les nouvelles entreprises d'un accès aux facteurs de production (en particulier la main-d'œuvre qualifiée) et aux marchés dont elles auraient besoin pour prospérer.

31. Ces conclusions invitent à la prudence à l'égard des mesures d'aide très ciblée à certaines entreprises, parce que les grandes entreprises en place seront probablement les principales bénéficiaires de ces mesures en tirant parti de leur avantage comparatif pour la recherche de rentes. Elles montrent en outre que les gouvernements voulant sélectionner les nouvelles technologies ou les entreprises méritant le plus d'être aidées se trouvent confrontés à de sérieux problèmes d'information : puisqu'il est fréquent que même les grandes entreprises en place ne prennent pas les bonnes décisions stratégiques et qu'elles soient ainsi en définitive déstabilisées par des entreprises de plus petite taille, comment les gouvernements pourraient-ils faire des choix avisés ? Philippon et Véron (2008) concluent que la meilleure politique industrielle consiste à aider les petites entreprises innovantes à se développer plus rapidement, non pas en sélectionnant celles qui paraissent les plus prometteuses, mais en créant un environnement favorable et en facilitant leur financement. Ces auteurs préconisent des mesures « horizontales », notamment la simplification de la réglementation des valeurs mobilières (pour faciliter l'émission d'actions par les petites entreprises), une réforme du droit de la faillite, l'élimination des distorsions dans le traitement fiscal des titres de capital et des titres d'emprunt et, enfin, une plus vive concurrence sur les marchés de capitaux. En définitive, les résultats qu'on vient de citer montrent combien il est utile de diminuer les coûts d'entrée pour les nouvelles entreprises, qui restent élevés dans un grand nombre de pays : selon Djankov *et al.*

15 K. Fogel, R. Mork et B. Yeung, « Big Business Stability and Economic Growth: is what's good for General Motors good for America? », NBER Working Paper N°12394.

(2001)[16], le coût de création d'une entreprise variait en 1999 entre 1.7 % du PIB par habitant en Nouvelle-Zélande et 495 % du PIB par habitant en République dominicaine, avec une moyenne mondiale de 66 %.

2.5. Faut-il que les champions soient nationaux ?

32. Les mesures qui visent à favoriser et à protéger les champions nationaux se fondent sur l'hypothèse que la nationalité des principaux actionnaires d'une société et la localisation de son siège ont un large impact sur sa contribution à l'économie des pays où l'entreprise exerce ses activités. Cette croyance s'exprime dans la plupart des pays chaque fois qu'une grande entreprise nationale est acquise par une grande entreprise étrangère. Ce « patriotisme économique » s'est fait entendre dernièrement dans un grand nombre de pays développés et a conduit à l'adoption de mesures de contrôle des investissements étrangers ou au renforcement de ces mesures (par exemple, aux États-Unis, le Foreign Investment and National Security Act de 2007, qui a élargi la portée des dispositions Exon-Florio de 1988). Plusieurs pays européens ont des réglementations qui restreignent les rachats étrangers ; en outre, certains pays européens ont récemment essayé de décourager les rachats transnationaux dans des secteurs allant de l'énergie aux transports aériens en passant par les produits alimentaires. Plus généralement, avec les acquisitions de plus en plus fréquentes de cibles de pays développés par des entreprises de pays en développement (par exemple, acquisition l'IBM par Lenovo ou d'Arcelor par Mittal) et la poursuite des opérations d'acquisition inverses (par exemple, l'acquisition de Shin Corp, le « champion national » thaïlandais pour les télécommunications, par Temasek, le Fonds souverain de Singapour, ou l'acquisition de Ranbaxy, fabricant indien de médicaments génériques, par l'entreprise japonaise Daiichi Sankyo), l'opinion publique et les gouvernements sont très sensibles à la nationalité des entreprises. Le Royaume-Uni a valeur d'exception à cet égard : il a laissé des entreprises étrangères acquérir la totalité de son industrie automobile et des pans entiers de ses secteurs de la distribution de l'eau et de l'énergie, activités politiquement sensibles dans un grand nombre de pays.

33. L'exemple de l'industrie automobile du Royaume-Uni est particulièrement intéressant, parce que la fin des champions nationaux (après leur acquisition par des entreprises étrangères) n'a pas sonné le glas de cette industrie : la production totale avait augmenté en 2005 par rapport à 1995 et, ce qui peut paraître surprenant, les exportations britanniques d'automobiles sont passées durant cette période de 837 000 à 1 315 000 véhicules par an[17].

34. Plusieurs études empiriques récentes confirment que les rachats étrangers ne sont pas préjudiciables pour le pays d'accueil, et ce pour plusieurs raisons. Premièrement, les synergies que créent ces rachats (transnationaux ou non) bénéficient en moyenne aux actionnaires des entreprises acquises, alors que les actionnaires des entreprises qui ont procédé à l'acquisition n'en tirent qu'un faible parti, voire perdent de l'argent[18]. Si tel est le cas, une acquisition étrangère peut donc être considérée comme un transfert de richesse des actionnaires étrangers aux actionnaires nationaux — ce dont il n'y a guère lieu de se tracasser. Deuxièmement, plusieurs études empiriques concluent que les rachats étrangers ont un impact positif marqué sur la productivité et n'ont que peu d'effet en moyenne sur l'emploi total. Ce résultat a pu être observé dans le cas du Royaume-Uni[19], de la Suède (avec quelques réserves)[20] et des États-Unis[21]. Par

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16 S. Djankov, R. La Porta, F. Lopez-de-Silanes, et A. Shleifer, « The Regulation of Entry ». Quarterly Journal of Economics, 2002, vol. 107.

17 http://www.autoindustry.co.uk/statistics/production/uk/index

18 Voir, par exemple, Andrade, G., Mitchell, M. et Stafford, E. (2001). « New evidence and perspectives on mergers », *Journal of Economic Perspectives,* 15, 103-120.

19 Griffith et Simpson, « Characteristics of Foreign Owned Firms in British Manufacturing », NBER Working Paper n° 9573.

ailleurs, on constate que l'investissement direct étranger est bénéfique pour les autres entreprises du même secteur ou pour les entreprises avec lesquelles il existe un lien vertical (fournisseurs ou clients). Les données probantes sont jusqu'à présent plus nombreuses dans le cas des pays développés. En ce qui concerne les économies en développement ou en transition, les données d'observation (encore peu abondantes, il faut l'admettre) montrent que la présence de filiales d'entreprises à capitaux étrangers a tendance à accroître la productivité des fournisseurs locaux. Par exemple, « *après qu'un producteur tchèque de pièces en alliage d'aluminium pour l'industrie automobile a eu signé son premier contrat avec une entreprise multinationale, des équipes de cette multinationale se sont rendues dans l'entreprise tchèque deux jours par mois durant une longue période pour améliorer le système de contrôle de la qualité. L'entreprise tchèque a ensuite appliqué ces améliorations à ses autres lignes de production (qui n'étaient pas destinées à ce client) et a réduit le nombre de pièces défectueuses* »[22]. Au-delà de ces éléments anecdotiques, une étude économétrique consacrée aux entreprises étrangères exerçant leurs activités en Lituanie a également conclu à l'existence d'un tel effet : les contacts avec les filiales locales d'entreprises étrangères ont tendance à renforcer l'efficience des fournisseurs locaux à la faveur des retombées technologiques, ce phénomène pouvant être très marqué : une augmentation de 4 % des prises de participation étrangères entraîne une amélioration de 15 % de la productivité du fournisseur. Mais il faut reconnaître que, contrairement à cet effet d'interaction dans la chaîne logistique, plusieurs études portant sur le Maroc, le Venezuela et la République tchèque n'ont pas conclu à l'existence d'externalités positives intra-sectorielles liées spécifiquement au capital étranger[23]. Malgré tout, même en l'absence d'externalités, les acquisitions étrangères ont un impact positif en améliorant dans l'entreprise acquise la productivité du travail et l'efficience.

35. Au total, les données disponibles n'étayent guère l'argument selon lequel la nationalité d'un « champion » serait importante sur le plan de la productivité, de l'innovation ou de l'emploi. La nationalité ne semble pas non plus avoir un impact sur la localisation de la R-D. Cette conclusion affaiblit l'argumentation en faveur des champions nationaux.

3. Politique industrielle et externalités

36. La politique industrielle fait intervenir une autre motivation fréquemment invoquée : certaines entreprises créent des externalités positives que l'intervention des pouvoirs publics doit récompenser puisque les mécanismes du marché ne le font pas.

37. Le débat concerne essentiellement deux types d'externalités : la création de concurrence et les effets sectoriels d'économies d'échelle ou d'agglomération (ce qu'on appelle aussi les « effets de grappe »). Avant de commenter chacun de ces types d'externalités, il faut faire une observation générale d'ordre théorique. Lorsque la décision que prend une entreprise d'implanter une usine dans un pays est susceptible d'avoir des externalités positives localement, on peut être tenté de conclure trop précipitamment qu'il est justifié d'accorder des subventions pour attirer cette usine. Mais ce raisonnement ne tient pas compte d'éventuelles externalités transnationales négatives. Si les externalités locales positives sont les mêmes quel que soit le lieu où l'usine est située, et si le seul effet d'une subvention est de déplacer une usine d'un lieu à un autre, alors le gain de chaque pays correspond à la perte d'un autre pays et la

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20 Heyman, Sjöholm et Gustavsson « Is There Really a Foreign Ownership Wage Premium? Evidence from Matched Employer Employee Data », TRUIER Working Paper n°199.

21 Bernard et Jensen, « Firm Structure, Multinationals and Manufacturing Plant Deaths », *Review of Economics and Statistics,* vol. 89(2), 2007.

22 B. Javorcik, « Does Foreign Direct Investment Increase the Productivity of Domestic Firms? In Search of Spillovers through Backward Linkages », *American Economic Review*, 2004, vol. 94(3).

23 Javorcik (2004).

politique industrielle ne crée aucun avantage au niveau mondial. Sachant que les financements publics ont un coût d'efficience, ces subventions diminuent en définitive le surplus à l'échelle mondiale, même si elles peuvent être rationnelles dans l'optique de chaque pays. Cette observation vaut probablement pour certains cas de politique industrielle à courte vue. Par exemple, les études consacrées aux États-Unis, où l'aide n'est pas interdite, donnent une image assez négative de la concurrence entre États pour attirer les entreprises. Aux États-Unis, les États semblent se livrer à une concurrence très dispendieuse, simplement pour attirer sur leur territoire des activités exercées dans des États voisins, sans que les créations de nouvelles activités soient nombreuses[24]. Cette concurrence destructrice entre États semble en outre s'être intensifiée récemment[25], de sorte que certains auteurs américains préconisent un contrôle fédéral des aides des États[26].

38. Toutefois, si les externalités positives sont très variables selon la localisation de l'usine, la concurrence entre les gouvernements qui offrent des subventions pour attirer cette usine sur leur territoire peut donner des résultats efficients.

3.1. L'argument de la « création de concurrence »

39. Selon cet argument, en présence de coûts fixes élevés, l'incitation privée à entrer dans un secteur donné est insuffisante parce que le gain privé lié à cette entrée est souvent plus faible que le gain social. Le gain privé se limite au profit réalisé par l'entrant, alors que le gain social comprend également l'avantage que procure aux consommateurs une plus vive concurrence. En pratique, cet argument a été invoqué dans le contexte des mesures de politique industrielle visant à créer des champions nationaux sur les marchés où n'opéraient précédemment qu'un très petit nombre de producteurs étrangers. On peut citer comme exemple de ce type de politique industrielle la tentative de création de concurrents nationaux d'IBM dans plusieurs pays européens au cours des années 60 et 70, qui a été un échec, alors que l'Europe est parvenue en revanche à remettre en cause la domination de Boeing dans l'industrie aéronautique grâce à Airbus.

40. D'un point de vue théorique, ce type de justification de la politique industrielle rappelle la « politique commerciale stratégique » par laquelle les pays s'efforcent de transférer à leurs producteurs nationaux la rente dont bénéficient les producteurs étrangers[27]. Lorsqu'on veut évaluer ce type de politique, il faut bien garder à l'esprit que d'importantes externalités transnationales sont en jeu. On ne peut connaître a priori le signe de ces externalités. D'une part, soutenir un champion national est bénéfique pour tous les consommateurs, y compris étrangers (à moins que l'intensification de la concurrence ne soit compensée par une forte hausse globale des coûts tenant à ce que les économies d'échelle ne sont pas exploitées), et le fait que les pays ne prennent pas en compte les consommateurs étrangers peut en théorie aboutir à ce que l'aide accordée soit trop faible. D'un autre côté, les pays n'internalisent pas les pertes que subissent les

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24 R. Tannenwald, Are State and Local Revenue Systems becoming Obsolete? *National Tax Journal*, vol. 55 (2), Sept. 2002, p. 467.

25 K. Chi et D. Leatherby, *State Business Incentives: Trends and Options for the Future,*, Lexington, Kentucky : Council of State Governments, 1997.

26 P. Enrich, « Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business », *Harvard Law Review*, vol. 110 (2), 1996, p. 377. On notera cependant que si les externalités positives varient sensiblement en fonction de la localisation de l'usine, la concurrence entre les collectivités publiques offrant des subventions pour l'attirer sur leur territoire peut donner des résultats efficients (W. Tiebout, A pure theory of local expenditures, *Journal of Political Economy,* vol. 64(5), 1956, p. 4126 ; T. Besley et P. Seabright, « The Effects and Policy Implications of State aids to Industry: an Economic Analysis », *Economic Policy,* 1999, p 15-53).

27 J. Brander et B. Spencer, Export Subsidies and International Market Share Rivalry, *Journal of International Economics*, vol. 18, 1985, p. 83.

concurrents étrangers. Plusieurs articles récents de David Collie[28] montrent que si le coût d'efficience de l'impôt est élevé et si le marché considéré est un marché de produits très homogènes, la politique industrielle peut aboutir à une course inefficiente aux subventions dont le résultat est un gaspillage de deniers publics, même si chaque pays agit rationnellement et s'efforce de maximiser son surplus.

41. Comme souvent, les études empiriques sur ce thème sont ambivalentes. Premièrement, on constate que dans plusieurs cas les mesures de politique industrielle qui obéissent à la volonté d'intensifier la concurrence ont totalement échoué, en particulier dans l'informatique. Deuxièmement, une estimation de l'impact du lancement d'Airbus avec l'aide de plusieurs pays européens illustre l'ampleur des externalités négatives. D'un côté, la création d'Airbus a été bénéfique pour l'Europe dans son ensemble, parce qu'elle a transféré au profit d'Airbus certaines rentes dont bénéficiaient les constructeurs aéronautiques américains et a également contribué à une baisse des prix (compte tenu de la qualité). Mais la création d'Airbus a été préjudiciable du point de vue du bien-être mondial, parce que les constructeurs américains ont subi de lourdes pertes en n'étant plus autant à même de récupérer leurs coûts fixes sur de gros volumes de ventes. En ce sens, la création d'Airbus a réduit l'efficience de la production mondiale d'avions, parce qu'elle s'est traduite par un gaspillage prenant la forme d'une duplication des coûts fixes[29]. La création d'Airbus est donc une opération à double tranchant. D'une part, c'est un exemple de politique industrielle efficiente qui a eu clairement des effets bénéfiques pour les pays participants, et qui a montré que les problèmes liés à l'intervention des pouvoirs publics dans l'industrie, notamment la recherche de rentes ou une responsabilisation insuffisante, peuvent être surmontés. D'un autre côté, il serait erroné de considérer les politiques de ce type comme un exemple de stratégies favorisant la croissance au niveau mondial, puisqu'elles peuvent réduire le bien-être à ce niveau, même si elles sont couronnées de succès.

3.2. Externalités, retombées, pôles de compétitivité et champions nationaux

42. Depuis quelque temps, le principal argument des partisans d'une politique industrielle interventionniste se fonde sur la nécessité, pour les gouvernements, de corriger une défaillance des marchés en ce qu'ils ne « récompensent » pas les externalités locales résultant de la concentration régionale des entreprises dans certains secteurs. La variante la plus courante de cet argument est que la concentration des entreprises dans une région donnée crée trois types d'externalités, chacune pouvant être considérée comme un exemple spécifique d'économies d'échelle sectorielles. Le premier type d'externalités est le partage des intrants : la concentration des entreprises dans un même secteur et dans une région donnée attire les fournisseurs d'intrants, ce qui réduit les coûts de l'ensemble des entreprises. Le second type d'externalités est la création d'un gisement de main-d'œuvre : une concentration d'entreprises attire un vaste gisement de travailleurs dotés des qualifications nécessaires au secteur concerné, ce qui diminue les coûts de recherche d'emploi pour les travailleurs et de recrutement pour les entreprises. Il y a un troisième type d'externalités : les retombées en termes de connaissances ; l'effort de R-D d'une entreprise peut être bénéfique pour d'autres entreprises parce que les nouvelles connaissances se diffusent en dehors de l'entreprise qui réalise la R-D, par le biais des interactions sociales et industrielles ou commerciales (par exemple, les interactions entre fournisseurs et clients), ou en raison des mouvements de salariés entre entreprises. Une variante de ces arguments, qui vaut tout particulièrement pour les économies en développement, fait appel aux externalités d'information : lorsqu'une entreprise est établie dans un nouveau secteur, les autres agents économiques observent sa performance et apprennent à mieux connaître

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28 D. Collie, State aid in the European Union: The prohibition of subsidies in an integrated market, *International Journal of Industrial Organization*, vol.18, 867-884; 1998; D. Collie, Prohibiting State aid in an Integrated Market, *Journal of Industry, Competition and Trade*, vol. 2 (3), 2002, p. 215; D. Collie, State aid to Investment and R&D, European Economy, *Economic Papers*, vol. 231, 2005, p. 1. Voir également J.-A. Garcia et D. Neven, State aid and Distortion of Competition, a Benchmark Model, HEI Working Paper No. 06/2005.

29 D. Neven et P. Seabright, European Industrial Policy: the Airbus Case, *Economic Policy*, 1995.

les perspectives d'évolution de ce secteur. Selon Rodrik (2004)[30], ce processus de découverte crée des externalités d'information positives et justifie donc une intervention des pouvoirs publics, afin de déterminer quels sont les secteurs prometteurs et d'encourager les entreprises à y entrer.

43. Les études empiriques sont cette fois encore ambivalentes. D'un côté, l'existence d'externalités d'agglomération positives est abondamment démontrée, de sorte qu'on peut considérer comme raisonnable la justification théorique de la politique industrielle. D'un autre côté, les pouvoirs publics, lorsqu'ils veulent reproduire la Silicon Valley ou lancer une activité dans un nouveau secteur, obtiennent des résultats contrastés ; beaucoup de ces tentatives ont échoué et, bien souvent, les pouvoirs publics ne paraissent pas avoir joué un grand rôle dans les réussites les plus spectaculaires. Néanmoins, dans certains cas, et surtout en ce qui concerne les pays en développement, l'intervention des pouvoirs publics a été déterminante dans le développement réussi de secteurs entièrement nouveaux.

44. Une série d'études convergentes mettent en lumière toute l'importance des effets d'agglomération et des économies d'échelle sectorielles. Ces phénomènes sont sans doute très marqués : par exemple, selon une étude récente, lorsque l'échelle régionale d'une industrie est multipliée par deux au Japon, la productivité s'accroît en moyenne de 4.5 %[31]. À la différence des économies d'échelle intra-entreprise, ces économies d'échelle intra-sectorielles justifient en théorie une intervention publique pour qu'une activité atteigne une échelle suffisante. On a également mesuré les divers mécanismes sous-jacents. L'hypothèse de partage des intrants a été confirmée au niveau empirique : plus les entreprises sont concentrées dans une région, plus la sous-traitance se développe, parce qu'il y a davantage de possibilités d'approvisionnement extérieur en facteurs de production[32]. Les retombées en termes de connaissances représentent le type d'externalités locales le plus étudié. Par exemple, Agrawal *et al.* (2006) ont montré, à partir des citations de brevets, que les connaissances créées par l'inventeur sont appliquées plus que proportionnellement là où ce dernier résidait précédemment, ce qui ne peut s'expliquer que par l'importance des liens personnels[33] ; Audrestch et Feldman (1996) ont pour leur part bien fait ressortir la concentration géographique des innovations[34].

45. Il apparaît que la spécialisation d'un grand nombre de pays en développement doit plus au développement de secteurs où ils étaient présents initialement, en raison des externalités d'agglomération et d'information, qu'à un véritable avantage comparatif. Par exemple, comme le notent Hausman et Rodrik (2003)[35], des pays dont les dotations en ressources sont quasi identiques ont en définitive des spécialisations très différentes : la Corée exporte des fours à micro-ondes et pas de bicyclettes, alors que le Taipei chinois exporte des bicyclettes et pratiquement pas de micro-ondes ; le Bangladesh est l'un des

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30 D. Rodrik, « Industrial Policy for the twenty-first century », Harvard Kennedy School Working Paper 04-047.

31 Nakamura (1985).

32 Holmes, T. J. (1999), « Localization of Industry and Vertical Disintegration », *Review of Economics and Statistics*, Vol. 81(2): 314-25.

33 A. Agrawal, I. Cockburn et J. McHale, Gone But Not Forgotten : Knowledge Flows, Labor Mobility, and Enduring Social Relationships, *Journal of Economic Geography*, vol. 6(5), 2006 ; voir également E. Moretti, Workers' Education, Spillovers and Productivity : Evidence from Plant-Level Production Functions, *American Economic Review*, vol. 94(3), 2004.

34 D.B. Audretsch et M. Feldman, R&D Spillovers and the geography of innovation and production, *American Economic Review*, vol. 86, 630-664, 1996.

35 R. Hausman et D. Rodrik, « Economic Development as Self-Discovery », *Journal of Development Economics*, vol. 72, 2003.

principaux exportateurs de chapeaux, alors que le Pakistan n'en exporte presque pas. Cela donne donc à penser que les profils de spécialisation tiennent dans une large mesure à des événements aléatoires qui se produisent au stade initial du développement, c'est-à-dire à des initiatives aléatoires d'entrepreneurs agissant isolément, qui suscitent ensuite une dynamique autoentretenue. Si tel est le cas, l'argument des adversaires de la politique industrielle selon lequel les gouvernements ne devraient pas sélectionner les gagnants perd une partie de son poids. Si le développement insuffisant d'un secteur est dû uniquement à ce qu'aucun entrepreneur ne s'est lancé précédemment dans ce secteur — notamment parce qu'en cas de succès, il serait imité par de nombreux concurrents nationaux et ne recueillerait par les fruits des risques pris au départ – il paraît justifié que les pouvoirs publics favorisent activement le développement de nouvelles activités. Cela pourra permettre à un pays de diversifier son économie, cette diversification faisant partie intégrante du processus de développement[36].

46. On notera que, comme le montrent certaines données factuelles, les retombées locales positives (compte tenu de la taille de l'entreprise) sont moins marquées en cas d'implantation d'une grande entreprise dans une région qu'en cas d'installation d'une petite entreprise[37]. Cela tient probablement à ce que les grandes entreprises ont moins besoin d'interactions avec l'extérieur. Mais d'autres observations vont tout à fait dans la direction opposée, les grandes entreprises pouvant aussi jouer un rôle de premier plan dans le succès de certains pôles d'innovation (cas de Nokia in Finlande)[38].

47. Alors qu'on connaît de mieux en mieux la nature et l'intensité des externalités d'agglomération, l'évaluation des interventions des pouvoirs publics censées renforcer ces externalités donne des résultats contrastés. Les nombreuses tentatives de reproduction de la Silicon Valley n'ont pas été concluantes, même aux États-Unis, où l'on disposait pourtant d'informations détaillées de première main. Dans une étude d'ensemble consacrée aux pôles d'innovation, l'OCDE a souligné la diversité des mécanismes à la clé du succès, en concluant (i) qu'il est très difficile de mesurer la contribution des interventions des pouvoirs publics à la réussite de certains de ces pôles et (ii) qu'il n'y a pas de solution unique à appliquer en toute circonstance. Il est révélateur que l'un des pôles technologiques les plus réussis dans le monde en développement, celui de la région de Bangalore, paraît avoir pour origine une série de heureux hasards (notamment le refus d'IBM de céder aux actionnaires indiens 60 % de sa filiale indienne ; IBM a donc dû quitter l'Inde et les informaticiens indiens ont été contraints de faire appel à des plateformes ouvertes, se dotant ainsi des compétences qui allaient être extrêmement précieuses plus de dix ans plus tard)[39].

48. À l'inverse, Rodrik (2004)[40] fait valoir que certaines politiques industrielles mises en œuvre en Amérique latine et en Asie de l'est sont parvenues à prendre en compte les externalités d'information et à favoriser le développement de secteurs entièrement nouveaux. Par exemple, Fundación Chile, organisme public, a lancé les premières expériences de salmoniculture au Chili. Alors que cette activité n'existait pas auparavant, le Chili est maintenant l'un des principaux exportateurs de saumon. De même, selon Rodrik, le lancement de la production d'orchidées par des entreprises publiques taïwanaises a été selon lui un bon moyen de mettre en évidence la rentabilité de cette activité afin de stimuler l'investissement privé et de développer un nouveau secteur. Rodrik (1995) considère également le cas du conglomérat coréen Hyundai comme une parfaite illustration de l'utilité d'une politique judicieuse de soutien d'un champion national.

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36 J. Imbs et R. Wacziarg, « Stages of Diversification », *American Economic Review*, vol. 93(1), 2003.

37 Rosenthal, S. S. et W. C. Strange (2003), « Geography, Industrial Organization, and Agglomeration », *Review of Economics and Statistics* 85 (2), mai 2003. 377-393.

38 Voir le chapitre consacré à la Finlande dans OCDE, *Innovative Clusters*, 2001.

39 H. Pack et K. Saggi, « Is There a Case for Industrial Policy ? A Critical Survey », *The World Bank Research Observer*, vol. 21(2), 2006.

40 D. Rodrik, « Industrial Policy for the twenty-first century », Harvard Kennedy School Working Paper 04-047.

D'une part, les aides publiques à la diversification ont permis à Hyundai d'internaliser les externalités du marché du travail, car les gestionnaires qui avaient acquis des qualifications dans le secteur du ciment et de la construction ont pu les appliquer dans les nouvelles activités de Hyundai, notamment l'automobile et la construction navale. D'autre part, les subventions publiques directes et indirectes (notamment sous forme de garanties d'achat implicites dans la construction navale ; voir ci-dessus) ont encouragé Hyundai à rattraper en termes d'efficience les entreprises étrangères en place.

49. Rodrik souligne néanmoins les limites de ces politiques. Si les subventions à l'investissement dans les nouvelles activités ne sont pas strictement limitées dans leur champ d'application (elles ne doivent être attribuées qu'aux secteurs véritablement nouveaux) et dans leur durée (elles ne doivent pas se prolonger au-delà de la phase de découverte) et si elles ne sont pas subordonnées à un indicateur quelconque de performance se référant au marché, elles peuvent fort bien être inefficaces. En outre, dans le cas de la Corée, Rodrik (1995) souligne l'importance des initiatives du Président Park, célèbre en particulier pour sa constante intervention dans la mise en œuvre de sa politique économique et pour sa promptitude à court-circuiter l'administration en cas de plainte légitime d'un chef d'entreprise. Dès lors qu'on interprète le succès coréen comme pouvant être largement attribué à l'influence et à la sagacité d'un seul homme, il est très difficile d'en tirer des enseignements généraux, en particulier pour ce qui est des mesures à prendre pour éviter la recherche de rentes. On notera aussi les profondes divergences quant au caractère déterminant de la politique industrielle coréenne dans la performance d'ensemble du pays. Selon plusieurs auteurs, les principaux facteurs ont été le taux élevé d'investissement, le niveau d'instruction de la population et une répartition de la richesse relativement égalitaire[41].

50. L'enseignement général qu'on peut tirer des travaux empiriques sur les effets d'agglomération est que ces effets sont importants, mais que les instruments à utiliser pour en tirer parti sont complexes et qu'on ne sait pas encore très bien comment ils fonctionnent. En particulier, s'il est vrai que certaines mesures de politique industrielle ont toutes chances d'être utiles, il y a de bonnes raisons de les axer sur les petites et moyennes entreprises qui se trouvent à un stade précoce de développement, plutôt que sur les champions existants (malgré l'exemple coréen), parce que les diverses externalités qu'on vient d'évoquer se feront probablement sentir davantage dans le cas des petites et moyennes entreprises.

4. Recherche de rentes et économie politique de la politique industrielle

51. L'une des critiques les plus fréquemment formulées à l'encontre de la politique industrielle, surtout lorsqu'elle prend la forme de subventions à certaines entreprises, est que, même si les mesures en question sont en principe rationnelles, il est probable que dans la pratique les intérêts privés se livrant à la recherche de rentes les feront jouer en leur faveur par captation des autorités publiques.

52. On a de nombreux exemples d'une politique industrielle qui n'avait pas de sens du point de vue de l'intérêt collectif et pouvait mieux s'expliquer par la recherche de rentes ou des motivations politiques – – un cas extrême est l'aide accordée dans les années 90 par l'État du Michigan à certaines entreprises en vue de la création d'emplois, chaque emploi créé ayant coûté plus de deux millions USD[42]. Plus généralement, de nombreuses études illustrent comment les groupes d'intérêts privés sont capables de fausser la politique économique à leur profit[43] et mettent également en lumière l'impact des liens politiques

41 Voir G. Grossman et V. Norman à la fin de Rodrik (1995); voir égalementt Pack et Saggi (2006).

42 Voir R. Tannenwald, Are State and Local Revenue Systems becoming Obsolete? *National Tax Journal*, vol. 55 (2), Sept. 2002, p. 467.

43 Voir T. Persson et G. Tabellini, *Political Economics: Explaining Economic Policy*, MIT Press, 2000.

sur les résultats des entreprises, aussi bien dans les pays développés que dans les pays en développement[44]. Par exemple, le degré de protection douanière dont bénéficient diverses activités aux États-Unis est directement lié au niveau des dons aux partis politiques[45]. On constate en outre que les mesures spécifiques à un secteur ou à une entreprise (par exemple, les mesures de politique commerciale) favorisent en général les activités en déclin. Ce schéma est généralisé. On peut l'observer aussi bien dans la politique commerciale des États-Unis[46] que dans la politique européenne en matière d'aides d'État : par exemple, un grand nombre de pays européens ont dépensé des milliards d'euros pour essayer de maintenir en exploitation leurs mines de charbon, ce qui n'a fait que retarder de quelques années leur fermeture.

53. Une étude économétrique récente des aides d'État en Europe[47] conclut que plus le système politique d'un pays rend politiquement rentables les aides ciblées (cas, par exemple, des pays à électorat peu nombreux, où les divergences idéologiques entre les partis sont faibles et où les partis ne sont pas très unis), plus la proportion des aides aux entreprises qui sont ciblées (« sectorielles », pour reprendre la terminologie de l'UE) est élevée par rapport aux aides « horizontales ». On peut donc penser que les aides à des secteurs spécifiques reposent dans une certaine mesure sur des considérations électorales, malgré un contrôle strict de la part de la Commission européenne.

54. Une étude économétrique couvrant 32 pays développés ou en développement met en lumière un lien étroit entre l'existence d'une politique industrielle en faveur de champions nationaux et le niveau de corruption[48]. Toutes choses égales par ailleurs, les réglementations des marchés publics qui favorisent les champions nationaux, de même que l'octroi d'un régime fiscal préférentiel, sont associés à une nette augmentation de la corruption, et cette relation est statistiquement significative. Certes, cette étude appelle sur le plan méthodologique les mêmes réserves que toutes les études portant sur un ensemble de pays, mais elle montre que la politique industrielle, surtout lorsqu'elle vise des entreprises spécifiques, est largement mise à profit par les intérêts privés.

55. On peut en tirer deux enseignements. Premièrement, la recherche de rentes et les décisions à motivation politique peuvent nuire à la qualité de la politique industrielle et aboutir à une utilisation inefficace des financements publics ainsi qu'à une inefficience productive et allocative. En outre, plus la politique industrielle se prête à la captation par les intérêts privés, plus les entreprises sont susceptibles d'investir dans les activités de recherche de rentes, ce qui représente un gaspillage de ressources : selon plusieurs estimations, le coût des activités de recherche de rentes est très élevé[49].

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44 Brian Roberts "A Dead Senator Tells No Lies: Seniority and the Distribution of Federal Benefits." *American Journal of Political Science*, February1990, 34(1), 31–58; Fisman, Ray, (2001), « Estimating the Value of Political Connections », *American Economic Review*, septembre, 2001.

45 P. Goldberg et G. Maggi, Protection for Sale: An Empirical Investigation, *American Economic Review*, vol. 89 (5), 1999, p. 1135.

46 G. Hufbauer et H. Rosen *Trade Policy for Troubled Industries*, Policy Analyses in International Economics 15, Institute for International Economics Washington, D.C., 1986 ; G. Hufbauer, Gary, D. Berliner et K. Elliot, Trade Protection in the United States : 31 Case Studies, Institute for International Economics, Washington, D.C., 1986 ; Ray, E . (1991). « Protection of manufactures in the US » dans D. Green, *Global Protectionism: Is the US playing on a level field?* Macmillan, Londres.

47 Aydin (2007). « Politics of State Aid in the European Union: Subsidies as Distributive Politics », University of Washington, Political Science Department, non publié.

48 National Champions and Corruption: Some Unpleasant Interventionist Arithmetic. Alberto Ades; Rafael Di Tella. *The Economic Journal*, Vol. 107, No. 443, 1997.

49 Aux États-Unis, les dépenses de transfert totales ont été estimées à 25 % du PIB (D. Laband et J. Sophocleus, An Estimate of Expenditures on Transfer Activity in the United States, *Quarterly Journal of Economics*, vol. 107(3), 959-983, 1992). D'autres estimations, obtenues par régression du produit national

56. La politique industrielle crée parfois de nouveaux intérêts qui se livrent à des activités de recherche de rentes, par exemple en s'efforçant d'obtenir la pérennisation de mesures de politique industrielle auxquelles il faudrait en fait mettre fin parce que les circonstances se sont modifiées. Le projet Concorde, sous l'égide du Royaume-Uni et de la France, illustre cet aspect[50]. Le lancement d'un avion supersonique était judicieux dans les années 60, lorsque le pétrole était bon marché, mais il a perdu toute justification économique après le choc pétrolier de 1973. Il se trouvait néanmoins à un stade d'avancement tel que le groupe constitué par les nombreux fonctionnaires et chefs d'entreprises parties prenantes avait tout intérêt à ce qu'il soit poursuivi. Finalement, ce groupe a eu raison des signaux du marché et le projet est allé de l'avant, à un coût considérable pour les deux pays.

57. Selon Rodrik (1995), la politique industrielle des pays d'Asie de l'Est au cours des dernières décennies a été relativement indemne d'activités de recherche de rentes, contrairement à ce qu'on a pu observer dans la plupart des pays en développement et dans un grand nombre de pays développés. Par ailleurs, comme le souligne Rodrik (2004), l'existence d'activités de recherche de rentes ne suffit pas pour écarter les mesures de politique industrielle, pas plus que la recherche de rentes dans l'éducation ne justifie la fin de l'enseignement public. Toutefois, ces résultats vont à l'encontre des mesures de politique industrielle qui dotent les pouvoirs publics d'instruments leur permettant arbitrairement de sélectionner les gagnants et de récompenser certaines entreprises. Les instruments de portée plus générale, ou les aides accordées aux nouvelles entreprises et aux nouvelles activités à titre temporaire, limiteront probablement les possibilités de recherche de rentes.

5. La politique de la concurrence, instrument au service des objectifs de politique industrielle

58. On verra maintenant comment la politique de la concurrence peut remédier aux préoccupations qui sont souvent invoquées pour justifier les initiatives de politique industrielle. On envisagera les aspects suivants : la réalisation des économies d'échelle, la limitation des prix abusifs pouvant être pratiqués par les monopoleurs étrangers, les mesures facilitant l'entrée dans de nouveaux secteurs et l'efficience des entreprises.

5.1. Concurrence et rationalisation de la production

59. Certains des résultats théoriques évoqués ci-dessus montrent que les mécanismes du marché suffisent à eux seuls pour réaffecter la production aux unités les plus efficaces ; les fusions peuvent certes rationaliser encore la production, mais la majeure partie de la rationalisation résulte spontanément des mécanismes du marché, et ce d'autant plus si la concurrence est intense. Plusieurs études consacrées à l'impact de l'exposition aux échanges (qui a pour effet d'intensifier la concurrence) confirment ce constat. Comme le rappelle Melitz (2003), « *Aw, Chung et Roberts (2000) […] relèvent un certain nombre d'éléments montrant que l'exposition aux échanges oblige les entreprises les moins productives à cesser leur activité. Pavcnik constate […] que les réaffectations* [de parts de marché] *contribuent largement aux gains de productivité dans le secteur des biens échangeables. Dans une étude sur le même thème, Bernard et Jensen (1999) concluent que les réaffectations intra-sectorielles de parts de marché en faveur des entreprises exportatrices les plus productives représentent 20 % des gains de productivité dans les*

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brut sur le nombre relatif d'avocats (indicateur de l'ampleur des activités de recherche de rentes) et de médecins ou d'ingénieurs (indicateur du volume des activités productives) font apparaître un coût similaire, voire plus élevé pour les activités de recherche de rentes (S. Magee, W. Brock et L. Young, *Black Hole Tariffs and Endogenous Policy Theory : Political Economy in General Equilibrium*. Cambridge: Cambridge University Press, 1989; K. Murphy, A. Shleifer et R. Vishny, The Allocation of Talent: Implications for Growth, *Quarterly Journal of Economics*, vol. 106(2), 503-530, 1991.)

50 D. Myddlteon, *They Meant Well: Government Project Disasters*, Institute of Economic Affairs Monographs, Hobart Paper No. 160, 2007.

industries manufacturières des États-Unis[51] ». Cela confirme que la politique de la concurrence, en s'attaquant aux ententes et aux stratégies de dissuasion mises en œuvre à l'égard des nouveaux entrants, contribue à l'efficience productive.

5.2. Politique de la concurrence et prix abusifs

60. Selon Jonathan Baker[52], le coût économique de la concurrence imparfaite est de l'ordre de 1 % du PIB ; d'autres auteurs estiment que les ententes sont encore plus dommageables parce qu'on évalue en moyenne à 20-30 % le supplément de prix[53] et que la plupart des ententes ne sont pas détectées[54]. La politique de la concurrence est donc un moyen de lutter contre les prix abusifs pratiqués par les entreprises qui opèrent sur des marchés où la concurrence est insuffisante, et cela vaut encore plus pour les pays en développement. Selon Levenstein *et al*. (2003)[55], 2.9 % des importations totales des pays en développement en 1997, concernaient des activités considérées par les autorités de la concurrence européennes ou américaines comme faisant l'objet d'ententes internationales. Cela veut dire que les pays en développement peuvent utiliser la politique de la concurrence pour limiter leur exploitation par les entreprises des pays développés, mais pour que cette action soit efficace, il faut une application suffisamment stricte des dispositions en vigueur, pour renforcer l'effet dissuasif et accroître la probabilité de détection des pratiques anticoncurrentielles.

61. Face à un marché où la concurrence est insuffisante, une solution consiste à essayer de créer un concurrent local supplémentaire (un « champion national ») ; il y en a une autre : faire en sorte que le marché soit plus concurrentiel en utilisant la politique de la concurrence. L'action contre les prix abusifs comporte manifestement une alternative, à savoir l'utilisation de la politique de la concurrence ou celle de la politique industrielle.

62. La politique de la concurrence est probablement une meilleure réponse, parce qu'elle est bien moins coûteuse. Selon Baker (2003), le coût annuel total de mise en œuvre de la politique de la concurrence aux États-Unis était inférieur à la perte annuelle d'efficience due au seul cartel des vitamines aux États-Unis. De plus, la politique de la concurrence ne suscite pas toutes les difficultés et tous les risques qu'entraînent les mesures en faveur des champions nationaux, notamment en termes d'inefficience productive (gaspillage par duplication des coûts fixes et éventuel avantage de coût des entreprises étrangères en place par rapport au champion national).

63. Un fait essentiel est que la politique de la concurrence crée des externalités transnationales positives. Lorsqu'une autorité de la concurrence interdit une fusion ou une pratique d'exclusion, et protège donc ainsi la concurrence, cela bénéficie à tous les clients sur le marché concerné, y compris les clients étrangers. En cas d'entente, la complémentarité est plus faible, parce que les entreprises peuvent décider de s'entendre uniquement dans les pays où la politique de la concurrence manque de fermeté. Toutefois,

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51 M. Melitz, « The Impact of Trade on Intra-Industry Reallocations and Aggregate Industry Productivity », Econometrica, vol. 71 (6), 2003.

52 Jonathan Baker, « The Case for Antitrust Enforcement », *Journal of Economic Perspectives*, 2003.

53 Connor J. (2004), « Price Fixing Overcharges: Legal and Economic Evidence », Working Paper American Antitrust Institute, n°04-05.

54 Bryant P., Eckard E. (1991), « Price Fixing : The Probability of Getting Caught », Review of Economics and Statistics, vol. 73, pp. 531-536 ; W. Wils (2005), « Is Criminalisation of EU Competition Law the Answer ? », *Revue Lamy de la concurrence*, n°4.

55 M. Levenstein, V. Suslow, et L. Oswald, « Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy », *Antitrust Law Journal*, vol. 71, pp. 801-852, 2003.

même en cas d'entente, des externalités transnationales positives se produisent, parce que les entreprises peuvent plus facilement cartelliser un secteur lorsqu'elles interagissent dans un grand nombre de pays, puisque les contacts pris sur un grand nombre de marchés facilitent la collusion. Dès lors l'utilisation de la politique de la concurrence est encore plus justifiée que lorsqu'on se place dans une optique purement nationale.

5.3. Politique de la concurrence et développement de nouvelles entreprises et de nouveaux secteurs

64. L'une des missions de la politique de la concurrence est de réprimer les stratégies d'exclusion qu'appliquent les entreprises dominantes. Les autorités de la concurrence peuvent donc faciliter l'entrée dans les secteurs qui étaient auparavant dominés par un petit nombre d'entreprises disposant d'un pouvoir de marché substantiel. On peut prendre comme exemple les télécommunications. On considère le plus souvent qu'en Europe les décisions des autorités de la concurrence et des autorités de régulation obligeant les opérateurs historiques à ouvrir l'accès à leurs infrastructures à des conditions raisonnables ont contribué au développement rapide du haut débit pour les particuliers, de même qu'elles ont facilité l'entrée d'entreprises non intégrées qui ont lancé des services innovants comme le « triple play » (télévision, internet et téléphone).

65. Le secteur des produits pharmaceutiques offre un exemple de politique de la concurrence qui a facilité l'entrée dans ce secteur et le développement d'un « champion national » dans un pays en développement (l'Inde) en réduisant les barrières à l'entrée. Comme le montrent les études économétriques, les entreprises pharmaceutiques en place appliquent parfois à des stratégies de dissuasion à l'égard des nouveaux entrants potentiels avant ou immédiatement après l'expiration d'un brevet, afin de décourager l'entrée de fabricants de génériques sur le marché[56]. Certaines de ces stratégies, notamment les stratégies de prix d'éviction, contreviennent au droit de la concurrence et peuvent être sanctionnées par les autorités de la concurrence. On a, en fait, une abondante jurisprudence concernant les stratégies d'éviction mises en œuvre par les entreprises pharmaceutiques qui ont cherché à empêcher ou retarder l'entrée de fabricants de génériques. Grâce à la politique de la concurrence, les pouvoirs publics peuvent donc empêcher les entreprises pharmaceutiques d'essayer de s'arroger un pouvoir de monopole une fois un brevet expiré. Cette intervention est extrêmement précieuse pour les fabricants de génériques, dont certains (comme Ranbaxy, basé en Inde) sont originaires de pays en développement. La politique de la concurrence peut éliminer les barrières à l'entrée auxquelles se heurtent les fabricants de génériques des pays en développement, en faisant en sorte que lorsqu'un brevet a expiré, l'entreprise qui en est titulaire ne soit plus protégée dans la pratique et que cette absence de protection ne reste pas théorique. Sachant que, durant de nombreuses années, les pays en développement et les pays développés n'ont pas pu s'entendre sur la portée de la protection par brevet dans le secteur pharmaceutique, la politique de la concurrence offre une voie moyenne.

5.4. Impact de la concurrence sur l'efficience et la capacité d'innovation des entreprises

66. La concurrence influe sur l'efficience des entreprises essentiellement à travers deux mécanismes : premièrement, en modifiant l'incitation à innover et, deuxièmement, en agissant sur l'incitation à gérer efficacement l'entreprise. En ce qui concerne le deuxième mécanisme, il s'agit de déterminer le degré d'« inefficience X », c'est-à-dire l'inefficience due au fait que l'entreprise n'exploite pas ses propres possibilités technologiques.

67. Les études théoriques soulignent les effets ambigus de la concurrence sur l'innovation. D'une part, une très vive concurrence réduit les rentes post-innovation, parce qu'elle abrège la période durant

[56] G. Ellison et S.F. Ellison, « Strategic Entry Deterrence and the Behavior of Pharmaceutical Incumbents Prior to Patent Expiration », NBER Working Paper No. 13069.

laquelle l'innovateur peut espérer recueillir les fruits d'une innovation couronnée de succès. D'autre part, l'incitation du monopoleur à innover est atténuée par le fait que tout nouveau produit qu'il offre remplace un de ses anciens produits, plutôt que ceux de ses concurrents. C'est pourquoi plusieurs économistes considèrent que, pour des raisons théoriques, l'innovation est maximisée à un niveau intermédiaire de concurrence. De plus, un article récent d'Aghion *et al.* (2005)[57], conclut à l'existence d'une courbe en U inversé. Mais les résultats d'Aghion *et al.* reposent sur une comparaison entre secteurs, ce qui laisse subsister des doutes quant à l'existence d'un lien de causalité entre concurrence et innovation[58]. D'autres études, comparant un même secteur dans différents pays et analysant l'impact de différentes évolutions du degré de concurrence, concluent systématiquement que la concurrence stimule l'innovation. Par exemple, l'industrie du tabac au Royaume-Uni et aux États-Unis a davantage lancé d'innovations technologiques durant les périodes où la concurrence était plus vive (celles où le tabac ne faisait pas l'objet d'un monopole national)[59].

68. Mais s'en tenir à l'innovation serait très réducteur. Parmi les effets que la concurrence peut avoir sur l'efficience des entreprises, il y a celui qu'elle exerce sur les incitations des dirigeants de l'entreprise. L'intuition selon laquelle une plus vive concurrence incite les dirigeants d'une entreprise à déployer plus d'efforts pour éliminer le sous-emploi des ressources (l'« inefficience X ») a été reformulée en théorie économique sous l'angle des incitations des dirigeants de l'entreprise. On a fait intervenir à cet égard plusieurs mécanismes[60], qui se rattachent tous à l'idée que plus un marché est concurrentiel, plus il est facile pour les actionnaires d'une entreprise de mesurer exactement et de contrôler la performance des dirigeants. Par exemple, sur un marché très concurrentiel, la rentabilité d'une entreprise dépend essentiellement de la différence entre ses propres coûts (corrigés de la qualité) et ceux de ses concurrentes. Subordonner la rémunération aux bénéfices est donc rationnel sur ce type de marché, parce qu'on récompense ainsi l'effort plutôt que la chance. En revanche, sur les marchés peu concurrentiels, les bénéfices sont surtout fonction des chocs sur la demande et sur les coûts qui se produisent dans l'ensemble du secteur, ces chocs étant indépendants de l'action menée par les dirigeants des entreprises. En outre, la concurrence, en facilitant l'évaluation comparative, permet de mesurer la performance des dirigeants.

69. Cette relation positive entre la concurrence et l'inefficience X a été abondamment confirmée par les études empiriques dans certains secteurs. Par exemple, Ng et Seabright (2001)[61] ont étudié les transports aériens aux États-Unis et en Europe entre 1982 et 1995 et comparé les coûts des compagnies aériennes en fonction d'un grand nombre de facteurs, notamment la proportion d'itinéraires internationaux sur lesquels elles sont en position de monopole ou de duopole. Ces auteurs concluent que lorsque cette proportion augmente de 1 %, les coûts augmentent de 2 %.

70. De même, une étude consacrée à la Bulgarie met en lumière certains des mécanismes par lesquels les pressions du marché accroissent l'efficience des entreprises ; la productivité s'est améliorée plus vite

57 Aghion P, Bloom N., Blundell R., Griffith R., Howitt P., 2005 « Competition and Innovation: An Inverted-U Relationship », The Quarterly Journal of Economics.

58 Pour une appréciation critique, voir J. Baker, « Beyond Schumpter vs. Arrow: How Innovation Fosters Innovation », 2007.

59 E. Zitzewitz, « Competition and Long-Run Productivity Growth in the U.K. and U.S. Tobacco Industries, 1879-1939 », *Journal of Industrial Economics*, 2003.

60 Holmstrom (1982), Nalebuff et Stiglitz (1983).

61 C. Ng et P. Seabright, « Competition, Privatisation and Productive Efficiency: Evidence from the Airline Industry », *Economic Journal*, 2001.

dans les secteurs qui ont connu une rapide déconcentration après l'introduction des mécanismes du marché[62].

71. Enfin, une comparaison des performances à l'exportation de plusieurs industries japonaises dans les années 80 montre que les secteurs où la concurrence intérieure était la plus intense (cette intensité étant mesurée par l'instabilité des parts de marché) ont davantage exporté que ceux où la concurrence était moins vive[63]. Cela infirme directement l'un des arguments en faveur des champions nationaux, à savoir l'idée qu'en protégeant les grandes entreprises de la concurrence au niveau national, on les renforce au niveau mondial. Paradoxalement, on s'est souvent appuyé sur des exemples japonais pour étayer cet argument, en attribuant souvent le succès mondial d'un grand nombre d'entreprises japonaises à un manque supposé de concurrence au Japon ayant permis à des champions nationaux de prospérer. L'étude qu'on vient d'évoquer implique que cette interprétation de l'expérience japonaise est probablement incorrecte.

72. Au total, si l'on considère tous les aspects de l'efficience des entreprises, les résultats empiriques vont systématiquement dans le sens d'une relation positive entre concurrence et efficience. De plus, puisque la diminution de l'inefficience X semble jouer un grand rôle dans ce mécanisme, il n'y a aucune raison de considérer que la concurrence est uniquement importante pour les pays développés dans l'optique des secteurs de haute technologie, alors que les pays en développement devraient privilégier le rattrapage et utiliser les technologies préexistantes, sans que la concurrence soit alors un élément important. Au contraire, la concurrence semble jouer un grand rôle aussi bien dans les secteurs qui innovent et font appel aux technologies de pointe que dans les autres secteurs.

6. Conclusion : y a-t-il conflit entre la politique industrielle et la politique de la concurrence ?

73. À la lumière des données empiriques qu'on vient de commenter, un grand nombre de partisans de la politique industrielle sont d'accord sur les caractéristiques que la politique industrielle ne doit pas avoir : elle ne doit pas favoriser les entreprises en place, mais stimuler l'entrée ; elle ne doit pas sélectionner les gagnants, mais créer les conditions propices à l'innovation ; elle ne doit pas récompenser les perdants, mais comporter des mécanismes de surveillance prenant en compte la performance sur le marché. Autrement dit, malgré les difficultés qu'on rencontre pour caractériser une bonne politique industrielle, aucun partisan d'une politique industrielle active ne considère qu'elle doit consister à créer des champions nationaux et à les aider[64].

74. C'est pourquoi la politique industrielle et la politique de la concurrence sont probablement moins contradictoires qu'on le croit souvent. La politique de la concurrence est un moyen efficace de remédier à un grand nombre des préoccupations qui ont suscité traditionnellement des mesures industrielles interventionnistes, et les instruments nécessaires pour régler les problèmes que la politique de la concurrence ne peut résoudre (notamment lorsqu'il s'agit de prendre en compte les économies d'échelle sectorielles et les externalités d'agglomération) ne sont pas contraires, pour la plupart, à la politique de la concurrence.

75. Toutefois, il peut y avoir certaines tensions dans un domaine : le traitement des gains d'efficience dans le cadre du contrôle des fusions. La politique de contrôle des fusions étant axée dans la plupart des

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62 S. Djankov et B. Hoekman, « Market discipline and corporate efficiency: evidence from Bulgaria », Canadian Journal of Economics, vol. 33(1), 2000.

63 Sakakibara, Mariko, et Michael E. Porter. « Competing at Home to Win Abroad: Evidence from Japanese History », *The Review of Economics and Statistics* vol. 83(2), 2001.

64 Voir, par exemple, Rodrik (2004).

pays sur le bien-être des consommateurs, les autorités de la concurrence ne doivent prendre en compte les synergies créées par la fusion que si on peut en faire la preuve en s'appuyant sur des éléments suffisamment solides et si on peut s'attendre à ce qu'elles soient répercutées sur les consommateurs à un degré suffisant pour compenser les hausses de prix susceptibles de résulter d'un renforcement du pouvoir de marché. Dans la pratique, avec ce critère, il est presque impossible pour une entreprise d'obtenir l'autorisation d'une fusion pour des motifs qui se rattachent à l'efficience. Cela peut se traduire par l'interdiction de fusions qui seraient très bénéfiques en termes d'efficience, à l'encontre des préoccupations légitimes de politique industrielle. Cette question est néanmoins relativement nouvelle dans la plupart des cas ; par exemple, les synergies ne sont prises en compte dans l'Union européenne que depuis 2004. Sur ce point, la politique de la concurrence pourrait donc encore évoluer sous l'angle de la prise en compte des objectifs de politique industrielle.

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CANADA

1. This paper provides an overview of Canada's competition and industrial policies as they could be said to relate to the debate on national champions. In particular, we consider the Canadian merger review analytical framework and its interface with the public debate regarding domestic mergers. We also describe some of Canada's current industrial policies with respect to investment in certain Canadian businesses. Specifically, we discuss the current rules governing ownership restrictions in the airline and telecommunication industries.

National Champions

2. As elsewhere, Canadians want to see their companies achieve success on the world stage and become global leaders. The term "national champion" can have many meanings. For some, it can mean globally renowned companies that are efficient and globally diversified and inspire national pride. To others, it means the creation of domestic monopolies at the expense of domestic consumers and businesses. Competition drives innovation, investment and, ultimately, the production of road-tested companies ready to compete in a rough and tumble world. This was management expert Michael Porter's observation many years ago and it remains valid today: "creating a dominant domestic competitor rarely results in international competitive advantage. Companies that do not face significant competition at home are less likely to succeed internationally."[1]

3. Furthermore, as the Competition Bureau (the "Bureau") has observed:

> Domestic monopolies or near-monopolies, meanwhile, harm not only the Canadian economy, but also individual businesses and consumers in Canada, who may be forced to pay higher prices for the goods and services of companies not facing domestic competition.[2]

The OECD's Assessment of Certain Industrial Policies and Ownership Restrictions in Canada

4. As in most countries, there is, in Canada, legislation that restricts ownership or investment in certain industries. In some cases, legislation places direct restrictions on foreign ownership to ensure that such businesses do not fall under the control of non-Canadians. In other cases, the restrictions limit the degree to which any investor may hold more than a prescribed percentage of the business in question.

5. In 2006 and 2007, the OECD undertook both country-specific studies and country-comparative studies[3] assessing the openness of various economies to foreign direct investment. Among the conclusions

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1 See, for example, M. Porter, The Competitive Advantage of Nations (MacMillan Press, 1990) at 662.

2 Canadian world-beaters? Not without competition, Globe & Mail, page B2, Sheridan Scott, January 21, 2008

3 See Organisation of Economic Cooperation and Development (OECD), Economic Policy Reforms Going for Growth 2007, Paris, 2007, p. 144, available for purchase online at: http://www.oecd.org/document/8/0,3343,en_2649_37443_37882632_1_1_1_37443,00.html. See also Organisation of Economic Cooperation and Development (OECD), OECD's FDI Regulatory

of these studies was an opinion that the economic consequences of Canada's sector-specific policies restricting foreign investment have had significant negative implications for the productivity of the industry and the economic performance of the economy as a whole.

6. The OECD, in its studies, recognises the importance of FDI as a source for importing new technologies, management practices and sector specific know-how between countries. This, in turn, intensifies domestic competitive pressures by spurring domestic rivals to adopt best practices and state-of-the-art technologies. One conclusion of the OECD's study is that Canada could have increased its annual productivity growth rate between 1995 and 2003 by three quarters of one percent annually had it amended its regulations that restrained competition to conform to the least restrictive regulations of other OECD countries[4]. With respect to FDI restrictions, according to the OECD, reducing them to the level that is the least restrictive of competition (of all jurisdictions studied) would increase employment and provide a strong impulse to labour productivity growth[5].

Canada's Study of Competition and Foreign Direct Investment Policies

7. In response to the challenges Canada faces with respect to improving its overall competitive performance, in June, 2007 the federal government appointed a task force of leading business experts, the Competition Policy Review Panel, with the mandate to review Canada's competition policies and its framework for foreign investment policy and to make recommendations to the Government of Canada for making Canada more competitive in an increasingly global marketplace[6]. As part of its work, the Panel considered whether Canada's policies regarding merger review act as an impediment to the emergence of so-called Canadian national champions. As part of its public consultation process, third parties were invited to make submissions regarding this and a number of other issues affecting Canada's competitive performance internationally.

8. In their submissions, some parties raised specific concerns regarding the manner in which Canada applies the merger provisions in the case of domestic mergers, taking the view that the Bureau is impeding the growth of Canadian companies[7].

9. In its final report, the Panel fully endorsed the benefits of competition and competitive markets and rejected government policies that legislate or otherwise protect Canadian control:

> While we have many global success stories, Canada has also witnessed the loss of some of our most iconic firms. Our Panel was formed at a time when the debate over the hollowing out of Canada was at its peak. Indeed, we ourselves share the feelings of disappointment and loss when a notable Canadian firm is acquired by a foreign company.

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4 Ibid, OECD's FDI Regulatory Restrictiveness Index: Revision and Extension to More Economies, p. 147

5 Ibid, OECD's FDI Regulatory Restrictiveness Index: Revision and Extension to More Economies p. 150

6 The Competition Policy Review Panel released a consultation paper in October 2007 and issued its final report, entitled "Compete to Win", in June 2008. The Panel's work is available through its website: http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/eng/home

7 See, for example, From Common Sense to Bold Ambition, Moving Canada Forward on the Global Stage, Canadian Council of Chief Executives, Submission to the Competition Policy Review Panel, January 2008, p. 17. "Even as the process of consolidation has accelerated globally, the application of Canadian competition policy has appeared to reflect a bias against domestic mergers and acquisitions. The inevitable result has been a series of foreign takeovers."

> In our consultation paper, we asked Canadians whether domestic control and ownership was important to Canada's economic prospects and our ability to create opportunity for Canadians.
>
> For our part, we believe that competitive, Canadian-based firms are important. We are steadfast in our belief that Canadian ownership of our firms is valuable. But we do not believe that the best way to ensure Canadian control is through legislation or imposing other protections.
>
> We believe that the best way to ensure we create and sustain new Canadian champions is by ensuring that our policies, laws and regulations are the right ones to facilitate growth. Given the right conditions, the dynamism, talent and ambition of Canadians will rise to the fore. We will have more Canadian firms competing globally and winning globally[8].

10. With regards to the Competition Act specifically, the Panel observed that it "is recognised internationally as both modern and flexible and, in the Panel's view, it does not constitute an impediment to Canada's overall competitiveness."[9] Addressing the specific issue of merger review, the Panel noted:

> Merger review is a key activity conducted by the Competition Bureau that has a substantial impact on the competitiveness and scale of Canadian industry. Most transactions are reviewed on a timely basis as posing no competition concerns and very few transactions require merger remedies.
>
> Overall, the Panel is satisfied that substantive merger provisions are generally modern, compatible with the laws of our major trading partners and appropriate for the Canadian economy.[10]

11. Included in the Panel's recommendations were a number directed towards improving certain outmoded or ineffective provisions of the Competition Act. In the Fall of 2008, the Government of Canada announced its intention to proceed with legislation to modernise Canada's competition and investment laws and implement many of the recommendations of the Competition Policy Review Panel. In legislation tabled in the House of Commons on February 6, 2009, the Government introduced a package of amendments to both the Competition Act and the Investment Canada Act.[11]

The Interface between Competition Policy and National Industrial Policy

12. As noted above, during the Panel's review, much of the debate about the ability of Canadian companies to emerge and succeed internationally centred on alleged deficiencies in Canada's merger review regime. Of course, the Canadian Competition Act does not impede the emergence of national champions through superior competitive performance. With respect to merger transactions in Canada, the Bureau has a statutory obligation to review proposed merger transactions to ensure that the merger does not result in a substantial lessening or prevention of competition.

13. Like the antitrust merger review regimes of its major trading partners, Canada's regime does not take the nationality of the merging parties into account. Rather, it examines whether Canadian consumers

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8 Id Supranote 6, Compete to Win, p. 104.

9 Id Supranote 6, p. 53

10 Id Supranote 6, pp. 55-56

11 Bill C-10, An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures, http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=3656090&Language=e&Mode=1

and businesses will continue to benefit from a competitive market if the merger is completed. This includes asking such questions as "Where can Canadian consumers or businesses turn in order to buy competing products?" and "Will Canadian consumers and businesses continue to benefit from a competitive market following the merger?" This is in contrast to the view that the merging companies often bring to the table, which naturally focuses on their immediate business interests; namely, how the merger will help the company develop and expand the markets for their products. That can include the enhancement of an ability to exercise market power - what the Bureau must ensure is not substantial.

14. As a result of the approach required by statute, a more thorough review will typically be necessary whenever a merger involves two parties, either foreign or domestic, that supply the same Canadian market(s), particularly if the market(s) are highly concentrated and difficult for new competitors to enter. The reality is that, because financial investors or foreign competitors entering Canadian markets may raise no competition issues (owing to the fact they do not participate in the target's market(s) pre-merger), they can often benefit from an expedited review. The same is true for Canadian firms competing for an acquisition with foreign firms who may be more concentrated in the particular local markets affected. Finally, where the markets are continental or worldwide, rarely do any proposed mergers between even two very significant Canadian players raise concerns.

15. In the submissions to the Panel, there were two principal criticisms regarding the Bureau's merger review process with respect to the issue of the emergence of national champions. The first was that geographic markets are defined too narrowly, given the global nature of the marketplace. The second was that the Bureau does not understand the need of merging parties to achieve the size necessary to compete internationally. In response, it is important to understand the Bureau's role as set out in the Competition Act; namely, to ensure that Canadian businesses and consumers are able to benefit from a competitive marketplace, whether they buy from local, national or international companies.

The Relevant Geographic Markets Criticism:

> Turning to the first criticism; namely that the Bureau puts some parties (particularly domestically-based merging parties) at a disadvantage because of its approach to defining geographic markets.
>
> In this regard, the Bureau is diligent in approaching the issue of geographic market definition from a disciplined analytical perspective. To suggest the Bureau is insensitive to the fact many markets are broader than Canada ignores the facts. There are many examples where a merger has been cleared based on a geographic market that is broader than Canada, including mergers in the mining, steel, upstream oil and gas, and certain chemical industries. For example, in its review of Mittal Steel's acquisition of Arcelor SA, the Bureau concluded that the market is larger than Canada – in that case, North American in scope. It is a question of evidence from the market in the specific case as to where, from an antitrust perspective, the contours of the geographic market should be drawn.
>
> Similarly, as part of its assessment, Canada always accounts for the role of foreign competitors. For example, in the Bureau's analysis of the Maytag/Whirlpool merger, foreign competition was an important and offsetting factor that would limit the ability of manufacturers to increase prices for Canadian consumers in an anticompetitive way. What the critics ignore is that, while a merger may involve firms that operate globally, it may raise concerns in local markets within Canada. For example, local upstream markets may raise issues notwithstanding the downstream market may be continental or even worldwide. A recent example where markets were local – in the sense of provincial - was the acquisition of ICI by Akzo Nobel. In that case, both the merging firms supplied paint and other products in various jurisdictions worldwide. However, owing to, among

other things, strong local preferences and barriers resulting from loyalty programs, the Bureau was concerned that the merger would substantially lessen competition in Quebec, where the parties were two of the leading suppliers of paint. The remedy was confined to preserving competition in Quebec by requiring the merging parties to divest of certain brands sold in Quebec.

Scale Necessary to Compete – The Efficiency Criticism:

With respect to the second criticism, that the Bureau does not understand the need for parties to achieve the scale necessary to compete in the global marketplace, there are two principal responses. First, preferring local Canadian companies by allowing them to consolidate irrespective of the effect on Canadian consumers is contrary to the Bureau's mandate; in any event, the evidence is clear that companies not forced to compete at home do not thrive in global markets. Second, the Canadian Competition Act has an explicit statutory exception for transactions that are likely to generate gains in efficiency. In 1986, Parliament enacted an efficiency exception in section 96 of the Act. Pursuant to this exception, a merger that would likely result in a substantial prevention or lessening of competition will be allowed if the merger is likely to bring about gains in efficiency that will be greater than and offset the anti-competitive effects. As such, Canada's merger provisions account for the positive effects of efficiencies arising out of such mergers.[12] [13] In this regard, Canada currently has one of the most receptive regimes internationally for the consideration of efficiency claims in merger review. Consequently, even in the small number of cases where it is found that the merger will lessen competition substantially, it is always open to the parties to argue that an anti-competitive transaction should be cleared in light of the efficiencies it will bring to the Canadian economy.

It is worth noting in this regard that the number of mergers that the Bureau challenges is very small. Moreover, the reasons the Bureau does not challenge the vast majority of mergers is owing to factors other than the efficiencies exception. Specifically, the Bureau concludes, following a rigorous and economic analysis, that no substantial lessening or prevention of competition is likely to result from the merger. This can be owing to, among other considerations, the fact that sufficient competition will remain in affected markets following the merger, or that low barriers to entry allow for sufficient potential competition, either of which will prevent the exercise of market power. Accordingly, while there is an explicit statutory efficiencies provision, to date few firms have needed to take advantage of this provision.[14]

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12 The test used by the Bureau is whether a substantial lessening or prevention of competition will result from the merger. This refers to the ability of the merged parties to exercise market power, which is generally viewed as the ability to profitably raise price or otherwise restrict competition without fear of competitive reaction. The test extends beyond pricing and can include such non-monetary aspects of competition as restricting output, quality, variety, service, advertising, innovation and other dimensions of competition.

13 In general, the categories of efficiencies that will be considered include technical (productive) efficiency (the creation of a given volume of output at the lowest possible resource cost); and dynamic efficiency (the optimal introduction of new products and production processes over time).

14 The Superior Propane case in 2003 (Canada (The Commissioner of Competition) v. Superior Propane Inc., [2003] 3 F.C. 529 (C.A.), aff'g (2002), 18 C.P.R. (4th) 417 (Comp. Trib.) (redetermination decision following [2001] 3 F.C. 185 (C.A.), rev'g (2000), 7 C.P.R. (4th) 385 (Comp. Trib.))) is the only case in which the Competition Tribunal and the courts have applied the efficiencies exception in the Competition Act. The efficiencies exception was first invoked in Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd. (1992). In this case, the exception was moot; since the Competition Tribunal found that the merger did not substantially lessen or prevent competition. The exception has also been mentioned (but not applied) in four other Tribunal cases, namely: Canada (Director of Investigation

16. In its submission to the Competition Policy Review Panel, the Bureau recommended that Canada's position regarding the interface between merger review and the evolution of national champions be as follows:

- The efficiencies exception in the Competition Act provides a mechanism through which firms can grow to an efficient scale, even at the expense of competition in Canada. This approach requires that firms that are proposing an otherwise harmful merger bring forward credible and convincing evidence of the anticipated efficiency gains, rather than relying solely on arguments.

- Although the existing Canadian approach to balancing efficiencies against anti-competitive harm may be complex in some cases, it is based on principled and objective criteria that allow firms to grow to scale by achieving the efficiencies necessary to compete at home and abroad. It is applied through an independent, transparent legal process before the Competition Tribunal.

- In contrast, the introduction of a broad-based public interest test as part of any merger review process risks the possibility that decisions will not be made with proper regard to evidence or sound economic principles. The complexity inherent in public interest analysis can run the risk of greater delay and could even prevent potentially pro-competitive transactions. Moreover, where benefits are concentrated and costs are diffuse, it is possible for narrow groups that stand to benefit from public interest reviews to enrich themselves at the expense of others.

- The challenge for any government is to adopt policies that will enhance the economic benefits flowing from an open economy and the benefits of deregulation, while resisting the call from some to retreat to protectionism for certain industries at the expense of other domestic businesses and individual consumers. Adopting policies that favour protectionism increase the opportunity and ability of firms in protected industries to exercise market power by raising or maintaining prices above competitive levels. The implication of such policies is to sacrifice the global competitiveness of any other domestic industry that relies upon the products or services produced by the so-called national champion.

- Where public interest merger reviews are deemed necessary, they should be based on clearly identified public interest criteria, conducted by an independent body in a transparent manner, based on fact and evidence (as opposed to argument and private interest). Furthermore, the weighing of this evidence should be based on a standard that requires public benefits to clearly outweigh any potential harm to competition that may result from the proposed transaction.

Specific Sectoral Restrictions in Canada

17. The Bureau frequently considers the issue of investment restrictions in various sectors of Canada's economy, either as a feature of its enforcement activities under the Act or in its role as an advocate of competition policy before various legislative and regulatory bodies.

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and Research) v. Air Canada (1988)(the Tribunal observed that section 96 had to be interpreted in light of section 1.1); Canada (Director of Investigation and Research) v. Imperial Oil Limited (1989) (the Tribunal commented on the quantum of claimed efficiency gains); Director of Investigation and Research v. Canadian Pacific Ltd. (1997) (request for particulars relating to efficiencies); and, Commissioner of Competition v. Canadian Waste Services Holdings Inc. (2001) (efficiency arguments rejected as speculative at the remedy stage). See Competition Bureau, Treatment of Efficiencies in the Competition Act: Consultation Paper (September 2004) at 2, online: http://www.ic.gc.ca/epic/site/cb bc.nsf/en/01602e.html. See also, Report of the Advisory Panel, supra note 23 p. 21, footnote 3, online: http://www.competitionbureau.gc.ca/epic/site/cb bc.nsf/en/01954e.html.

18. When undertaking any competitive effects analysis under the Act, among the factors the Bureau considers is the presence of barriers to entry into a market for prospective competitors. Barriers can take many forms, ranging from regulatory restrictions, including sectoral restrictions, to sunk costs that cannot be recovered. As was noted in the Competition Policy Review Panel's final report, sectoral investment regimes and ownership restrictions constitute barriers to entry to many markets in Canada.[15]

Airlines

19. The Canada Transportation Act[16] provides that each Canadian airline must be at least 75% owned or otherwise controlled by Canadians, and that only a Canadian may obtain a licence to operate. "Canadian" is defined as:

> a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, a government in Canada or an agent of such a government or a corporation or other entity that is incorporated or formed under the laws of Canada or a province, that is controlled in fact by Canadians and of which at least seventy-five per cent, or such lesser percentage as the Governor in Council may by regulation specify, of the voting interests are owned and controlled by Canadians.[17]

20. In addition, the Air Canada Public Participation Act[18] requires that Air Canada's articles of continuance:

> contain provisions imposing constraints on the issue, transfer and ownership, including joint ownership, of voting shares of the Corporation to prevent non-residents from holding, beneficially owning or controlling, directly or indirectly, otherwise than by way of security only, in the aggregate voting shares to which are attached more than 25%, or any higher percentage that the Governor in Council may by regulation specify, of the votes that may ordinarily be cast to elect directors of the Corporation, other than votes that may be so cast by or on behalf of the Minister.[19]

21. In Canada, the presence of foreign ownership restrictions was a significant factor in the restructuring of the Canadian airline industry in 1999. As a result of these restrictions, Air Canada emerged as the only viable acquirer of Canadian Airlines and became the largest domestic carrier in the immediate period following the merger, although it subsequently sought bankruptcy protection to restructure its operations. Nonetheless, the restrictions have not prevented the emergence of WestJet as a second national carrier.

22. As the Bureau noted in its submission to the Competition Policy Review Panel, it supports a number of measures that would result in the reduction or elimination of foreign ownership restrictions on Canadian air carriers[20]. There does not appear to be any compelling economic reason why the air

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15 See, for example, the Panel's comments noted above, supranote 8.

16 S.C. 1996, c. 10

17 Id., s. 55(1).

18 R.S.C. 1985, c. C-35 (4th Supp.).

19 Idem, s. 6(1)(b).

20 Submission to the Competition Policy Review Panel by the Commissioner of Competition, January 11, 2008, p.13. http://www.ic.gc.ca/eic/site/cprp-gepmc.nsf/vwapj/commissioner_competition_bureau.pdf/$FILE/commissioner_competition_bureau.pdf

transportation sector should continue to have such restrictions. The Bureau recognises that the elimination of all ownership restrictions may not be feasible under current bilateral air agreements that require domestic air carriers to be substantially owned and controlled by their government or home country nationals. Accordingly, as a first step, the Bureau supports increasing the limit on foreign ownership of voting shares in Canadian air carriers from the current 25 percent to 49.9 percent. The airline industry is capital-intensive. New entrants, as well as established players, would benefit from the greater access to foreign capital through liberalised ownership rules.

23. In respect of domestic routes, the Bureau has also voiced its support for permitting the entry of wholly foreign owned carriers that only serve routes within Canada. Such an approach has been successfully adopted in Australia. Pursuant to such a policy, foreign carriers could draw upon their knowledge and expertise to establish new operations in Canada. Such "Canada-only carriers" could also generate greater feed traffic beyond the major international gateways thereby allowing international carriers to serve a greater number of routes to and from Canada.

24. The Bureau also supports cabotage. Cabotage refers to the right of a foreign carrier to operate within the domestic borders of another country. Canada, like most countries, does not permit cabotage. This prohibits, for example, a carrier such as Air France serving the Paris-Toronto route, from picking up additional passengers in Toronto and continuing a flight service to Vancouver. Permitting foreign air carriers to provide services between points in Canada has the potential to further promote competition on routes within Canada.

25. As part of its review, the Competition Policy Review Panel commented on the issues surrounding ownership restrictions in the airline industry and recommended that the Minister of Transport increase the limit on foreign ownership to 49% of voting equity, on a reciprocal basis, through bilateral negotiations with other countries. The Panel also recommended that the Minister indicate whether he would be willing to accept foreign-owned Canadian-incorporated domestic air carriers by December, 2009. The Panel urged the Minister to complete an Open Skies agreement with the European Union as soon as possible.[21] In that regard, Canada recently concluded negotiations with the European Union (EU) on a comprehensive air transport agreement that will open access to all 27 Member States for Canadian carriers and all points in Canada for EU carriers. We anticipate that consumers and air dependant industries will benefit from the additional flexibility provided by this new agreement.

Telecommunications

26. Canada continues to have foreign ownership restrictions on domestic telecommunications undertakings. In that sector, non-Canadians cannot directly own more than 20% of a Canadian telecommunications carrier and not more than 33.3% of a holding company that owns a Canadian carrier. As a result, the combined limit on foreign direct and indirect investment in a Canadian telecommunications carrier is capped at 46.7%. The Telecommunications Act[22] provides that only a Canadian carrier that is a Canadian-owned and controlled corporation incorporated or continued under the laws of Canada or a province may own or operate a transmission facility to provide telecommunications services to the public.[23] A corporation is Canadian-owned and controlled if: (i) not less than 80% of the members of its board of directors are individual Canadians; (ii) Canadians beneficially own, directly or indirectly, in the aggregate and otherwise than by way of security, not less than 80% of the corporation's issued and outstanding voting shares; and (iii) the corporation is not otherwise controlled by persons that are not

21 Id Supranote 6, Recommendations 7, 8 & 9, p. 42

22 S.C. 1993, c. 38.

23 Id., s. 16(1).

Canadians[24]. A Canadian is defined in the Canadian Telecommunications Common Carrier Ownership and Control Regulations[25] as follows:

- a Canadian citizen or permanent resident;
- a corporation without share capital where a majority of its directors or officers are appointed or designated by a federal or provincial government;
- a corporation in which Canadians beneficially own and control, in the aggregate and otherwise than by way of security, not less than two-thirds of the issued and outstanding voting shares, and which is not otherwise controlled by non-Canadians;
- a trust in which Canadians have not less than two-thirds of the beneficial interest and of which a majority of the trustees are Canadian; and
- a partnership in which Canadian partners beneficially own and control not less than two third of the beneficial interest and which is not otherwise controlled by non-Canadians.[26]

27. In 2006, an expert panel struck by the government to study Canada's telecommunications policies and regulatory framework, the Telecommunications Policy Review Panel (the TPRP), recommended that restrictions on foreign investment in telecommunications service providers be liberalised[27]. This position was supported by many of the parties that participated in the TPRP's review. Similarly, the OECD has urged Canada to eliminate foreign ownership restrictions in telecommunications[28] and has argued the negative effects of foreign investment restrictions on the cost of capital and on competition more generally.

28. In the Bureau's view, foreign ownership restrictions on facilities-based telecommunications carriers are no longer necessary to harmonise Canadian policy with that of our global trading partners. By limiting potential entry in the telecommunications markets, Canada's foreign investment restrictions reduce the competitive discipline that the threat of entry can provide. Moreover, these restrictions slow the realisation of the benefits to open competition for consumers and business supplied by these markets. Telecom is a key enabler in many other sectors of the economy and, as such, its impact on innovation and competitiveness is seen nationwide.

29. With respect to companies that previously only distributed broadcast signals but can now take advantage of technical advances to enter into competition with facilities-based telecommunications carriers, it is the Bureau's view that the foreign investment levels for these corporations should be consistent with those applicable to the telecommunications carriers. Regardless of technology, all carriers should enjoy the same access to capital and be bound by the same ownership rules. This approach will

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24 Id., s. 16(3).

25 SOR/94-667.

26 Id., s. 2.

27 The Telecommunications Policy Review Panel, Telecommunications Policy Review Panel, Final Report, (Ottawa: Publishing and Depository Services Public Works and Government Services Canada, 2006) at 11-25. Online: http://www.telecomreview.ca/epic/site/tprp-gecrt.nsf/en/rx00073e.html. The TPRP was formed in April, 2005 with the mandate to conduct a review of Canada's telecommunications policy and regulatory framework and made recommendations on how to make it a model of 21st century regulation. It issued its Final Report in March, 2006.

28 Id. supranote 6, p. 8.

ensure that broadcasting distribution undertakings are not placed at an unfair competitive disadvantage vis-à-vis telecommunications companies, given that both compete in high-speed access and telephony.

30. The Competition Policy Review Panel adopted the earlier recommendation from the TPRP noted above, namely, that the federal government should adopt a two-phased approach to foreign participation in the telecommunications and broadcast industry. In the first phase, according to the Panel recommendation, the Minister of Industry should amend the Telecommunications Act to allow foreign companies to establish a new telecommunications business in Canada or to acquire an existing telecommunications company with a market share of up to 10 percent of the telecommunications market in Canada. In the second phase, following a review of broadcasting and cultural policies including foreign investment, telecommunications and broadcasting foreign investment restrictions should be liberalised in a manner that is competitively neutral for telecommunications and broadcasting companies.[29]

Conclusion

31. Champion companies should emerge as the result of their superior competitive performance and market forces. There are significant risks of picking and promoting particular firms by exempting firms or industries from general competition laws or allowing firms to merge based on "public interest" criteria other than competitive effects and economic efficiency. Moreover, protecting domestic firms from foreign competition or other preferential treatment is harmful to the productivity of the domestic economy and the competitiveness of Canadian industries that, in many cases, depend on these firms for essential inputs into their businesses. In that regard, the Government of Canada has stated that "[i]n Canada, we must ensure that we have strong and effective regulations to protect people and enhance our quality of life, while minimising regulations that are unnecessary or that put Canada at a significant competitive disadvantage."[30]

[29] Id. supranote 6, Recommendation 11 at p. 49.

[30] Department of Finance Canada, Advantage Canada Building a Strong Economy for Canadians (2006) at 78, online: http://www.fin.gc.ca/ec2006/pdf/plane.pdf

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 conc. 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 stymieing 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

[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.

to above may be taken. The Commission shall inform the Member State concerned of its decision within 25 working days of that communication."[3]

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.

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

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 deindustrialisation 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;

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 intra-community 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 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.

FRANCE[1]

1. Jusqu'au début des années 90 environ, on pouvait encore qualifier la politique industrielle d'instrument de politique économique conduite par le Gouvernement dans l'objectif de promouvoir certains secteurs d'activité pour des raisons d'indépendance nationale, d'autonomie technologique ou d'équilibre territorial. De facto, depuis plus de 15 ans maintenant, l'activité principale des autorités françaises en matière industrielle a tendu à avoir une politique d'innovation, et non pas une politique sectorielle, quitte à promouvoir les technologies génériques les plus porteuses (société de la connaissance et TIC, problématiques de santé et biotechnologies, matériaux et nanotechnologies, notamment).

2. De la même manière, on ne peut plus définir simplement la politique industrielle comme l'ensemble des politiques verticales par opposition aux politiques horizontales, telles que la politique de concurrence. Les politiques d'innovation notamment sont largement horizontales, ainsi que celles concernant la propriété intellectuelle, les formations supérieures orientées vers les entreprises, l'entrepreneuriat, l'environnement des PME, le design, les adaptations de l'appareil productif aux variations de la demande mondiale en termes géopolitiques, le développement durable et les éco-industries requises pour la réduction des gaz à effet de serre, les priorités fiscales s'agissant des entreprises, etc.

3. Les politiques verticales ne sont donc pas des politiques de structure qui viseraient à agir sur la rationalisation des industries et la concentration des entreprises, et qui ne porteraient que sur la coordination entre les différents acteurs d'un même secteur comme dans les années 70. A titre d'illustration, des métiers aussi « traditionnels » que la sidérurgie progressent non pas par « de la coordination entre les différents acteurs d'un même secteur », mais par de la percolation de technologies exogènes au secteur sidérurgique, d'une part (TIC, par exemple), et par de la diffusion de technologies nouvelles sur les matériaux ferreux dans d'autres secteurs (aciers spéciaux dans l'automobile, le bâtiment, le ferroviaire, la construction navale, etc.) en partenariat avec ceux-ci.

4. Les objectifs de la politique industrielle peuvent parfois passer par la constitution ou le développement de grands groupes soutenus par les États. On parle alors de champions industriels, nationaux, voire européens (I). Mais, dans les cas où le degré de concentration d'un domaine est assez élevé, se pose la question de l'articulation entre des gains de valeur liés à la taille et à la concentration, et les inconvénients qui résulteraient d'une réduction de la concurrence, le tout avec une problématique, désormais permanente, des marchés pertinents à l'échelle mondiale et des politiques stratégiques menées par différents grands acteurs à l'échelle régionale (US, UE, Chine, typiquement).

5. L'écueil est de ne pas céder à la tentation du nationalisme économique mais il convient également de ne pas être dogmatique : lorsqu'il y a, notamment au niveau européen, un nombre limité d'opérateurs, et de même aux États-Unis ou en Chine, avec des dispositions légales favorisant ces opérateurs, parfois de façon discriminatoire au regard des règles de l'OMC (ce qui est patent en Chine actuellement sur les TRIMs, par exemple), il est impératif d'avoir une réelle capacité de négociation pour réduire les principales distorsions de concurrence au niveau où elles se présentent, c'est-à-dire, désormais,

[1] Cette contribution est inspirée des ateliers de concurrence organisés par la DGCCRF le 20 avril 2005, autour du thème : "champions nationaux" et droit de la concurrence.

très souvent à l'échelle mondiale ; cela peut passer par des concentrations à une échelle continentale, ou, dans certains cas liés à la défense notamment, plus réduite. Il s'agit alors de faire en sorte que politique industrielle et politique de concurrence soient édictées de manière suffisamment neutre pour permettre une mise en œuvre dans le sens d'une complémentarité pour assurer une plus grande compétitivité et efficacité globale (II).

1. La notion de «champion industriel»

1.1. La construction de la notion de champion en France

6. Il existe en France une forte tradition industrialiste, depuis, notamment, les manufactures du roi et les manufactures royales, entreprises privées mais dotées de privilèges en contrepartie du contrôle de l'administration royale. Une politique industrielle est parfaitement compatible avec l'existence d'entreprises privées, comme l'ont montré les révolutions industrielles en Europe, en Amérique du Nord ou en Asie. Les nationalisations des années 1930 en réaction à la Grande Dépression puis durant les années 1945-60 peuvent aussi être conçues comme l'expression d'une volonté du Gouvernement de créer sous l'égide et sous le contrôle direct de l'État, de grandes entreprises nationales cohabitant avec un secteur privé demeurant majoritaire. Ce sont des politiques d'offre, et non de demande (c'est-à-dire keynésienne), qui ont ainsi doté la France de grands réseaux à la reconstruction d'après guerre.

7. La tradition française, du début du XIXème siècle jusqu'au début des années 60 - et au-delà, s'il s'agit des discours politiques - est faite prioritairement de défense des « petits » contre les « grands » opérateurs, comme dans le secteur de la distribution. La défense des petits commerces est en effet inscrite dans la législation dès le XIXème pour lutter contre les « *chaînes de succursales* » et elle est renforcée sous le Front populaire contre les « *magasins à prix unique* ».

8. La politique des « champions nationaux » s'est développée, selon deux versants principaux:

- le versant « gaullien »
  Ce versant est celui des grands projets industriels et technologiques des années 60 et 70, presque toujours portés par une entreprise publique ou un groupe public, ayant permis la création du Concorde durant la Présidence de Charles de Gaulle, puis d'Airbus sous Georges Pompidou, ou encore du plan télécommunications sous Valéry Giscard d'Estaing.

- le versant de la « Nouvelle Société » durant la Présidence de George Pompidou
  Ce volet se traduit quant à lui par l'accompagnement par l'État des concentrations dans le secteur privé. Ces concentrations font alors l'objet, soit d'une bienveillance attentive (à travers notamment des agréments fiscaux), soit d'une volonté de ne pas entraver la croissance des entreprises, même après l'adoption de la loi du 19 juillet 1977 sur le contrôle des concentrations économiques.

9. Le Conseil d'État a d'abord apporté son concours à la mise en œuvre de l'idée qu'il peut être conforme à l'intérêt général de concentrer le soutien de l'État sur une seule entreprise déterminée. Ainsi, le Conseil d'État, dans un arrêt du 29 juin 1951, *Syndicat de la raffinerie de soufre française* (Rec. p.377), énonçait que l'administration peut accorder des conditions privilégiées à une seule entreprise « *lorsqu'elle estime qu'il est de l'intérêt national de favoriser l'expansion d'une entreprise déterminée* ».

10. Une autre affaire était encore plus significative : en présence de deux entreprises françaises en concurrence pour la vente d'équipements pour des usines sucrières à Saint-Domingue, l'administration française avait délibérément contrecarré les initiatives de l'une et favorisé l'autre afin que cette dernière puisse être compétitive face aux entreprises étrangères concurrentes : « *il résulte de l'instruction que la*

concurrence de deux groupes français en face d'offres de pays tiers était de nature à nuire aux intérêts français ;(que) les mesures dont se plaint le requérant se trouvaient ainsi justifiées par l'intérêt général » (CE 13 juillet 1963, Aureille, RDP 1964 p.205).

11. La jurisprudence a également permis, par exemple, de ne pas faire obstacle au développement de l'enseigne Elf délibérément encouragé par le gouvernement français. Un décret avait été pris pour limiter le développement des groupes pétroliers déjà présents sur le territoire français, en précisant qu'aucune nouvelle station-service ne pouvait être créée à moins de 40 kilomètres d'une station de la même marque ; le recours de la société Shell a été écarté au motif qu'une loi datant de 1928 - qui régissait l'importation des produits pétroliers et l'obligation de constituer des stocks de réserve - permettait au pouvoir réglementaire de réglementer tous les aspects de l'activité de ces entreprises (CE 19 juin 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). Les commentateurs de l'arrêt n'avaient pas manqué de relever qu'une telle solution donnait un certain confort à la politique industrielle de l'époque.

1.2. Les pratiques et textes actuels relatifs à la protection des intérêts nationaux

12. Certaines pratiques et certains textes favorisent la défense d'intérêts nationaux mais aujourd'hui, à une politique de la concurrence instrumentalisée par la politique industrielle, a succédé, dans une large mesure, une politique industrielle canalisée par le droit de la concurrence. Il ne s'agit pas cependant d'opposer politique industrielle et politique de concurrence : l'industrie prospère par la concurrence, son dynamisme en découle, et selon la théorie schumpetérienne, la politique industrielle, prise dans son ensemble, inclut largement des préoccupations de concurrence. On peut dire qu'elle est l'un des principaux moteurs de son existence même (voir par exemple le rapport du CAE de 2000, sur les politiques industrielles en Europe, Lorenzi, Cohen & alii).

1.2.1. La défense d'intérêts nationaux canalisée par le droit de la concurrence communautaire

13. Le contrôle de la Communauté européenne est un contrôle du respect des principes de non-discrimination et de proportionnalité : il n'empêche pas toute protection de certains intérêts légitimes nationaux. Par ailleurs, certaines dispositions du droit communautaire permettent la défense de ces intérêts.

14. En France, l'article L153-1 I du Code monétaire et financier prévoit que « *Sont soumis à autorisation préalable du ministre chargé de l'économie les investissements étrangers dans une activité en France qui, même à titre occasionnel, participe à l'exercice de l'autorité publique ou relève de l'un des domaines suivants : a) Activités de nature à porter atteinte à l'ordre public, à la sécurité publique ou aux intérêts de la défense nationale ; b) Activités de recherche, de production ou de commercialisation d'armes, de munitions, de poudres et substances explosives* ».

15. Un décret du 31 décembre 2005 codifié aux articles R.153-1 à R.153-5, et adopté sur le fondement de cet article indique une liste de secteurs stratégiques à protéger des investissements étrangers. Cette liste comprend 7 secteurs si ces investissements proviennent de pays de l'Union européenne (les activités de sécurité privée, les matériels d'interception des communications, la sécurité informatique, les biens et technologies à double usage…) et 11 secteurs si les investissements sont en provenance d'un pays tiers (cryptologie, recherche et production d'armes et substances explosives, études et équipement au profit du ministère de la défense…).

16. Le Ministre de l'Économie peut donc demander certaines garanties aux investisseurs étrangers souhaitant racheter des sociétés françaises, appartenant à ces secteurs dits sensibles. Il pourra exiger par exemple la pérennité des activités et des capacités industrielles.

17. La publication de ce décret n°2005-1739 le 30 décembre 2005 a amené la Commission européenne à s'interroger sur la conformité de ce décret aux principes de liberté de circulation des capitaux et de liberté d'établissement. Elle a donc envoyé à la France une lettre de demande d'information le 20 janvier 2006, une lettre de mise en demeure le 4 avril 2006 et un avis motivé le 12 octobre 2006 auquel le gouvernement français a répondu le 11 décembre 2006 en indiquant que l'examen pouvait ne pas donner lieu à un blocage des investissements en demandant à l'investisseur « *des engagements limités au seul établissement concerné* ». Le décret n'a pas donné lieu à la saisine de la CJCE. Néanmoins, le cas n'est toujours pas formellement clos.

18. Il faut au demeurant noter que cela s'inscrivait dans une démarche commune avec d'autres puissances économiques:

- ainsi l'Allemagne par la loi du 6 mai 2004 et ses décrets d'application de juillet 2004 et septembre 2005 s'attachait à limiter certains investissements étrangers. Le gouvernement fédéral a adopté le 20 août 2008 un projet de loi qui étend ce dispositif, sous la pression des inquiétudes relatives aux actions possibles de certains fonds souverains (chinois et pétroliers notamment) dans un contexte de dépression des cours des actions, et d'asymétrie concurrentielle du droit commercial de ces pays ;
- les États-Unis de leur côté disposent de la loi Exon Florio depuis 1988, modifiée par la loi sur l'investissement étranger et la sécurité nationale du 24 octobre 2007 ; un règlement d'application du Defense Production Act de 1950 et du Foreign Investment and Security Act a été publié le 14 novembre 2008. Le Webb-Pomerene Act de 1918 a été complété par l'Export Trading Company Act de 1982. Il prévoit que les associations d'entreprises américaines ayant une activité d'exportation[2] sont exemptées de l'application des lois antitrust américaines et notamment échappent à l'interdiction des ententes, à condition qu'elles ne gênent pas les exportations de leurs concurrents américains et qu'elles n'entraînent pas des modifications de prix et des pratiques restrictives de concurrence sur le marché américain. Ce texte a donc pour objectif de favoriser les entreprises exportatrices américaines.
- le Japon dispose d'une loi sur le commerce extérieur de 1949, amendée en 1992 et 1998 ; un arrêté ministériel du 7 septembre 2007 complète cette loi et la liste des secteurs soumis à autorisation préalable ;
- la Chine, surtout, a 67 secteurs « stratégiques » dans lesquels les investissements étrangers sont restreints (notamment à une situation de minoritaire) et 34 dans lesquels ils sont interdits. Elle a durci ce dispositif le 1er août 2008 de façon discrétionnaire.

1.2.2. Des dispositions communautaires permettant la défense de certains intérêts légitimes sous contrôle de la Commission

a) L'article 21 du règlement relatif au contrôle des concentrations entre entreprises

19. L'application des règles européennes est parfois accusée de faire échec à toute stratégie politique en matière industrielle car elle conduit à exercer un contrôle strict de l'attribution des aides d'État ou à vérifier que les fusions d'entreprises, même lorsqu'elles permettent de construire un « champion national » ne conduisent pas à la création d'une position dominante. En réalité, la contradiction n'est pas si fréquente et le nombre de cas où la Commission a interdit une opération de concentration reste très limité.

[2] L'Export Trading Company Act de 1982 a assoupli les dispositions du Webb-Pomerene Act : l'exemption ne s'applique plus uniquement aux associations ayant exclusivement une activité d'exportation, en revanche, l'exemption ne s'applique qu'aux activités d'exportation. En outre, il peut s'agir d'exportation de marchandises mais aussi de services et transferts de technologie.

20. En vertu de l'article 21 du règlement n°139/2004 du 20 janvier 2004 relatif au contrôle des concentrations entre entreprises, les concentrations de dimension communautaire relèvent de la compétence exclusive de la Commission.

21. Néanmoins, le point 4 de cet article 21 prévoit que

> « *les États membres peuvent prendre les mesures appropriées pour assurer la protection d'intérêts légitimes autres que ceux qui sont pris en considération par le présent règlement et compatibles avec les principes généraux et les autres dispositions du droit communautaire.*
>
> *Sont considérés comme intérêts légitimes, au sens du premier alinéa, la* ***sécurité publique****, la* ***pluralité des médias*** *et les* ***règles prudentielles****.*
>
> *Tout autre intérêt public doit être communiqué par l'État membre concerné à la Commission et reconnu par celle-ci après examen de sa compatibilité avec les principes généraux et les autres dispositions du droit communautaire avant que les mesures visées ci-dessus puissent être prises. La Commission notifie sa décision à l'État membre concerné dans un délai de vingt-cinq jours ouvrables à dater de ladite communication* »[3].
>
> Cette disposition existait également dans l'ancien règlement 4064/89 du 21 décembre 1989.

22. La notion de sécurité publique visée par l'article 21 est relativement large en ce qu'elle comprend la défense nationale, la sécurité intérieure mais aussi la sécurité d'approvisionnement d'un produit ou d'un service ayant une importance fondamentale pour l'existence d'un État (CJCE, 10 juillet 1984, Campus Oil Limited e.a. c/ Ministre de l'Industrie et de l'Énergie :

> « *Les produits pétroliers, par leur importance exceptionnelle comme source d'énergie dans l'économie moderne, sont fondamentaux pour l'existence d'un État dès lors que le fonctionnement non seulement de son économie mais surtout de ses institutions et de ses services publics essentiels et même la survie de sa population en dépendent. Une interruption de l'approvisionnement en produits pétroliers et les risques qui en résultent pour l'existence d'un État peuvent dès lors gravement affecter sa sécurité publique, que l'article 36 (nouvel article 30) permet de protéger* »).

23. Néanmoins, « *la sécurité publique ne peut être invoquée que lorsqu'il y a une menace véritable et suffisamment sérieuse à un intérêt fondamental de la société* » (Commission européenne, E.on c/Endesa, aff M.4197, §61)

24. Si cet intérêt de sécurité ou ceux de la pluralité des médias et des règles prudentielles sont invoqués, la Commission vérifie qu'il s'agit bien d'un intérêt public et légitime menacé mais également que l'État en cause respecte les principes de proportionnalité et de non-discrimination, et choisisse la mesure la moins restrictive objectivement pour atteindre l'objectif poursuivi. Dans le cas contraire, elle peut saisir la CJCE sur le fondement de l'article 226 du Traité CE, après avoir émis des conclusions préliminaires.

25. La Commission est par ailleurs sévère vis-à-vis des mesures étatiques disproportionnées et bloquantes à l'encontre des fusions transfrontières et ce d'autant plus qu'une politique industrielle européenne se développe, avec l'idée de « champions européens ».

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[3] JO L 24 du 29 janvier 2004, p. 1–22

b) L'article 87 du traité et les aides d'état

26. La politique communautaire relative aux aides d'État vise également à empêcher les distorsions de concurrence sur le marché intérieur. En effet, les restrictions de la concurrence peuvent être le fait des gouvernements lorsque ceux-ci accordent des aides publiques aux opérateurs économiques.

27. L'article 87 du traité déclare incompatibles avec le marché intérieur « dans la mesure où elles affectent les échanges entre les États membres, les aides accordées par les États ou au moyen de ressources d'État sous quelque forme que ce soit, qui faussent ou qui menacent de fausser la concurrence en favorisant certaines entreprises ou certaines productions ».

28. Tout avantage accordé par l'État ou au moyen des ressources de l'État est considéré comme une aide d'État lorsque :

- il confère un avantage économique à son bénéficiaire ;
- il est octroyé de manière sélective à certaines entreprises ou certaines productions ;
- il risque de fausser la concurrence ; et
- il affecte les échanges entre les États membres.

29. Seules peuvent être exemptes de cette interdiction les aides notifiées à Bruxelles et expressément autorisées par l'Union européenne.

30. Les aides d'État sont régies par trois règlements[4] communautaires et la Commission apprécie les mesures qui lui sont notifiées en fonction de lignes directrices qui n'ont pas de valeur réglementaire mais qui permettent aux États membres de connaître les critères d'appréciation de la CE par catégories d'aides.

c) Des champions nationaux aux champions européens ?

31. En pratique une application trop rigoureuse des règles de concurrence communautaire peut empêcher l'émergence de « champions européens » tout en favorisant indirectement la création de concurrents extra européens (Cf. le retrait de la fusion Pechiney/Alcan face aux demandes d'engagements de la Commission alors que cette opération sera suivie de la fusion Alcan/Pechiney qui se fera au détriment d'une grande entreprise européenne).

32. Cependant, la Commission européenne tend à réaliser l'importance de ne pas opposer stratégie industrielle et règle du marché intérieur dans le contexte d'une économie mondialisée.

33. Lors d'une rencontre sur la concurrence entre le Japon et l'Union européenne organisée à Tokyo le 7 mars 2006, Nelly Kroes déclarait : "*national champions are outdated (...) The borders are gone. It is all about European champions and global champions*" (« *les champions nationaux sont dépassés (...) Les frontières ont disparu. Ce qui compte aujourd'hui, c'est seulement les champions européens et les champions mondiaux* »).

[4] - Règlement de procédure CE 659/1999 du conseil complété par un règlement CE784/2004 de la Commission
- Règlement autorisant les exemptions par catégories CE994/98 du conseil et un règlement d'exemption par catégories CE 800/2008 de la commission
- Règlement de minimis CE1998/2006

34. Dans un discours, la même année, elle déclarait que les fusions transfrontalières intra-UE étaient « *plus susceptibles de créer de grands groupes européens forts et capables de gagner sur les marchés internationaux tout en permettant aux consommateurs européens, industriels et privés, de bénéficier d'un meilleur choix et d'une meilleure qualité* » (Challenges to the Integration of the European Market: Protectionism and Effective Competition Policy, 12 juin 2006).

35. Viviane Reding, Commissaire responsable de la Société de l'information et des médias, au sein de la Commission européenne, lors des Rencontres du Cercle des Européens - L'Express, le 7 mars 2008 déclarait également que « *Réussir l'Europe, ce n'est pas proposer de bâtir des champions nationaux, mais bien des champions européens qui seuls offrent cette capacité de développement adaptée aux enjeux d'une économie globalisée* ».

36. Cette logique n'est pas loin de celle des champions nationaux en ce qu'elle se conçoit comme une défense face à la concurrence mondiale. Ainsi, dans son discours de mars 2008, Viviane Reding, en parlant de la nécessité de champions européens, indiquait que le marché intérieur est à la fois « *un rempart face à la globalisation et un moteur pour que les entreprises européennes s'affirment comme leaders mondiaux* ».

37. Cette logique des champions nationaux ou européens n'est pas en contradiction avec la politique de concurrence. Ces politiques sont deux instruments de la politique publique qui peuvent utilement être mis en œuvre de concert dans le sens d'une plus grande compétitivité. Il convient aujourd'hui de chercher les voies d'une meilleure articulation.

2. La complémentarité des politiques industrielles et de concurrence

2.1. L'importance de l'industriel

38. L'industrie est le lieu principal des innovations technologiques et des gains de productivité. L'industrie peut aussi avoir un rôle stratégique en termes d'indépendance et de compétitivité.

2.1.1. L'exemple français

39. Le rapport Beffa, « *Pour une nouvelle politique industrielle* », résume ce rôle essentiel de l'industrie dans le développement économique.

> « *Même si la part des services dans l'économie s'accroît, une industrie solide est nécessaire à un équilibre vertueux de la balance commerciale et à la croissance. En effet, la demande en biens industriels des pays développés reste importante, car elle assure l'essentiel de leur qualité de vie. Si ces biens ne sont pas produits, ils doivent être achetés à l'étranger. Quels services exportables peuvent être la contrepartie de l'achat des biens industriels à l'étranger ? Selon un scénario envisagé par certains auteurs, la France pourrait devenir essentiellement agricole et touristique et acheter ses biens à d'autres pays spécialisés dans la production industrielle. Cette évolution de la spécialisation vers des secteurs à faible valeur ajoutée appauvrirait la France et fragiliserait sa position dans le commerce international.*
>
> *Par ailleurs, l'opposition entre services et industrie perd son sens. En effet, le développement des services est essentiellement porté par les services aux entreprises, qui croissent bien plus vite que les services aux particuliers (INSEE première n° 972, juin 2004). Il faut ainsi penser le développement industriel et le développement des services comme complémentaires et non comme substituables.*
>
> *De manière plus générale, l'industrie demeure un des principaux moteurs de l'activité économique en termes de valeur ajoutée et d'emploi. Elle exerce un effet d'entraînement puissant sur l'ensemble des activités, en particulier par ses consommations intermédiaires : pour 1€ de*

production, l'industrie consomme 0,7€ de produits intermédiaires, contre 0,4€ pour les services (DATAR, 2004). Ainsi, l'importance de l'industrie doit être évaluée sur un périmètre correspondant à l'ampleur de son impact économique réel, l'industrie représente alors près de 41 % du PIB français et 51 % de l'emploi marchand en 1998. Ainsi, la baisse de l'emploi industriel direct n'a de sens qu'en tenant compte du quasi-doublement de l'intérim dans l'industrie au cours des années 90 et de l'externalisation importante d'un certain nombre de fonctions vers les services. Le marché de l'emploi reste donc tiré de manière importante par les résultats de l'industrie. En outre, l'industrie possède un pouvoir très fortement structurant sur la diffusion des innovations technologiques à l'ensemble de l'économie et, par extension, sur sa productivité globale »[5].

2.1.2. Au niveau européen

40. L'industrie est une composante déterminante de l'économie européenne. L'industrie manufacturière assure ainsi 20% de la production totale de l'Union européenne, 75% de ses exportations et plus de 80% des dépenses privées de recherche et développement (R&D).

41. La croissance de la productivité y est près de deux fois plus élevée que dans le reste de l'économie. Employant près de 50 millions de personnes dans l'Union européenne, l'industrie a également un rôle d'entraînement en raison de son lien avec le secteur des services, lesquels sont largement utilisés par l'industrie et bénéficient des innovations industrielles pour leur développement[6].

42. Suite au Conseil européen de Lisbonne de mars 2000 qui s'était fixé pour objectif de faire de l'Union européenne « l'économie de la connaissance la plus compétitive et la plus dynamique du monde » à l'horizon de 2010, la Commission européenne a posé les bases d'une politique industrielle communautaire, en raison de l'importance de l'industrie dans l'économie européenne. Les orientations de cette politique sont présentées dans un ensemble de textes : le programme-cadre pour l'innovation et la compétitivité[7], la communication sur l'industrie manufacturière[8], la communication relative à la mise en place du programme communautaire de Lisbonne en matière de recherche et d'innovation[9] et le septième programme-cadre pour la recherche[10].

5 Rapport Beffa au Président de la République, « *Pour une nouvelle politique industrielle* », La Documentation française, 2005.

6 JF Jamet, « *La politique industrielle de l'Europe* », Les policy paper de la Fondation Jean Schuman, 16 janvier 2006, n°15

7 Proposition de décision du Parlement européen et du Conseil établissant un programme-cadre pour l'innovation et la compétitivité (2007-2013), COM (2005) 121.

8 Communication de la Commission : « Mettre en œuvre le programme communautaire de Lisbonne : Un cadre politique pour renforcer l'industrie manufacturière de l'UE - vers une approche plus intégrée de la politique industrielle » COM (2005) 474

9 Communication de la Commission : « Davantage de recherche et d'innovation – Investir pour la croissance et de l'emploi. Une stratégie commune », COM (2005) 488

10 Proposition de décision du Parlement européen et du Conseil relative au septième programme-cadre de la Communauté européenne pour des activités de recherche, de développement technologique et de démonstration (2007-2013), COM (2005) 119

2.2. L'analyse économique relative aux champions industriels : les politiques industrielles comme facteur de compétitivité

43. L'école de Harvard et l'école de Chicago constituent les deux schémas de pensée dominants en économie industrielle. D'après l'école de Harvard, la structure du marché détermine la conduite des entreprises, laquelle conduit à leur performance.

44. L'école de Chicago renverse la causalité : selon elle, la performance des entreprises va causer leur conduite, laquelle va causer la structure du marché. Naturellement, la modalité de l'intervention publique est radicalement différente selon la nature de la causalité.

45. Selon l'école de Chicago: à partir du moment où il est possible d'entrer, d'investir sur un marché où les barrières à l'entrée sur le marché sont absentes, les autorités de concurrence ne devraient pas se soucier de régulation des dits marchés : puisque la performance des entreprises cause la structure du marché, il ne sert à rien d'agir sur cette structure.

46. A l'inverse, dans l'optique de l'école de Harvard, il peut être optimal d'agir sur la structure du marché ; la politique industrielle - et notamment la politique des champions nationaux - peut être pertinente. Si l'on accepte l'idée qu'une taille minimale sur certains marchés est synonyme d'une certaine efficacité en termes de coûts de production et d'innovation. Il s'agit alors de favoriser une plus grande performance, à travers deux principaux aspects : l'efficacité productive et l'innovation. Ceci dit, cela n'est vrai qu'à un certain degré de concurrence.

2.2.1. L'efficacité productive

47. Le premier argument en faveur de la politique industrielle est le suivant : la globalisation des économies accroît la taille des marchés. Cette globalisation incite donc à la création de grands groupes, de manière à bénéficier d'économies d'échelle plus importantes.

48. Cependant, il existe peu de preuves empiriques d'une corrélation positive entre une certaine concentration sur le marché et une plus forte productivité. En revanche, Nickell a étudié en 1996 la relation entre différents indicateurs de concurrence et la croissance de la productivité des facteurs. Il en déduit qu'une intensification de la concurrence se traduit par une accélération de la productivité globale des facteurs, laquelle ralentit avec le renforcement de la concentration et la hausse des profits.

2.2.2. L'innovation

49. L'innovation est un moteur de la croissance. Les défenseurs de la politique industrielle arguent du fait que le champion national - dans certains cas - peut être utilisé pour stimuler l'innovation.

50. Cette question remonte aux travaux de Schumpeter. Si l'on suit le paradigme de l'école de Harvard, on dira qu'une entreprise importante va innover plus parce qu'elle le peut, qu'elle a les moyens de prendre des risques.

51. Le rapport Beffa[11] préconise le retour des programmes nationaux, chacun de ces programmes étant coordonné par un leader ou un champion national. Derrière cette défense de l'innovation se profile l'idée de diffusion technologique de la recherche et développement (R&D) des grosses entreprises vers le reste de l'économie, tel que cela a été le cas dans le domaine des télécoms en France.

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[11] Rapport Beffa au Président de la République, «Pour une nouvelle politique industrielle», La Documentation française, 2005.

52. D'après Schumpeter, l'activité de R&D est une activité dans laquelle il existe des rendements d'échelle. En outre, une innovation sera plus facilement diffusée au sein d'une grande entreprise. Par ailleurs, une moindre concurrence sur le marché des produits va permettre la création de rentes, laquelle va inciter d'autres entreprises à rentrer sur le marché en innovant. Par conséquent, l'entreprise leader sera incitée à innover plus pour conserver sa position.

53. Cet argument peut être complété par un argument de course à l'innovation. En cas de course à l'innovation entre un monopole et son concurrent, si le monopole innove en premier, il conserve son pouvoir de monopole. Si au contraire le rival potentiel innove en premier, le marché se transforme en duopole. Par conséquent, le monopole a donc plus à perdre à ne pas innover que son rival.

54. Un autre argument repose sur la diversification des risques. En effet, la R&D est une activité risquée. Une grosse entreprise multi-activités va diversifier le risque de ne pas trouver entre toutes ses activités. Ce rôle de diversification des risques peut également être joué par l'État dans le cadre des grands programmes.

55. Le dernier argument est un argument de financement. Puisque les marchés financiers sont imparfaits, les entreprises doivent financer en partie leurs investissements en R&D sur leurs ressources propres. Les grosses entreprises, qui disposent de ressources propres plus importantes ont donc plus de capacité d'innover que les entreprises de moindre taille.

56. Au contraire, il existe une théorie de l'effet de remplacement selon laquelle l'innovation est un processus de "destruction créatrice de valeur". Chaque innovation va créer une externalité négative pour le détenteur de l'innovation détruite. Un monopole qui innove se voit donc contraint à détruire sa précédente innovation. Par conséquent, il sera moins enclin à innover, à moins que le marché, de par son caractère concurrentiel, ne l'incite à le faire.

57. Toutefois, le mécanisme de destruction créatrice de valeur sera favorable à l'emploi qualifié découlant de l'innovation.

58. En conclusion, l'incitation à innover, comme l'efficacité productive peuvent être améliorées du fait de l'existence d'un champion national, à condition qu'un certain degré de concurrence existe sur le marché. Mais, en définitive, tout dépend de la taille des marchés.

59. Les politiques industrielles et de concurrence vont donc, complémentairement, dans le sens d'une plus grande efficacité et d'une plus grande compétitivité de l'économie.

2.3. La complémentarité des politiques industrielle et de concurrence

60. Pour les partisans du patriotisme économique, la politique industrielle viendrait compenser les effets négatifs d'une politique de concurrence favorable à l'ouverture des frontières et des capitaux. Ils partent notamment de l'hypothèse selon laquelle la nationalité du capital d'une entreprise, et l'implantation du siège social, auraient des effets sur la localisation des activités et, surtout, la protection de l'emploi national. Ses partisans voient dans les quelques exemples qui ont pu la confirmer, une démonstration de cette hypothèse[12].

61. Or, rien ne démontre le caractère systématique des effets sur la localisation des activités des changements de contrôles d'entreprises et rien ne démontre que, si de tels effets existent, ces derniers sont dus au fait que l'investisseur en cause est étranger. Les entreprises étrangères sont, il est vrai « *moins*

12 Fermetures de sites en France lors de l'acquisition de Pechiney par Alcan

sensibles aux pressions des syndicats, des médias, des politiques, voire des États »[13] mais il n'empêche que les éventuelles suppressions d'emplois qu'elles opèrent peuvent simplement être rationnelles économiquement. Dans le contexte d'une économie mondialisée, le choix stratégique de la localisation de la production dépend en grande partie de la qualification des employés. L'Union européenne doit faire face à une concurrence croissante, notamment de la part des pays émergents. Les évolutions en cours portent en elles un risque de désindustrialisation de l'Europe, caractérisée aujourd'hui par la délocalisation d'un nombre non négligeable de centres de productions vers les pays tiers.

62. Par ailleurs politique industrielle et politique de concurrence ne sont pas contradictoires : en ce qu'elle vise une compétitivité accrue et une situation économique saine, elles sont au contraire complémentaires à long terme. Des interventions au titre de la politique industrielle ne peuvent trouver un sens et une efficacité durables que si les entreprises touchées par ces interventions sont soumises à une concurrence réelle dans le contexte d'un commerce international sain et loyal.

63. De plus, la politique de concurrence n'est pas en contradiction avec les politiques industrielles mises en œuvre au plan national et/ou européen. Elle n'interdit pas la construction de champions industriels. Elle pourrait seulement entraîner l'interdiction de concentrations portant une atteinte irrémédiable à la concurrence.

64. Mario Monti, alors commissaire européen chargé de la concurrence, a déclaré, lors d'auditions de la Commission des affaires économiques du sénat, le 8 juin 2004, que non seulement les règles européennes de la concurrence n'entravaient pas l'émergence de champions industriels, mais qu'au contraire, elles la facilitaient, en raison, d'une part, de la taille du marché européen et, d'autre part, du «guichet unique» et de l'unité des règles de la concurrence au niveau communautaire. Il a rappelé que, dans le domaine du contrôle des concentrations, très peu d'opérations donnaient lieu à un refus, ce qui permettait la création de grands groupes, compétitifs au niveau mondial.

65. Le rapport « Une stratégie européenne pour la mondialisation » de la mission L'Europe dans la mondialisation présidée par Laurent Cohen-Tanugi et rendu public en avril 2008, en vue de la présidence française du Conseil de l'Union européenne, indique ainsi que la Commission « *n'a fait obstacle qu'à une trentaine de fusions ou acquisitions européennes au cours des vingt dernières années (sur plus de 3 000 notifiées), permettant (...) la constitution de très nombreux «champions» européens et nationaux* ».[14]

66. La concurrence peut donc aller dans le sens d'une politique industrielle efficace. L'ouverture à la concurrence dans les télécoms a par ailleurs provoqué l'émergence de champions européens comme, Ericsson ou Siemens par exemple. Ainsi « *La politique de concurrence ne peut être conçue au service de la seule défense de la concurrence mais plutôt comme un moyen parvenir à l'efficacité économique* ».[15]

67. Enfin, une prise en compte des objectifs de politique industrielle n'implique pas nécessairement un abaissement des objectifs et des moyens de la politique de concurrence, contrairement à ce que pensent certains économistes qui affirment que la notion de champion industriel est en totale contradiction avec le critère d'atomicité du modèle de la concurrence pure et parfaite. Ainsi, toute économie a besoin d'opérateurs pour entrer en concurrence avec d'autres économies. De plus, il est nécessaire que les

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13 Augustin Landier et David Thesmar « *Quel patriotisme économique au XXIe siècle?* » in Problèmes économiques de la Documentation française du 5 juillet 2006 (n°2.903), p.29

14 « *Une stratégie européenne pour la mondialisation* » L. Cohen-Tanugi, p.152. Rapport consultable sur www.euromonde2015.eu

15 D. Encaoua et R. Guesnerie « *Politiques de concurrences* », Rapport du Conseil d'Analyse économique, 2006 (n°60) La Documentation française, p.109

opérateurs acquièrent une taille leur permettant de survivre, de construire et d'innover sur des marchés de plus en plus vastes géographiquement.

68. La Commission prend cela en compte lorsqu'elle évalue l'impact des fusions, acquisitions ou abus de position dominante qui lui sont soumis. Elle s'appuie ainsi sur une définition de marchés pertinents « *qui intègre leur dimension géographique et leur mondialisation accrue* ».[16]

69. Par ailleurs, David Encaoua et Roger Guesnerie dans leur rapport « *Politiques de concurrences* »[17] diront non seulement que « *la concurrence n'est qu'un des facteurs de l'innovation et du progrès technique* »[18] mais aussi ceci : « *notre conviction est claire : la concurrence est une condition nécessaire mais non suffisante pour que l'Union européenne retrouve le chemin de la croissance et de la compétitivité*».

70. En conclusion, politique de la concurrence et politique industrielle visent un même objectif d'efficacité économique, de compétitivité, et doivent être édictées et mises en œuvre de manière complémentaire et coordonnée.

71. Le rapport « *Politiques de concurrences* »[19] préconise à ce titre un renforcement de la coopération entre la DG Concurrence, la DG Entreprise et Industrie et la DG Recherche, notamment pour l'évaluation des opérations de concentration comportant des enjeux marqués de compétitivité industrielle.

72. Le nouvel article L 430-7-1 II du Code de commerce en France permet la prise en compte de ces enjeux en introduisant la possibilité pour le Ministre de l'économie de prendre en compte des critères de politique industrielle en matière de concentration. L'Autorité de la concurrence sera quant à elle en charge d'une évaluation strictement concurrentielle.

2.4. La prise en compte de la concurrence internationale dans les politiques communautaires internes

73. La politique de la concurrence et la politique industrielle poursuivent, a priori, un objectif commun à savoir, (i) accroître l'efficacité des entreprises et (ii) mieux les préparer à la concurrence domestique et internationale. La base légale au niveau communautaire pour la politique de concurrence est déterminée par les articles 81 à 87 du Traité, celle pour la politique industrielle l'est à l'article 157 qui précise que toutes les politiques doivent contribuer aux objectifs de la politique industrielle mais aussi que « *le présent titre ne constitue pas une base pour l'introduction …de mesures pouvant entraîner des distorsions de concurrence.* » Sur un plan pratique, on l'a vu, ces deux approches peuvent être source de divergence voire de conflit.

2.4.1. Des interventions publiques pour favoriser l'émergence d'entreprises innovantes

74. Encourager les entreprises à augmenter leurs dépenses de R&D et d'innovation ne doit pas conduire, naturellement, à perturber le fonctionnement normal du marché et de la concurrence. Les interventions publiques visent à pallier les défaillances du marché, et ce en conformité avec les règles

16 « *Une stratégie européenne pour la mondialisation* » L. Cohen-Tanugi, p.152. Rapport consultable sur www.euromonde2015.eu

17 Rapport du Conseil d'Analyse économique, 2006 (n°60) La Documentation française, p.109

18 Idem

19 Rapport du Conseil d'Analyse économique, 2006 (n°60) La Documentation française, p.109

communautaires en matière d'aides d'État. Certains projets de R&D et d'innovation, en effet, ne se réalisent pas pour des raisons diverses :

- manque de moyens propres des PME innovantes et difficulté d'en obtenir sur le marché bancaire ou à des conditions trop pénalisantes ;
- pas d'inclinaison naturelle des entreprises à la coopération avec d'autres, alors même qu'une thématique de recherche n'est envisageable qu'en partenariat ;
- coûts et risques trop importants de certains projets, alors même que les bénéfices sociétaux qui pourraient en découler sont importants.

75. Les pouvoirs publics, ont, face à ces raisons diverses, développé au fil du temps des approches complémentaires pour répondre aux besoins différents des acteurs économiques. Ces interventions ont été autorisées par la Commission européenne, qui a constaté leur bien-fondé et l'absence d'effets néfastes sur la concurrence intra communautaire.

76. Le contrôle communautaire des aides à la R&D et à l'innovation vise à prévenir les effets négatifs d'une aide sur les entreprises concurrentes des États membres. Cette logique, légitime au regard des objectifs de renforcement du marché intérieur, n'est toutefois pas toujours satisfaisante : la définition restrictive d'activités de recherche éligibles aux aides, la fixation d'intensités maximales, la mise en place d'une procédure longue et lourde d'instruction des projets les plus importants au niveau communautaire, après une instruction longue au niveau national, sont des contraintes qui n'existent qu'au sein de l'Union européenne. Or la concurrence en matière de recherche se joue au plan mondial.

77. Il semble fondamental aujourd'hui de s'interroger sur l'impact de ces contraintes, de ce contrôle en matière d'aides à la R&D et à l'innovation sur la compétitivité des entreprises européennes, dans un contexte de concurrence ouverte et mondiale.

78. Il ne s'agit pas de s'affranchir du contrôle communautaire des aides, qui est l'une des bases de la construction du marché intérieur. Il s'agit de réaffirmer que le fondement du contrôle des aides est la construction et le renforcement du marché intérieur dans un contexte international évolutif. En ce sens, ceci rejoint l'approche souhaitée par la Commission elle-même dans son plan d'action 2005-2009 adopté le 15 juillet 2005 : « *La politique des aides d'État (...) doit contribuer, par elle-même et aussi en venant appuyer d'autres politiques, à faire de l'Europe un lieu plus attractif pour les investissements et l'emploi, à renforcer les connaissances et l'innovation pour susciter de la croissance et à créer des emplois plus nombreux et meilleurs.* »

79. Renforcer les politiques de soutien à la R&D et à l'innovation passe par une meilleure prise en compte de la concurrence internationale dans les politiques communautaires internes. L'émergence de champions européens passe aussi par le développement de projets dits à risque que le marché ne semble parfois pas à même de vouloir financer.

80. L'examen de l'intérêt stratégique des projets et non de la seule défaillance de marché et de l'impact sur la concurrence devrait devenir un élément de la politique de concurrence si l'Europe veut voir émerger davantage de champions européens. Ceci est d'ailleurs la règle aux États-Unis et au Japon.

2.5. L'introduction de critères de politique industrielle dans la mise en œuvre du droit de la concurrence : un exemple français récent

81. La récente réforme de l'organisation du système français du contrôle des concentrations prévoit que des impératifs de politique industrielle ne peuvent pas être pris en compte par l'autorité de la concurrence, qui pourra toutefois, si il y a lieu, intégrer les gains d'efficacité économique compensant les

atteintes à la concurrence évalués dans le cadre de l'examen de projets de concentrations (cf. point 2.3 ci-dessus). Ces impératifs de politique industrielle pourront, en revanche, être pris en compte de manière plus large par le Ministre de l'économie à l'issue de la procédure.

82. En effet, la loi de modernisation de l'économie du 4 août 2008 a réformé la régulation concurrentielle des marchés en France, notamment en ce qui concerne les règles relatives au traitement des affaires de concentration. L'Autorité de la concurrence traitera ces opérations sous l'angle concurrentiel.

83. Pour sa part, le Ministre de l'économie conservera un pouvoir d'évocation en fin de phase II. Ainsi l'article L430-7-1 II du Code de commerce indique que « *le ministre chargé de l'économie peut évoquer l'affaire et statuer sur l'opération en cause* ***pour des motifs d'intérêt général autres que le maintien de la concurrence*** *et, le cas échéant, compensant l'atteinte portée à cette dernière par l'opération* ».

84. L'article continue en indiquant que : « ***Les motifs d'intérêt général autres que le maintien de la concurrence*** *pouvant conduire le ministre chargé de l'économie à évoquer l'affaire sont, notamment, le développement industriel, la compétitivité des entreprises en cause au regard de la concurrence internationale ou la création ou le maintien de l'emploi* ».

85. L'octroi de ce pouvoir d'évocation se justifie par la nécessité de permettre un bilan global des opérations de concentration jugées stratégiques et pour lesquelles les autorités considèrent comme indispensable de pouvoir continuer à concilier les impératifs de la régulation de la concurrence avec ceux d'autres politiques publiques. S'il décide d'évoquer une décision de l'Autorité de la concurrence, le Ministre devra prendre une décision motivée, éventuellement conditionnée à la mise en œuvre effective d'engagements (article L 430-7-1, II alinéa 3 du Code de commerce).

86. Par ailleurs, le Ministre disposera d'une large marge de manœuvre, en ce qu'il pourra non seulement passer outre une décision d'interdiction, mais également mettre son veto à la réalisation d'une opération autorisée par l'Autorité de la concurrence.

87. Des procédures similaires existent dans d'autres États européens :

- l'article 42 de la loi antitrust en Allemagne prévoit la possibilité pour le Gouvernement fédéral d'autoriser une fusion interdite par l'autorité de concurrence (mais non l'inverse) ; depuis l'instauration de ce système en 1973, et sur les quelques 170 cas d'interdiction prononcés par le *Bundeskartellamnt*, le Gouvernement allemand a autorisé l'opération à 11 reprises ;
- au Royaume Uni, l'Enterprise Act, entré en vigueur en juin 2003, prévoit la possibilité pour le Gouvernement de saisir la Competition Commission afin d'engager une procédure d'examen approfondi des opérations de concentration mettant en jeu un intérêt public spécifique (pluralité des médias, approvisionnement dans le domaine de l'eau, défense) ; le Gouvernement peut ainsi interdire une concentration autorisée par les autorités de concurrence.

88. Cela permet une prise en compte des spécificités sectorielles lors de l'analyse des politiques de concurrence, que le rapport « *Politiques de concurrences* »[20] considère comme nécessaire.

89. Cela conduit en effet à une plus grande compétitivité et à une plus grande efficacité globale. En ce sens, politique de concurrence et politique industrielle sont tout à fait complémentaires.

[20] Rapport du Conseil d'Analyse économique, 2006 (n°60) La Documentation française, p.109

GERMANY

1. Introduction

1. This contribution focuses on the relationship between industrial policy, including the issue of national champions, and competition law in Germany.

2. Economic policy thinking in post-war Germany has been strongly influenced by the so-called Freiburger Schule or ordoliberalism. Ordoliberalism is a German variation of neoliberalism, which stresses the importance of economic freedom, competition as a market organising principle and the role of government in protecting competition without interfering with the market forces, wherever possible[1].

3. The *Bundeskartellamt* endorses this thinking. In its view, competition is the best means to innovate and produce better and cheaper goods and services[2]. Or, to use Friedrich August von Hayek's famous words: Competition is a "discovery process". In this respect, firms are generally closer than the state to market developments and the opportunities the markets offer. This means that firms rather than the state are likely to discover the technological as well as the product and service developments worth-while pursuing[3]. Consequently, the state should limit itself to guaranteeing the necessary regulatory framework and intervening only in cases of genuine market failures[4].

4. The principle to let market forces work freely and limit state intervention to a minimum is reflected in modern-day economic policy formulation in Germany. The German Federal Ministry of Economics and Technology, for instance, stresses this principle of non-interference under the rubric "Industrial Policy" on its website: "Entrepreneurial initiative, contractual freedom between business partners, competition and a functioning price system are the central pillars of a market economy. These essential market mechanisms must not be distorted by state interference"[5].

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1 See also Michael Glos (German Minister for Economics and Technology from 2005 to 2009), *Schlaglichter der Wirtschaftspolitik, Sonderheft Finanzkrise*, available in German at http://www.bmwi.de/BMWi/Redaktion/PDF/S-T/sonderheft-finanzkrise,property=pdf,bereich=bmwi,sprache=de,rwb=true.pdf.

2 See also Neelie Kroes, Address at the Institute of Electrical Engineers, Challenges to the Integration of the European Market: Protectionism and Effective Competition Policy (12 June 2006), available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/369&format=HTML&aged=0&language=EN&guiLanguage=en. See also Deborah Platt Majoras, Remarks at the International Competition Conference/EU Competition Day, National Champions: I Don't Even Think it Sounds Good (Munich, 26 March 2007), available at http://www.ecd-ikk-2007.de/seiten/Majoras_en.pdf.

3 See also German Monopolies Commission, Competition Policy under Shadow of "National Champions", Summary of the Fifteenth Biennial Report 2002/2003, available in English at http://www.monopolkommission.de/haupt_15/sum_h15_en.pdf.

4 See the section on the present financial crisis below.

5 See http://www.bmwi.de/English/Navigation/Economy/industrial-policy,did=76808.html.

5. This position is reflected in the principle that the government does not interfere with mergers and acquisitions by either domestic or foreign-owned or foreign-based firms[6]. The fundamental freedom enshrined in Article 56 of the Treaty establishing the European Community (EC) (free movement of capital) allows firms based in the European Union to invest in Germany[7]. As for third countries[8], however, the German parliament is currently working on an amendment to the Foreign Trade Act ("*Außenwirtschaftsgesetz*") based on a government proposal[9]. The new amendment would allow the Ministry for Economics and Technology to investigate whether the acquisition of interests in "resident undertakings" amounting to at least 25% of the voting rights would endanger the "public policy or public security" of the Federal Republic of Germany.

2. Competition law, industrial policy and national champions

2.1. The Bundeskartellamt *bases its decisions solely on competition aspects*

6. German competition law strictly separates competition and non-competition aspects. The *Bundeskartellamt* (as well as the competition authorities of the German *Länder*) assesses and decides solely on competition grounds. The *Bundeskartellamt* must not and does not take any other aspects into account, including industrial policy aspects[10]. The track record of the *Bundeskartellamt* underlines that is has not shied away from adopting decisions that conflicted with the agenda of industry leaders as well as politicians when there were competition concerns.

2.2. Institutional aspects – independence of the competition agency

7. Apart from the substantive law, the institutional setting of the *Bundeskartellamt* helps to ensure that it can focus exclusively on competition aspects. In that respect it is of the greatest importance that the relevant decision-making bodies within the *Bundeskartellamt* are independent of external influence when they deal with individual cases. This also means independence from the Government, in particular the Ministry of Economics and Technology. But the principle of independent decision-making goes even further: The decisions are taken in a decentralised manner by each of the *Bundeskartellamt's* twelve decision divisions (by the chair and two members of the competent division in a majority vote); the President of the *Bundeskartellamt* may not give any instructions.

2.3. Section 42 ARC– Ministerial Authorisation

8. With respect to mergers, however, Section 42 of the German Act against Restraints of Competition (ARC)[11] empowers the Minister for Economics and Technology the authority, in exceptional

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6 In this context, it is worth mentioning that there is no legal basis for the government to reverse decisions taken by the *Bundeskartellamt* in the area of anticompetitive agreements and unilateral conduct.

7 The EC-Treaty is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF. For restrictions of and exceptions to the principle of free movement of capital see Articles 57, 58 and 59 EC

8. Firms based in EFTA countries are considered to be community-based in the context of the proposed Section 53 of the Foreign Trade Act ("*Außenwirtschaftsgesetz*").

9 The proposal is available at http://dip21.bundestag.de/dip21/btd/16/107/1610730.pdf (in German only).

10 In the view of the *Bundeskartellamt* this separation of objectives, i.e. the use of a purely competition-based standard by competition agencies, is highly preferable to a mixed standard that may allow non-competition objectives to be taken into account. In relation to the latter approach, see Evenett, The Return of Industrial Policy – A Threat to Competition Law, in: Competition Law Today (Dhall, ed.), 2006, p. 452-476, p. 472.

11 Available in English at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0712_GWB_mitInhaltsverzeichnis_E.pdf.

cases, to override a prohibition decision by the *Bundeskartellamt* on strictly non-competition grounds[12]. More precisely, the provision allows the Minister "upon application, [to] authorise a concentration prohibited by the *Bundeskartellamt* if, in a specific case, the restraint of competition is outweighed by advantages to the economy as a whole following from the concentration, or if the concentration is justified by an overriding public interest." The formulation of the provision already indicates what is common in practice, namely that a ministerial authorisation is difficult to obtain. In fact, since the introduction of merger control and the institute of the ministerial authorisation in 1973, parties to merger projects have only rarely applied for such an authorisation and have in even fewer cases done so successfully[13]. There may be various reasons for this: The criteria laid down in Section 42 set a high standard, the Minister for Economics and Technology conducts a transparent procedure involving third parties, the German Monopolies Commission is heard on the matter, a decision is published and the parties to the procedure may appeal against the decision in court. Furthermore, German Economics Ministers so far have made it very clear by applying Section 42 cautiously that the ministerial authorisation of mergers that had previously been prohibited by the *Bundeskartellamt* due to competition concerns is only granted in exceptional cases.

9. Section 42 shows that, whereas the Minister may invoke broader political reasons for his decisions, the *Bundeskartellamt* in its analysis of merger projects is confined solely to competition aspects. This is, besides its institutional independence, another shield protecting the *Bundeskartellamt* from outside pressure. Furthermore, it may be argued that the instrument of ministerial authorisation strikes the balance between the strictly competition based analysis of the *Bundeskartellamt*, that leaves no room for discretion in merger cases, and – in rare cases – the overriding interests of the public that may nevertheless justify the merger.

Case example – E.ON/Ruhrgas

10. A recent example, in which it was decided by ministerial authorisation that the serious competition concerns of the *Bundeskartellamt* – which had blocked the merger – were outweighed by overriding public interest, is the E.ON/Ruhrgas merger. This case concerned the energy sector, in particular the supply of gas. The *Bundeskartellamt* had found that the merger would strengthen dominant positions both in the gas and electricity sales markets[14]. The *Bundeskartellamt* held that the merger would be problematic in particular with respect to the gas markets where the merger would lead to a cementation of Ruhrgas' dominant position and would significantly diminish the likelihood of any effective competition from other grid gas companies. In the ministerial authorisation it was argued that the merger would strengthen the international competitiveness of Ruhrgas on the supply as well as the demand side. Furthermore, the merger would improve security of energy supply through the long-term supply of well-priced gas, in particular from Russia[15].

11. After the merger was consummated it became clear that competition in the energy sector remained unsatisfactory despite the liberalisation process in Germany.

12. To open the markets to competition, the *Bundeskartellamt* initiated proceedings based on Articles 81 and 82 EC to investigate E.ON/Ruhrgas' practice of long-term gas supply contracts with its customers. A survey had shown that almost three-quarters of the contracts concerned cover 100% of the gas

12 No such provision exists with respect to anticompetitive agreements and unilateral conduct.

13 In the 22 cases in which parties to a merger have applied for a ministerial authorisation, the Minister has issued (at least partial) authorisation in five cases, some of them subject to obligations.

14 See *Bundeskartellamt* WuW/E DE-V 511-526 – E.ON/Ruhrgas. See also English press release, available at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2002/2002_01_21.php.

15 See WuW/E DE-V 573-598 – E.ON/Ruhrgas and WuW/E DE-V 643-653 – E.ON/Ruhrgas.

distributor's requirement or at least quantities of between 80% and 100%. Almost all of these contracts ran for more than four years, in some cases up to twenty years. This combination of long contract periods and a high degree of requirement satisfaction leads to considerable foreclosure effects. In its decision in January 2006[16], the *Bundeskartellamt* prohibited E.ON Ruhrgas' existing long-term contracts with distributors, which covered more than 80% of their actual gas requirements. These contracts were to be terminated at the latest by the end of the same gas year, on 30 September 2006.

2.4. Other political measures that are relevant to competition

13. There are of course other means that may have the effect of protecting "domestic" firms from competition by "foreign" firms: One example is the adoption of laws that raise barriers to entry for (potential) competitors of the incumbent firm. A recent illustration can be found in the postal services sector. Germany has formally opened up the market with the discontinuation, from January 2008, of the last exclusivity rights of the incumbent Deutsche Post. However, Deutsche Post still enjoys considerable advantages such as the exemption from value added tax obligations. Further to this, a rather high minimum wage was introduced for the postal sector in 2007 that has rendered the offer of postal services in competition with the incumbent Deutsche Post uneconomic for many newer competitors in the market[17]. In the view of the *Bundeskartellamt* the measure is effectively a barrier to market entry for new competitors that may undermine the full legal market opening that took effect at the beginning of 2008.

3. Measures adopted in the recent economic crisis

3.1. The Financial Market Stabilisation Act

14. The last months have been characterised by a severe crisis in the financial markets with implications extending to the real economy. To address the extraordinarily difficult situation and restore confidence in the financial markets, the German parliament has enacted the Financial Market Stabilisation Act that came into effect in October 2008[18]. The Act comprises a package of measures aimed at stabilising the financial markets. The primary objectives of the act are (i) to secure the liquidity of financial institutions that have their seat in Germany and (ii) to prevent a general credit crunch. The concern was that systemically indispensible banks could fail with consequences which were unpredictable for the wider economy in Germany and beyond. The core of the package is a rescue fund which may (inter alia and under certain conditions) acquire (or otherwise secure) loans, securities, derivative financial instruments and other risk positions, acquire equity in the recapitalisation process and thus strengthen the core capital ratio of the undertakings or also acquire a participation, in particular, shares in firms.

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16 See WuW/E DE-V 1147-1162 – E.ON Ruhrgas. See press release at http://www.bundeskartellamt.de/wEnglisch/News/Archiv/ArchivNews2006/2006_01_17.php.

17 The German Monopolies Commission has criticised this step in a special opinion entitled "Monopoly fight with all means, see press release (in German only) available at http://www.monopolkommission.de/sg_51/presse_s51.pdf. A leading competition lawyer, Prof. Wernhard Möschel, argued in an expertise for a hearing before the German parliament's Committee on Economics and Technology on 19 January 2009 that the minimum wage (based on the in-house wage scale of the Deutsche Post) deprives (potential) competitors of the most important competitive instrument. Prof. Möschel concludes that the decision to declare the collective agreement between Deutsche Post and the labour union ver.di as binding for the whole sector is in violation of the German constitution, German and European competition law (as an anticompetitive agreement, Article 81 EC and Section 1 ARC), and also in violation of the freedom of establishment, Article 43 EC.

18 An English version of the act is available at: http://www.bundesfinanzministerium.de/nn_69116/DE/BMF__Startseite/Aktuelles/Aktuelle__Gesetze/Gesetze__Verordnungen/Finanzmarktstabi__engl__anl,templateId=raw,property=publicationFile.pdf.

15. According to Article 2 Section 17 of the Act, Parts I-III of the German Act against Restraints of Competition are not applicable. This means that the acquisition of interests by the fund in financial institutions is not subject to German merger control law. This does not imply, however, that the acquisition of these interests from the fund by third parties in the future would also escape merger control law.

3.2. Specific measures taken on the basis of the Stabilisation Act

16. The Stabilisation Act is of great importance to rescue financial institutions that are vital for the financial market to function ("systemic banks"). However, such extraordinary measures are fraught with the problem of distinguishing between genuine rescue situations and cases where this instrument may be used to pursue other objectives. This question has been raised in the press with respect to the merger case of Commerzbank and Dresdner Bank[19]. In this case, it has been argued that the objective of granting aid from the rescue fund has been to support the envisaged concentrations between the respective parties rather than to rescue a bank in serious financial turmoil. Whatever the merit of the criticism, it highlights the problem that with a powerful instrument like a rescue fund, the state is likely to be lobbied to intervene for all kinds of special interests.

17. Such intervention would run counter to ordoliberal traditions where the state was supposed to leave the market forces to work independently where possible[20]. Industrial policy measures bear the risk of the state taking wrong decisions that have to be paid for by taxpayers. Furthermore, competition may be seriously distorted. State intervention should therefore, as mentioned before, be restricted to the minimum necessary.

18. It is feared that the financial crisis may extend to other sectors and affect the real economy. Parliament has therefore adopted a broader investment and stimulus package to bolster the economy. As far as the implementation of the measures is concerned, the government will have to ensure that they will not lead to significant market distortion, to the detriment of those competitors that do not benefit from the measures adopted[21]. Furthermore, the state measures should not provide an incentive for firms to take money from the state although the aid is not needed to gain a competitive advantage over their competitors. The issue of aid by the state may finally run counter to the objective of creating a level playing field for firms in different countries[22].

4. Conclusion

19. The *Bundeskartellamt* takes a critical view of state intervention that goes beyond setting a regulatory framework for markets to function. Generally, developments within the markets and developments which open up new markets should be left to firms, not the state, since these will normally have a much better insight into how markets function than the state. Thus, it should be left to firms and competition to identify key sectors, technologies as well as goods and services that merit investment and development. Or, as the former Chairman of the United Kingdom's Competition Commission, Prof. Paul Geroski, put it: "[T]he kind of 'competitiveness' which competition policy actually strives to create is

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19 See, e.g., Ist Ihnen noch zu helfen? Süddeutsche Zeitung, 27 January 2009, p. 17.

20 See also the critical opinion of the German Monopolies Commission, available in German at http://www.monopolkommission.de/presse/pressemitteilung090122.pdf.

21 See German Monopolies Commission, press release, available in German at http://www.monopolkommission.de/presse/pressemitteilung090122.pdf.

22 Creating a level playing field between firms throughout the European Union is the objective of the EC Treaty's rule on state aid, see Articles 87 et seq.

virtually the only way a nation state can achieve the kind of "competitiveness" which industrial policy proponents aspire to."[23]

20. If market intervention is in fact necessary, for instance in these difficult times of financial crisis and spill-over to the real economy, governments setting up rescue funds and granting state aid to firms in trouble should limit themselves to rescuing or supporting firms that are crucial for the functioning of the system. Any other measure may only lead to high costs for the tax payer and seriously distort competition in the markets concerned.

[23] Paul Geroski, Competition Policy and National Champions, Speech to WIFO (Austrian Institute of Economic Research) in Vienna (8 March 2005), available at http://www.competition-commission.org.uk/our_peop/members/chair_speeches/pdf/geroski_wifo_vienna_080305.pdf.

JAPAN

1. Introduction

1. Today, the importance of competition policies has been widely acknowledged throughout the world and the pursuit of fair and free competition is regarded to contribute to the promotion of trade and investment, the maintenance of sustainable economic growth by enhancing economic efficiency and productivity and the further achievement of national and consumer welfare. Viewed from a historical perspective, however, a culture of competition was not widespread among the general public in Japan from the beginning, even though the Japanese economy had long been based on a market economy. This is suggested by the fact that government policies that inclined to draw a picture of a desirable industrial structure and encourage harmonious cooperation among entrepreneurs received general support even after the Antimonopoly Act ("AMA") was enacted as a part of post-World War II economic democratisation policy.

2. This contribution paper introduces how the relationship between industrial policy and competition policy has changed through the process of increasing understanding of competition policy up to today.

2. Experience of Japanese competition law and policy

2.1. Enactment of the Act Concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade (Antimonopoly Act, "AMA") (1947)

3. In 1947, the AMA, the Japanese competition law, was enacted and the Japan Fair Trade Commission (JFTC) was established as an independent commission.

4. After World War II, as part of the democratisation of the Japanese economy, the AMA was introduced for the purpose of establishing a competitive economic system based on a market economy. It aimed to maintain a permanently competitive market through structural measures, such as the dissolution of giant conglomerates known as the *Saibatsu*, the elimination of the concentration of economic power and the removal of private controlling groups. The competition law and policy in Japan was introduced drastically and at the same time. While some assess that the resulting competitive market structure of the Japanese economy through this effort made a great contribution to the development of the Japanese economy overall, the concept of competition policy and economic development through competition did not take root rapidly.

2.2. "Dark Ages of the Antimonopoly Act" (1950s)

5. The immediate challenge for Japan after the departure of the occupying forces was to achieve economic independence. Government policy, therefore, focused on fostering and strengthening domestic industries to earn foreign exchange through exports. This led to the enactment of various laws exempting a wide range of industries from the AMA, mainly with the objective of easing cartel regulations. In addition, administrative guidance, which might harm competition and was incompatible with competition policy, was implemented in many industries during periods of recession with a view to preventing excessive

competition or stabilising the market. Thus, from the viewpoint of both the legal systems and the legal institutions, competition policy was restricted and forced to step back.

2.3. Approach to large-scale mergers and acquisitions (1960s)

6. The deregulation of trade, foreign exchange and capital was strongly promoted in the Japanese economy during this period. At this time the Japanese economy was considered to be more closely connected with global markets through these deregulations and competition among entrepreneurs in the Japanese economy was taken as having an international scale. However, in order to strengthen the management base of enterprises, industrial policies that intensively facilitated the concentration of capital gathered more support based on the so-called "theory of excessive competition"; that is, the idea that the characteristics of Japanese entrepreneurs, which are comparatively too small in size, was thought to lead to excessive competition.

7. For example, a bill of the Law for Temporary Measures to Promote Specified Industries, which aimed to promote industrial reorganisation, was submitted to the Diet in March 1963. In this law, the government, in cooperation with the private sector, was to designate particular industries for reorganisation such as automobiles, special steels and petrochemicals, which needed to strengthen their international competitiveness, and set up policies regarding capital investments, mergers and the rationalisation of cartels of enterprises. Although the bill did not necessarily garner any positive support from political and industrial circles and was withdrawn in the Diet, an increase in large-scale mergers of enterprises followed in key industrial fields.

8. One typical large-scale merger during this period was a merger between two major steel companies, Yawata and Fuji (Consent Decision on 30 October, 1969). This merger would have greatly influenced the national economy because it was to be the largest post-war merger in Japan and steel products were significant basic materials for a variety of industries. Japan's industrial community supported this merger as necessary for promoting industrial reorganisation under the open economy. However, it can be said that the merger was going to have a serious influence on competition because it would merge the 1st and the 2nd largest entrepreneurs in the key steel industry and the new entrepreneur's market share would exceed 30 percent in more than 20 products. The JFTC considered that the merger would raise a lot of problems in terms of competition policy and its decision was viewed with great interest. Although the JFTC accepted the merger proposal in the end, with delivering a consent order demanding various remedies, discussions on the role of the AMA became more active, and it was made clear that approval for larger–scale mergers would not be easy to obtain. The merger of Yawata and Fuji marked a tuning point, and the existence of the AMA and the JFTC were strongly recognised in Japan's industrial community from then on.

2.4. Greater awareness of competition policy through elimination measures against anti-competitive activities that affect the whole national economy (1970s)

9. During this period, the international monetary crisis and the oil crisis shocked the Japanese economy. Unusual inflation psychology followed the oil crisis in 1973, leading to skyrocketing prices. Many suppliers such as manufacturers rushed to form illegal cartels in order to raise prices in advance before their costs rose. The JFTC uncovered the illegal cartels one by one and rendered cease-and-desist orders. On 15 February 1974, the JFTC filed with the Public Prosecutor General criminal accusations against 11 oil wholesalers and their executives, who were involved in the price cartel case of oil products, based on the provision of Article 73, Paragraph 1 of the AMA, which was the first case of criminal accusation in a cartel after the AMA was enacted.

10. In addition, because administrative guidance was involved in this cartel case[1], the relationship between administrative guidance and cartels became an issue for debate. Concern about the relationship between administrative guidance and cartels had been discussed for many years, and the JFTC had consistently taken the position that cartels, even those concluded under administrative guidance, were violations of the AMA. The prosecution in this case and a guilty verdict at the Supreme Court marked a turning point of changing past practices to restrain competition by administrative guidance[2].

11. During the structural depression after the oil crises, the so-called Structurally Depressed Industry laws, that is, the Law on Temporary Measures for Stabilisation of Specified Depressed Industries (1978), the Law on Temporary Measures for the Structural Improvement of Specified Industries (1983) and the Law on Temporary Measures to Facilitate Industrial Structural Adjustment (1987) were drafted. In the process of the legislation of these acts, there was, at first, a strong tendency of requiring government intervention from the viewpoint of industrial policy, such as considering or implementing instructed cartels by the government and exemptions to the AMA. However, because of the JFTC's actions and the influence of so-called "Positive Adjustment Policy" approved by the OECD, these laws ended up substantially taking into consideration competition policy, which is shown by the fact that the JFTC's agreement was required even if cartels instructed by the relevant Ministers were allowed. In addition, in the later legislation of the above laws, in order to implement business alliances within the framework of the AMA, consideration of competition policy resulted in the development of a coordination scheme between the relevant minister and the JFTC regarding the relevant minister's approval of the alliances; furthermore, cartels instructed by the relevant ministers were not allowed in the 1987 law.

2.5. Expansion of the scope of application of the competition law through deregulation and reduction in exemptions (1980-90s)

12. In the latter half of the 1980s, deregulation was promoted to open the Japanese market and boost imports in order to mitigate trade friction caused by Japan's enormous trade surplus. Further in the 1990s, the yen's appreciation led to calls for structural reform of the Japanese economy, as it revealed the price differential within and outside the country as well as concern for the hollowing-out of industry and employment uncertainty as it encouraged enterprises to shift overseas. In order to construct an economic society based on the principle of self-responsibility and market principles, the importance of strengthening competition policy as well as deregulating Japan's economic and social systems was emphasised. Thus, the active development of competition policy proceeded in this period.

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1 In this case, the administrative guidance from the Ministry of International Trade and Industry (MITI) sought to "control prices of oil products and stabilise livelihoods by requiring oil wholesalers to consult with the ministry in advance for approval of any oil price hike, not leaving price changes to their industry's sole discretion, or by indicating price changes in the ministry's basic policy to be reflected in their price hike plan, always on condition that any price hike should stay within the maximum price established in 1971 per type of oil in order to cope with the emergency caused by the extraordinary oil price hike resulting from successive substantial increases in oil price put into effect by OPEC and OAPEC since the autumn of 1970." The meaning of Administrative Guidance is currently stipulated in Article 2, Paragraph 6 of the Administrative Procedure Act (Act No.88 of 1993): "recommendations, advice, or other acts by which an Administrative Organ may seek, within the scope of its duties or affairs under its jurisdiction, certain action or inaction on the part of specified persons in order to realise administrative aims, where such acts are not Dispositions".

2 On the occasion of the Tokyo High Court's ruling in the cartel case of Petroleum Products, the JFTC published the "Interpretations Concerning the Relation between the Antimonopoly Act and Administrative Guidance" (the former Administrative Guidance Guidelines) in March 1981, which organised its view, centred on administrative guidance concerning prices and quantities. The JFTC sent the guidelines to the relevant ministries and agencies and requested them to consider them in their administrative management.

13. In 1995, the Cabinet adopted "The Deregulation Action Plan", which included the active development of regulatory reform and competition policy. There have been several Cabinet Decisions concerning regulatory reform since then.

14. In order to clarify the guidelines under the AMA about ensuring the transparency of distribution and business practices, which was discussed in the Structural Impediments Initiative (SII) talks between Japan and the United States starting in 1989, the JFTC published "Guidelines Concerning Distribution Systems and Business Practices" (1991). In addition, the JFTC formulated and published "Guidelines Concerning the Activities of Firms and Trade Associations with Regard to Public Bids" (1994) and "Guidelines Concerning the Activities of Trade Associations under the Antimonopoly Act" (1995), which were intended to contribute to preventing firms and trade associations from violating the AMA and to help them in their pursuit of appropriate actions. Furthermore, the JFTC reviewed the former Administrative Guidance Guidelines in June 1994, and then formulated and published new "Guidelines Concerning Administrative Guidance under the Antimonopoly Act" (1994) that show the agency's views on administrative guidance regarding the entry of firms and provide concrete examples indicating each category of administrative guidance that may pose a problem under the AMA.

15. The need for exemptions has changed significantly since the inception of the exemption system in accordance with the improvement of the economic environment as Japan gained global economic power and the financial conditions of Japanese companies strengthened. Therefore, reflecting several Cabinet Decisions since "the Revised Deregulation Action Plan" (in March 1996), the JFTC has reviewed exemptions to the AMA significantly. The number of exemptions was reduced from 89 systems under 30 laws, as of the end of FY 1995, to 21 systems under 15 laws as of the end of 2008.

2.6. Efforts for strengthening the enforcement power of the AMA (ongoing)

16. As is shown in the processes mentioned above, it may be no exaggeration to say that the importance of competition law and policy has become widely perceived to a considerable degree in Japan and competition law and policy has become firmly established in the Japanese economy. As a result, when considering a policy or measure applicable to any individual industry for example, the government now carefully considers how it will serve to improve competitive environments or promote competition in the relevant market. Also firmly established is the realisation that for the further development of our economy, it is indispensable for entrepreneurs in many industries not only to improve technology and productivity in the face of stiff international competition but also to compete actively in domestic markets.

17. On the other hand, in the face of Japan's ever-changing economic realities, the JFTC is continuously reviewing the AMA and competition policy in order to make them more effective for maintaining and promoting fair and free competition in consideration of whether the legal system of the AMA is designed to function sufficiently or is comparable to that of the level of international standards.

a) Enhancement of law enforcement functions through the amendment of the AMA

   In order to strengthen the measures against antimonopoly violations, a comprehensive amendment of the AMA, which was the largest since 1977, including (a) an increase of the surcharge rate, (b) introduction of a leniency program, (c) introduction of criminal investigative power and (d) revision of the hearing procedures, was approved by the Diet in April 2005 and came into effect in January 2006.

   In compliance with the provisions contained in Article 13 in the Supplementary Provisions of the amended AMA of 2005, the Act's amendment bill, including (a) the introduction of a surcharge system imposed on those entrepreneurs engaging in exclusionary type private monopolisation,

unfair trade practices, etc., (b) the review of the surcharge rate imposed on entrepreneurs that have been playing a leading role in cartel, bid-riggings, etc., (c) the introduction of a joint application system for the leniency program by those entrepreneurs affiliated with each other and implicated in the same infringement and (d) the revision of the notification system regarding business combinations, was approved at the Cabinet meeting held on March 11, 2008, and was submitted to the 169th ordinary session of the Diet on the same day[3].

b) Efforts for regulatory reforms

To realise sustained economic growth led by private-sector demand, it is a pressing task to push ahead with the structural reform of our economy through regulatory reform. By means of structural reform, we are expected to build a socioeconomic system that is open to the world and permits the private sector to fully utilise its initiative and vitality acting on the principles of self-responsibility and the market mechanism.

In such circumstances, the Japanese government places the revitalisation of the economy based on regulatory reform as the top priority, and has been promoting regulatory reform since the mid-1990s. Most recently, reform has been promoted in accordance with the Three-Year Plan for the Promotion of Regulatory Reform (Cabinet Decision of June 2007, revised in March 2008).

The JFTC actively participates in formulating programs designed to promote such regulatory reform, makes necessary recommendations for improving individual government regulations and makes efforts for a clearer application of competition laws through the formulation of guidelines. As part of such efforts, since 2000 the JFTC has conducted studies, presented recommendations and formulated guidelines on some 35 regulatory reforms in total.

c) Improvement of corporate compliance

There are increasing movements toward requiring improved corporate compliance, such as through the amendment of the AMA, the creation of a system of whistleblower protection and rulemaking for internal control under the Companies Act and the Financial Instruments and Exchange Act. Because improvement of corporate compliance is important for advancing fair competition in the economy and trade, the JFTC promotes support for improvement of compliance as a key policy designed to enhance compliance under the AMA, and conducts a questionnaire survey on corporate compliance and publishes reports. In 2007, for instance, the JFTC developed a questionnaire survey for foreign-owned companies operating in Japan and summarised the data and situation of their compliance in Japan. At the same time, the JFTC developed a similar survey among domestic companies and examined how foreign-owned companies differ from domestic companies in their compliance. The JFTC also surveyed lawyers, asking how companies changed in their awareness of compliance in response to the required improvement of corporate compliance following enforcement of the amended AMA. The JFTC analysed the results obtained in all these surveys and published “Compliance by foreign-owned companies and compliance by foreign-owned and domestic companies as viewed by lawyers - with a focus on the Antimonopoly Act.” (Published in May 2008)

3. Conclusion

18. Implemented as part of the policy designed to democratise Japan’s post-war economy, the AMA has since made steady progress, struggling through war-derived devastation and turmoil, rapid economic

[3] The bill was withdrawn at the end of the 170th Diet in December 2008.

growth, oil crises, collapse of the bubble economy, etc. At times, the process was a rocky road as the AMA was subjected to relaxed revisions on some occasions and insufficient recognition among the general public on others. Little by little the AMA has struck root in our economic society and is now widely recognised.

19. One of the reasons why it took such a long time to gain understanding of competition law and policy is that there was a recognition that government policy that had been inclined to protect and foster domestic industries had contributed to the high growth of the Japanese economy, which is now the second-largest in the world. However, during the period of Japan's rapid economic recovery and growth following World War II, fierce competition continued in many industries among entrepreneurs with many new market entries. Therefore, the policy of growing so-called National Champions has never functioned as the core of industrial policy in Japan. We should also take note of the fact that the AMA as a comprehensive competition law has consistently existed and the JFTC has continued enforcing the AMA since 1947 until today. While regulations to protect specific industries or entrepreneurs through industrial policy may temporarily bring about a certain level of growth and contribute to maintaining the economy, it is recognised that on a long-term basis, as the creative initiatives of entrepreneurs do not function sufficiently and diverse resources are not utilised efficiently, economic structural reform does not occur smoothly and autonomously, and continuous economic growth can be hindered.

20. From around the 1970s, a competition policy perspective began to be considered in implementing industrial policy oriented government intervention. In and after the 1980s, the government worked more actively on implementing competition policies in accordance with deregulations amid the growing recognition of the necessity for structural reform. Today, the importance of improving competitive environments and promoting competition in the market is widely recognised. As a result, for instance, the JFTC and relevant ministries are in close contact and coordinate with each other in such a manner that policies to be determined under relevant business laws of specific industries are drawn up and implemented in a manner consistent with the policies worked out under the AMA.

KOREA

1. Introduction

1. During the 1960s and 1970s, Korea enjoyed a phenomenal economic growth by employing a strategy that aims to nurture certain industries through financial support and protection like tax incentives and safeguard measures. However, during the same period, problems like monopolistic market structure and market distortion were created, which undermined the Korean economy's fundamentals. Today, departing from a government-oriented growth strategy through support and protection, Korea has adopted a market-oriented growth strategy in which promotion of competition, regulatory reform lead to technological innovation and enhanced productivity.

2. This paper will first study Korea's past industrial policies, then explore the conflicts between industrial policy and competition policy and seek possible viable solutions. This is an issue on which much discussion is recently taking place in Korea.

2. Thoughts on Korea's industrial policies of the past

2.1. 1960s - 1970s: To nurture strategic industries through selection and concentration

3. With the first 5-year economic development plan launched in 1962, Korea went about economic development in earnest. At that time, the development strategy was "government-driven export-oriented industrialisation" aiming to overcome unfavourable conditions of small domestic markets and lack of natural resources and thereby to find new growth momentum in exports.

4. In order to develop heavy and chemical industry, the Korean government employed mainly indirect subsidy programs like the provision of low-interest loans, tax breaks and safeguard measures to protect local industry. At the same time, with monopolistic market structure worsening, it enacted the "Price Stabilisation Act," to control prices.

5. Into the 1970s, a high growth of an average of 9.6% continued. However, protectionism and excessive regulations in the form of over-investment in heavy and chemical industry and price controls caused multiple adverse effects, like worsened monopolistic market structure and inefficient resource allocation.

2.2. 1980s: to shift to a system that promotes self-compliance and competition

6. Going through the second oil shock, the Korean government had a rude awakening over the government-driven economic management system, perceiving the limitation of government intervention. Hence, under the principles of "self-compliance, competition and market opening," Korea embarked upon transforming its economic management style into a market-oriented one.

7. To that end, the Korean government reduced government financial assistance on a large scale, abolished individual laws for industrial development and significantly eased safeguard measures by removing the import prohibition list. Besides, with the view of overhauling the industrial assistance system

and carrying out industrial rationalisation effectively, the government introduced the Industrial Development Act. The law confined the role of the government to a "trouble shooter," limiting government intervention only to the case in which market fails to function properly, for example, restructuring of sunset industries. As a result, the 1980s saw regulations on manufacturing industry largely scaled back and market disciplines greatly increased.

8. In the 1990s, Korea proceeded with deregulation in the service sector including finance, telecommunications and transportation in full swing. The purpose of deregulation was to eliminate barriers to entry into the industries and to make it clear when the government should intervene and when it shouldn't, so as to change the framework of the role of the government. Plus, Korea's entry to the WTO in 1995 paved the way for removing trade barriers like tariffs and quantity controls to a level of advanced countries'.

9. Into the 2000s, the policy paradigm of greater market disciplines and market opening was consistently maintained and evolved. Sweeping restructuring of corporate sector and financial industry was carried out, which aimed in the short term, to remove factors that might make the sector and the industry unhealthy and in the long term, to raise transparency, efficiency and fairness of the economy and thereby to strengthen competitiveness through market disciplines.

3. Recent development of industrial policy and competition policy of Korea

10. Currently, Korea's industrial policy takes very measured approaches. The Industrial Development Act as the framework law governing the national industrial policy does not contain major policy tools to nurture national champions, such as sector-specific subsidies, entry restriction, easier access to credit and exemption from antitrust law. The Act, instead, presents long-term-based workforce training assistance, R&D investment in basic science and technology and institutional innovation as primary tools of industrial policy.

11. The Monopoly Regulation and Fair Trade Act (the MRFTA), Korea's competition law, currently applies to all industrial sectors without exception. Exemption from antitrust law is granted only to legitimate exercise of intellectual property rights pursuant to the relevant law or conduct deemed reasonable under other laws and regulations.

12. Therefore, it is fair to say that since the 1980s, Korea has not adopted a national champion promoting strategy and so its leading exporters in shipbuilding, automobiles, and electronics sectors have gotten on their feet without government assistance to survive fierce competition at home and abroad and become the world's leaders. Yet, some regulated industries like finance, telecommunications and energy are keeping anti-competitive regulations for the sake of protecting users' interest and ensuring universal access.

13. In recent years, Korea's competition authority often has conflicted with regulatory authorities mainly for the following two issues. First, undertakings' conduct involving administrative guidance[1] frequently used by regulatory authorities to achieve the purpose of industrial policy like industrial vitalisation and the securing of public interest, often infringes competition law. Second, regulatory authorities' entry restriction or price controls to protect related industry and companies often go against competition advocacy efforts. Accordingly, the Korea Fair Trade Commission is responding to the first

[1] The term "administrative guidance" means any administrative action for an administrative agency to guide a specific person in performing or failing to perform any certain act or to recommend or advise him/her to do so or not to do so in order to accomplish administrative purposes within the scope of affairs falling under its jurisdiction.

issue by establishing principles with which to enforce its law while for the second issue, consulting with the relevant regulatory authorities to improve anti-competitive regulations under their jurisdiction.

a) Antitrust infringements involving regulatory authorities' administrative guidance.

In case undertakings' conduct induced by administrative guidance of government agencies in charge of industrial policy is in violation of competition law, the issue comes down to the matter of whether the conduct can be exempted from application of the MRTFA, deemed as legitimate act pursuant to the relevant law or can be considered legal under the MRFTA. This issue has mainly been relevant in cartel cases.

Guidelines for Review of Cartels involving Administrative Guidance

The KFTC established a set of conditions and allowed administrative guidance to be exempted from antitrust law only when those conditions are met. First, the relevant laws should stipulate detailed conditions under which collaboration between competitors is allowed. Second, the relevant laws should explicitly grant administrative agencies authority to issue administrative guidance regarding collaboration between competitors.

Meanwhile, where administrative guidance is involved, the case in which undertakings have made a mutual agreement based on the guidance constitutes a cartel activity, but the case when undertakings follow individually the guidance without the mutual agreement does not.

Two local phone companies' cartel involving local call rates

In 2003, two local phone companies KT(market share at about 91% by number of subscribers) and Hanaro Telecom (market share at about 8%) made an agreement in an attempt to bridge the gap in the two's call rates. Under the agreement, KT would maintain its existing call rates but if Hanaro Telecom adjusts its call rates, KT would give its market share in the local phone market by 1.2% on an annual average by 2007. At that time, the examinee KT argued that its conduct should be exempted from competition law, citing that it was inevitable according to administrative guidance of the Ministry of Information and Communication[2], which tried to prevent the then ailing Hanaro Telecom from being driven out of the market.

The KFTC recognised the existence of the guidance, but concluded that there was no cause-effect relationship[3] between the guidance and the cartel conduct and the guidance was a mere recommendation, thereby imposing a corrective order and 118.4 billion (about 9.1 billion dollars) in surcharge on KT and Hanaro Telecom.

b) KFTC's efforts to reform anti-competitive regulations.

Korea's competition advocacy system

Pursuant to Article 63 of the MRFTA, the KFTC introduced and has had preliminary consultation on enactment and reinforcement of anti-competitive regulations. Under this system, where

2 The Ministry was in charge of promoting and regulating the IT industry, and after governmental reorganisation, is currently named "Korea Communications Commission."

3 Under the agreement, provisions other than the one related to call rate fixing were not put into practice, and the MIC did not take any action on the specific measures for compliance with the agreements or the part of the agreement which failed to be carried out.

regulatory authorities wish to enact or amend laws and regulations that have anti-competitive provisions like the determining of price or transaction terms, restriction in market entry or business activities, or cartels, or to approve of or take actions regarding such anti-competitive laws and regulations, they are required to have consultation with the KFTC in advance or to inform the KFTC of such matters. Then the KFTC suggests recommendations to the relevant authorities, which in turn reflect them in their laws and regulations.

Plus, when it comes to statutory amendment in Korea, all proposals should receive examination by the Regulatory Reform Committee, where the KFTC participates in as the government representative and is actively engaged in competition advocacy efforts. Particularly, from this year, the competition assessment among the Regulatory Impact Analysis items will be carried out solely by the KFTC. This shows that competition authority's role is gradually increasing in the area of regulatory reform in Korea.

Accomplishments

As the awareness of and consensus on the preliminary consultation on anti-competitive regulations (Article 63 of the MRFTA) is growing within the government, the number of consultation since 2004 has noticeably increased. In addition, the percentage of accepted KFTC recommendations to the number of the submitted ones is more than 80%, and increasing.

The ongoing efforts to reform anti-competitive regulations launched in 1988 have been successful, with a notable feat in the late 1990s when the Omnibus Cartel Repeal Act enacted to abolish more than 20 cartels from 18 laws. In 2007, based on the survey of the demand side (or those regulated), the KFTC reviewed 52 regulations and agreed with the relevant authorities to improve 23 of them. Since last year, the KFTC has been focusing on anti-competitive regulations like entry and business activity restrictions in major 3 regulated industries that are finance (banks, securities, non-life insurance), broadcasting & telecommunications, and aviation & transportation. Besides, the KFTC is also making efforts to ferret out and improve anti-competitive ordinances and rules of local municipalities.

Cases demonstrating economic effect of regulatory reform

In theory, there is no doubt that regulatory reform boosts the economy and brings positive effects on various economic growth indicators. Here are Korea's experiences of regulatory reform in the IT sector introduced.

Since 1990, in concerted efforts with the relevant authority, the KFTC has been spurring efforts to shift the telecommunication market to a competitive one through the easing of entry restriction and price controls. As a result, Korea's telecommunication industry saw new entrants entering to the market one after another after the mid 1990s and the each service sector form a competitive environment, and in 1998, call rating system changed from approval-based to notification-based. As a result, the overall call rates gradually decreased, with distant call and international call rates both plummeting by more than 50%.

4. Conclusion

14. In hindsight, policy to protect local industry with measures like subsidies, exemption from competition law and entry restriction as seen in Korea seems to be an effective policy at a time when a country with little resources and small domestic market is in its early stage of industrialisation. However, as the economy gets bigger and more complex, a government-oriented strategy that promotes national champions may deepen monopolistic market structure, create inefficiencies and have other adverse side

effects. After all, Korea's change in policy paradigm to strengthen market economy in the 1980s amid the oil shocks turned out to be a major contributor to its substantive growth thereafter.

15. In the era of global competition, the key to success lies in creating an environment where companies can develop problem-solving capability themselves and so enhance their productivity. In this light, only policies that create such a pro-competitive microeconomic environment for companies will facilitate productivity growth and efficiency gains and ultimately sustainable economic development.

NORWAY

1. Introduction

1. During the last decades we have witnessed increased globalisation of the world's economy. Trade barriers have been broken down and enabled us to exploit huge benefits from increased competition and international trade. Important progress has also been made in international coordination and harmonisation of competition rules and practices, although much work remains in this area.

2. Recently the international financial crisis poses a serious threat to this positive development, at least in the short run. The danger is now that the current crisis will bring this positive trend to a halt and induce world economies to be more protective, at least in the short run. Instead of focusing on the long term benefits from competition and international trade in a globalised economy, many fear that world leaders will focus on short-term national interest and the protection of local industries and labour markets.

3. The long term consequences of the current crisis may still be many. First we run the risk of increased general mistrust of market based solutions, which in turn also may influence competition policy. Second, we may experience that public interference in free markets may become more acceptable. We have seen many and large rescue packages for the banking sector which for the most part are sensible, but the danger is that also other industries would be covered by this. This could lead to a phase of state aid race where national governments seek to improve the competiveness of local industry by granting them subsidies. We clearly see such tendencies within the car industry world wide. Moreover, efforts toward international convergence of competition policy may experience a setback, not only in the US-EU relations but also when it comes to implementing modern competition policy in emerging economies such as China and India.

4. There is also a danger of politicising competition policy which would mean a setback for effects-based and bureaucratic competition enforcement. Examples of this are already starting to pop up worldwide, and the danger is that this tendency will continue. The lifting of normal merger control for the Lloyds TSB takeover of HBOS in the UK may serve a case in point. In this case the OFT found serious competition concerns with the proposed takeover and referenced the case to the Competition Commission. However, in late October 2008 the UK Secretary of State cleared the merger without reference to the Competition Commission.

5. Finally, national states may be tempted to promote national champions to alleviate short run economic problems, even in the absence of market failure.

6. Event though the current financial crisis may involve a temporary setback to globalisation and increased international competition, it is hard to imagine that this will be a permanent trend. After all, the crisis is largely due to improper regulation of the financial sector and unwise policies, and not too much competition. When the current crisis blows over, the efforts to globalise markets will continue. The question then is whether promoting national champions to counter this short run crisis, is a good long run solution.

7. The national champion debate is also inherently linked to industrial policy (see Seabright, 2005; Falck and Heblich, 2007). One way to define industrial policy is Foreman-Peck (2006): "state intervention that affects or is intended to affect industry but not other economic activities directly." The rationale for industrial policy is normally perceived as to correct market failures. One of the central elements of the EU's Lisbon Strategy is "… to make EU the most competitive and dynamic knowledge-based economic region of the world." One way to fulfil this goal is to promote European or national champions through industrial policy.

8. National champions can be categorised with at least four different types (Cohen, 1995; Falck and Heblich, 2007): Chicks, lame ducks, big project firms and strong firms. Strong firms are the real champions: competitive and technologically advanced firms. Lame ducks are lagging behind in technology and competitiveness, while big-project firms operate in strategic fields targeted by local governments.

9. There is strong evidence that radical innovations are more frequently introduced by new firms rather than incumbents (Audretsch, 1995). Hence, industrial policy targeting high-tech chicks (infant industries) should promote diversity and small and medium sized industries to promote experimentation and variety. Hence a national champion policy towards chicks is almost deemed to fail. Lame ducks are found in none-competitive environments and declining industries, historically protected from international competition. Optimal industrial policy towards these firms often is to allow them to die and to support the process of structural change.

10. Big-project firms are in many respects similar to lame ducks, but the need to support these firms is not found in poor economics performance or market failure. Instead the justification is strategic and firms from the energy or military sector are often involved. Hence, in fact the only scope for industrial policy should be to promote the real champions, i.e. firms that operate on or close to the technological frontier that has the potential to be highly competitive on the world market. The question is whether these firms are an industrial policy issue?

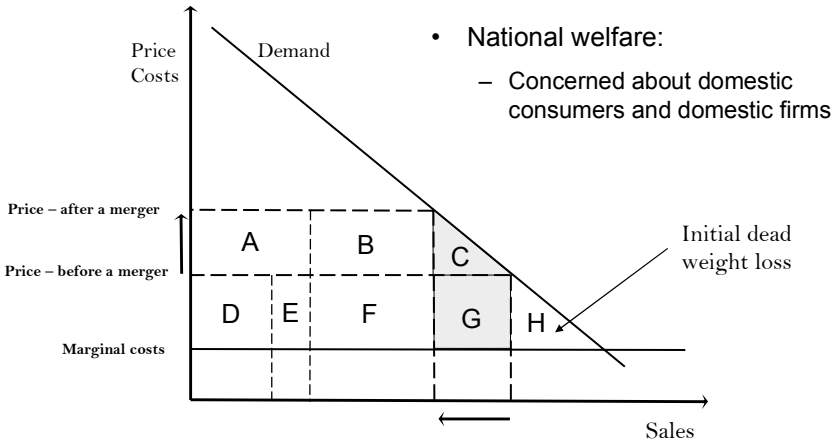
11. The current financial crisis may tempt policy makers to promote national champions as a short run remedy even in the absence of market failure. This could for instance be done by introducing lax merger control. The question is whether lax competition policy is a good long term solution to the current crisis. The next section explores some theoretical arguments for creating national champions though lenient merger control.

2. A theory of national champions

12. The basic question explored in this section is the effects of lenient merger control to promote a national champion. I will illustrate the theoretical effects by constructing a very simple example which I will gradually make more complex and realistic. The main ingredients of the examples will be some merging firms and some firms that are outsiders to the merger. I will distinguish a situation with a closed economy, which can be thought of as the financial crisis, where all relevant firms are domestic. This will be contrasted with a second scenario with an open economy where some firms are owned by foreigners. The latter can be thought of as a more globalised economy. The focus will be on how any proposed merger will affect national welfare in the two settings, i.e. we are concerned about both domestic consumers and domestic firms' profits.

13. To make it really simple, consider first a national market with three symmetric firms with constant marginal costs in an industry. The market is characterised by some form of imperfect competition. The economy is closed and all firms are owned nationally. Then consider a proposed merger between two of the firms involving no cost savings. The standard effect of the merger will be a price increase followed by an increase in the dead weight loss. This can be illustrated as in Figure 1 below.

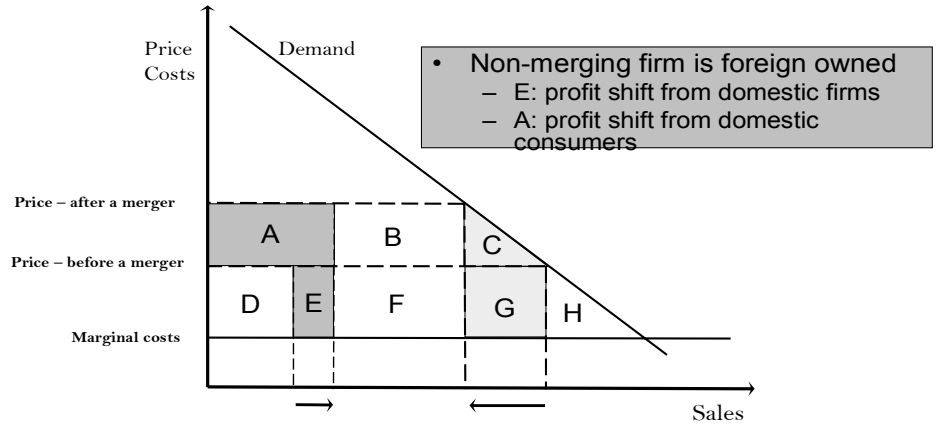
Figure 1. Effects from a national merger in a closed economy



14. Before the merger the joint profit of all three firms is D + E + F + G. After the merger the joint profit is A + B + D + E + F. Hence, the increase in profit is A + B – G. Consumers have lost A + B + C due to increased price. Hence, the loss to society from the merger is C + G.

15. Then consider a similar merger in an open economy. Recall that now (the outsider) is a foreign-owned firm. This situation is illustrated in Figure 2.

Figure 2. Effects from a national merger in an open economy



16. We see that the consequence for consumers is the same; the price increases by the same amount as before. The joint profit is also the same, but now some of the profit ends up with the foreign firm. Area E in the figure is the profit shift from the domestic to the foreign firm. When the merging firms contract their joint output, the outsider (foreign firm) will expand output and earn more profit. In addition, some of the reduced consumer surplus is now transferred out of the country as profit to the foreign firm. This is illustrated by area A in the figure. Thus, the loss in national surplus from the merger is now C + G (the dead weight loss) plus A + E, where the latter stems from the fact that the outsider to the merger is a foreign owned firm.

17. The lesson we can learn from this simple example is that a merger between domestic firms to create a national champion is generally detrimental to national welfare, and more so in an open economy where outsiders may be foreign firms. Hence, from a national perspective we should be more sceptical to national mergers in open economies than in closed economies.

18. Clearly, this is a very simple example and we need to develop this further. An obvious objection is that if the merger involves substantial cost synergies the result may differ. However, this depends largely on the nature of the cost savings involved with the merger. If the savings are predominantly fixed costs – for instance due to savings of a head quarter – there will still be a price increase and a profit loss out of the country as in our first example. On the other hand, if the savings are made in variable costs, we might experience a price decrease following the merger. However, in order to achieve a price decrease, the savings in variable costs have to be quite substantial. Moreover, the profit loss out of the country still counts negative for the national surplus even in this case. There is no clear evidence of substantial and systematic cost reductions from mergers. For instance, in the banking industry there are studies suggesting that economies of scale are exhausted for quite small operations. The implication for merger policy is that claims about cost savings should be met with sound scepticism unless they are backed by convincing documentation. Also, one should focus on savings in variable costs more than fixed cost savings.

19. Another potential objection is that the domestic market may be a part of a larger international market. One example is the common Nordic spot market for electricity. Can this be an argument for being more lenient towards domestic price-increasing mergers? Clearly, if the country is a net importer of electricity, the answer is clearly no. However, if the opposite is true – i.e. the country is a net exporter; domestic welfare might increase even with a price-increasing merger. The reason is of course that the increase in profit for national firms from exports may outweigh the negative impact domestically. In the Nordic electricity market Norway is on average a net exporter, but this is about to disappear. This means that nationally it can be beneficial to allow domestic mergers, especially if the price-cost margin is very low at the outset. However, it is clear that consumers will always lose from a price-increasing merger. With a consumer standard for evaluating mergers, this can never be beneficial. Moreover, allowing mergers for this reason will be a beggar-thy-neighbour policy, and other countries may be tempted to do the same. The result would be a prisoners' dilemma where all countries are worse off compared to the situation where no countries pursued such a policy. This illuminates the need for supranational competition policy where all national states coordinate their policies.

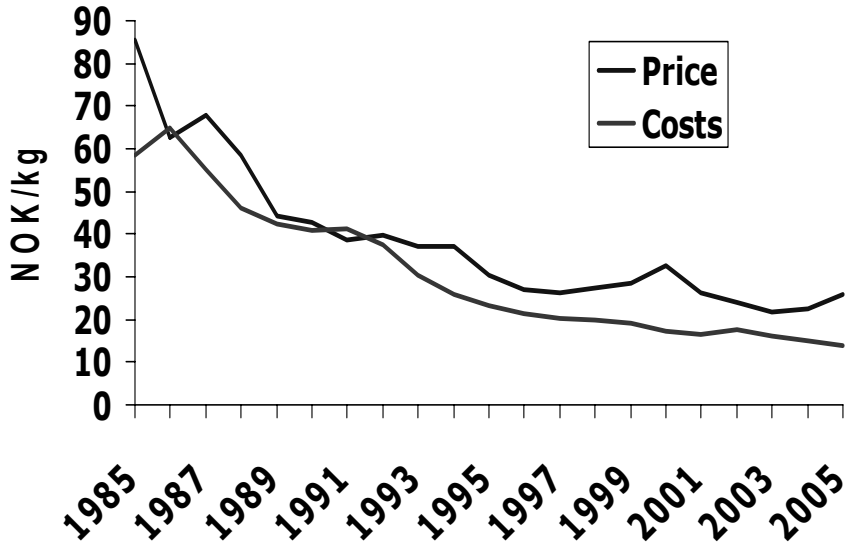
20. Yet another scenario is that a merger between two domestic firms may be a move to prevent a takeover from a foreign firm. If we allow such an international merger we must recall that the outsider will be a domestic firm. The profit shift will be as above, but this time into the country. A question that arises is whether the cost savings are larger or smaller with an international merger than with a domestic merger. There are at least two reasons why an international merger may induce more costs savings. First the domestic firm may get access to knowledge and more efficient technology from the multinational firm. Second, an international merger may lower wages as some competition may be induced between trade unions in different countries, as the merged firm may threaten to move production from one country to

another. Therefore the price increase following an international merger may very well be smaller than the price increase from a domestic merger.

2.1. Examples

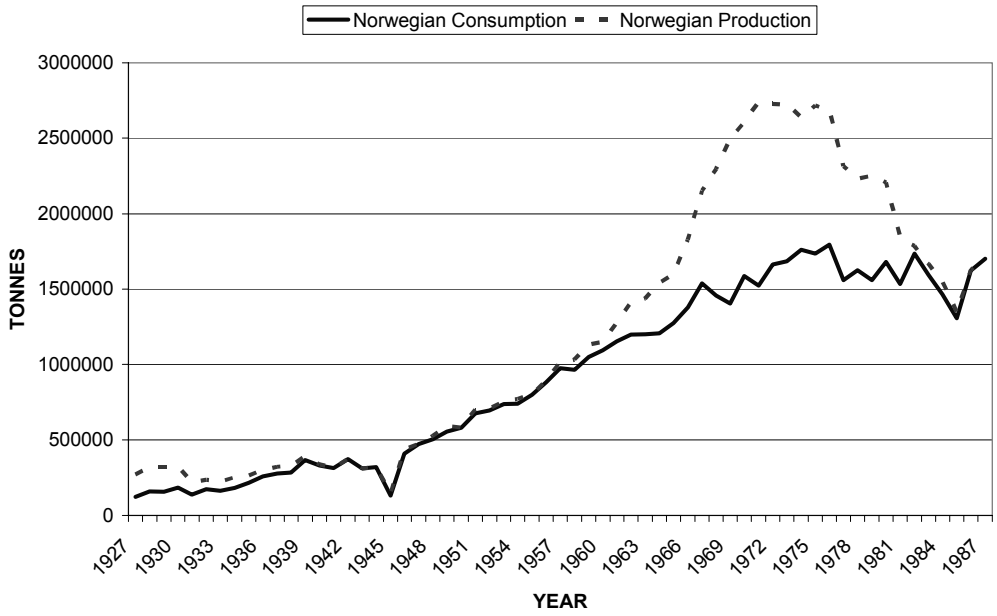
21. Two examples from the Norwegian market might help illustrate the point above. In the Norwegian industry for farmed salmon the government imposed a restriction on ownership and thereby prevented the development of a national champion. In spite of this the Norwegian salmon industry has experienced a considerable international success. Between 1990 and 2001 the sales of Norwegian salmon tripled and costs and prices dropped substantially over the same period. This development is illustrated in Figure 3 below.

Figure 3. Prices and costs for Norwegian farmed salmon 1985-2006



22. A different example is the rather sad story of the Norwegian cement industry. For a long time, this industry escaped antitrust scrutiny which enabled the industry to sustain a national price cartel from 1923 to 1967. The cartel was set up in a way that the market shares for the different producers were distributed according to each producer's share of total capacity. To no one's surprise, this setup induced the firms to overinvest in capacity, which the firms did especially after World War II. This of course led to huge costs and the price that could be obtained on international markets did not cover the costs associated with the expansion in capacity. Figure 4 below depicts domestic production relative to Norwegian consumption of cement.

Figure 4. Domestic production and consumption of cement 1927-1988



3. Conclusion

23. Industrial policy to promote national champions should be motivated and based on the existence of a market failure. However, absent market failures, policy makers may still be tempted to promote national champions for a variety of reasons. The current financial crisis is one reason why policy makers may be extra tempted to promote national champions. The financial crisis will pass, and then the process of globalisation will continue. Hence, the question is whether promotion of national champions to solve a short term problem is a good long term solution.

24. Globalisation in the long run involves increased international competition, but also increased competition for acquisitions. The question then is whether policy makers should help their national champions by introducing lenient competition policy to allow already large domestic firms to grow even larger? In the same vein, should national policy makers try to avoid foreign acquisitions of national champions?

25. As I have illustrated through theory and examples there is scant evidence that a policy of promoting national champions will be beneficial for national welfare even in the short run, and much less so in the long run. On the contrary, one might argue that fierce competition at home will induce firms to be innovative and cost efficient. This in turn, will pave the way for success in an international market. Moreover, promoting national champions by one state may induce neighbouring states to pursue the same policy. If so, the only consequence will be concentrated national markets and potentially serious harm to consumers.

26. Thus promoting national champions in the short run to counter the current crisis may be potentially very damaging in the long run. Creating national monopolies will certainly harm consumers by increased prices at home. This could - in principle - be justified if the international success of a national champion would feed back to the domestic market. However, it is not a straightforward issue that a

national champion will be successful internationally, and even if it were, it is not clear whether this success would be channelled back domestically. It is tempting to paraphrase Gerosky (2005): "Competitive markets create champions, not governments."

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SWITZERLAND

1. Introduction

1. First of all, it is important to note that industrial policy can not only be pursued by giving state aids or subsidies. Regulatory measures such as giving monopoly rights in certain areas to selected companies that are also active in other geographical and/or product markets can create distortions that benefit or harm competitors. Even subtle regulations such as safety standards or other declaration requirements can influence competition in a way that one or several companies or a sector are treated preferentially in the market.

2. So, when subsidies or state aids between countries are compared, these comparisons should always be taken with care as states giving a low level of obvious financial advantages to certain companies or sectors can as well pursue an industrial policy with more subtle means.

2. The Swiss approach to industrial policy and national champions

3. Switzerland does not pursue an explicit industrial policy. Although we are aware of arguments such as the "infant industry" argument, we still believe that it is a risky or even unaccomplishable task for the government to select in advance certain sectors, products or companies that are supposed to be successful in a competitive market in the future. A competitive and undistorted market is probably the best way to select companies and sectors that are promising also in an open and internationalised market.

4. There are several reasons that accrue for the difficulties for the state to select companies and/or sectors that are successful in the future:

- Many sectors, especially high-tech sectors, are subject to rapid technological development and innovations. These developments and innovations are unknown in advance to the state and even to market players. Today's promising technologies could be worthless tomorrow – ruled out by even better new technologies or changed preferences.

- Comparative advantages are not very well known to government and these advantages can change over time or with the opening of new markets.

- The two bullets above amount to risks that are – in our experience – much better managed by private investors than by the government.

5. The statements above do not mean that the government has no role at all in industrial policy. On the contrary, we believe that it is the state's and the competition authorities' task to work towards financing and regulations that are not distorting competition so that the most efficient companies and sectors are successful in the market.

6. Sometimes, industrial policy is taken as an instrument to protect existing companies' structures in rapidly changing markets. We believe that such a policy is costly and that other means are more successful in the long run to generate wealth in a globalising market. Instead of benefitting selected companies or

sectors, the state should create a framework that is beneficial in general for economic activity and competition:

- A low general tax level for all companies and sectors is very beneficial for attracting companies in strong international competition.

- A low level of administrative burden allows companies to save time and money, to adapt to new challenges and to get a competitive advantage over their competitors.

- A flexible labour market is the most important tool to allow companies and employees to adapt efficiently to new economic challenges and developments.

- Unemployment insurance combined with further training and education allows the unemployed to adjust to market needs.

- Contributing to non-sector specific research and regulations that promote innovative activity are important measures as well.

7. All the measures listed above are important state tasks. They can be designed to be non-distortive to competition and if so, we believe that such a policy will usually be economically more successful than a policy that tries to pursue a targeted industrial policy.

8. The same conclusions are valid for the issue of national champions. Switzerland is in open country to foreign investment and hosts dozens of large multi-national companies. Switzerland does not significantly influence companies in merging or not merging or collaborating with national or foreign companies. We believe that this liberal and permissive strategy has contributed to creating wealth and exchange of knowledge across borders.

9. This approach is also reflected in Switzerland's competition policy: According to the Cartel Act the government may, in exceptional cases, authorise agreements affecting competition and practices of enterprises having a dominant position whose unlawful nature has been ascertained by the competition authority, or mergers that have been prohibited by the competition authority, if they are necessary in order to safeguard compelling public interests. However, the Swiss government has so far never used this option and has never overruled competition agency decisions so far. Inversely, the government cannot prohibit an operation, for instance a merger, if it considers that it harms public interests, as it falls in the competence of the competition authority.

10. The Swiss cartel law does neither provide for general exemptions of competition law, with only one exception: If bank mergers are necessary to protect creditors' interest, for example due to turmoil on financial markets, the financial services regulator's decision prevails. In this case, the Competition Commission is consulted in advance.

UNITED STATES[1]

Answers of the United States to Questionnaire Part II: "The Relationship between Competition and Industrial Policies in Promoting Economic Development"

"1. Does your country have a national industrial policy? What areas/sectors of the economy are covered by the national industrial policy? What are the key features of your national industrial policy? How is competition policy addressed in your industrial policy?"

1. Before answering these questions, it would be useful to define the term "industrial policy." A paper by noted antitrust economist Lawrence White used the following:

> "In current use, the term 'industrial policy' denotes the promotion of specific industrial sectors rather than industrialization overall… Industrial policies are direct, micro, and selective; they are an attempt by government to influence the decision making of companies or alter market signals; thus they are discriminating… Industrial policy has sometimes sought to support the losers, delaying or retarding their decline; in other cases the goal is to succor or catalyze maturing sectors or to stimulate advancing sectors."[2]

2. The United States does not have an industrial policy, as defined above. Rather, our broad policy is free competition and, concomitantly, vigorous antitrust enforcement. That policy necessarily co-exists with other government policies, such as those short term measures that are intended to ease the economic shocks that affect particular industries in troubled times. At various times, measures favouring specific industries have been implemented, at both national and sub-federal levels, that some might see as constituting industrial policy. Nevertheless, competition policy, not industrial policy, is the main organising principle of the United States' economic policy, not just a special detail engrafted onto one form of industrial intervention or another.

"2. How are the competition principles embedded in the specific sectors of the industrial policy?"

3. N/A.

"3. In your opinion, are there any conflicts and/or complementarities/synergies between competition and industrial laws/policies? Please give at least two substantive concrete examples for each situation."

4. We believe that there usually are more potential conflicts than complementarities or synergies. Hypothetical examples of the former could include regulatory rate setting for competing firms, applying policies that discriminate by nationality, and ineffective merger enforcement by sectoral regulators.

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1 The attached document was prepared for a discussion on industrial policy at the Ninth Intergovernmental Group of Experts on Competition Law and Policy at UNCTAD, in July 2009.

2 Robert Driscoll and Jack Behrman, eds., National Industrial Policies, Cambridge, Mass., 1984, at 5, quoted in Lawrence J. White, "Antitrust and Industrial Policy: A View from the U.S.," Working Paper 08-04, Reg-Markets Center, January 2008.

Examples of the latter – synergies stemming from industrial policy writ large -- could include government infrastructure investment and government R&D programs. A number of U.S. Government agencies maintain important and useful R&D programs, including the National Institutes of Health ("NIH"), the National Aeronautics and Space Administration ("NASA"), and the Department of Defense's Defense Advanced Research Projects Agency ("DARPA"). Widespread provision of transport and other infrastructures and open advancement of basic and applied scientific knowledge ought to be quite compatible with competition policy.

5. Conversely, government efforts to "stabilise" industry sectors, for example, through pricing or output constraints, trade barriers, or encouragement of anticompetitive, inefficient mergers, obviously conflict with modern competition policy and are unlikely to promote industry competitiveness in the longer run. As former Federal Trade Commission Chairman Majoras described it:

> "The fact is that competition in the domestic market, regardless of its origin, begets efficient, productive firms, which are better able to compete on global markets, which in turn increases economic growth and standards of living." [3]

"4. To promote national champions as an industrial policy tool may be inconsistent with competition policy, whereas merger control as a competition policy tool may be inconsistent with industrial policy. In your opinion, which of the two policies should be prioritised and why?"

6. We believe that the latter (merger control) should be prioritised. Nor is merger control the only antitrust tool that should be prioritised -- the usual antitrust rules against cartels, other anticompetitive agreements, and monopolistic practices also need to be vigorously applied. For the reasons noted in our previous answer, these antitrust tools promote competition and efficiency, and long-term competitiveness.[4]

"5. Many countries' competition laws have exemption provisions that favour some domestic economic sectors, such as agriculture, SMEs, and acceleration of technological progress, including intellectual property rights. What types of exemptions does your competition law include and for what policy purposes?"

7. Please refer to our Answer Number 4 to Part I of this Questionnaire for an identification of U.S. antitrust exemptions and immunities.

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[3] Deborah Platt Majoras, "National Champions: I Don't Even Think it Sounds Good," Remarks at the International Competition Conference/EU Competition Day, Munich, Germany, March 26, 2007, at 2. See also Lawrence White, "Antitrust and Industrial Policy: A View from the U.S.," supra.

[4] For a discussion of the empirical findings of the association between vigorous domestic rivalry and the creation and persistence of competitive advantage in an industry, see Michael Porter, THE COMPETITIVE ADVANTAGE OF NATIONS, Collier Macmillan, Inc., (1990) at p. 117, and the discussion of the failure of protectionist policies that protect "infant industries" or allow "breathing space" to allow an established industry to adjust at pp. 665-667.

EUROPEAN COMMISSION

1. The Commission's general stance on industrial policy and "national champions"

1. It should be emphasised at the outset that in the view of the European Commission, industrial policy and competition policy are not in conflict with each other.[1] Rather, particularly as a strong industry depends on an open market with free competition, competition policy should form part of industrial policy.[2] Accordingly, this rather anachronistic term should more suitably be substituted by "competitiveness policy" as the overall notion.[3] This view has been frequently stated by the Commission, notably in its 2004 Communication "A pro-active Competition Policy for a Competitive Europe"[4].

2. The term "national champions" is often used to refer to domestic companies that are strong players in international markets and that are in various ways supported by their governments.[5] They often contribute to national pride and their success is seen as a benchmark of the state of the national economy.

3. It has to be underlined that the Commission is not against "national champions" per se, as long as their status is achieved in accordance with EC law on competition, mergers and State aid. National champions resulting from the play of competition in an open and competitive market do not raise issues.[6]

4. However, it should also be noted that the Commission does not see a special need to foster "national champions". Every nation can be a winner in the single market[7], with which the concept of merely "national" champions is somewhat in tension. In contrast, a recent call for the creation of "European Champions"[8] is more in keeping with the spirit of the internal market. But even regarding "European Champions", the Commission does not see any need to foster them in an interventionist way. Moreover, the concept of any kind of "champion" cannot be invoked, explicitly or implicitly, as a justification for setting aside the rules on anti-trust, mergers and State aid.[9]

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1 *P.A. Geroski*, Competition Policy and National Champions, p. 6 et seq.

2 *N. Kroes*, Industrial Policy and Competition Law & Policy, Speech/06/499, p. 2; *N. Kroes*, Competitiveness, Speech/08/207, p. 2; also *Lars Sorgard*, The Economics of National Champions, p. 63.

3 See *N. Kroes*, Industrial Policy and Competition Law & Policy, Speech/06/499, p. 4 et seq.

4 COM(2004) 293 final of 20/4/2004. See the accompanying press release IP/04/501.

5 See *J. Hayward* in J.E. Shalom (ed.), Industrial Enterprise and European Integration, p. 10 et seq. on the different notions and *M. Motta*, Competition Policy, p. 10 et seq. on the history.

6 COM (2004) 293 final of 20/4/2004, p. 4.

7 *N. Kroes*, Competitiveness, Speech/08/207, p. 2.

8 D. Strauss-Kahn, Round Table: Sustainable Project for Europe: Final Report of the Group of Policy Advisors, 2004; the creation of European Champions has also been an argument of the French Government in the past, see *J. Hayward* in J.E. Shalom (ed.), Industrial Enterprise and European Integration, p. 7.

9 *N. Kroes*, Building a Competitive Europe, Speech/05/78, p. 4.

5. The Commission holds that a competitive market, guaranteed by EC law, is the best instrument to bolster the economy and industry in Europe. It is the central driver for economic growth, and only firms that can stand competition at home (and in Europe) can compete with the entire world. Thus, vigorous competition based on a pro-active competition policy, that intends to improve the regulatory framework for competition as well as the efficiency of enforcement practices,[10] is the best industrial policy.[11] EC law does not form an obstacle to creating firms with sufficient dimension to compete in the global marketplace, as long as competition is guaranteed.[12]

6. However, competition is not an end in itself but a means to an end, and in that respect it is connected to the Lisbon Agenda (a ten-year strategy for improving the competitiveness of the EU economy, launched in Lisbon in 2000).[13] Economic growth should be based on innovation, lead to new knowledge-based jobs, guarantee sustainability, protect the environment and thereby contribute to social welfare and ensure long-term prosperity in Europe.[14] One should bear in mind that also the Lisbon Agenda is a European Agenda, exceeding national borders.

2. Exemptions from competition law for *National Champions*?

2.1 The "critical mass" or "scale economy"-argument

7. One common argument invoked in favour of national champions is the "critical mass" or "scale economy"-argument, stating that EC competition law as it is applied by the Commission may prevent companies from reaching the "critical mass" necessary to persist in markets that require undertaking with a special scale to be competitive. Especially, to compete in the global market might require a critical mass, according to the supporters of that view.

8. This argument is not convincing: Firstly, if the business idea is actually sustainable and persuasive, investors with rational expectations and interest in future compensation will be found so that the necessary size will be reached even without government support and State aid. Secondly, the merger rules do not preclude companies from growing to a "critical mass", whether organically or by merger and acquisition, as long as this does not lead to a distortion of competition to the disadvantage of consumers, or to a denial of market access. Thus, the Commission acknowledges that a minimal scale might be desirable, especially in high-tech sectors, but this does not remove the rationale for ensuring competition even in those sectors. Thirdly, defining the relevant market in merger cases with respect to their scale (meaning de facto a more lenient approach in the case of smaller local or national markets) would lead to an unacceptable discrimination against consumers in smaller economies.

2.2 "Market failure" and "learning effects"-argument

9. There might be situations in which under the given technology a profitable production is not possible for private producers. This leads to a market failure that a government can address in order to produce a total welfare benefit that exceeds the government's cost. Comparable problems might arise concerning the development of new technology and inventions in general. In some areas (e.g. the aviation sector) the costs and risks are so high and incalculable that private investors may be unwilling to incur

10 See COM (2004) 293 final in this respect.

11 *N. Kroes*, Building a Competitive Europe, Speech/05/78, p. 4.

12 *N. Kroes*, Competitiveness, Speech/08/207, p. 4 et seq.

13 *N. Kroes*, Building a Competitive Europe, Speech/05/78, p. 3; *N. Kroes*, Industrial Policy and Competition Law & Policy, Speech/06/499, p. 7.

14 COM (2004) 293 final; *N. Kroes*, Industrial Policy and Competition Law & Policy, Speech/06/499, p. 4.

them irrespective of the opportunities. Further, one might conceivably envisage government support for national firms during their "learning phase" until they know how to be profitable in highly innovative sectors. But even in those cases, no support should be granted if funds could be achieved from the free market because of expectations of profit in the long-term. In any case, there is a fundamental distinction between a government address market failures and fostering the creation of national champions.

10. EC law provides for mechanisms to address market failures via state aids, e.g. the Community Framework for State aid for Research and Development and Innovation (2006 OJ C 323/1)[15]; the Community guidelines on state aid to promote risk capital investments in small and medium-sized enterprises (2006 OJ C 194/2)[16] or the Community guidelines on State aid for rescuing and restructuring firms in difficulty (2004 OJ C 244/2)[17].

11. In short, one could say that the Commission accepts "intelligently-targeted support" to fill gaps left by genuine market failures if the support is granted to enhance active competition.[18] The outcome of a national champion does not raise concerns under these circumstances; however, the aim of creation of a national champion does not serve as a justification in itself for state aid or other state intervention.

3. Case-law regarding interventions by Member States

12. In the context of "national champions", an EU member State could be incited to intervene in one of three ways which are pertinent for EU competition law:

c) It may grant state aid in some form to the undertaking in question. In this case article 87 of the Treaty applies. Unless covered by a block exemption, the aid must be notified to the Commission and may not be paid as long as the Commission has not approved it. Any state aid illegally paid out must be reimbursed to the State in question by the beneficiary company.

As an example of the Commission's determined enforcement practice one might refer to the case "Électricité de France (EdF)". The Commission did not accept the State guarantee that France accorded EdF for several years[19] and decided in 2003 that EdF had to reimburse more than

15 See p. 20 under 7.3.1.: "Existence of a market failure: As indicated in Chapter 1, *State aid may be necessary to increase R&D&I in the economy only to the extent that the market, on its own, fails to deliver an optimal outcome.* It is established that certain market failures hamper the overall level of R&D&I in the Community. However, not all undertakings and sectors in the economy are confronted to these market failures to the same extent. Consequently, as regards measures subject to a detailed assessment, the Member State should provide adequate information whether the aid refers to a general market failure regarding R&D&I in the Community, or to a specific market failure."

16 See p. 5 concerning the balancing test asking inter alia: "(2) Is the aid well designed to deliver the objective of common interest, *that is does the proposed aid address the market failure* or other objective?"

17 See para. 19: "Article 87(2) and (3) of the Treaty provide for the possibility that aid falling within the scope of Article 87(1) will be regarded as compatible with the common market. Apart from cases of aid envisaged by Article 87(2), in particular aid to make good the damage caused by natural disasters or exceptional occurrences, which are not covered here, the only basis on which aid for firms in difficulty can be deemed compatible is Article 87(3)(c). Under that provision the Commission has the power to authorise «aid to facilitate the development of certain economic activities (...) where such aid does not adversely affect trading conditions to an extent contrary to the common interest.» In particular, this could be the case where *the aid is necessary to correct disparities caused by market failures* or to ensure economic and social cohesion."

18 *N. Kroes*, Building a Competitive Europe, Speech/05/78, p. 8.

19 See press release IP/03/477.

€ 1.2 billion. In another case the Commission decided that Olympic Airlines had to return more than € 700 million in illegal State subsidies it received from Greece.[20]

d) It may encourage or foster a merger between two domestic companies which has a Community dimension and therefore falls within the scope of the EU merger regulation. In this case the Commission, under the merger Regulation, assesses only the effect on competition, without taking into account other factors, and where the merger poses problems for competition, it can require remedies or prohibit the merger, regardless of whether it is supported by a Member State.

   Accordingly, the Commission was unable to authorise a merger of Scania and Volvo irrespective of the support of the Swedish government for the merger.[21] The merger of Gaz de France (GdF) and Suez, supported by the French government, could be approved only after various remedies had been accepted to avoid distortions of competition in France and Belgium.[22]

e) It may oppose a takeover of a domestic company by a foreign company, where there is a Community dimension and the EU merger regulation is applicable. In this case, the only legal instrument permitting a member State to intervene is article 21.4 of the merger Regulation, which allows intervention on strictly limited grounds: public security, plurality of the media and prudential rules, and other public interests only if they are communicated to the Commission by the Member State concerned and shall be recognised by the Commission.[23]

   Thus, the Real Decreto-Ley 4/2006 of 24th February 2006, an emergency law enacted by the Spanish government to prevent the takeover of national energy firm Endesa by the German firm E.ON., was annulled by the European Court of Justice, on application by the Commission, as being in violation of 21.4 of the merger Regulation.[24] Already in 1999 in the Champalimaud case

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20 See inter alia press releases IP/02/1853, IP/05/1139, IP/06/425, IP/06/531, IP/06/1424.

21 COMP/M.1672 Volvo/Scania and the accompanying press release IP/00/257.

22 See press release IP/06/1558.

23 Full text of article 21.4 of the merger Regulation:

> Notwithstanding paragraphs 2 and 3, 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.
>
> Notwithstanding paragraphs 2 and 3, 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.

24 Commission press release IP/06/1853. On 6/3/2008, the Court upheld the Commission's position (OJ C-107/9 of 26.4.2008), but E.ON's bid for Endesa had already been withdrawn.

the Commission had rejected the attempt of Portugal to block a bid of Banco Santander Central Hispano (BSCH) for the Champalimaud financial group as incompatible with article 21 of the merger Regulation.[25]

13. These examples may suffice to prove that national champions do not enjoy a privileged or special status and that the Commission is determined to enforce the competition rules for all undertakings in the EU.

4. Conclusions

- The Commission holds that industrial policy and competition policy are not in contrast to each other but that **industrial policy has to comprise competition policy** and therefore should be called **competitiveness policy**.

- The Commission **believes in open markets and free competition as the best means** to brace Europe's economy for the global market and to maintain and enhance social welfare in Europe. There is **no need for *national champions*** as all Member States and their economies are winners of the single market.

- However, there is **no *per se* objection** to *national champion*s **as long as** their status is achieved **in compliance with EC law** and as a result of an open and competitive market.

- The idea of *national champions* itself can **in no case justify the incompliance with EC-law or suffice for an exemption** from it.

- Exemptions might lead to *national champions* but the **wish for *national champions* does not suffice for an exemption**.

[25] See press releases IP/99/774 and IP/00/296. However, the Court of Justice did not rule on that case, as the Portuguese state withdrew the measures in question.

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BRAZIL

1. Introduction

1. The interaction between industrial and competition policies in Brazil is recent and derives from the change of perspective that has occurred in the nineties within the eternal dispute between interventionists and liberals. Indeed, although the main objective of competition policy is not to help companies to increase their competitive power, it can foster competition working in convergence with the industrial policy.

2. Said connection between competition and industrial policies is feasible and based on the institutional and legal convergence, as much as on the economic literature. Therefore should not be taken as a tension between policies, as it is many times alleged. This discussion is again been stimulated due to the financial crisis as much as the debate on the national champions and on the industrial policies based on vertical intervention.

3. In Brazil, industrial policy has been being implemented for many years while competition policy is relatively young.

4. Apart from their respective specific objectives, industrial and competition policies have the common goal of enhancing dynamic competitive advantages in markets increasingly integrated. The Brazilian experience shows that competition plays an important role in industrial policy although it may not be a sufficient mechanism to achieve all its goals. This interaction depends on facing competition as a dynamic process towards a highly competitive environment. The Brazilian Government is working on a policy model that fosters the convergence between industrial policy and competition policies, as per described in this paper.

2. The historical context

5. From the end of the Second World War to the beginning of eighties, Brazil started an industrialisation process based on import substitution and the alliance between national and foreign private capital. For the first time, industrialisation entered the political and economical agenda in Brazil. New political actors came to the scene, as industrial and labour associations, and the economic policy reflected this new political perspective. The nationalist development and the state interventionism prevailed, amalgamating political forces to economical objectives of the industrialising project.

6. These interventionist policies created state owned companies in order to foster economic activities considered essential to the national development. These companies turned into national champions as Petrobras (the Brazilian oil producer with refineries, production and exploitation areas, pipelines, and terminals), CSN (the Brazilian Steel Company), Vale do Rio Doce (the Brazilian mining company) among other champions that were always promoted as being necessary for strengthening the national sovereignty and security.

7. In 1988 a new Constitution was launched “founded on the appreciation of the value of human work and on free enterprise, (and) is intended to ensure everyone a life with dignity, in accordance with the

dictates of social justice" as much as established that the "free exercise of any economic activity is ensured to everyone, regardless of authorization from government agencies, except in the cases set forth by law."[1]

8. Therefore, the end of the eighties and the nineties symbolised a change from direct interventionist policies towards indirect intervention based on regulation, what represented a transformation to the development standards in Brazil.

9. This transformation happened not only on the industrial policy orientation, but also on all the public policies. Through this perspective, social policies were redrafted, inflation was controlled, economy was opened, companies were privatised and governmental agencies were created in order to regulate some sectors (telecommunications, electricity, petroleum, etc).

10. The "Collor Plan"[2], a collection of economic reforms which combined fiscal and trade liberalisation with radical inflation stabilisation measures carried out between 1990 and 1992, was launched among other programs, as the privatisation one, the "National Privatization Program" ("PND"), and the industrial and foreign trade reform program, the "Industrial and Foreign Trade Policy" ("PICE"), which aimed to stimulate the entry of foreign companies; meanwhile, innovation was motivated by commercial opening through non-tariff barrier reduction, targeting oligopolised sectors of the economy.

11. Later on, still with the selective protection of certain key industries and the fail of the stabilisation strategy and the presidential impeachment, inflation and fiscal problems appeared again. A new plan was launched in 1994, the "Real Plan", and represented a milestone to the economic development standards in Brazil, that was influenced by the guidelines established on the Washington Consensus. The Real Plan proposed a new fiscal strategy, a monetary reform and continued to envision the economy opening, managing to decrease inflation.

12. Among with the aforementioned changes promoted in 1994, Law #8.884/94 was enacted and changed the Administrative Council for Economic Defense (CADE) into an independent agency[3], regulated other antitrust measures, and aimed to create a competition culture between producers and consumers in which competition rules are mandatory to guarantee the existence of the free market. These objectives, however, were just consolidated in the last decade.

13. The industrial policy has grown stronger as of 2002, during President Lula´s government, with the policies called "Industrial, Technological and Foreign Trade Policy" (PITCE), and "Policy for Productive Development" (PDP), aiming to strengthen and expand the Brazilian industrial sector trough an improvement on companies innovative capacity in a long term strategy.

14. Furthermore, the Brazilian National Agency for Industrial Development ("ABDI") was created in 2004 in order to execute the projects of said development policy, which acts jointly with the Finance Ministry and the Brazilian Development Bank (BNDES).

15. The PDP aims to continue the advances promoted by the PITCE, amplifying its objectives and consolidating the ongoing actions and the capacity of implementing and evaluating the industrial policies, through a long term strategy, as per described above. Said Plan was developed under the leadership of the Brazilian Ministry of Development, Industry and Foreign Trade and has four horizontal macro targets: (i)

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1 Sole Paragraph – Article 170 of the Constitution.

2 The Color Plan was officially called New Brazil Plan, but it became closely associated with the former President, Fernando Collor de Mello himself, and therefore was names "Collor Plan"

3 CADE was created in 1962, but the Council had marginal economic impact

expansion of fixed investment; (ii) raising private expenditure in research and development (R&D); (iii) expansion of exports; (iv) making Small and Micro Enterprises (SMEs) more dynamic. These targets were divided in three different levels: (i) systemic actions, which have the focus on generating positives externalities for the whole productive structure; (ii) strategic highlights, consisting on public policy goals chosen due to their importance to the long-term productive development of Brazil; and (iii) structural programmes for productive systems, oriented towards strategic targets based on the diversity of the domestic productive structure.

16. The instruments of the PDP are divided in four categories, which expressively comprise antitrust regulation: (i) incentives (fiscal incentives, credit, venture capital, and economic subvention); (ii) state's buying power (public procurement and state-owned companies' procurement); (iii) technical support (certification, export/trade promotion, intellectual property, human resources and business capacity building); and (iv) regulation (technical, economic and antitrust).

17. The PDP is a horizontal policy, meaning that it is aimed at promoting incentives for the increase of economic competitiveness. An example worth mentioning of this horizontality is the inclusion in the macro targets of the PDP of incentives for the promotion of SMEs, which represent around 20% of the Brazilian GDP. This example also shows that industrial policy converges with competition policy, to the extent it provides conditions for the increase of competition and participation of SMEs in international markets and, consequently, within the internal market as well.

18. Competition principles are intrinsic to the whole industrial policy. Notwithstanding, the Brazilian Government can recognise some sectors such as the information technology, biofuels, infrastructure and capital goods sectors as essential for the systemic competitiveness, should they generate horizontal effects to the economy as a whole. Furthermore, even when there is such recognition, policies are designed on a horizontal way, so that no companies are privileged to the detriment of other companies of the same sector. Indeed, financial support lines and programs offered by the Brazilian Development Bank (BNDES) are available to all the companies of a respective sector.

19. Nowadays, both competition and industrial policies are mature and representative in the political agenda, which aims to enhance dynamic competitive advantages in markets increasingly integrated. However, the convergence of said policies is something new to the agenda.

3. Convergence between industrial and competition policies

20. Nowadays, post-merger control in Brazil is mandatory, and there are no exemptions in the Brazilian Competition Law or other sectorial laws.[4] Thus, there is antitrust enforcement even when mergers occur in the regulated sectors.

21. Notwithstanding, article 54 of the Law 8.884 contains a special provision that permits mergers that satisfy attributes enumerated in its Paragraph 2 to be approved, provided that the transaction is *"taken in the public interest or otherwise required to the benefit of the Brazilian economy" and that "no damages are caused to end-consumers or end–users*":

> *"Article 54. Any acts that may limit or otherwise restrain open competition, or that result in the control of relevant markets for certain products or services, shall be submitted to CADE for review.*

[4] The role of the Central Bank while analysing mergers in the financial sector is being discussed at the moment, according to what is going to be explained below.

Paragraph 1. CADE may authorize any acts referred to in the main section of this article provided that they meet the following requirements:

I - they shall be cumulatively or alternatively intended to:

(a) increase productivity;

(b) improve the quality of a product or service; or

(c) cause an increased efficiency, as well as foster the technological or economic development;

II - the resulting benefits shall be ratably allocated among their participants, on the one part, and consumers or end-users, on the other;

III - they shall not drive competition out of a substantial portion of the relevant market for a product or service; and

IV - only the acts strictly required to attain an envisaged objective shall be performed for that purpose.

Paragraph 2. Any action under this article may be considered lawful if at least three of the requirements listed in the above items are met, whenever any such action is taken in the public interest or otherwise required to the benefit of the Brazilian economy, provided no damages are caused to end-consumers or end-users. (...)"

22. To date, however, no decisions have ever been issued on grounds of this provision.

23. There are other discussions in regards to competences of the Brazilian Competition Policy System (BCPS)[5] and other agencies in certain regulated sectors. The regulatory policies – especially those focused on infrastructure sectors, in which market failures occur – should be connected to a wider and more modern industrial policy. In this perspective, in which there is a regulatory agency responsible for the technical and economical regulation, cooperation strategies between CADE and said agencies have been implemented regarding conducts and merger control. These sectorial bodies can issue non-binding opinions concerning the impacts of competition processes to industry.

24. Relating to the financial sector matters, the Bill # 5.877/05 establishes, among other provisions, the role of the Central Bank while analysing mergers in the financial sector. According to said Bill, the Central Bank would be responsible for evaluating if the merger is justifiable in order to avoid systemic risks. In case of no systemic risk involved, CADE would be responsible for reviewing the merger according to the competition rules in force.

25. In the same tone, negotiations between CADE and BNDES are being undertaken aiming to strengthen the relationship between the two authorities. Among the objectives of the negotiations are the establishment of technical cooperation, the exchange of information, and the development of sectorial studies. Furthermore, CADE and Ministry of Development, Industry and Foreign Trade (MDIC) are also presently engaged in developing a cooperation agreement designed to facilitate sharing of industrial sector information between the two agencies.

[5] The Brazilian Competition Policy System (BCPS) is composed of three agencies -- namely, the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE), the Secretariat of Economic Law of the Ministry of Justice (SDE), and the Administrative Council for Economic Defense (CADE).

26. Brazil's antitrust law provides that any transaction that may limit or otherwise restrain competition must be notified. As mentioned above, there are no exemptions to antitrust review under the Brazilian law. However, CADE could take into consideration if the transaction being analysed is being supported by an industrial policy. In this case, the support by other governmental agencies to the transaction could be a strong indication for CADE´s review, as long as it is identified that the aims of the industrial policy that supports the merger are subsumed to one of the provisions of the article 54 above mentioned. This is a feasible convergence between industrial and competition policies, should both policies target the increase of productivity, the improvement of quality and the increase of efficiency as well as fostering economical and technological development.

27. Even though to date no decisions on merger reviews have ever been justified on the grounds of this convergence, the polemic discussion regarding national champions was brought to discussion in AmBev case.

28. In said case, (Merger Review nº 08012.005846/1999-12) two of the largest Brazilian beverage companies merged, creating American Beverage Co (AmBev), which turned to be the biggest beverage company in Latin America. Part of the case for the AmBev merger was that it would create a "national champion" capable of competing internationally, even though the debate was limited to private interests and there was not public effort or public policy involved.

29. The transaction was approved with the imposition of some remedies. However, CADE could not impose, as a restriction, the prohibition of selling the company to an international company, what happened four years after the transaction was approved, when the firm was taken over by Belgian beer giant Interbrew in the deal that created Inbev. CADE does not have the power to prohibit an international company to buy a Brazilian company if the deal is in accordance with the Brazilian rules.

30. More recently, two large telecommunication companies in Brazil announced their merger. Again, it is been alleged that the merge would create a national telecommunications champion. CADE, however, has not issued any opinion in said ongoing Merger Review yet.

4. Conclusions

31. The convergence between industrial policy and competition policy is feasible. Industrial policy should be designed in a pro-competitive way and the competition policy should amplify its competitive process, recognising that cooperative actions are mandatory to the power of antitrust policy.

32. The relationship between competition and industrial policies is recent. However, Brazil has nowadays mature institutions that have been working hard on said convergence, and the negotiations between CADE, the Brazilian Development Bank and the Ministry of Development, Industry and Foreign Trade are an indication of these efforts put towards the development of a qualitative transformation of the economy.

33. The Brazilian state continues to act as a regulator and therefore no types of companies are exempted of antitrust rules. Notwithstanding, the Brazilian Competition Policy System, when applying the antitrust policy can take into consideration the existence of public policies towards a certain industry.

CHINA[1]

1. Intensifying supervision of public enterprises and guiding them to act in a law-abiding way is an important task for competition authorities of every country. Plenty of public enterprises such as water supply, electricity supply, gas supply, heat supply, postal service, telecoms, railways, civil aviation, urban transportation and cabled TV have direct bearing on people's life. These industries, most of which are regulatory ones and possess natural monopoly features, lack sufficient competition, thus easily resulting in high-price, low-quality products and services. These situations have caused dissatisfaction among consumers, gradually becoming a hot issue.

2. Chinese government attaches great importance on the supervision of public enterprises, encouraging them to compete efficiently. Recently we have made some progress in the reform of the monopoly industries by separating government functions and enterprises management, introducing competition into the industry, improving government's supervision and promoting enterprise restructuring, etc. For instance, in the past ten years we have been working hard on the reform in the telecommunication industry. Through the separation of enterprise management from the government, the whole industry restructured several times and we currently have three telecommunication companies. Each of them can carry out the local fixed-line phone business in each other's regions as well as provide mutual preferential service to each other, such as equal access. The competition is being shaped step by step, thus problems such as high price, low quality service have been solved to some extent. Besides, a lot of private investment is coming into industries like civil aviation and oil supply and consumers have more options other than public enterprises.

3. Meanwhile, through legislation Chinese government have been intensifying the supervision in this area. The Anti-Unfair Competition Law of 1993 has included specific regulations prohibiting restrictive competitive behaviours of public enterprises and other operators possessing an exclusive position in accordance with the Law. According to Article 6 of the Law, the public enterprises and other operators with an exclusive position in accordance with Law shall not force others to buy the goods of operators designated by them so as to exclude other operators from competing fairly. Besides, laws like "Price Law of China", "Telecommunications Regulations of China" have set strict regulations on restrictive competitive behaviour of public enterprises.

4. SAIC is the competent authority directly under the State Council, taking charge of market supervision and enforcing "Anti-Unfair Competition Law", supervising restrictive behaviour. According to statistics, Administrations for Industry and Commerce (AIC), from 1999 to the first half of 2008, almost 7000 cases of restrictive behaviour of public enterprises have been dealt with, covering a dozen industries such as water supply, electricity supply, insurance, telecoms, commercial banks, tobacco, oil, salt supply etc. Their restrictive behaviours include coercive transactions, coercive service supply, differentiated treatments, tie-in with unreasonable trading conditions, and abuse of the dominant position to collect unjustified fees.

[1] By Song Yue, Antimonopoly and Anti-Unfair Competition Enforcement Bureau, SAIC, China

5. In guiding public enterprises to follow fair competition principle, we work closely with industry institutions and give respective due role to full play to strengthen effective supervision in regulatory industries. We coordinate with the postal service, telecoms, railways and civil aviation industry institutions, particularly intensifying communication on the drafting of competition policy and industrial policy, and discuss how to prevent unfair competitive behaviour and restrictive behaviour in these special industries. We are working shoulder to shoulder and perform duties within respective jurisdictions in regulating and supervising public enterprises' behaviour to guarantee the legitimate rights and interests of consumers. It has been proved by practice that to supervise public enterprises, the coordination and cooperation between competition authorities and industrial institutions is of utter importance.

6. Since 1 August 2008, Chinese Antimonopoly Law (AML) has taken effect. SAIC is one of the main competition enforcement authorities, in accordance with law and the entrustment of the State Council. We take charge of Monopoly Agreement, Abuse of a Dominant Market Position, Abuse of Administrative Power to Eliminate or Restrict Competition (price monopoly behaviour excluded). Article 7 of the Law has clearly stated that business of monopolised industry shall act in a law-abiding, honest, credit-worthy and self-disciplined way, and shall subject themselves to public scrutiny. The public enterprises shall not abuse their dominant or exclusive position to harm consumers' interests. SAIC, as the main AML enforcement authority, will further supervise public enterprises in accordance with the Law, enhance consumers' welfare and construct a highly-efficient and orderly competition pattern.

LITHUANIA

1. Introduction

1. The main guidelines for the industrial policy of Lithuania are set out in the Long-term Economic Development Strategy of Lithuania until 2015. Its provisions favour the so-called horizontal industrial policy and clearly speak against the sectorial industrial policy. Such a view is based, firstly, on the doubt about the ability of the State to select the "right" activities and the optimal amount of support as regards positive externalities, and secondly, on the lack of comprehensive and reliable information as well as on the risk of retaliation from other countries as regards the pursuit of monopoly profits. It is not enough to take into account the market share of a sector or its growth rate. There is a lack of reliable information and methods to analyse costs and benefits of such a policy. The analysis of examples of other countries can also hardly provide any guidelines for the selection of State-supported sectors.

2. Priority is therefore given to the development of industrial and social infrastructure (energy, transport and telecommunications, education and science, culture, health care and environment) serving as basis for the effective functioning of the economy, as well as of knowledge-based and high-technology activities in all fields of the economy. The need for the sustainability of industrial development is also highlighted. It is however emphasised that those fields should not necessarily be subsidised or otherwise supported by the State.

2. History and Evaluation

2.1. To what extent does the industrial policy in your country target firms on the basis of their nationality (e.g., by granting state aids/subsidies to national firms only, or by controlling their ownership)? If so, how is nationality defined?

3. The Law on Enterprises and Facilities of Strategic Importance to National Security and Other Enterprises Important to Ensuring National Security specifies the enterprises and facilities which are of strategic importance to national security, which must belong to the State by the right of ownership and in which (and the conditions under which) a proportion of the capital may be held by the private national and foreign capital meeting the criteria of European and trans-Atlantic integration provided the power of decision is retained by the State. The latter are e.g., Lithuanian Railways, Lithuanian Radio and Television Centre, AB Kaunas Hydro Power Plant.

4. The Constitutional Law on the Implementation of Paragraph 3 of Article 47 of the Constitution of the Republic of Lithuania defines foreign subjects meeting the criteria of European and trans-Atlantic integration as foreign legal persons as well as other foreign organisations set up in:

- the EU Member states or states parties to the Europe (Association) Agreement concluded with the European Communities and their member states;
- Member states of the OECD, NATO and states parties to the EEA Agreement.

These criteria are also met by nationals and permanent residents of the said states, as well as permanent residents of the Republic of Lithuania who are not citizens of the Republic of Lithuania.

2.2. What economic conditions have been associated with government industrial policy and support for national champions in your nation and region? Has this changed over time as economic development advanced?

5. The peculiarity of the examples mentioned hereafter lays in the fact that those particular companies were established to supply the vast market of the Soviet Union, they operated under regulated economy conditions and were owned by the State for a long time. After Lithuania declared its independence, the companies had to adapt to a completely different situation, they were also fully or partially privatised. The intention of the State was to get the companies on their feet under the market economy conditions. This policy has now lost its ground, especially after Lithuania joined the EU.

2.3. Are there major success stories of industrial policy or national champions that are prominent in policy discussions? Are there any perceived major failures of industrial or national champion policies? How do you define "success" and "failure" in this context? Are successful national champion stories supported by best practice competition policy standards?

6. There have been no major success stories of industrial policy or national champions in Lithuania.

7. One example that could be presented as a failure is the State policy in respect of AB "Alytaus tekstile". This company is now subject to bankruptcy proceedings, its debts amount to more than EUR 12 million.

8. The company was established in 1965, it was the biggest undertaking in Alytus (a city with 68 thousand inhabitants) and the biggest textile manufacturer in Lithuania. The company was not profitable since Lithuania declared its independence in 1990. In 1998, 47 percent of the company's shares were sold to the Singaporean business concern "Tolaram group". The investor committed to pay 13 million Litas (approximately EUR 3.8 million), to maintain 3500 jobs and to invest 240 million Litas (approximately EUR 70 million). The State kept 11.82 percent of the shares.

9. In 2002, the Competition Council did not approve the plans of the Ministry of Finance to prolong repayment of the loan (approximately EUR 3.4 million, provided in 1995) until 2009 and to lower the annual interest rate to 5 percent, presented along with the restructuring plan of AB "Alytaus tekstile". The Competition Council concluded that the restructuring plan did not ensure restoration of long-term solvency and viability. Moreover, the investor "Tolaram group" had committed, signing the agreement to purchase the shares of the company, to invest money therefore the involvement of the State was deemed to be unnecessary.

10. However, "Tolaram Group" failed to fulfil its commitments: it paid 10 million Litas (approximately EUR 2.9 million), reduced the number of employees to 2648 and invested merely 10 million Litas (EUR 2.9 million). The volume of sales decreased from EUR 49 million in 1999 to EUR 37 million in 2002.

11. In 2003, the State repurchased the 47 percent of the company's shares for approximately EUR 300 thousand. Since the Law on Management, Use and Disposal of State-Owned and Municipal Assets did not allow for buying shares from natural persons and private legal persons, an ad hoc law was passed: the Law on Acquisition of Shares of AB "Alytaus tekstile". In December 2003, the Government approved the rehabilitation plan of AB "Alytaus tekstile" in order to avoid serious social, economic and employment problems in Alytus. Following that and shortly before the accession to the EU, the State provided

assistance to the company for approximately EUR 8 million. The assistance comprised release from refunding a loan given on behalf of the State (the same loan of 1995) and from paying fines and interests, a new payment schedule in respect of the Personal Income Tax and social security contributions overdue, and financial assistance of approximately EUR 1.5 million in the form of capital injection. As the implementation of such measures was not possible pursuant to the national laws in force, an ad hoc law was passed.

12. Despite the assistance, expected results were not achieved: volume of sales did not increase, costs did not decrease, and performance indicators did not essentially improve. In 2004 and 2005, the company suffered a net loss of more than EUR 4.6 million each year.

13. In 2007, AB "Alytaus tekstile" asked for further financial injection of approximately EUR 9 million to continue its activities. After long and very intensive discussions, the decision was taken not to provide any more assistance and to sell the shares owned by the State. The price was set at 1 cent (approximately 0.3 Eurocents) a share; the shares were sold on the Vilnius Stock Exchange in 2007. The new owners (a group of natural and legal persons) declared bankruptcy shortly thereafter.

14. Another example could be the State policy regarding AB "Mazeikiu nafta", the only crude oil refinery in the Baltic States. It illustrates a difficult case where it is very complicated to strike the balance: it is not a failure but it can neither be perceived as a success. The overriding ground to support this company was the strategic importance of oil supply (the company is also included in the list of Enterprises of importance to ensuring national security); beside that, AB "Mazeikiu nafta" has been the main supplier of gasoline and diesel fuel for the Lithuanian, Latvian and Estonian markets, the largest buyer of services in Lithuania, largest Lithuanian company in terms of revenues and payment of taxes (approximately 230 million Euros or 4% of all taxes in 2007) as well as one of the major exporters.

15. The refinery was built in the 1970s, the State policy in favour of this company continued until the accession of Lithuania to the EU. It consisted mainly of loans and loan guarantees for 520 million USD in total, import duties for oil products (5% from 1998; 15% from 1999 to 2004) and compensations for some of the losses (e.g., caused by interruption of the supply) until 2003. It has to be mentioned that the State was the owner or controlled the majority of the company's shares at that time (59% in 1999). At the end of 2008, the State held 9.98% of the shares but the decision has been taken to sell the remaining part.

16. Speaking of the effectiveness of the State support, it has to be mentioned that the State did not impose any conditions on the use of the loans / guaranteed loans, no planning took place. It followed that only 8% of the sums received were used for investment, the rest of it covered the operating expenses.

17. AB "Mazeikiu nafta" operated at a loss for a long time. The productivity indicators have been very high all the time, 7-8 times higher than those of the whole economy; however, this could be based on the capital-intensive character of this particular industry and did not help to create new value or to at least ensure revenues covering costs. Only in 2003, after the Russian company "Yukos" became shareholder of AB "Mazeikiu nafta", the company turned a profit. Until that year, it could not demonstrate successful economic activity and the State did not get any Corporate Income Tax revenues from this company. The tax revenues came from excise duty therefore they depended solely on the consumption of oil products and would have been collected anyway, irrespective of the origin of those products.

18. It has to be pointed out that, despite the good performance of the company in the past few years, AB "Mazeikiu nafta" is considerably dependent on the crude oil supply from Russia, and its performance indicators are very susceptible to the interruptions of this supply. Given the importance of this company to the Lithuanian economy, this embodies the risk of considerable negative effects.

19. The Competition Council carried out three investigations concerning AB "Mazeikiu nafta", which resulted in conclusions (in 2000, 2001 and 2005) that AB "Mazeikiu nafta" had infringed the Law on Competition.

20. The first investigation was based on a complaint that the company is providing exclusive conditions of distribution of its products to a limited number of companies, fixing exclusive discounts to them. The investigation concluded that the AB "Mazeikiu nafta" held dominant position in the A-80 and A/92/95/98 brand gasoline and diesel fuel markets and that it took advantage of its unilateral decisive influence in the markets and, concluding similar agreements with different companies, fixed dissimilar conditions for the purchase of oil products. These actions of the company constituted an infringement of Article 9(3) of the Law on Competition, which prohibits abuse of the dominant position through application of dissimilar (discriminating) conditions to equivalent transactions with certain undertakings, thereby placing them at a competitive disadvantage.

21. While conducting the abovementioned investigation, the Competition Council established restrictions with regard to import of oil products. Consequently, the Competition Council initiated an investigation on the compliance of actions of the AB "Mazeikiu nafta" and 5 companies trading in oil products with Article 5 of the Law on Competition ("Prohibition of Agreements Restricting Competition"). AB "Mazeikiu nafta" was operating in the production level of the oil products (gasoline, diesel fuel, aviation fuel and fuel oil), while other 5 companies were engaged in the distribution of the said oil products in the trade level. The investigation established that AB "Mazeikiu nafta" selected companies holding or potentially holding import licenses, also maintaining relations with producers of oil products in other countries and holding a significant share of the market for trade in oil products. AB "Mazeikiu nafta" concluded agreements with 5 companies providing for discounts for them in exchange for their obligations not to import the said oil products. In practice it meant that where any actual or potential foreign producer would have an intention to sell its products on Lithuanian market, the binding contractual obligations would prevent the resellers from purchasing and distributing the products of such a producer. As a result, the possibilities of the AB "Mazeikiu nafta" to increase the sale of its products in the said markets and thus reduce the competition between its own products and imported ones were significantly improved.

22. In 2004, the Competition Council initiated ex officio an investigation to establish whether the activity of the company could have possibly had an impact upon the constant rise in gasoline and diesel fuel price levels in Lithuania as compared to those in other Baltic States, also whether the lasting price differences could have resulted through the abuse of its dominant position in Lithuania. Although initially the investigation was started in accordance with Article 9 of the Law on Competition, suspicions having arisen in the course of the investigation that actions of AB "Mazeikiu nafta" also could affect the trade between the EU Member States (Lithuania, Latvia and Estonia), the Competition Council decided to supplement the investigation with the provisions of Article 82 of the EC Treaty. As the European Commission did not exercise its legal authority to subject the investigation to its jurisdiction, therefore the investigation was further continued by the Competition Council. The investigation allowed a conclusion that higher prices of fuels in Lithuania as compared to those in Latvia and Estonia have resulted from a number of reasons stemming both from the different conditions in individual areas of the Baltic markets, as well as actions restricting competition exercised by AB "Mazeikiu nafta". To a degree the price differences might have resulted due to differences in the excise duty conversion, also due to the requirements operational in Lithuania to accumulate the reserves of fuel, which in turn results in freezing part of the funds thus increasing the fuel prices, etc. However, the investigation established a number of facts and circumstances constituting a proof of the abuse of dominant position by AB "Mazeikiu nafta" by applying different strategies and economically groundless and discriminative pricing policy for Lithuanian, Latvian and Estonian buyers, as well as the annual loyalty and non-competing obligations, as well as other restrictive practices which resulted in dissimilar conditions for the entities operating in the market and

allowed discrimination of individual companies. Therefore the companies were forced to sell fuels to Lithuanian consumers at higher prices than in Latvia and Estonia.

2.4. Does your competition agency use benchmarks to assess the economic costs and benefits of government interventions that promote industrial policy or national champions? Have you communicated benchmarks to other economic policy makers? Is there any dependable analytical approach that allows you to distinguish industrial policy from competition policy? Do you engage in competition advocacy in this policy area?

23. Rules of Procedure of the Government of the Republic of Lithuania stipulate that draft legal acts proposed to the Government and related to competition and state aid to economic entities must be sent for comments to and agreed on with the Competition Council. The analysis is made to ensure that the provisions proposed do not contradict any national or EU competition legislation in force, our agency is however not engaged in any other industrial policy considerations.

2.5. Have merger review laws ever been suspended in your country? If so, why? Were concerns expressed either explicitly or implicitly about the way in which merger efficiencies are typically examined or in the way in which failing firms are analysed?

24. Merger review laws have never been suspended in Lithuania nor were any concerns expressed about the way in which mergers or failing firms are analysed.

2.6. Have any of your decisions ever been overridden on grounds of industrial policy? Are there any recent examples? What reasons were given? To what extent had the competition agency already considered the market characteristics or considerations that were the basis for the override? What have been the consequences of the override for consumers and competition policy?

25. None of our decisions has been overridden on grounds of industrial policy. The existing legal framework does not provide for such a possibility, yet it leaves some freedom of manoeuvre in other aspects.

26. Article 2(1) ("Application of the Law") of the Law on Competition lays down that this law "shall prohibit undertakings from performing actions which restrict or may restrict competition, regardless of the character of their activity, except in cases where this Law or laws governing individual areas of economic activity provide for exemptions and permit certain actions prohibited under this Law".

27. Article 4(2) ("Duty of Public and Local Authorities to Ensure Freedom of Fair Competition") of the Law on Competition stipulates that "Public and local authorities shall be prohibited from adopting legal acts or other decisions which grant privileges to or discriminate against any individual undertakings or their groups and which bring about or may bring about differences in the conditions of competition for competitors in the relevant market, except where the difference in the conditions of competition cannot be avoided when the requirements of the laws of the Republic of Lithuania are complied with.". Moreover, the provisions of Article 19(1)(4) ("Powers of the Competition Council") of the Law on Competition say that if public or local authorities infringe Article 4 of the Law on Competition and fail to comply with the request to amend or revoke legal acts or other decisions restricting competition, the Competition Council shall have the right to appeal against those decisions to the court, with the exception of the statutory acts issued by the Government of the Republic of Lithuania.

28. None of the above-mentioned exceptions were as yet applied in any resolutions of the Competition Council on the conformity of certain actions or decisions with the provisions of the Law on Competition.

2.7. Does your government implement some policies directly dedicated to innovation? If so, could you specify the sectors that benefit from these policies as well as the instruments used to foster innovation?

29. There are different measures, both national and co-financed by the EU Structural funds. These measures are not sector-specific. For the period 2008-2013, there are grant schemes for technical feasibility studies for SMEs, for R&D activities and facilities (labs, research centres etc.), for cluster management and infrastructure, for investment into new equipment and technologies, for investment into launching new e-business systems, new management methods and systems by SMEs, etc. These grant schemes conform to the EU State aid rules. There are also instruments of e.g., funding of public infrastructure in incubators, science and technology parks, i.e. public services in respect of innovation. Tax incentives are also provided: all companies investing in R&D are eligible for Corporate Income Tax reduction.

2.8. Did measures adopted in your country to deal with the recent economic crisis raise competition concerns? If so, could you describe the measures and the concerns? Have these competition concerns been taken into account, and, if so, how? In particular, have initial proposals been amended in order to comply with competition law? Have some of these measures been exempted from competition policy scrutiny?

30. On the contrary, due to the fact that Lithuania has a very limited access to financial resources, there are no measures to support undertakings, e.g., the Government tends to abolish all tax reductions. In case any support measures were to be introduced, the Competition Council would scrutinise them carefully for possible competition and state aid concerns.

3. Means and Goals

3.1. Please specify whether any of the following are instruments of industrial policy in your country:

- ***Government procurement***
- ***Exemptions from antitrust laws***
- ***Regulatory barriers to competition***
- ***Access to credit***
- ***Arranged mergers and acquisitions***
- ***Control of acquisitions of national companies by foreign investors***
- ***Other?***

31. The exemptions provided for in the relevant public procurement laws should not be attributed to the instruments of industrial policy since they are granted to public contracts related to State secrets or official secrets, to international agreements with other countries, to military supplies, to financial services etc. In conformity with the provisions of the relevant EU legislation, exemptions may be granted for entities operating in the water, energy, transport and postal services sectors.

32. The exemption from antitrust laws pursuant to Article 2(1) of the Law on Competition is described in the answer to Question 6 above. Other possible exemptions are only granted to agreements of minor importance which do not appreciably restrict competition (*de minimis*) and to agreements covered by the relevant EU block exemption regulations.

33. Regulatory barriers to competition exist only in respect of activities regarded as public services, e.g., in the field of heat and electricity sectors, universal postal services etc.

34. The Law on State Debt foresees the possibility for legal persons of the Republic of Lithuania as well as of the EU or EEA Member States established in the Republic of Lithuania to receive loans from the funds borrowed on behalf of the State, as well as State guarantees. Undertakings (i.e. legal entities engaged in economic activity) are eligible for loans and guarantees if they carry out an investment project included into the State Investment Programme. Such loans and guarantees must respect the EU State aid rules. In practice, these instruments are now targeted towards financing of public infrastructure.

35. The only arranged merger took place in 2008 when the national electricity company LEO LT was established merging three companies controlling the electricity production and distribution system in Lithuania. This merger was determined by the obligation, included in the Accession Treaty, to close the Ignalina nuclear power plant at the end of 2009. The new company is designated to invest in a construction of a new nuclear power plant and power connections with Poland and Sweden.

36. Control of acquisitions of national companies by foreign investors is exercised only if a particular company is included in the list of enterprises of strategic importance to national security (see above).

3.2. To what extent are industrial policies in your country motivated or rationalised as regional or national economic development initiatives? Has this explanation been used more sparingly over time as your economy expanded?

37. Lithuania is still one of the least-developed regions of the EU, the whole country is regarded as a region eligible for assistance under Article 87(3)(a) of the EC Treaty (aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment) therefore the main objective of different Lithuanian policies, including industrial policy, is national economic development. This explanation has so far not lost its importance and priority. State aids are also predominantly awarded under the objective of "regional development".

3.3. To what extent are industrial policies motivated or rationalised as an effort to help domestic firms withstand the exercise of market power by foreign firms? How does this rationale square with rules against market distortions caused by state aids? How has your competition agency analysed these circumstances?

38. There were no industrial policies motivated or rationalised referring to this motive.

3.4. Are industrial policies motivated or rationalised as a means to correct market failures in your country? If so, what types of market failures have been involved? How do you compare industrial policy or national champions with other policy approaches for correcting these market failures (such as taxes or subsidies on consumption of the product)?

3.5. Do you think that one nation engaging in industrial policy or supporting national champions attracts retaliation from other nations? To what extent are projected gains from industrial policy and national champions dependent on other nations not pursuing these policies, too? Do industrial policy and national champions constitute a "prisoners' dilemma" situation?

39. As an answer to both Questions 4 and 5, the following arguments against industrial policy, presented in the Long-term Economic Development Strategy of Lithuania until 2015, can be highlighted:

- the fact that, even if the market is deformed, there is no guarantee that industrial policy measures will distribute the resources more effectively than the imperfect market and
- the "risk of revenge from foreign countries".

MALTA

1. History and Evaluation

1.1. To what extent does the industrial policy in your country target firms on the basis of their nationality (e.g., by granting state aids/subsidies to national firms only, or by controlling their ownership)? If so, how is nationality defined?

1. Malta's industrial policy does not target firms on the basis of their nationality nor does Malta's legislation or regulators interfere with or control the ownership of market operators in any sector. There are no nationality prerequisites for the registration of companies or for the approval of mergers and acquisitions by the competition authority and generally nationality requirements are not attached to the granting of trading or operating licences.

2. In recent years the government has embarked on a sustained privatisation programme for government controlled entities that had enjoyed a state monopoly for a number of years. However, in none of the privatisation projects was Maltese nationality a requirement; indeed in most cases the business was acquired by foreign interests or a consortium involving foreign interests as in the banking, telecommunications and energy sectors.

3. Furthermore, legislation empowering the State to provide financial assistance and other forms of aid and incentives to industry does not make this grant of state aid conditional on the Maltese nationality of the beneficiary nor allow discrimination on the basis of nationality.

4. The Malta Enterprise, a government agency set up by the Malta Enterprise Act[1] to replace the pre-existing Malta Development Corporation, the Malta External Trade Company Limited and the Institute for the Promotion of Small Enterprise Limited, is entrusted by the said Act to inter alia originate, lead and further initiatives relating to the economic and social development of Malta in line with Government objectives, policies and goals; to lead Malta's strategy as relates to all forms of enterprise; to promote, assist and develop the establishment, competitiveness and internationalisation of enterprise in Malta; to develop the technological, human resource, and skills bases, and to strengthen the capacity of undertakings, to undertake strategic assessment and formulation, to innovate, and to undertake research, development and design activities; and to administer schemes, grants and other financial facilities requiring the disbursement of funds, including funds originating from foreign sources[2]. Neither this Act nor the Business Promotion Act[3] (following amendments in 2001) which is also administered by the Malta Enterprise empowers this government agency to exclude non-Maltese beneficiaries or to discriminate against them in the incentive schemes devised and operated by it.

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1 Chapter 463 of the Laws of Malta.

2 Ibid, Article 8.

3 Chapter 325 of the Laws of Malta.

5. Indeed the role of the Malta Enterprise is to provide incentives for both foreign direct investors as well as local enterprises demonstrating commitment towards growth and increase in value added and employment. To date it has provided incentives that fall in the following six categories:

- **Investment Aid**: Companies engaged in specific activities can benefit from tax credits on capital investment and job creation.
- **SME Development**: Grants targeting the creation and development of innovative start-ups, and the development of forward looking small and medium-sized enterprises.
- **Enterprise Support**: Assistance to businesses to support them in developing their international competitiveness, improving their processes and networking with other businesses.
- **Access to Finance**: Companies may be assisted through loan guarantees, soft loans, loan interest subsidies or royalty financing in the case of highly innovative projects.
- **Employment and Training**: Enterprises are supported in recruiting new employees and training their staff.
- **R&D and Innovation**: Various incentives to stimulate innovative enterprises to engage in research & development.

1.2. What economic conditions have been associated with government industrial policy and support for national champions in your nation and region? Has this changed over time as economic development advanced?

6. In the 1970s and early 1980s, as Malta was seeking to develop, strengthen and diversify its industrial and economic base. having recently (in 1964) obtained its independence from foreign rule when the economy was heavily based on military expenditure, government policy was largely based on an interventionist, protectionist approach through the use of price and import controls devised to protect the local industry and the creation of state monopolies or government-granted monopolies. After 1987 and especially following Malta's application for EU membership in 1990 (Malta joined the EU in 2004) more pro-market policies were adopted, leading to the dismantling of import barriers, liberalisation of markets and privatisation of state-owned enterprises and reduction of subventions. The extensive liberalisation and privatisation programme is still under way as temporary derogations won during the EU negotiation process expire. Today, the government is focusing its role in the economy on the regulatory aspect, facilitating rather than participating as an operator in economic activities while in certain sectors promoting the use of public-private partnerships and building strategic partnerships as part of its strategy to stimulate economic growth. Current industrial policy strategy, apart from maintaining and upgrading existing investment (most of which involves SMEs), is to attract new foreign direct investment (FDI) targeting primarily the sectors of pharmaceutical manufacturing and services; the ICT; biotechnology and bio-informatics; high-tech manufacturing; creative sectors; and the maritime and aviation industries.

1.3. Are there major success stories of industrial policy or national champions that are prominent in policy discussions? Are there any perceived major failures of industrial or national champion policies? How do you define "success" and "failure" in this context? Are successful national champion stories supported by best practice competition policy standards?

7. In the 1990s Malta managed to successfully diversify its economy from one initially based on tourism and light and heavy manufacturing such as textiles and shipbuilding to an economy thriving on 'new' economy products and services such as in the Information and Communication Technology (ICT) and financial services sectors and on high value-added manufacturing industries by for instance attracting foreign direct investment in the pharmaceutical industry.

8. The country's ICT vision has registered considerable success in the attraction of ICT companies operating from Malta. Government's commitment to establish Malta as an ICT centre of excellence has led to vertical strategic alliances with the leading international ICT firms, while a number of other foreign ICT companies are locating their operations in Malta. A major deliverable of this strategy was the development and implementation of a Technology Centre of Excellence in the region. SmartCity Malta is the vehicle for the realisation of this deliverable as it will create a state-of-the-art ICT and Media Park on the models of Dubai Internet City and Dubai Media City and is the largest foreign direct investment in the ICT and media sectors ever made in Malta.

9. However, industrial policy and competition policy have always been considered as complementary rather than conflicting policies. The small size of the domestic market tends to limit the scope for competition in a number of markets. In the presence of imperfect market structures, one of the tenets of Malta's industrial policy, as reiterated in several policy documents, has been that ever more aggressive regulation and supervision of market players should be adopted. The strengthening of competition policy and competition authorities has thus always been a key priority, with further liberalisation of economic sectors deemed necessary to enhance the degree of competition in the domestic markets.

1.4. Does your competition agency use benchmarks to assess the economic costs and benefits of government interventions that promote industrial policy or national champions? Have you communicated benchmarks to other economic policy makers? Is there any dependable analytical approach that allows you to distinguish industrial policy from competition policy? Do you engage in competition advocacy in this policy area?

10. The Office for Fair Competition does not use benchmarks to assess the economic costs and benefits of government interventions that promote industrial policy or national champions but it uses competition advocacy to ensure that industrial policy does not damage competition: it comments on and recommends changes to proposed or adopted legislation, government measures or government policy that it considers not to be in line with competition principles or that raise competition concerns. Moreover, since 2004, no undertaking, including public undertakings or state controlled entities with special or exclusive rights, and no economic sector is excluded from the scope of the competition rules; so national champions are subject to the full rigours of competition law as any other undertaking. The only exception is where the undertaking is entrusted with the operation of services of a general economic interest or has the character of a revenue producing monopoly where the Office would refrain from subjecting such activities to the full rigour of the competition rules if their application would obstruct the performance, in law or in fact, of the particular tasks assigned to the undertaking; yet even here this exemption is applied very restrictively[4]. As for state aid, there is a specific agency, the State Aid Monitoring Board that reviews and assesses existing and new state aid and provides advice about their compatibility with EU State Aid law and acts as an interlocutor with the European Commission on State aid matters[5].

4 Competition Act, Chapter 379 of the Laws of Malta, Article 30.

5 Business Promotion Act, Chapter 325 of the Laws of Malta, Articles 57-58.

1.5. Have merger review laws ever been suspended in your country? If so, why? Were concerns expressed either explicitly or implicitly about the way in which merger efficiencies are typically examined or in the way in which failing firms are analysed?

1.6. Have any of your decisions ever been overridden on grounds of industrial policy? Are there any recent examples? What reasons were given? To what extent had the competition agency already considered the market characteristics or considerations that were the basis for the override? What have been the consequences of the override for consumers and competition policy?

11. The Control of Concentrations Regulations[6], Malta's first merger review law, entered into force on 1st January 2003 and has never been suspended. Industrial policy considerations have never featured in the assessment of concentrations, the test being solely whether the concentration might lead to a substantial lessening of competition in the Maltese market or a part of it. No concerns have ever been expressed about the way that the Office for Fair Competition that is responsible for its implementation assesses efficiencies or failing firms under these provisions, though to date there has been no concentration that though raising competition concerns was cleared on the basis of efficiencies or the failing firm defence. The Regulations and the Competition Act do not empower the government to override any decision of the Office for Fair Competition on grounds of industrial policy or any other ground. The decisions are reviewable only by the Commission for Fair Trading, an independent administrative tribunal, which may overturn these decisions only on competition grounds.

1.7. Does your government implement some policies directly dedicated to innovation? If so, could you specify the sectors that benefit from these policies as well as the instruments used to foster innovation?

12. Malta, with the exception of the ICT sector, has been lagging behind in R&D expenditure and has been regressing in terms of its competitiveness and the supporting role played by research and innovation in this regard. The figures for business research and innovation for 2003 show that expenditure on R&I from the private sector constituted only 0.069% of GDP while the public R&I expenditure stood at a mere 0.19% of GDP. However, the government has now embarked on a strategy of actively promoting research and development and innovation and the European Innovation Scoreboard (EIS) for 2008 places Malta in the category of countries that are 'catching up'. It certifies that Malta's innovation performance is below the EU27 average but the rate of improvement is above that of the EU27. The report confirms that Malta's relative strengths are in the availability of finance for innovation projects and the support by the government for innovation activities; however, the number of firms that have introduced innovations onto the market or within their organisations, covering technological and non-technological innovations, remains low[7].

13. R&D activity in the business sector is largely concentrated in 30-40 firms and is clustered around a number of specific sectors, mainly related to high-value-added manufacturing in ICT, manufacture of machinery, manufacture of chemicals and medical instruments, financial intermediation, food and beverage, and printing, among others. The precise level of sectoral R&D activity is difficult to determine, since official statistics are not readily available, and are often not reliable since firms do not always report their R&D activity or give incomplete information. This makes it difficult to determine the level of intensity of private R&D investments as a percentage of sectoral GDP.

14. Malta's industrial sector is characterised by a dual structure. On the one hand, industry predominantly consists of domestically-owned micro enterprises primarily local market oriented and

6 LN 294 of 2002 as subsequently amended.

7 http://www.proinno-europe.eu/EIS2008/website/docs/EIS_2008_Final_report.pdf

engaged at the lower end of the technological ladder generally lacking the critical mass to engage in research, technological development and innovation. On the other hand, Malta's industry comprises a number of foreign owned affiliates of multinational conglomerates which undertake research, technological development and innovation activities in home economies and merely transfer technology to Malta in accordance with corporate strategies to serve the needs of the local manufacturing arms. This state of affairs has so far resulted in limited inter-linkages between the domestic and foreign sector, primarily as a result of lack of economies of scale and scope.

15. Government initiatives to boost research and development and innovation have taken mostly the form of aid schemes administered by the Malta Enterprise. As stated above, some of the financial and fiscal incentives provided by the Malta Enterprise are directly devised to facilitate R&D expenditure and encourage innovation and to attract to Malta foreign enterprises that are innovation driven such as the package of aid schemes specifically designed to stimulate innovative enterprises to engage in research & development. Malta's National Reform Programme 2008-2010 envisages that further aid in this category will be granted via incentives such as the EUREKA and the EUROSTARS initiative together with the R&D grant schemes funded under the European Regional Development Fund (ERDF). Encouraging innovation will take place through the implementation of a grant scheme funded under the ERDF promoting product and process innovation together with eco–innovations.

16. Moreover, in the National Reform Programme the government undertakes to raise its R&D expenditure in relation to GDP from its current 0.3% to 0.75% by 2010, to support innovation through public procurement, to participate in joint programming activities and to target research strategies for identified priority areas. For the next two years government has identified two priority areas: (i) increased efforts towards more and better research in the manufacturing sector and (ii) formulation of a health research strategy and action plan.

17. Furthermore, in the Industry Strategy for Malta: 2007-2010 the Government advocates clustering and networking for industry as it considers that inter alia the mix of competition and co-operation would act as underlying drivers of learning and innovation.

18. Malta's accession to the European Patent Convention in March 2007, as well as Malta's strong patent laws, also served to encourage innovation.

1.8. Did measures adopted in your country to deal with the recent economic crisis raise competition concerns? If so, could you describe the measures and the concerns? Have these competition concerns been taken into account, and, if so, how? In particular, have initial proposals been amended in order to comply with competition law? Have some of these measures been exempted from competition policy scrutiny?

19. None of the measures taken so far to deal with the current economic crisis have raised competition concerns.

2. Means and Goals

2.1. Please specify whether any of the following are instruments of industrial policy in your country:

- ***Government procurement***
- ***Exemptions from antitrust laws***
- ***Regulatory barriers to competition***
- ***Access to credit***
- ***Arranged mergers and acquisitions***
- ***Control of acquisitions of national companies by foreign investors***
- ***Other?***

20. The Public Contracts Regulations ensure that there is no discrimination between economic operators and that all economic operators are treated equally and transparently in all calls for tenders whatever their estimated value[8]. There are some contracts that are exempted from this rule but this exception is not there for industrial policy purposes as it applies to public contracts awarded in pursuance of an international agreement concluded by Malta in accordance with EC rules, public contracts linked to the protection of Malta's security, public contracts relating to public telecommunications networks and various public service contracts.

21. No economic sectors or undertakings are exempt from antitrust laws. Any remaining regulatory barriers to competition post EU accession are being progressively dismantled and markets fully liberalised to competition. Though certain state monopolies remain (e.g. in respect of transmission of electricity where Malta obtained a derogation from certain provisions of the Electricity Directive because it is a 'small isolated system') and some licensing systems have been retained to limit the number of operators in the markets concerned, these are justified and necessitated by the constraints and market imperfections inherent in small market economies (like Malta) and not driven by any industrial policy considerations.

22. There are no government restrictions on access to credit but, as shown above, Government through the Malta Enterprise facilitates access to credit through various schemes. As for mergers and acquisitions there is no government or regulator interference except for oversight by the Office for Fair Competition that, as explained above, may block or force changes to mergers or acquisition only on purely competition grounds.

2.2. To what extent are industrial policies in your country motivated or rationalised as regional or national economic development initiatives? Has this explanation been used more sparingly over time as your economy expanded?

23. As reiterated by various policy documents, Malta's industrial policies are essentially geared at promoting a competitive and high value adding economy and achieving sustainable socio-economic development for a better quality of life and a more sustainable use of the environment.

2.3. To what extent are industrial policies motivated or rationalised as an effort to help domestic firms withstand the exercise of market power by foreign firms? How does this rationale square with rules against market distortions caused by state aids? How has your competition agency analysed these circumstances?

24. Malta's industrial policy is not devised as a means of protecting local industry against the exercise of market power by foreign firms but, operating within the confines of EU State Aid law and

8 LN 177 of 2005 as subsequently amended, Reg 4.

Maltese and EC antitrust rules, as explained above, it is intended to increase the competitiveness of local industry (largely composed of SMEs) particularly in so far as their R&D and innovation efforts are concerned or where they are expanding into new international markets.

2.4. Are industrial policies motivated or rationalised as a means to correct market failures in your country? If so, what types of market failures have been involved? How do you compare industrial policy or national champions with other policy approaches for correcting these market failures (such as taxes or subsidies on consumption of the product)?

25. None of the industrial policy measures are intended as a means of correcting market failures.

2.5. Do you think that one nation engaging in industrial policy or supporting national champions attracts retaliation from other nations? To what extent are projected gains from industrial policy and national champions dependent on other nations not pursuing these policies, too? Do industrial policy and national champions constitute a "prisoners' dilemma" situation?

26. Supporting national champions by exempting them from the full rigour of the competition and state aid rules or by shielding them from competition on the home market through regulatory barriers is counter-productive as it invites retaliation from other States and actually weakens the firm's competitiveness in the international markets as the challenge of facing competition at home would drive the firm to lower its costs and boost its efficiency and sharpen its innovative drive. If all States were to adopt a pro-national champion approach the result would be less efficient firms in the market to the detriment of consumer welfare and consumer interests. Thus, even for a small nation it is not in its interests to promote champions by following a lax competition policy. On the other hand, one should distinguish industrial policy from a national champion policy as an industrial policy that seeks to sharpen the competitiveness of local industry and instil or heighten the innovative drive and make industry more high-tech and knowledge intensive has the same goal as competition policy – that of consumer welfare.

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PAPUA NEW GUINEA

1. Introduction

1. Papua New Guinea (PNG) has been an independent nation since 1975. For many years it was thought that the economy had not developed enough to warrant competition law. There was some limited consumer protection law and price control. Furthermore with most utilities being provided by the national Government time was not ripe for competition law. Industry was largely Government run or controlled.

2. However with the move to privatisation of some utilities and the development of the PNG economy competition law was introduced. That process commenced in 1996.

3. Competition Policy and Industrial Policy became part of the same goal, economic efficiency and consumer welfare.

4. The policy was to open up markets to imports, foster exports and generally encourage competition. Industries that lacked competition were subject to regulation by the competition regulator, including price control in some limited circumstances.

5. In 2002 the PNG Parliament enacted the Independent Consumer and Competition Commission Act 2002. It created the Independent Consumer and Competition Commission (ICCC). The ICCC, the consumer protection provisions and the regulatory provisions came into effect on 16 May 2002. The competition provisions did not come into effect until 16 May 2003.

6. The competition provisions, referred to as the Market Conduct Rules, are based on those in the New Zealand Commerce Act and are similar to the competition provisions applying in most developed economies. Broadly speaking, the Market Conduct Rules prohibit arrangements which substantially lessen competition (with a per se prohibition of price fixing); resale price maintenance; exclusionary conduct (primary boycotts); and misuse of market power (abuse of dominant position). Anti-competitive mergers or acquisitions are also prohibited. Authorisation by the ICCC on public benefit grounds can be applied for – a small number of authorisations on public benefit grounds have been approved by the ICCC since 2003 for business acquisitions or for anti-competitive arrangements.

7. The law is tailored to meet PNG needs. In particular there are provisions regulating PNG's monopoly (government owned) utilities. There is also provision for price control, though the number of products which are currently subject to price control or price monitoring is very few.

8. In effect the ICCC Act has an overall competition and consumer protection mix. In addition the Act has some unique provisions relating to essential utilities which affect the bulk of PNG consumers.

2. Clearance and authorisation.

9. The Act provides for both clearance and authorisation in relation to mergers and has set time limits for both. In relation to clearance the ICCC has to make its decision within 20 days, in relation to authorisation it is 72 days. [Clearance is where the ICCC is requested to declare whether or not a merger

may result in a substantial lessening of competition. Authorisation is where a merger or acquisition which would or might substantially lessen competition, and thus be in breach of the law, can be exempted on public benefit grounds.]

10. Authorisation (but not clearance) is also available for conduct which would otherwise be prohibited by the other competition provisions of the Act, except for taking advantage of market power (abuse of dominant position) which cannot be authorised. In a small non trade exposed economy such as PNG there is a very high likelihood that many mergers will substantially lessen competition. Further, conduct such as resale price maintenance and exclusive arrangements that have no doubt been prevalent in PNG for many years are now either clearly unlawful or potentially unlawful.

11. The clearance and authorisation processes allow other factors and policies to be taken into account when considering competition issues, including industry policy.

3. Regulatory and price control provisions of the ICCC Act

12. In addition to its functions in administering competition law, the ICCC has other industry regulatory and price control roles.

13. PNG industry regulatory framework relates specifically to government owned monopoly utilities, where there is a "regulatory contract" between each of the utilities and ICCC (on behalf PNG consumers), which sets a price path for the monopoly services provided by that utility, going forward into the medium to long term future, as well as setting out required service quality standards,. Those regulatory contracts with the ICCC exist in relation to electricity, water, ports, telecommunications and postal services.

14. The regulatory contracts are developed and enforced and reviewed by the ICCC. The contracts relate to pricing, service standards, innovation, capital expenditure plans and increased efficiencies.

15. Price control has been rolled back in recent years but still applies to some basic commodities used by PNG citizens. For example price control or price monitoring exists in relation to fuel, public transport services, rice and flour.

16. In addition to its regulatory contracts and price regulation functions, the ICCC conducts regular reviews of sectors of PNG industry and advises the Government on possible changes to regulation or policies generally in those industries. Recent reviews include petroleum, coastal shipping, tourism, general insurance, and the water and sewage industries. Through these reviews, the ICCC's views on competition policy can be injected into the debate on industrial policy in these industries.

4. The ICCC

17. The ICCC is the only national regulatory body that acts as a consumer and business watchdog. The provisions of the ICCC Act apply to all businesses in Papua New Guinea including government enterprises. The ICCC Act also applies to conduct outside PNG which affects the PNG market.

18. The ICCC was set up to be independent from government interference or pressure from individual Ministers or politicians, in recognition of the importance of the industry regulator having integrity and a totally professional and objective approach to its tasks, protected from outside influence. This was seen as being particularly important in the PNG environment where, as with many developing countries, corruption and lack of transparency in decision making have been major impediments to business confidence – particularly so where PNG has in recent years received an adverse rating from Transparency International on its worldwide corruption index – 161st out of 179 countries.

19. To ensure this independence and integrity, the Commission consists of a full time Commissioner and two part time Associate Commissioners, all of whom are appointed by a committee which includes both the Prime Minister and the opposition leader. One Associate Commissioner position is allocated to an overseas industry regulation expert. Commissioners, who are appointed for five years, are protected against arbitrary dismissal by having, in effect, the tenure of a senior judge. In addition, the ICCC Act expressly provides that the Commission is not subject to direction or control by a Minister or anyone else in the performance of its functions, except for certain specific, publicly notified directions.

20. In performing its functions and exercising its powers under the ICCC Act, the ICCC is required to have regard to the following primary objectives:

- to enhance the welfare of the people through the promotion of competition and fair trade and the protection of consumers' interests;
- to promote economic efficiency in industry structure, investment and conduct; and
- to protect the long term interests of the people with regard to the price, quality and reliability of significant goods and services.

21. The ICCC Act also gives the ICCC a number of facilitating objectives:

- to promote and protect the bona fide interests of consumers with regard to the price, quality and reliability of goods and services;
- to ensure that users and consumers (including low-income or vulnerable consumers) benefit from competition and efficiency;
- to facilitate effective competition and promote competitive market conduct;
- to prevent the misuse of market power;
- to promote and encourage the efficient operation of industries and efficient investment in industries;
- to ensure that regulatory decision making has regard to any applicable health, safety, environmental and social legislation; and
- to promote and encourage fair trading practices and a fair market.

22. These primary and facilitating objectives require the ICCC to focus on industrial policy in carrying out its functions and, thus, give the ICCC a central role in the administration of industry policy.

5. Interaction between the ICCC's promotion of competition, and its regulatory roles

23. The ICCC's primary objective is the enhancement of consumer welfare, while the protection and promotion of competition is one means towards achieving that end. PNG is a small economy and competition is not always possible but consumer protection is essential. There may be circumstances where price regulation or other government intervention is needed to protect consumers and make sure that they have access to best value goods and services.

24. The competitiveness of a market affects the level of consumer protection required. In PNG we strive for competitive and informed markets but that is not always possible and hence substantial reliance on regulatory and price controls.

25. In circumstances where there is little or no competition in the market (e.g. in a natural monopoly situation such as a telephone or electricity utility, and particularly in small economies that tend to have less competitive markets) there may be greater justification for intervention to ensure that consumer welfare is maintained because competition is not driving the market.

26. In short, the amount and type of regulation there should be to ultimately benefit consumers will depend on the competitiveness of markets. In highly contested markets, regulation should be only introduced with great care, while in markets where there is little or no contestability; some form of regulation may be more readily justified. That regulation may extend, in some cases, to price regulation or price control for particular commodities or services, where market forces alone cannot restrain prices, even though price control is, in one sense, the antithesis of competition regulation.

27. Given the high degree of interaction between the two policies, it is not possible to determine competition law policies and consumer protection policies in isolation. It is not only possible, but necessary, to administer these laws in harmony to achieve the ultimate goal of consumer welfare.

6. Importance of competition policy to a small economy

28. Competition policy, which is appropriately designed and effectively enforced, can be more important in small economies than in larger ones.

29. Small economies can support only one or two competitors in many industries, because of the small size of the markets. Openness to trade is a good solution to many of the problems of small size, because it enlarges the market, but competition policy also plays a crucial role in regulating market activity; it helps trade by reducing barriers to both foreign importer entry and domestic product exports; it plays a critical role where exposure to international trade is not sufficient to solve a small economy's efficiency problems; and where artificial trade barriers (such as tariffs) are not reduced, competition policy is an alternative for regulating 'closed' small markets. In this sense, competition policy is a subset, or an integral part, of industry policy.

30. However, since competition policy is adopted to address various failures of the market, the policy should be carefully designed to deal effectively with the unique obstacles to competition that are present because of the small size of the economy.

31. The main goal of competition policy in small economies should be to promote efficiency. But when considering competition policy for small economies you are faced with a dilemma.

32. On the one hand, large firm or plant size may be required in order to achieve efficient scales of production, so it may be that only one or two firms can operate in an industry in order to achieve efficiency.

33. But on the other hand, the high level of concentration, or even monopoly control, of a market that results can lead to certain types of industry behaviour that is very damaging to efficiency.

34. The case studies on national champions, set out below, demonstrate how this damage can occur unless it is carefully managed.

7. Industry Policy issues - interaction and conflict with competition law

7.1. Protectionism

35. Starting in 1999, significant unilateral trade liberalisation began in PNG under the Tariff Reform Program. Most imports (about 75% in value) enter duty free. Tariffs are applied to those products that are made, or could be made, in PNG. Rates on these imports have declined by 5% in each of January 2001, 2003 and 2005 to their current rates of 40%, 25% and 15% for the prohibitive, protective and intermediate product rates respectively.

36. PNG has no antidumping, countervailing duty or safeguard mechanisms (trade remedy instruments). Some manufacturers, feeling the effect of the Tariff Reform Program, are urging the PNG government to legislate for such trade remedy instruments. PNG's Import-Export Impediments Subcommittee has been specifically requested to address, and potentially prepare legislation and procedures, for the trade remedy instruments. It is possible that unless some reasonable trade remedy instruments are designed, legislated and enacted, future Tariff Reforms will be stalled. Some PNG negotiators consider trade remedy instruments necessary before considering future cuts.

37. PNG has entered into FTA agreements with the Pacific (Pacific Island Country Trade Agreement and sub regionally with the Melanesian Spearhead Group Trade Agreement) and the EU. The latter being part of the EU's EPA initiative for the Pacific ACP countries (PACPs). An interim agreement has been initialled and a comprehensive agreement including services and development issues are to be negotiated. The latter may include a competition law provision.

38. The entry into the above FTAs has triggered Article 6 of the Pacific Agreement on Closer Economic Relations (PACER) agreement which requires the Pacific states to commence negotiations for a full FTA with Australia and New Zealand. Australia has indicated their desire to enter into these PACER+ negotiations. Australia is the exporter for 56% of PNG's imports. If negotiated, PACER+ will have significant implications.

39. The likely precedent to be used in the PACER+ negotiations will be the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZERTA). ANZERTA has one of the strongest set of competition law provisions of any regional trade agreements. We understand that the competition law provisions go beyond co-operation and comity issues and require competition principles to be used in applying trade remedy instruments.

40. Generally speaking, both trade remedy and competition policy legislation and application has been prone to regulatory capture by protectionist influences, industrial policy advocates and self-interest groups. With PNG looking for rapid industrial and resource development, this is potentially a minefield for PNG's competition, trade and investment liberalisation objectives. Some potential investors in PNG have taken advantage of PNG's situation of a small and underdeveloped economy needing to develop its industrial base, combined with PNG's relatively high perceived sovereign risk, to extract concessions and competition advantages from the government including tax holidays, import protection, and short or long term monopoly rights, as conditions required before the new investment will be made. Successive governments have felt obliged to accede to these demands, being concerned that the investments will not go ahead without it. Some instances of this can be seen in the case studies on national champions.

8. National Champions

41. Since independence in 1975, PNG has had a policy of supporting some national champions which are seen as of strategic importance to the national economy or to the effective operation and development of infrastructure. However, this is a relatively limited policy; PNG does not have any

significant number of statutory monopolies (though the size and nature of its economy means that there are many areas of natural monopoly) and the statutory monopoly protection or statutory market preference which does apply, has been diminishing in recent years.

42. This diminution is due to the introduction of general competition law and industry regulation in 2002 through the ICCC Act, described earlier. The general competition law (market conduct rules) in the ICCC Act have universal application across all industries in PNG, and also apply to government insofar as it carries on a business. There is provision for exemption from the application of the Act to acts which are specifically authorised by legislation, though such instances are rare.

43. More particularly, when competition law was introduced in 2002, the statutory frameworks supporting major utilities (such as electricity, water, telecommunications, ports and harbours and the like, which had until then been government owned and run state monopolies), were changed to allow competition in those industries, with a licensing regime for both the existing monopolists and any new competitors. Those utilities had by then been corporatised with the intention of their being privatised, though that privatisation has not generally occurred.

44. However, while competition is now permitted in most of these utility sectors, some of the utilities retained some statutory monopoly positions, at least for a limited time. As explained earlier, the utilities regulatory framework involves the ICCC setting long term price paths and service quality standards for the monopoly activities of these utilities, either through the ICCC Act or through price regulation under the Prices Regulation Act. Thus some of the utilities can be regarded as "national champions" because of their strategic importance to the national economy and social structure.

45. With the utilities reforms of 2002 it was intended that the statutory monopoly protection which the utilities retained, would be reduced over time until that protection was fully removed and those markets became fully competitive. It was hoped that at that stage the special regulatory arrangements regulating consumer price paths and specifying service quality standards may also be able to be removed, with regulation of prices and service quality for utility industries being driven by market forces and the general application of competition law.

8.1. Telikom PNG Limited

46. The best example of what has occurred since 2002 with utilities regulation and the continued protection of national champions in PNG is in the telecommunications sector, with Telikom PNG Limited (Telikom).

47. Telikom (originally the Postmaster General's Department) was, in 2002, the sole licensed operator for fixed lines and also the sole licensed mobile (cell phone) operator. When the 2002 reforms were introduced, Telikom's existing statutory monopoly was expected to continue for five years, ending in 2007. This monopoly was secured by the ICCC being prevented from issuing any competing fixed line carrier or mobile carrier licences until October 2007. It was anticipated that by that time, Telikom should have developed and improved its business and services to a point where it would be able to effectively compete with other mobile and fixed line operations, which would then be licensed to develop and operate new mobile and fixed networks in open competition with Telikom. It was felt that that five years' additional protection from competition for Telikom, until 2007, should have been sufficient to protect Telikom, as a national champion, to allow it to then operate successfully in a competitive environment.

48. In December 2005, Government Policy changed, to require the introduction of two new competitors to compete with Telikom in mobile telephones after March 2006, while Telikom's monopoly in fixed lines was to remain until October 2007. There is now active and vigorous competition between

Telikom and Digicel in the mobile market (the second new competitor not yet having commenced operations). However, attempts were made in 2006 and 2007 by some in government to reinstate Telikom's monopoly in mobiles as well as fixed lines, on a permanent basis. These moves, which were strongly criticised at the time by the business and wider communities in PNG, were not successful in preventing Digicel from competing with Telikom in mobiles. However, Government Policy was changed in 2008 to, in effect, continue Telikom's monopoly over fixed lines beyond 2007, and to legislate Telikom's monopoly over international gateways (and thus monopolise all international telephone business) for an indefinite period until full competition is achieved.

49. This change in policy was explained as being necessary to enable Telikom, as the national champion in telecommunications, to continue to receive monopoly rents from fixed line and international telecommunications, to enable Telikom to transform itself into a strong and effective competitor. The Government has said that this is stage one of a two stage process leading towards open competition in international markets and, presumably, in all other areas including fixed lines. The Government has committed to the European Union that stage two, open competition (in international gateways at least), will occur during 2009.

50. Thus the national champion in telecommunications, Telikom, is continuing to receive government monopoly protection in fixed lines and international, though with the stated objective of moving into a fully open competitive environment in the future.

8.2. PNG Power Limited

51. The only other utility which has statutory monopoly protection is PNG Power Limited, formerly the Electricity Commission, though only in a limited way. Since 2002, persons operating electricity generation, transmission, distribution and retailing businesses have been required to be licensed by the ICCC and can operate in competition with each other. PNG Power has licences for each of those four activities. However, its electricity retailing licence is a monopoly in respect of those places which were supplied retail electricity by PNG Power in 2002 and which are still being supplied by it. In new areas for supply, PNG Power does not have any monopoly rights.

52. Thus electricity generation, transmission and distribution are fully competitive (though few licences have been requested or issued to anyone other than PNG Power), while PNG Power retains its retailing monopoly in those areas which it serviced prior to 2002, and new service areas are also open to retail competition.

53. There are no statutory monopolies for other utilities, though some retain effective natural monopolies.

8.3. Air Nuigini Limited

54. Air Nuigini, which is government owned, originally had an effective monopoly over scheduled air services domestically and internationally. For several years, Air Nuigini has faced competition on domestic routes from privately owned competitors, principally Airlines of PNG Limited, and in the last year or so Airlines of PNG has been competing with Air Nuigini on some international services. There are no statutory or legislated monopoly rights for Air Nuigini.

55. However, in recent months, the government, in promoting Air Nuigini as the national carrier, and in effect a national champion, has provided financial assistance to Air Nuigini on non-commercial terms, including by way of non-repayable grants, to enable Air Nuigini to purchase additional aircraft and, in at least one instance, giving a grant to allow Air Nuigini to continue to operate a seriously loss-making international route.

56. While Air Nuigini enjoys no special statutory advantages over its competitors, the financial assistance given by the government to its national champion, air Nuigini has the capacity to distort competition in PNG's domestic and international airline markets.

8.4. Major Oil and Gas Projects

57. There have been instances where the Government has chosen national champions for special treatment or exemption from competition laws, as an inducement to the development of projects in PNG involving oil and gas. In 1997, the then government agreed, as part of an arrangement for the construction of an oil refinery in PNG, to ensure that the refinery operator, InterOil Limited, would have an effective monopoly over the supply of fuel to all domestic fuel distributors in PNG. After the competition law was enacted in 2002, the government was obliged, by its project agreement with InterOil, to make a regulation exempting InterOil's monopoly over supplying fuel to domestic distributors from the application of the competition law. This means that InterOil has an effective stranglehold over the supply, by imports or otherwise, of petrol, diesel and kerosene throughout PNG.

58. In 2006 when InterOil sought to acquire domestic fuel distributors in PNG which would give it a retail market share in excess of 60%, as well as its monopoly on supply to all distributors, the government submitted very strongly to the ICCC that InterOil's acquisition should be authorised on public benefit grounds, notwithstanding the anti-competitive effects of the acquisition. That acquisition was authorised by the ICCC, largely on the basis of the government's strong submission in favour.

59. In more recent times, the government has also granted exemption from various regulatory provisions, through amendments to several pieces of legislation, to a consortium headed by Exxon Mobil in relation to a major oil and gas exploration/production project in PNG. The exemptions include no price regulation over any products produced by the consortium (though most or all of that product would be exported anyway) and exemption from the essential pipeline access legislation which otherwise applies in PNG.

60. There is another major oil and gas exploration project under discussion in PNG involving InterOil, amongst others, and there is a probability that this project will also be granted a range of exemptions from the application of PNG law.

61. It is, of course, impossible to say whether these major oil and gas projects would have got off the ground if the exemptions they had sought had not been granted, but they do provide real life examples of the government picking national champions, albeit foreign owned, for special favourable treatment not accorded other industry participants in PNG.

9. Conclusion

62. The favourable treatment accorded these national champions may not be in the best interests of national industry policy nor in accord with best practice competition policy, however the circumstances of PNG's economic and political development have forced the government to accord that special treatment to those particular enterprises.

RUSSIAN FEDERATION

1. On November 17, 2008 the Government of the Russian Federation adopted a "Concept of Long-term Social and Economic Development of the Russian Federation until 2020" the main objective of which is to determine ways to ensure in long-term perspective (2008-2020) the stable growth of welfare of the Russian citizens, national security, dynamic development of economy, strengthening Russia's positions in the global community.

2. This Concept contains tasks for development of social aspects and different sectors of economy, including raising of competitiveness of the Russian products on the global market. This envisages structural changes of industries and industry's diversification. The major objective is moving to the high-technology-based economy.

3. The notion of necessity of competition threads the whole Concept. Therefore the balance of competition policy and industrial policy is seen with unaided eye.

4. What is more the Federal Antimonopoly Service (FAS Russia) provides on an annual basis the Report to the Government "On Competition in the Russian Federation" that addresses major challenges for competition development in all the sectors of economy, including oil and gas, power energy, transport, retail, construction and many others. Along with describing the current situation the Report contains specific actions to be undertaken to eliminate the threats for competition development and aimed at pro-competitive development of different sectors of the Russian economy. This Report is available online on the official web-site of the FAS Russia.

5. Along with this Report the FAS Russia together with the Ministry of Economic Development has elaborated the Program for Competition Development in the Russian Federation (to be adopted shortly), which covers the issues of threats to competition and means for their elimination, competition development in the sensitive and socially-important sectors of economy. Moreover, this Program contains proposals on competition policy improvement.

6. All the above mentioned documents determine the strategy of pro-competitive development of the Russian economy and ensure the balance of competition and industrial policy in Russia.

7. Moreover, the Russian Ministry of Industry and Trade has been elaborating a number of industrial sectors policies that determine the strategy of their development for the certain period of time. For instance these policies include:

- Development Strategy for aviation industry till 2015;
- Development Strategy for electronic industry till 2025;
- Development Strategy for shipbuilding industry till 2020, etc.

8. All of them have been adopted in compliance with the Russian legislation and procedure which means that all the interested state agencies are to agree on them. The FAS Russia has taken an active part in introducing competition principles to all of these documents.

9. The great load of the FAS Russia activity concerns natural monopolies regulation (gas and oil sector, railways, post, etc) aimed primarily at achieving the balance of consumers and natural monopolies interests that ensures availability for consumers of the sold goods and effective functioning of natural monopolies.

10. The FAS Russia has a number of successful implementations of reforms of monopolistic sectors in order to ensure their pro-competitive development, such as the one in power energy sector (which is considered to be the best one in the world from the competition perspective), telecommunications, railways, oil and gas sector, air transportation, etc. Usually in order to implement such reforms basic structural and institutional reorganisations are being conducted, fundamentals of the sector legal base meeting the market conditions are being formed, functions of state management and economic activity are being separated, a system of state regulation complying with the new conditions is being created.

11. Other tools of this state economic regulation is formation of rules on non-discriminatory access to the infrastructure of the natural monopolies and continuous activity on separation of potentially competitive and naturally monopolistic sectors which is based on the fact that natural monopolies were initially created as vertically integrated companies. It should be underlined that according to the law on natural monopolies constraint of economically justified transfer of the spheres of natural monopolies to the competitive market is prohibited.

12. The FAS Russia is also concerned with the growth of the price pressure on economy by natural monopolies due to their non-effectiveness. In order to settle this problem the FAS Russia suggests introducing significant amendments to the legislation on natural monopolies aimed at reduction of their costs, at toughening of state control over them (one of the options is to introduce the procedure of confirmation and agreement by all the state authorities of investment programs of the natural monopolies).

13. What is more the FAS Russia is truly concerned with threats to the competition development that are posed by creation of state corporations in various sectors of economy, which was explicitly described in the 2007 Annual Report of the FAS Russia to the Government of the Russian Federation. State participation in such entities leads to distortion of competition on the relevant markets.

14. To eliminate these concerns the following measures are considered by the FAS Russia as appropriate:

a) Enhancement of competition control over public entities. Despite that public entities are created as non-commercial organisations they conduct economic activity and make profit, this is why they are fully applicable to the competition law. The competition authority has a right to get access to any information of public entities.

b) Restitution of powers (bill drafting, supervising, control and enforcement) from all the public entities back to state and setting of legal prohibition for such delegation of functions.

c) Expansion of using tender mechanisms by public entities under purchase of goods, works, services from private Russian companies. Practice of holding auctions for public procurement has shown high effectiveness of these market mechanisms.

d) Ensuring transparent functioning of public entities for which is necessary to: determine clear criteria of assessment of their activity, introduce according to the principles of the administrative

reform the system of indicators of their work, toughen requirements to report, modernise system of state statistic supervision over public entities and companies controlled by them.

e) Introduction of moratorium on creation of new public entities until organising effective system of monitoring and control over activity of already existing entities, as well as their demonstration of their results.

f) Adoption of regulation envisaging fixed amount of the state financial resources given to the public entity to eliminate opportunity of permanent state financial support to the public entities.

15. The Russian Federal Law №135-FZ "On Protection of Competition" does not contain any sectoral exemptions. However according to the provisions of the Article 13 of this Law the Government of the Russian Federation has the right to determine the cases of permissibility of agreements and concerted practices meeting the conditions stated in items 1 and 2 of part 1 of the present article (perfection of production, sale of goods or stimulation of technical, economic progress or raising of competitive capacity of the Russian goods in the world market; obtaining by consumers of benefits (advantages) which are proportionate to the benefits (advantages) obtained by the economic entities in the result of actions (inaction), agreements and concerted practices, transactions, other actions) (general exemptions).

16. Presently the Government of the Russian Federation is considering the adoption of the Resolution "On adoption of the list of block exemptions in respect of agreements (concerted actions) between economic entities" elaborated by the FAS Russia. This Resolution contains three block exemptions in respect of agreements:

- between buyers and sellers of products;
- between banks and insurers;
- on scientific and technical cooperation and joint use of the gained results of such cooperation.

17. However in order to ensure competition development in different sectors of economy the FAS Russia introduces competition principles to various sectoral legal acts (Water Code, Forest Code, laws on fishery, power industry, finance, etc).

18. Talking about the balance between the merger control and promotion of the so-called national champions as the tools of competition and industrial policies respectively, each case is considered carefully by the FAS Russia. And should the companies justify their merger as bringing more social and economic benefits the FAS Russia has no grounds to refuse it, according to the law.

19. For instance, the merger of OJSC "Volgaburmash" and OJSC "Uralburmash", which are virtually the single representatives of Russia in drill bits production for oil and gas and mining industries respectively on the world market of drill bits, was thoroughly considered by the FAS Russia. Having analysed this market the FAS Russia gave its satisfaction on this merger. The FAS Russia came to the conclusion that this market in Russia, as well as in the whole world, is characterised by high concentration of production. The group of consumers of these two plants doesn't practically overlap. And the merger of these plants would have a number of benefits in respect of enhancement of their positions on the global market. This merger would allow getting an access to cheap credit resources in order to increase capacities and to invest into the development of new products. Moreover there would be an opportunity to get a synergetic effect from optimisation of logistics, raw supply discounts and savings from research and development. As a result of the analysis the FAS Russia anticipated enhancement of competition by foreign producers. Moreover after the merger the Russian Holding could be rated on the 6th place in the

world and occupy 13% of the global market under the scope of production and under the diversity of its product line the Holding could be on the 3rd place in the world which is consistent with the long-term strategy of development of Russia stated by the Government of the Russian Federation and will allow Russia to have an equal right in adopting new product standards on the market in future. The overall economic effect from reduction of costs is estimates as US $12,9mln annually.

20. Another illustrative merger case is the merger of OJSC "NLMK" and "VIZ-Steel" Ltd., two major producers of transformer steel, which was also satisfied by the FAS Russia due to its social and economic benefits for Russia. 90% of the produced transformer steel is exported and should the Russian companies lose their competitiveness on the foreign market the production of transformer steel will be ceased. The presence of Russia on the global market of high-technology metal products is considered to be as one of strategic priorities. At the same time taking into consideration that the European Commission does not limit the geographical borders of the transformer steel market by the territory of one country, the market of transformer steel in Russia is competitive. The major peculiarity of the Russian market is the horizontal integration of transformer steel producers due to the fact that their joint efforts aimed at development of scientific and technical base, development and introduction of new technologies provide for their competitiveness both on the domestic and global market of electric steel.

21. To sum up, the FAS Russia is not against creation of national champions but only in those sectors where it is justified and necessary for enhancing competitiveness of Russia on the global markets. What is seen as a means to restrain their negative impact are severe sanctions that are provided by the turnover fines, an opportunity to determine collective dominance on the market and the established procedure of compulsory separation of companies' activities.

SLOVENIA

1. Introduction

1. The answer to the question why some countries are more successful than others in promoting their economic development is multi-dimensional and involves diverse aspects of the effects produced by advanced entrepreneurship and entrepreneurial culture and also by governmental industrial policy. Industrial policies differ across countries in terms of the aims they pursue and the measures and instruments they apply. They also vary in the achieved results. In any case, they should not overlap with competition policy aims and issues.

2. The outlines and goals of industrial policy are set in the frame of Slovenia's Development Strategy, including five development priorities with the corresponding action plans for the period of 2006-2013. The Strategy does not focus solely on economic issues but also involves social, environmental, political, legal and cultural issues. Due to such prioritisation of the objectives, it also serves as Slovenia's strategy of sustainable development. At the same time it integrates the Lisbon goals with the national settings, keeping Slovenia's specific development opportunities and setbacks in view.

2. History and evaluation

2.1 To what extent does the industrial policy in you county target firms on the basis of other nationality (e.g. by granting state aids/subsidies to national firms only or by controlling their ownership)? If so, how is nationality defined?

3. There is no specific legislation framework related to nationally targeted instruments of industrial policy. However, there seems to be an important restriction in controlling the ownership of state-owned companies. These restrictions derive from the fact that the State has, directly and indirectly via the two parastatal funds (Pension Fund and Restitution Fund), controlling shares in a number of important Slovenian enterprises.

2.2 What economic conditions have been associated with governmental industrial policy and support for national champions in your nation and region? Has this changed over time as economic development advanced?

4. Slovenia is a relatively young country. After independence and the period of privatisation, the country started the post-privatisation period with the key goal of economic growth. The EU accession strategy was created to define and outline a set of consistent medium-term economic policies required to complete the economic transformation and to prepare the economy for the accession to the EU.

5. To assist in accomplishing this aim, the state contributed towards creating a suitable climate for an accelerated development in the new private sector, facilitating the entrance of new enterprises on the market and improving the investment climate. Above all, the aim of economic growth asked for the strengthening of competitiveness in the enterprise sector.

6. High degree of internationalisation of the national economy requested considerable structural changes. Slovenia as a small market economy could hardly afford to provide the support of national industrial policy favourable to national champions. Foreign direct investment (FDI) deserved special attention in the reform of the enterprise sector which is a clear indicator of an open economy.

2.3 Are there major success stories of industrial policy or national champions that are prominent in policy discussions? Are there any perceived major failures of industrial or national champions policies? How do you define "success" and "failure" in this context? Are successful national champions stories supported by vest practice competition policy standards?

7. There have been no major success stories of industrial policy or national champions.

8. As regards competition policy standards, existing measures in the frame of competition legislation provide for effective prohibition or control of actions which could potentially affect competition by abusing a dominant position and market power or cartels and other restrictive agreements.

9. In general, Slovenian competition legislation applies to all undertakings active in Slovenia. Such activity may be performed through establishment in Slovenia or through marketing products in Slovenia. Therefore, even companies established and merging outside Slovenia are required to notify the concentration if they sell the products in Slovenia and meet the set thresholds. When deciding on the approval of such a merger, the CPO would take into consideration only the geographical market in Slovenia and would be concerned mostly with local effects.

2.4 Does your competition agency use benchmarks to assess the economic costs and benefits of government intervention that promote industrial policy or national champions? Have you communicated benchmarks to other economic policy makers? Is there any dependable analytical approach that allows you to distinguish industrial policy from competition policy? Do you engage in competition advocacy in this policy area?

10. In Slovenia there are no specific rules or practices related to using benchmarks to asses the economic costs and benefits of government intervention that promote industrial policy or national champions nor a dependable analytical approach that allows to distinguish industrial policy from competition policy. From this perspective, competition advocacy activities play an important role. Competition Protection Office (CPO) is entitled to providing comments in the mandatory review process with regard to legislative proposals.

11. Moreover, competition advocacy is an important tool in the promotion of competition principles and market methods. Successful advocacy may contribute to a higher quality of regulation or to accelerate deregulation processes in situations where new market conditions do not lead to increased competitiveness of the companies.

2.5 Have merger review laws ever been suspended in your country? If so, why? Were concerns expressed either explicitly or implicitly about the way in which merger efficiencies are typically examined or in the way in which failing firms are analysed?

12. Merger review law has never been suspended in Slovenia nor was any concerns expressed about the way in which merger efficiencies are examined.

2.6 Have any of your decisions ever been overridden on grounds of Industrial policy? Are there any recent examples? What reasons were given? To what extent had the competition agency already considered the market characteristics or considerations that were the basis for the override? What have been the consequences of the override for consumers and competition policy?

13. None of the decisions of CPO has ever been overridden on grounds of Industrial policy. According to the existing legislation such a possibility is not provided.

2.7. Does your government implement some policies directly dedicated to innovation? If so, could you specify the sectors that benefit from these policies as well as the instruments used to foster innovation?

14. The central strategic research and development document in Slovenia is the National Research and Development Programme 2006-2010 (NRRP) which was adopted in 2005. The priority measures encompass also "further changes in industrial policy and the system of financing research activities so as to encourage cooperation between research companies and industry[1]. The important group of measures in the NRRP is included in the plans and documents related to the utilisation of EU Structural Funds resources.

15. Concrete measures to promote technical development and innovations are defined in the implementation programmes of the Ministry of Economy–Programme of measures to promote Entrepreneurship and Competitiveness. Measures are aimed at improving the ability to innovate of enterprises and for general support to innovations. Moreover, the importance of non-technological innovations is emphasised in addition to technological ones. The sub-program includes measures related to the innovation environment as well as direct incentives to enterprises to increase innovations in their operations. The measures are aimed at establishing and operation of an innovation environment and culture, promoting creativity and innovativeness of enterprises in all business areas, supporting growth of early-stage innovative companies and promoting various forms of linking.

16. According to the analysis provided in the Development Report 2008, innovation activity of companies increased significantly in 2004-2006 compared to the previous period, particularly in the services sector.

2.8. Did measures adopted in your country to deal with the recent economic crisis raise competition concerns? If so, could you describe the measures and the concerns? Have these competition concerns been taken into account, and, if so, how? In particular, have initial proposals been amended in order to comply with competition law? Have some of these measures been exempted from competition policy scrutiny?

17. Slovenia is facing the effects of the financial crisis and the cooling down of the economic environment both in the EU and globally. This affects the Slovenian economy in two ways: through the paralysis of the interbank market in the Euro zone and the decrease in export demand in all its key markets.

18. Economic policy measures, which follow the recommendations of the European Commission while considering Slovenia's characteristic features as a small and open economy, apply to both aggregate demand and aggregate supply. The measures are intended for the financial and industrial sectors. In the financial sector, the Government seeks to maintain the trust of savers in the financial system and ensure credit activity and solvency. Measures with regard to industry are aimed at maintaining production facilities and jobs. So far, a key part of the measures was a subsidy scheme that would shorten working

[1] Slovenia – Reform Programme for achieving the Lisbon Strategy Goals 2008-2010

hours to below 40 a week in order to keep salaries unchecked and prevent the loss of jobs as a result of falling demand.

19. The adopted measures did not raise any competition concerns so far.

3. Means and Goals

3.1 Please specify whether any of the following are instruments of industrial policy in your country:

- ***Government procurement***
- ***Exemptions from antitrust laws***
- ***Regulatory barriers to competition***
- ***Access to credit***
- ***Arranged mergers and acquisitions***
- ***Control of acquisitions of national companies by foreign investors***
- ***Other?***

20. There are certain exemptions in the relevant public procurement laws provide for; however, they should not be attributed to the instruments of the industrial policy since they are related to public contracts which include classified information, or involving international agreements with other countries, financial services etc. Moreover, exemptions may be granted for entities operating in the water, energy, transport and postal services sector.

21. The provisions of PRCA-1 do not include any exemption from antitrust law. The only possible exemptions could be granted to agreements of minor importance which do not appreciably restrict competition (*de minimis*) and to agreements covered by the relevant EU block exemption regulations.

22. As regards control of acquisitions of national companies by foreign investors, existing measures in the frame of competition legislation provide for effective prohibition or control of actions which could potentially affect competition by abusing a dominant position and market power or cartels and other restrictive agreements. In general, Slovenian competition legislation applies to all undertakings active in Slovenia. Such activity may be performed through establishment in Slovenia or through marketing products in Slovenia. Therefore, even companies established and merging outside Slovenia are required to notify the concentration if they sell the products in Slovenia and meet the set thresholds. When deciding on the approval of such a merger, the CPO would take into consideration only the geographical market in Slovenia and would be concerned mostly with local effects.

3.2 To what extent are industrial policies in your country motivated or rationalised as regional or national economic development initiatives? Has this explanation been used more sparingly over time as your economy expanded?

23. According to the provisions of the Slovenia's Development Strategy, industrial policy measures are strongly motivated by national economic development initiatives. Among the key national objectives for the period of 2006-2013, the first priority is a competitive economy and faster economic growth, aiming at fostering entrepreneurship and increasing competitiveness.

24. The development issue was present more or less also in all the previous strategies, however, before they were more restructuring-oriented. For the time being, strategies are in line with the Lisbon Strategy goals as applied by the EU.

3.3. To what extent are industrial policies motivated or rationalised as an effort to help domestic firms withstand the exercise of market power by foreign firms? How does this rationale square with rules against market distortions caused by state aids? How has your competition agency analysed these circumstances?

25. There were no formal circumstances where industrial policy would be motivated or rationalised as an effort to help domestic firms to withstand the exercise of market power by foreign firms.

3.4. Are industrial policies motivated or rationalised as a means to correct market failures in your country? If so, what types of market failures have been involved? How do you compare industrial policy or national champions with other policy approaches for correcting these market failures (such as taxes or subsidies on consumption of the product)?

26. Formally, industrial policy measures are not motivated as a means to correct market failures. Non-agricultural subsidies are gradually undergoing positive shifts – subsidies regarded as effective boosters of economic growth and development are gaining importance in the national budget (subsidies for technological development and small and medium-sized enterprises). The allocation of subsidies to recipients (especially for companies) was recently still problematic, mostly from the perspective of effectiveness of subsidies[2].

3.5. Do you think that one nation engaging in industrial policy or supporting national champions attracts retaliation from other nations? To what extent are projected gains from industrial policy and national champions dependent on other nations not pursuing these policies, too? Do industrial policy and national champions constitute a "prisoners' dilemma" situation?

27. Engaging in industrial policy or supporting national champions is certainly a two-fold problem. In case of market failures, there is no guarantee that the industrial policy measures would provide the necessary results or better results as the market itself. However, one should have in mind that there are specific situations where such measures are inevitable, but in any case these measures should be compatible with competition rules.

2 Development Report 2008

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SOUTH AFRICA

1. Background

1. The South African state, in common with most developing countries and a great many developed countries, pursued an active industrial policy in order to create the basis for industrial development. A wide range of instruments were employed as part of this industrial policy including direct state investment and ownership, tariffs and other protectionist measures, tax holidays and subsidies, procurement requirements and government supported mergers. It is probably a fair, if somewhat sweeping generalisation, to say that where basic industrial and commercial inputs were concerned the favoured instruments were direct government investment and tax subsidies, while where consumer goods were concerned tariffs were the instruments of choice. Direct government investment has underpinned dominant firms – 'national champions' – in, inter alia, steel, petro-chemicals, fertilisers, and large swathes of transport from fuel pipelines to passenger air transport. The South African state also invested in many industrial enterprises through the Industrial Development Corporation, a large industrial development finance institution established in the 1940s which has also exercised a major influence on policy designed to support industrial development. In addition, in common with almost all countries, the state owned utilities in telecommunications and electricity.

2. We very briefly describe the evolution of state involvement in major industries before reviewing more recent debates around the role of industrial policy in South Africa and setting out the challenges that previous state support for industry poses for competition policy. Finally we sketch briefly some of the elements of what we believe are an effort to reduce the tensions which may arise between competition and industrial policy.

2. Evolution of state involvement in major industries

3. In the 1980's and 1990's, the South African government, again in common with many of its counterparts in the rest of the world, embarked on a process of economic liberalisation that included a lowering of tariffs and other barriers to international trade as well as the privatisation of important state owned enterprises, most notably those involved in petro-chemicals and steel. The first of these, Sasol Limited ("Sasol"), is now a significant multinational while the latter – Iscor Limited – has been absorbed into the ArcelorMittal South Africa Limited ("ArcelorMittal") steel empire. Sasol and ArcelorMittal, the erstwhile state created and owned enterprises, dominate a great many of the critical domestic markets in which they participate. Other South African national champions – notably the dominant fixed line telephone company, Telkom SA Limited ("Telkom"), and the monopoly provider of electricity, Eskom Holdings, are still owned by the state.

4. The alcoholic beverages market is a clear example of a state sanctioned anti-competitive private agreement to support the creation of national champions in the beer and wine and spirits market. Here, in the 1970's the state ignored the views of the Competition Board, a largely advisory body that preceded the contemporary competition statute and institutions, and allowed a market sharing agreement which, to this day, underpins dominant firms in each of the beer and wines and spirits markets,

3. Recent debates around the role of industrial policy in South Africa

5. Support for industrial policy has been maintained despite widespread dissatisfaction with the conduct of the state owned enterprises ("SOEs") and former SOEs, those corporate entities that are justifiably characterised as South Africa's 'national champions'. Industrial policy over the past decade or so has sought to pursue different objectives in the form of a more diversified and labour absorbing development path, and it has not used extended state ownership to achieve this, while there has also been far-reaching trade liberalisation. But, the established position of large former SOEs has enabled them to continue to benefit from state support such as tax holidays for major investments. At the same time, government has been largely ineffective in counteracting these interests. For example, South Africa's telecommunication charges are generally agreed to be amongst the highest in the world and the population and the exceptionally energy intensive mining and minerals processing sectors have recently had to be bear the brunt of serious shortfalls in electricity capacity. Both entities are subject to relatively new, under-resourced and relatively weak regulatory bodies.

6. The former SOE's, notably Sasol and ArcelorMittal SA, have been at the centre of several significant abuse of dominance investigations and several successful prosecutions. While it is wholly possible to argue that state investment was necessary for the establishment of these basic capabilities that underpinned a deep level mining and, later, a manufacturing economy, in their current incarnation these national champions are strongly associated with inefficiency and with abusive conduct, both exclusionary and exploitative. By way of example ArcelorMittal has been successfully prosecuted by a large gold mining company for contravening the excessive pricing prohibition in the Competition Act 89 of 1998, as amended ("the Competition Act" or "the Act") and Sasol was successfully prosecuted for discriminatory pricing in contravention of the Competition Act although the latter decision was overturned by the Competition Appeal Court. Telkom's monopoly was extended in exchange for a commitment to roll out fixed line telephone services to the rural and other low income areas – although it partly honoured the roll out commitments, it did so at prices too high for the newly connected consumers to afford and so before long the rate of disconnection exceeded the rate of new connection.

7. A product of the period of economic reforms – although with diverse roots and influences extending significantly beyond the imperatives of economic liberalisation – was a much strengthened competition policy regime, which included the promulgation of a new anti-trust statute in 1998 as well as the establishment of sector regulators in the telecommunications, energy and selected transport markets. While the reforms do evidence growing respect for market principles, the continued support for industrial policy, support which has been strengthened by the current global economic turmoil, has meant the possible tensions between these policy fields have been the subject of recent policy debates and analysis. These have highlighted the importance of dealing with the impact of anti-competitive conduct for South Africa's economic development and, as such, the complementarities between industrial and competition policies. Sector specific policies of the Department of Trade and Industry for sectors such as metals, machinery and plastic products have also highlighted the negative impact of supra-competitive pricing of basic material inputs.

8. Support for industrial policy, specifically including national champions, is manifest in certain of the provisions of the Competition Act itself. Hence the promotion of employment, competitiveness and small and medium-sized enterprises feature alongside more orthodox consumer welfare objectives as explicitly stated 'purposes' of the Competition Act[1]. The objective of supporting small and medium-sized enterprises played a significant role in the Tribunal's decision in the matter of Nationwide Poles CC v

[1] Note that the purpose of promoting international competitiveness provides that a purpose of the Act is 'to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic'. (our emphasis)

Sasol Oil (Pty) Ltd. In this matter Sasol was found to have contravened the Act's proscription of price discrimination. In its decision the Tribunal noted that it was required to take account of 'an industrial policy that places the development of SMEs at the centre of attempts to improve the workings of the market mechanism[2].' Although this decision was overturned on appeal, in its decision the Competition Appeal Court supported the Tribunal's view that the Act required that the competition authorities take note of 'the need to ensure that small and medium businesses are able to use the Act to protect their ability to compete fairly and freely[3].'

9. The insertion of industrial policy objectives in the Competition Act extends beyond the general purposes of the statute.

10. Section 10 of the Act provides that the Competition Commission may exempt a firm from the application of the chapter of the Act which proscribes anti-competitive agreements and abuse of dominance if the agreement or practice contributes to the promotion of exports, to the competitiveness of small businesses, to changes in productive capacity necessary to prevent the decline of an industry, or to the economic stability of an industry designated by the Minister of Trade and Industry. Note that only the Competition Commission is entitled, with a right of appeal to the Competition Tribunal, to grant an exemption. The Minister has no decision making function with regard to applications for exemption.

11. While the number of exemptions granted is small, as might be expected a number of those that have been granted do indeed promote the core industrial policy objective of international competitiveness, if not competition, although it is not immediately apparent that any of these exemptions severely compromise competition. Indeed even when granting an exemption the Commission attempts to carefully design the exemption so as to maintain competition to the greatest extent possible. However, clearly in order to have qualified for exemption the exempted conduct would have to constitute a contravention of the Act. For example, the Commission conditionally exempted a geographic market sharing agreement between Qantas (the Australian airline) and South African Airways (also a state owned 'national champion') on the grounds that the exemption promoted exports and allowed for a change in productive capacity necessary to stop decline in an industry[4].

12. The merger provisions of the Act similarly require the competition decision maker to take account of industrial policy objectives. Hence when deciding a merger the relevant competition agency – the Tribunal in the case of mergers above a specified threshold and the Commission in respect of those falling below the threshold – is required to decide whether the merger is likely to give rise to a substantial lessening of competition, and then, regardless of the outcome of the competition evaluation, to determine the transaction's impact on a specified number of public interest grounds, which include the standard industrial policy objectives such as the transaction's likely impact on region or sector, on the ability of small businesses to become competitive, and on the ability of national industries to compete in international markets.

13. It is important to note that the relevant competition authority is the only decision maker, including in the assessment of the public interest impact of the merger. Neither the Minister nor any other executive structure is entitled to override the competition authorities' decisions. A ministry or department of state may make representation to the Commission and the Tribunal and, on several important occasions, have done so, but the decision making prerogative resides solely with the competition authorities. This, and the fact that the competition evaluation precedes the public interest assessment, ensures that, while the

2 72/CR/Dec03 - Nationwide Poles CC and Sasol Oil (Pty) Ltd

3 49/CAC/Apr05 - Sasol Oil (Pty) Ltd and Nationwide Poles CC

4 Government Gazette No. 30805, 29 February 2008

industrial policy objectives are seriously treated, they are assessed by competition professionals through the lens of the competition evaluation. This may help explain why, although the public interest assessment has occasionally resulted in the imposition of a condition (usually centred on the employment impact), they have never been dispositive in the decision whether or not to approve or prohibit a merger.

14. In short, the insertion into the competition statute of industrial policy objectives alongside orthodox consumer has not materially compromised the attainment of the core competition objectives. Nor, we believe, does this place our work outside of the mainstream of competition enforcement and adjudication. Evoking international competitiveness and scale economies in merger assessments, whether under the guise of public interest or efficiency, is standard practice in most jurisdictions with which we are familiar. The critical difference between our practice and many, if not all, other jurisdictions, is the explicit inclusion of social and industrial policy objectives in the competition statute, the transparent manner in which the public interest is weighed against the competition impact, and the fact that it is the competition authority, rather than a minister of state, that is the decision maker even on public interest matters.

15. This is not to say that the inherent tension between industrial policy and competition policy has been eliminated, particularly in those instances where industrial policy seeks to selectively promote the interests of particular enterprises. Indeed the current economic crisis has, if anything, strengthened the hand of those who support a leading role for the state in the attainment of economic objectives. Nor is this surprising – for those competition fundamentalists who have consistently denied the prevalence or impact of market failures, the financial crisis is clearly a salutary lesson. However, the financial crisis has ineluctably become the basis for all manner of economic actors to demand state support and intervention in favour of national firms. Certainly in South Africa it has become the basis for demanding state support for a range of enterprises and sectors whose woes owe more to decades of state protection and its handmaiden, inefficiency, than to the impact of the economic downturn. Faced with the opportunism that underpins these demands for support, the competition authority can do little other than use its advocacy tools and its public profile to warn of the dangers inherent in undermining market processes and to warn against a conveniently distorted interpretation of the concept of market failure, one that views every unsuccessful firm or sector as the victim of market failure rather than of inferior products and supra-competitive cost structures.

4. Efforts to reduce the tension between competition policy and industrial policy

16. However, the South African authorities are attempting to take a more positive and constructive approach to industrial policy, than that of the market fundamentalist ‘nay-sayer’. We sketch briefly some of the elements of what we believe are an effort to reduce the tension between these important fields of economic policy.

17. Firstly, there are unquestionably industrial policy instruments and programmes that are, at worst, neutral with respect to the attainment of competition policy objectives. These are industrial supports that are far from market and that are directed at strengthening generic industrial capabilities as opposed to those that privilege particular firms. Human resource development and general support for research and development are clear examples of this. Where support is extended to particular enterprises it should be done as the outcome of a competitive and transparent process in which the criteria for support are clearly specified. The criteria should emphasise the prospective recipient’s prospect for future success rather than need. Furthermore, industrial policy support should always be accompanied by a clearly specified exit strategy for the provider of support. It is imperative that the competition authorities participate actively in the debate surrounding industrial policy and that they advocate for competition-friendly industrial policies.

18. Secondly, it is imperative that the competition authorities do not conduct themselves in a manner that suggests that they are anti-big business. Indeed it is important that their work evidences the incontrovertible truth that has taught generations of anti-trust enforcers that the overwhelming majority of mergers do not raise competition concern and that the merger process is an important aspect of the process of economic restructuring process. Similarly its prosecutorial strategies and decisions must give expression to the learning that holds that many vertical agreements and, indeed, instances of unilateral conduct are efficiency enhancing.

19. Third, the credibility of the competition authorities rests on being effective in addressing anti-competitive conduct and rigorously evaluating mergers that raise competition concerns. This is particularly the case in economies with conditions for sustained cartel conduct and abuse of dominant positions. Recent cases of cartel conduct in various food products have demonstrated how the far-reaching liberalisation of government controls in 1996 was undermined by private regulation by the food processing companies. The support for market oriented economic policies requires vigorous enforcement against such conduct. In this regard, it is important to recognise that small markets are particularly vulnerable to anti-competitive unilateral conduct. Hence there is a legitimate role for the competition authorities in ensuring that entry barriers are as low as possible and that SMEs are able to survive. The 'protection of competition not competitors' mantra rings hollow where a great many markets are characterised by the absence of competitors and hence competition. It has been suggested that industrial policy should, wherever possible, avoid supporting dominant firms but should rather focus its attention and resources on second tier firms and new entrants. It is of course possible that second tier firms remain at that level because their offerings are inferior to the first-tier firms. But it is also highly conceivable that certain of these firms are stuck in the second tier because of the structure of the market and the conduct of its dominant participants. Where the conduct of the dominant firms is impeachable then vigorous prosecution must follow, but where the dominant firms are privileged by non-competition events and policies of the past – for example a previous history of state ownership – then there is a prima facie case for directing assistance at those that have not been beneficiaries of this historical privilege.

20. Fourthly, the competition enforcer would be well-served in this debate by a prosecutorial strategy that is clearly seen to be generating positive outcomes from an efficiency and poverty alleviation perspective. For example, the South African Competition Commission, has identified bid rigging in public tenders as an important priority area, and under that rubric, construction and civil engineering as markets that require close scrutiny. The context for this is a government economic policy that has identified public investment in infrastructure as a pillar of its growth strategy and that is committed to massive infrastructural spend in support of the 2010 FIFA World Cup. By focusing on bid rigging, the competition authorities are demonstrating the positive contribution that competition policy can make to a pillar of the state's economic and industrial policy.

CHINESE TAIPEI

1. This submission briefly explains the development of Chinese Taipei industrial policy and its relationship with competition policy.

1. Industrial Policy of Chinese Taipei

2. Small and medium size enterprises (hereinafter "SMEs") averagely accounted for above 98% of 1.2 million enterprises in Chinese Taipei in past years. The effective industrial policy implemented by the Ministry of Economic Affair, which is the competition agency of national economic development and industrial policy, is the key to ensuring economic growth and welfare of a nation. In 1980s, the business environment in Chinese Taipei changed as wages rose and the New Taiwan dollar appreciated against the US dollar. Labour and land costs increased dramatically for industrial use. At the same time, people became more aware of environmental protection issues resulted from the high-degree pollution industries. These economic challenges made the government started to promote the development of strategic industries that were characterised by a high level of technology, high value added and low energy consumption. With the establishment of the Hsinchu Science-based Industrial Park to facilitate the development of hi-tech industries, enterprises were encouraged to step up their R&D activities, improve productivity and quality, and enhance their international competitiveness.

3. When global and regional organisations became increasingly important, Chinese Taipei gradually lost its competitive advantage in labour-intensive products with low added value. The government implemented new industrial policies, including stimulating R&D by tax incentives, encouraging automation of production as well as pollution prevention, providing labour training programs so as to improve the upgrading of domestic industry in 1990s.

4. Since Chinese Taipei joined the WTO in 2002, the economic environment has become more liberalised, making it a part of the global industrialised system. The government has disclosed its intention to build Chinese Taipei into a Green Silicon Island, thus revealing its vision for national development in the new century. The project was expected to deliver economic benefits by promoting Chinese Taipei as global logistic centre, developing knowledge-based economic, stimulating conventional industries, creating R&D centres in Chinese Taipei by foreign corporations, and setting up in Chinese Taipei of local innovation and incubation centres for SMEs. The core value of the industrial policy in 2000s is to lead businesses towards a high value-added industrial era featured by innovation, invention, and R&D on the foundation of the past achievements in semi-conductor industry.

2. Policy of National Champions of Chinese Taipei

5. Apart from industrial policy of promoting the development of SMEs, Chinese Taipei has supported the policy for national champions in financial industry since 2001 financial reforms. Although Chinese Taipei was relatively unscathed during Asian financial crisis broke out in 1997, rising non-performing loans (hereinafter "NPL") ratios and an over-banking issue increasingly became the major concerns of sector regulator, the Ministry of Finance (hereinafter the "MIF'), thus the MIF adopted financial reform project from 2001.

6. The first phase of financial reforms adopted measures to reduce NPL ratios, encouraged merger activities to prevent from over-competition in banking sector, created strong financial supervision by establishing Financial Supervision Commission (hereinafter the "FSC"), deregulated market restraints by drafting and promulgating new laws and their amendments.

7. As a result, there were 14 financial holding companies established, 58 banks engaging in trust business, and 26 merger cases involving 61 financial institutions completed to build up a favourable banking environment. Concerning the banking industry has been too fragmented, too homogenous, and overly competitive, the FSC stepped in the second phase of the reform in 2005 to further consolidate banking companies. The FSC hoped to create one or two leading domestic player in the financial service industry, or what the FSC calls "national champion" banks to play a role in the international financial market after the reform.

3. Competition Policy and Advocacy

8. At the time of the industrial policy focusing on changing industrial structure in 1990s, the government promulgated the Fair Trade Law (hereinafter the "Law") in 1991, began to bring more attention on the merit of competition culture in industries.

9. The Fair Trade Commission (hereinafter the "Commission") initiated a task force to review over two hundred already existing relevant laws and regulations, which might have conflicted with the competition policy in 1993 and 1996. The performance of the project in 1996 was reported to the Cabinet for further consultation with sector regulators. However, owing to a lack of sufficient support from the Council for Economic and Planning and Development under the Cabinet which is in charge of deregulation policies, the Commission then proposed an amendment to Article 46 of the Law so as to affirm the status of the Law as the fundamental economic law and as the basis for harmonising competition and industrial policies.

10. To resolve the conflicts arising between different policy measures, Article 46 of the Law was amended to state: "Where there is any other law governing the conduct of enterprises in respect of competition, such other law shall govern, provided that it does not conflict with the legislative purposes of this Law." The purpose of this amendment is to ensure that any business conduct related to competition will adhere to the spirit of the competition law.

11. In addition to the mandate, Article 9 of the Law is the statutory foundation that calls on the Commission to cooperate with and advise other agencies regarding the impact of other policies.

12. Meanwhile, with the 1999 amendment to Article 46 of the Law, the Commission participated in the project of "Green Silicon Island Vision and Promotion Strategy" under the Cabinet and then the Commission established a task force which was referred to as the "Project for the Review of the Enforcement of the 'Green Silicon Island Vision and Promotion Strategy' Regulations" in July 2001.

13. The Commission providing guidance and consulting with the relevant government agencies by comprehensively reviewing laws and regulations that were impeding competition, the results were reported to the Cabinet in August 2003. At that time, more than ten different sector regulators governing more than thirty-one laws and regulations had not yet committed themselves to adopting the alternative pro-competitive laws and policies. Following further negotiations with the sector regulators in charge of such policies, 8 rules with anti-competitive effects were still pending, with half of them being related to the mandates of some professional associations to stipulate remuneration standards in charters.

14. The Commission has organised a task force to evaluate and promote the application of the OECD competition toolkit beginning with the first season of 2008. Two Commissioners of the Commission co-

chair the "Competition Assessment Task Force." The team followed the analysis process of the toolkit to evaluate the competitive effects on two selected government policies and planned to publish the cases with the major content of the toolkit in traditional Chinese for future competition advocacy purposes. Hopefully, through the practice, the Commission based on its past experiences of regulatory reform will find out the most appropriate methodology for competition advocacy.

4. Questions for Consideration

4.1. History and Evaluation

Q5. Have merger review laws ever been suspended in your country? If so, why? Were concerns expressed either explicitly or implicitly about the way in which merger efficiencies are typically examined or in the way in which failing firms are analysed?

15. In an effort to minimise the number of exclusions at least to the extent that is still in line with the legislative purposes of the Law, the Commission adopts the most appropriate strategy to deal with each kind of "exemptions".

16. Turning to explicit exemptions, although the Law applies to all sectors with no exception in Chinese Taipei, there are statutory exemptions applicable to mergers in the banking and insurance industries under certain circumstances:

- Article 62 of the Banking Act stipulates that if a bank is insolvent or has the risk of injuring depositors' interests as a result of obvious adverse changes in its business or financial status, the central competent authority may order it to suspend business and take resolution measures, may suspend part of its business, may send officials to supervise or take over operations or may take other necessary actions. Article 62-4.4 further provides that if the competent authority determines that it is necessary to proceed with a transfer immediately and that there will be no serious and adverse effect on market competition, approval by the Commission under Paragraph 1, Article 11 of the Law shall not be required.

- Article 19 of the Financial Holding Company Act stipulates that if a financial holding company, a bank subsidiary, an insurance subsidiary or a securities subsidiary of a financial holding company is insolvent, or after adjustments, has a negative net worth on account of adverse changes in its financial or business conditions, and if the Ministry of Finance determines that immediate measures are necessary and that such measures will not result in unfair competition in the financial market, Article 11 of the Law shall not apply, and an application to the Commission will not be required for that financial holding company to: 1) merge with any company referred to in Paragraph 1, Subparagraph 1 or Subparagraph 2 of the preceding Article or transfer all of its rights and obligations to any said company or assume all the rights and obligations of any said company; 2) permit the same person or same concerned person to hold shares representing more than one-third (1/3) of its voting rights; or 3) be established as a result of a transfer from a financial institution.

- Article 13 of the Financial Institutions Merger Act stipulates that in the event that the business or financial status of its credit department obviously deteriorates, a farmers or fishers association cannot meet its liabilities or its net value after adjustment becomes negative, the competent authority may, if deemed necessary, and after consultation with the central competent authority in charge of farmers or fishers associations, order that association to assign its credit department and the property required for its operations to a bank. Where the competent authority deems it necessary to take emergent measures and where such measures would not have any material

adverse effect on competition in the financial market, the bank is exempted from applying to the Commission for approval in accordance with Paragraph 1 of Article 11 of the Law.

- Article 149-7 of the Insurance Act stipulates that when an insurance enterprise organised in the form of a limited liability company by shares assumes the operations, assets or liabilities of another insurance enterprise, where the competent authority deems that there is a need for urgent measures and there will be no material adverse impact on market competition, the requirement to report a business combination to with the Commission under Paragraph 1, Article 11 of the Law shall be waived.

Q6. Have any of your decisions ever been overridden on grounds of industrial policy? Are there any recent examples? What reasons were given? To what extent had the competition agency already considered the market characteristics or considerations that were the basis for the override? What have been the consequences of the override for consumers and competition policy?

17. There is one case illustrating that decisions of the Commission could be overridden on grounds of industrial policy.

18. The Commission had long been aware that some laws regulating professionals required that the charters of the individual trade associations set fee standards for certain practices--for example, fees professionals may charge and fee schedules applicable by type of service. In some cases, the trade associations had to submit their fee standard proposals for the regulators' approval. Since professionals cannot practice without membership in their own trade associations, the fee standards stipulated in the trade associations' charters in effect would decrease significantly or even eliminate the possibility of price competition in their respective markets.

19. Since these charters are authorised by relevant laws and have existed for quite a long time, to avoid the potential problems of conflict in jurisdictions and uncertainty over laws, the Commission decided to consult with the relevant regulators before taking any formal actions against those trade associations. In 1999, the Commission met with the Ministry of the Interior, the Ministry of Finance, the Ministry of Justice and the Public Construction Commission to discuss whether the price standards in the trade association charters for architects, accountants, lawyers and technicians were in violation of the Law. Soon thereafter, the Commission concluded that the trade associations had undoubtedly been engaging in concerted actions, and, as a result, it forwarded its formal opinions to the relevant regulators as well as the trade associations to clarify its position in its implementation of the Law. The Commission advised those government agencies to revise the relevant laws and required that the relevant trade associations eliminate all provisions for setting fee standards within a year.

20. In 2001, the Commission found that none of the responsible government agencies had proposed a draft to revise the relevant laws. Of the trade associations for whom the agencies were responsible, some had urged their members not to adhere to follow the fee standards stipulated in their charters, but most architects' trade associations strongly refused to comply with the Commission's requirements. Further communications with the architects' trade associations were undertaken but simply to no avail. Finally, in 2003, the Commission issued the three largest architects' trade associations orders requesting that they not only stop using fee standards but also repeal the relevant provisions in their charters at their next general meeting.

21. In the same year, the three architects' trade associations appealed the Commission's decision to the Cabinet, the highest administrative body, and the end result was that the Cabinet turned down the Commission's decision. This was based on the fact that: 1) it was not clear whether the fee standards were actually affecting the market's function; 2) the fee standards could not be effective without the regulator's

permission; in other words, the trade associations did not make the final decision; and 3) Article 9 of the Fair Trade Act stipulated that for matters provided for in the Act that concerned other authorities, the Commission could consult with those other authorities to deal with the issue. The Commission is still considering whether there is a need to raise the issue with the Ministry of the Interior in the future.

22. This was the first time since the amendments to the Law that the Commission had tried to deploy its power against anti-competitive behaviour granted by another authority. The fact that its enforcement effort was not well received by the highest administrative body has caused the Commission to slow down its pace in trying to repeal existing laws which go against the legislative purpose of the Law.

23. The amendment to the Architects Law drafted by the Ministry of the Interior has recently been proposed to the Cabinet. The Commission has been invited to provide comments on the provisions designed to retain the power of architects' associations to set minimum fee standards. The architects' trade association has stated that setting a fair fee standard would possibly balance the asymmetric market position between architects and consumers, and would further ensure the quality of the resulting construction. On the other hand, since considering setting a standard service charge is not the only way of guaranteeing security, and inferior quality does not necessarily result from price competition, the Commission has proposed a draft amendment to the Architects Law that will delete the power of the association to set the fee. By so doing, the Commission asserted again that such conduct is in breach of the Law under any circumstances.

24. After the consultation held by the Cabinet, it has been decided that the new amendment will directly require the Ministry of the Interior, the sector regulator, to set the fee standard on the basis of the recommendations of consumers and stakeholders. The amendment has yet to be proposed to the legislators.

4.2. Means and Goals

Q1. Please specify any of the following are instruments of industrial policy in your country:

- *Government procurement*
- *Exemptions from antitrust laws*
- *Regulatory barriers to competition*
- *Access to credit*
- *Arranged mergers and acquisitions*
- *Control of acquisitions of national companies by foreign investors*
- *Other*

25. Any instruments from the above could reach the industrial policy goals in Chinese Taipei.

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UKRAINE

1. Introductory notes

1. The analysis of reference of competition policy to industrial policy requires, first and foremost, determination of their objectives.

2. The objectives of the competition policy, in our opinion, may be defined as formation of the product market functioning conditions to provide triple efficiency due to effect of competition mechanisms: allocative efficiency, that is efficiency of resources distribution; efficiency of resources use, or X-efficiency after Harvey Leibenstein, and dynamic efficiency or adaptive efficiency, that is efficiency of forming new resources, first of all, competence and skills.

3. In turn, the objectives of the industrial policy include provision of development of specific industries, which implies expansion of production capacity, sale of the relevant products and improvement of their quality.

4. As one of the main ways to achieve the objective of the industrial policy lies in scientific and technical progress, that is formation and use of new resources, the objectives of the industrial policy actually coincide with the objectives of the competition policy to the extent of providing adaptive efficiency by the latter.

5. At the same time, ensuring allocative efficiency implies maximal approximation of markets functioning to the model of perfect competition with the following essential features: setting prices at the level of marginal costs, dispersive market structure (low level of market concentration), absence of entrance barriers, full independence of economic agents and equal business conditions. However, according to proponents of the influential theoretical school connected first of all with the name of Joseph Schumpeter, the aforesaid perfect competition model is unable to ensure adaptive efficiency. So, there is some discrepancy not only and not just between competition policy and industrial policy, but rather between the priorities of the competition policy, depending whereon the competition model shall be determined (perfect competition versus symmetrical oligopolistic model versus asymmetrical oligopolistic model or model of national champions) to the utmost extent compliant with the needs of development of competitive economy at the specific moment.

2. Ukraine's experience

6. In Ukraine, as at the time of recovery from the transformational crisis (at the turn of 1990s and 2000s), several types of markers were formed (from the point of view of competitive conditions): markets with high competitive structure, markets with oligopolistic structure, markets with domination features, monopolised markets.

7. At the stage of recovery from the crisis, the most successful development indicators were shown by branches with formed oligopolistic structure. This is first and foremost connected with the fact that concentration of material and staff resources in the framework of industrial and financial groups, and opportunity to pursue active protectionist policy in own interests on the part of the state, formed conditions

for the branches they operated in for the fastest recovery from crisis and provide stabilisation and entire economic growth. This particularly concerned iron-and-steel industry. Markets of this branch are typically oligopolistic (in 2004, 60 per cent of ferrous metals production was covered by 5 producers, the share of the biggest one was 21 per cent). In 1995, steel production constituted only 42.4 per cent compared to the volumes of 1990, but already in 1996, the decline in production was overcome, and in 1996-1999, steel production grew by 22.9 per cent, production of rolled ferrous metals grew by 29.8 per cent. The growth continued further: in 2000-2004, steel production grew by 12 per cent, and in general for 1995-2004, it grew 1.55 times (average growth rate: 15 per cent). Ukraine was ranked the world's 5th steel exporter.

8. By analogy, production of motor petrol and fuel oil, which in 2000 was only 22.7 per cent compared to the volumes of 1990, in 2000-2004 grew 2.3 times upon formation of several large vertically integrated structures in the field (in 2004, the largest 5 structures covered 78 per cent of production). Production of beer, 88 per cent of which in Ukraine at the beginning of 2000 belonged to 4 business entities, from 1997 to 2001, grew in kind 2.16 times. Record growth rates in 2000-2004 were shown by the volumes of mobile communication services provided in Ukraine mainly by 2 large providers: services scope in money terms grew 6.8 times within this period.

9. It is important to note that in 2005-2007, 58,5-69,8 per cent of costs for innovation in production sector fell on 200 biggest enterprises while 54 thousands enterprises was covered only by 41,5-30,2 per cent of such costs.

10. At the same time, high rates of economic growth were observed in a number of industries, in which competitive environment was formed. The production growth rates in food industry in 2000 compared to 1999 constituted 26.1 per cent and twice exceeded the relevant general indicator of the country's industry, in light industry: 39.0 per cent, wood processing and pulp and paper industry: 37.1 per cent. In 2002, production growth rate in meat industry 4.6 times exceeded the industry's general indicator, in wood processing – 3.8 times, in vegetables and fruit processing – 3.5 times exceeded the industry's average indicator.

11. Low efficient business practices were demonstrated by monopolised branches of economy. For instance, the revenue from railway cargo transportations in 2001-2003 grew more than twice, but in kind they grew only by 27.5%. Physical volume of services on production and distribution of electric energy, gas and water for the same period grew by 8.6 per cent, though the revenue from them grew by 25 per cent. In the postal area in 2001-2002, revenue for rendering of services grew more than twice, and the scope of services in kind grew only by 2.1 per cent.

12. The attempts to achieve the objectives of the industrial policy by way of granting exclusive rights and preferences to individual business entities proved to be inefficient. In particular, in automobile production, which faced deep crisis (in 1997 compared to 1990, the number of light motor vehicles produced in Ukraine reduced 78 times), under the Law of Ukraine «On stimulation of automobile production in Ukraine» adopted in 1997, individual business entities acquired exclusive preferences. As a result, actually, in 1998, production of light motor vehicles grew 12.9 times, but in the same year, the foreign investor, which acquired these exclusive rights, became bankrupt because of the East-Asian financial crisis and in 1999, production of light motor vehicles in Ukraine again reduced 2.7 times. In 2001, the main provisions of the Law of Ukraine «On stimulation of automobile production in Ukraine» to the extent of providing exclusive preferences to an individual producer was cancelled. After that, in 2002-2004, production of light motor vehicles in Ukraine was performed at high rates, and in 2004, its volume 11 per cent exceeded the indicator of 1990. In 2006, the largest national producer covered nearly a half of the internal production of light motor vehicles, the 2 following ones covered nearly a one-fourth thereof.

13. We should note that advantages shown by the markets with oligopolistic structure at the stage of recovery from the crisis, at the stage of Ukraine's economy stabilisation (2004-2007) were to considerable extent lost. Consequently, the annual average growth rate in steel production for this period constituted only 0.11 per cent, the annual average growth rate of rolled ferrous metals and coal production: 0.43 per cent; in production of motor petrol and fuel oil aggregate reduction occurred, which constituted respectively 2.3 and 9.8 per cent a year. At the same time, a number of branches, whose markets had competitive structure, showed in 2004-2007 stable production growth rates: for example, wood processing industry: 20.3 per cent a year, pulp and paper production and editorial activity: 14.8 per cent a year, production of meat and meat products: 14.6 per cent a year, food-taste industry: 11.5 per cent a year. In a number of cases, the Antimonopoly Committee revealed the behaviour bearing traces of monopolistic pricing in these fields. In the markets of some oil products and metallurgical industry, there were cases, when business entities simultaneously operating in external markets and facing considerable competition, and in the internal markets bearing marks of collective or individual domination, set internal prices at the level being considerably higher than external ones, thus doting promotion of their products in the external markets.

14. Export-oriented branches, for which markets with oligopolistic structure dominated, showed the lowest stability at the first stage of financial crisis of 2008: in metallurgy, in September 2008, decline in production compared to 2007 was 19.1 per cent, in coal production: 15.6 per cent, in oil processing: 20.7 per cent. At the same time, growth was observed in branches characterised by competitive market structure such as wood processing, pulp and paper production and editorial activity.

3. Preliminary conclusions

15. Experience available in Ukraine allows making the following preliminary conclusions in respect of reference of competition policy to industrial policy:

- Successful industry development implying availability of any model-based competition;
- At the stage of recovery from the structural crisis, efficient industry development may be contributed by the competition model implying symmetrically oligopolistic market structure;
- Similar competition model may be also allowed at the stage of technologic paradigm changes;
- In other cases, competition policy shall probably have the priority of approximation to the perfect competition model;
- In any case, to achieve the objectives of industrial policy, it is unfeasible to apply such measures as provision of exclusive rights to individual business entities or creation of obstacles to starting production of similar products by other entrepreneurs.

UZBEKISTAN

1. Most of the state aids and subsidies in Uzbekistan are granted only to national (100% state owned companies) or to joint-ventures where state has controlling of majority stakes. Even though there is no official definition as to the nationality in this case, it would be defined as 100% of state ownership or where state possesses controlling stake. The support to the national champions is provided mainly by establishing excise-duties to imports, providing bank loans and controlling ownership.

2. The main targets of the government's industrial policy are to foster exports and reduce unemployment. However, as the country is not a member of WTO the policy to support national champions has been stable for long period of time.

3. There are no major success or failure stories related to policies. Most of the time the support provided to national champions helps companies to grow and improve production. The state support is given for certain period of time after which the state reviews the necessity for further assistance. The success is defined as sustainable growth in production and increased efficiency as well as decreasing costs. National champions are usually but not wholly excluded from the sphere of activity covered by the best practice of competition policy standards. Currently the automobile market is supported by high import duties, which sometimes leads to high prices. Success means the total economic independence of the companies, where state eventually stops the subsidies and leaves it open to pure competition. Failure means continued subsidy of the companies without proper strategy as to the company's future. Failure would also mean rising costs, decreasing efficiency and poor quality of the products.

4. The competition agency is not responsible for calculating the costs and benefits of the government interventions; however the agency tracks the prices of products and monitors the market access issues at those sectors. Industrial policy and competition policy in theory are different sides of the same issue. Each of the policies overlaps each other and to the point defines the priorities depending on state's preferences. In most developing or transitional countries competition policy never realises its role and always lags behind the industrial policy, because of rationally set priorities, which sometimes may look like to have a negative long term economic impact for the economy. The competition agency constantly monitors the number of bankrupt companies and the number of insolvent companies. The benchmark to assess economic costs and benefits of government interventions is not implemented.

5. When the mergers take place based on the decrees by the Cabinet of Ministers preliminary review of merger's effects take place by the competition authority. Mergers that have been approved by the competition agency are constantly monitored. Companies that apply for approval of the merger submit business plans on investment plans, plans of restructuring of manufacturing processes and increasing of production. These plans are reviewed by the competition agency and in cases when investors don't take responsibility according to their business plans the competition agency reviews the case and may take a decision to reverse the merger.

6. No decision of the competition agency has been overridden on grounds of industrial policy. However, at the current level of economic development, industrial policy prevails over competition policy.

7. There is a special fund under the Academy of Science that is used to support research activities by the academic institutions in cooperation with manufacturers.

Means and Goals

8. The instruments used for industrial policy are government procurements, exemptions from antitrust laws, regulatory barriers to competition, access to credit, arranged mergers and acquisitions, control of acquisitions of national companies by foreign investors, easy access to commodity resources and products of monopolist companies.

9. In cases when national champions operate in foreign markets such as the case with the automotive producer, state is often motivated to increase the market share or protect the existent share in the foreign markets. So, such motivations are limited because not many of the national champions directly operate in foreign markets.

10. Industrial policy in Uzbekistan is often motivated to foster exports and decrease the dependence of imports, as well as creating jobs. So by those means it is not directed at correcting market failures.

11. As competition to Uzbek companies mostly comes from China, Uzbekistan is also pursuing these policies which clearly constitutes to the "prisoners' dilemma" situation. However, big nations such as China can take more advantage from these policies because it might take a long time for all countries to adopt industrial policies to back up their manufacturers.

BIAC

The Business and Industry Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Global Competition Forum for its meeting on Competition Policy, Industrial Policy and National Champions on February 19, 2009.

1. Strong Competition Policy should be maintained in Times of Economic Crisis

1. In times of economic crisis, governments may question whether competition policy can by itself provide adequate tools for assuring that robust commercial, financial, and industrial sectors are preserved. Indeed, a struggling economy might cause some to argue for laissez faire competition oversight and increased government support of industry in order to help businesses weather the storm of the current financial crisis. Although many different views may be taken as to the cause of the current economic crisis, there is no indication that competition policy enforcement is to blame. Therefore, it would be irrational to conclude that wholesale reform of competition policy can significantly contribute to economic recovery. In fact, there is significant risk that a departure from sound competition enforcement based on fundamental economic principles could significantly hamper recovery efforts. Moreover, governmental intervention into competitive markets could harm competition for years to come.

2. Arguably, a lack of appropriate regulatory oversight in the financial market sectors may have contributed to the current economic crisis in that the inadequacy of the risk management of many financial institutions was neither detected nor deterred. This is an area of concern and of legitimate inquiry with respect to financial markets and the imposition or enforcement of regulations regarding the banking and mortgage lending sectors[1]. Even with respect to these sectors, however, failed competition policy does not appear to have been a contributory factor. In the United States, for example, there is no indication that lax merger control led to excess concentration in the banking sector, resulting in a lack of competitive vigour in that sector. In fact, bank mergers prior to and in the throes of the economic crisis were closely scrutinised to ensure that anticompetitive effects would not result. The U.S. Department of Justice has imposed conditions and required remedies to protect competition in several recent bank mergers[2].

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1 See BIAC's companion paper, "The Relationship between Financial Sector Conditions and Competition Policy."

2 See, e.g., NationsBank's acquisition of Barnett Banks, Press Release, U.S. Department of Justice Antitrust Division, Justice Department Reaches Record Agreement with NationsBank $4.1 Billion Divestiture Largest Ever in a Single State (Dec. 9, 1997), available at http://www.usdoj.gov/atr/public/press_releases/1997/1300.htm; Fifth Third Bancorp's merger with Old Kent Financial Corporation, Press Release, U.S. Department of Justice Antitrust Division, Justice Department Requires Fifth Third Bancorp and Old Kent Financial Corporation to Make Divestitures in Michigan (March 8, 2001), available at http://www.usdoj.gov/atr/public/press_releases/2001/7638.htm; BB&T Corporation's merger with F&M National Corporation, Press Release, U.S. Department of Justice Antitrust Division, Justice Department Requires BB&T Corporation and F&M National Corporation to Make Divestitures in Virginia and West Virginia (June 19, 2001), available at http://www.usdoj.gov/atr/public/press_releases/2001/222009.htm); PNC Financial Services Group Inc.'s acquisition of National City Corporation, Press Release, U.S. Department of Justice Antitrust Division, Justice Department Requires Divestitures In Acquisition Of National City Corporation By The PNC

Moreover, there is no indication that any collusive behaviour occurred in the banking industry that went unchallenged by the Department of Justice[3]. This is evident in the Department of Justice's investigation of so-called "clubbing" arrangements by private equity funds[4].

3. The current economic crisis strongly suggests a need for targeted regulation of certain industries, but the benefits of deregulation are real and governments should be wary of swinging the pendulum back towards excessive intervention in industry. History demonstrates that free enterprise and deregulatory based policies foster innovation, spur competition, lower prices, and increase efficiency. The deregulation policies initiated in many countries in the fields of transportation, energy, telecommunications, and other industries were prompted by the view that as a result "consumers should benefit from more choices, improved products and services, and lower prices."[5] These policies had to be supported by the implementation of a strong competition policy, as shown by the recent developments of the telecommunications sector in Europe.

4. In contrast, total or partial nationalisation of industry can have negative consequences such as the subsidising of obsolete sectors and the propping-up of inefficient competitors, which impairs innovation and encourages inefficiency. There is little evidence that state control with indirect management through government officials has ever had much success in achieving these enterprise criteria. A legitimate distinction may be possible between such outright state intervention and providing or underwriting short-term debt capital to ensure that competitive businesses remain liquid in times of a credit crisis. In their anxiety to repair the consequences of the current economic crisis, however, governments must be extremely careful about overemphasising short-term considerations, which may lead to well-intended, but ultimately wrong decisions in an effort to protect employment, or other, sometimes ill-defined, public interest considerations.

5. Recognising that some level of state intervention is indispensable in the current crisis to prevent the world economy from grinding to a halt, we urge governments to keep real, long-term economic objectives in mind in their allocation of public help. This should be directed to the regeneration and sustainability of sectors that underpin the functioning of broad segments of the economy and that will

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Financial Services Group (Dec. 11, 2008), available at http://www.usdoj.gov/atr/public/press_releases/2008/240315.htm).

3 In fact, the Department of Justice has been quite active in this area. As Assistant Attorney General of the Antitrust Division from 2005 through 2008, Thomas Barnett "enjoyed a reputation for taking aggressive action against companies involved in price-fixing and other anti-competitive behavior." Ryan Davis, Top DOJ Antitrust Enforcer to Resign, Law360, Nov. 7, 2008, available at http://www.law360.com/articles/76063. In 2008, the Department of Justice imposed more than US$1billion in criminal fines compared to US$338 in 2005. David E. Vann, Jr. & Ellen L. Frye, "Overview," CARTEL REGULATION 3, 3 (2009). The Department of Justice has also continued its efforts to imprison cartel offenders. Id. at 4. "Since 1999, the Division has entered into plea agreements with over 30 foreign executives from nine countries." Id.

4 In October 2006, the Department of Justice sent informal letters to Kohlberg Kravis Roberts & Company, Silver Lake Partners, the Carlyle Group, Clayton Dubilier & Rice, and Merrill Lynch & Co., requesting information about their business practices and participation in recent high-profile auctions. In these letters, the Department of Justice expressed heightened concerns that investment funds may be "conspiring" or "colluding" as part of a club to artificially reduce the purchase prices of the companies that are the targets of buyouts. See, Dennis K. Berman and Henny Sender, Private-Equity Firms Face Anticompetitive Probe; U.S.'s Informal Inquiries Have Gone to Major Players Such as KKR, Silver Lake, Wall St. J., Oct. 10, 2006, at A3.

5 Statement from Canadian Industry Minister Maxime Bernier on the CRTC Deregulation Decision of Local Telephone Service (Jul. 25, 2007), available at http://www.ic.gc.ca/eic/site/ic1.nsf/eng/02093.html.

contribute to sustainable development, to the upgrading of infrastructure, and to the setting up of innovation resources that will fully benefit the post-crisis era, rather than to artificially prop up uncompetitive businesses where the credit crisis is only hiding a long-term trend of decline.

6. Competition policy also should be extremely careful about overemphasising short-term considerations. As a U.S. Deputy Assistant Attorney General stated in 2002, "[m]isguided competition policy designed to maintain fragmented markets or protect small business retards growth and undermines faith in free markets."[6] This comment was made in support of the affirmation that the sole objective of competition policy should be long-term consumer welfare. The same concept has progressively been recognised as the prime purpose of competition policy in many other jurisdictions such as the European Union. A good illustration of these tensions can be found in the sometimes ambivalent attitude of competition policy to intellectual property rights: from a short-term perspective, they can be considered as a barrier to entry, but from a long-term perspective they are an indispensable incentive to innovation[7].

2. Industrial Policy and Competition Policy Should Operate the Same Core Objective of Maximising Consumer Welfare

7. Despite the inherent tension between an industrial policy that relies on subsidisation and a competition policy that supports the success of efficiency, both industrial policy and competition policy should share the same goal of maximising consumer welfare. Although different means might be used to achieve this goal, the policies can be compatible and sound competition policy need not be sacrificed in the name of industrial policy.

8. Industrial policy could be given many definitions, but generally refers to any government action, regulation, or law that promotes the ongoing operation of, or investment in, a particular industry, often by way of direct or indirect government financial support. The stated intention is that by supporting particular industries or firms, they are provided sufficient time to develop, or recover, which will eventually lead to an increase in economic welfare[8]. Time often will allow the protected firms or industries to reach sufficient size to achieve economies of scale without becoming susceptible to short-term market irregularities[9]. In this way, the companies are not required to survive based solely on their own resources, efficiency, ingenuity, or invention.

9. Competition policy intends to promote and to protect competition rather than to protect competitors. The European Commission has noted that the objective of Article 82 is "the protection of competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources . . . . This means that it is competition, and not competitors as such, that is to be protected."[10] Free and fair competition in the longer term leads to the survival and success of the most

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6 Jonathan Galloway, *The Pursuit of National Champions, the Intersection of Competition Law and Industrial Policy*, 28 ECLR 2007, 172 (citing a November 7, 2002 speech at the American Bar Association Fall Forum, Washington DC).

7 See the controversy about the EC Commission's comments about the operation of the Patents system in its Preliminary Report on its Pharmaceutical Sector Inquiry, DG Competition Staff Working Paper (Nov. 28, 2008), available at http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/preliminary_report.pdf.

8 Takako Ishihara, Assoc. Professor, Faculty of Economics and Information Science, Hyogo University, "Industrial Policy and Competition Policy," at 8 (2002), available at http://www.jftc.go.jp/eacpf/05/jicatext2/0826Ind.pdf.

9 Id.

10 European Commission, Directorate-General for Competition, "DG Competition Discussion Paper on the Application of Article 82 of the Treat to Exclusionary Abuses," 17 (Dec. 2005).

efficient actors, with the lowest prices and highest degree of product innovation. As noted by European Commissioner Neelie Kroes, "[t]o be concrete about it: citizens get better goods and services, and businesses have more opportunities to sell them."[11] Similarly, dating back to the landmark case of Brown Shoe in the early 1960s, the U.S. has held that the legislative history of the Clayton Act "illuminates congressional concern with the protection of competition, not competitors."[12] As noted by former U.S. Department of Justice Assistant Attorney General Thomas Barnett, "the distinction between harm to a rival and harm to competition has disseminated throughout our antitrust law – another triumph of the common law."[13]

10. As noted above, industrial policy and competition policy clearly have different means for achieving their goals. European Commissioner Neelie Kroes has asserted that the "great ideological divide" that apparently exists in Europe between competition policy and industrial policy, the economic libertarians and the Colbertist dirigistes, has no *raison d'être*[14]. This difference can raise significant tensions between the two policies. For example, such tensions were observed two decades ago in the preparation of the first Merger Regulation in 1989 and the De Havilland/Aerospatiale case in 1991 and seem to be recurrent: more recent examples include the debate over "efficiencies" in the preparation of the new Merger Regulation in 2004, the GE/Honeywell or ABN-Amro/Antonventa cases in 2001 and 2005, and the ongoing battles over Spanish energy companies[15] and Portuguese banks[16].

11. Merger control is not the only field where these tensions are visible. Antagonistic arguments of industrial policy and competition policy are exchanged each time there is difficulty over the implementation of state aid controls under Article 87 of the EC Treaty. Another example is the dispute about the so-called "Volkswagen Law" which culminated in the European Court of Justice ruling of October 2007. The European Commission's stated posture favours competition policy over industrial policy, as shown by its restrictive position on the "legitimate interests" justifying intervention of Member States in community dimension concentrations under Article 21.4 ECMR, or its initiation of proceedings

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11 Neelie Kroes, European Commissioner for Competition Policy, "Competitiveness – the Common Goal of Competition and Industrial Policies," Address at the Aspen Institute (Apr. 18, 2008), available at http://www.europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/207&format=PDF&aged=1&language=EN&guiLanguage=en .

12 Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

13 Thomas O. Barnett, Assistant Attorney General, Antitrust Division, Department of Justice, "Competition Law and Policy Modernization: Lessons from the U.S. Common-Law Experience," Presentation to the Lisbon Conference on Competition Law and Economics, Lisbon, Portugal (Nov. 16, 2007), available at http://www.usdoj.gov/atr/public/speeches/227755.htm.

14 Neelie Kroes, European Commissioner for Competition Policy, "Industrial Policy and Competition Law & Policy," Speech at Fordham University School of Law (Sept. 14 2006), available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/499&format=HTML&aged=0&language=EN&guiLanguage=en.

15 In 2006, the Spanish government enacted an emergency law to prevent the takeover of Endesa, a national energy company, by the German company, E.ON. The European Court of Justice annulled the law as it was in violation of 21.4 of the Merger Regulation. Even though the Court upheld the Commission's position, E.ON's bid for Endesa has already been withdrawn. Press Release, European Commission, IP/06/1853 (Dec. 20, 2006).

16 In 1999, Portugal attempted to block a Spanish bank's, Banco Santander Central Hispano's (BSCH), bid for the Champalimaud Group of Portugal. The Commission notified the Portuguese government of its objections to the decision and the Portuguese government withdrew the improper measures. Press Release, European Commission IP/99/774 (Oct. 20. 1999); Press Release European Commission, IP/00/296 (Mar. 27, 2000).

against "golden shares" under Article 226 of the EC Treaty. Current conditions provide no reason to believe that it will depart from this approach.

12. The international business community also appreciates these tensions. In industrialised economies there generally is little support for industrial policy as it existed in the post-war years: the public sector has shrunk and planning at a national level (such as the "indicative" planning conducted by the French Commissariat au Plan between 1946 and 2006) has virtually disappeared.

13. However, the international business community recognises that the market cannot do everything by itself. This is the case not only in times of crisis when governments are called to the rescue in response to systemic failures, but also in "normal" times when business requires infrastructure and innovation requires education. These elements are widely regarded as being a primary responsibility of the State. Investment decisions taken or encouraged by governments in these fields, that can be looked at as a form of industrial policy, have heavy consequences on the countries' economies, and therefore must be planned carefully.

14. Governments, however, should not discard competition policy in favour of sweeping industrial programs, even in times of economic crisis. Instead, industrial policy should be utilised sparingly in order to overcome short-term disruptions, but always with an eye toward long-term objectives of ensuring long-term competition and maximising consumer welfare once the crisis conditions have eased.

3. Promotion of National Champions Can Distort Competition and Undermine Global Competitiveness

15. As put bluntly by the EC Competition Director General: national champions are "illegal, they're immoral and they're fat."[17] Former U.S. Federal Trade Commission Chairman Deborah Platt Majoras similarly thought that "the national champion concept is one whose time has come and gone."[18] As companies become increasingly global, promotion of national champions becomes not only unjustifiable, but increasingly futile as it becomes harder to define a "national champion." Is "nationality" defined by the company's place of incorporation, the nationality of the majority of its shareholders, the nationality of its board members, the location of its top management, the location of its key assets, or – an even less measurable concept – its company culture? As noted by Mrs. Kroes in 2006, the domestic share in large European companies' business has in many cases fallen below 40%[19]. The concept of "national champions" that we discuss in this section is that of a company that is artificially propped up by its government. The economic reality of globalisation, which gives less substance to "economic patriotism," makes policies in favour of national champions more and more difficult to justify.

16. Indeed the notion that governments should abandon the approach of promoting free and fair competition among independent firms and replace it with a policy promoting national champions would be detrimental to competition and to consumers. Inevitably such ideas gain momentum in times of international economic crisis. While the notion of "economic patriotism" may be popular in such circumstances, the resolution of this international crisis requires a well-coordinated international response. Countries that promote policies that isolate national industries and seek to gain a strategic national

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17 Philip Lowe, "What is wrong with National Champions?" Speech to the Enforcing Competition Law Conference, London (June 23, 2006).

18 Deborah Platt Majoras, Chairman, U.S. Federal Trade Commission, "National Champions: I Don't Even Think it Sounds Good," Remarks before the International Competition Conference/EU Competition Day (Mar. 26, 2007).

19 Kroes, supra note 13.

advantage thwart efforts at international teamwork. "What looks like necessary help to ailing industries at the domestic level may quickly translate into unfair competition from other countries' perspective."[20]

17. Following the stock market crash of 1929, the U.S. adopted the Smoot-Hawley Tariff Act, designed to promote domestic businesses over foreign competitors.[21] The Act quickly unleashed a backlash of global retaliation, pitting foreign countries against the U.S. and impeding coordinated efforts at recovery. This occurred at a time when a "global economy" was nearly non-existent. Thus, the lessons to be learned from this exercise are exponentially more important in the current and much more intensively integrated global environment. Tariffs, of course, are not the only means of domestic protectionism: national champions and subsidies are all variations on the same theme and are all likely to hinder cooperative efforts.

18. Markets that are characterised by competition amongst independent, non-nationalised firms promote consumer welfare more so than markets comprised of nationalised companies. History clearly proves this by showing that "enterprise" and deregulatory based policies foster innovation, spur competition, lower prices, and increase efficiency. Examples include the deregulation of telecommunications, trucking, transportation, and other industries.

19. National champions, however, are an attempt to give some form of preference, support, or protection to a national company. Such an approach may involve government intervention to provide subsidies to the national champion, altering merger policy so as to ensure that a domestic champion is not acquired by a foreign entity, or providing more favourable terms for the national company to gain business as compared to other firms (e.g., directed bids).

20. One theoretical rationale in favour of national champions relies on the capacity of the championed firm to generate economies of scale in order to thrive in markets which are global and driven by price. But, these premises are highly disputable and can come at a high cost to consumers in both domestic and foreign markets because the economies of scale are not necessarily the result of efficiency[22]. Arguably, an economy needs large companies as well as a rich fabric of SMEs because in certain areas of activity the cost of innovation can only be borne in the long-term by large companies. However, there is a substantial history demonstrating that start-ups are also indispensable to the eco-system of innovation. Such businesses, when they are successful, often become large independent firms (e.g., Microsoft, SAP, and Vodafone) or tend to merge into larger units after a period of time.

21. Despite the efficiencies of scope and scale often associated with large companies, those companies that are propped up by governments often are inefficient and lacking in invention and as a consequence lack competitiveness which in turn makes them ever more dependent on government support. It is only those large companies that achieve economies of scale through innovation and actual competition that can achieve international competitiveness, efficiencies, and provide incremental consumer welfare gains.

22. National champions distort competition because they deprive the market of opportunities for the best synergies. Companies that do not have to compete or who receive an influx of cash from outside

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20 Patricia Wruuck, Industrial Policy Puts Global Cooperation at Risk, Yale Global Online (Nov. 14, 2008), available at http://yaleglobal.yale.edu/display.article?id=11606.

21 See U.S. Department of State discussion regarding the Smoot-Hawley Tariff Act, available at http://future.state.gov/when/timeline/1921_timeline/smoot_tariff.html.

22 See, e.g., Paul Geroski, Chairman, U.K. Competition Commission, "Competition Policy and National Champions" (Mar. 8, 2005), available at: http://www.mmc.gov.uk/our_peop/members/chair_speeches/pdf/geroski_wifo_vienna_080305.pdf.

sources do not strive to cut costs, to make better products, or to compete for customers. The net effect of championing a domestic company is to assure that more efficient and aggressive competitors are not allowed to compete on a level playing field. This can have significant detrimental effects on consumer welfare by denying consumers the benefits of innovation, expansion, and integrative efficiencies. As stated by former U.S. Federal Trade Commission Chairman Deborah Platt Majoras, "[i]n short, protect competition, and you protect consumers. Try to direct or manage competition, and you protect only specific competitors and their special interest; consumers, and thus the economy, lose."[23]

23. Additionally, governments that support national champions also pay a substantial cost for doing so. The McKinsey Global Institute's twelve-year study to determine why some nations remain wealthy and others remain poor despite years of international aid found that "economic progress depends on increasing productivity, which depends on undistorted competition. When government policies limit competition . . . more efficient companies can't replace less efficient ones. Economic growth slows and nations remain poor."[24]

24. Given this outlook, there is no reason that smaller economies should take a different view toward promotion of national champions. Indeed, there is no reason why a small country that participates in the world trade would not abide by the same rules as larger countries. Luxemburg for instance has been subject to European competition law since the formation of the common market of which it was one of the founders. Indeed there may be fears that in the field of merger control, small and large countries receive asymmetric treatment, as claimed when the Commission prohibited Volvo's acquisition of Scania in 2000[25]. However, the remedy to this issue is probably to be found in challenging market segmentation and geographical market delineations rather than in establishing specific regulatory exceptions or different substantive standards for smaller countries. Also, there may be issues in certain small countries related to the transition from a state-controlled to a market economy based regime, but like issues related to development they are not specific to the size of the country, and they should be transitional by nature.

25. Developing countries often have a tendency toward significant state intervention until privately funded industrial investments are allowed to evolve. This often results in prolonged phases of protectionism and anti-competitiveness. However, some observers who have analysed the successful progress of the new economic giants of East Asia doubt that going through such phases is indispensable: "claims that those industrial policies that constrained rivalry were central to East Asian development and that such measures were effective have been discredited by empirical research."[26]

26. In any case, most would presumably agree that support should not be lent to economic dinosaurs that end up having no incentive to innovate or to make the necessary structural changes. The problem is that no country is prepared to admit its company is an economic dinosaur. As a result, there may be situations where because they independently do not have the management, products, assets, financing, etc. to compete in the global economy, companies – even would-be national champions – should be left to fail.

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23 Majoras, supra note 17.

24 Majoras, supra note 17 (citing William Lewis, The Power of Productivity: Wealth, Poverty, and the Threat to Global Stability (2004), at 103).

25 Henrik Horn and Johan Stennek, "The Political Economy of EU Merger Control: Small vs. Large Member States" (Sept. 21, 2005) available at http://www.econ-law.se/Papers/Horn-Stennek-revised.pdf.

26 Douglas Brook, "Industrial vs. Competition Policy", Asian Development Bank Institute (May 2, 2007), available at http://www.adbi.org/research-policy-brief/2007/05/02/2239.industrial.policy/industrial.vs..competition.policy/.

Alternatively, governments should be open to allowing their companies to be acquired by international companies that can provide the required tools and synergies to compete effectively in the global economy.

27. The "crisis" exceptions recently observed in the U.S. and in European countries (e.g., the "public interest" intervention on the HBOS/Lloyds bank merger in the U.K., public aid to the French, German, and U.S. car industries) should not become recurrent accepted policy, but merely remain a short-term aberration.

4. Greater Emphasis on Certain Tools of Antitrust Policy May Serve to Enhance Industrial Reform and to Improve Outcomes

28. Despite the business community's belief that wholesale reform or even serious amendment of competition policy is not necessary, now may be an appropriate time to consider aspects of competition policy that can be further advanced to ensure strong, robust, and efficient companies that are able to survive economic crises.

29. Competition agencies have long paid lip service to the concept of efficiencies and have incorporated efficiencies analysis into their theoretical merger guidance, but have rarely given them much weight in merger matters.[27] In the current environment, where the output of many businesses has declined sharply in a very short period of time, the benefit of integrative efficiencies is greater than ever. Merged companies that are able to take advantage of a reduction of costs – whether fixed or variable – are more likely to remain viable and competitive. Those companies that are deprived of such cost savings or are incapable of realising them may well be lost to bankruptcy or liquidation.

30. This suggests that agencies should seriously evaluate whether to give greater credit to efficiencies and more readily approve some mergers that present a risk of slight anticompetitive effects (by which we mean either transitory in nature or limited in magnitude or both) in order to permit more cost-efficient competitors to emerge. The alternative may be to deny such mergers and preserve competitors that are less able to withstand the kind of economic upheaval that we are witnessing at present.

31. Crucial to this discussion is the need to consider dynamic as well as static efficiencies in merger analysis. Static efficiencies, such as economies of scale in production, are one-time only events and therefore often times can be more easily quantified.[28] Dynamic efficiencies, however, are harder to quantify as they include efficiencies "that enable firms to improve their performance, whether in terms of cost, quality, service, or new product development, on a potentially continuing basis."[29] There should be room for consideration of dynamic efficiencies in merger analysis beyond mere lip service, especially

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27 One exception in recent years has been the analysis conducted by the U.S. Department of Justice concerning efficiencies. See, e.g., Verizon Communications Inc.'s acquisition of MIC Inc., Press Release, U.S. Department of Justice Antitrust Division, Justice Department Requires Divestitures In Verizon's Acquisition Of MCI and SBC'S Acquisition of AT&T (Oct. 27, 2005), available at http://www.usdoj.gov/atr/public/press_releases/2005/212407.htm; and the merger between Delta Air Lines Inc. and Northwest Airlines Corporation, Press Release, U.S. Department of Justice Antitrust Division, Statement of The Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of The Merger of Delta Air Lines Inc. and Northwest Airlines Corporation (Oct. 29, 2008), available at http://www.usdoj.gov/atr/public/press_releases/2008/238849.htm.

28 See OECD Policy Roundtables, "Dynamic Efficiencies in Merger Analysis" at 9 (2007), available at http://www.oecd.org/dataoecd/53/22/40623561.pdf.

29 Id.

where dynamic efficiencies would outdistance any potential harm to consumers.[30] Despite the rhetoric, practical experience shows that agencies are eager to identify and to assert the mere possibility of harm to competition, yet extremely reluctant to acknowledge dynamic efficiencies that are highly likely to result from a merger. As evidence of this imbalance, consider how many agency decisions that find competitive harm also acknowledge the presence of efficiencies. This suggests that agencies view efficiencies, to some extent, as an afterthought used to justify a decision to clear a transaction, but not seriously considered once any potential for harm is identified.

32. The scope of efficiencies to be taken into account for the purposes of evaluating concentrations has been highly debated before the adoption of the new European Merger Regulation, described as "the most controversial topic in the history of the ECMR."[31] The controversy related to the fear that this could be used by large countries in defence of their national champions. Eventually, by deciding that efficiencies must both be merger-specific and benefit consumers, the Commission has adopted a standard which preserves the ultimate goals of competition policy. Canada has a similarly flexible approach to efficiencies as a defence in merger cases, not requiring that they are passed on to consumers in the form of lower prices, provided they remain consistent with the purpose of the Competition Act "to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy."[32] The key, however, is not whether the standards are adopted in policy, but rather whether they are adopted in practice.

33. The concept of "international competitiveness" found in the French merger guidelines is more susceptible to use in favour of national champions. Indeed the view in some corners is that critical size is a form of efficiency that must be taken into account in appraising a merger: in 2004, Mr. Strauss-Kahn advocated "an evolution of competition law to facilitate the formation of European players having critical size on the market."[33] This concept of "international competitiveness" remains as one of the motives that can be invoked by the Minister of Finance to set aside a decision (based purely on competition grounds) taken by the new Competition Authority under the reform of August 2008.[34]

34. However, competition policy criteria have clearly prevailed in the appraisal of mergers in the EC. The reasons for which a European Member State can intervene in a merger of community dimension and thereby impose decisions motivated by domestic public policy considerations have been progressively restricted. They relate essentially to "defensive" reasons of security; the other two accepted motives, plurality in the press and financial prudence are perhaps less relevant. But even in these limited areas the role of competition policy has not been entirely excluded.

35. As a separate issue, current economic conditions highlight that competition policy should further incorporate consideration of the failing firm issue in conducting merger analysis. Just as it would distort competition to subsidise inefficient competitors, it would equally distort competition to inhibit efforts by companies to become more efficient through various means, including by merger or, more likely, acquisition. Historically, a failing firm defence has only been considered – and then with tremendous scepticism – as a measure of absolute last resort. In order to invoke this defence in the U.S., for example,

30 See Steven C. Salop, "Efficiencies in Dynamic Merger Analysis," Federal Trade Commission Hearings on Global and Innovation-Based Competition (Nov. 2, 1995), available at http://www.ftc.gov/opp/global/saloptst.shtm.

31 A. Lindsay, "The ECMR: Substantive Issues" (2nd ed.), 510.

32 Canadian Competition Act, sections 96 and 1.1.

33 Table Ronde, "Un Projet Durable pour l'Europe de Demain" (Apr. 2004).

34 Art. L.430-7-1 of the French Commercial Code.

parties to a transaction must satisfy a very strict standard.[35] Former Federal Trade Commissioner Robert Pitofsky stated "that by requiring firms virtually to be in bankruptcy rather than clearly on the road to highly probably failure, United States law (unlike the law of many of our trading partners) is too restrictive."[36] The U.S. agencies have left the strict standard as is, but argue that "[w]hen faced with mergers involving firms in distressed industries or near-failing firms, antitrust should assess such transactions in terms of their likely competitive effects."[37]

36. There is some indication that these considerations have been at work to a greater extent since the outbreak of the economic crisis. In her remarks before the Economic and Monetary Affairs Committee of the European Parliament, European Commissioner Neelie Kroes noted that the Commission will continue to apply existing merger control rules and that "the Commission can and will take into account the evolving market conditions and, where applicable, the failing firm defence."[38] Similarly, in discussing why the U.S. undertook certain initiatives and not others to stabilise the financial sector, the U.S. Treasury noted that the Treasury did not prohibit acquisitions because "when a failing bank is acquired by a healthy bank, the community of the failing bank is better off than if the bank had been allowed to fail. Branches and financial services in that community are usually preserved. Costs to the taxpayers via the FDIC deposit fund are also lower than had the bank been allowed to fail. Prudent mergers and acquisitions can strengthen our financial system and our communities, while protecting taxpayers."[39] But, the U.S. government has not issued a blank check for every bank acquisition to go through without question as demonstrated by Department of Justice action in PNC Financial Services Group Inc.'s recent acquisition of National City Corporation, where the Department of Justice required the divestiture of 61 branch banking offices.[40]

37. Government intervention should not be used as a means to impose or facilitate the creation of a cartel, particularly if that cartel would have any impact on international commerce. The durable harm

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35 See U.S. Department of Justice and Federal Trade Commission, "Horizontal Merger Guidelines," available at http://www.usdoj.gov/atr/public/guidelines/hmg.pdf ("A merger is not likely to create or enhance market power or facilitate its exercise if the following circumstances are met: 1) the allegedly failing firm would be unable to meet its financial obligations in the near future; 2) it would not be able to reorganise successfully under Chapter 11 of the Bankruptcy Act; 3) it has made unsuccessful good-faith efforts to elicit reasonable alternative offers of acquisition of the assets of the failing firm that would both keep its tangible and intangible assets in the relevant market and pose a less severe danger to competition than does the proposed merger; and 4) absent the acquisition, the assets of the failing firm would exit the relevant market.")

36 Robert Pitofsky, Chairman, Federal Trade Commission, "FTC Staff Report on Competition Policy: Six Months After," (Nov. 7, 1996), available at http://www.ftc.gov/speeches/pitofsky/rpaba11.shtm.

37 Federal Trade Commission Staff, "Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace," 3 (May 1996).

38 Neelie Kroes, European Commissioner for Competition Policy, "Dealing with the Current Financial Crisis," Speech before the Economic and Monetary Affairs Committee, European Parliament (Oct. 6, 2008), available at http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/498&format=HTML&aged=0&language=EN&guiLanguage=en.

39 Press Release, U.S. Department of Treasury, Interim Assistant Secretary for Financial Stability Neel Kashkari Review of the Financial Market Crisis and the Troubled Assets Relief Program (Jan. 13, 2009), available at http://www.ustreas.gov/press/releases/hp1349.htm.

40 Press Release, U.S. Department of Justice Antitrust Division, Justice Department Requires Divestitures In Acquisition Of National City Corporation By The PNC Financial Services Group (Dec. 11, 2008), available at http://www.usdoj.gov/atr/public/press_releases/2008/240315.htm.

caused by cartels is well-understood. Cartels are more likely to be formed in times of economic difficulty as companies search for ways to survive rather than face demise. Sharpening the tools to detect and especially to deter cartels will be an important role of competition agencies in helping to recover from the current crisis. As noted by Office of Fair Trading Chief Executive Officer, John Fingleton, "we may see greater temptation to cartelise markets with rising competition between existing suppliers for a shrinking demand . . . it is important that we [competition agencies] are vigilant to the potential rise of cartels in a recession."[41]

38. At the same time, there may be much greater scope for firms to pool resources and coordinate efforts in ways that are pro-competitive and efficiency-enhancing through joint ventures, technology transfer, and similar cooperative ventures. We believe that such opportunities, at times, are not fully exploited due to uncertainty over the scope of competition laws. An emphasis on creating greater transparency with respect to joint venture guidance and enforcement principles could help to eliminate this uncertainty and lead to more efficient outcomes that benefit consumers. In particular, a greater use of safe harbours in providing guidance to joint venturing companies and a more realistic approach by agencies to the thresholds at which they are likely to take action – as compared to the thresholds under which there may be a theoretical basis, in laboratory conditions, for taking enforcement action – would improve the potential for companies to conclude efficient joint ventures.

5. Conclusion

39. The primary concern of the international business community is that a "level playing field" is maintained. "Industrial policy" can often be an impediment to a level playing field, created to favour short-term objectives rather than long-run efficiency. BIAC recognises that industrial policy is, in some limited cases, an indispensable role of governments in attempting to promote industrial development or in responding to a systematic market failure as seen in the current economic crisis. Where industrial policy has the effect of a competitive retreat, creating anti-competitive domestic or international markets for any significant period of time, it clearly has gone too far. Deploying protectionist policies is not a means of long-term resolution of the current economic crisis, and competition policy cannot be set aside to wait for better times. Competition policy can adjust, however, to help further goals of industrial development and financial stability, in particular by enhancing consideration of efficiencies and failing firm issues in merger control. More than ever, there is a clear need for international coordination of measures based on internationally accepted ground rules that the OECD is uniquely placed to help formulate.

[41] John Fingleton, Chief Executive Officer, Office of Fair Trading, "Competition Policy in Troubled Times" at 15 (Jan. 20, 2009), available at http://www.oft.gov.uk/shared_oft/speeches/2009/spe0109.pdf.

MR. ELIE COHEN

1. Should market regulations and competition authorities be considered tools befitting periods of economic calm, while government assistance, if not industrial policies, are deemed the only tools suitable in times of crisis? As the current crisis deepens, it can be seen that the initial reflex of any government is to put the rules of competition on hold, protect domestic industry and, in some cases, even exploit the crisis by attempting to reap an illusory competitive advantage. Limiting imports by invoking dumping clauses, reserving financial guarantees for nationals alone and lending to local banks on preferential terms are all indicative of one and the same approach: when confronted by a crisis, protection is better than openness, and national identity takes precedence over territorial roots. The government assistance that it was believed could be limited to the financial industry so as to preclude systemic risk has now been extended to the motor and real estate industries, to credit-strapped SMEs, and probably before long to airlines, the chemicals industry and so on. In this way, a dynamic is taking hold which, unless care is taken, will justify protectionist measures, limitations on competition and forms of national preference. We thought the lessons of 1929 had been learned, and that there had been a clean break with the artificial havens of an administered economy, but the lure of national solutions may prove irresistible.

2. Europe, far from responding to the shock of the crisis with common policies, and far from seizing the opportunity to demonstrate the strength of the single market and of the euro area, has adopted a policy that reveals the temptation for each country to fend for itself. Clearly, what is showcased in the media would suggest just the opposite: a G4 meeting convened under the French presidency, a co-ordinated Sarkozy-Brown crisis-resolution plan, a meeting of the G20, a co-ordinated economic stimulus plan. The fact of the matter is that communication has prevailed over substance. For proof, one need only consider the policies carried out in response to the September 2008 liquidity shock and solvency crisis.

3. A shared panoply of tools of intervention was adopted: deposit guarantees, bank recapitalisation, interbank loan guarantees and in some cases the purchase of toxic assets. Yet national implementation of these measures ended up creating distortions. One example of this was the recapitalisation of banks: some countries took a punitive approach tantamount to nationalisation; others lent government funds on highly preferential terms; and the rest made recapitalisation contingent on credit expansion or dividend limitation. There were three practical outcomes to this race to fragment and renationalise financial systems. First, national competition authorities were muzzled, as was the UK Office of Fair Trading in respect of the HBOS-Lloyds-TSB merger. Second, the lack of a European mechanism for salvaging integrated financial corporations gave rise to intergovernmental joint ventures to save Fortis and Dexia, with the probable ultimate result of national dismantling of these integrated European groups. Third, the ever more numerous government bailouts and the competitive distortions they cannot help but generate made DG Competition want to apply the conventional method of *quid pro quos* for public assistance, with rapid capitulation to national demands. It was believed that Europe, being a prescriptive power, would be capable of managing the conflict between systemic risk and competitive risk generated by government assistance, but DG Competition's demand for a cutback in lending by assisted businesses in the midst of a credit crunch put it in an awkward position[1].

[1] "Brussels would like to compel all assisted banks to bolster their balance sheets, *i.e.* to lend less in proportion to their equity, even if that equity is strengthened with State funding" (*Le Figaro*, 1 December

4. It can be considered that this error has since been rectified, and that DG Competition is gradually getting its bearings back, submitting national assistance plans to swift but effective review. This assumption will soon be put to the test, since we are now witnessing a second wave of recapitalisations with partial nationalisations. If the current governmental schemes were to be carried out with no harmonisation, the European financial landscape would soon be split asunder between British firms heavily recapitalised and subject to prescriptive credit policy, French firms thinly recapitalised but with no strings attached and a merged German group heavily recapitalised on scandalously preferential terms.

5. One might attribute this relative impotence of the competition authority to the urgency of the situation and consider that when the storm has passed the Commission will resume control. The concentrations undertaken in response to the crisis will pose problems of abuse of dominant positions in some markets, and especially the one for mortgage lending; what has been authorised today can thus be dismantled tomorrow.

6. The history of European integration may even prompt us to consider a third scenario for the course of competition policy against the backdrop of a major financial crisis: taking the high road out. Finding the European Union relatively powerless to cope with the break-up of regulatory and prudential supervisory powers may prompt amendments to the Maastricht Treaty that would invest the central bank with supervisory power to foster financial stability. Similarly, the risk of fragmentation of the single market for financial services may give rise to centralised regulation of banks of Community-wide scope. Lastly, a European financial and fiscal power may arise to deal with internal dislocation risks within the euro area should there be a deterioration of national public debts (as measured by sovereign-debt spreads between European countries). The financial crisis is having magnifying effects on the imperfections and dysfunctional aspects of European institutions. The worst is not certain, but to date the European Union has not been up to the tasks at hand.

2008); "The State is opposed to the Commission on a major issue: Brussels is making its go-ahead for the transaction contingent on limited growth in credit and in bank balance sheets" (*Les Échos,* 1 December 2008).

M. ELIE COHEN

1. Faut-il considérer les régulations de marché et les autorités de concurrence comme des outils pour temps de paix économique et les aides publiques voire les politiques industrielles comme les seuls outils appropriés aux temps de crise? Avec l'approfondissement de la crise on constate que le premier réflexe de tout Gouvernement est de mettre entre parenthèses les règles de la concurrence, de protéger son industrie domestique, voire de tirer partie de la crise pour gagner un avantage concurrentiel illusoire. Limiter des importations en invoquant des clauses de dumping, réserver ses garanties financières à ses nationaux, prêter aux banques autochtones à des conditions avantageuses relève d'une seule et même logique : face à la crise la protection est supérieure à l'ouverture, l'identité nationale prime sur l'ancrage territorial. Les aides publiques qu'on croyait pouvoir limiter à l'industrie financière pour prévenir le risque systémique sont étendues à l'industrie automobile, à l'immobilier, aux PME en mal de crédit et demain sans doute aux compagnies aériennes, à l'industrie chimique ….. Ainsi se forme une dynamique qui, si on n'y prend garde, justifiera des mesures protectionnistes, des limites à la concurrence, des formes de préférence nationale. On croyait avoir tiré les leçons de 29 et rompu avec les paradis artificiels de l'économie administrée mais la tentation des solutions nationales risque de devenir irrépressible.

2. L'Europe, loin d'avoir répondu au choc de la crise par des politiques communes, loin d'avoir saisi l'occasion pour montrer la force du marché unique et de la zone Euro, a adopté une politique qui révèle la tentation du chacun pour soi. Certes, l'écume médiatique témoigne du contraire : G4 organisé sous présidence française, plan coordonné Sarkozy-Brown de sortie de crise, réunion du G20, plan de stimulation économique coordonné. En fait, la communication l'a emporté sur la substance. Pour s'en convaincre, il suffit de considérer les politiques menées face au choc de liquidité et la crise de solvabilité de Septembre 2008.

3. Une panoplie commune d'outils d'intervention a été adoptée : garantie des dépôts, recapitalisation des banques, garantie du crédit interbancaire, achat éventuel d'achats toxiques. Mais la mise en œuvre nationale de ses mesures a abouti à créer des distorsions. Un exemple, la recapitalisation des banques : certains pays ont adopté une logique punitive de quasi-nationalisation, d'autres prêtèrent des capitaux publics à des conditions très avantageuses, les derniers enfin conditionnèrent la recapitalisation au développement du crédit ou à la limitation des dividendes. Le résultat pratique de cette course à la fragmentation et à la renationalisation des systèmes financiers a été triple. D'une part, les autorités de concurrence nationale ont été condamnées au silence, ce fut notamment le cas de l'autorité de la Concurrence britannique pour la fusion HBOS-Lloyds-TSB. D'autre part l'absence de mécanisme européen de sauvetage des entreprises financières intégrées conduisit à des *joint ventures* interétatiques pour sauver Fortis ou Dexia avec comme résultat ultime probable un démantèlement sur des bases nationales de ces groupes européens intégrés. Enfin, la multiplication d'aides publiques et les distorsions concurrentielles qu'elles ne pouvaient pas ne pas générer ont conduit la DG Comp à vouloir appliquer la méthode classique des contreparties aux aides publiques avec une capitulation rapide face aux demandes nationales. On croyait que l'Europe, puissance normative, saurait gérer le conflit entre risque systémique et

risque concurrentiel généré par les aides publiques mais la demande par la DG Comp de réduction du crédit par les entreprises aidées dans un contexte de *credit crunch* l'a mise en porte à faux[1].

4. On peut considérer que cette erreur a été depuis corrigée et que la DG Comp retrouve progressivement ses marques en soumettant les plans d'aides nationaux à un examen rapide mais efficace. Cette hypothèse sera rapidement testée puisqu'on assiste à un deuxième cycle de recapitalisations avec des nationalisations partielles. Si les plans gouvernementaux actuels étaient menés à bien sans harmonisation des conditions de recapitalisation, on assisterait rapidement à un éclatement du paysage financier européen entre des entreprises anglaises fortement recapitalisées et soumises à une politique du crédit directive, des entreprises françaises faiblement recapitalisées mais sans conditions attachées et un groupe allemand fusionné fortement recapitalisé à des conditions scandaleusement favorables.

5. On peut mettre cette impuissance relative de l'autorité de la concurrence sur le compte de l'urgence et estimer qu'une fois passé l'orage, la commission reprendra la main. Il est probable que les concentrations réalisées à la faveur de la crise poseront des problèmes d'abus de position dominante sur certains marchés, notamment celui du crédit immobilier ; on pourra donc défaire demain ce qu'on a autorisé aujourd'hui.

6. L'histoire de l'intégration européenne peut même nous inciter à envisager une troisième hypothèse d'évolution de la politique de la concurrence dans un contexte de crise financière majeure : la sortie par le haut. Le constat fait d'une relative impuissance de l'Union Européenne face à l'éclatement des pouvoirs de régulation et de supervision prudentielle peuvent conduire à compléter Maastricht en dotant la banque centrale d'un pouvoir de supervision au service de la stabilité financière. De même, le risque de fragmentation du marché unique de services financiers peut conduire à une régulation centralisée des banques d'envergure communautaire. Enfin, un pouvoir financier et fiscal européen pourrait naître pour traiter les risques de dislocation interne de la zone Euro en cas d'aggravation de la crise des dettes publiques nationales (mesuré par les *spreads* sur dette souveraine entre pays européens). La crise financière a des effets grossissants sur les imperfections et les dysfonctionnements des institutions européennes. Le pire n'est pas certain, mais l'Union Européenne n'a jusqu'ici pas été à la hauteur des enjeux.

[1] « Bruxelles voudrait imposer à toutes les banques aidées de redresser leur bilan, c'est à dire de prêter moins en proportion de leurs capitaux propres, fussent-ils renforcés par les deniers de l'État Le Figaro 1/12/08 « L'État s'oppose à la Commission sur un point majeur : Bruxelles conditionne son feu vert à l'opération à une croissance limitée du crédit et à celle de la taille du bilan des banques » Les Echos 1/12/08

SUMMARY OF DISCUSSION

7. **The Chairman** (Professor Frédéric Jenny) opened the discussion and introduced the three expert panellists: Mario Monti, a former Competition Commissioner and currently President of the Bocconi University; Elie Cohen, Research Director of the French National Council for Scientific Research, member of the French Economic Analysis Council and Professor at the École des Sciences Politiques de Paris; and Luis Pais Antunes, a member of the Portuguese Parliament, a former minister and Director General for Competition in the Portuguese government. The Chairman stated that the meeting would consist of a discussion among the panellists and then questions and comments from the floor.

Mr Mario Monti

8. Mr Monti considered that three questions need to be asked in order to stimulate the discussion. First, are we entering a 'competition night'? Second, is competition policy silently shifting standards from consumer welfare to producer welfare? Third, is promoting national champions equivalent to protecting national weaknesses?

9. In relation to the first question, Mr Monti noted that actual developments have not been that discouraging. For him, actual developments have in fact been positive. Two examples were provided. The first is that France has introduced a new, and single, competition authority, Autorité de la Concurrence. This represents a positive development for Mr Monti for two reasons: (a) it involves a more modern approach to the relationship between industrial policy and competition policy, as the Minister for Economy and Finance relinquished most of his powers in the area of vetting mergers; and (b) there is an now extended role for the advocacy activities of the competition authority. The second positive development was that in the US in the last few months there has been an interesting, far-reaching debate about the use of a more active competition enforcement policy. Mr Monti noted, then, that while the current financial crisis continued to throw shadows on competition policy everywhere, one should not lose sight of these positive developments. As a result of the crisis, Mr Monti suggested there is both a temptation, as well as intellectual foundations, for some phasing out or temporary suspension of certain competition enforcement measures, and not only in Europe.

10. On the second question Mr Monti noted that there is a generalised intellectual consensus about consumer welfare being the appropriate basis for competition policy. Mr Monti conceded however that the disruptions generated by the crisis have engendered measures and decisions on the part of competition enforcement which could hardly be justified on the basis of consumer welfare. These measures and decisions represent the imperative felt by many governments - and maybe some competition authorities - that priority should be given to the survival of productive entities. Mr Monti believed that many governments are providing lip service to Keynes but not really implementing - for the first time in the last 60 years when it is needed - a serious Keynesian demand policy in a coordinated manner.

11. On the third question, Mr Monti submitted that the whole discussion about national champions, European champions and competition policy over the last several years has probably over-estimated alleged obstacles opposed by the European Union structures to the emergence of national or European champions and under-estimated the real, objective facilitation of champions brought about by European integration. Mr Monti underlined that many European, and non-European, champions can exist without

violating current EU and national competition rules. So while it is important to acknowledge that there are threats of disintegration as a response to the crisis, it should not be forgotten that the European framework has facilitated in an important manner the emergence of national or European champions by simply providing companies with a large domestic customer base: the single market. Mr Monti considered whether, in the long term, sufficient stability is possible when systematic state aid control is performed only in one part of the world, i.e. in the EU. He believed that there is potential for the development of intolerance towards state aid control and that the European Commission should be praised for its efforts to limit the spread of such intolerance. Mr Monti submitted that, given that there is intellectual agreement on avoiding protectionism in relation to the G20, maybe more should be done in that context to introduce some common principles of state aid control which should not apply only to one part of the global economy.

12. **The Chairman** thanked Mr Mario Monti for his comments and gave the floor to Mr Elie Cohen.

Mr Elie Cohen

13. Mr Cohen suggested that the current crisis is giving rise to protectionist fears. While one must keep this protectionist risk in mind, one must not forget that the current crisis forces one to fundamentally rethink ways of improving global imbalances. The persistence of global imbalances is going to bring us face-to-face with a very simple problem which is that we cannot live sustainably with deficits concentrated on one side and surpluses concentrated on the other: countries will have to rethink their economic specialisation to ensure that over the long term they can balance their current account deficits. In other words, in order to be able to import, countries will have to be able to export. For some time, it was thought that current account imbalances could be offset by financial specialisation, by income from patents, by royalties on licences, earnings from shares abroad, etc. However, when a crisis hits one discovers that these flows do not enable us to offset current account imbalances.

14. To avoid these imbalances one can develop activities which increase one's exports. Mr Cohen submitted that this is not so different than industrial policy: industrial policy is a government's resolve to influence the economic specialisation of a country. Specialisation can be a result of deliberate government policy creating skills in sectors that are not natural sectors of activity. In the future, one will have to cope with a return to government intervention in the specialisation of a country, because without it global imbalances will bring down the entire international economic system.

15. Mr Cohen submitted that what is needed is a change of mentality concerning industrial policies and national champions. The traditional model, which disregards industrial policies, is usually based on three justifications: (i) government is not good at picking the right industries and the right firms and therefore it makes (costly) mistakes; (ii) government has a bias towards making national champions and therefore distorts the allocative efficiency which is the very principle of market functioning; and (iii) government is routinely captured by pressure groups. Mr Cohen believes one should continually question and debate these three ideas. In this regard he highlights that people often mention government mistakes and failures but forget about the serious policy failures in the private sector. Mistakes in the private sector can be just as painful for the taxpayers as mistakes in the public sector, as evidenced by the current financial crisis.

16. The general idea that competition policies are always a good thing - because they are for the benefit of the consumer and consumer purchasing power, they stimulate innovation, or they allocate resources efficiently - should also be debated. For example, some forms of competition can have a negative impact on innovation. Economic theory has changed and is reflecting a more mixed picture of the respective benefits of industrial policy and competition policy. For example, it is true that sectoral industrial policies can be justified when there are co-ordination problems or information problems to be

solved. One should not forget that promoting innovation, promoting research and development and promoting the development of research spillovers for application in industrial systems has a very strong impact on productivity gains. Government intervention in the form of subsidies or preferential loan terms to help finance particularly high upfront costs in very capital-intensive sectors is another justifiable case. The current contribution of development economics demonstrates that import substitution policies, public aid policies and public control policies over certain entities are delivering economic success, as in the cases of Brazil and Korea. For a country producing agricultural commodities to become an industrial or technologically advanced country, it would need to have suitable institutions and therefore government intervention would be necessary along with state aid and even, in the initial stages, some form of protection and government procurement.

17. Distinctions need to be drawn concerning the use of both competition policy and industrial policy. First, a distinction should be made between economies that are only just emerging and mature economies. When a country is an emerging economy, not only are industrial policies appropriate, they are warranted, since one needs to change a country's specialisation, i.e. to turn from a context of agricultural products to an industrial context. The strategies applicable at the initial stage of economic take-off are not the strategies that apply to mature economies, where competition policies are more important. Second, distinctions should be made according to the stage of development and sector. In certain sectors with particularly high upfront investment costs, there is justification for state aid. In sectors where the mode of growth and development is less intensive, strategies that are aimed more at developing co-operation, promoting cluster effects, the circulation of information, developing externalities, research, etc. should be promoted.

18. Mr Cohen concluded by stating that it is possible to have a more 'integrated' vision of competition policy and industrial policy and that such a vision is all the more necessary because we are entering into a world where we are going to have to radically change economic behaviour.

19. **The Chairman** thanked Mr Elie Cohen for his comments and gave the floor to Mr Luis Pais Antunes.

Mr Luis Pais Antunes

20. Mr Pais Antunes made three assumptions at the outset: (i) that although competition policy was facing difficult times the 'competition nightmare phase' has not yet begun; (ii) that the time has now come to think more about integration of competition concerns in other policies rather than putting all of the focus on the exercise of competition policy; and (iii) that in the current situation sound competition principles are more needed than ever before: we're not entering a period where competition principles and competition concerns should be put on hold until markets become in a position to be more effective.

21. Mr Pais Antunes argued that not only has the recession shocked markets, policy makers and the general public, but also it has clearly damaged the growing public confidence in the ability of competitive markets to deliver positive outcomes. At least potentially, recession is hostile towards competition policy. For him, intervention to rescue the financial system in exceptional circumstances is crucial but should not be considered as a reason to suspend the importance of competition in other sectors, either via state aid, anticompetitive mergers, cartels and collusive practices. A new framework for state aid will be needed in the short term. Subsidies are rarely ideal in that they are normally costly for the taxpayer, necessarily favour less efficient firms, create dependency and ultimately may damage competitive incentives. However, restrictions on competition are even worse: they tend to favour higher consumer prices and promote inefficiency; they are less transparent; and they can result in permanent changes in the market structure (which may create even bigger competitive issues in the future).

22. Mr Pais Antunes acknowledged that there are arguments both in favour and against national champions. Arguments in favour include the following. First, in certain industries infant companies need help, specialised knowledge, experience, and support in relation to start up costs. Second, subsidies given to national champions can attract internationally mobile researchers. Third, the promotion of agglomeration of clusters can create spillovers and help participants to become even more innovative and competitive. Fourth, government investments can supplement large companies' investments in plant and equipment, thereby enhancing their productivity and their potential for creating employment. Fifth, governments may need to correct short-term market failures. Finally, there may be a need to rescue failing companies or industries for socio-economic reasons: to prevent a slow down and the consequent job losses.

23. Although Mr Pais Antunes acknowledged that there are a number of arguments against the strategy of supporting national champions, he wished to focus on only two. The first is that the social cost of supporting specific industries can be significant. (The real solution should aim to address the skill requirements and transition costs for the affected workers rather than supporting the specific industries themselves.) The second is that subsidies and protection for a national champion begets retaliation in other countries.

24. Mr Pais Antunes believed that what is needed is pragmatism and flexibility. Instead of having an active policy of protecting and promoting specific national champions, one should try to manage the interaction between (i) the existence of important industrial clusters (and the need to protect these), and (ii) respect for the main competition principles. All kinds of policies - in particular those of the industrial, social/employment variety - require a careful assessment of competitive costs. Wherever a restriction on competition is deemed necessary both governments and agencies should be creative and should narrow the scope and duration of the restriction on competition. Finally, one should not forget that some of the bigger cartels in recent history were organised during recessions; governments and agencies must therefore be very vigilant on this issue.

25. **The Chairman** thanked Mr Luis Pais Antunes for his comments and invited the speakers to react to each others comments.

26. **Mr Mario Monti** agreed with all of the comments of Mr Elie Cohen except for his points on the supposed divergences. He noted: (a) that Mr Cohen acknowledged that there is a case for a number of public interventions in the economic process, including for state aid; and (b) that competition policy is itself a public intervention in the market mechanism. He then posed two questions to Mr Cohen: (i) how did he articulate his vision in the case of an integrating or integrated system like the EU?; and (ii) did he think that within the EU the promotion or maintenance of national champions should justify negative externalities on other Member States?

27. **Mr Elie Cohen** submitted that when one observes the operation of national champions in a certain number of sectors the case for questioning vertically integrated national monopolies becomes quite clear: if one wants to create a truly integrated market, it makes sense to also create the conditions for new entrants; however, if there is to be new entry, these vertical monopolies need to be separated to some extent. In every case, one must take account of the costs and benefits of fragmenting players that have the proven capability of behaving efficiently.

28. **Mr Luis Pais Antunes** agreed that a cost/benefit analysis must always be carried out to weigh the advantages and drawbacks of national champions. For him, the tension in the current debate is that where Mr Mario Monti would see a few more advantages, Mr Elie Cohen would see a few more drawbacks and vice versa. Mr Pais Antunes also submitted that in the current situation other policies than competition policy (e.g. social policy, employment policy and industrial policy) will necessarily take priority, at least for the next 2-3 years.

29. **The Chairman** then opened the general discussion by setting out its four main themes:

i) the potential conflict between industrial policy and competition policy;

ii) the complementarities between these two policies, i.e. whether they can be mutually reinforcing;

iii) the creation and promotion of national champions; and

iv) the specific problem of small and developing economies on the relationship between competition policy and industrial policy.

In relation to the first theme, the Chairman noted that after a period of very active industrial policy Japan recently moved away from industrial policy and towards a more competition-based economic policy. On this note the Chairman passed the floor to the delegate from Japan.

30. The delegate from **Japan** noted that both external and internal factors were responsible for the change towards a more competition-based economic policy. External factors included the impact of deregulation and trade liberalisation. Internal factors included the accumulated effects of the Japan Fair Trade Commission's (JFTC's) enforcement of the Antimonopoly Act of 1947 and various advocacy activities undertaken since the enactment of this Act. During the late 1980s Japanese economic policy changed from a producer-oriented one to one focused on consumer interest. At present regulatory agencies in charge of telecoms, electricity and gas etc. share almost the same basic ideas regarding competition policy as those of the JFTC. In other sectors, the JFTC continues to raise competition awareness by initiating reviews and expressing JFTC's views on administrative reforms from a perspective of competition policy and by enforcing the Antimonopoly Act against illegal activities. In Japan it took a long time from the enactment of the Antimonopoly Act in 1947 to the development of a common understanding of the importance of competition. But the Japanese delegate thought that jurisdictions which introduced competition laws after the 1990s do not need such a long time because nowadays the majority of jurisdictions have comprehensive competition laws and the importance of competition is more widely acknowledged in the world.

31. **The Chairman** thanked the delegate from Japan for his comments. He noted that in Brazil there was a pre-1988 period during which active involvement of the state in the development of the economy was the hallmark of its economic policy. The Chairman asked the delegate from Brazil: (i) have there been shifts back and forth between an emphasis on competition policy and on industrial policy; (ii) has this led to difficulties?; and (iii) what are the reasons for this 'uncertain policy'?

32. The delegate from **Brazil** submitted that at present Brazil has an industrial policy which, from the standpoint of the competition authority, poses no threat to competition policy. Until the 1980s Brazil had an industrial policy which left no room for competition policy, but after adoption of a new constitution in 1988 a very strong competition policy was introduced and provision was made for certain grounds on which mergers could be approved, such as technological development, innovation, efficiency, etc. The Brazilian government currently takes no direct action to create firms that will be national champions. The National Bank for Economic and Social Development does, however, use public funds to stimulate innovation and technological research by firms. The Brazilian competition authority can also approve mergers between firms even in cases where a substantial portion of competition has been eliminated. To do this it must demonstrate that the merger is in the public interest and is an important operation for the national economy. Such arguments have yet to be advanced in practice. It was also noted that the Brazilian government is currently in the process of enhancing the role of the competition authority by taking steps to approve draft legislation which will modernise the entire competition authority and improve the effectiveness of its actions.

33. **The Chairman** noted that in Germany the competition authority, rather than being required to judge on industrial policy when relevant, has actually been overruled in some cases by the Government or by the Ministry for reasons of industrial policy.

34. The delegate from **Germany** mentioned the *E.ON/Ruhrgas* case, in which it was decided by ministerial authorisation that the serious competition concerns of the Bundeskartellamt – which had blocked the merger – were outweighed by an overriding public interest, namely, energy security. Following this case, a number of problems related to competition in this sector have been identified, and proceedings against energy companies have been initiated (including against E.ON/Ruhrgas). According to the delegate, it is difficult to identify any clear positive results from the merger clearance in terms of energy security. Indeed, it is unclear whether E.ON/Ruhrgas's power in the field of gas played any role in tempering the recent gas conflict between Russia and the Ukraine, for example. Given that only eight ministerial allowances in the area of mergers have been granted since 1973, the delegate from Germany believes it is relatively difficult to obtain such an allowance and to place industrial policy above competition policy.

35. **The Chairman** then requested comments from China, one of the only countries attending the roundtable that talks in its written contribution about competition within the government sectors, the state-controlled sectors, and the importance of maintaining competition between state-owned firms.

36. According to the delegate from **China**, the Chinese government attaches great importance to the supervision of public enterprises and encourages them to compete efficiently. Recently China has made some progress in the reform of its monopoly industries by: (i) separating government functions and enterprise management; (ii) introducing competition into the industry; (iii) improving government's supervision; and (iv) promoting enterprise restructuring. Over the last number of years, the Chinese government has intensified its supervision in this area, and has targeted behaviour such as coercive transactions, coercive service supply, discriminatory treatment, tie-in with unreasonable trading conditions, and abuse of a dominant position to collect unjustified fees. The Chinese Anti-Monopoly Law entered into force in August 2008. Article 7 of the law clearly states that firms in monopolised industries shall act in a law-abiding, honest and self-disciplined way and will be subjected to public scrutiny.

37. **The Chairman** then requested comments from Canada on the second theme of the discussion: how industrial and competition policy complement one another.

38. The delegate from **Canada** explained that a panel was recently set up to review Canada's foreign investment and competition policy rules. The panel specifically considered the role of national champions, and one of the concerns raised was whether the Canadian merger provisions impeded the growth of Canadian companies and encouraged foreign takeovers and the loss of national champions. The panel was satisfied with the appropriateness and consistency of application of the substantive merger review provisions. To underline this point the delegate quoted from the Canadian submission: 'Champion companies should emerge as the result of their superior competitive performance and market forces. There are significant risks of picking and promoting particular firms by exempting firms or industries from general competition laws or allowing firms to merge based on "public interest" criteria other than competitive effects and economic efficiency. Moreover, protecting domestic firms from foreign competition or other preferential treatment is harmful to the productivity of the domestic economy and the competitiveness of Canadian industries that, in many cases, depend on these firms for essential inputs into their businesses'.[1] The delegate from Canada also submitted that it was somewhat hypocritical for countries to argue that national champions should not be protected when legislation exists that actually insulates export cartels and international state control cartels.

[1] http://www.oecd.org/dataoecd/60/33/42174422.pdf at 11.

39. **The Chairman** then requested comments from South Africa. In particular, he wished to know about the internal guidelines adopted by the South African competition authority to facilitate convergence between competition policy and industrial policy.

40. The delegate from **South Africa** believed that competition policy makers should try and work out an industrial policy and a competition policy that can co-exist with each other. Three principles would help achieve this aim. The first is that industrial policy support should be as far from the market as possible. The provision of generic capabilities like human resource capabilities, general research and development capabilities can fit comfortably with competition policy and be completely non-distortionary. The closer one gets to providing support to selected sectors and firms, however, the more difficult it is for industrial policy and competition policy to co-exist. If individual support is to be given it should be based upon an 'open-window-type' architecture where governments offer support and firms bid in an open and transparent manner for this support. The second principle is that support for industrial policy and competition policy should not translate into a competition policy that is perceived to be opposed *a priori* to large firms. That said, industrial policy should concentrate on providing support to second-tier firms rather than to dominant firms. The third principle is that competition policy enforcers need to develop a prosecutorial strategy that supports the industrial and social policy objectives of government. The South African Competition Commission, for example, has articulated a prosecutorial strategy which concentrates on bid rigging in big public investment tenders because public investment is the key driver of South Africa's economic growth and development strategy.

41. **The Chairman** thanked the delegate from South Africa before noting that in France over the last two decades increasing weight has been given to competition policy and both competition policy and industrial policy have started to converge. He asked the delegate from France to explain both the factors that lie behind this change and the impact that this change in perception has had on the importance or respective roles of industrial policy and competition policy.

42. The delegate from **France** highlighted that France is now among those countries which consider that competition policy and industrial policy are more complementary than contradictory, if only because they pursue the same objective of economic efficiency. It was noted that this is a fairly recent development in historical terms, since for many years France considered that economic efficiency was the outcome of industrial efficiency and that industrial efficiency was primarily the outcome of public intervention. There are three signs of rapprochement between competition policy and industrial policy: (i) the continued opening-up of markets and the exposure of historical champions to competition; (ii) a change in the aim of industrial policy, which now seeks primarily to improve the environment in which all firms can prosper; and (iii) the French competition authority takes increasing account of economic efficiencies in the application of the competition rules, particularly in the opinions it has recently given to the Minister concerning economic concentrations. Furthermore, the reform in France concerning the institutional organisation of competition can be interpreted as a sign of complementarity. The transfer of decision-making powers regarding concentrations to an authority with more extensive powers reflects the government's confidence in the ability of that authority to reconcile the aims of industrial policy with the direct introduction of competition.

43. **The Chairman** asked the delegate from Slovenia about the perceptions of the respective rules of industrial policy and competition policy in the development strategy of that country.

44. The delegate from **Slovenia** explained that in the post-privatisation period economic development and economic growth were the key goals in creating economic policies required to complete the economic transformation and to prepare for the membership to the EU. After Slovenia's accession to the EU, industrial policy measures were strongly motivated by national development initiatives, with the key priorities being a competitive economy, fast economic growth aiming at fostering entrepreneurship,

and an increase in competition. At present development strategies are in line with the Lisbon strategy goals. The privatisation process played an important role in shaping Slovenian attitudes towards competition policy and industrial policy in the early years after independence. But irrespective of privatisation, competition policy standards were developed so as to provide for effective prohibition or control of actions which could potentially affect competition on the market or harm consumer welfare.

45. **The Chairman** then noted that there is relatively heavy government intervention in certain sectors in the US (e.g. R & D, health, defence, and energy) and asked for clarification from the US delegate on the common element of these sectors that justifies such an intervention.

46. The delegate from **the United States** explained that the expenditures referred to tend to be public goods. The most important outlay is on basic research which is unlikely to be undertaken by private investors but which nonetheless yield substantial benefits to social wellbeing. Another outlay is investment in human capital, e.g. higher education. A third outlay is investment undertaken in the context of national security. These types of expenditure have been enormously influential. For example, the Internet was directly and unmistakably the consequence of outlays made by Darpo which is a sub-unit of the Department of Defense. The delegate suggested that with sector specific outlays the deeper question is not so much whether or not different governments invest in these different strategies but rather why some work and some do not. For example, why did the experiment with nuclear power work in France and not in the USA?

47. **The Chairman** asked the Swiss delegate about Switzerland's non-interventionist approach and its lack of direct industrial policy.

48. The delegate from **Switzerland** submitted that if by industrial policy one means something that favours the specificities of a given country then there is no contradiction between competition policy and industrial policy. Exploiting and using national specificities is certainly something that Switzerland has done. There has been investment in universities and research sectors, for example. In this context it is not about choosing winners: anybody can apply for these subsidies. For the Swiss delegate it is natural that a country favours an environment in which it thinks it has the best chances to succeed.

49. **The Chairman** then invited the delegate from Norway to explain why upon reading their contribution there appears to be such a wide gap between industrial policy and competition policy in that country.

50. The delegate from **Norway** stressed that it is not the case that industrial policy and competition policy are inherently in conflict and that Norway's contribution does not discuss industrial policy in general but rather reflects upon the national champion component of industrial policy. For the delegate, the rationale for industrial policy is normally to correct market failures, e.g. the existence of externalities. The Norwegian competition authority clearly recognises that a competition policy promoting national champions can be a viable and effective option provided two conditions are fulfilled: (a) the market failure has to be clearly identified; and (b) it must be likely that the promotion of a national champion will correct the market failure. Nonetheless, the Norwegian competition authority has expressed scepticism towards the idea that a national champion policy can correct a market failure. The only scope for industrial policy should be to promote strong firms; these firms operate close to the technological frontier and have the potential to be highly competitive on an international market. But generally these firms seem to succeed without any support. There is also a danger that national authorities may be tempted to pursue a policy of promoting national champions even in the absence of market failure.

51. **The Chairman** then invited the delegate from the Russian Federation to comment on the claim that competition is viewed as the central element of the industrial development plan of that country.

52. The delegate from **the Russian Federation** explained that in November 2008 his government adopted a strategy of long term social and economic development which aims to ensure stable welfare growth, national security, dynamic development of the economy, and the strengthening of Russia's position in the global community. This strategy also aims to improve the competitiveness of Russian products on the global market and envisages structural changes of Russian industries and industry diversification, particularly in the technology sectors. The delegate explained that the Federal Antimonopoly Service reports on an annual basis to the government concerning competition issues and recommends specific actions to be undertaken to develop competition. The Russian Ministry of Industry and Trade has engaged in a process of liberating a number of industrial sector policies including those related to aviation, electronics and the ship building industry. A large part of FAS's activities concern the natural monopoly regulations (gas and oil sector, railways, post, etc…) which aim primarily at achieving a balance between the interests of consumers and those of the natural monopolies. In order to implement competition-based reforms, basic structural and institutional reorganisations are being undertaken, the functions of state management and economic activity are being separated, and a system of state regulation complying with the new conditions is being created.

53. **The Chairman** then invited the delegate from the EU to comment on the third theme of the discussion: national champions.

54. According to the delegate from **the EU,** the European legal framework does not prevent the creation of national champions when they do not lead to a distortion of competition: the creation of a national champion would be incompatible with the rules if it distorts competition to an extent that it negatively affects consumer welfare. The European Commission has a good track record of enforcing this principle. Indeed, the European Commission has been quite active in recent years in removing barriers that would prevent the acquisition of national players - strategic players sometimes - by companies located in other Member States. The same principle applies with state aid: one should balance the negative effects of the aid in competition with the positive effects that could derive from this aid, and the fact that the aid would lead to the creation of a national champion cannot be considered as such as a positive effect in this context. Positive effects include improvements in efficiency and the removal of market failures. In relation to market failures, one must establish: (i) the actual existence of a market failure; (ii) that the aid is necessary and proportionate to remove it; and (iii) that these positive effects are not outweighed by the negative ones deriving from the distortion of competition. The third condition would not likely to be met in these conditions if the aid leads to the creation of a strengthening of a dominant position.

55. **The Chairman** asked the delegate from Lithuania to explain the competition policy aspect of the interaction between the competition authority and the government regarding the survival of the leading textile firm in Lithuania.

56. The delegate from **Lithuania** explained the textile company in question was not created by the Lithuanian government – it was a leftover from the Soviet era – and that the fundamental problem was that the company was too big for the Lithuania economy. The Competition Council decided it was not appropriate to allow state aid to the company: it did not provide enough safeguards to restore the company's viability in the long term. In the years following this decision the company remained unprofitable. Given that the law in force would have prevented the provision of aid, the government decided to adopt a special law devoted to that particular company. It appears that the company is still unsuccessful and the decision of the Competition Council has been vindicated.

57. **The Chairman** noted that in Korea, even though competition policy has been quite active, there is protection against competition in a number of industries such as finance, telecom and energy. He asked the Korean delegate to comment on this issue.

58. The delegate from **Korea** explained that in order to promote competition, enhance consumer welfare and regulate industries like telecoms and energy, the competition authority and the regulatory authorities coordinate with each other. Regulatory authorities are mainly in charge of handling highly technical and specific matters such as technical standards, access technology and end-user price. The competition authority of Korea, the KFTC, is in charge of preventing anti-competitive behaviours in regulated sectors such as refusing access to essential facilities, price fixing, and abuse of dominant power. Sometimes in relation to guaranteeing universal access there are overlaps between the jurisdiction of the competition authority and the regulatory authority. In this situation both agencies consult with each other to coordinate their own activities. To clarify the rules and scope of responsibilities the KTFC has signed MOUs with the financial and telecom sector regulators.

59. **The Chairman** called on the delegate from Chinese Taipei to comment on the efforts of his government to create a national champion in banking while promoting competition in other sectors.

60. The delegate from **Chinese Taipei** explained that in 2005 his government began the second phase of the financial reform and the purpose of this reform was to cut down the number of banks in Chinese Taipei. There were two reasons underlying this approach: (i) there was a strong and general consensus among the participants in the banking industry that the banking business in Chinese Taipei was too dispersed, fragmented and overly competitive; and (ii) it was believed that by turning Chinese Taipei into a regional financial centre with one or two big companies one would increase the global competition capacity and the visibility of Chinese Taipei around the world. For the Chinese Taipei competition authority, there is no significant competition issue with this type of national champion policy: currently there are around 40 domestic commercial banks and around 40 foreign commercial banks in Chinese Taipei that are competing fiercely. It was conceded that this type of national champion policy might provide incentives for companies in other industries to ask for favouritism. That has occurred in Chinese Taipei in the high power industry, the uranium industry and in higher education. One must continue to advocate competition policy and also give advice to the government when attempt are made to choose the winner or the loser.

61. **The Chairman** then asked the delegate from BIAC to outline BIAC's attitude towards nationalisation of firms in troubled industries and towards the efficiency defence in merger reviews.

62. The delegate from **BIAC** believed that strong competition policy should be maintained through this time of crisis and that anticompetitive protection of national champions should be contested, whether it takes the form of nationalisation or otherwise. However, if help is given to large companies it should always be driven by a long-term policy and not only by short-term considerations. As regards the efficiency defence, the delegate submitted that one can (i) have a more flexible and a less doctrinaire approach to this concept, and (ii) introduce and emphasise the concept of dynamic efficiency as opposed to static efficiency. He also advocated a more flexible approach to the failing firm defence and to joint ventures, which may be a useful way of to getting us out of the current crisis.

63. **The Chairman** turned the discussion towards the final theme: the perspective from the small and developing economies on the relationship between competition policy and industrial policy. He called first for comments from Papua New Guinea.

64. The delegate from **Papua New Guinea** submitted that from a developing country's perspective it is advisable for governments to give concessions and comparative advantages (such as tax holidays, import protection, or monopoly rights) to potential major investors or sector-specific investors. Currently, a major oil and gas exploration project is under discussion in Papua New Guinea involving InterOil amongst others and it is likely that this project will also be granted a range of exemptions from the application of competition law.

65. **The Chairman** called for comments from Uzbekistan, a country that is apparently following a forthright policy of import substitution and export promotion. In particular, the Chairman wished to know whether Uzbekistan was considering moving to a more competition-based policy in the near future.

66. According to the delegate from **Uzbekistan**, there are no major success or failure stories related to industrial policy in that country. Industrial policy can also be justified on the ground of supporting infant industries and reducing social problems that might arise from unemployment. However, competition policy should not be disregarded, even during the ongoing crisis. Currently the competition authority in Uzbekistan is working on a new law that will extend competition law to the financial markets.

67. **The Chairman** then turned to the Maltese delegate and asked whether Malta has found that trade policy was an effective substitute or complement for competition policy and whether besides the pressure of state aid there is still a need in Malta to have an active competition policy.

68. The delegate from **Malta** explained that in the late 1990s Malta moved from a policy that was highly protectionist to one which is more pro-market with the dismantling of all import barriers, liberalisation of markets, privatisation of state-owned enterprises and a reduction of subventions. This was accompanied by the enactment of antitrust and (competition-based) merger legislation and the setting up of a competition authority and a state aid monitoring board. Malta does not have a policy of creating, supporting or maintaining national champions; rather, the emphasis in its industrial policy is on attracting foreign direct investment to Malta. By opening up its markets fully to competing products from abroad and by liberalising the markets to allow new entrants it has made its markets more competitive to the benefit of consumers. But liberalisation alone is not a substitute for competition policy and oversight by the competition authority, for two reasons. First, the NCA has to ensure that operators do not re-erect private barriers to trade to shield themselves from foreign competition. Second, in some sectors, due to the small size of the market and the heavy investments involved, only one or two operators will be viable; there the NCA and the sector specific regulators should ensure that these dominant operators do not abuse their dominance. The delegate also submitted that industrial policy and competition policy are considered to be complementary rather than conflicting policies. The small size of the domestic market tends to limit the scope for competition in a number of markets. In the presence of imperfect market structures one of the tenets of Malta's industrial policy has been the adoption of ever more aggressive regulation and supervision of market players.

69. **The Chairman** then asked for comments on this issue from the delegate from the Ukraine.

70. The delegate from **the Ukraine** noted that the Ukraine is a country that has recently passed through three stages of development: the crisis of change, the emergence from that crisis and a period of stabilisation. It is currently facing economic problems, although this time it is in the same way as every other country. The Ukraine's experience has shown that: (i) the monopoly sector operated inefficiently; (ii) during the emergence from its crisis stage, the industrial sectors with oligopolistic markets were those which were the most successful; and (iii) in the stabilisation stage the situation has changed (as oligopolistic markets in a calm period become a field for collaboration and for parallel behaviour by actors). In the Ukrainian context at least, the policy concept of competitiveness proposed by the EC appears to have borne fruit. It was submitted in this regard that an optimum model of such a policy must presuppose competition as a necessary component of industrial policy.

71. **The Chairman** thanked the delegate from the Ukraine for his comments and passed the floor to David Spector, who, the Chairman noted, had written an impressive background paper for the discussion.

72. **Mr David Spector** reminded participants that in the past in most jurisdictions competition policy attached a very large weight to market share considerations which could in some cases lead to the

implementation of competition policy that ignored the effects identified previously by Mr Elie Cohen. However, this is no longer the case: recently EC competition and merger law have become more economics-based. This does not mean that there is no scope for conflict anymore; but this conflict relates to the more detailed implementation of competition policy. Choosing a consumer welfare standard over a total welfare standard is clearly an issue that sometimes leads competition policy to conflict with industrial policy. The area of efficiencies, however, provides the greatest scope for conflict between industrial policy and competition policy: the standard of proof for the existence of efficiencies is very high as competition policy is a legal process; industrial policy, by contrast, is just like economic policy in general and may leave more room for discretion.

73. **Mr Mario Monti** believed that competition policy has everything to gain if it is perceived as being more pragmatist and less religious than it is sometimes portrayed. For mergers, unlike for state aid, there is an international framework, and this largely reduces the potential debates about whether or not European merger control policy should favour European champions: a potential European champion would in all likelihood require authorisation not only by the European Commission but by a number of key authorities around the world.

74. **Mr Elie Cohen** noted that the contributions submitted for this roundtable enable one to take better stock of the interlinkages that exist in practice between industrial policy and competition policy. Three contributions in particular impressed him: Germany, South Africa and the USA. Germany's presentation demonstrated that, in the energy sector, one cannot reason solely in terms of either competition or industrial policy. In this context a policy decision is taken which reflects a form of trade-off (i.e. the weighing up of the pros and cons) at any given time between the three objectives of competitiveness, security of supply, and environmental sustainability. The South African contribution highlighted that the real problem in promoting national champions is not so much that the State is systematically wrong while the market is right; the real difference is that the State does not know when to stop in cases where a given approach fails to produce results. Accordingly, the question is how to find procedures that will allow government to set out upstream criteria that will make it possible to determine the effectiveness of a given choice. The US contribution provided a good illustration of what the pursuit of public goods, or the development or provision of public goods, can have in the way of virtuous effects on the economic development of a country, on its specialisations through the specific vectors of human capital development, R&D development and infrastructure development.

75. The US contribution also raised the issue of nuclear energy. Mr Cohen believed that three points need to be made here: (i) that there are initial investment and development costs that are particularly high, and therefore it cannot be assumed that several actors will support this type of cost which they know will be irretrievably lost if their branch is not chosen; (ii) a choice has to be made in a context in which there is competition between different types of energy sources and therefore the nuclear option is permanently subject to trends in the price of oil or coal; and (iii) the challenges of safety and preserving one's reputation are particularly important. Mr Cohen believed that in this context industrial solutions are less expensive to the taxpayer than competition-based solutions. After considering the merits of the French example, Mr Cohen submitted that in a system in which competition is encouraged between different actors driven by short-term economic considerations based on variations in energy prices, without the benefits of serial production and without the benefit of learning effects from several competing nuclear technologies, one ends up with a system which is more expensive, far less efficient and which proves to be a relative failure over time.

76. **Mr Luis Pais Antunes** submitted that that the main challenge at present is to spread a competition culture within public bodies, i.e. within governments, as that is the field where the 'competition war' is going to be played. He also believed that the marriage between industrial policy and

competition policy is not an impossible marriage; like in any marriage tensions do exist and one should not try to ignore them.

77. **The Chairman** drew the Roundtable to a close and thanked the delegations for their submissions as well as the three panelists.

COMPTE RENDU DE LA DISCUSSION

78. **Le Président** (le Professeur Frédéric Jenny) ouvre la discussion et présente les trois membres du groupe d'experts : Mario Monti, ancien Commissaire européen chargé de la concurrence, actuellement Président de l'Université de Bocconi (Italie) ; Elie Cohen, Directeur de recherche au Centre national de la recherche scientifique français, membre du Conseil d'analyse économique français et Professeur à l'École des sciences politiques de Paris (France) et Luis Pais Antunes, Parlementaire, ancien Ministre et ancien Directeur général de la concurrence (Portugal). Le Président déclare que la réunion comportera une discussion entre les membres du groupe suivie de questions et de commentaires de la salle.

M. Mario Monti

79. M. Monti estime que trois questions doivent être posées pour animer la discussion. Premièrement, « le glas de la concurrence » a-t-il sonné ? Deuxièmement, la politique de la concurrence serait-elle en train de changer discrètement de priorité, passant d'une politique tournée vers le bien-être des consommateurs à une politique orientée vers le bien-être des producteurs ? Troisièmement, la promotion des champions nationaux équivaut-elle à protéger les faiblesses nationales ?

80. S'agissant de la première question, M. Monti observe que les évolutions intervenues ne sont pas à ce point décourageantes. En fait, il les juge même positives. Deux exemples sont donnés pour illustrer le propos. Le premier est la création en France d'une autorité unique et indépendante chargée de veiller au respect de la concurrence, l'Autorité de la concurrence. M. Monti estime qu'il s'agit d'une évolution positive pour deux raisons : (a) elle correspond à une approche plus moderne des liens entre politique industrielle et politique de la concurrence, le ministre de l'Économie et des Finances renonçant à l'essentiel de ses pouvoirs dans le domaine du contrôle des fusions et (b) les actions de promotion et de sensibilisation de l'Autorité de la concurrence voient leur rôle renforcé. Le deuxième aspect positif est la tenue aux États-Unis, au cours de ces derniers mois, d'un débat intéressant, de grande portée, sur l'opportunité de mettre en œuvre une politique antitrust plus active. M. Monti note ensuite qu'il ne faudrait pas perdre de vue ces évolutions positives même si, dans le monde entier, la crise financière actuelle laisse toujours planer une menace sur la politique de la concurrence. Avec la crise, estime M. Monti, il y a à la fois la tentation et les arguments intellectuels pour supprimer progressivement ou suspendre provisoirement un certain nombre de mesures assurant le respect de la concurrence, et ce, pas uniquement en Europe.

81. S'agissant de la deuxième question, M. Monti relève l'existence d'un consensus intellectuel sur le fait que le bien-être des consommateurs constitue le fondement approprié de la politique de la concurrence. M. Monti concède toutefois que les bouleversements provoqués par la crise ont conduit à l'adoption de mesures et de décisions de la part des autorités chargées d'appliquer le droit de la concurrence qui sont difficiles à justifier par le bien-être des consommateurs. Ces mesures et décisions sont l'expression de la nécessité ressentie par un grand nombre de gouvernements – et, le cas échéant, par certaines autorités de la concurrence – de donner la priorité à la survie des unités de production. M. Monti estime que bon nombre de gouvernements expriment une adhésion de pure forme à Keynes, mais qu'ils ne mettent pas en œuvre – alors que ce serait nécessaire pour la première fois depuis 60 ans – une politique keynésienne de la demande sérieuse et coordonnée.

82. S'agissant de la troisième question, M. Monti observe que tout le débat autour des champions nationaux, des champions européens et de la politique de la concurrence de ces dernières années au moins a probablement surestimé les obstacles opposés par les structures de l'Union européenne à l'émergence de champions nationaux ou européens et sous-estimé le fait que l'intégration européenne a réellement et objectivement facilité la création et le maintien de champions nationaux. M. Monti souligne que l'existence de bon nombre de champions européens mais aussi de champions non européens est compatible avec les règles communautaires et nationales de la concurrence en vigueur. S'il importe de reconnaître que la crise engendre des risques de désintégration, il ne faudrait pas oublier que le cadre européen a grandement facilité l'émergence des champions nationaux et européens par la – seule – création d'un marché unique qui a élargi la clientèle nationale des entreprises. M. Monti se demande si l'on peut parvenir à une stabilité suffisante à long terme lorsqu'une seule partie du monde, en l'occurrence l'UE, procède à un contrôle systématique des aides d'État. Il pense que l'on pourrait voir apparaître une intolérance au contrôle des aides d'État et qu'il faut saluer les efforts consentis par la Commission européenne pour éviter que cette intolérance ne se répande. M. Monti suggère, au vu du consensus intellectuel qui existe au sein du G20 pour éviter toute forme de protectionnisme, qu'il faudrait peut-être consentir davantage d'efforts dans ces conditions pour mettre en place des principes communs relatifs au contrôle des aides d'État qui ne s'appliqueraient pas seulement à une partie de l'économie mondiale.

83. **Le Président** remercie M. Mario Monti pour ses commentaires et donne la parole à M. Elie Cohen.

M. Elie Cohen

84. M. Cohen indique que la crise actuelle fait craindre des réactions protectionnistes. S'il faut garder ce risque de protectionnisme présent à l'esprit, il ne faut pas oublier que la crise actuelle nous oblige à repenser en profondeur les moyens de réduire les déséquilibres mondiaux. La persistance de déséquilibres mondiaux va nous confronter directement à un problème très simple, à savoir qu'on ne peut pas vivre durablement avec des déficits concentrés d'un côté et des excédents de l'autre : les pays vont devoir repenser leur spécialisation économique de façon à pouvoir résorber le déficit de leur balance courante et assurer son équilibre sur le long terme. Bref, pour pouvoir importer les pays devront être en mesure d'exporter. Pendant un certain temps, on a cru que l'on pouvait résorber les déséquilibres des balances des paiements courants par la spécialisation financière, grâce aux redevances des brevets et des licences ou aux dividendes des actions à l'étranger, etc., mais lorsque la crise frappe à la porte, on constate qu'il n'en est rien.

85. Pour éviter pareils déséquilibres, on peut développer des activités génératrices d'exportations. M. Cohen indique que cette option présente une certaine analogie avec la politique industrielle : la politique industrielle traduit la détermination des pouvoirs publics d'influer sur la spécialisation économique du pays. La spécialisation peut résulter de la mise en œuvre d'une politique délibérée des pouvoirs publics pour créer des capacités dans des secteurs qui ne sont pas des secteurs d'activité naturels. Il faut s'attendre à un regain d'intervention de l'État dans la spécialisation du pays et il faudra s'y adapter car, sans intervention de cette nature, le système économique international, dans son ensemble, menace de s'effondrer sous l'effet des déséquilibres mondiaux existants.

86. M. Cohen pense qu'un changement de mentalités s'impose s'agissant de la politique industrielle et des champions nationaux. Le modèle traditionnel, qui fait fi de la politique industrielle, repose habituellement sur trois justifications : (i) les gouvernements ont du mal à choisir les « bons » secteurs d'activité et les « bonnes » entreprises, ceux qui mériteraient de l'être, commettant, par voie de conséquence, des erreurs qui coûtent chères ; (ii) les pouvoirs publics ont tendance à privilégier la création de champions nationaux altérant, par là-même, l'efficience allocative qui est le principe de base sur lequel repose le fonctionnement du marché ; (iii) les pouvoirs publics sont ordinairement pris en otage par des

groupes de pression. M. Cohen estime qu'il faudrait en permanence remettre en question et s'interroger sur la pertinence de ces trois idées. À cet égard, il souligne qu'il est souvent fait état des erreurs et des défaillances des pouvoirs publics alors qu'on oublie les graves erreurs de décision commises par le secteur privé. Les erreurs imputables au secteur privé peuvent être aussi douloureuses pour les contribuables que celles du secteur public comme le montre la crise financière actuelle.

87. Il faudrait également s'interroger sur la pertinence de l'idée généralement répandue selon laquelle la politique de la concurrence est toujours une bonne chose puisqu'elle profite au consommateur et à son pouvoir d'achat, qu'elle stimule l'innovation et qu'elle assure l'allocation efficiente des ressources. Ainsi, certaines formes de concurrence peuvent avoir des effets négatifs sur l'innovation. La théorie économique a évolué ; elle donne désormais une image plus nuancée des avantages respectifs de la politique industrielle et de la politique de la concurrence. Il est vrai, par exemple, qu'il peut être justifié de mettre en œuvre une politique industrielle sectorielle lorsqu'il existe des problèmes de coordination ou d'information à régler. En effet, il ne faut pas oublier que le fait d'encourager l'innovation et la recherche-développement et de favoriser l'exploitation des retombées de la recherche pour les appliquer aux systèmes industriels influe très fortement sur les gains de productivité. L'intervention des pouvoirs publics sous la forme d'aides d'État ou de prêts à taux préférentiel peut de même se justifier pour aider les entreprises à financer des coûts immédiats qui sont particulièrement élevés dans les secteurs à très forte intensité capitalistique. La part actuelle de l'économie du développement montre que les politiques de substitution des importations, les politiques d'aides publiques et les politiques de contrôle de certaines entreprises par l'État sont des gages de réussite économique, comme l'illustrent les cas du Brésil et de la Corée. Sans institutions adaptées et, par voie de conséquence, sans l'intervention des pouvoirs publics (sous forme d'aides d'État et, même au stade initial, de mesures de protection ou de la constitution de marchés publics) un pays agricole ne peut pas devenir un pays industriel ou un pays technologiquement avancé.

88. Il faut opérer des distinctions entre l'utilisation qui est faite de la politique de la concurrence et celle qui est faite de la politique industrielle. En premier lieu, il faut distinguer les économies tout juste naissantes de celles qui sont parvenues à maturité. Il est non seulement indiqué mais encore justifié pour un pays à économie émergente d'avoir une politique industrielle puisqu'il doit changer de spécialisation, en l'occurrence passer du stade agricole au stade industriel. Les stratégies applicables dans la phase de décollage d'une économie et celles qui le sont dans la phase de maturité économique durant laquelle la politique de la concurrence a plus d'importance, ne sont pas identiques. En second lieu, il faut opérer des distinctions selon le stade de développement et le secteur concerné. Les aides d'État se justifient dans les secteurs où les coûts immédiats d'investissement sont particulièrement élevés. En revanche, dans les secteurs où le mode de croissance et de développement sont moins intensifs, les stratégies visant davantage à développer la coopération, à favoriser les effets de grappe ou la circulation d'informations, à accroître les externalités, à stimuler la recherche, etc., sont à privilégier.

89. M. Cohen conclut en affirmant qu'il est possible d'avoir une vision plus « intégrée » de la politique de la concurrence et de la politique industrielle et que pareille vision est d'autant plus nécessaire que nous entrons dans un monde dans lequel il nous faudra radicalement changer notre comportement économique.

90. **Le Président r**emercie M. Elie Cohen pour ses commentaires et donne la parole à M. Luis Pais Antunes.

M. Luis Pais Antunes

91. M. Pais Antunes formule trois observations liminaires : (i) « le glas de la concurrence n'a pas encore sonné » même si la politique de la concurrence connaît des temps difficiles ; (ii) le moment est venu de songer davantage à intégrer des considérations de concurrence dans les autres politiques plutôt que de

placer l'accent exclusivement sur l'application de la politique de la concurrence et (iii) les principes d'une saine concurrence s'imposent plus que jamais dans la situation actuelle : nous n'entrons pas dans une période dans laquelle les principes et les considérations de concurrence devraient être mis sous le boisseau en attendant que les marchés soient en mesure de retrouver une certaine efficacité.

92. M. Pais Antunes constate que la récession a non seulement plongé les marchés, les responsables politiques et le public en général dans le désarroi mais encore ébranlé la confiance croissante de l'opinion dans la capacité des marchés concurrentiels à avoir des effets positifs. La récession est, au moins potentiellement, réfractaire à l'existence d'une politique de la concurrence. Il estime qu'il est capital d'intervenir pour, dans des circonstances exceptionnelles, sauver le système financier mais que l'on ne saurait y voir une raison valable pour renoncer (temporairement) à la concurrence qui est essentielle dans d'autres secteurs en octroyant des aides d'État, en tolérant les fusions, les ententes ou les pratiques collusoires anticoncurrentielles. Un nouveau régime des aides d'État sera nécessaire à court terme. Les subventions, qui coûtent généralement cher aux contribuables, qui favorisent par la force des choses les entreprises les moins performantes, sont source de dépendance et peuvent nuire aux incitations à la concurrence, sont rarement la panacée. Mais, les restrictions de la concurrence sont pires encore : elles ont tendance à renchérir les prix à la consommation et à favoriser l'inefficience ; elles manquent de transparence et peuvent conduire à modifier sans cesse la structure du marché (au risque de créer des problèmes de concurrence plus importants encore à l'avenir).

93. M. Pais Antunes reconnaît qu'il existe à la fois des arguments pour et contre les champions nationaux. Les arguments mis en avant pour légitimer la création ou le soutien des champions nationaux sont notamment les suivants. Premièrement, dans certains secteurs, les entreprises naissantes ont besoin d'aide, de connaissances spécialisées, d'expérience ainsi que d'un soutien pour faire face aux frais de démarrage. Deuxièmement, l'octroi de subventions est susceptible d'attirer des chercheurs qui présentent une certaine mobilité à l'échelle internationale. Troisièmement, le fait de favoriser l'agglomération de pôles peut créer un effet d'entraînement et aider les acteurs du marché à devenir plus innovants et plus compétitifs. Quatrièmement, les investissements publics peuvent venir compléter les investissements en installations et équipements des grandes entreprises et, par là-même, accroître leur productivité et leur capacité de créer des emplois. Cinquièmement, les pouvoirs publics peuvent être appelés à remédier aux défaillances à court terme du marché. Enfin, on peut souhaiter sauver des entreprises ou des secteurs en difficulté pour éviter un ralentissement économique avec son cortège de suppressions d'emplois.

94. M. Pais Antunes admet qu'il existe un certain nombre d'arguments contre la politique de soutien des champions nationaux. Il souhaite toutefois concentrer son attention sur deux d'entre eux seulement. Selon le premier argument, le soutien de secteurs déterminés peut avoir un coût social très élevé. (La vraie solution devrait viser à doter les travailleurs concernés des compétences requises et à s'attaquer aux coûts que présente pour eux la transition et non à soutenir des secteurs ou des entreprises déterminés en tant que tels.) Le deuxième argument avancé à l'encontre d'une politique des champions nationaux est que l'octroi de subventions et la protection d'un champion national peuvent conduire les autres pays à prendre des mesures de rétorsion.

95. M. Pais Antunes estime qu'il faut faire preuve de pragmatisme et de souplesse en la matière. Au lieu de protéger et de promouvoir activement des champions nationaux, il faudrait essayer de concilier (i) l'existence de pôles industriels importants (et la nécessité de les protéger) et (ii) le respect des principes essentiels de la concurrence. Toutes les politiques, quelles qu'elles soient (en particulier, la politique industrielle, la politique sociale/de l'emploi) exigent une évaluation minutieuse de leurs coûts sous l'angle de la concurrence. Si une restriction de la concurrence est jugée utile, les gouvernements comme les autorités de la concurrence doivent faire preuve d'imagination et en limiter la portée et la durée. Enfin, il ne faudrait pas oublier que certains des plus grands cartels se sont constitués pendant les récessions ; gouvernements et autorités doivent donc se montrer très vigilants à cet égard.

96. **Le Président** remercie M. Luis Pais Antunes pour ses commentaires et invite les orateurs à réagir à leurs interventions respectives.

97. **M. Mario Monti** souscrit à tous les commentaires de M. Elie Cohen, exception faite de ses développements sur les divergences supposées. Il relève : (a) que M. Cohen admet que certaines interventions des pouvoirs publics dans le processus économique, y compris les aides d'État, se justifient et (b) que la politique de la concurrence constitue en soi une intervention des pouvoirs publics dans les mécanismes du marché. Puis, il pose deux questions à M. Cohen : (i) comment se traduit sa vision des choses dans le cas d'un système intégrant ou intégré comme l'est l'UE et (ii) pense-t-il que la création ou le maintien de champions nationaux justifie l'existence d'externalités négatives pour d'autres États membres de l'UE ?

98. **M. Elie Cohen** estime que les motifs de remise en cause des monopoles nationaux verticalement intégrés sont relativement manifestes pour qui observe le comportement des champions nationaux dans un certain nombre de secteurs : si on veut créer un marché réellement intégré, il est logique de créer en même temps les conditions permettant l'accès de nouveaux entrants. Or s'il doit y avoir de nouvelles entrées sur le marché, il faut dans une certaine mesure éclater ces monopoles verticaux. Dans chaque cas, il faut tenir compte des coûts et des avantages de la fragmentation d'acteurs économiques dont la capacité d'agir avec efficience est établie.

99. **M. Luis Pais Antunes** marque son accord sur la nécessité de procéder dans tous les cas à une analyse coûts/bénéfices pour évaluer les avantages et inconvénients des champions nationaux. Pour lui, le présent débat achoppe sur le fait que lorsque les avantages l'emportent pour M. Mario Monti, les inconvénients priment pour M. Elie Cohen et inversement. M. Pais Antunes observe par ailleurs qu'il est inévitable dans la situation actuelle que d'autres politiques que sont, par exemple, la politique sociale, la politique de l'emploi ou encore la politique industrielle, prennent le pas sur la politique de la concurrence à tout le moins au cours des deux ou trois prochaines années.

100. **Le Président** ouvre ensuite la discussion générale en énonçant ses quatre thèmes principaux :

v) Le conflit éventuel entre politique industrielle et politique de la concurrence ;

vi) La complémentarité de ces deux politiques, en l'occurrence leur aptitude (ou non) à se renforcer mutuellement ;

vii) la création et le soutien des champions nationaux ; et

viii) Les liens entre politique de la concurrence et politique industrielle dans le cas particulier des petites économies et des économies en développement.

S'agissant du premier thème, le Président observe que le Japon, après avoir connu une période où il a mis en œuvre une politique industrielle très active, s'est récemment détourné de cette dernière au profit d'une politique économique davantage axée sur la concurrence. Sur ce, le Président donne la parole au délégué du Japon.

101. Le délégué du **Japon** indique que ce changement d'orientation s'explique à la fois par des facteurs externes et internes. Les facteurs externes comprennent les effets de la déréglementation et de la libéralisation du commerce ; les facteurs internes, les effets cumulés de l'application, par la l'autorité de la concurrence du Japon (Japan Fair Trade Commission – JFTC), de la Loi sur les monopoles de 1947 et les diverses actions de sensibilisation et de promotion mises en œuvre depuis l'adoption de cette loi. À la fin des années 80, le Japon est passé d'une politique économique orientée vers les producteurs à une politique économique axée sur l'intérêt des consommateurs. À présent, les autorités de tutelle des

télécommunications, de l'électricité et du gaz, etc. partagent pour l'essentiel les grandes idées de la JFTC sur la politique de la concurrence. Dans les autres secteurs, la JFTC continue son travail de sensibilisation à la concurrence en lançant des études et en donnant son avis, sous l'angle de la politique de la concurrence, sur les réformes administratives engagées et en appliquant la Loi sur les monopoles aux activités illicites. Au Japon, l'émergence d'une communauté de vues sur l'importance de la concurrence ne s'est pas faite du jour au lendemain après l'adoption, en 1947, de la Loi sur les monopoles. Mais le délégué japonais pense qu'il faudra moins de temps dans les pays qui se sont dotés d'une législation sur la concurrence après les années 90, la majorité des États disposant désormais d'un droit de la concurrence très complet et l'importance de la concurrence étant plus largement reconnue dans le monde de nos jours.

102. **Le Président** remercie le délégué du Japon pour ses observations. Il relève qu'au Brésil il y a un « avant 1988 » au cours duquel la politique économique du pays était caractérisée par une intervention très active de l'État dans le développement économique du pays. Le Président demande au délégué du Brésil si : (i) il y a eu valse-hésitation entre la politique de la concurrence et la politique industrielle ; (ii) si cela a posé des difficultés et (iii) quelles sont les raisons à l'origine de cette politique marquée au sceau de l'incertitude.

103. Le délégué du **Brésil** affirme que, de l'avis de l'Autorité de la concurrence, la politique industrielle actuelle du Brésil ne représente aucune menace pour la politique de la concurrence. Jusque dans les années 80, la politique industrielle du Brésil ne laissait aucune place à la politique de la concurrence. Mais, à la suite de l'adoption d'une nouvelle Constitution en 1988, le Brésil s'est doté d'une politique de la concurrence très vigoureuse et a défini un certain nombre de critères d'évaluation des fusions parmi lesquels le développement technologique, l'innovation ou encore l'efficience qui, s'ils sont satisfaits, vaudront autorisation de l'opération. À l'heure actuelle, le gouvernement brésilien ne prend aucune mesure directe pour créer des champions nationaux. La Banque nationale de développement économique et sociale utilise toutefois des fonds publics pour stimuler l'innovation et la recherche technologique des entreprises. L'Autorité de la concurrence brésilienne peut également autoriser les fusions d'entreprises, y compris si elles éliminent la concurrence sur une partie substantielle du marché. Pour ce faire, elle doit établir que la fusion poursuit un intérêt public et qu'il s'agit d'une opération importante pour l'économie nationale. Mais encore faut-il que ces motifs se vérifient dans les faits. On notera en outre que le gouvernement brésilien est en train de renforcer le rôle de l'Autorité de la concurrence, s'employant à cet effet à faire approuver et adopter un projet de loi qui modernisera l'Autorité de la concurrence et améliorera son efficacité.

104. **Le Président** note qu'en Allemagne l'Autorité de la concurrence, au lieu d'être appelée à donner son avis sur la politique industrielle s'il y a lieu, a en fait vu le gouvernement ou le ministre, dans certains cas, passer outre à son avis pour des motifs de politique industrielle.

105. Le délégué de **l'Allemagne** mentionne l'affaire *E.ON/Ruhrgas*, dans laquelle il a été décidé par autorisation ministérielle qu'un intérêt public prépondérant, en l'occurrence assurer la sécurité énergétique du pays, l'emportait largement sur les graves préoccupations de concurrence du *Bundeskartellamt* qui avait bloqué la fusion. À la suite de cette affaire, un certain nombre de problèmes de concurrence ont été mis en évidence dans ce secteur et des poursuites judiciaires contre les entreprises d'énergie (parmi lesquelles l'entreprise *E.ON/Ruhrgas*) ont été engagées. Selon le délégué, il est difficile de déceler la moindre retombée positive de la fusion pour la sécurité énergétique. Mais on ignore si la puissance de l'entreprise *E.ON/Ruhrgas* dans le secteur du gaz a joué un rôle en désamorçant le conflit ayant récemment opposé la Russie à l'Ukraine au sujet des livraisons de gaz, par exemple. Seules huit fusions ayant reçu l'aval ministériel depuis 1973, le délégué de l'Allemagne estime qu'il est relativement difficile d'obtenir pareille autorisation et de faire primer la politique industrielle sur la politique de la concurrence.

106. **Le Président** sollicite les commentaires de la Chine, un des seuls pays à participer à la Table ronde qui, dans sa contribution écrite, parle de concurrence dans le secteur public, le secteur placé sous la tutelle de l'État, et de l'importance qu'il y a à préserver la concurrence entre les entreprises publiques.

107. Selon le délégué de la **Chine**, le gouvernement chinois attache une grande importance à la surveillance des entreprises publiques et les encourage à se faire concurrence. La Chine a récemment accompli des progrès dans la mise en œuvre de la réforme du secteur des monopoles en : (i) séparant les fonctions administratives et la gestion des entreprises ; (ii) en ouvrant le secteur à la concurrence ; (iii) en renforçant la surveillance de l'État et (iv) en encourageant la restructuration des entreprises. Ces dernières années, le gouvernement chinois a intensifié sa surveillance dans ce secteur en s'attaquant plus particulièrement aux ventes de biens et aux prestations de service forcées, aux discriminations, aux ventes liées assorties de conditions commerciales déraisonnables et aux abus de position dominante aux fins de percevoir un paiement indus. La Loi antimonopole de la Chine est entrée en vigueur en août 2008. L'article 7 de cette loi énonce clairement que les entreprises de secteurs donnant lieu à des monopoles agissent dans le respect de la loi ; font preuve de loyauté et d'autodiscipline et sont soumises à une surveillance étroite des pouvoirs publics.

108. **Le Président** sollicite ensuite des commentaires du Canada sur le deuxième thème de la discussion : la façon dont la politique industrielle et la politique de la concurrence se complètent mutuellement.

109. Le délégué du **Canada** explique qu'un groupe d'experts, chargé de passer en revue les règles applicables aux investissements étrangers et les règles de concurrence, avait récemment été créé au Canada. Le groupe d'experts s'est plus particulièrement penché sur le rôle des champions nationaux, se demandant notamment si les dispositions de la législation canadienne relatives aux fusions n'entravaient pas la croissance des sociétés canadiennes et si elles n'encourageaient pas les rachats des entreprises nationales par des investisseurs étrangers, conduisant ainsi à la perte des champions nationaux. Le groupe d'experts a estimé que les règles de fond relatives au contrôle des fusions étaient appliquées de façon adéquate et cohérente. Le délégué cite un passage de la contribution canadienne pour illustrer son propos : « les entreprises doivent tirer leur 'statut de champion national' de leurs performances économiques supérieures à celles de leurs concurrents et du jeu du marché. Il existe de sérieux risques à choisir et à favoriser des entreprises déterminées en soustrayant ces entreprises, voire des secteurs entiers, aux règles générales de concurrence ou en autorisant les fusions d'entreprises pour des motifs d' 'intérêt général' autres que leurs effets sur la concurrence et l'efficience économique. De surcroît, en protégeant les entreprises nationales de la concurrence étrangère ou en leur accordant d'autres formes de traitement préférentiel, on nuit à la productivité de l'économie nationale et à la compétitivité de l'industrie canadienne qui, dans bien des cas, dépendent de ces entreprises pour des intrants essentiels à leur activité »[1]. Le délégué du Canada remarque en outre qu'il est quelque peu hypocrite pour un pays d'affirmer que les champions nationaux ne devraient pas être protégés alors qu'il dispose d'une législation ayant pour effet concret de soustraire les ententes à l'exportation et les ententes publiques internationales au respect des règles de concurrence.

110. **Le Président** demande ensuite à l'Afrique du Sud de présenter ses observations. En particulier, il souhaiterait obtenir des précisions sur les lignes directrices internes adoptées par l'Autorité de la concurrence sud-africaine (Commission de la concurrence) en vue de faciliter la convergence de la politique de la concurrence et de la politique industrielle.

111. Le délégué **de l'Afrique du Sud** estime que les responsables de la politique de la concurrence devraient s'efforcer d'élaborer des politiques industrielles et des politiques de la concurrence à même de

[1] http://www.oecd.org/dataoecd/60/33/42174422.pdf p. 11.

coexister. Trois principes peuvent y contribuer. Le premier de ces principes veut que le soutien apporté par la politique industrielle intervienne le plus en amont possible du marché. L'apport de capacités génériques comme les capacités des ressources humaines ou les capacités de recherche-développement générales peut, sans la moindre difficulté et sans aucun risque de fausser la concurrence, s'accorder avec la politique de la concurrence. Cependant, plus le soutien est ciblé sur des secteurs et des entreprises déterminés, plus la politique industrielle et la politique de la concurrence auront du mal à coexister. Tout soutien à une entreprise ou un secteur donné, qui serait jugé nécessaire, devrait reposer sur une architecture de type « guichet ouvert » dans le cadre de laquelle les pouvoirs publics offrent un soutien et les entreprises intéressées se portent candidates dans des conditions de transparence et d'ouverture. En ce qui concerne le deuxième principe, il ne faut pas, à vouloir conjuguer politique industrielle et politique de la concurrence, que l'on aboutisse à une politique de la concurrence paraissant *a priori* opposée aux grandes entreprises. Cela étant, la politique industrielle devrait privilégier le soutien des entreprises de deuxième rang à celui des entreprises dominantes. Le troisième principe veut que les autorités de la concurrence mettent impérativement en œuvre une stratégie en matière de poursuites qui serve les objectifs de la politique industrielle et de la politique sociale des pouvoirs publics. Ainsi, la Commission de la concurrence sud-africaine a-t-elle défini une stratégie en matière de poursuites qui s'attaque en priorité aux soumissions concertées dans les grands marchés publics d'investissement, l'investissement public étant le moteur de la stratégie de développement économique et social de l'Afrique du Sud.

112. **Le Président** remercie le délégué de l'Afrique du Sud avant de noter que la France a accordé de plus en plus d'importance à la politique de la concurrence au cours des vingt dernières années et que la politique de la concurrence et la politique industrielle avaient commencé à converger. Il demande au délégué de la France de préciser les raisons de ce changement d'optique et ses effets sur l'importance ou le rôle imparti respectivement à la politique industrielle et à la politique de la concurrence.

113. Le délégué de la **France** insiste sur le fait que la France figure désormais parmi les pays qui estiment que la politique de la concurrence et la politique industrielle se complètent plus qu'elles ne s'opposent, ne serait-ce que parce qu'elles tendent vers le même objectif : l'efficience économique. Il s'agit d'une évolution relativement récente sur le plan historique, la France ayant des années durant considéré que l'efficience économique découlait de l'efficience industrielle et que l'efficience industrielle résultait principalement de l'intervention des pouvoirs publics. Les signes du rapprochement de la politique de la concurrence et de la politique industrielle sont au nombre de trois : (i) l'ouverture des marchés qui se poursuit et l'exposition des champions historiques à la concurrence ; (ii) la nouvelle ambition de la politique industrielle qui désormais vise en priorité à améliorer l'environnement dans lequel les entreprises sont appelées à évoluer pour permettre à chacune d'entre elles de prospérer et (iii) la prise en considération croissante, par l'Autorité de la concurrence, des efficiences économiques dans l'application des règles de concurrence, comme elle l'a fait dans ses avis sur les concentrations économiques qu'elle a donnés récemment au ministre. On peut également voir dans la réforme de l'organisation institutionnelle de la concurrence engagée en France une manifestation de cette complémentarité. Le transfert de pouvoirs de décision dans le domaine du contrôle des concentrations à une autorité dont les compétences ont par ailleurs été élargies montre que le gouvernement lui fait confiance pour concilier les objectifs de la politique industrielle avec l'introduction directe de la concurrence.

114. **Le Président** demande au délégué de la Slovénie de décrire la manière dont sont conçus les rôles respectifs de la politique industrielle et de la politique de la concurrence dans la stratégie de développement de ce pays.

115. Le délégué de la **Slovénie** explique que, dans la période qui a suivi la privatisation, l'élaboration de la politique économique, nécessaire pour parachever la transformation économique du pays et préparer son entrée dans l'UE, avait pour objectifs premiers de favoriser le développement et la croissance économiques. Après l'adhésion de la Slovénie à l'UE, les initiatives de développement national ont très

fortement influé sur les mesures de politique industrielle qui avaient pour priorités essentielles de doter le pays d'une économie compétitive, de favoriser une croissance économique rapide pour stimuler l'entrepreneuriat et de développer la concurrence. À présent, les stratégies de développement coïncident avec les objectifs de la Stratégie de Lisbonne. Dans les premières années qui ont suivi le retour à l'indépendance du pays, le processus de privatisation a joué un rôle important en façonnant la conception slovène de la politique de la concurrence et de la politique industrielle. Les règles de concurrence ont été élaborées indépendamment de la privatisation pour assurer une interdiction et un contrôle effectifs et efficaces des actes ou agissements de nature à fausser la concurrence ou porter préjudice au bien-être des consommateurs.

116. **Le Président** note ensuite qu'aux États-Unis l'intervention des pouvoirs publics est relativement importante dans certains secteurs (par exemple la R-D, la santé, la défense et l'énergie) et demande des éclaircissements au délégué des États-Unis sur l'existence d'un point commun à ces secteurs qui puisse justifier pareille intervention.

117. Le délégué des **États-Unis** explique que ces dépenses sont en quelque sorte des biens publics. La dépense la plus importante est celle destinée à la recherche fondamentale qui, bien qu'elle contribue grandement au bien-être social, a peu de chances d'être entreprise par des investisseurs privés. Une deuxième dépense concerne l'investissement dans le capital humain, par exemple l'enseignement supérieur. Une troisième dépense porte sur les investissements liés à la sécurité nationale. Les dépenses de cette nature ont un impact énorme. Ainsi l'Internet est-il la conséquence directe et indéniable des dépenses réalisées par le Darpo (Defense Airborne Reconnaissance Projects Office) qui est un (sous-)service du Département de la Défense. Le délégué remarque qu'en présence de dépenses ciblées sur un secteur déterminé la question n'est pas tant de savoir si les pouvoirs publics investissent ou non dans ces différentes stratégies mais pourquoi certaines donnent des résultats, d'autres non. Pourquoi, par exemple, l'expérience de l'énergie nucléaire donne-t-elle des résultats en France mais non aux États-Unis ?

118. **Le Président** demande au délégué suisse de donner des précisions sur l'approche non interventionniste de la Suisse et l'absence d'une politique industrielle directe.

119. Le délégué de la **Suisse** remarque que la politique de la concurrence et la politique industrielle ne s'opposent pas si par « politique industrielle, on entend 'quelque chose' qui favorise les spécificités d'un pays déterminé ». Exploiter et utiliser les spécificités nationales, la Suisse l'a assurément fait. Elle a, par exemple, investi dans les secteurs de la recherche et de l'enseignement supérieur. Dans ce contexte, il ne s'agit pas de choisir les gagnants : tout le monde peut demander à bénéficier d'une subvention. Pour le délégué suisse, il est normal qu'un pays favorise l'instauration d'un environnement dont il pense qu'il offre les plus grandes chances de réussite.

120. **Le Président** invite ensuite le délégué de la Norvège à expliquer pourquoi à la lecture de la contribution de son pays, il semble y exister un tel fossé entre politique de la concurrence et politique industrielle.

121. Le délégué de la **Norvège** souligne qu'il n'en est rien, que la politique de la concurrence et la politique industrielle ne s'opposent pas par nature et que la contribution de la Norvège ne porte pas sur la politique industrielle en général mais sur la politique des champions nationaux en particulier. Pour le délégué, la politique industrielle se justifie en principe par la nécessité de remédier à des défaillances du marché, par exemple l'existence d'externalités. L'Autorité de la concurrence norvégienne admet clairement qu'une politique de la concurrence favorisant les champions nationaux puisse être une option viable et efficace à deux conditions cependant : (a) la défaillance du marché doit être clairement établie et (b) le soutien du champion national doit être de nature à remédier à la défaillance constatée. L'Autorité norvégienne de la concurrence s'est néanmoins dite sceptique sur l'aptitude de la politique des champions

nationaux à remédier aux défaillances du marché. La politique industrielle devrait servir exclusivement au soutien des_entreprises solides, des entreprises proches de la frontière technologique et des entreprises ayant le potentiel pour être très compétitives sur un marché international. Mais en général ces entreprises semblent réussir sans l'aide des pouvoirs publics. Il existe aussi le risque que les autorités nationales ne soient tentées de mettre en œuvre une politique industrielle qui favorise les champions nationaux, y compris en l'absence de défaillances du marché.

122. **Le Président** invite ensuite le délégué de la Fédération de Russie à commenter l'affirmation suivant laquelle la concurrence serait considérée comme le pivot du plan de développement de ce pays.

123. Le délégué de la **Fédération de Russie** explique qu'en novembre 2008 son gouvernement a adopté une stratégie de développement économique et social à long terme qui vise à assurer une progression régulière du bien-être axée sur la sécurité nationale, une dynamisation de l'économie, et le renforcement de la position de la Russie dans la communauté mondiale. Cette stratégie se propose en outre d'améliorer la compétitivité des produits russes sur le marché mondial et prévoit des changements structurels dans l'industrie russe et une diversification industrielle, en particulier dans les secteurs technologiques. Le délégué précise que le Service fédéral de lutte contre les monopoles fait rapport annuellement au gouvernement sur les questions relatives à la concurrence et recommande l'adoption de mesures concrètes pour développer la concurrence. Le ministre de l'Industrie et du Commerce russe a entrepris de libéraliser un certain nombre de secteurs industriels parmi lesquels l'aéronautique, l'électronique et la construction navale. Une grande partie des activités du Service fédéral est consacrée à la réglementation des monopoles naturels (secteurs du gaz et du pétrole, chemins de fer, poste, etc.) dont l'objectif premier est d'établir un juste équilibre entre les intérêts des consommateurs et ceux des monopoles naturels. La mise en œuvre des réformes en cours axées sur la concurrence passe par des réorganisations structurelles et institutionnelles essentielles, la séparation des fonctions de gestion publique et d'activité économique et la mise en place d'un système de réglementation publique satisfaisant aux nouvelles conditions.

124. **Le Président** invite ensuite le délégué de l'Union Européenne à formuler des commentaires sur le troisième thème de la discussion : les champions nationaux.

125. Selon le délégué de l'**UE,** le cadre juridique européen ne fait pas obstacle à la création de champions nationaux s'ils ne faussent pas la concurrence : la création d'un national champion est incompatible avec la réglementation communautaire si la distorsion de concurrence est de nature à nuire au bien-être des consommateurs. La Commission européenne a fait ses preuves en appliquant ce principe. En effet, elle a beaucoup œuvré ces dernières années pour éliminer les obstacles qui entravaient l'acquisition des entreprises nationales – dans certains cas, des entreprises stratégiques – par des sociétés établies dans les autres États membres. Le même principe prévaut pour les aides d'État : il faut mettre en balance les effets négatifs de l'aide sur la concurrence avec les effets positifs qui pourraient en résulter, étant précisé que la création d'un champion national ne saurait en soi passer pour un tel effet positif dans ce contexte. Parmi les effets positifs figurent les gains d'efficience et la suppression des défaillances du marché. S'agissant de ces dernières, il faut établir : (i) qu'il existe effectivement une défaillance du marché ; (ii) que l'aide est nécessaire et proportionnée au but poursuivi qui est de remédier à cette défaillance et (iii) que ces effets positifs ne sont pas annihilés par les effets négatifs résultant de la distorsion de concurrence. La troisième condition ne serait dès lors probablement pas remplie si l'aide devait aboutir à la création ou au renforcement d'une position dominante.

126. **Le Président** demande au délégué de la Lituanie de préciser, sous l'angle de la politique de la concurrence, l'interaction entre l'Autorité de la concurrence et le gouvernement s'agissant de la survie de la première entreprise textile du pays.

127. Le délégué de la **Lituanie** explique que l'entreprise en question n'a pas été créée par le gouvernement lituanien – il s'agit d'un vestige de l'époque soviétique – et que le problème essentiel est qu'elle est trop grande pour l'économie lituanienne. Le Conseil de la concurrence a jugé inopportun de lui octroyer une aide d'État : elle n'offrait pas suffisamment de garanties de voir sa viabilité à long terme rétablie. L'entreprise est restée déficitaire dans les années qui ont suivi cette décision. La loi en vigueur à cette époque s'opposant à l'octroi d'une aide dans de telles conditions, le gouvernement a décidé d'adopter une loi spéciale consacrée à cette seule entreprise. Il s'avère que l'entreprise n'est toujours pas rentable et que la décision du Conseil de la concurrence était justifiée.

128. **Le Président** note que la Corée a une politique de la concurrence relativement dynamique mais aussi un certain nombre de secteurs protégés tels ceux de la finance, des télécommunications et de l'énergie. Il demande au délégué de la Corée de commenter ce point.

129. Le délégué de la **Corée** explique que pour stimuler la concurrence, accroître le bien-être des consommateurs et réglementer des secteurs tels que les télécommunications et l'énergie, l'Autorité de la concurrence et les autorités de tutelle coordonnent leurs actions. Les autorités de tutelle s'occupent principalement de questions hautement techniques et pointues telles que les normes techniques, la technologie d'accès et les prix de détail ; l'Autorité de la concurrence de la Corée, la KFTC, a pour fonction d'empêcher les comportements anticoncurrentiels dans les secteurs réglementés tels que le refus d'accès aux ressources essentielles, les ententes sur les prix et les abus de position dominante. Il arrive que, pour assurer un accès universel aux ressources essentielles, l'Autorité de la concurrence empiète sur le domaine de compétence de l'autorité de tutelle concernée et inversement. En pareil cas, les deux autorités se concertent pour coordonner leurs actions. La KTFC a signé un mémorandum d'accord avec les autorités de tutelle des secteurs de la finance et des télécommunications dans le but de préciser les normes et leur domaine de compétence respectif.

130. **Le Président** invite le délégué du Taipei chinois à commenter les efforts consentis par son gouvernement pour créer un champion national dans le secteur bancaire alors qu'il encourage la concurrence dans les autres secteurs.

131. Le délégué du **Taipei chinois** explique que son gouvernement a lancé la deuxième phase de la réforme financière en 2005 et que cette réforme vise à réduire le nombre de banques présentes dans le Taipei chinois. Deux raisons sont à l'origine de cette stratégie : (i) il existe un consensus général et solide parmi les acteurs du secteur bancaire pour considérer que l'activité bancaire dans le Taipei chinois est trop dispersée, fragmentée et excessivement concurrentielle et (ii) on pense qu'en transformant le Taipei chinois en un centre financier régional, comptant en tout et pour une ou deux grandes sociétés, on augmentera la compétitivité générale et la visibilité du Taipei chinois dans le monde entier. Pareille politique de champion national ne pose, de l'avis de l'Autorité de la concurrence du Taipei chinois, aucun problème majeur au regard de la concurrence : le Taipei chinois compte actuellement 40 banques commerciales nationales et près de 40 banques commerciales étrangères qui se livrent une concurrence féroce. Il est admis que ce type de politique de champion national peut inciter les entreprises d'autres secteurs à solliciter eux-mêmes un traitement préférentiel. Tel a, de fait, été le cas dans les secteurs gros consommateurs d'énergie, l'industrie de l'uranium et l'enseignement supérieur. Il faut continuer à défendre la politique de la concurrence mais aussi de conseiller le gouvernement lorsqu'il tente de choisir le gagnant ou le perdant.

132. **Le Président** demande ensuite au délégué du BIAC d'exposer la position du BIAC sur les nationalisations dans les secteurs en difficulté et l'argument de défense des efficiences dans le cadre du contrôle des fusions.

133. Le délégué du **BIAC** estime qu'il faut continuer, en ces temps de crise, à mettre en œuvre une politique de la concurrence énergique et à s'opposer à la protection des champions nationaux qui est anticoncurrentielle, qu'elle prenne la forme de nationalisations ou une autre forme. Cependant toute aide, s'il y a lieu d'allouer une aide à une entreprise de grande taille, devrait s'inscrire dans une stratégie de long terme et non point tirer sa justification de simples considérations à court terme. S'agissant de l'argument de défense des efficiences, la délégué fait remarquer (i) qu'on peut avoir une approche plus souple et moins doctrinaire de cette notion et (ii) introduire et mettre l'accent sur la notion d'efficience dynamique de préférence à la notion d'efficience statique. Il recommande par ailleurs d'adopter une approche plus souple à l'égard du sauvetage des entreprises défaillantes et des coentreprises qui peuvent être utiles pour sortir de la crise actuelle.

134. **Le Président** oriente la discussion sur le dernier thème annoncé : le point de vue des petites économies et des économies en développement sur les liens entre politique de la concurrence et politique industrielle. Il invite d'abord la Papouasie-Nouvelle-Guinée à présenter ses observations.

135. Le délégué de la **Papouasie-Nouvelle-Guinée** remarque que, du point de vue d'un pays en développement, il est opportun que les pouvoirs publics accordent des réductions (sous la forme d'exonérations fiscales, de protection à l'importation ou de droits exclusifs) et, par là-même, des avantages comparatifs aux grands investisseurs potentiels ou aux investisseurs sectoriels potentiels. Un grand projet d'exploration d'hydrocarbures, auquel participe entre autres la société *InterOil,* est actuellement à l'étude en Papouasie-Nouvelle-Guinée et il est probable que ce projet bénéficie en outre d'un certain nombre d'exemptions à l'application des règles de concurrence.

136. **Le Président** demande à l'Ouzbékistan, pays qui apparemment applique une politique directe de substitution des importations et d'aides à l'exportation, de présenter ses observations. En particulier, le Président souhaiterait savoir si l'Ouzbékistan envisage prochainement de passer à une politique davantage axée sur la concurrence.

137. Selon le délégué de l'**Ouzbékistan**, la politique industrielle n'a été à l'origine d'aucune réussite éclatante, ni d'aucun échec retentissant dans ce pays. La politique industrielle peut également se justifier par la nécessité d'aider des industries naissantes et de limiter les problèmes sociaux liés au chômage. La politique de la concurrence ne devrait pas pour autant être négligée, même pendant la crise actuelle. En **Ouzbékistan,** l'Autorité de la concurrence travaille actuellement sur une nouvelle loi ayant pour objet d'étendre le droit de la concurrence aux marchés de capitaux.

138. **Le Président** se tourne ensuite vers le délégué maltais et lui demande si, pour Malte, la politique commerciale peut efficacement remplacer la politique de la concurrence ou si elle la complète utilement et si, au-delà de la pression des aides d'État, il reste nécessaire à Malte d'avoir une politique de la concurrence active.

139. Le délégué de **Malte** explique qu'à la fin des années 90, son pays est passé d'une politique extrêmement protectionniste à une politique plus favorable au marché en démantelant toutes les barrières à l'importation, en libéralisant les marchés, en privatisant les entreprises publiques et en réduisant les subventions. Cette évolution est allée de pair avec l'adoption d'une législation de la concurrence et d'une législation sur le contrôle des fusions (fondée sur la concurrence) ainsi que la création d'une Autorité de la concurrence et d'un Conseil de surveillance des aides d'État. Malte n'a pas de politique de création, de soutien ou de maintien des champions nationaux ; au contraire, sa politique industrielle vise à attirer les investissements directs étrangers à Malte. En ouvrant complètement ses marchés aux produits étrangers concurrents et en libéralisant les marchés pour permettre l'accès de nouveaux entrants, elle a amélioré la compétitivité de ses marchés dans l'intérêt des consommateurs. Mais la libéralisation ne saurait à elle seule remplacer la politique de la concurrence et la surveillance de l'Autorité de la concurrence, pour deux

raisons. Premièrement, l'Autorité de la concurrence doit veiller à ce que les opérateurs économiques n'érigent pas de nouveaux obstacles privés aux échanges pour se protéger de la concurrence étrangère. Deuxièmement, dans les secteurs comptant seulement un ou deux opérateurs viables du fait de la taille réduite du marché et des investissements très lourds qu'ils exigent, l'Autorité et l'autorité de tutelle compétente doivent s'assurer que ces opérateurs n'abusent pas de leur position dominante au détriment des consommateurs. Le délégué indique par ailleurs que politique de la concurrence et politique industrielle sont jugées plus complémentaires qu'opposées. La taille réduite du marché national a tendance à limiter l'intensité de la concurrence sur un certain nombre de marchés infranationaux. En présence de structures de marché imparfaites, la politique industrielle de Malte repose notamment sur une réglementation et un contrôle de plus en plus stricts des opérateurs économiques.

140. **Le Président** demande ensuite au délégué de l'Ukraine de présenter ses observations à ce sujet.

141. Le délégué de l'**Ukraine** observe que l'Ukraine est récemment passée par trois stades de développement : la crise née du changement, la sortie de crise et une période de stabilisation. Elle est actuellement en proie à des difficultés économiques, à l'instar, cette fois-ci, de tous les autres pays de la planète. L'expérience ukrainienne montre que : (i) le secteur monopolistique était inefficient; (ii) que, dans la phase de sortie de crise, les secteurs industriels en situation d'oligopoles ont été les plus performants et (iii) que, dans la phase de stabilisation, la situation a changé, les marchés oligopolistiques devenant, en période de calme, le théâtre de pratiques concertées et de comportements parallèles de la part des intervenants. Le principe de compétitivité proposé par la CE semble avoir porté ses fruits à tout le moins dans le contexte ukrainien. On notera à cet égard que, selon ce principe, le modèle optimum présuppose que la concurrence est une composante nécessaire de la politique industrielle.

142. **Le Président** remercie le délégué de l'Ukraine pour ses observations et donne la parole à David Spector, qui, relève le Président, a rédigé une note de référence impressionnante pour la discussion.

143. **M. David Spector** rappelle aux participants que, par le passé, dans la plupart des pays, la politique de la concurrence accordait une très grande importance aux parts de marché détenues par les concurrents ce qui, dans certains cas, a conduit à l'application d'une politique de la concurrence faisant fi des effets précédemment mentionnés par M. Elie Cohen. Mais tel n'est plus le cas de nos jours : le droit communautaire de la concurrence et des concentrations a récemment pris une tournure plus économique. Certes, cela n'exclut pas toute possibilité de conflit mais ce conflit est lié à l'application plus pointilleuse de la politique de la concurrence. Faire prévaloir le critère du bien-être des consommateurs sur celui du bien-être total peut à l'évidence, dans certains cas, conduire à un conflit entre la politique de la concurrence et la politique industrielle. Mais, c'est sur le terrain des efficiences que les risques de conflit entre la politique de la concurrence et la politique industrielle sont les plus grands : le niveau de preuve requis pour les efficiences est très exigeant, la politique de la concurrence ayant un caractère judiciaire que n'a pas la politique industrielle qui, à cet égard, s'apparente davantage à la politique économique en général et laisse place à une certaine latitude contrairement à la première.

144. **M. Mario Monti** pense que la politique de la concurrence a tout à gagner si on la juge plus pragmatique et moins dogmatique que la description qui en est parfois donnée. Pour ce qui concerne les fusions, contrairement aux aides d'État, il existe un cadre international et cela réduit grandement l'intérêt de débattre de l'opportunité, pour la politique européenne de contrôle des fusions, de favoriser les champions européens. En effet, un éventuel champion européen devrait probablement obtenir l'aval de la Commission européenne mais aussi d'un certain nombre d'autorités de premier plan dans le monde.

145. **M. Elie Cohen** observe que les contributions présentées pour cette Table ronde permettent de mieux saisir l'interdépendance qui unit dans les faits politique industrielle et politique de la concurrence. Trois contributions l'ont plus particulièrement impressionné à cet égard. Il s'agit des contributions

présentées par l'Allemagne, l'Afrique du Sud et les États-Unis. La contribution de l'Allemagne montre que, dans le secteur de l'énergie, on ne saurait raisonner uniquement en termes de choix entre politique de la concurrence et politique industrielle. En effet, la décision qui est adoptée par les pouvoirs publics en ce domaine correspond en quelque sorte à une mise en balance (en d'autres termes, à une évaluation des avantages et des inconvénients), à un moment « t », des trois objectifs à atteindre que sont : la compétitivité, la sécurité des approvisionnements et la viabilité environnementale. La contribution de l'Afrique du Sud met en exergue le fait que le problème d'une politique des champions nationaux n'est pas tant que l'État aurait systématiquement tort alors que le marché aurait raison ; la différence est ailleurs : elle est dans l'ignorance de l'État qui ne sait pas à quel moment s'arrêter lorsque le soutien du champion national ne donne pas les résultats escomptés. Le problème est donc de trouver un moyen permettant aux pouvoirs publics de savoir si le choix effectué est le bon ; en d'autres termes, de mettre en place, en amont, une procédure d'alerte sur la pertinence du choix effectué et de définir les critères à cet effet. La contribution américaine illustre très bien les effets vertueux que la recherche de biens publics, leur fabrication ou leur fourniture, peuvent à leur manière avoir sur le développement économique d'un pays, ses spécialisations, par ces vecteurs particuliers que sont la valorisation du capital humain, le développement de la R-D et des infrastructures.

146. La contribution américaine soulève également le problème de l'énergie nucléaire. M. Cohen juge utile, à ce stade, de faire trois remarques : (i) certains coûts d'investissement et de fonctionnement initiaux étant particulièrement élevés, on ne saurait partir du principe que plusieurs acteurs économiques vont supporter ces coûts sachant qu'ils l'auront fait pure perte si leur branche d'activité n'est pas choisie ; (ii) un choix est à effectuer dans un contexte concurrentiel opposant des sources d'énergie de nature différente de sorte que l'option du nucléaire est soumise aux fluctuations permanentes des prix du pétrole et du charbon et (iii) les exigences de sécurité et la nécessité de protéger sa réputation sont particulièrement importantes dans ce domaine. M. Cohen est d'avis que, dans ce contexte, les solutions industrielles sont moins coûteuses pour le contribuable que les solutions fondées sur un modèle concurrentiel. Après examen des vertus de l'exemple français, M. Cohen fait observer qu'un système qui encourage des opérateurs économiques obéissant à des considérations de court terme fondées sur les fluctuations des prix de l'énergie à se livrer concurrence, sans par ailleurs tirer partie des avantages de la production en série et des effets d'apprentissage par la mise en concurrence de différentes technologies nucléaires, est un système qui en fin de compte s'avérera plus coûteux, moins efficient et dont il apparaîtra, par conséquent, qu'il aboutit à un échec relatif.

147. **M. Luis Pais Antunes** remarque que le principal défi aujourd'hui est d'insuffler la culture de la concurrence aux organes publics, en d'autres termes aux pouvoirs publics, car c'est à ce niveau que se jouera la « bataille de la concurrence ». Il estime par ailleurs qu'un mariage entre politique industrielle et politique de la concurrence n'est pas une union impossible ; comme dans toute union, il existe des tensions que l'on aurait toutefois tort de vouloir ignorer.

148. Le **Président** remercie les délégations pour leurs contributions ainsi que les trois experts et clôt les travaux de la Table ronde.