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Perspectives on EU M&A Control after the EC's Siemens-Alstom Decision

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The recent decision by the European Commission (EC) prohibiting Siemens from taking over Alstom was perceived by their respective German and French governments as a blow to plans to create a "European champion" in the railway sector. Both states declared that they will strive to change the EU competition rules that prevent similar transactions. According to the traditional approach to competition protection, the implementation of most of the proposals would have negative consequences for the EU economy and indirectly for Polish enterprises and consumers.

The Siemens-Alstom Case. In June 2018, the German company Siemens notified the European Commission of its intent to take over the French concern, Alstom, in accordance with EU Regulation 139/2004 on the control of mergers and acquisitions (M&A). The EC then determined that the transaction would result in the disappearance of one of the two main competitors on the European markets for railway and metro signalling systems and very high-speed rolling stock. The new company would be the second-largest company in the world in terms of revenue, after China-based CRRC, and would enjoy a virtual monopoly in the EU. In October 2018, the EC demanded Siemens and Alstom put forward a remedy package that would resolve the competition concerns. However, the proposed package failed to address the issues sufficiently, the EC maintained, citing the competitors and the competition authorities in Belgium, the Netherlands, Spain, and the UK, which addressed a letter to the EC on this matter. Even the German authority voiced objections.

The governments of Germany and France exerted pressure on the EC to accept the transaction which would have created a railway counterpart to Airbus and served as proof of flourishing cooperation between the two countries. German Chancellor Angela Merkel, French President Emmanuel Macron, the economy ministers of both countries, Peter Altmaier and Bruno Le Maire, respectively, the head of the German CDU, Annegret Kramp-Karrenbauer, and the candidate of the German Christian Democrats for EC president, Manfred Weber, criticized the EC's position and described EU competition law as an obstacle to the creation of "European champions" able to compete effectively on the global market. In recent years, EU law has prevented similar deals involving other German companies, including Heidelberg Cement, Lufthansa, and Deutsche Börse. Nevertheless, the EC resisted the pressure and on 6 February issued a decision prohibiting the takeover. Faced with high fines, the companies announced the merger would not go ahead.

Evaluation of the French-German Proposal. On 19 February in Berlin, Ministers Le Maire and Altmaier announced "A Franco-German manifesto for a European industrial policy fit for the 21st Century," a programme of changes they believe will prevent the gradual disappearance of the European industrial base. In terms of M&A control, it envisages an amendment to Regulation 139/2004 and the EC guidelines to relax assessment criteria of the long-term impact of transactions on competition on global markets and

grant the EC “more flexibility” in this area. In addition, it calls for empowering the EU Council to be able to override EC decisions blocking large transactions. It also calls for greater consideration of state control of and subsidies for undertakings involved in M&A deals assessed by the EC.

Citing a long-term perspective, global markets, and flexibility suggest a willingness to leave the door open for the EC to accept M&A agreements it has viewed as distorting competition in the EU, under the pretext of future potential entries into the EU market of competitors from China or the U.S. In the Siemens-Alstom case, the companies raised such concerns with respect to CRRC. However, the EC established that the Chinese company had never taken part in any tenders to supply signalling systems or high-speed rail in the EU and that this was highly unlikely in the foreseeable future. Given the EC’s reluctance, the “manifesto” proposes giving the EU Council the power to override decisions (likely through a qualified majority) blocking an M&A deal. This would allow for individual exceptions for major companies. Thanks to the number of votes in the Council, France and Germany would have a better chance there. Other entities would remain constrained by the standard rules. Both proposals contradict the well-established idea of competition protection in the EU, which assumes that a reduction in the number of large competitors leads to a decrease in innovation and product quality, and to higher prices for customers. However, there is an ongoing discussion among economists whether this approach needs to be revised.

Still, the last proposal can be appraised. Subsidies unjustifiably increase the market power of some companies at the expense of others, distorting competition. In the EU, subsidies are in principle precluded by the rules on state aid, but in third countries there usually are no similar rules. Therefore, the argument is that the subsidies for companies seeking M&A deals in the EU should be taken into account in the EC’s decision-making process. On the other hand, the control over a company by a third state, such as Russia or China, may pose threats to security or public order, particularly in strategic sectors. This problem has been noticed, among others, by France and Germany, which implemented solutions allowing their governments to block troublesome transactions. This year, the EU is expected to adopt a regulation that will grant the EC limited powers to screen foreign direct investment. However, it will give the individual members of the EU the final say over whether to approve a deal involving non-EU entities. This was a result of pressure by smaller countries, including Cyprus, Greece, Malta, and Portugal.

Conclusions and Recommendations. Further clarification of the proposed changes by France and Germany should be expected in the next term of the European Parliament and the EC and in the attempts to conclude work on the issue during the German presidency of the Council in the second half of 2020. The course of events may, however, be accelerated by other possible decisions blocking mergers by companies from both countries. One of the cases mentioned in this context is the proposed creation of a joint venture in the steel sector—which would be the second largest in the EU after ArcelorMittal—involving Germany-based ThyssenKrupp and India-based Tata. The EC decision on this matter is expected in April 2019.

Since the exclusive competence in legislation on competition matters belongs to the EC, the content of an eventual draft amendment to Regulation 139/2004 will greatly depend on the next competition commissioner and EC president. Besides Weber, candidates for this position include the current competition commissioner responsible for the decision in the Siemens-Alstom case, Margarethe Vestager. Whether the amendment would require unanimity in the EU Council (required for adoption of Regulation 139/2004 in 2004) or qualified majority (less likely), will be determined by the final shape of the project.

The idea of “European champions” only seems to correspond with the Polish government’s Responsible Development Plan, which seeks to create national champions that can compete effectively on global markets. Unlike domestic champions, creating companies with a dominant position in the EU as a whole would be a threat to competition in the Union and it is not clear whether this would be offset by benefits to the economy resulting from expansion into non-European markets. To compete more effectively globally, large European companies should rather establish joint ventures to coordinate production and sales in non-EU markets, to which the EC is not opposed. Undoing the current rules is not in Poland’s interest because of the relatively lower turnover and market shares of major Polish companies. In comparison with those from France and Germany, their M&A deals might be blocked by the EC only in very exceptional cases. The creation of corporations with a strong dominant position on the EU level could in the future effectively hinder the expansion of Polish companies on the EU market or strengthening of their position.

However, limiting the possibility of M&As by companies controlled or subsidised by non-EU countries, which so far has been dealt with only to a small extent, may be beneficial to the EU and Poland. Additionally, in order to protect innovation in the EU, a proposal for a change of approach to so-called “killer acquisitions,” aimed to limit competition, in industries such as IT, artificial intelligence, or robotics should be considered. For formal reasons, they usually escape scrutiny. This proposal, however, may be difficult for Ireland, Germany, or France to accept because many companies involved in such acquisitions are based in those countries.