



**EUROPEAN COMMISSION**

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## **Recent developments and issues in EU antitrust law: Comments on the European Commission's merger decisions Wieland/Aurubis and Siemens/Alstom**

*Check Against Delivery*  
*Seul le texte prononcé fait foi*  
*Es gilt das gesprochene Wort*

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<sup>1</sup> Originally delivered in German with title *Aktuelle Entwicklungen und Probleme des EU-Kartellrechts: Anmerkungen zu den Fusionskontrollentscheidungen der Europäischen Kommission in den Fällen Wieland/Aurubis und Siemens/Alstom* (available at [http://ec.europa.eu/competition/speeches/text/sp2019\\_02\\_de.pdf](http://ec.europa.eu/competition/speeches/text/sp2019_02_de.pdf))

## 1. Introduction

Mr Chairman, dear Dr Brinker, Ladies and Gentlemen:

I am very pleased to have the opportunity to speak again at this years' Brussels conference of the Studienvereinigung Kartellrecht. The exchange with your organisation is particularly important to me and the Directorate-General for Competition of the European Commission. We have different roles in the application and enforcement of the European Union's competition law. However, we have in common what could be called "system responsibility". This commonality takes its ideal form in open, constructive and sometimes challenging dialogue.

I am particularly pleased that this exchange will continue seamlessly under the Studienvereinigung's new leadership. For this, my sincere thanks go to you, Dr Brinker, and all Board members, along with my best wishes for your future work. I would also like to thank the previous Board members. It will come as no surprise to you that I make special mention of Dr Montag here. As chairman of the Studienvereinigung, he has led the conversation with several generations of colleagues in the Directorate-General: always knowledgeable at the highest level, pugnacious in the best sense and at all times committed to the law. I trust that his voice will continue to enrich our debates.

Dear Dr Brinker,

You have accepted the chairmanship of the Studienvereinigung at an exciting and eventful time. In recent years, the discussion around antitrust law and merger control has intensified in the context of globalisation and digitalisation. In recent weeks, this discussion has definitely made its way out of the "niches" of the professional sphere into the "mainstream" of public opinion.

When I accepted the invitation to today's meeting, I actually intended to talk about the findings of our own conference devoted to the development of competition law in the digital age. Many of you were present just one month ago at the Commission, on 17 January. But actuality has overtaken intention. At this point in time, last week's merger control decisions in the cases Wieland/Aurubis and Siemens/Alstom are in the limelight. That is why today I would like to talk about these decisions and their context. The debate on digital issues has not been called off – it is only postponed. After the winter, in which we are today, the spring conferences and discussions will follow, and there will be plenty opportunities for us to continue the digital debate.

Dear Ladies and Gentlemen,

You are aware of the outcome of the Wieland/Aurubis and Siemens/Alstom cases.

It is not exactly common for the Commission to prohibit mergers. More than 7,000 transactions have been notified to the Commission since 1990. In less than 30 cases a prohibition decision was adopted. Only in 1996 and 2001 more than two prohibitions were imposed in the same year. It was a veritable novelty that the Commission had to prohibit two concentrations on the same day.

A tweet – which I understand has been deleted in the meantime – described the Commission's approach as "technically correct" but "wrong for Europe".

Is that correct? Have outdated legal rules forced the Commission to take a decision that fails to meet the challenges of our time? Does European Union competition law need a major overhaul to remain relevant in the age of globalisation?

Just as consulting the law facilitates the finding of justice, any discussion about a decision should begin by looking at the facts of the case and the reasoning in the decision.

Therefore, I would like to briefly recall the factual and legal context as set out in the two decisions of 6 February 2019.

## **2. The merger prohibitions of 6 February 2019**

### **Wieland/Aurubis**

I will start with Wieland/Aurubis.

Wieland manufactures rolled copper and copper alloys products in Germany, the United Kingdom, the US and Singapore.

Aurubis is a worldwide provider of non-ferrous metals (including copper) and is the largest integrated European copper producer.

The proposed merger would have combined Wieland and Aurubis Rolled Products.

In addition, through the merger, Wieland would also have taken full control over Schwermetall.

Schwermetall is a 50/50 joint venture between Wieland and Aurubis. It is active in the manufacturing of pre-rolled copper and copper alloy strips, which it sells to both Wieland and Aurubis, as well as to other copper manufacturers. Schwermetall is responsible for over 60% of European pre-rolled strip sales. Pre-rolled strip is used as an input in the manufacturing of rolled copper products.

Rolled copper products are used, among other things, for the manufacture of

many electrical and electronic products, such as connectors in cars, trains and aircraft.

The Commission had serious concerns that the merger would have allowed the industry leader Wieland to eliminate the competitive pressure from one of its most important challengers and become a dominant player in the markets for rolled copper products in the European Economic Area.

As a result, downstream industrial customers would have faced significant price increases.

The Commission's assessment showed that, as regards rolled copper products:

Wieland would have market shares of more than 50% in value following the transaction. Only one other player with more than 20% market share in the EEA would have remained: KME/MKM. All other competitors have significantly smaller market shares. For rolled copper products, the transaction would therefore have reduced the number of large suppliers from three to two in the EEA.

The transaction would have eliminated price competition between two important producers that currently compete closely in important segments of the high value part of the market. For example, both companies supply rolled copper products for electric connectors used in the automotive and other industries. European customers cannot rely on suppliers outside the EEA. This is due to import duties and just-in-time delivery requirements, as well as the superior technical capabilities of EU suppliers. As a result, there are only limited imports from outside Europe (5% of EEA consumption), while European producers export significant quantities to the US and Asia (around 30% of EEA production).

As regards pre-rolled strip, the Commission found that:

Schwermetall currently has operational independence from its parent companies Wieland and Aurubis when it comes to sales of pre-rolled strip to third parties.

The merger would have eliminated this independence.

Furthermore, Wieland's acquisition of Aurubis' stake in Schwermetall would have enabled Wieland to raise input costs for smaller competitors and/or gain access to their confidential information. This is because these smaller competitors need to source a significant part of their pre-rolled copper strip requirements from Schwermetall, as there are no other suitable alternative suppliers. Wieland was not able to demonstrate that its acquisition of Aurubis' stake in Schwermetall would result in efficiencies that could not be achieved by other means.

During the investigation, a large number of European industrial customers expressed strong and substantiated concerns about the significant negative impact of the transaction – both upstream regarding access to pre-rolled strip from Schwermetall, and downstream regarding price increases for rolled products. The Commission's analysis of internal documents of the parties confirmed that these concerns were justified.

Wieland was not willing to address the concerns comprehensively. As you know, remedies proposed by merging companies must fully address the Commission's competition concerns on a lasting basis. While Wieland was ready to divest two Aurubis plants that manufacture rolled copper products, it was not willing to divest Aurubis' 50% stake in Schwermetall.

The Commission consulted market participants about the proposed remedy. A majority of the market participants considered the remedy inadequate to address the serious competition concerns.

Therefore, the Commission concluded that the remedies offered by the companies would not have dispelled its competition concerns. As a result, the Commission prohibited the proposed transaction.

## Siemens/Alstom

I will now turn to Siemens/Alstom.

Siemens is active worldwide in several industrial areas with its mobility division offering a broad portfolio of rolling stock, rail automation and signalling solutions, rail electrification systems, road traffic technology, IT solutions, as well as other products and services concerning the transportation of people and goods by rail and road.

Alstom is active worldwide in the rail transport industry, offering a wide range of transport solutions (from high-speed trains to metros, trams and e-buses) and related services (maintenance and modernisation), as well as products dedicated to signalling solutions, passengers and infrastructure, rail electrification systems and digital mobility.

The creation of a genuine European railway market depends crucially on the availability of signalling systems, which are compliant with the European Train Control System (ETCS) standard at competitive prices. Investment in signalling systems that comply with this standard will allow trains to operate safely and smoothly across borders between Member States. New investments in trains are key to transition to more climate friendly and environmentally sustainable mobility.

The proposed concentration would have brought together the two largest suppliers of various types of railway and metro signalling systems, as well as of rolling stock in Europe. Both companies also have leading positions globally.

The Commission had serious concerns that the proposed transaction would significantly impede effective competition in two important areas: i) signalling installations, which are essential to keep rail and metro travel safe by preventing collisions, and ii) very high-speed trains, which are trains operating at speeds of 300 km per hour or more.

The deal would have created an undisputed market leader in some signalling markets and a dominant player in the market for very high-speed trains. It would have significantly reduced competition in both these areas, depriving customers, including train operators and rail infrastructure managers of a choice of suppliers and products.

More specifically, the Commission's investigation showed that:

For signalling systems, the proposed transaction would have removed a very strong competitor from several mainline and urban signalling markets.

The merged entity would have become the undisputed market leader in several railway signalling markets in the EEA, in particular in the field of automatic train protection systems (ETCS), comprising both on-board systems and systems installed along the tracks, as well as in the area of stand-alone interlocking systems in several Member States;

In metro signalling, an essential element of metro systems, the merged entity would also have become the market leader in the latest Communication-Based Train Control (CBTC) metro signalling systems.

For very high-speed trains, the proposed transaction would have reduced the number of suppliers by removing one of the two largest manufacturers of this type of trains in the EEA. The merged entity would hold very high market shares both within the EEA and on a wider market also comprising the rest of the world except South Korea, Japan and China (which are not open to competition).

The parties did not bring forward any substantiated arguments to explain why the transaction would create merger specific efficiencies.

In all of the above markets, the competitive pressure from remaining competitors would not have been sufficient to ensure effective competition.

As part of its investigation, the Commission has also looked in depth at the global competitive environment: more on that in a moment.

The Commission received several complaints during its in-depth investigation, from customers, competitors, industry associations and trade unions. It also received negative comments from several National Competition Authorities in the EEA. Stakeholders were worried that the proposed transaction would significantly harm competition and reduce innovation in signalling systems and very high-speed rolling stock, lead to the foreclosure of smaller competitors and to higher prices and less choice for customers

Again, the parties were not willing to offer adequate remedies to address these concerns.

Where concerns arise because of loss of direct competition between the merging companies, remedies providing a structural divestiture are generally preferable to other types of remedies.

This is because they immediately replace the competition in the markets, which would have been lost from the merger. These types of structural solutions were offered by parties and accepted by the Commission in past mergers such as BASF's acquisition of Solvay's nylon business, Gemalto's acquisition by Thales, Linde's merger with Praxair, GE's acquisition of Alstom's power generation and transmission assets or Holcim's acquisition of Lafarge.

In mainline signalling systems, the remedy proposed was a complex mix of Siemens and Alstom assets, with some assets transferred in whole or part, and others licensed or copied. Businesses and production sites would have had to be split, with personnel transferred in some cases but not others.

Moreover, the buyer of the assets would have had to continue to be dependent on the merged entity for a number of licence and service agreements. As a result, the proposed remedy did not consist of a stand-alone and future proof business that a buyer could have used to effectively and independently compete against the merged company.

In very high-speed trains, the parties offered to divest a train currently not capable of running at very high speeds or, alternatively, a licence for Siemens' very high-speed technology. The licence was subject to multiple restrictive terms and carve-outs, which essentially would not have given the buyer the ability and incentive to develop a competing very high-speed train in the first place.

The Commission sought the views of market participants about the proposed remedy. The feedback was negative for both areas. This confirmed the Commission's view that the remedies offered by Siemens were not enough to address the serious competition concerns and would not have been sufficient to prevent higher prices and less choice for railway operators and infrastructure managers.

As a result, the Commission has prohibited the proposed transaction.

As with Wieland/Aurubis, Member States were consulted on the prohibition decision via the Advisory Committee. Without prejudging the publication of the statement, I would advise anyone interested to read the opinion of the Advisory Committee. It will certainly be of interest to you.

### **3. Substantive principles of EU merger control**

These two decisions were each taken after very close and in-depth reviews of the proposed mergers. Both mergers were notified in June of last year. In the nearly eight months since notification, the Commission has investigated the relevant facts in great detail.

Following the investigations, the Commission took its decisions on the basis of the applicable law and of established methods of economic analysis. These decisions are based on the facts established by the Commission and the assessments based on them and supported by them.

They were not influenced by the identities of the parties concerned; by the countries in which their headquarters are located; or by the position or importance of the advocates or the critics of the merger.

Allow me to demonstrate this by looking at the aspect that is in the centre of public interest in the Siemens/Alstom case.

One of the main arguments the parties put forward as to why the Commission should clear the transaction, was the reference to competition from Chinese companies, in particular the state-owned enterprises CRSC and CRRC.

The Commission has therefore indeed examined the question of whether CRSC or CRRC have an impact on competition in the relevant markets today or at least in the foreseeable future.

The answer to this was clear: today and in the foreseeable future, such a competitive constraint has neither a current nor a potential impact.

CRSC's signalling-system products are not yet on an equal footing with those from Siemens or Alstom. In contrast to China, signalling technology in Europe is mainly tendered for existing routes. Chinese producers have virtually no experience with comparable projects. In China, mainly new lines are being built where the installation of signalling technology is less demanding. Accordingly, CRSC has never even tried to participate in a tender in Europe.

The market for very high-speed trains is characterised by high barriers to entry, particularly in Europe. Trains must comply with a variety of national and European rules before they can be used in Europe. CRRC has not sold a single very high-speed train outside of China. In all likelihood, this will not change any time soon. A company's track record – the successful implementation of comparable projects – is an essential criterion in tenders for high-speed trains. However, CRRC will lack such a track record for many years to come with regard to European projects.

In conclusion, the Commission's detailed and well-founded concerns were ultimately only countered by speculative assertions about the role of Chinese competitors in the future, for which the Commission could not find enough evidence.

Perhaps these or other Chinese companies will be successful in relevant markets beyond China. Perhaps they will even become strong competitors of Siemens and Alstom. But no one, not even the parties, has at this stage been able to convincingly explain to the Commission why a merger, with the resulting loss of competition, would be necessary to prepare for such competition in the future.

This argument reminded me of the story *Momo*, by Michael Ende. The story is about the careful handling of your own lifetime. Competition is similar to lifetime: you cannot save today to have more later. The opposite is the case.



## 4. Procedural principles of EU merger control

As pointed out, the strict link between merger control and provable facts is one of its defining principles precisely because of its inherent forward looking and forecast nature.

This ties in with the procedural rules applicable to the parties to the merger, but also to other parties concerned.

Ultimately, this is the rule of law, which is highlighted in Article 2 of the Treaty on European Union (TEU) as a constituent principle of the EU.

As regards merger control, the rule-of-law principle implies that all decisions – including prohibition and clearance decisions – must be justified on the basis of verifiable facts, which must be determined in a transparent and non-discriminatory procedure and subject to full scrutiny by the Union courts.

The procedure ensures the integrity and quality of decisions.

This is good for everyone: the parties to a concentration, the other economic players, consumers, the Member States – as well as for the Commission as the initial decision-making institution and the Courts as potentially final decision-making institutions.

However, to achieve this, everyone must contribute. Starting with the Commission itself: in the past two years, court rulings have underlined just that. The Commission is therefore making every effort to avoid repeating errors such as those, which led to the annulment of the Commission's merger decisions in the Liberty/Ziggo and UPS/TNT cases.

But because procedural rules serve the interest of all those affected by the procedure, they are not a one-way street.

I would like to illustrate this with reference to the first subparagraph of Article 19 (2) of the Implementing Regulation.

According to this provision, remedial commitments offered in Phase II proceedings must be submitted to the Commission within 65 working days.

There is a reason why this deadline is well before the deadline for a decision by the Commission. The principle of the rule of law requires that the Commission's decision can be prepared, consulted and coordinated with the necessary care. In addition, the Implementing Regulation, as well as the Remedy Notice, set out clear rules on how the Commission can demonstrate procedural flexibility and still accept commitments later on: namely, when the commitments fully address the identified competition concerns – without any further market testing being necessary – leaving enough time for proper scrutiny by the Commission and, moreover, the proper participation of Member States in the Advisory Committee.

It runs counter to this function of the procedural rules and the protection they provide for the rights of third parties, when the exchange between the parties and the Commission about possible commitments turns into a kind of poker game, because highly complex changes to commitments related to competition concerns, which were already clearly identified for weeks or even months, are still presented after 100 working days of Phase II.

Here, the Commission must pay particular attention to its role as guardian of the procedure.

And let me restate one point: the identification, analysis and presentation of facts by the Commission and the resulting legal implications are subject to full control by the European Union Courts.

The Commission is aware of the requirements and obligations that arise from this.

## **5. Are the decisions of 6 February 2019 reason to change the EU Merger Regulation?**

In light of the factual and legal situation, allow me to make some comments on the political debate that has taken place in the last few days and weeks.

This debate was launched with the following premise: In times of globalisation, Europe needs “champions”.

If, however, the current law causes the Commission to prohibit mergers aimed at the creation of such champions, one has to change the law.

Keywords in this debate range from a so-called “softening” of the assessment criteria of the EU Merger Regulation to the creation of a so-called “*Ministererlaubnis*” at European level, which may be more appropriately called “Council Permit” here.

As an official, I am not in a position to prejudge a democratically legitimate legislative process.

However, given that a change in secondary or even primary law must be well founded and well considered in the light of the requirements of the legislative procedure, it indeed lies within the responsibility of an official to consider the relevant aspects from a public interest point of view in the exercise of his duty to advise the institutions, as provided for in the “Better Regulation” system and the impact assessment for legislative projects.

The first aspect I would like – and need – to stress serves to clarify what exactly is being discussed and what may be regulated.

I have emphasized that the Commission's merger control decisions examine the question of whether or not the undertakings concerned are or will be exposed to current or potential competitive pressure – or even distortive pressure – in the relevant markets.

The result of this investigation is subject to judicial review, which is required by applicable law to correct any errors the Commission may make.

This applies in the Siemens/Alstom and Wieland/Aurubis cases as in any other merger control case.

But does this not mean that the discussion about changing the law is not really about the question of whether current or potential competitive pressure is being assessed at all or being properly assessed? Does this not mean that the discussion is centered on the very different question of whether certain powerful, champion-anointed undertakings should be able to free themselves from competition oversight in some respects? Does this not mean that the balance underlying the current law between the interests of all stakeholders involved in business and society would have to be fundamentally changed?

The second aspect, which derives from this clarification, is the need to define criteria for such change.

And, finally, the third aspect is examining their suitability to actually achieve the desired objective of strengthening the EU through the creation of European Champions.

As an official of the EU, when analyzing these issues, I certainly presuppose the concept of Europe, which is found in the principles underlying the EU Treaties.

Let me just refer to Article 3 (3) TEU, which states that the Union “shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment”.

This leads me to a number of questions with regard to changes in the law, which by their nature are not intended to be exhaustive.

First, how can we define and examine the requirements that turn an undertaking into a “candidate champion”? Is a self-assessment sufficient? Is there a rule-based procedure or at least an accountable process? Is market power the decisive factor? Or rather a specific ability to innovate?

Second, how can we define the level of advantage that champions should benefit from and the corresponding level of disadvantage other economic operators in the single market, Member States and the European society have to accept in the champions’ interest? How can we balance this against the competitiveness of the individual members of the Union and the Union as a whole?

Third, how can we make sure that the benefits champions are supposed to obtain will also benefit the Union as a whole and not only translate into shareholder value?

Fourth, is there any kind of scientific evidence that attributes to such a change of law a superior capacity to achieve the objectives of the Union compared to the current law? Do other economic areas achieve higher competitiveness and better social inclusion through the softening of competition law or voluntaristic interventions in competition law? Which “champions” promoted the public good in retrospective and which did not? Has there been any need for a derogation from competition law in order to create a “winner”? Which champions were only created by competitive pressure?

Fifth, what is the cost-benefit ratio of such a change in law compared to the consistent application of all the instruments available under the existing law? A consistent application of competition law to strengthen European competitiveness? A consistent application of trade defense instruments and foreign direct investment audit instruments, as well as public procurement law, to counteract third- countries practices that distort competition? A consistent effort to implement social market economy standards in free trade agreements, multilateral organizations such as the World Trade Organization and other forms of international cooperation? A consistent completion and strengthening of the European internal market as the “home turf” of “European Champions”?

Sixth – as a little detour to the digital debate that we will continue on another occasion – how would such a change in the law affect the debate – often carried out by the same side – about the proper enforcement of competition law in the digital economy, where a recurrent complaint is an insufficient level of competition law and enforcement?

And seventh, would “power economics before market economics” be the correct answer to our society-wide loss of confidence in the economy and its governance since the financial crisis? During those years the cost of liquidating alleged champions, which proved to be too big to fail, was not always borne by their owners and beneficiaries but by the general public.

To echo Bertolt Brecht's reading worker – with whom, of course, I cannotliterarily compete: “So many questions”.

## 6. Europe in the world

Let me conclude with a look at Europe and its economy. The unique feature of the European economy and society is its diversity. 24.5 million small, medium and large companies serve 500 million customers. Performance-based competition between companies from all Member States in Europe's internal market and world markets has brought unrivaled productivity, innovation, growth, employment and prosperity to EU citizens. In contrast to other regions of the world, the European model is not based either on the primacy of public or private funding of market power. Rather, it places the citizen at the center of economic policy action and – like an ecosystem – builds on the balance of all its components.

In Michael Ende's novel "Momo", the turtle Cassiopeia can see into the future and avert disaster. Unfortunately, I do not have this gift.

But I can hope and wish that together we all succeed in cherishing, nurturing and future-proofing our European ecosystem.

That should be and remain the common and unifying goal of the debate.

With this in mind, I would like to thank you as gardeners of this ecosystem – or, more prosaically, in line with Article 1 of the German Federal Lawyers' Act, as organs of the administration of the law – for your attention to a gardener among many.

Many thanks for your patience.

It has been an honour and a pleasure for me to be here with you today.