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MERGERS, ANTITRUST, AND THE CHINA CARD

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I Introduction

Merger control laws prohibit mergers that are anticompetitive. But should they allow mergers that make the firms and the country more competitive in the world? More competitive with China?

Over the last several years, narratives of leading competitors seeking merger clearance increasingly feature 'China.' Merger partners plead: 'We need this merger to be competitive internationally,' or: 'Stop this merger and China will win the race.' The claims are made by Western companies, and sometimes by governments, in an atmosphere charged with concern that China is gaining, strategically and unfairly, in the international race for economic hegemony.[2]

Is the 'competitiveness' claim real and true? Will the merger really help the firms stand up to the world and specifically to China? Or are the firms just crying 'Dragon' and playing the 'China card'?

This essay explores the invocation of competitiveness, and particularly competitiveness with China, to justify transactions or conduct under the antitrust laws. We limit the inquiry to the United States and the European Union.[3] We deal

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[2] See Angela Huyue Zhang, *Chinese Antitrust Exceptionalism* (Oxford 2021) (suggesting that the claim is overplayed, and also that lumping Chinese firms as China Inc. obscures the healthy competition of many Chinese firms).

[3] We note that jurisdictions may use the words 'competitive' and 'competitiveness' simply to mean 'efficient' and 'able to compete better with foreign firms'; that the words are sometimes included in competition acts as goals of the law, as in South Africa; and the concept often is melded into accepted goals of competition. We concentrate here on a more particular phenomenon: using the specter of Chinese economic dominance as a justification for an anticompetitive transaction.

prominently with mergers but also include antitrust in general. The aim is to explore how the words 'competitiveness' and 'international competitiveness' are used; the extent to which the usage fits neatly into traditional antitrust analysis (i.e., whether the transaction helps or hurts market competition), or whether it is offered as a defense to an anticompetitive transaction, proposing to sacrifice competition to achieve a greater good (standing up to China). If the latter, is competitiveness a public interest factor like national security or sustainability?[4] If so, what are the standards if the defense is admissible under law?

To explore these questions, we present three case studies: from Europe, *Siemens/ Alstom,*[5] and from the United States, *T-Mobile/Sprint*[6] and the intellectual property licensing case *FTC v. Qualcomm.*[7] As to each, we ask the following four questions: 1. How was 'competitiveness' asserted? Was it a separate justification, or was it invoked simply as part of an argument for efficiencies benefiting consumers (the usual merger/antitrust analysis)? 2. Would acceptance of the justification require a relaxation of usual merger/antitrust analysis? 3. Would allowing the contested transaction be likely to advance the industrial policy goal pursued (e.g., standing up to China)? 4. Would the competitiveness gained outweigh the competition lost (usually meaning threat of higher prices and lost innovation)?[8]

After the case studies, we ask a fifth question: Suppose the jurisdiction desired to adopt industrial policy to make its firms more competitive in the world, or, specifically, more likely to win the economic race against China. Would that policy credibly include an antitrust 'pass'; i.e., in antitrust cases, tolerating the

[4] Sustainability may be raised as an independent public interest factor. Alternatively, it may be raised as a market factor compatible with making the market work, or in the context of achieving a competitive green market. See Julian Nowag, 'Sustainability and Competition Law and Policy – Background Note' (OECD DAF/COMP(2020)3) <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2020)3&docLanguage=E> accessed 27 March 2021, explaining the variety of ways in which sustainability is invoked or regarded in antitrust, from full compatibility to priority-setting to a trump or exemption. For incorporating sustainability into the consumer welfare analysis of traditional antitrust, see, e.g., Maurits Dolmans, 'Sustainable Competition Policy' (2020) Vol 5 Issue 4 and Vol 6 Issue 1 CLPD.

[5] *Siemens/Alstom* (COMP/M.8677) Commission Decision [2019] (not yet published in Official Journal) <https://ec.europa.eu/competition/mergers/cases1/20219/m8677_9376_7.pdf> accessed 27 March 2021.

[6] *New York v. Deutsche Telekom AG*, 439 F. Supp.3d 179 (S.D.N.Y. 2020).

[7] *FTC v. Qualcomm Inc.*, 969 F.3d 974 (9th Cir 2020).

[8] The innovation question is a difficult and contested one. Scholarship shows that in most market situations dynamic innovation is likely to fall as high barrier markets become highly concentrated. Evidence and arguments to the contrary also exist. This is the Arrow/Schumpeter debate. See Richard J. Gilbert, *Innovation Matters: Competition Policy for The High-Technology Economy* (MIT 2020).

creation of market power in the hopes of creating an economically stronger U.S. or EU?

To situate the problem and telescope our findings, we make three points at the outset. The first is about the law. The competition law of neither the EU nor the United States allows industrial policy (or, competitiveness) to justify an anticompetitive transaction, although some words and recitals in relevant instruments and case law give some room for proponents to argue for flexibility.[9] Second, the three cases presented, which probably represent the most prominent invocations of competitiveness in antitrust in the last decade, are all cases of prima facie severe harms to competition and a remote chance at best that the transaction or conduct would help combat the 'threat' of China. Third, in the frenzy of concern that China Inc. is taking over the world, it is understandable that Western players are looking for ways to fight back. It is also predictable that firms that want their deal cleared may use expressive language likely to elicit favourable public opinion. Therefore, it is all the more important to understand when the competitiveness defense has real substance, and when parties are simply playing the China card.

II. Europe: The *Siemens/Alstom* Saga

The *Siemens/Alstom* saga, by now quite famous or infamous, is an unavoidable chapter in this inquiry. Siemens, a German multinational and one of the largest suppliers of high-speed trains and signaling systems in Europe, proposed to merge with Alstom, a French multinational, to form a European champion. Together they would be by far the largest supplier of high-speed trains and especially very high speed trains, and of signaling systems, in Europe.

The merger parties argued that the merger would not harm competition; that a number of European and foreign competitors would remain, exerting competitive pressures. They argued that the set of actual or potential

[9] For EU law, see Nicholas Levy, David Little and Henry Mostyn, 'European Champions – Why Politics should stay out of EU merger control' [2019] No. 2-2019 Concurrences Review 23. For U.S. law, see *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679 (1978) (antitrust law is about competition, not public interest); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) (neither countervailing power nor competitiveness in a larger market are defenses to an anticompetitive merger).

competitors included China's state-owned flagship CRRC as well as Japan's Kawasaki and Korea's Hyundai Rotem. They defined the geographic market as worldwide excluding China, Korea and Japan (these markets being closed to foreign suppliers). While the legal argument to the European Commission focused on whether the merger was or was not anticompetitive to the harm of Europeans, the music playing was from another score: Europe needs a European champion of high speed trains 'to resist the impending hegemony of CRRC.'[10]

The Commission analysed markets for high speed and very high speed trains, and for signaling. For high speed and very high speed trains, it determined that the relevant geographic market was at least as wide as the European Economic Area (EEA) including Switzerland, and stated: 'the Commission cannot exclude that the relevant markets are broader and cover the rest of the world, excluding China, South Korea and Japan.'[11]

The merged entity would have had 70-80% of the EEA and Swiss market for high and very high speed rolling stock and 60-70% of those markets world-wide excluding China, Japan and South Korea, and it would have had 70-80% of mainline signaling in the EEA.

For the competitive assessment, the parties perceived Asian dragons at the doorstep of Europe, constituting a significant competitive force in the European market. Were they? The Commission thought not. CRRC had never won a high speed or very high speed tender in the EEA. It did not have the necessary certifications and, the Commission found, it was not a credible prospective bidder. While CRRC flourished in China, it did so under shelter from foreign competition. Its worldwide market position remained marginal and resulted from a single sale to the Indonesian Railway arranged through government negotiations, not competition. The Commission found that it 'has not sold any high or very high-speed rolling stock in normal competitive conditions so far, nor has it been deemed fit to do so'.[12] It 'remains untested in competitive tenders against the

[10] See Konstantinos Efstathiou and Breugel, 'The Alstom-Siemens merger and the need for European champions' (*Bruegel*, 11 March 2019), <https://www.bruegel.org/2019/03/the-alstom-siemens-merger-and-the-need-for-european-champions/> accessed 27 March 2021 (laying out the arguments for and against creating European champions).
[11] *Siemens/Alstom* (n 5) Recital 133.
[12] *Siemens/Alstom* (n 5) Recital 274.

world's main suppliers [of high and very high-speed rolling stock] outside of China'.[13] Moreover, 'CRRC … cannot be considered to exercise a significant competitive constraint on the worldwide market [outside of China, Japan and South Korea].'[14] The Commission made similar findings regarding Hyundai and Kawasaki.

Thus, the Asian-dragon case failed to persuade. Moreover, the Commission said, '[t]he parties did not bring forward any substantiated arguments to explain why the transaction would create merger specific efficiencies.'[15] The Commission prohibited the merger.

While the matter was pending before the Commission, there were lively discussions on industrial policy and the merits of national champions. The governments of France and Germany support national champions, and they argued that the merger of Siemens and Alstom should be cleared. Poland and Italy sided with France and Germany.

The governments of France and Germany were not happy with the prohibition decision. Within two weeks, they issued a Joint Manifesto for a European Industrial Policy Fit for the 21st Century.[16] The Manifesto envisioned Europe at a strategic crossroads with a clear choice: either 'unite our forces or allow our industrial base and capacity to gradually disappear . . . .'[17] Joining forces is 'what will give Europe its economic sovereignty and independence.'[18] 'Competition rules are essential but existing rules need to be revised to be able to adequately take into account industrial policy considerations in order to enable European companies to successfully compete on the world stage.'[19] The Manifesto called for massive investment in innovation, defensive measures to protect against

[13] *Siemens/Alstom* (n 5) Recital 171.
[14] Ibid.
[15] Commission 'Commission prohibits Siemens' proposed acquisition of Alstom' (Press Release IP/19/881) (6 February 2019) <https://ec.europa.eu/commission/presscorner/detail/en/IP_19_881> accessed 27 March 2021.
[16] Governments of France and Germany, 'A Franco-German Manifesto for a European industrial policy fit for the 21st Century' (*Federal Ministry of Foreign and Economic Affairs*, 19 February 2019) <https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf%3F__blob%3DpublicationFile%26v%3D2> accessed 27 March 2021.
[17] Ibid 1.
[18] Ibid.
[19] Ibid. The document notes that some players in the world are heavily subsidised by their governments.

unfair competition such as screening for foreign investment and reciprocity on public procurement, and changes in the competition framework.

The changes in the competition framework contemplated a revision to the EU's merger guidelines

> to take greater account of competition at the global level, potential future competition and the time frame when it comes to looking ahead to the development of competition to give the European Commission more flexibility when assessing relevant markets.[20]

This, the document said, would enable a more dynamic and long-term approach to competition, at global scale.[21]

The Manifesto also would have revised the institutional structure to give the parties to an adverse merger decision a right of appeal to the Council; but this prong of the proposal was so strongly and convincingly opposed[22] that it was dropped.[23]

The Franco-German Manifesto was taken seriously within the EU. Then President-Elect of the European Commission, Ursula von der Leyen, questioned whether merger analysis had become obsolete, too short term, and out of touch with the reality of global markets.[24] By contrast, Competition Commissioner Margrethe Vestager defended the Siemens/Alstom prohibition. She did initiate reexamination of the 1997 Notice on the Definition of the Relevant Market, which is certainly due for a re-visit, but she resisted the call for adopting a European industrial policy through amendments to the merger control law. The debate is not over,[25] but so far competition law based on competition has stood its ground.

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[20] Efstathiou (n 10).
[21] Ibid.
[22] See, e.g., Levy et al. (n 9).
[23] See Thomas Oster, 'European industrial policy vs. European competition law: state of play 18 months after the Siemens-Alstom decision' (*Bird & Bird Blog*, November 2020) <https://www.twobirds.com/en/news/articles/2020/global/european-industrial-policy-vs-european-competition-law-state> accessed 27 March 2021.
[24] Ibid. President-elect von der Leyen instructed Competition Commissioner Vestager to 'evaluate and review Europe's competition rules … [including] merger control'.
[25] However, the governments of France and Germany have agreed that unfairness of competing with subsidised firms should be addressed by trade law on subsidies, not competition law, and they agreed to drop the proposed institutional change that would allow a Council veto. See Oster (n 23).

We come now to our questions, which we will address to the Manifesto rather than to the firms' arguments before the Commission, for the parties' voice for industrial policy may be heard through the Manifesto, not the decision. What did the proponents of the Manifesto mean when they argued that the Siemens/Alstom merger should have been allowed in the name of competitiveness with China? Would acceptance of the competitiveness/national champion argument mean relaxation of the antitrust laws? Would the merger have been likely to realise the industrial policy expectations? Would the sacrifice of competition have been worth it?

The supporters of the Manifesto clearly intended creation of a national champion to trump antitrust. They would trade off competition for 'sovereignty'; the better for standing up to China (and other Asian nations), and they would revise the competition laws to make this possible. But surprisingly, in terms of specific competition law revisions (and after dropping the electrifying idea of a Council veto),[26] the Manifesto does not call for an industrial policy defense to anticompetitive mergers. Its proposal involves tinkering with technical analytical terms. The Manifesto would widen markets and give more attention to potential competition and efficiencies. As applied to Siemens/Alstom, the drafters seemed to think that under the proposal CRRC would suddenly qualify as a potential competitor in Europe even if it were not, that efficiencies would be presumed even if not proved, that Europe as a geographic market would be ruled out, and that the wider-than-Europe market would suddenly include China, Korea and Japan even if they remained closed to foreign competition. The Manifesto would play around with technician's terms apparently to give flexibility or cover to an industrial policy motivation. This would be a dangerous, obfuscating move.[27]

Would the merger have snuffed out serious competition? Would the merger in fact have made Europe economically stronger against China and in the world? How likely is it that the merger would have created European economic power to hold back the feared inroads of China (CRRC) into the high speed rolling

[26] The initial draft would have provided a right to appeal Commission decisions to the Council. The Council is a political body, and this design would inevitably have fostered political decision-making.

[27] A political rather than economic market definition extending national or regional markets to the world including China would play havoc with all of EU competition law. For example, artificial expansion of the market could make it hard or impossible for the Commission to prove dominance for purposes of Article 102 in perfectly legitimate abuse of dominance cases.

stocks and signaling markets in Europe? Would the sacrifice of competition have been worth it?

First, the loss of the direct rivalry between Siemens and Alstom, the two most important rivals in the concentrated, high-barrier markets and often the only bidders on tenders, was likely to be quite significant on dimensions of price, quality, and innovation.[28] Was CRRC likely to enter and fill the slack? CRRC had taken initial steps by participating in the tender for a high speed contract in the UK. But, according to the fact-finding, for the foreseeable future, CRRC was unlikely to enter the European market. Moreover, even if CRRC might have entered the European market, competition would almost surely have been more robust if both European firms remained forces in the market.[29]

Second, would a single Alstom/Siemens have been a 'more competitive' firm (as against China and the world) than Alstom and Siemens each on their own? This idea is speculative and counter intuitive. Bigness does not make economic superiority.[30] The idea that Siemens/Alstom was a merger to a lithe European champion that would win the world race and prevent the market from falling into the lap of China seems fanciful. A judge would need proof of this narrative, especially where the most intense pro-competitive pressure on the European firms would have been removed from the market by the merger.

There may be cases in which pressures from world competition are so great and world competition is so demanding, or efficient scale to meet world competition requires a larger firm and the tradeoff between lost domestic

[28] Rivalry usually produces innovation. See Gilbert (n 8).

[29] Even if Chinese competition had been strong, a concern for resilience might have counselled keeping two significant domestic players in the European market. See Lawrence H. Summers, 'How to Fix Globalization – for Detroit, Not Davos' (The American Interest, 22 May 2020): 'I do think that it is incumbent on us to make sure that we have the resilience to not be dependent on China and potential adversaries of the United States for goods that are going to be crucial for us…'

[30] See Gilbert (n 8). Mergers can produce efficiencies, which, according to the Commission, were not proved here. See *Siemens/Alstom* (n 5) Recital 1270. See also Frederic Jenny and Damien Neven, 'Competition Policy in the Aftermath of the Siemens/Alstom prohibition: An Agenda for the new Commission' [2019] No. 2-2019 Concurrences Review 2. Big mergers are prone to producing inefficiencies including digestion costs, and mergers to national champions are particularly risky. See Austrian Competition Authority, 'Position Paper on National and European Champions in Merger Control' (November 2019) <https://www.bwb.gv.at/fileadmin/user_upload/PDFs/Positionspapier_European_Champions_EN.pdf> accessed 27 March 2021. Especially at 2.4. See also David W. Garrison, 'Most Mergers Fail Because People Aren't Boxes' (Forbes, 24 June 2019) <https://www.forbes.com/sites/forbescoachescouncil/2019/06/24/most-mergers-fail-because-people-arent-boxes/?sh=75ab997b5277> accessed 27 March 2021.

competition and gained world grit is worth it. A country (or jurisdiction) could decide to make this tradeoff. But that was not this case.

There may be cases of unfairness in competition against subsidised foreign champions, and there may be cases of technology races, especially involving foreign-subsidised research. Nations may decide to challenge violations of world anti-subsidy rules or to subsidise their nation's own research to assure self-sufficiency or leadership.[31] But those are not antitrust responses.

The European case study is interesting for the clarity of the Manifesto to explicitly put industrial policy above competition policy. But curiously, the specific antitrust proposals that remained after dropping the Council veto can be read as changes to accord with market realities and are not intrinsically a nod to industrial policy.[32]

Since the Siemens/Alstom merger would have eliminated significant competition and it was not clear how the merger could elevate Europe vis-a-vis China and other Asian competition, there is room to suspect that the competitiveness defense of the parties was a play of the China card.

III. United States

We present two U.S. case studies. The first is *T-Mobile/Sprint*, a four to three merger in the concentrated telecoms market. The second is *FTC v. Qualcomm. Qualcomm* is not a merger case but a conduct case involving monopolization and intellectual property.

A. *T-Mobile/Sprint*

AT&T and Verizon were the two largest firms in the U.S. telecoms market. T-Mobile and Sprint, ranking third and fourth, proposed to merge. T-Mobile was a

[31] See Summers, 'How to Fix Globalization' (n 29)*:* 'We need to assure that we remain central to global standard setting as technologies develop, to assure that our allies are not unduly dependent on China and that there are American companies at the forefront with respect to key technologies. I am no fan of industrial policy generally, but somebody should have done something that assured that there was a serious American competitor in the 5G space.'

[32] The Commission might decide that the Merger Guidelines need to give more attention to potential competition likely to flower in the longer run, thereby justifying more merger prohibitions. This is the converse of the thrust of the Manifesto --- permitting more mergers in the name of industrial policy.

maverick, and Sprint was the low-cost option. Announcing the merger, T-Mobile promised that the combination would supercharge the competition and 'lay the foundation for U.S. companies and innovators to lead in the 5G era'.[33] The New York Times reported that, 'As tensions rise between the United States and China in the high-tech realm, the [T-Mobile/Sprint merger] has become entangled in fears about losing international competitiveness.'[34] (Note, however, that the telecoms firms are simply distributors of 5G and other technologies; not producers or innovators of it.)

Our story here is a bit different from *Siemens/Alstom*, in which industrial policy was openly debated as a path that might save the merger from antitrust condemnation. In the United States, the injection of national industrial policy into antitrust is usually met with scorn, at least by the antitrust authorities, and advocates might be inclined to be less than transparent. They might combine the competition and competitiveness arguments so thoroughly that the two cannot be distinguished. Might there be a rhetorical advantage to telling the judge: 'This merger is procompetitive, and besides, if you make the mistake of stopping it, the (technology) market falls to China'? What judge wants to be the one who cedes the power of America?

The merger of T-Mobile and Sprint had major anticompetitive aspects. It took off the market one of the few firms left in this highly concentrated market. The merger required regulatory approval. The Federal Communications Commission had concurrent power with the Department of Justice. The FCC went first, even while the DOJ was contemplating its course of action. The standard for FCC approval is the public interest, which includes effect on competition and indeed is usually the controlling factor. The FCC approved the merger by a split vote, finding that, with conditions for divestiture, it would not lessen competition and would be in the public interest. It said:

> Expanding 5G access to all Americans will also enhance the benefits of 5G innovation for the overall United States economy and will support American

[33] T-Mobile, 'T-Mobile and Sprint to Combine, Accelerating 5G Innovation & Increasing Competition' (*T-Mobile Press*, 29 April 2018) <https://www.t-mobile.com/news/press/5gforall> accessed 27 March 2021.

[34] Raymond Zhong, 'Pitch Behind T-Mobile-Sprint Merger: Keep Up With China in 5G' *N.Y. Times* (New York, 30 April 2018) <https://www.nytimes.com/2018/04/30/technology/tmobile-sprint-china-5g.html> accessed 27 March 2021.

> technological leadership. The larger the United States' 5G user base, and the broader its nationwide coverage, the greater the opportunity for entrepreneurs and innovators. The network benefits of the T-Mobile/Sprint transaction will thus extend beyond mobile wireless services alone, to enhance the competitiveness of the United States' economy.[35]

Meanwhile, the Department of Justice's Antitrust Division reportedly considered assessing the merger as procompetitive on grounds that it would produce a stronger rival to the top two, but it did not. Instead, unusually, it worked behind the scenes to broker a deal to spin off Sprint's prepaid mobile telecom service to an acceptable buyer, whereupon it could assess the merger with the fix as not anticompetitive.[36] For a buyer, it identified media-content satellite-TV provider Dish Network, which was not (yet) in the mobile telecom distribution business and would require support from T-Mobile for several years while it entered. The DOJ filed its complaint against and settlement with T-Mobile and Sprint, requiring spin off and supportive injunctions, and filed for court approval, which it received some months later.[37] Meanwhile, convinced that the merger was anticompetitive and that Dish was no substitute for the lost competition, 14 states, led by New York, sued to enjoin the merger. They tried their case before Judge Victor Marrero of the Southern District of New York. In the face of extensive economic testimony, including experts on both sides who sounded convincing, the Judge declared that the economic experts cancelled one another out and he would decide the case on the trustworthiness of the testimony of the business witnesses. The business witnesses on whose testimony he relied were, particularly, T-Mobile's President of Technology, Neville Ray, and Deutsche Telekom (majority owner of T-Mobile) CEO Tim Höttges. In his opinion, Judge Marrero quoted the following testimony:

Direct Examination of T-Mobile's President of Technology Neville Ray:

> [The merger is] critical internationally. We are seeing massive-scaled investments attacking this 5G space in major markets across the world, such

[35] *In re* Applications of T-Mobile US, Inc. & Sprint Corp., 34 FCC Rcd. 10578, 10582 (2019).
[36] See Katie Benner and Cecilia Kang, 'How a Top Antitrust Official Helped T-Mobile and Sprint Merge' N.Y. Times (New York, 19 December 2019) <https://www.nytimes.com/2019/12/19/technology/sprint-t-mobile-merger-antitrust-official.html> accessed 27 March 2021.
[37] *United States v. Deutsche Telekom AG*, No. 19-cv-2232, 2020 U.S. Dist. LEXIS 87971 (D.D.C. Apr. 1, 2020).

> as South Korea, China, and the scale and size of those 5G launches in networks that are being built is quite amazing. And why is that important? The economic benefits from all of the innovation and services that will be launched and built on those networks, when we think about what's happened in LTE with Uber and Lyft, the Chinese and the South Koreans want the next Uber and they want the next Lyfts. They want those companies. They want those to be created in their countries, not here in the U.S. So internationally, it's critical that the U.S. catch up and make sure we have material 5G deployment in this country. It's going to be worth millions of jobs, and it will create hundreds of billions in financial benefit for the U.S. economy.[38]

Cross examination of Timotheus Höttges, CEO of Deutsche Telekom:

> 'It's Korea, it's China and, therefore, having a significant infrastructure, and that is a topic for Europe and a topic for U.S., is a competitive advantage as well for this.'[39]

Paraphrasing testimony, the court said:

> Because this process takes time, prominent experts in the [wireless] industry have expressed concerns that other countries like China or South Korea may fully implement 5G first and dominate the market for innovative applications made possible through 5G.[40]

The judge elaborated in a footnote:

> Ray noted that faster nationwide adoption of 5G could catalyze job growth and innovation in connection with the development of new services, and that this would help the United States to maintain its position as a technological innovator even as other countries such as China and South Korea seek to establish themselves as leaders in a 5G world.[41]

[38] Transcript of Record at 1147, New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020) (No. 19 Civ. 5434 (VM).
[39] Ibid. 246.
[40] *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d at 193.
[41] Ibid 209 n. 12.

Sprint's competition would be lost and the hope that Dish would fill the gap was speculative.[42] But the U.S. states lost their bid for an injunction. But for the China/Korea defense, would the states have prevailed?[43]

We look at the four questions.

1. How was 'competitiveness' or 'international competitiveness' asserted? Was it asserted as a separate justification or as part of an argument for efficiencies and innovation likely to inure to the benefit of consumers? [We call the latter 'usual' merger/antitrust analysis.]

'Competitiveness' was not used in the pleadings. The official argument was that the merger with the spin off and conditionality would be good for consumers and for the 5G rollout, and the 5G rollout would also be good for U.S. competition against China. Competitiveness was not asserted as a justification for an anticompetitive merger.

2. Would/did deference to [international] competitiveness require a relaxation or reorientation of usual merger/antitrust analysis?

Maybe it did, and maybe the court took an unusual leap of faith. But the judge gave the benefit of the large doubt on competitive effects to the merging firms, and did not acknowledge compromising antitrust standards.

3. Will the merger with the spin off and conditionality probably advance the industrial policy goal (e.g. stronger technological competition with China)?

In this case the only question was whether the realignment would help (not hurt) competition, with a stronger performance by the merged firm. If all goes as predicted by the parties and the judge, industrial policy would align with competition policy – even though the contribution of this merger to the 5G race with China is hard to see.

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[42] See, e.g., Nicholas Economides, John Kwoka, Thomas Philippon, Robert Seamans, Hal Singer, Marshall Steinbaum and Lawrence J. White, Economists' Tunney Act Amicus Brief in New York v. Deutsche Telekom AG, New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020) (No. 19 Civ. 5434 (VM); Economists' Tunney Act Reply Comments on the DOJ's Proposed Remedy in the Sprint/T-Mobile Merger Proceeding (Working Papers 20-02, NET Institute, January 2020), https://ideas.repec.org/p/net/wpaper/2002.html; Economists' Reply Comments on the DOJ's Proposed Remedy in the Sprint/T-Mobile Merger Proceeding, Working Papers 20-02, NET Institute, January 2020, https://ideas.repec.org/p/net/wpaper/2002.html.

[43] Of course, the DOJ support for the deal may have been a powerful weight, and Sprint's ineptness may have led the judge to discount the lost competition.

As a reporter wrote, referring to a conference call with the T-Mobile and Sprint CEOs promoting their merger, 'They kept pointing to China on the call, but that is just a nice way to grease the skids.'[44] 'Many analysts believe that such talk is merely aimed at persuading the Trump administration to approve the deal.'[45]

4. If competitiveness is gained, will it outweigh the competition lost?

It seems so unlikely that T-Mobile's absorption of Sprint will increase America's competitiveness, pitting a now stronger competitor against China in 5G technology. On the other side, the loss of competition by removing Sprint as a player was prima facie very significant.

B. FTC v Qualcomm

Qualcomm, headquartered in California, is the world's largest maker of chips necessary to operate smartphones. The Qualcomm modem chips are necessary to connect mobile devices to cellular networks and to connect to the internet, and are utilised in both 3G and 4G cellular standards. All major manufacturers of mobile devices need at least some Qualcomm chips. The chips are essential because the Standards Development Organization (SDO or SSO) included the Qualcomm technology in the industry-agreed standards; thus Qualcomm owns Standard Essential Patents (SEPs). As is usual in the case of technology designated as part of the standard, to assure that the technology is available to all users and at a competitive price, the SDO required and Qualcomm agreed to a FRAND obligation – to license its SEPs on fair, reasonable and non-discriminatory terms.

Qualcomm, however, adopted a licensing strategy known as 'no license, no chips.' It required all OEMs (who needed Qualcomm chips) to take a technology license from Qualcomm for all chips they used even if they used some chips of rivals, barred the OEMs from reselling the chips (e.g. to rivals such as Intel), and charged a monopoly fee for the license. It refused to license its technology to its rival chip manufacturers. This arrangement ensured that regardless of the supplier, every OEM would have to license Qualcomm's patents. Thus, Qualcomm attempted to foreclose its competitors and charged a monopoly price to its buyers, getting royalties even on chips supplied by competitors.

[44] Zhong, (n 34).
[45] Ibid.

In the last days of the Obama administration and by a divided vote, the Federal Trade Commission sued Qualcomm for violations of Sections 1 and 2 of the Sherman Act. Administrations changed, and President Trump appointed Makan Delrahim Assistant Attorney General in charge of the Antitrust Division of the Department of Justice. One of AG Delrahim's principal initiatives was to change the balance between antitrust law and intellectual property. He believed that the law and the antitrust agencies' guidance were too favourable to antitrust as a check on restrictive practices by holders of intellectual property, and argued for rules that would give almost complete freedom from antitrust to IP holders, in the name of both innovation incentives and the Constitution.[46]

The FTC's *Qualcomm* case was tried before federal district court judge in California, Lucy Koh. Even before the district court ruled, foreseeing a victory for the FTC and a possible order to Qualcomm to license its technology on FRAND terms, the Justice Department filed a Statement of Interest (very unusually, for this was one federal antitrust agency interfering in the lawsuit of another). In the Statement of Interest, the DOJ cautioned the judge: 'a remedy should work as little injury as possible to other public policies.'[47] The DOJ elaborated:

> Indeed, there is a plausible prospect that an overly broad remedy in this case could reduce competition and innovation in markets for 5G technology and downstream applications that rely on that technology. Such an outcome could exceed the appropriate scope of an equitable antitrust remedy. Moreover, it has the distinct potential to harm rather than help competition ...[48]

Judge Koh disagreed with the DOJ's assessment of what is anticompetitive. In a fact-intensive, 233-page opinion, she found that Qualcomm's practices strangled competition and violated the law, and she enjoined them. Qualcomm appealed. The DOJ filed an amicus brief on the side of Qualcomm. In the amicus brief, the DOJ argued that the FTC case was ill founded, disregarded the antitrust rule of no duty to deal, improperly equated FRAND (contract) obligations with

[46] Makan Delrahim, 'Remarks at University of Pennsylvania Law School: The New Madison approach to Antitrust and Intellectual Property' (16 March 2018); Ibid 3; (U.S. CONST. art. I, sec. 8).
[47] Statement of Interest of the United States at 2, FTC v. Qualcomm, 411 F. Supp. 3d (N.D. Cal 2019) (No. 17-CV-00220-LHK).
[48] Ibid 5.

antitrust obligations, and ignored paramount rights conferred by intellectual property ownership. The brief attached affidavits by top officials of the Department of Defense and the Department of Energy, arguing that the antitrust remedies will significantly reduce Qualcomm's technological competitiveness vis-a-vis China and could seriously harm U.S. national competitiveness. The DOJ brief states: 'U.S. leadership in 5G technology and standard-setting is critical to national security.' [49] It references the DOD statement that a 'reduction in Qualcomm's leadership in 5G innovation and standard-setting,' 'even in the short-term,' could 'significantly impact U.S. national security' by enabling foreign-owned firms to expand their influence'. [50]

The DOJ brief and the DOD and DOE statements attached to it collectively reinforce the claims and notions that, inferentially, the FTC victory in the lawsuit against Qualcomm will 'hobble' Qualcomm by lessening its 'ability to make significant investments in R&D' and will 'inappropriately reduce […] Qualcomm's revenues substantially, and hence its ability to invest in R&D and standard setting activities'. This hobbling will aggravate 'well-known U.S. national security concerns about Huawei and other Chinese telecommunications companies'.[51] Also they claim, exposing Qualcomm to antitrust would threaten 'a shift to Chinese dominance in 5G [which] would have substantial negative national security consequences for the United States'.[52]

Perhaps the documents speak for themselves, but it is an astounding proposition that if a famously profitable monopoly firm such as Qualcomm is enjoined from anticompetitive licensing strategies it will lose its ability to invest optimally in R&D and thus threaten American national security and U.S. competitiveness.

The Court of Appeals for the Ninth Circuit accepted the Qualcomm/DOJ narrative and reversed.[53] Given the DOD's avowed aim to protect the revenues of

[49] United States Statement of Interest Concerning Qualcomm's Motion for Partial Stay of Injunction Pending Trial at 5, FTC v. Qualcomm, 969 F.3d 974 (9th Cir 2020) (No. 19-16122).
[50] Ibid. 6. The DOD statement describes the DOD's close relationship with Qualcomm as a trusted and crucial supplier of 'mission critical telecommunications products,' and one that 'provides significant confidence in the integrity of such infrastructure …'
[51] The quotes are from the DOD statement, pages 4-7, most of which are reiterated by the DOJ brief.
[52] Ibid.
[53] *FTC v. Qualcomm*, 969 F.3d 974 (9th Cir. 2020)

Qualcomm, Qualcomm's victory might be seen as a subsidy to Qualcomm, only one paid for by consumers, not the government.

We come to the four questions:

1. How was the international competitive factor asserted – separately, or as part of the usual antitrust analysis?

The Antitrust Division of the Department of Justice, famously a crusader against allowing industrial policy into antitrust, wrapped itself in the industrial policy flag of the affidavits from the Departments of Energy and Defense.[54] However, the DOJ brief never waivers in its claim that good antitrust would leave intellectual property holders alone to refuse to license at will and to reap their monopoly profits.

2. Would deference to competitiveness require relaxation of antitrust?

For those who believe that Qualcomm's strategy significantly harmed competition in the chips and that intellectual property rights did not shield the anticompetitive strategies, yes. But to those who believe in a virtual exemption for intellectual property (the Trump DOJ and the appellate court),[55] a 'competitiveness' defense

[54] In a number of cases, national security concerns have been raised. At various times in history, the country has been protective of mergers in the defense industry. See Cullen O'Keefe, 'How Will National Security Considerations Affect Antitrust Decisions in AI? An Examination of Historical Precedents, Centre for the Governance of AI, Oxford' <https://www.fhi.ox.ac.uk/wp-content/uploads/How-Will-National-Security-Considerations-Affect-Antitrust-Decisions-in-AI-Cullen-OKeefe.pdf> accessed 27 March 2021.

In 1974 the Department of Justice brought a monumental antitrust case against American Telephone & Telegraph Company for monopolizing the telephone industry. AT&T had created the best telephone system in the world and had the best telecom research and development lab the world, but it had integrated into all corners of the industry, technology was changing, world competition was growing, and the firm (endearingly called Ma Bell) was using its leverage to hold back challengers to its ecosystem. In the early 1980s the Reagan Justice Department determined to press the case and secure a break-up of AT&T's functional parts. Secretary of Defense Casper Weinberger strongly opposed, believing that AT&T was America's golden goose and that a break-up would cripple it, destroy America's lead, and harm national security. The Justice Department won the fight; it won a preliminary battle in court; it convinced AT&T that a break-up was in its interest, and the break-up was ordered by consent decree. It is commonly accepted today that the AT&T break-up was good for the country and indeed needed for the continued competitiveness of America, in light of the changing technology and the diseconomies of functional integration and regulatory challenges that would hold back AT&T as a long distance service provider. Ibid 24-25; Eleanor Fox and Daniel Crane, *Cases and Materials on U.S. Antitrust in Global Context* (4th edn, West 2020) 413-14.

[55] This case was even more complex, for, under U.S. antitrust principles, there is almost never a duty to deal, and the U.S. antitrust law does not condemn monopoly pricing. The conservative narrative of the case is that the complaint was about duty to deal and high pricing.

would be 'icing on the cake.' That is, a competitiveness defense would not be necessary to achieve the right result.

3. Will Qualcomm's continuation of its practices help the U.S. stand up to China and perhaps to outcompete China's champion, Huawei? Or would Koh's injunction requiring FRAND licensing of SEPs to rival chipmakers and prohibiting the web of exclusions and requirements that inflated prices of essential chips to OEMs have strengthened America's competitiveness in the world?

This question goes to the heart of the American free enterprise system, what it means, and how best to unleash its energies. The answer is part empirical, requiring counter-factual inquiries and predictions; in the absence of data, it is ideological. For the ideological component, policy makers may tend to believe that both policies (competition and competitiveness) point in the same direction: if the practice is good for competition, it is good for competitiveness, and if it harms competition, it is bad for competitiveness.

4. To the extent that Qualcomm's practices are good for competitiveness (e.g. helps it and the U.S. to stand up to China), does the gain in competitiveness outweigh the loss in competition?

Again, the premises beg the question and the subjectiveness of the calculations make it hard to answer. The traditional antitrust answer is: On the one side, additional monopoly profits do not normally make a firm a better, stronger competitor, nor do they guarantee more money devoted to R&D, much less technological breakthroughs. On the other side, conduct by a monopoly firm that squelches the competition of the best positioned rivals, such as Intel (rivals to make the chips and invent new technologies) normally has serious anticompetitive effects on innovation and price, and the increased competition may be better for competitiveness than increased monopoly profits.

In both U.S. cases, the claim was weak that an antitrust pass would improve competitiveness of the country [against China]. The rhetoric of competitiveness and China may have been intended more to motivate than inform. It may have helped to achieve two anticompetitive results.

IV. Industrial Policy Tools

We come now to the fifth question: Suppose the jurisdiction desired to adopt affirmative policy to make its firms more competitive in the world, gain a technological edge, or become economically stronger against China. Would that policy credibly include an antitrust 'pass'; i.e., in antitrust cases, tolerating the creation of market power in the home market in the hopes of creating an economically stronger U.S. or EU?

We ask this question to put into perspective use of an antitrust tool in light of the array of the other available tools to achieve the goal. The question forces the larger question – What are the best tools to make the United States or the EU economically stronger and better able to fight the competition and sometimes unfair (e.g., subsidised) competition of Chinese firms? What are the best tools to enhance the technological edge of the jurisdiction?

First, in a market economy, the accepted best tool for economically strong and inventive firms is competition, combined with the other incentives of private enterprise. Efficiency and innovation effects are properly part of the competition analysis in merger control laws, so that if the merger makes the firm a better, more responsive firm, antitrust is not a bar and there is no need for a vague 'competitiveness' justification.[56]

Second, if competition alone does not work, a government may choose to invest. For example, it might fund specified research projects, typically building in incentives and systems of accountability.[57] Regarding the current 5G technology race and the dominance of China's Huawei (so loudly invoked in our U.S. case studies above), the Council on Foreign Relations recommends 'that the U.S. Development Finance Corporation partner with counterparts in Finland, South Korea, and Sweden to co-finance Nokia, Samsung, and Ericsson 5G projects' and work with them to develop open architecture that allows multiple companies to supply different parts of a modular 5G network. The United States is better positioned to compete by specializing in parts of the network. The Council on Foreign Relations further recommends that the United States prepare for the arrival of 6G by U.S. funding of R&D at university centres that are researching 6G

[56] See, for the role of efficiencies, ….. in this volume.

[57] See, e.g., Daniel P. Gross and Bhaven N. Sampat, 'Inventing The Endless Frontier: The Effects Of The World War II Research Effort On Post-War Innovation' (2020) NBER Working Paper 27375, <http://www.nber.org/papers/w27375> accessed 27 March 2021.

technologies, and by considering tax breaks and other incentives to induce private investment.[58]

In Europe under state aid rules, the Commission approves Member State funding of important projects. Rules allow Member States to support transnational projects of strategic significance for the EU -- Important Projects of Common European Interest ('IPCEI'). The Commission has recently approved aid by a consortium of Member States to support joint research and innovation in microelectronics, and a second project to support research and innovation in the battery value chain.[59]

Third, a government may choose to nudge or support business collaboration even though it entails elimination of rivalry. The United States does this very rarely, but it did so in its support of Boeing and Lockheed's joint venture, the United Launch Alliance, to make rockets that would launch heavy satellites and other space vehicles.[60] The market comprised a small number of very high tech launches (real rocket science), and experience increased the ability of the teams to design and execute the launch vehicles. The joint venture was designed to improve the quality of performance and increase reliability to the government, the sole buyer. For clearance of the joint venture, the parties agreed to a series of conditions that would keep the parent companies competitive and protect emerging competition. For a second example, in March 2021, in the midst of the Coronavirus pandemic, the U.S. Government invoked the Defense Production Act to facilitate a collaboration between Merck and Johnson & Johnson in the emergency quest to produce enough vaccines for adults in the U.S. by the end of

[58] David Sacks, 'China's Huawei is Winning the 5G Race. Here's What the United State Should Do To Respond', blog post, Council on Foreign Relations, 29 March 2021 <https://www.cfr.org/blog/china-huawei-5g> accessed 3 April 2021.

[59] Commission, 'Commission approves plan by France, Germany, Italy and the UK to give €1.75 billion public support to joint research and innovation project in microelectronics' (Press Release IP/18/6862) (18 December 2018) < https://ec.europa.eu/commission/presscorner/detail/et/ip_18_6862> accessed 27 March 2021; Commission, 'State aid: Commission approves €2.9 billion public support by twelve Member States for a second pan-European research and innovation project along the entire battery value chain' (Press Release IP/21/226) (26 January 2021) <https://ec.europa.eu/commission/presscorner/detail/en/IP_21_226> accessed 27 March 2021.

[60] Matter of Boeing Co., Lockheed Martin Corp., and United Launch Alliance, File no. 051 -0165 (FTC Oct. 12, 2006) (analysis of agreement containing consent order).

May 2021. The initiative includes government funding to upgrade plants to safety standards necessary to produce the vaccine. [61]

Fourth, when nations are beset by unfair international competition such as excessive and non-transparent subsidies funneled to state-owned enterprises, they consider remedies under trade law. They may adopt bi-lateral investment agreements, such as the EU is in the process of concluding with China.[62]

Fifth, there are cases in which a takeover by a foreign firm of a domestic firm endangers national security. This problem is normally assigned to a special channel. In the United States, that channel is CFIUS, the Committee on Foreign Investment in the United States. Countries all over the world have now adopted CFUIS-like review of foreign mergers. Under CFIUS, the U.S. President can veto an acquisition, and, short of a veto, can bring political pressure to bear to stop the acquisition and limit the business of the foreign firm. President Trump actively used CFIUS against China to limit the activities of Huawei and Tik Tok,[63] while China has used its abundant counterpart powers to keep foreign firms out of

[61] See Christopher Rowland and Laurie McGinley, 'Merck will help make Johnson & Johnson coronavirus vaccine as rivals team up to help Biden accelerate shots' *Washington Post* (Washington, 2 March 2021) <https://www.washingtonpost.com/health/2021/03/02/merck-johnson-and-johnson-covid-vaccine-partnership/> accessed 27 March 2021.

[62] Commission, 'EU and China reach agreement in principle on investment' (Press Release) (30 December 2020) <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2233> accessed 27 March 2021.
Note that when a merger party is subsidised by the state, the fact of the subsidy may be relevant to showing potential increase of the merged firm's financial strength. See *STX/Aker Yards* (Case COMP/M.4956) Commission Decision 2009/C (2009) OJ L147/14.

[63] See, e.g., Nicole Sperling, 'Trump Officially Orders TikTok's Chinese Owner to Divest' *N.Y. Times* (New York, 14 August 2020) <https://www.nytimes.com/2020/08/14/business/tiktok-trump-bytedance-order.html> accessed 27 March 2021. President Trump also blocked Singapore-based chip manufacturer Broadcom from buying Qualcomm in what would have been the largest technology merger in history for fear that the acquisition would lessen Qualcomm's incentives to invest in 5G technology and play into China's developing lead. See Steven Overly, 'Trump Blocks Broadcom-Qualcomm deal over China concerns' *Politico* (Washington DC, 12 March 2018) <https://www.politico.com/story/2018/03/12/trump-blocks-broadcom-qualcomm-deal-409794> accessed 27 March 2021.

China or to limit their growth.[64] These measures and tools underscore the current elevated concern with 'the China threat.'

Sixth, over-regulation and insufficiently targeted regulation may sometimes hinder growth and innovation, and jurisdictions may reassess the scope and proportionality of their regulatory schemes.

An antitrust pass for an anticompetitive merger is not on the list.

V. Conclusions

The three cases studied suggest the following conclusions:

1. The ideas of competitiveness, national champion, and industrial policy are more likely to find a receptive audience in certain European nations than in the United States and are more likely to be openly proposed as antitrust defenses in Europe, even while EU as well as U.S. antitrust authorities remain resistant. There is currently, however, in both jurisdictions, heightened concern and sometimes obsession with being competitive with China. Government officials – often individuals who are not experts in antitrust and are skeptical of markets – may grasp at the straw of relaxing competition as a way to strengthen the national hand. While in most cases the strategy is unlikely to work, parties to deals with prominently anticompetitive aspects may get some mileage in public and even judicial opinion by playing 'the China card.'

2. In all three cases, it appeared that the challenged conduct would result in a significant loss of competition, that the competitiveness story was entirely

[64] See, e.g., Fareed Zakaria, 'The New China Scare: Why America Shouldn't Panic about its Latest Challenger' (2020) Vol. 99 No. 1 Foreign Affairs 52; Julian Gewirtz, 'China Thinks America is Losing: Washington Must Show Beijing It's Wrong' (2020) Vol. 99 No. 6 Foreign Affairs 62. China has used antitrust in its economic strategy wars. Qualcomm had a deal to buy Netherlands-based NXP Semiconductors. The merger did not have anticompetitive aspects. But it got caught in the cross winds of a U.S. ban on U.S. chipmakers' doing business with China's ZTE and the Chinese authorities held up antitrust approval until after the deadline for the deal expired. See, e.g., Michael Martina and Stephen Nellis, 'Qualcomm ends $44 billion NXP bid after failing to win China Approval' *Reuters* (London, 25 July 2018) <https://www.reuters.com/article/us-nxp-semicondtrs-m-a-qualcomm/qualcomm-ends-44-billion-nxp-bid-after-failing-to-win-china-approval-idUSKBN1KF193> accessed 27 March 2021.

speculative and contingent, and that competition, rather than its suppression, was a better way to build strength in the global arena.

3. If a government were contemplating an industrial policy to weaponise domestic industry against China, it almost surely would not select an antitrust pass to do the job.

4. In sum, competitiveness (with China) as an antitrust defense deserves healthy skepticism. The defense (if admissible under law) needs an explicit, evidence-based narrative. Is there a credible story that the merger will produce a stronger, better, more inventive competitor, even if it creates market power that may hurt consumers? Or are the parties merely crying Dragon and playing the China card?