

# Bigger Is Better . . . Or Maybe Not: The Siemens/Alstom Railway Merger

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## OVERVIEW

The European Commission recently reaffirmed that industrial policy objectives have no role to play when it comes to applying the EU merger control rules. Despite unusually intense industrial and political pressure to get the Siemens/Alstom railway merger done, Competition Commissioner Vestager has forcefully reiterated that the substantive test under the EU Merger Regulation remains exclusively competition based.

## IN DEPTH

Prior to the promulgation of the EU Merger Regulation (EUMR), the issue of whether industrial policy should be factored into the European Commission's (EC's) review of a merger was a heated one. Industrial policy has, however, been categorically excluded as a factor to be taken into account when reviewing a transaction's compatibility with the EU internal market. The test under which transactions are assessed under the EUMR is and has always been, exclusively competition based. *General Electric/Honeywell* (2001), *Schneider/Legrand* (2001), *Volvo/Scania* (2000) and, more recently, *Deutsche Börse/NYSE Euronext* (2012) bear testimony to the EC's historical reluctance to take into account (national) industrial policy and bow to political pressure. The EC's *Siemens/Alstom* decision of 6 February 2019 confirms this stance.

## The EUMR and Industrial Policy

The substantive test under the EUMR is a competition test. Specifically, the EC asks whether a merger would "significantly impede effective competition" (SIEC), in particular as a result of the creation or strengthening of a dominant position. The EUMR, therefore, leaves no scope for industrial policy or wider public interests to be taken into account.

The EC's strict adherence to a competition-based test lies at the core of the debate surrounding the Siemens/Alstom merger. France and Germany, in particular, have advocated supporting the Siemens/Alstom merger with a view to creating an industrial champion in the railway sector. Calling upon the EC to apply "obsolete" competition rules more flexibly, the French and German Governments have been strong proponents of relaxing the merger control rules to accommodate the

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creation of a European champion faced with (some say unfair) competition from Chinese state-owned enterprises (in this case, CRR Corp. Ltd).

Industrial policy arguments in support of reinforcing the industrial strength of the European Union have been rejected once again. In deference to the SIEC test, and echoing the sentiments of Sir Leon Brittan at the time of the promulgation of the original EUMR, Competition Commissioner Vestager has repeatedly stated that European champions cannot be built by undermining competition. Moreover, any competitive threat out of China based on unfair competition can be best addressed through recourse to other measures, such as challenging the grant of that country's subsidies under World Trade Organisation rules.

## **The Siemens/Alstom Merger – Strict Application of the SIEC Test**

### ***Competition Concerns***

In September 2017, Siemens and Alstom agreed to merge their rail assets, hoping to create a European industrial champion. In June 2018, the transaction was notified to the EC. Upon review of the merger, the EC found that the transaction would lead to higher prices, reduced choice, and less innovation with respect to rolling stock and signaling solutions.

#### **Specifically:**

- **Rolling stock (i.e., trains):** Whether seen from a European Economic Area (EEA) or worldwide perspective, the merged entity would be the undisputed market leader, more than three times larger than the closest competitor in the EEA, according to the EC. The merged entity would also become the market leader in mainline (including regional trains) and metro rolling stock in the EEA. After the proposed transaction, competitors in the sector would have difficulty competing against the merged entity's track record and installed base of rolling stock.
- **Signaling solutions:** The merged entity would become the undisputed market leader, with around three times the market share of the closest competitor, and would be unlikely to face significant competitive pressure.

Furthermore, the EC found that new entry, in particular with respect to Chinese suppliers, was unlikely given, *inter alia*, high safety and technical standards in the European Union—despite repeated arguments by the parties to the contrary.

### ***Complex Cocktail of Remedies Rejected***

In a bid to allay the EC's concerns, the parties' opening gambit was to offer to divest either Alstom's global Pendolino high-speed train business or the technology of Siemens' current very-high-speed Velaro trains, together with an exclusive five-year license for the forthcoming update, known as Velaro Novo in the EEA, as well as various signalling assets from both parties.

This initial package was met with a storm of protest: competitors and customers voiced concerns as to the adequacy of the proposed remedies. In an unusual move, the national competition authorities (NCAs) of the United Kingdom, the Netherlands, Belgium, and Spain openly opined that the proposed

remedies “fall far short of what would be required to address all concerns to the required standard”. Moreover, the NCAs argued that the China threat is overblown, as “barriers to entry and expansion for new or emerging players are very significant”.

Faced with such staunch criticism of their remedy proposal, the parties tweaked the initial remedies package to expand the geographic scope of some licenses beyond the limits of the EEA and to include licenses to additional technologies. Such revised package was again deemed insufficient. The German competition authority, in particular, was of the view that a “mix and match” approach involving the divestment of signaling businesses of both parties would not lead to a viable competitive rival. In a last-ditch attempt to overcome the EC’s concerns, the parties offered to sell signaling assets as well as longer licensing agreements and identified potential acquirers.

In the end, the EC was not convinced by the parties’ proposed remedies and prohibited the transaction on 6 February 2019.

## Comment

The Siemens/Alstom merger bears renewed testimony to the fact that the EU merger control rules show no sign of being relaxed to accommodate industrial policy objectives, such as the creation of a European champion. Time will tell whether the EU merger control rules will be changed to take into account industrial policy. Any such change would require legislative tinkering with the EUMR by unanimous decision of all Member States, which would be difficult to secure. As things currently stand, competition-based principles continue to prevail.

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