



UiO : Department of Private Law

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EU Competition Law –
Merger control

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Outline

- Tuesday 28 October
- Tuesday 4 November

- 1. Introduction**
2. Jurisdiction
3. Procedure
4. Substantive assessment

Introduction

- National/regional merger control regimes
 - Mono-/multijurisdictional notifications
- «Merger control»
 - Control with transactions that result in lasting structural market changes
- Ex ante review
 - Review by competition authorities before the transaction is implemented
- Mandatory / voluntary notification systems
 - Duty to notify vs jurisdiction
 - Prohibition on implementation (stand-still periods)
- Procedure
 - Fixed time limits for review
- Intervention (prohibition or conditional approval) based on substantive standards of effects
 - What are the competitive and welfare effects of the transaction?

Outline: substantive EU competition law

	CONDUCT (ex post)		STRUCTURE (ex ante)
	Abuse of dominance (unilateral conduct)	Anti-competitive agreements (cooperation)	Concentrations (mergers, acquisitions, FFJV)
Legal sources and soft-law instruments	<p>Art. 102 TFEU</p> <p>Case law</p> <p>Commission decisions</p> <p>Guidance on enforcement priorities in applying Article 102</p>	<p>Art. 101 TFEU</p> <p>Block exemptions</p> <p>Case law</p> <p>Commission decisions</p> <p>De minimis notice</p> <p>Guidelines Article 101(3)</p> <p>Guidelines horizontal cooperation agreements</p> <p>Guidelines vertical restraints</p> <p>Other guidelines</p>	<p>EUMR + Implementing Regulation</p> <p>Case law</p> <p>Commission decisions</p> <p>Commission jurisdictional notice</p> <p>Horizontal Guidelines</p> <p>Non-horizontal Guidelines</p> <p>Notice on ancillary restraints</p> <p>Notice on remedies</p> <p>Other notices & guidelines</p>
	Guidelines on the effect on trade concept		
	Notice on the definition of relevant market		

EU Merger Control

- Control with «concentrations» with an EU dimension
- Mandatory notification of «concentrations» with an EU dimension to the European Commission
 - Number of notified concentrations per year (over the last ten years): between 200-400
- Procedure
 - Prohibition of implementation until the concentration has been cleared – sanctions for infringements
 - Fixed time-limits and tight deadlines for initiation of proceedings and decisions
- Substantive standard of review
 - SIEC-test
 - Consumer welfare standard
- Judicial review (GC and ECJ)

«One-stop-shop principle»

- Concentrations with an EU dimension – notified to and investigated by the Commission only in the EU
 - Not (also) by Member States' competition authorities
- «the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation» (Article 21.2 EUMR)
- «No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.» (Article 21.3 EUMR)
- Case referrals
 - Commission -> NCA's
 - NCA's -> Commission

Historic development of EU merger control

- Prior to 1990
 - Brief examples of application of Articles 101 and 102 to acquisitions
 - Difficulties: ex post control, Article 102 (requires dominance), Article 101 (requires agreements)
- Regulation 4064/89 (original merger regulation)
 - Jurisdictional, procedural and substantive rules
- Regulation 1310/93 (amendments to Reg. 4064/89)
 - A second set of jurisdictional/notification turnover thresholds
- Regulation 139/2004
 - Substantive standard (dominance => SIEC)

International merger control in practice (counsel perspective)

- Due diligence process
 - Exchange of commercially sensitive information?
 - Article 101 TFEU
 - «chinese walls» etc.
- Risk of intervention?
 - Pre-transaction analyses
- Jurisdictional screening
 - Mandatory notification in one or several jurisdictions?
 - Competition authorities in EU, Member States, other jurisdictions
- Contractual regulation
 - Allocation of risk of intervention
 - Expected time until clearance may be obtained (closing)
- Filing/notification
 - Stand-still period
 - Procedure, handling of RFI's etc.

Effects of concentrations and merger control

- Most concentrations do not cause competitive concerns
- Many concentrations create efficiencies
 - Economies of scale
 - Economies of scope
 - Vertical integration – e.g. reduction of transaction costs
- Some concentrations restrict competition

- Most concentrations are cleared
- Merger control likely deters the most problematic concentrations
 - Unlikely to obtain clearance
- Some concentrations are closely investigated
 - Cleared
 - Prohibited
 - Cleared on conditions

1. Introduction

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Introduction

- Scope of the EUMR
 - Lasting structural changes with an EU dimension
- «Lasting structural changes»
 - Lasting - duration
 - Types of structural changes / «concentrations»
 - Mergers
 - Acquisitions of control
 - Full function joint ventures
- EU dimension
 - Turnover thresholds
- Referrals

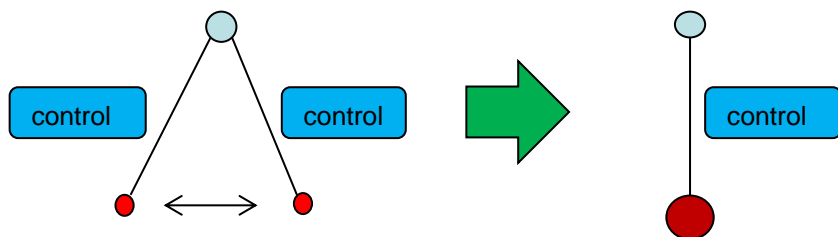
«Lasting»

- Transactions that on a lasting basis result in a change of control of an undertaking and in the structure of the market (Article 3 EUMR)
 - Temporary/brief structural changes not covered
 - Commission's decisional practice: 3 years insufficient, 10-12 years sufficient
- Transitory transactions
 - Several transactions in succession (Jurisdictional Notice, para 29 etc)
 - Where the first transaction is temporary (generally not exceeding one year), and the second transaction is certain (no uncertainty that it will take place), only the second transaction is considered to be on a lasting basis

«Concentration»

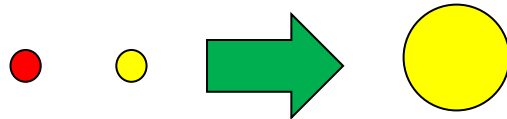
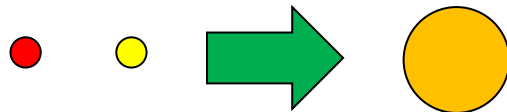
- The EU Merger Control applies to «concentrations»
- Article 3 EUMR – definition of «concentration»
 - 1) Mergers of undertakings
 - 2) Acquisitions of control by undertakings of undertakings
 - 3) Creation of full function joint ventures
- If not a “concentration”
 - No duty to notify the Commission
 - The Commission does not have jurisdiction under the EUMR
 - National merger control regimes may require notification or have jurisdiction
- Acquisitions of minority shareholdings
 - May have anti-competitive effects
 - Not a “concentration” unless change of control
 - Commission’s ongoing public consultation
 - *Inter alia* whether the scope of the EUMR should be extended to acquisition of non-controlling minority shareholdings

Internal restructuring



- An internal restructuring within a group of companies does not constitute a «concentration»
- Not a merger between previously independent undertakings or a change of control of a previously independent undertaking

Mergers



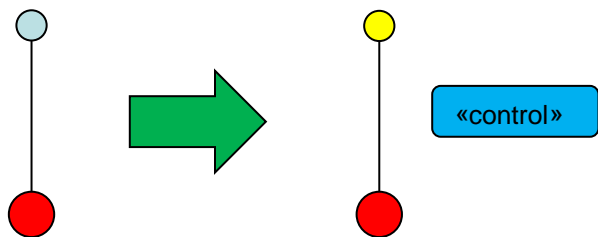
- «the merger of two or more previously independent undertakings or parts of undertakings», Article 3.1(a) EUMR
- Commissions jurisdictional notice, para 9
 - A merger «occurs when two or more independent undertakings amalgamate into a new undertaking and cease to exist as separate legal entities»
 - «A merger may also occur when an undertaking is absorbed by another, the latter retaining its legal identity while the former ceases to exist as a legal entity.»

Example

Case COMP/M.2208, Chevron/Texaco

- Concentration (merger)
 - “On 15 October 2000, Texaco, Chevron and Keepep executed an Agreement and Plan of Merger (the “Merger Agreement”). By virtue of the Merger Agreement, on the date of the merger, Keepep, a new wholly owned subsidiary of Chevron, will merge into and with Texaco. Thereupon, the separate existence of Keepep will cease and Texaco will be the surviving corporation and become a wholly owned subsidiary of Chevron. On the date of the merger, Chevron Corporation will be re-named as ChevronTexaco Corporation. Therefore, the notified transaction is a full legal merger and a concentration within the meaning of Article 3(1)(a) of the Merger Regulation.” (para 4)
- Community (EU) dimension
- Competition assessment
 - No horizontal or vertical concerns
- Cleared without conditions

Acquisitions of «control»

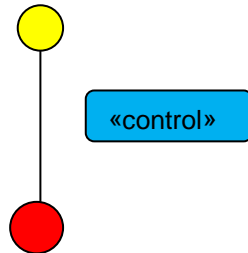


- «the acquisition (...) by one or more undertakings (...) of direct or indirect control of the whole or parts of one or more other undertakings.» (Article 3.1(b) EUMR)
- Definition of «control»
 - «rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact and law involved, confer the possibility of exercising decisive influence on an undertaking» (Article 3.2 EUMR)

Acquisitions of «control» (cont.)

- Object of control
 - Undertakings
 - «parts of» undertakings
 - Assets – «business with a market presence to which turnover can be clearly attributed» (Jurisdictional notice, para 24)
- «control»
 - Determine the strategic commercial behaviour of an undertaking
 - Case T-282/02, Cementbouw v Commission
- «possibility» – not necessary that decisive influence will be actually exercised
- Means of control
 - Acquisition of shares, assets
 - Contractual rights (e.g. shareholders agreements)

Sole control



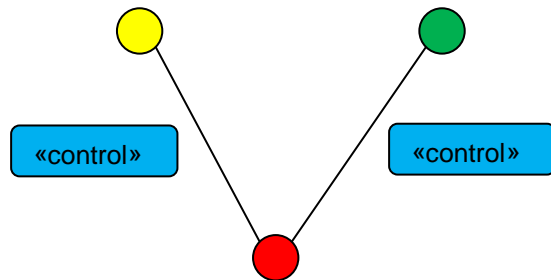
- Positive / negative control
 - Impose decisions regarding the strategic commercial behaviour of an undertaking (positive) – e.g. majority voting rights
 - Block decisions regarding the strategic commercial behaviour of an undertaking (negative) – e.g. 50 % voting rights, contractual veto rights
- De jure / de facto control
 - De jure: e.g. $\geq 50\%$ voting rights, contractual rights/veto rights
 - De facto: e.g. minority shareholder highly likely to achieve majority at shareholders meeting (prospective assessment of historic presence on shareholders meeting)

Example

Case IV/M.613 - Jefferson Smurfit Group PLC/Munksjö AB

- The parties
 - Irish and Swedish paper/paper product manufacturers
- The transaction
 - Jefferson to acquire 29.04% of the shares in Munksjö
- Concentration (*de facto* sole control)
 - “where a shareholder has a substantial minority interest in an undertaking and the remaining shares are widely dispersed, and particularly where the substantial but minority shareholder *de facto* controls the voting at the annual meeting, that shareholder exercises decisive influence on the undertaking within [the EUMR].”
 - Remaining shares held by over 12000 shareholders, second largest held 5,9 %, only shareholders holding a total of between 32-36 % attended the annual general meeting in 1994 and 1995
- Community dimension
- Competition assessment – no horizontal or vertical concerns
- Cleared without conditions

Joint control



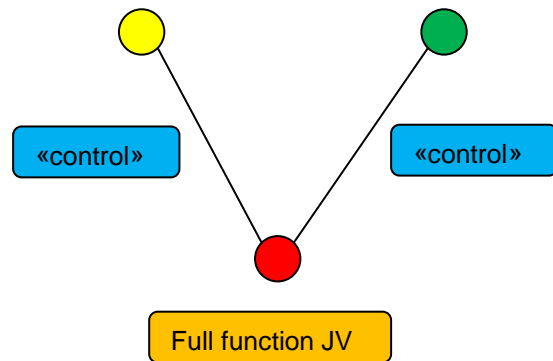
- Change of control of an «undertaking»
 - i.e. sole joint, no control to joint
- «two or more undertakings (...) have the power to block actions which determine the strategic commercial behaviour of an undertaking»
 - Case T-282/02, Cementbouw v Commission
- Possibility of a deadlock situation
 - Required to permanently cooperate
- De jure joint control
 - Equality in voting rights/equal representation in management bodies
 - Veto rights over strategic commercial decisions
 - Budget
 - Business plan
 - Major investments
 - Appointment of senior management
- De facto joint control
 - Exceptionally
 - E.g. Strong common interests between minority shareholders – each provides vital contribution to the undertaking

Example

Case COMP/M.3097, Maersk Data/Eurogate IT/Global Transportation Solutions

- The transaction
 - Global Transportation Solutions owned 100 % by Maersk Data
 - Eurogate to acquire 50 % of the shares in Global Transportation Solutions
- Concentration
 - From sole to joint control
 - “Upon completion of the notified transaction MDU and Eurogate will each hold a 50% interest in GTS. The board will consist of 4 members equally appointed by the parties and the voting rights of each board member are in direct proportion with the shareholding of the shareholder responsible for their appointment. Therefore, MDU and Eurogate will control 50% each of the votes. Certain decisions such as the approval of the business plan will require agreement between the parties. Therefore, GTS will be jointly controlled by MDU and Eurogate.” (para 5)
- Community dimension
- Competition assessment – no competitive concerns
- Cleared without conditions

Creation of full function joint ventures



- «The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration» (Article 3.4 EUMR)
- «creation»
 - Not a previous «undertaking» (otherwise «change of control»)
 - «Greenfield» operation or contribution of assets
- Joint control
- «all the functions of an autonomous economic entity» / full function / operational autonomy
- Article 101 TFEU
 - Applicable if not a FFJV
 - Applicable to coordination between parent undertakings

Full function joint ventures (cont.)

- «all the functions of an autonomous economic entity»
 - A joint venture's full function character «essentially means that [it] must operate on a market, performing the functions normally carried out on the same market.»
Commission's jurisdictional notice, para 94
- Sufficient resources
 - A management dedicated to the JV's day-to-day operations
 - Finances, staff, assets
- Independence from parent undertakings
 - Market presence
 - «A joint venture is not full-function if it only takes over one specific function within the parent companies' business activities» Commission's jurisdictional notice, para 95
 - E.g. limited to R&D or production or distribution of the parent companies' products/services
 - Not only sale/purchase/support relations with parents
- Lasting basis – not established for a short finite period (three years insufficient, 10-12 years sufficient)

EU dimension

- EU Merger Control only applies to concentrations the impact of which goes beyond the national borders of the Member States
- Quantitative thresholds based on turnover of undertakings concerned and connected undertakings
- Proxy for the economic resources being combined in a concentration and their geographic allocation
- Not an analysis of competitive effects
- Jurisdictional and administrative criteria to screen out concentrations with limited cross-border and anti-competitive potential within the EU

Turnover thresholds (Article 1 EUMR)

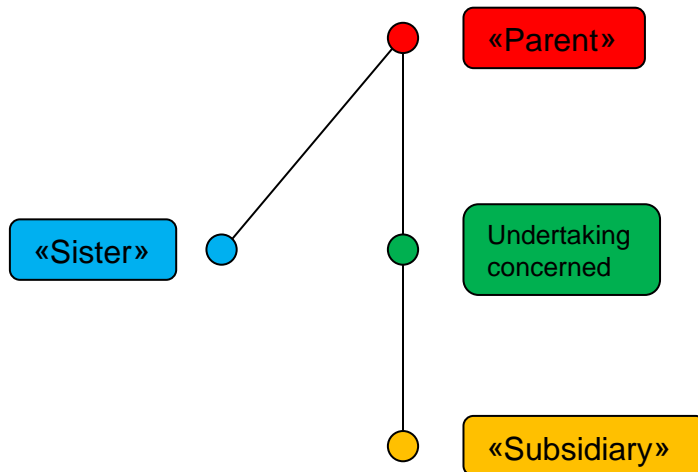
– two alternative sets

- 1) Article 1 (2) EUMR
 - Combined global turnover > EUR 5 billion
 - EU turnover of at least two undertakings concerned > EUR 250 million
 - Exception: each of the undertakings concerned achieves 2/3 of their EU turnover in one and the same Member State
- 2) Article 1 (3) EUMR
 - Combined global turnover > EUR 2,5 billion
 - Combined turnover within at least three Member States > EUR 100 million
 - EU turnover of at least two undertakings concerned in at least three of the same Member States > EUR 25 million
 - EU turnover of at least two undertakings concerned > EUR 100 million
 - Exception: each of the the undertakings concerned achieves 2/3 of their EU turnover in one and the same Member State

Calculation of turnover (Article 5 EUMR)

- «undertakings concerned» – those participating in a concentration
 - Mergers: merging parties
 - Acquisitions of control
 - Sole control: acquirer and target
 - Joint control: acquirers and target
- «Turnover»
 - Amounts derived from sale of goods and services in the preceding financial year
- Geographical allocation of turnover
 - Location of customer (EU or Member States)

Whose turnover is taken into account?



- Article 5(4) EUMR
 - Undertakings concerned
 - Including «parents», «subsidiaries» and «sister companies»
 - Formalised criteria for inclusion of group companies

Referral of cases to and from the Commission

- 1) Concentrations with an EU dimension referred to Member States
 - Pre-notification referrals (Article 4.4 EUMR) – reasoned submission by the notifying parties that the concentration may significantly affect competition in a market within a Member State
 - Post-notification referrals (Article 9 EUMR) – request by a Member State that the Commission refers a concentration that threatens to affect significantly competition in a market within the Member State or affects competition in a market within a Member State
- 2) Concentrations without an EU dimension referred to the Commission
 - Pre-notification referrals (Article 4.5 EUMR) - reasoned submission by the notifying parties that the concentration is capable of being reviewed by the NCA's of three Member States
 - Post-notification referrals (Article 22 EUMR) – Requests by Member States that the Commission examines concentrations that affect trade between Member States and threatens to significantly affect competition

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The duty to notify

- Prior notification of concentration with EU dimension (Article 4.1 EUMR)
 - Shall be notified to the Commission before their implementation
 - (Ref. stand-still obligation)
 - Can be notified at the earliest where a good faith intention to conclude an agreement on concentration can be demonstrated
- Whose duty to notify? (Article 4.2 EUMR)
 - Mergers: the merging parties
 - Acquisition of sole control: the acquirer
 - Acquisition of joint control: the acquirers
 - (seller and target do not have a duty to notify)

Submission of notification

- Article 3, Regulation 802/2004 implementing Regulation 139/2004
 - Notifications shall be submitted in the manner prescribed by Form CO (Annex I)
 - Notifications may, in certain cases, be submitted in Short Form (Annex II)
- Form CO
 - Specifies the information that must be provided to the Commission
 - Inter alia: details on the transaction, the parties, affected markets, efficiencies, etc.
- Short Form CO
 - Available for «unproblematic» concentrations
 - E.g. no horizontal or vertical overlaps
 - Less comprehensive information requirements than Form CO

Timetable

- Pre-notification stage
 - Contact between notifying parties and Commission
 - Clarify jurisdictional issues, waivers on information requirements, substantive issues etc.
- Phase I
 - 25 working days following notification (10 day extension if the parties offer commitments)
 - Great majority of notified concentrations cleared in Phase I
- Phase II
 - The Commission opens a Phase II investigation if it has concerns that the concentrations raises significant competition issues
 - In-depth analysis of the concentration's effects
 - 90 working days from initiation of proceedings (15/20 day extension)

Stand-still obligation (Article 7 EUMR)

- A concentration with an EU dimension shall not be implemented either before its notification or until it has been cleared by the Commission
 - Narrow exceptions
- «implemented»
 - Closing
 - Exercise of voting rights
 - Coordination (may also be prohibited by Article 101 TFEU)
- Case T-332/09, Electrabel v Commission
 - Acquisition of *de facto* sole control (appr. 48 % of voting rights) over CNR in 2003
 - Dispersed remaining shareholder voting rights and low attendance at shareholders meeting = *de facto* control
 - Notified the Commission in 2008 – concentration cleared
 - Fine: EUR 20 million for infringement of the stand-still obligation Article 7 EUMR

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Introduction

- SIEC-test
 - Significant Impediment of Effective Competition
 - Expanded dominance-standard
 - Efficiency defence
- Types of concentrations/theories of harm
 - Horizontal mergers (between competitors)
 - Unilateral effects
 - Coordinated effects
 - Vertical mergers (between undertakings on different levels of the distribution chain)
 - Foreclosure
 - (Coordinated effects)
 - Conglomerate mergers (between firms that are in a relationship which is neither horizontal nor vertical)
 - Mergers between companies that are active in closely related markets (complementary products or products that belong to the same product range)
 - Foreclosure
 - (Coordinated effects)

SIEC-standard

- «A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.” (Article 2.3 EUMR)
- Background
 - From dominance-test (Reg 4064/89) to SIEC (EUMR, Reg 139/04)
 - Problem: a dominance-test «gap»? E.g. 3->2 mergers not leading to single or collective dominance?
 - Solution: SIEC-standard broadening the dominance-test
 - Recital 25 EUMR: «The notion of "significant impediment to effective competition" (...) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position”

«Efficiency defense»

- EUMR, recital 29
 - “In order to determine the impact of a concentration on competition in the common market, it is appropriate to take account of any substantiated and likely efficiencies put forward by the undertakings concerned.”
 - “It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition.”
 - “The Commission should publish guidance on the conditions under which it may take efficiencies into account in the assessment of a concentration.”
- Efficiencies dealt with in the Commission’s Horizontal and Non-Horizontal Merger Guidelines
 - Verifiable, merger-specific, benefit consumers

A prospective analysis

- Ex ante review
 - «the prospective analysis consists of an examination of how a concentration might alter the factors determining the state of competition on a given market in order to establish whether it would give rise to a serious impediment to effective competition. Such an analysis makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely» Case C-12/01, Tetra Laval v Commission, para 43
- Causation
 - «if a concentration is not the cause of the creation or strengthening of a dominant position (...) it must be declared compatible with the common market.» Joined cases C-68/94 and C-30/95, Kali & Salz

Causation & the «failing firm defence»

- Commission's Horizontal Merger Guidelines, para 89-90
- The Commission may decide that an otherwise problematic merger is nevertheless compatible with the common market if one of the merging parties is a failing firm
- The basic requirement is that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger
- Three criteria
 - 1) the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking
 - 2) there is no less anti-competitive alternative purchase than the notified merger
 - 3) in the absence of a merger, the assets of the failing firm would inevitably exit the market

Proof

- Burden of proof
 - «where the Commission takes the view that a merger should be prohibited because it will create or strengthen a dominant position within a foreseeable period, it is incumbent upon it to produce convincing evidence thereof»
 - Case T-5/02, Tetra Laval v Commission, para 155. See also Case T-342/99, Airtours v Commission
 - Efficiencies
 - Most of the information, allowing the Commission to assess whether the merger will bring about the sort of efficiencies that would enable it to clear a merger, is solely in the possession of the merging parties.
 - It is, therefore, incumbent upon the notifying parties to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised. (Horizontal merger guidelines, para 87)
- Standard of proof
 - Proof of anti-competitive effects calls for “a precise examination, supported by convincing evidence, of the circumstances which allegedly produce such effects” Case T-5/02, Tetra Laval v Commission

Definition of the relevant market(s)

- «a proper definition of the relevant market is a necessary precondition for any assessment of the effect of a concentration on competition»
 - Joined cases C-68/94 & C-30/95, *Kali & Salz*. See also case T-342/99, *Airtours*, para 19
- The European Commission's *Notice on the Definition of the Relevant Market*
 - “Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way *the competitive constraints* that the undertakings involved face.” (Commission Notice, para 2)
- Two dimensions
 - The relevant product market
 - The relevant geographic market

Horizontal concentrations

- Market shares / concentration levels
- Market shares (combined)
 - > 50 % (presumption of dominance)
 - Between 40-50 % (close scrutiny)
 - < 40 % (few cases)
- HHI levels (Herfindahl-Hirschman Index)
 - Sum of the squares of the market shares all the undertakings in the market
 - Range: 0-10 000
 - Commission's horizontal guidelines
 - Post-merger HHI < 1 000
 - Unlikely to find competitive concerns
 - Post-merger HHI between 1 000 and 2 000 and a delta below 250
 - Unlikely to find competitive concerns
 - Post-merger HHI above 2 000 and a delta below 150
 - Unlikely to find competitive concerns, unless e.g. one of the undertakings has a pre-merger market share of 50 % or more

Horizontal concentrations (cont.)

- Non-coordinated/unilateral effects (loss of competition between the parties in the concentration + market power)
 - Single dominance
 - Non-collusive oligopoly (e.g. 3->2 mergers not leading to single or collective dominance, but SIEC)
 - Factors
 - The parties have significant market shares/high post-merger HHI, the parties are close competitors, entry barriers, competitors' market position, potential competition, buyer power etc
 - Efficiencies
- Coordinated effects
 - Creation or strengthening of collective dominance (see Case T-342/99, Airtours v Commission, and Horizontal Merger Guidelines, para 41 etc)
 - Tacit collusion in a tight oligopoly/duopoly
 - Transparent market, homogenous products, entry barriers, deterrent mechanisms

Example

Case IV/M.53, Aerospatale-Alenia/de Havilland

- Transaction
 - The joint acquisition by Aerospatale and Alenia of the assets of the de Havilland division (the second largest manufacturer of regional aircrafts) (de Havilland) from Boeing
 - Aerospatale and Alenia already controlled ATR, the world and European leading manufacturer of regional aircrafts
- Concentration
 - Joint control by Aerospatale and Alenia
- Community dimension
- Competitive assessment – considerable overlap ATR – de Havilland
 - The proposed concentration would significantly strengthen ATR's position on the commuter/regional aircraft markets for the following reasons
 - high combined market share on the 40-59 seat market (from 46% to 63%), and of the overall commuter market (from 30 % to 50 %)
 - elimination of de Havilland as a competitor
 - coverage of the whole range of commuter aircraft
 - considerable extension of the customer base
- Concentration prohibited

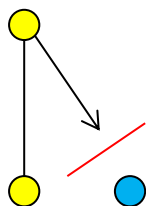
Vertical concentrations

- Generally less likely to significantly impede effective competition than horizontal mergers
- Market shares / concentration levels
 - The Commission is unlikely to find concern in non-horizontal mergers where the market share post-merger of the new entity in each of the markets concerned is below 30 % and the post merger HHI is below 2 000 (Non-Horizontal Merger Guidelines, para 25)

Vertical concentrations (cont.)

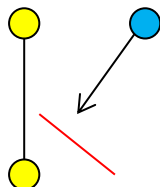
Input foreclosure

(post-merger restricted access to inputs)



Customer foreclosure

(post-merger restricted access to customers)



- Non-coordinated effects / foreclosure
 - Input foreclosure
 - Significant market power upstream
 - Incentive to foreclose (lost sales vs reduced competition downstream)
 - Other factors, efficiencies etc.
 - Customer foreclosure
 - Significant market power downstream
 - Incentive to foreclose (increased costs from not purchasing from competitors vs reduced competition)
 - Other factors, efficiencies
- Coordinated effects
 - Foreclosure subsequently leading to a situation of collective dominance

Conglomerate concentrations

- Mergers between firms that are in a relationship which is neither horizontal (competitors in the same relevant market) nor vertical (suppliers or customers)
- Non-coordinated effects / foreclosure
 - The combination of products in related markets may confer on the merged entity the ability and incentive to leverage a strong market position from one market to another by means of tying or bundling or other exclusionary practices (Non-horizontal guidelines, para 93)
 - Tying/bundling – substantial market power in one market used to foreclose competitors in other markets
- Coordinated effects
 - Foreclosure subsequently leading to a situation of collective dominance

Example

Case IV/M.938, Guinness/Grand Metropolitan

- Merger between two largest spirit producers in the world
- National markets for each type of spirit
 - “The holder of a portfolio of leading spirit brands may enjoy a number of advantages. In particular, his position in relation to his customers is stronger since he is able to provide a range of products and will account for a greater proportion of their business, he will have greater flexibility to structure his prices, promotions and discounts, he will have greater potential for tying, and he will be able to realise economies of scale and scope in his sales and marketing activities. Finally the implicit (or explicit) threat of a refusal to supply is more potent.” (para 40)
- Cleared, subject to conditions

Outcomes

- Clearance
- Prohibition (rare 20 + cases)
- Conditional clearance / remedies (around 5 % of notified concentrations)

Conditional clearance / remedies

- Commission notice on remedies
- Basic conditions for acceptable remedies
 - Eliminate the competition concerns entirely
 - Capable of being implemented effectively within a short period of time
- Structural remedies
 - Divestitures (businesses, assets, brands, IPRs)
- Behavioural remedies
 - Access remedies
 - Contractual remedies