

ARTICLE

REFUSAL OF THE ALSTOM/SIEMENS MERGER THE FRENCH AND GERMAN GOVERNMENTS PUBLISH A "MANIFESTO" FOR THE MODIFICATION OF MERGER CONTROL

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The political reaction is noticeably prompt: thirteen days after the European Commission's rejection of the Alstom / Siemens merger, the French and German governments published, on 19 February 2019, a manifesto for a European industrial policy for the 21st century (hereinafter the "*Manifesto*")^[1] which "*calls for a more ambitious European industrial strategy with clear objectives by 2030*".

Predictably, the Manifesto emphasizes the need for Europe to have a real industrial policy in order to be competitive on a global scale and to develop long-term industrial strategies. According to the Manifesto, this evolution will only be possible if States combine their funding, skills and expertise.

The Manifesto states that this European industrial strategy must be structured around three "pillars":

- investing massively in innovation;
- implementing effective measures to protect oneself;
- adapting the regulatory framework.

I/ Investing massively in innovation

This involves setting up a European strategy to finance technology with the support of various programs (InvestEU) and competent and experienced European institutions (European Investment Fund - EIF) and financial markets.

The Manifesto spotlights innovation and expresses the need for a strong EU commitment to disruptive innovation in order to be able to produce disruptive technologies: "*the goal is to support very high-risk deep tech projects at the European level with a large autonomy given to program managers allowing them to make high-risk technological bets*".

The other ambition is to place the EU among the world leaders in artificial intelligence (AI). To this end, France and Germany will intensify their cooperation through a joint research and innovation network: "[a] working group of the economic ministries deals with the cooperation in AI focusing on four topics: 1. Data sharing, 2. Cross-border experimental zones, 3. Best practices to achieve the transfer of research results to businesses, 4. Technical and ethical standards."

II/ Implementing effective measures to protect oneself

In order to defend EU technologies, companies and markets, ministers suggest filtering foreign investment in Europe. This filtering should be supplemented by strict national laws, as France and Germany have already done. In other words, it is a matter of creating a European "Montebourg Decree" (which was introduced when Alstom's energy division was sold).

In relation with third countries, the defense of multilateralism, the opening of markets and the promotion of an ambitious EU trade policy are required. It will be necessary to monitor and adapt EU trade policy to improve transparency and fight against unfair practices more effectively.

III/ Adapting the regulatory framework

This "adaptation" is at the heart of the Manifesto and is undoubtedly the response to the European Commission's decision in the Alstom/Siemens merger. Even if this Manifesto does not explicitly refer to the Alstom/Siemens merger, the part on the adaptation of the regulatory framework and in particular the desire to reform European merger control rules leaves no doubt that this is a clear reaction of the French and German governments not to let such a merger fail.

France and Germany suggest the following changes, and in particular:

- "*taking into greater consideration the state-control of and subsidies for undertakings within the framework of merger control*;
- *updating current merger guidelines to take greater account of competition at the global level, potential future competition and the timeframe when it comes to looking ahead to the development of competition to give the European Commission more flexibility when assessing relevant markets*;
- *consider whether a right of appeal of the Council which could ultimately override Commission decisions could be appropriate in well-defined cases, subject to strict conditions*".

It is not clear at this stage which "consideration" the first point refers to.

On the other hand, the second and third points are very clear.

The second point seeks to ensure that the "Chinese threat" (or from any other emerging country) should be systematically taken into account in the assessment of a merger. However, this type of threat is already included in the analysis under potential competition. If the Commission has not accepted that the Chinese threat did not counterbalance Alstom/Siemens' market power, it is because CRCC was not a credible potential competitor according to the Commission. It "*concluded that it was unlikely that new competitors, in particular potential Chinese suppliers, would enter the markets for rolling stock and signaling equipment in the EEA in the foreseeable future.*"

It is not really a question of "*flexibility in the assessment of relevant markets*" but rather how to define potential competition. Vast subject.

The third point is also clear. The aim is to allow politics to override the decisions of the European Commission.

In France, when the responsibility for merger control was transferred from the Minister of the Economy to the French Competition Authority, an independent administrative authority, it was decided (by tradition?) to leave a power of "evocation" to this Minister. He may, "*on grounds of general interest other than the maintenance of competition, in particular, industrial development, the competitiveness of the companies concerned as regards international competition or the creation or safeguarding of jobs*"^[2] take a decision which will replace the decision taken by the Competition Authority.

Since 2008, this provision has been applied only once. On June 14, 2018, the French Competition Authority authorized Financière Cofigeo to acquire securities and assets of the Agripole group's ready-made meals division (William Saurin, Panzani, Garbit), subject to two targeted disposals (a production site and the Zapetti brand) aimed to maintain competition in the sector.^[3]

The Minister decided to "evoke" this decision, which provoked a prompt and cold reaction from the French Competition Authority.^[4]

On July 19, 2018, the Minister of Economy published his decision: he deleted the obligation to carry out the two disposals and authorized the merger, "*subject to a commitment to maintain employment in [the] group [acquirer]*"^[5]

The Manifesto aims at setting up a similar procedure. The determination of the "well-defined cases" and "strict conditions" is particularly difficult in view of the sometimes divergent interests of the Member States.

There is no doubt that the implementation of the measures provided for in the Manifesto will enter into the debate when the next European Commission is set up and established.

The current Commission has also planned to have an impact in this debate: the Commissioner for Competition stated yesterday that the functioning of the European competition rules should not be called into question because of a single particularly specific merger, with an explicit message to economic operators: "*this merger could have been carried out if we had been able to solve the two remaining problems on signaling systems and high-speed trains*", i.e. if Alstom and Siemens had offered commitments other than those they had proposed.

[1] [Manifeste franco-allemand pour une politique industrielle européenne adaptée au XXie siècle](#)

[2] Article L. 430-7-1 of the French *code de commerce*

[3] http://www.autoritedelaconurrence.fr/user/standard.php?lang=en&id_rub=683&id_article=3189

[4] http://www.autoritedelaconurrence.fr/user/standard.php?lang=en&id_rub=683&id_article=3191

[5] https://minefi.hosting.augure.com/Augure_Minefi/r/ContenuEnLigne/Download?id=94DA81B4-E419-4365-BE70-95ECB61CAA90&filename=602-%20Acquisition%20de%20titres%20et%20actifs%20du%20groupe%20Agripole%20par%20Financi%C3%A8re%20Cofigeo%20SAS.pdf