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SHOULD EUROPEAN COMPETITION POLICY CHANGE IN REACTION TO GLOBAL CHALLENGES?

Lessons from the Siemens–Alstom merger and its impact*

The paper deals with the lessons from the European Commission's early 2019 prohibition of the Siemens–Alstom merger and the subsequent industrial policy debate. After reviewing the assessment principles in competition policy concerning mergers and describing the specific merger in detail, it discusses industrial policy's proposals for changes to practice and institutional reform in competition policy . Concerning policy proposals, while some principles and guidelines in competition policy need review, there is an ongoing professional discourse concerning these issues, and the fundamental assessment framework works well. Concerning institutions' suggestions, however, the proposed industrial policy reforms may restrict regulatory independence and erode the values of professional competition policy assessments, which are strong determinants of welfare in the long run.

INTRODUCTION

This paper deals with perhaps the most momentous event in European competition policy in 2019, the prohibition of the Siemens–Alstom merger and the subsequent wide-reaching policy debate. The European Commission reached its final decision and issued its short reasoning for the prohibition on February 6, 2019. Competition commissioner Margrethe Verstager summed up the case thus:[1]

- „Siemens and Alstom are both champions in the rail industry. Without sufficient remedies, this merger would have resulted in higher prices for the signalling systems that keep passengers safe and for the next generations of very high-speed trains. The Commission prohibited the merger because the companies were not willing to address our serious competition concerns."

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[1] The European Commission's press release, February 6, 2019. https://ec.europa.eu/commission/presscorner/detail/en/IP_19_881.

Preceding the decision, both the French and the German government lobbied intensely for the Commission to approve the merger. German chancellor Angela Merkel and French president Emmanuel Macron both publicly stated that Europe needs "super champions"[2] and "industrial giants"[3] that can succeed in global competition – especially against Asian, and specifically state-sponsored Chinese competitors –, and can protect European jobs.[4] According to the politicians, competition policy should support such European industrial policy endeavours. Criticism mounted after the prohibition, and culminated in the French and the German economic ministries issuing the document known in competition circles simply as the Manifesto, which briefly outlines how European industrial policy should change to successfully face the challenges of the 21st century (*Manifesto* [2019]). This likely intentionally provocative proposal makes several recommendations for the major overhaul of the institutional framework of European competition policy. A couple of months later, in the framework of the Weimar Triangle, the Polish economics ministry joined its German and French counterparts, and they issued their proposals for the modernisation of competition policy together.[5]

The conflict in Europe between competition policy and other policies relating to given industries (industrial policy, regulation, trade policy) did not begin with this case – this paper will give several examples of mergers where the European Commission's competition decisions received serious criticism for evaluating firms' behaviour from the point of view of consumer welfare. However, the Siemens–Alstom merger seems special, because it is this case where it was first explicitly discussed how competitive pressure (possibly) exerted by Asian firms should be evaluated on the global market. While these firms have not yet arrived on many markets,

[2] See the Politico article *Trains put Merkel and Macron on collision course with Brussels* (November 14, 2018). https://www.politico.eu/article/siemens-alstom-merger-trains-pit-merkel-and-macron-against-brussels.

[3] See the Reuters article Explainer: *Why Siemens-Alstom rail merger is creating European tensions* (January 17, 2019). https://www.reuters.com/article/us-alstom-m-a-siemens-politics/explainer-why-siemens-alstom-rail-merger-is-creating-european-tensions-idUSKCN1PB216.

[4] It is interesting to note that in 2016, according to certain sources, Siemens and the Canadian Bombardier were considering a possible merger of their rail businesses, but that these discussions didn't pan out. See for example the Reuters article *Bombardier, Siemens rail merger de-railed by control issues: sources* (September 28, 2017). https://www.reuters.com/article/us-bombardier-siemens/bombardier-siemens-rail-merger-de-railed-by-control-issues-sources-idUSKCN1C33AB.

Furthermore, right after the prohibition of the Siemens–Alstom merger, the idea emerged that an Alstom–Bombardier merger could be the next possibility to consolidate the industry, see the Reuters article *Siemens deal collapse fuels Alstom-Bombardier tie-up talk, shares rally* (February 6, 2019). https://www.reuters.com/article/us-alstom-m-a-siemens-stocks/siemens-deal-collapse-fuels-alstom-bombardier-tie-up-talk-shares-rally-idUSKCN1PV1K9. Up until this article was finalised at the end of 2019, there were no further developments, but it is likely that further restructuring will take place in the industry.

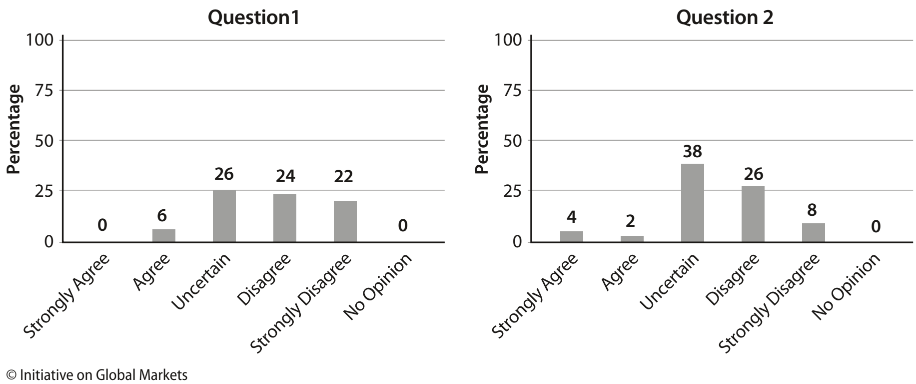
[5] See *Weimar Triangle* [2019]. The Weimar Triangle *(Weimarer Dreieck)* is a forum for discussion between these three countries, established in 1991.

but their eventual entry is typically expected by the industries' market players, and causes them to worry.

The Chicago Initiative on Global Markets (IGM) maintains a European IGM Economic Experts Panel, where one can find an interesting illustrative result concerning how much the presence of Asian international firms influences or changes the opinions even of independent academic economists.[6] Panellists were given two statements to evaluate in mid-February 2019, following the merger decision:

> Question 1: The average European is better off if Europe's competition authorities let firms merge into European champions in their sectors, even it weakens competition.
> Question 2: If China and other countries use policies that create giant international firms, then the average European is better off if Europe's competition authorities let firms merge into European champions in their sectors, even it weakens competition.

Figure 1 shows the unweighted results from the answers received.



Sources: European IGM Economic Experts Panel (www.igmchicago.org/european-economic-experts-panel).

FIGURE 1 • **Answers of the IGM European Economic Experts Panel**

The results are as expected for the first question: only 6 percent of respondents agreed with the statement, 26 percent were uncertain, and 46 percent disagreed or strongly disagreed – in similar proportions. However, when the presence of giant

[6] The panel consists of 50-60 internationally acclaimed academic economists working in various areas. They are regularly sent policy statements concerning current affairs, and asked to briefly express their opinion. Answers are in a scale of five (from strongly disagree to strongly agree), and panelists also give a weight between 1-10 to show how definite their opinion is; results are then shown both weighted and unweighted. The panel can be found here: http://www.igmchicago.org/surveys/european-champions.

international firms was added to the question, the results were somewhat different: while still only 6 percent of respondents agreed, a significantly increased proportion, 38 percent were uncertain, and while the proportion of respondents who disagreed was largely unchanged at 26 percent, the number of respondents who strongly disagreed decreased significantly to 8 percent.

After the first reactions to the merger prohibition, more sober expert analyses began to appear which considered the questions posed by the merger and the Manifesto's recommendations from different angles. Since the parties did not appeal the decision, the Commission published its preliminary decision relatively quickly, in August 2019, which increased clarity in the case. This in-depth, detailed document makes it much easier to interpret events.

The paper is structured as follows. The next section discusses the implicit conflicts behind the debate on how competition policy's objectives differ from those of other policy areas, and the institution economic explanations for them. Then, I briefly summarise the main institutional framework of European merger control, and the parts of the assessment of the Siemens–Alstom merger that we need to be familiar with in order to understand the main points of the debate. I describe in more detail the facts that were taken into account in the assessment, and the arguments of the merging parties and the Commission. I then review the main points made by the Manifesto and the Weimer Triangle, focusing on the parts concerning competition policy. Finally, I discuss the arguments that have arisen in the debate, which mainly are against the recommendations for competition policy and institutional reform outlined in the Manifesto. The final section concludes.

THE CONSEQUENCES OF COMPETITION POLICY HAVING A DIFFERENT OBJECTIVE TO OTHER POLICY AREAS

Firstly, it is important to establish that European competition policy, and with that, merger control only considers the change in consumer welfare when making an assessment, and referring to the restriction of competition. While this principle is not explicitly included in any regulations or guidelines,[7] the practice of authorities and courts has been consistent in applying it for decades. This welfare standard differs fundamentally from the standard used by other policy areas (regulation, industrial policy, trade policy), where the objective is to maximise some weighted average of consumer and producer surplus.[8] As a natural consequence, if competition policy

[7] This approach based on consumer surplus is often not enshrined in national competition law. The Dutch competition policy conducted an international survey on the topic in 2011 (see *ICN* [2011] page 15, figure 1.4.2): of 56 respondent countries only 48 percent mention consumer surplus explicitly, while a further 28 percent refer to it some indirect way.

[8] This is often stated in the form that competition policy focuses on allocative efficiency, while other areas also consider productive efficiency to some extent.

is consistently and correctly applying the assessment principle assigned to it, then it will reach a different conclusion than would be optimal for other policy areas' approach.

Several articles in economic theory and institutional economics discuss the issue of what the optimal welfare standard should be for regulatory institutions. The result of *Neven–Röller*'s [2005] classic model states that in an institutional environment where strong industrial lobbying can influence policy decisions it may be optimal to divert the regulatory institution's objective function to favour consumer welfare only – as a consequence, final societal welfare will be closer to its maximum. It is also a well-known result that if there is a real danger of regulatory capture, it is better if more than one regulatory agency has the power to make decisions.[9] All this means that if the decisions in one policy area do not seem optimal from the point of view of another one, that does not necessarily signal a problem, but could be the natural results of a competing regulatory environment.

The debate concerning the different objectives of competition policy and other policy areas re-emerges occasionally in the context of a given large case. The Commission has blocked the creation of large national or European champions several times before, such as in the ATR–de Havilland merger in 1991 (despite the fact that another European directorate, DG Industry and the president of the Commission were both in favour of it), the Volvo–Scania merger in 2000 and the Deutsche Börse–NYSE merger in 2012.[10] There are also several examples of the opposite, when national industrial policy wished to block, on protectionist grounds, large European firms from being taken over by non-EU or non-national firms, and were vocal in their opinions [Mittal–Arcelor (2006), E.ON–Endesa (2006), GE–Alstom gas turbines business (2016)], but the Commission approved these large transactions, since – with sufficient commitments – they did not significantly lessen competition. There are also examples of two policy areas reaching different conclusions from the practice of the European Court of Justice: at the beginning of the 2000s, in the Deutsche Telekom case, the Commission condemned the German firm for abuse of a dominant position for market behaviour whose framework had been approved by the German telecommunications regulator, and this approach was explicitly investigated and approved by the court.[11]

If some policy reform aims to change the basic welfare approach of competition policy, it would have far-reaching consequences not only for merger control, but for all competition policy areas.

[9] See for example *Laffont–Martimort* [1999].

[10] See *Levy et al.* [2019] for a more detailed discussion of these transactions and the debates surrounding them.

[11] The case number is 37.451 at the Commission and T-271/03 at the European Court of Justice.

THE RELEVANT PARTS OF EUROPEAN MERGER CONTROL FOR DISCUSSING THE SIEMENS–ALSTOM CASE

The European Union has had licence to review large mergers with an EU dimension since 1989. The current regulatory framework is given by council regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation, ECMR). The in-depth review of mergers is undertaken in a two-phase process by the Commission's directorate specialised in competition, the Directorate General for Competition (DG Comp). In the first, shorter phase DG Comp may determine that the merger does not significantly lessen competition on any relevant market, and approve the transaction, or, if there are doubts, it can refer it to the second phase to be investigated more thoroughly. If DG Comp presumes, based on the uncovered facts and detailed analyses, that the merger would significantly decrease competition, it discloses this to the parties in a so-called statement of objections, who can then make detailed comments. Subsequently, DG Comp develops its final assessment, presents it to the Commission, and the Commission makes a decision about the merger.

The Commission issues several guidelines between 2004 and 2008 concerning the assessment principles it follows when evaluating mergers. The main method is the so-called SIEC- or SLC test (which stand for significant impediment to effective competition and substantial lessening of competition respectively), where the Commission investigates whether a merger substantially decreases competition on the relevant markets or markets.[12] Depending on the specificities of the given merger, various factors may have larger or smaller significance. In the Siemens–Alstom case, we highlight three factors which were key to the Commission's assessment.

The first factor is the issue of entry.[13] Entry is one of the so-called countervailing factors to be considered during the assessment, as it can counteract the possible harmful effects (most often related to price increases) that a merger may cause. For a potential entrant to exert sufficient competitive pressure on market players post-merger, three cumulative conditions must be satisfied: 1) entry should be a sufficiently likely, 2) entry should occur in a timely manner, and 3) entry should be significant enough to counteract the harmful effects of the merger. While the merger guidelines do state that the appropriate time period depends on the characteristics and dynamics of the market, but the baseline is that "entry is normally only considered timely if it occurs within two years" (*EC* [2004*a*] para. 74). The burden of proof concerning entry lies with the competition authority.

The second factor is the question of efficiencies (*EC* [2004*a*] para. 76–88). If the merger creates significant efficiency benefits to the firms involved, then the this, via a price drop, for example, can counteract the potential detrimental effects

[12] For a detailed discussion of the SLC test in Hungarian, see *Csorba* [2008].
[13] See the so-called Horizontal Merger Guidelines at *EC* [2004*a*] paragraphs 68–75.

on competition, and the possible price increase these may cause. There are also cumulative conditions to be satisfied in order to prove the existence of efficiencies, and the burden of proof lies with the parties: 1) the efficiencies must benefit consumers, 2) they must be substantial enough to countervail the potential harm, 3) they must be verifiable and quantifiable, and 4) they must be merger-specific, that is, they must be a direct consequence of the merger and could not be achieved by less anticompetitive means. It is an important principle of European competition policy that efficiency gains and consumer benefits must be shown on the market where the harm was identified: efficiencies on other markets can typically not be used to counteract harmful effects.

The final factor concerns remedies. Separate guidelines are available about this topic (*EC* [2008]). If the Commission is not convinced that the countervailing factors can indeed counteract the harm, the transaction could be modified to achieve this. Remedies must be devised by the parties for the Commission to consider, but it the Commission's role to decide whether or not they are adequate. If they are not, the Commission itself cannot alter the transaction, and has no other recourse than to prohibit the merger. Remedies must also satisfy several conditions to make a transaction permissible: 1) they must be clear enough that their effects can be assessed, 2) they must eliminate the competition concerns entirely and effectively, 3) they must be be capable of being implemented effectively within a short period of time. While each decision must be made on a case-by-case basis, in general the Commission prefers structural commitments, divestitures, especially for horizontal mergers. The divested business must be a viable entity, capable of operating independently of the merging parties (in particular with the respect to inputs and technology).

THE DETAILS OF THE SIEMENS–ALSTOM MERGER

In view of the assessment framework presented above – and based on the Commission's detailed public decision – this section will summarise the main characteristics of the Siemens–Alstom merger. For the sake of brevity, I describe only the reasoning concerning the market for high speed trains, especially since the arguments for the markets for signalling were very similar, but require more technical detail to understand.

The principal overlap between the merging parties is on the market for high speed trains, which are capable of speeds over 250 km/h. The Commission found convincing evidence that the market for high speed trains is a separate relevant market. A further important question was whether the segment of very high-speed trains was a separate relevant market as well. While there was evidence for very high-speed trains to be considered a separate relevant market, this question could finally be left open, as the Commission's assessment was the same for both possible market definitions (*EC* [2019*a*] Decision M.8677, para. 105–106).

Concerning the relevant geographical market, the Commission concluded that it is at least EEA-wide and includes Switzerland. There were several indications that the market for high speed trains may be world-wide, excepting China, Japan and South Korea, where the entry of foreign firms is significantly administratively restricted. However, similarly to the case of the relevant product market, the Commission's conclusions did not depend on the specific geographical market chosen, and the question could be left open (*EC* [2019*a*] Decision M.8677, para. 133.).

A total of eight significant firms won commissions to produce high speed trains on the open part of the worldwide market. Commissions are rare and very high in value, and therefore are placed via tenders. Consequently, it makes little sense to calculate market shares year by year, since it is quite possible that only a single tender was issued in a given year in the entire world. Hence, the Commission considered that summing up the revenues stemming from tenders over a ten-year period (2008–2018) to be the best representation of the parties' and their competitors' market position. The results are shown below in *Table 1* (*EC* [2019*a*] Decision M.8677, para. 165).

The combined share of the parties is over 60 percent in each combination of relevant product and geographic market. Siemens is an especially large player in the segment of high-speed trains capable of speeds between 250–300 km/h, with a market share between 40 and 50 percent, and Alstom is one of three competitors with shares over 10 percent. The situation is similar in the very high-speed segment, except that there, Alstom is the larger player. Looking at the high-speed market together, the parties are strong first and second largest players, each with shares over 30 percent, and there is only one competitor with a share over 10 percent – even considering a worldwide market (excluding the three closed Asian countries).[14]

The Commission evaluated the role of each competitor separately, and concluded that the competitive pressure they exert is limited.[15] The revenue of the European competitors stems mainly from tenders won in their home countries where they were the only contestants, or from tenders won in consortium with another competitor. Furthermore, the Chinese CRRC, whose increasing competitive pressure the parties especially emphasised, achieved its revenue via a single, Indonesian commission, which it received not through a tender, but through an international agreement. CRRC does not have the TSI qualification of the European Railway Standard, which would enable to participate in European tenders. The South Korean manufacturer Hyundai-Roten hardly participated in tenders outside its home country in the past

[14] The parties criticised the calculation of the market shares in several ways, especially that the events after 2012 are more important for the merger, and that for the tenders, the revenues should only be considered when there was an explicit call for tender and competition took place, and the significant revenues from aftermarkets ("non-contestable tenders") should not. While the Commission did not agree with these propositions, it did show market shares for these cases, too (see *EC* [2019] paragraphs 187 and 222): the combined shares of the parties were still never lower than 50-60 percent, and were even higher in certain markets than with the original method.

[15] See *EC* [2019*a*] Case M.8677, from paragraph 248, and from paragraph 272 for CRRC specifically.

TABLE 1 • **Market shares on the market for high-speed trains (percent)**

Competitor	EEA and CH 2008–2018			Worldwide (excluding China, Japan, Korea) 2008–2018		
	High-speed (between 250 and 299 km/h)	Very high-speed (from 300 km/h)	High and very high-speed	High-speed (between 250 and 299 km/h)	Very high-speed (from 300 km/h)	High and very high-speed
Alstom	10–20	50–60	30–40	10–20	50–60	30–40
Siemens	40–50	10–20	30–40	40–50	10–20	20–30
Combined	*60–70*	*70–80*	*70–80*	*60–70*	*60–70*	*60–70*
Bombardier	10–20	5–10	10–20	10–20	5–10	10–20
Hitachi–Ansaldo	0–5	10–20	5–10	0–5	5–10	5–10
Stadler	10–20	0–5	5–10	10–20	0–5	0–5
Talgo	0–5	5–10	0–5	0–5	10–20	5–10
CAF	0–5	0–5	0–5	0–5	0–5	0–5
CRRC	0–5	0–5	0–5	0–5	0–5	0–5

Source: EC [2019*a*] Decision M.8677, p. 40.

10 years, while the Japanese Kawasaki never entered European tenders and only won one foreign commission, in Taiwan.

The Commission also analysed tenders and their results in detail, making use of several methods.[16] While the quantitative results constitute business secrets and cannot be made public, but we do know that in an overwhelming majority of tenders taking place between 2008 and 2018 there were fewer than three serious applicants (despite typically at least four firms having been invited). Siemens and Alstom hold the first two places in both rates for participation and winning, for any relevant product or geographical market. Furthermore, the presence of the one has the greatest effect on the probability of winning for the other on any given tender. Based on these findings, the Commission concluded that the parties are each other's closest competitors, especially in the very high-speed segment, and therefore the merger would result in a significant lessening of competition.

The decision then discusses in detail the possibilities for entry and the countervailing effect it may have, especially on the part of Asian competitors – this being the central argument of the parties against the competitive concerns (*EC* [2019*a*] Decision M.8677, para. 462 onwards). One of the main arguments made by the parties is that if the Commission considers market shares and tenders going back 10 years to assess market dynamics, it should also look ahead at least 5-10 years when evaluating potential entry. While the Commission does not explicitly accept this argument, it does make the assessment for this time horizon as well, and still does not consider the entry of Chinese firms sufficiently likely, thus dismissing the parties' arguments. The Commission also makes the comment that Alstom was

[16] See *EC* [2019*a*] Case M.8677, from paragraph 292. For a brief overview of methods for analysing tenders and an application in a Hungarian merger case, see *Csorba* [2008].

already arguing that Chinese firms may enter the market at any time during the 2010 Alstom–Areva merger (*EC* [2010] Decision M.5754, see para. 495.), and this has not happened since.

There is very little information concerning efficiencies (*EC* [2019*a*] Decision M.8677, para. 1262.). The main reason is that according the Commission, parties only submitted a short, verbal argument on this topic when notifying the merger, but did not give sufficient details and did not prove their statements. The Commission therefore did not consider their efficiency defence sufficient: the efficiencies were not verifiable and quantified, and it was also not proven how the claimed decreases in costs and increase in portfolio would benefit consumers.

The decision does, however, discuss possible remedies in great detail. The parties put forward such remedies for both high-speed trains and signalling systems.[17] However, even after multiple modifications, the Commission did not deem these remedies sufficient to eliminate competition concerns. The main problem was the same in each case: the remedies proposed by the parties did go further than offering certain technologies and licences to certain, non-specified potential buyers (according to such potential buyers, under rather unclear conditions), and some quite restricted access to production (mainly only engineering) capacity, or access to their own assets. The Commission therefore was not convinced that a competitor could build a viable business model and exert the significant competitive pressure that the merger would eliminate, based on this offer.

The ex-post assessment of the merger in view of the public decision

Based on the first Commission press releases and the heated reactions from the other side following the prohibition, one could have thought that the Commission prohibited the merger of two large European firms mainly due to its harmful effects on European markets and the two firms face significantly stronger competition outside of Europe. One of the main critiques was namely that due to the prohibition decision, Siemens and Alstom would weaken on the global market, due to the expansion of Asian firms; and this may have repercussions on European markets as well. Reading the detailed decision, however, it is clear that this is not the case: the parties are leaders on the worldwide market, too, and Asian competitors are not nearly as threatening outside their home countries.

It is also clear from the decision that the evidence uncovered by the Commission overwhelmingly point in one direction. In addition, a large portion of this evidence, such as the data for the tender analysis, the internal documents, and the market analyses were actually supplied by the parties. This means that the parties' own competition law and competition economics experts most probably had enough

[17] See *EC* [2019*a*] Case M.8677, starting at paragraph 1285 and continuing for close to 100 pages.

information in-house to wave the red flag, and signal that based on prevailing competition policy standards, the Commission will most likely prohibit the merger. It is suggestive that in the 400-page decision and its annex containing the Commission's economic analysis there is no reference to any economic analysis submitted by the parties and conducted by an outside consulting firm that would have needed comment – presumably because no such supportive analysis could be given, which is quite unusual for a significant, second phase merger. It is also rare that there was no real attempt on the part of the parties to present an efficiency defence in addition to the verbal arguments presented during notification (or that they were not worth mentioning by the Commission), while the parties would have had several months to work out such a defence after the detailed investigation (the second phase) began and the first concerns were made clear.

Finally, it is also difficult to make sense of the not especially helpful attitude the parties displayed – as evidenced by the decision – during the remedies phase. The disputed and unclear conditions of the technology transfer did not change significantly even after feedback about them was received, and the Commission could therefore not conclude that they would eliminate the competition concerns with sufficient certainty. No significant divestitures were offered either, not even for signalling systems, even though that would likely have been more warmly received by the Commission. While there is no information about this in the decision, this market is likely smaller than the market for high-speed trains with its massive tenders, and therefore it may have made sense to make a sacrifice there to improve the chances of the merger being approved.

Overall, my opinion is that there seems to be no other rational reason for the notification of this merger and the parties' behaviour during the process than that the parties expected that some factor outside of competition policy may sway the Commission's final decision in their favour. The Commission, however, was consistent in using the legal, analytical and institutional framework that applies to it, and prohibited the merger. In the end, the parties themselves did not appeal the Commission's decision.

THE PROPOSALS OF THE MANIFESTO AND THE WEIMAR TRIANGLE

A few weeks after the prohibition of the Siemens–Alstom merger the French and German economics ministries issued the short document knows as the Manifesto, which outlines the strategic course for European industrial policy for the next decade (*Manifesto* [2019]). The document was issued in the name of France and Germany, but came out following consultations with several other countries, and proposed significant reforms.

According to the Manifesto, the basis of common industrial policy is pooling Europe's resources, since this is the only way to ensure success in the global market.

The document outlines three pillars for achieving this strategic goal, addressing each in a separate section:

1) a common innovation policy, to significantly increase growth in innovative investments;
2) adapting the regulatory framework to the challenges posed by global competition; and
3) taking effective – essentially, trade policy – measures to enable Europe to protect its markets and firms.

The reform of the institutional framework of competition policy appears in the second pillar, and this is therefore the part detailed in this paper. The Manifesto acknowledges that competition rules are essential, but states that they need to be adapted to industrial policy objectives so that European firms can successfully compete on the global stage. Three proposals are then made specifically concerning merger control.

The first two proposals concern changing the assessment framework for mergers, and suggest changing the wording of the merger regulation and the guidelines – we will later refer to these as *competition policy reforms*. The first one is that the state-control of and subsidies for firms should be given greater consideration during assessment. While this point is not elaborated upon any further, but the introductory parts of the document allude to "some" Asian countries which heavily subsidise their own companies, and that these firms therefore have a competitive advantage, while European firms have a competitive disadvantage that should be compensated for.

The second proposal contains specific modifications for the merger guidelines: according to the Manifesto, competition at the global level should be given greater consideration, and the time frame for assessing the countervailing effect of potential competition should be increased.

The third proposal concerns changing the decision-making process for mergers. We will refer to this proposal as an *institutional reform*. The proposal is merely that the Council of the European Union should have veto power over Commission decisions "in well-defined cases, subject to strict conditions". Neither the Manifesto, not later statements discussed what these cases and conditions should be. At this point it is worth mentioning that the Council of the European Union is largely a political body, while the Commission is more a professional body; the Council is made up of the political leaders (ministers) of the member states, and in certain votes, the populations of the member states is taken into account.

While the Manifesto, with its less detailed proposals, gained more attention and responses, it's important to mention that in March 2019, the French, German and Polish economics ministries also issued a list of proposals to modernise European competition policy, under the framework of the Weimar Triangle (*Weimar Triangle* [2019]). This document contains all the competition policy proposals in the Manifesto, but contains further elements as well.

One important new element is the proposal to create guidelines for evaluating efficiency benefits. The document further urges the more consistent application of the method to define the relevant geographical market, but the desired changes are not described in more detail. Finally, there is a proposal that the Commission should give greater attention to the possible application of behavioural remedies, because in their opinion such remedies have the advantage over structural remedies of being more flexible. Concerning institutional proposals, while the Council's veto does not appear explicitly, but several smaller proposals are made about how industrial policy considerations could be better channelled into the Commission's decisions. At the political level, the role of the Competitiveness Council should be increased in creating merger policy, while for some cases the document calls for an increase in the role of the Advisory Committees, which ask the opinion of member states, to take into account competitiveness considerations.

A DISCUSSION OF THE COMPETITION POLICY REFORMS PROPOSED BY INDUSTRIAL POLICY

The first proposal in the Manifesto – that merger control should give greater consideration to the state-control of and subsidies for undertakings – appears neither very precisely formulated nor especially well-founded. While the competitive assessment will generally reveal the background and motivations of a market player, but ultimately it analyses the firm's actual effect on competition (the outcomes on the market), and these are not derived from the firm's specific characteristics. Simply because a firm is not entirely motivated by maximising profit does not mean it exerts greater competitive pressure. There have been several important competition policy cases in the past twenty years where the Commission seriously investigated the competitive pressure exerted by firms offering their services for free, and it was sometimes significant (see for example the Facebook–WhatsApp merger – Case M.7217), sometimes not (see for example the Microsoft interoperability case, Case C-3/37792 – *EC* [2004*b*]).

The other proposal in the Manifesto, connected to entry, is in fact not new: these issues have been under discussion in professional forums for several years. Over the past few years, especially in response to developments on digital markets and the debates surrounding them, there is an increasingly widespread opinion (see *Crémer et al.* [2019]) that the time horizon for potential entry is too short, and this is especially problematic when assessing the acquisitions of start-ups. Since 2015, in several cases the Commission has analysed the expected effects of mergers for periods longer than two years, mainly in the case of pharmaceutical mergers, to investigate the increasingly prominent innovation concern (that post-merger the parties may significantly restrict their innovation activity).[18] These developments

[18] *Motta–Peitz* [2019] reviews these mergers in more detail.

mean that a significant shift has already taken place, and further adjustments can be expected regarding the timeline for evaluating entry/potential competition. It is worth noting, however, that a longer time horizon necessarily increases the uncertainty of the assessment, since it's much harder to predict market developments five or ten years ahead, especially in a fast-changing market environment. Therefore, if the competitive assessment starts working with a longer time horizon, this will probably be matched with a more conservative approach, that is, for a merger to be approved, it may be required that no competition concerns arise in the next five to ten year even assuming a pessimistic market forecast.

The Weimar Triangle proposals concerning the "modernisation" of the geographical market is also a long-standing topic of discussion in professional circles. The basic principles of market definition were laid down in 1997 in the Commission Notice on the definition of the relevant market (*EC* [1997]), therefore it is high time for the Commission to issue an updated version, which could, firstly, empirical methods that been refined over the past decades, and secondly, reference the many important precedents that have since established. However, the Commission is in fact consistent in evaluating competitive pressure coming from foreign countries when defining the relevant market,[19] as analysed in detail in a paper ordered by the Commission and written by two competition policy experts (*Fletcher–Lyons* [2016]). The newest development in this issue is that in late 2019, the DG Comp's re-elected commissioner announced and justified in detail that in the next cycle, the Market Definition Notice would indeed be updated.[20]

The most welcome proposal of the Weimar Triangle is the one calling for guidelines on evaluating efficiencies. While the Commission previously issued detailed guidelines about the exemption rules in the assessment of agreements based on efficiency in 2004,[21] this mainly contains theoretical principles, and there is little information about what the expectations for the economic modelling of efficiencies are. Nor do the in-depth merger decisions of the past 15 years provide any real guidance: firstly, because there were very few attempts to mount a serious efficiency defence, and secondly, when that did happen, the Commission discussed and dismissed these rather briefly.[22] Unfortunately, due to the low number of public decisions with efficiency analyses it is quite difficult to formulate what the guidelines should contain; however, in the absence of such guidelines there continues to be great uncertainty as to what an efficiency defence should look like in practice, beyond the theoretical principles.

[19] See *EC* [2015] for a summary.

[20] See Margrethe Verstager's presentation on December 9, 2019 (https://eur-lex.europa.eu/legal-content/HU/TXT/HTML/?uri=CELEX:52016XC1012(03)&from=HU).

[21] See *EC* [2004*c*].

[22] The only exception known to me is the UPS–TNT merger (Case M.6570, *EC* [2013]), in which efficiencies are discussed in great detail. But even in this case, efficiencies were not sufficient to dispel the competition concerns.

It would furthermore be important to start the debate on whether out-of-market efficiencies could be taken into account as countervailing factors in a merger. The Commission has so far been rather dismissive of this possibility.[23] The issue already came up twenty years ago when the Volvo–Scania merger was prohibited (and similarly garnered criticism on industrial policy grounds). In that case, the main reason for the prohibition was that the merger would have resulted in a dominant position in Scandinavian countries, but it was not possible to weigh this harm against efficiency gains in other European countries.[24]

THE INDUSTRIAL POLICY-BASED PROPOSALS FOR REFORM

It is important to note at the outset that it is possible under the current European merger regulation that the Commission approve a merger on competition policy grounds, but a member state can prohibit it or get involved in other ways based on other policy objectives; this is in line with Community law (*Council of the EU* [2004] Article 21, para. 4). These are the so-called public interest tests in merger control. Several European countries have created such an institutional framework over the past 20 years, typically for the given industry's regulatory body, to be able to take into account media pluralism or energy security, for example, to voice concerns about mergers under their jurisdiction.[25] As we discussed before, it can be rational from an institutional economics perspective for a given industry to be analysed by more than one authority, using slightly different points of view, and that in a given case each body's approval should be needed for a merger to go forward.

However, there is very little theoretical basis or practical example of a political institution overruling a regulatory institution's decision to intervene.[26] This is exactly the provocative proposal that the Manifesto made, concerning giving the Council

[23] It is possible in US regulatory practice to take efficiencies on other markets into account as countervailing factors. See for example the methods of the Department of Transport in assessing the cooperation agreements (essentially close to mergers) of airline companies. This is part of the reason why the US authorities unconditionally approved certain agreements where the European Commission found significant competition concerns. See *EC–DOT* [2010] for a detailed discussion of these differences in approach.

[24] See *Wik–Hugmark* [2019] for a more detailed comparison of the Siemens–Alstom and the Volvo–Scania mergers.

[25] A general overview of these institutions, as well as the experiences of several countries were discussed in detail at the OECD roundtable. The documents are available at the OECD website: https://www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm.

[26] *Buhart–Henry* [2019] mentions such cases. Such ministerial authority has existed for the longest time in Germany, where the ministry can veto the German competition authority's intervention. However, since its introduction 45 years ago, only 22 such requests were made and only 9 were granted. In comparison, in Hungary, the government can designate a merger as being of national strategic importance since 2013, in which case the Hungarian Competition Authority does not need to investigate it. Up to the end of 2018, 21 such governmental decisions were made (although

of the EU veto power in specific and special cases. Several arguments can be made against such a move, and I summarise them here.[27] Many of these arguments are also relevant in the case of the other institutional proposals for reform.

In any case where the Council vetoed a Commission merger prohibition, the most evident loss of welfare would be the significant decrease in consumer welfare, an expectation formed after a long (often 9–12 month) investigation by the Commission, based on the detailed questioning of consumers, industry players, market data and economic modelling. Theoretically one could argue that, looking at societal welfare as a whole, this decrease in consumer welfare could be counteracted by an increase in producer surplus, due to increased competitiveness or some other consideration, but there is no well-formulated or widely debated and accepted framework for such "wide-spectrum" analyses. Furthermore, there is no regulatory body to conduct such a "wide" investigation, which could help the Council or any other political body in making a decision. Without such an analysis, it is unlikely that decisions would not be influenced by short term interests, and there would not be a greater opportunity for decisions to be influenced – which would probably also cause further welfare losses in a given case.

Merger control is currently the fastest and most professionally well-accepted institution of EU competition policy. Compared with the other areas, the merger decisions made by the Commission and other European competition authorities are perhaps among the most predictable and transparent. Since the 2004 reform to merger regulation, the significant majority of the Commission's merger decisions have stood up in court (although very few decisions are appealed). These factors have contributed to the reputation of merger policy, which also has significant welfare-enhancing effects because several problematic mergers never take place, due to preliminary assessments by the parties or their advisors. That is, the difficult-to-measure deterrent effect of merger policy is likely quite strong. If a less professionally minded institution were to be added to the system, this long-standing reputation could be severely shaken.

If this credibility were eroded, it could also mean that parties will be less motivated to offer really effective remedies in order for the merger to be approved. While we can only make assumptions in evaluating the Siemens–Alstom case, maybe if there had been fewer supportive political messages made public during the investigation, the parties in this merger may have accepted earlier that the Commission would stick to its own assessment framework, and especially, will insist on structural commitments.

It is also unclear how this political veto would fit into the practice of court appeal: firstly, would the veto replace court review, and secondly, could the veto itself be

some of these may not have given rise to competition concerns). For a more detailed assessment and analysis of the Hungarian situation, see *Papp* [2019].

[27] *Levy et al.* [2019] criticised this proposal in detail, discussing all the points mentioned here. Additional arguments can be found in *Buhart–Henry* [2019], *Motta–Peitz* [2019], and *Lianos* [2019].

subject to appeal (and if yes, based on what considerations)? There are no established answers to these questions, and consequently, such an institutional intervention would undermine the hard-won predictability and reputation of merger control.

Finally, it is worth considering that if the Council of the EU were to play a larger role in competition policy, the weight of political entities is different there than in the European Commission. The population of the member states plays an important role in the Council, and therefore larger countries may have a greater say in voting on the more important questions. Unsurprisingly, the Manifesto was submitted by Germany and France, the most populous EU member states: the combined weight of their votes in the Council is close to 20 percent, and over 25 percent including Poland (and these numbers will further increase with the third most populous member state, the United Kingdom, leaving the Union).

CLOSING THOUGHTS

The paper discusses the lessons from the Siemens–Alstom merger, and the subsequent industrial policy debates and proposals concerning merger regulation. The main conclusion – slightly biased in favour of competition policy institutions – is that while certain principles of the competitive assessment (but not the basic legal framework) could stand to be reviewed,[28] but these are exactly the proposals that, in a wider context, are already being widely debated in professional circles. The really new proposals brought up in the 2019 industrial policy debate, in my opinion, challenge the basic institutional values of regulatory independence and professional assessment, while these factors greatly determine the welfare of a country or community in the long run.

As a further interesting addition, the Commission prohibited the merger between certain European steel activities of Tata Steel and ThyssenKrupp – see case M.8713 (*EC* [2019*b*]). The transaction would have resulted in the merger of the second and third largest steel manufacturers in Europe, but the Commission's in-depth investigation revealed that this would have led to a significant decrease in competition and price increases. The commitments offered by the parties proved insufficient to address the competitive concerns. While there is no public decision yet, the role of imports from Asian countries was key in this case as well. According to the parties, the Commission's approach was fundamentally flawed in this respect, and they appealed the decision to the European Court of Justice (see case T-584/19).[29] While the court's decision may take 2 to 3 years, hopefully it will provide some much-needed reassurance or guidance on how to assess these debated factors.

[28] These are changing the timeframe of evaluating entry, the need for guidelines on efficiencies, and updating the Commission notice on market definition (*EC* [1997]).

[29] See http://curia.europa.eu/juris/document/document.jsf?text=&docid=219388&pageIndex=0&doclang=HU&mode=lst&dir=&occ=first&part=1&cid=4496017

REFERENCES

Buhart, J.–Henry, D. [2019]: Industrial policy to trump competition? The Siemens/Alstom railway merger and its aftermath. In: Which competition and industrial policies for the new EU Commission after *Siemens/Alstom*? On-Topic. Concurrences, No. 2, pp. 6–12.

Which competition… [2019]: Which competition and industrial policies for the new EU Commission after *Siemens/Alstom*? On-Topic. Concurrences, No. 2, https://cdn.roschier.com/app/uploads/2019/04/16103653/03.concurrences_2-2019_on-topic_siemens_alstom9069403_1.pdf.

Council Of The EU [2004]: COUNCIL REGULATION (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), Official Journal, January 29, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=EN.

Crémer, J.–de Montjoye, Y-A.–Schweitzer, H. [2019]: Competition policy for the digital era. European Commission, Brussels, https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

Csorba, Gergely [2008]: A fúziókontroll módszertanáról. Dominancia vagy versenyhatásteszt? In: *Pál Valentiny–Ferenc László Kiss* (eds.): Verseny és szabályozás, 2007. MTA Közgazdaságtudományi Intézet, Budapest, pp. 96–110, http://econ.core.hu/file/download/vesz/verseny_04_CsorbaG_fuziokontroll.pdf.

EC [1997]: Commission notice on the definition of relevant market for the purposes of Community competition law. Official Journal, 97/C 372/03, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31997Y1209(01).

EC [2004*a*]: Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings. Official Journal, 2004/C 31/03, February 5, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0205(02)&from=EN.

EC [2004*b*]: Commission decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty (Case COMP/C-3/37.792 Microsoft) C(2004)900 final European Commission, Brussels, April 21, https://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_1.pdf.

EC [2004*c*]: Communication from the Commission – Notice – Guidelines on the application of Article 81(3) of the Treaty. European Commission, Official Journal, April 27, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52004XC0427(07)&from=EN.

EC [2008]: Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004. Official Journal, 2004/C 267/01, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:267:0001:0027:EN:PDF.

EC [2010]: Case No COMP/M.5754 – Alstom Holdings/ Areva T&D Transmission activities Notification of 23.02.2010 pursuant to Article 4 of Council Regulation, No.139/2004. European Commission, Brussels, March 26, https://ec.europa.eu/competition/mergers/cases/decisions/m5754_20100326_20310_256102_EN.pdf.

EC [2013]: Commission decision of 30.1.2013 addressed to: United Parcel Service Inc. declaring a concentration to be incompatible with the internal market and the EEA Agreement. Case No COMP/M.6570 – UPS/TNT EXPRESS. C(2013) 431 final, European Commission, Brussels, https://ec.europa.eu/competition/mergers/cases/decisions/m6570_20130130_20610_4241141_EN.pdf.

EC [2015]: Market definition in a globalised world. European Commission, Competition Policy Brief, No. 12, https://ec.europa.eu/competition/publications/cpb/2015/002_en.pdf.

EC [2019*a*]: Commission decision of 6.2.2019 declaring a concentration to be incompatible with the internal market and the functioning of the EEA Agreement. Case M.8677 SIEMENS/ALSTOM. 6.2.2019 C(2019) 921 final. European Commission, Brussels, https://ec.europa.eu/competition/mergers/cases/decisions/m8677_9376_3.pdf.

EC [2019*b*]: Mergers: Commission prohibits proposed merger between Tata Steel and ThyssenKrupp. Press Release, June 11, European Commission, Brussels, https://europa.eu/rapid/press-release_IP-19-2948_en.htm.

EC–DOT [2010]: Transatlantic Airline Alliances: Competitive Issues and Regulatory Approaches. European Commission – United States Department of Transportation, https://ec.europa.eu/competition/sectors/transport/reports/joint_alliance_report.pdf.

Fletcher, A.–Lyons, B. [2016]: Geographic Market Definition in European Commission Merger Control. European Commission, https://ec.europa.eu/competition/publications/reports/study_gmd.pdf.

ICN [2011]: Competition Enforcement and Consumer Welfare. Setting the Agenda. International Competition Network, ICN Conference, the Hague, May 17–20, 2011, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/11/SP_CWelfare2011.pdf.

Laffont, J-J.–Martimort, D. [1999]: Separation of Regulators against Collusive Behavior. The RAND Journal of Economics, Vol. 30, No. 2, pp. 232–262.

Levy, N.– Mostyn, H.–Little, D. [2019]: European champions. Why politics should stay out of merger control. In: *Which competition...* [2019] pp. 23–30.

Lianos, I. [2019]: The future of competition policy in Europe: Some reflections ont he interaction between industrial policy and competition law. In: Which competition and industrial policies for the new EU Commission after *Siemens/Alstom*? On-Topic. Concurrences, No. 2, pp. 31–43.

Manifesto [2019]: A Franco-German Manifesto for a European industrial policy fit for the 21st Century. Bundesministerium für Wirtschaft und Energie–Ministere de l'Économie et des Finances, https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf?__blob=publicationFile&v=2.

Motta, M.–Peitz, M. [2019]: Challenges for EU merger control. In: Which competition and industrial policies for the new EU Commission after *Siemens/Alstom*? On-Topic. Concurrences, No. 2, pp. 44–49.

Neven, D.–Röller, L-H. [2005]: Consumer surplus vs. welfare standard in a political economy model of merger control. International Journal of Industrial Organization, Vol. 23, No. 9–10, pp. 829–848, https://doi.org/10.1016/j.ijindorg.2005.08.011.

Papp, Álmos [2019]: One step forward or two steps back? In: Which competition and industrial policies for the new EU Commission after *Siemens/Alstom*? On-Topic. Concurrences, No. 2, pp. 54–58.

Weimar Triangle [2019]: Modernising EU Competition Policy. Bundesministerium für Wirtschaft und Energie–Ministere de l'Économie et des Finances–Ministerstwo Przedsiebiorczosci i Technologii, https://www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf?__blob=publicationFile&v=4.

Wik, C.–Hugmark, K. [2019]: Which competition policy for the new European Commission? A Nordic perspective. In: Which competition and industrial policies for the new EU Commission after *Siemens/Alstom*? On-Topic. Concurrences, No. 2, pp. 59–62.