

A decorative graphic in the top right corner of the page, featuring a white, angular, geometric shape that overlaps a portion of a globe. The globe shows a map of the world with various colors representing continents and oceans.

We are the champions – France and Germany unite to revive industrial policy at European level

27 February 2019

Following the European Commission's prohibition of the Alstom-Siemens transaction, the French and German governments published a manifesto calling for a reform of current EU merger rules to shape a "European industrial policy fit for the 21st Century." This manifesto appears to be directly addressed to the next European Commission, which will be renewed following the European elections this year.

The Franco-German manifesto (see [here](#)) directly stems from the Alstom-Siemens prohibition decision which was criticized by the French and German governments, as they viewed the merger as a unique opportunity to create a "European champion" able to compete with increasingly powerful Chinese competitors. Ignoring such political considerations, the EU Commission assessed that the remedies offered by Alstom and Siemens were insufficient in order to address the competition concerns raised by the transaction, notably in consideration of the very high market shares held by the parties in the high-speed trains and railway signaling systems markets.

The French and German governments did not hide their discontent. The French Minister for Economic and Financial Affairs Bruno Le Maire described European competition rules as obsolete, whilst German Chancellor Angela Merkel expressed doubts on the European Union's ability to create global players. Minister Bruno Le Maire even added that the commission's decision was a political and economic mistake serving the interests of the Chinese government, and notably the Chinese company China Railway Construction Corp. Ltd. (CRCC).

Reform proposals

The ambition of the manifesto is to strengthen and improve the European Union's industrial strategy by setting clear objectives for 2030. To this end, the manifesto sets three pillars as the cornerstones of the future European industrial strategy:

"Massively investing in innovation"

The rationale behind the first pillar is that the key to success is to create, develop, and produce new technologies. In this respect, the manifesto advocates for: (i) the creation of a European strategy for technology funding primarily focused on private investment; (ii) a strong commitment to disruptive innovation; (iii) the goal to become world leaders on artificial

intelligence (AI) through the intensification of the Franco-German cooperation in research and development; (iv) the production of cutting-edge technologies in sectors such as hydrogen, low carbon industrial processes, smart health, or cybersecurity; and (v) financial markets' support of industry innovation thanks to the completion of the capital markets union.

Taking "effective measures to protect ourselves"

This pillar of the manifesto focuses on the adoption of effective measures to defend the European Union's technologies, companies, and markets. The suggested measures notably include ensuring the full implementation of the recently agreed European foreign investment screening framework¹ (see our latest coverage on this [here](#)). The manifesto suggests that the French and German legislative frameworks are examples of good practice, due to the countries' "tough national legislation" (see our coverage on the latest developments in Germany [here](#)). The manifesto also pushes for the creation of a reciprocity mechanism for public procurement with third countries and the promotion of multilateralism, open markets, and an ambitious EU trade policy.

Adapting the EU regulatory framework

As a direct consequence of the prohibition of the Alstom-Siemens merger, the Franco-German manifesto advocates for an adaptation of the current regulatory framework, notably by:

- "Taking into greater consideration the state-control of and subsidies for undertakings within the framework of merger control." This consideration reflects the French and German ministers' criticism of the prohibition decision in Alstom-Siemens, in relation to the potential competition exerted by Chinese companies such as CRRC, which is directly controlled by the Chinese government.
- "Updating current merger guidelines." The rationale for this consideration would likely be to quickly change the handling of merger procedures under Regulation No. 139/2004 while avoiding the lengthy legislative procedure required to directly modify the regulation.
 - According to the manifesto, new merger guidelines might include assessing competition risks on a global- rather than on a European-relevant geographic market, in line with Minister Bruno Le Maire's comments on the fact that the EU Commission allegedly did not sufficiently take into account the potential competition exerted by the Chinese company CRRC.
 - Currently, competition assessments by the commission already involve an analysis of the relevant geographic market. The commission thus defines global or regional geographic markets depending on a large number of criteria such as price differences and basic demand characteristics, trade flows, the existence of regulatory barriers, or the costs of transports of the products. These criteria for the geographic market definition are set out in the "[Commission Notice on the definition of the relevant market for the purposes of Community competition law](#)" of 1997. Such "soft law" could be revised by the commission without initiating a formal review of the EU Merger Regulation with unclear prospects of success, in case other member states do not support the French-German initiative.

¹ The package agreed on 20 November 2018 aims at ensuring that the EU and its member states are equipped to protect their essential interests while remaining one of the most open investment regimes in the world. It facilitates the exchange of information between member states, allows the commission to issue opinions, and reaffirms that national security interests are the responsibility of member states.

- The creation of a right of appeal of the EU Commission's decisions, subject to strict conditions. The manifesto proposes a political review of merger decisions without specifying which body would carry out this function. A possibility could be the European Council, which is composed of the 28 heads of state of the member states.
 - This proposal would amount to the creation of a "phase III" in the assessment of concentrations and a right for commission decisions to be overturned on political grounds. The main objective of the proposal is to enable other arguments to be taken into account, such as the industrial policies of member states, as opposed to an analysis purely based on competition arguments. Such a mechanism is therefore likely to apply mostly to major European economies (such as France or Germany), which are strongly pushing for the creation of European industrial champions.

Context

A so-called phase III already exists both in the French and German national competition frameworks. In France, while the prerogative to authorize or prohibit concentrations was taken away from the minister for economic and financial affairs back in 2008 and granted to the French Competition Authority (FCA), the minister for economic affairs was left with the ability to "evoke a case" within 25 working days after the publication of the FCA decision. Through this process, the French minister may take a decision based on public interest grounds such as industrial development or the creation and safeguarding of employment. Interestingly, this mechanism was used for the first time in France in June 2018 by Minister Bruno Le Maire, who is now trying to push for the implementation of such a mechanism at EU level.

French representatives have been trying to push for the creation of a "phase III" at EU level for a long time. What appears to be new is the recent support of German representatives to this idea, which might (or might not) give a new impetus to this question.

German Minister Altmaier presented his "National Industry Policy 2030" setting out "strategical guidelines for a German and European industry policy" (see our article on it [here](#)) on 5 February 2019. The joint manifesto widely reflects the German minister's paper, which already proclaimed "*Size matters!*" However, the call for a possibility to overturn commission decisions had notably been absent in the German paper, although a similar instrument exists in Germany. The so-called "ministerial consent" allows a prohibition decision of the Federal Cartel Office (FCO) to be overturned in extraordinary circumstances if (i) the macroeconomic advantages of the proposed merger outweigh the restriction of competition and (ii) significant public interest justifies the clearance of the transaction without endangering the free market economy in Germany. In the last 45 years, there have been only 22 applications for such a ministerial consent of which only nine have been successful.

Looking ahead

The directorate-general for competition of the European Commission (DG COMP) promptly responded to the manifesto, as Competition Chief Margrethe Vestager held that the prohibition of the Alstom-Siemens merger should not provide grounds for a major overhaul of EU competition rules, stressing that the prohibition resulted from the parties' own decisions (i.e., the lack of sufficient remedies) and not from competition rules. Representatives of the EU Commission have mostly reacted dismissively of the proposed changes. Johannes Laitenberger, director-general of DG COMP, has viewed the reform proposals as "voluntaristic interventions into a rule-based

system" and questioned their effectiveness from a market economy perspective (his speech addressing the reform, of which a transcript is unfortunately only available in German, can be retrieved [here](#)).

The criticism from DG COMP also reflects a number of unsolved questions prompted by the joint manifesto with regard to the proposed changes to the merger framework. One important question not addressed yet is how a mechanism to overturn commission decisions based on policy reasons in the European Union with its 28 member states could be viably introduced.

We expect the political debate to continue in the context of the European parliament elections later this year.

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