EUROPEAN COMMISSION

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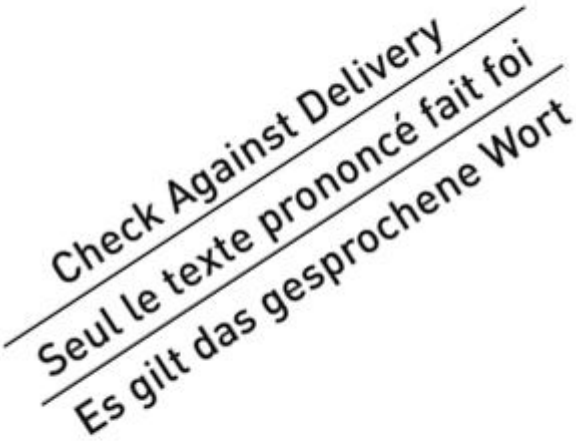
Merger review: Past evolution and future prospects



Conference on Competition Policy, Law and Economics
Cernobbio (Italy)

2 November 2012

Spokespersons' Service
Service des Porte-parole

SPEECH / 12 / 773

Ladies and Gentlemen,

It is always a pleasure to be back in Cernobbio, in this occasion to participate in this Conference on Competition Policy.

And I wish to thank in particular Jorge Padilla for inviting me to open your debates this evening.

I have chosen for my speech today one of the topics you have included in the agenda: merger control.

I will share with you the latest developments in this field and put them in the context of the evolution of this policy over the past few years. I will then close with a look at the future.

But first, let me make one important point. As I travel across Europe – in particular when I visit certain countries – I am often asked why the Commission is raising hurdles against the creation of large European companies; why Brussels is not supporting "European champions".

I am always a bit surprised by such remarks – and by their dogged reiteration – because they do not correspond at all to the facts.

Since the Merger Regulation came into force in 1990, the Commission has cleared more than 4,600 deals and blocked only 22. Less than five every thousand cases!

Last year – to give you fresher figures – we received 309 notifications, approved as many as 299 of them in Phase I and blocked only one transaction. By the way, with very good arguments to do so.

So, let's recognise the facts: it is simply not true that the Commission is putting the brakes on the legitimate efforts of Europe's firms to scale up. This is something that anyone can verify reading the newspapers or the Official Journal.

Let's look at the reality as it is. The list of the world's biggest corporations kept by Forbes magazine has 30 companies from the US and 27 from the EU in the top 100 places. One doesn't have the impression that Europe lacks corporate giants.

The reality is that when a planned merger does not raise competition problems – and this happens quite often – we clear it. Just think of Iberia and British Airways, Fiat and Chrysler, Volkswagen and MAN. The examples are legion.

And I can assure you that every time this is the case, I am very happy.

But indeed our responsibility is to take action whenever our review concludes that the company resulting from a merger would harm competitive conditions. That is to say, would harm all the other companies present in the relevant market.

Even in these cases, taking action means in most instances clearing the deal on condition that the parties offer adequate remedies.

Here the recent acquisition of EMI's recorded music business by Universal is a good example. The operation would reduce the number of music majors, but we gave the go-ahead when the companies offered to sell a significant number of labels featuring top-selling artists, from Coldplay and Tina Turner to Maria Callas.

What we must avoid are attempts to shield Europe's companies from competition, in particular during this harsh period for the economy. In this game, only a few of them will benefit, and the majority will lose.

I will firmly react against these temptations. Merger control is not the place for protectionist measures.

The discipline imposed by a keen competition environment in the Single Market is a tonic for Europe's companies. It prepares them to do business on the global markets and to succeed.

We must stand up for these principles. They are good for Europe's economy and they also give us the moral ground to negotiate fair and equal terms with our commercial partners around the world.

Importing lower competition-policy standards from other parts of the world is against our interests, which are best served by making the case for open markets and a level playing field for global trade.

Raising barriers on our borders brings Europe many more disadvantages than advantages.

Therefore, the fact that the EU competition authority is leading by example is fully consistent with our interests.

This year we have taken important decisions and we are currently working on a number of interesting cases.

I've already mentioned Universal's acquisition of the recording branch of EMI in September.

In several other instances we have cleared mergers after in-depth investigations, either with or without commitments offered by the parties.

One deal cleared with conditions was between Südzucker and ED&F Man in the sugar industry.

In the UTC/Goodrich merger – a major transaction in the aviation component industry – we reached the same conclusion.

This deal affected markets on both sides of the Atlantic and is a good example of the close and effective cooperation with US and Canadian authorities which has now become the norm in our practice.

A deal we approved without remedies was the joint venture between the three largest mobile telecoms operators in the UK.

Our investigation found that many competitors were planning to enter the nascent market of mobile-payment applications and that none of the companies involved had the ability or the incentive to foreclose.

Among the cases now pending, let me cite our current review of Glencore's plan to acquire Xstrata – a significant deal in the global metal and minerals sector.

Here, our scrutiny is well advanced, the parties submitted remedies last Tuesday and, after the correspondent market test, we will soon decide whether to clear the proposed transaction or open an in-depth investigation.

Other current Phase II cases include the acquisition of Inoxum, the stainless-steel division of ThyssenKrupp, by the Finnish steel company Outokumpu.

The company has offered remedies, in particular the divestment of the whole Terni plant.

We will decide in a few days if they are adequate to address our concerns.

We are also reviewing Hutchison's takeover of Orange in the Austrian mobile telephony market and the merger between UPS and TNT. Our preliminary view is that serious competition concerns would arise in both cases, and substantial remedies are needed.

Finally, we are analysing Ryanair's renewed bid to acquire a controlling stake of its Irish rival Aer Lingus.

Ladies and Gentlemen:

To put our merger-control activity in its proper context, let me now look at the main principles that guide our reviews.

The backbone of our investigations is the economic concepts laid down in the guidelines we use to study the deals and to identify the problems they may cause to competition.

Our practice has evolved since the adoption of the new Merger Regulation. The guidelines of 2004 and 2008 introduced strict analytical frameworks and a test for competitive harm based on economic effects.

In particular, this reform process made clear that the competition concerns raised by horizontal mergers are not confined to dominance – whether single-firm or collective – but can also come from 'unilateral effects' in situations of oligopoly.

After these changes, our review is now focussed more on how a merger can affect the competitive dynamics of markets and less on structural aspects such as concentration levels and market shares.

High market shares are not always problematic; conversely, sometimes even moderate shares can impair competition. It all depends on the actual market conditions in which each individual deal takes place.

In all cases, we closely assess the likely impact of a merger on price and other parameters – such as quality, choice and innovation – and the pro-competitive effects and efficiencies of a proposed deal.

We always look with great care at the claims made by companies that their merger can improve efficiency.

But we also reject these claims when the benefits are kept as private profits rather than being transferred to the economy in terms of prices or innovation.

Innovation is a major driver of growth and its promotion is key to help Europe rebound from this prolonged economic slowdown.

In the Intel/McAfee deal, for instance, we imposed interoperability remedies for five years to allow competitors the opportunity to evolve.

Also, we cleared the Western Digital/Hitachi transaction on condition that the parties would sell certain assets to keep an already concentrated market contestable and we also required that the buyer of the divested assets have innovation capability.

Today, as you know very well, reviewing complex transactions involves sophisticated qualitative and quantitative analyses and I believe that our decision-making has greatly benefitted from this growing reliance on economic evidence.

The amount of data in such cases is quite large. Depending on market segments, the number of observations ranges from a few thousand to over three million.

As a result, the Western Digital/Hitachi decision ran to over 200 pages. By comparison, the Commission's first decision following an in-depth investigation in 1991 was 21 pages long.

This is what being a modern and responsible competition authority implies. All our decisions must be well argued, verifiable, and ready to stand the test of the Court.

But I have not come to Cernobbio only to praise merger policy.

Although I am proud of our record and of the good reputation we enjoy among experts and market participants, it is still my responsibility to fine-tune and improve the system.

This is why I have asked DG Competition to see how our procedures can be made even more business-friendly than they are today.

I want to make notifications easier to cut the red tape and find faster and simpler ways to handle the cases that clearly pose no problems to competition.

I intend to streamline the system so that we can focus on the cases that have a real impact on competition and consumers in the internal market and require complex analyses of the kind I've just mentioned.

At the same time, I believe that our control should not stand in the way of corporate plans when a merger has no negative impact or can actually generate efficiencies. It is our responsibility to encourage growth at a time when Europe most needs it.

In practice this simplification exercise can be done within the current system. Once we have worked out the concrete proposals we will consult the stakeholders before adopting the final package, which can be introduced in a relatively short time in the course of next year.

In the longer term, there is also room for improvement on one substantive point.

The transactions that lead to the acquisition of non-controlling minority stakes currently escape our scrutiny even though they may sometimes cause significant harm to competition.

Other authorities can address these problems, such as in the US and in some national EU jurisdictions. But the Merger Regulation limits our control to the acquisition of controlling stakes; and the actions that are possible under Articles 101 and 102 don't cover all situations. I understand this is one of the topics of discussion at your conference.

Therefore, I can see an enforcement gap here. We are currently considering the different options. Any reform would have to strike the right balance between effective enforcement and the need to keep the regulatory burden light.

If the scope of the Merger Regulation is eventually extended to cover non-controlling minority shareholdings, there are two options.

One is to propose a selective system in which the Commission identifies the cases that may raise specific problems; the other would be a mandatory notification system of the kind in use today for mergers involving the acquisition of control.

I intend to launch a public consultation to discuss these options. My preliminary preference would be to go for a selective system and identify the cases which *prima facie* can raise competition problems rather than creating a system in which significant minority shareholdings would have to be notified in all instances.

Ladies and Gentlemen:

This evening I have given you an update on the main cases we are working on. I have reviewed the evolution of merger policy over the past few years and announced its possible future developments.

To round up my presentation, let me stress once again the benefits of our one-stop-shop review of mergers.

Over the years, the system has made sure that that no market would reach dangerous levels of concentration and that waves of consolidation in certain industries would not harm competition.

In a word, merger control has proved to be an effective tool to promote integration in the internal market. This has always been important, and even more so as a consequence of the crisis.

There has never been a greater need to keep the Single Market contestable, open and efficient. I am convinced that this is a first, necessary step to make Europe a better place to do business and to help put our economies on the road to a sustainable recovery.

Thank you.