GCR
GLOBAL COMPETITION REVIEW

Getting on board - Siemens/Alstom

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In February, the European Commission blocked Siemens/Alstom, setting off debate across the continent about whether the competition enforcer was a drag on EU companies in a cutthroat global marketplace. ***Janith Aranze*** *reached out to five practitioners for their take on the decision, its reasoning and its impact on the future of EU merger regulation.*

The merger of German Siemens and French Alstom would have combined Europe's two largest suppliers of train-signalling equipment and high-speed trains. The companies argued that their tie-up was essential for them to compete against state-owned Chinese train manufacturer CRRC.

In the run-up to the decision, the French and German governments lobbied for the deal to be approved. Siemens chief executive Joe Kaiser tagged German economic minister Peter Altmaier and French counterpart Bruno Le Maire when tweeting to EU competition commissioner Margrethe Vestager: "Those who love Europe should shape their future and

not lose themselves in backward formulas. It has to be bitter if you are technically right but you are doing everything wrong for Europe."

The companies tried in vain to offer a divestment package sufficient to ease the European Commission's concerns. But the enforcer said the remedies proposed were a "complex mix of assets" and did not consist of a stand-alone, future-proof business for a potential buyer. Vestager took the press room stage in the European Commission's Berlaymont headquarters on 6 February to dismiss the claims about the pro-competitive effects of the deal and impending Chinese market-entry that could only be fought through the creation of a "European champion".

The commission's decision could be a watershed moment for EU merger control. The French and German governments appear to be following through on their promises to radically reform European merger regulation. Their proposals include allowing heads of EU member states to veto commission merger decisions, and taking into account the growth of future competitors when assessing relevant markets.

While the full decision is yet to be published, the commission's case was based on well-established antitrust arguments. Yet questions remain about whether the enforcer downplayed the threat of Chinese entry and whether its decision will benefit consumers in the long term.

We invited five practitioners to share their views.

Ingrid Vandenborre

Partner at Skadden Arps Slate Meagher & Flom

With the European Commission decision to block Wieland's proposed acquisition of Aurubis Rolled Products and Schwermetall on the same day, *Siemens/Alstom* was the ninth merger the commission had prohibited over the past 10 years. The authority took the view that the merged entity would have become the "undisputed market leader in several mainline signalling markets" and the market leader in the latest communication-based train control metro signalling systems. The proposed transaction would also reportedly have removed one of the two largest manufacturers of very high-speed rolling stock in the European Economic Area (EEA). A new entry from China was deemed unlikely to present a constraint in the foreseeable future.

Although the decision has triggered heated debate in France and Germany that the EU merger control rules should be reformed to support EU champions, the following thoughts will be limited to more technical aspects of the decision, based on what has been made available in relation to the decision to date.

First, although the commission stated that it "was prepared to move away from its strong preference for clean-cut divestiture as long as the remedies offered were going far enough," given that these involved "technologically intense" markets, it considered that the remedies offered did not address the concerns. A licence to use technology that the originator would still own was identified as insufficient, implying that only an exclusive licence would have been sufficient. A five-year exclusive licence to make Velaro trains in the EEA, subject to restrictions including for certain tenders, was also deemed insufficient.

Second, the commission noted that the parties failed to bring forward substantiated arguments to explain why the transaction would create merger-specific efficiencies. It is interesting that the failure to identify efficiencies is increasingly flagged as supporting enforcement. Agencies seem to increasingly expect an efficiencies story to support approval of a transaction. The tendency is particularly relevant in the recent debate on over- versus under-enforcement, with the suggestions made recently that the burden of proof in merger review should be reversed and notifying parties should be required to demonstrate the lack of anticompetitive effect.

Third, it is unclear to what extent the commission relied on economic analyses to support the issues identified and assess the remedies proposed. The commission reportedly relied heavily on the parties' internal documents – more than 800,000 – to assess the negative impact of the deal on competition. Although not entirely novel, there is certainly a clear trend for the commission to request and review an increasing number of internal documents to support enforcement also in a merger review context. Absent clear rules of evidence, that leaves a number of open questions as to the justified relevance of contemporaneous material for some of aspects of merger control review.

Catriona Hatton

Partner at Baker Botts

The reaction to the European Commission's *Siemens/Alstom* decision on the political level brings to mind the old saying, "hard cases make bad law." While there is clearly a high level of frustration in Paris and Berlin with the outcome, the recent Franco-German proposals – which could see EU ministers having the power to overrule European Commission merger decisions – risk unravelling the benefits of entrusting merger control to an independent antitrust authority, free from political interference, whose sole mandate is to safeguard competition.

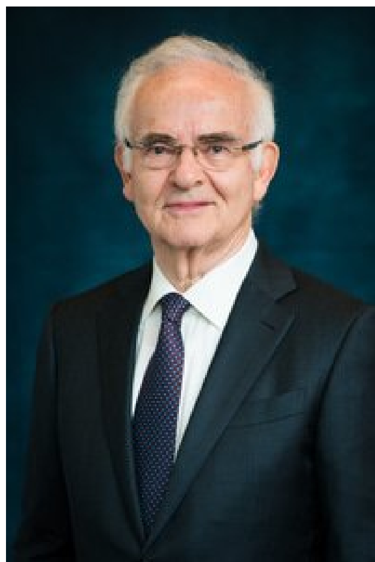
Siemens/Alstom attracted more political attention probably than any deal since the days of *General Electric/Honeywell* and *Boeing/McDonnell Douglas*. Back then, US politicians sought to influence an EU outcome that could prevent the emergence of US champions, with even the threat of trade sanctions by then-president Bill Clinton if the Boeing deal was not approved. US political interference was heavily criticised on this side of the Atlantic, and EU merger control has continued to develop largely free from political interference in individual cases. While the EU merger regulation allows national governments to intervene in deals on very limited public interest grounds such as media plurality or public security, the system foresees tight commission and judicial scrutiny over such interventions to ensure they are not used improperly to create national champions. Also, when designing the rules, the legislature was careful to avoid a situation where national governments could use public interest grounds to authorise a merger that the commission has blocked on competition grounds.

So whatever the merits of the *Siemens/Alstom* decision, should one case now lead to a major departure from decades of EU merger law and policy, with potential international repercussions on the myriad merger control systems around the globe? There has been much criticism of the Chinese merger regime over the years for its consideration of industrial policy goals aimed to protect domestic companies and create national champions, which can lead to outcomes that unfairly restrict the ability of foreign companies to do business in China. A merger control regime where decisions are taken by an independent, impartial authority based on sophisticated legal and economic analyses of potential harm to competition, and which is subject to judicial scrutiny, promotes growth and provides predictability for business. The

Organisation for Economic Co-operation and Development and the International Competition Network, among others, have been flying the flag for years for this type of assessment based on transparent criteria and free from political interference. We need to preserve the independence of our merger control system and look to other areas of law and policy to promote the competitiveness of EU companies in the international market and to tackle unfair treatment by other jurisdictions. Allowing politicians to overturn merger decisions taken by the commission would generate uncertainty, open the process up to extensive political lobbying and conflicting national interests and ultimately could lead to merger control being used as a trade retaliatory measure to the detriment of competition. I think this is one of those situations where we need to remind ourselves that hard cases should not make bad law!

Götz Drauz

Partner at Sullivan & Cromwell



Faced with high market shares in a European Economic Area (EEA) wide market for high-speed rolling stock and signalling systems, the merging parties strongly relied on the "Chinese defence". After all, CRRC is by far the largest manufacturer of high-speed rolling stock in the world. However, the Commission excluded Chinese suppliers from its merger "counterfactual" since they were not yet present in the EEA, and that it would take a very long time before they can become credible suppliers for European customers.

The parties will have pointed out that an assessment of the competitive constraints should not be based solely on the existing market situation. Rather, the commission would have to take account of future market developments that can be predicted with a sufficient degree of certainty. In fact, given the massive build-up of China's capabilities and its determination to capture new markets, not least manifested in its Belt and Road Initiative, it seems reasonable to predict that Chinese competition would be felt in the next two to five years, and likely sooner if the merger went ahead. The commission might also have relied in its appraisal on the contribution of the merger to the "development of technical and economic progress" as stated in article 2(1)(b) of the Regulation. After all, the combination of the parties' activities was likely to lead to very substantial cost savings (Alstom trade unions' complaint immediately proves this point).

In the end, in my view, the commission shied away from a bold move forward into the largely uncharted territory of the "efficiency defence", not least given the phalanx of opposition, including customers, competitors and rather unusually several national competition authorities. To ultimately reject the merger owing to insufficient remedies provided an easier way out by equally avoiding likely court challenges.

The political interference certainly did not help. Faced with this very public intervention, the College will always unite in defending its credibility and authority. On the other hand, the criticism at the apparent inability of the present Commission to find more convincing answers when faced with high European market shares in businesses that are genuinely global will not go away any time soon: Our stock exchanges are still dwarfs compared with their US and Asian counterparts, there are still some 30-plus mobile telecom operators that find it hard to invest in 5G and stay level with their international competition. It is widely believed that many markets in Europe require consolidation. In view of this, the standard commission response to any such transformational mergers, no problem – as long as a new competitor is

instantly created – may no longer suffice. The German–French initiative to review merger law may be seen as one possible way to deal with this unease.

Pascale Deschamps

Partner at Oxera

The strong political reaction to the *Siemens/Alstom* decision triggered big opposition, from competition specialists in particular but not only, arguing that such populist reactions should not be allowed to affect how the European Commission assesses European mergers. The specialists said this is one more round of political interference, which is unlikely to change anything; the commission and other European decision-making bodies should just ignore those calls, not change a thing, and move on.

There does not appear to be anything particularly innovative or special about how the commission has been analysing the competitive impact of the transaction. Nonetheless, the core of the polemic around this case is not so much about the substantive analysis. This case highlights once more the divide between strict application of competition rules, on the one hand, and public perception and political goals, on the other.

In some member states – France in particular – competition in itself is not perceived as an ultimate goal that needs to be achieved without regard to other parameters. Although Vestager has explained many times that the commission puts European consumers' best interests at the heart of its reasoning, this does not necessarily translate into putting European citizens' best interests first. Consumers buy nothing from Alstom or Siemens directly, and do not see a direct link between the price of train tickets and the fact that these companies are merging. What European citizens and their political representatives do see is a true internal-market, cross-border merger, which may help to keep technology and jobs within the EU in the long term. This disconnect between the commission's reasoning around consumer welfare, and citizens' concerns – around jobs, social welfare, environmental impact, as well as prices, of course – appears under crude light in this case. It is not going to go away simply by ignoring the political signs of this phenomenon.

Airbus and the European space programme are past examples of successes in focusing political and economic means on specific sectors to achieve something otherwise unachievable. In the case of *Siemens/Alstom*, a lot hinges on what one believes about the future: Will heavily subsidised Chinese companies enter the European market and if they do, what would be the impact on European economies?

Politicians may call for merger review to take into account wider considerations than the impact on competition within the next few years. The imminent exit of the UK, a strong proponent of the consumer welfare standard, will only exacerbate the influence of such views. Jobs, industrial policy, environmental impact, security of European supply, and protection of production chains are all factors that governments are keen to put in the balance along with price and quality. How to achieve that, while ensuring consistency and integrity in the balancing exercise that would be undertaken, is, of course, difficult to address. However, simply ignoring the issue to preserve the purity of competitive assessments of mergers does not make it disappear. By refusing to engage in the debate, stakeholders may be left with having to live with the consequences of political choices that are made and imposed on them, as opposed to being able to influence how such an issue could be resolved to everybody's benefit and without jeopardising the fundamental principle of preserving competition in the EEA.

Harry G. Broadman

Managing Director and Practice Chair,
Berkeley Research Group LLC

The proposed merger between Siemens and Alstom to fight off the future intrusion of the giant state-owned Chinese rail industry into the EU market might have seemed to be in the public interest. In the eyes of Berlin and Paris, what better way to combat size than to scale up? Vestager, however, had the wisdom – if not courage – to make the correct call and block Siemens' acquisition of Alstom.

Competing against Chinese firms is becoming tough in many sectors across the globe. This is because, in large part, Chinese enterprises don't have to play by the same rules as most businesses of other nationalities. Just as in international trade policy, the solution for the EU rail industry will, in part, turn on a coalition of countries forcing China to play by the rules of fair competition to which others adhere. Regrettably, in the case of trade, the mainstage fight with China has only the US in the ring; nothing much will come from a bilateral scuffle. In the case of competition policy, the French and Germans taking on China by themselves is not much more potent.

Sound public policy towards competition among firms must be based on deftly balancing the welfare of a country's consumers, workers and businesses. For Siemens and Alstom, the answer won't be scale; that's looking through the wrong end of a telescope.

At its barest of bones, Vestager's assessment of the contemplated *Siemens/Alstom* merger largely turned on this question: Would turning the dominant EU rail duopoly into effectively an EU monopoly preserve or enhance the current potency – such as it is – of the competitive forces at play in the EU rail market? It would be hard to answer in the affirmative with a straight face.

The odds are that such a combination would not have a salutary effect on the prices charged to rail users, supply chain costs, quality of service, incentives to innovate and other operational facets of the EU rail sector. In antitrust parlance, this is in essence the "economic welfare standard" for making judgements about the impacts on market participants from a proposed merger that would necessarily eliminate a seller from the market.

In contrast, where market dominance of a firm is rooted in its rapid organic growth – such as is largely the case of the US high-tech companies – arguably the burden of proof is far more qualified. There's a good case to be made that their success in the market is the result of consumers rewarding them by buying increasing amounts of what they're selling because their prices are fair and the quality of what the firms are offering is sound.

That brings us back to *Siemens/Alstom* and the prospective threat of the Chinese. Do the German and French rail firms believe that their EU consumers won't be able to discern if the price/quality trade-off of what they're bringing to market is superior to what the Chinese can offer?