Recent Developments in EU Merger Control

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Outline

1) Overview
   a) Notifications
   b) Interventions / theories of harm
   c) Remedies

2) Significant cases / trends
   a) Unilateral effects (1): mobile telecom cases
   b) Unilateral effects (2): the geographic dimension in industrial mergers
   d) Comeback of co-ordinated effects
   e) Merger control and innovation

3) International Co-operation

4) Policy developments
OVERVIEW
Number of notifications

Number of notifications (2000 - 2016)

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
<th>Simplified</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>330</td>
<td>41</td>
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<td>2001</td>
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<td>2004</td>
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<td>2005</td>
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<td>2014</td>
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<tr>
<td>2015</td>
<td>362</td>
<td>244</td>
</tr>
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</table>
Interventions

<table>
<thead>
<tr>
<th>Year</th>
<th>Intervention Cases</th>
<th>Phase I w/ remedies</th>
<th>Phase II w/ remedies</th>
<th>Prohibitions</th>
<th>Abandoned in Phase II</th>
<th>Notified</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
<td>22 (7%)</td>
<td>13</td>
<td>7</td>
<td>0</td>
<td>2</td>
<td>337</td>
</tr>
<tr>
<td>2016</td>
<td>27 (8%)</td>
<td>19</td>
<td>6</td>
<td>1</td>
<td>1</td>
<td>362</td>
</tr>
</tbody>
</table>

Interventions (remedies I+II, prohibitions, withdrawals sec. phase)

- Remedies I+II over total decisions
- Prohibitions over total decisions
- Interventions over total decisions
- Withdrawals second phase over total decisions
## Theories of harm (2015-2016)

### Horizontal Effects

<table>
<thead>
<tr>
<th>Unilateral effects on price</th>
<th>Found in <strong>46/49 interventions</strong> (e.g. telecom mergers in DK, IT, UK)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unilateral effects on innovation</td>
<td>Found in <strong>5 interventions</strong> (on top of price effects)</td>
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<tr>
<td></td>
<td>• Pharma: Novartis/ GSK’s oncology business, Medtronic/Covidien and Pfizer/Hospira</td>
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<td></td>
<td>• and beyond: GE/Alstom; Halliburton/Baker Hughes (abandoned)</td>
</tr>
<tr>
<td>Coordinated effects</td>
<td>Found in <strong>3 interventions</strong> (on top of unilateral): Teliasonera/Telenor (abandoned); AB Inbev/SABMiller; Hutchison 3G Italy/Wind/JV</td>
</tr>
</tbody>
</table>

### Vertical Effects

<table>
<thead>
<tr>
<th>Foreclosure risks</th>
<th>Remedied in Liberty Global/Corelio/W&amp;W/De Vijver Media and ASL/Arianespace</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Assessed and dismissed in Vodafone/Liberty Global/Dutch JV and Liberty Global/BASE Belgium</td>
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### Conglomerate Effects

<table>
<thead>
<tr>
<th>Foreclosure risks</th>
<th>Remedied in Microsoft/LinkedIn</th>
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</table>
Remedies: Strong preference for structural solutions

Types of remedies: 2011-16 (95 cases until end 2016)

- Divestitures 71%
- Standard divestitures 36%
- Other/complex divestitures 35%
- Access and other non-divestiture remedies 22%
- Removal of links with competitor 7%
Remedies (2): Structural solutions

- Divestiture of **stand-alone businesses** (full overlap) preferred route:
  - Allows to clear complex deals in Phase I (e.g. Holcim/Lafarge; AB Inbev/ SabMiller)
  - Product by product divestments may not always be sufficient (e.g. Teva/Allergan in pharmaceutical sector)
- **Safeguards needed** for other (more complex) types of divestitures/carve-outs:
  - Upfront buyer (e.g GE/Alstom, Staples/Office Depot, Ball/Rexam)
  - Fix-it-first (Hutchison 3G Italy/Wind/JV)
  - Purchaser criteria
- Not everything can be fixed with remedies (Halliburton / Baker Hughes ?)
SIGNIFICANT CASES/TRENDS
Consolidation wave in telecoms

- **Mobile/mobile:** e.g.
  - *Telefónica Deutschland/E-Plus* (2014, Germany, remedies)
  - *Hutchison 3G/Telefónica Ireland* (2014, Ireland, remedies)
  - *TeliaSonera/Telenor* (2015, Denmark, abandoned)
  - *Hutchison 3G UK/Telefonica UK* (2016, UK, prohibited)
  - *Hutchison 3G Italy/Wind/JV* (2016, Italy, remedies)

- **Fixed/fixed:** e.g.
  - *Altice/PT Portugal* (2015, Portugal, remedies)

- **Mobile/fixed convergence:** e.g.
  - *Vodafone/Ono* (2014, Spain, unconditional clearance)
  - *Orange/Jazztel* (2015, Spain, remedies for overlap in fixed)
  - *Liberty Global/Base Belgium* (2016, Belgium, merger of MVNO with MNO, remedies for overlap in mobile)
  - *Vodafone/Liberty Global/Dutch JV* (2016, Netherlands, remedies to remove overlap in fixed)

- **Fixed/content:** e.g.

Most transactions within a single Member State

Cross-border telecoms mergers still rare: e.g. *Deutsche Telekom/ GTS Group* (2014)
Unilateral effects in mobile telecoms markets

• Similar market structure in many MS:
  • Very concentrated markets (4 or 3 MNO players)
  • High barriers to entry for new MNOs.
  • Presence of MVNOs. Different competitive pressure.
• Established framework of assessment
  • Focus and outcome may differ from case to case
• Well-tested investigative and economic tools
  • Input from market participants, internal documents, UPP, customer survey
• Remedies are case-specific
DK: TeliaSonera/Telenor

- JV between 2nd (Telenor) and 3rd (Telia) MNO in DK; pre-existing network-sharing agreement among them.
- Creation of largest MNO in DK. Reduction from 4 to 3 mobile network operators.
- SIEC in:
  - Retail markets: both unilateral and coordinated effects
  - Business markets
  - Wholesale markets
- Offered commitments not sufficient to create a fourth independent mobile network operator to dispel competition concerns.
UK: Hutchison 3G/Telefonica (O2)

- 4\textsuperscript{th} (H3G) acquiring 2nd (O2) MNO; creation of market leader ahead of BT/EE and Vodafone

- SIEC in:
  - **Retail market**: Unilateral effects due to loss of competition between Three and O2;
  - Additional concerns regarding the two existing UK network sharing agreements: reduced competition by either one or both of the other MNO partners of the merged entity and lower level of industry-wide investments into network infrastructure
  - **Wholesale market**: unilateral effects due to reduced number of MNO hosts

- **Offered commitments** Considered too complex and not sufficient: strengthening of MVNOs and network sharing does not replace weakened competition caused by merger and does not resolve structural network sharing problems
If present on both networks, merged THREE/O2 risked undermining investment and network quality.
IT: H3G/Wind

- 4th (H3G) and 3rd (Wind) creating a JV; similar size as the other two MNOs (TIM and VF)

- Unilateral effects on the retail market (focus on counterfactual -- role of H3G and Wind absent the merger)

- Coordinated effects on the retail market (elimination of aggressive competitor; *Airtours* criteria met)

- Unilateral effects on the wholesale market
**IT: H3G/Wind**

- Phase II clearance, without an SO; early engagement in serious remedy discussions, in parallel with commercial discussions with potential remedy takers

- Fix-it-first remedy (purchaser identified and approved in conditional clearance decision)

- MNO remedy (commitment to divest/transfer/make available necessary assets to allow for the entry of a 4th MNO)

- Strong entrant (French telecom operator Iliad), with credible business plan and commitment to invest
IT: Outcome of Commission decision

- Permitting **in-country consolidation**...
- ... while enabling a European mobile player to *expand cross-border* and to *invest significantly* in mobile infrastructure
Mergers in industrial markets (1/2)

• **Features**
  - Mature, concentrated markets
  - (Greenfield) entry unlikely
  - Geographic markets defined largely by transport costs and local presence
  - Capacity constraints and limited importance of imports

• **Examples** of recent large mergers in concentrated markets:
  - *Ball/Rexam* (2016): 1\textsuperscript{st} and 2\textsuperscript{nd} largest beverage can manufacturers in the EEA
  - *Halliburton / Baker Hughes* (2016, abandoned in Phase 2): Merger to duopoly in servicing most of the North Sea offshore and complex EU onshore oilfields as well as integrated services
Mergers in industrial markets (2/2)

Increased use of catchment areas and isochrones where relevant (i.e. important transport costs) and where data permits

- **Cargill/ADM**: Customer-/plant-based market reconstructions

- **Recent cement mergers (e.g. Holcim/Lafarge)**

- **Plastic Omnium/Faurecia**: catchment area of 250 km around each of the OEMs' production plants

- **Ball/Rexam** (beverage cans): isochrones used across national boundaries. Catchment areas grouped in 9 differentiated regional clusters (700km radius)
Comeback of coordinated effects

**Horizontal Merger Guidelines:**
- Market characteristics
- Reaching terms of coordination
- Sustainability of coordination: Monitoring of deviations, Deterrent mechanisms, Reactions of outsiders (*Airtours* criteria)
- Merger specific effects

**Few recent cases:**
- M. 7009 Holcim/Cemex West and M. 7054 Cemex/ Holcim Assets (2014): examined in depth but ultimately cleared, as no merger specific effects
- M. 7419 TeliaSonera/ Telenor/ JV (2015, Denmark, abandoned): co-ordinated effects at least for certain retail customers
Coordinated effects in Hutchison 3G Italy/Wind/JV

**Market characteristics:**
- Previous attempts at tacit coordination (parallel price increases, parallel changes in duration of pre-paid contracts)

**Reaching terms of coordination:**
- Using post-merger market shares as focal point

**Sustainability of coordination:**
- Sufficient transparency to monitor deviations (public prices, transparent customer flows)
- Threat of price wars (past examples) is credible deterrent mechanism
- Limited incentives to deviate
- No countervailing buyer power, no new MNO entry, marginal role of virtual operators

**Merger specific effects:**
- Reducing players from 4 to 3, removing most agressive MNO (H3G)
- Creating symmetrical market structure ("Triopoly")
Coordinated effects in AB InBev/SABMiller

Market characteristics:
- Concentrated markets where large brewers repeatedly meet
- Strong evidence of existing tacit price coordination in several markets
- Revenue management: large brewers are value, not volume players

Reaching terms of coordination:
- Price leadership model

Sustainability of coordination:
- Price transparency
- Deterrent mechanism is immediate retaliation incl. in different geographic markets: lower prices in low share area to respond to price war in high share area
- No countervailing buyer power, smaller competitors unable to disrupt

Merger specific effects:
- Reduced number of players, more multi-market retaliation potential, and tipping undecided markets to leadership
Merger control and innovation
SIEC test covers all aspects of a loss of competition...

... including harm resulting from hampering innovation...

**Horizontal guidelines §38:** In markets where innovation is an important competitive force, a merger may increase the firms' ability and incentive to bring new innovations to the market and, thereby, the competitive pressure on rivals to innovate in that market. Alternatively, effective competition may be significantly impeded by a merger between two important innovators, for instance between two companies with "pipeline" products related to a specific product market. Similarly, a firm with a relatively small market share may nevertheless be an important competitive force if it has promising pipeline products.

**Non-horizontal guidelines, §26:** In practice, the Commission will not extensively investigate such mergers, except where special circumstances such as, for instance, one or more of the following factors are present: (a) a merger involves a company that is likely to expand significantly in the near future, e.g. because of a recent innovation [...].

...thereby assessing dynamic effects on future innovation
Innovation competition in pharmaceutical sector

**Novartis/ GlaxoSmithKline's oncology business (2015)**

- Overlap between cancer treatment drugs none of which was yet on the market; only one third party developer

- Novartis would likely stop developing two pipeline cancer drugs → 3 to 2 pipelines implies loss of treatment choice and possibly future price competition

- Serious doubts not only for pipeline drugs in late-stage clinical trials but also for some in earlier stage trials

**Pfizer/Hospira (2015)**

- Actual product / pipeline overlap in biosimilars, only one third party developer

- Incentives to delay further development

- Divestment of biosimilar pipeline drug to Novartis
GE/Alstom (2015): innovation in large gas turbines

- Only 4 full technology competitors in heavy duty gas turbines worldwide
- GE would likely discontinue some of Alstom's gas turbines, including a pipeline turbine, and would close Alstom's innovation pools
- Divestment to Ansaldo of technology and upgrades, two test facilities and large number of Alstom R&D engineers
  → Creation of player with innovation capabilities similar to Alstom
Dow/ DuPont: innovation in crop protection

- Dow and DuPont are two major crop protection and seeds R&D players creating (for the moment) world 1st integrated player
- Innovation is key in crop protection
- Concerns regarding **reduced innovation competition**
  - Only five global integrated R&D-based players; not all active in different innovation areas; high entry barriers
  - The parties are competing head-to-head in a number of important herbicide, insecticide and fungicide innovation areas
  - Dow and DuPont are important and close innovators
  - Specific evidence: past industry consolidation; analysis of patent data, pipelines, internal documents, feedback from market participants
Commission ensures DOW/DUPONT merger preserves price and innovation competition in crop protection.

- Effects on price competition
- Divestment to single buyer
- Effects on innovation competition
INTERNATIONAL COOPERATION
International Cooperation on EU merger cases
2014-15

- USA: 37%
- Canada: 16%
- Brazil: 12%
- China: 9%
- Australia: 8%
- Japan: 4%
- Serbia: 4%
- South Africa: 4%
- Chile: 2%
- Israel: 2%
- Kenya: 2%
- Mexico: 2%
- Pakistan: 2%
- South Korea: 2%
- Switzerland: 2%
- Turkey: 2%
Increased convergence through the ICN

ICN (established in 2001): Fosters global convergence, mostly on the basis of non-binding Recommended Practices, that embody global accepted standards:

- Recommended Practices for Merger Analysis
- Recommended Practices for Merger Notification and Review Procedures
- ICN Investigate Techniques Handbook for Merger Review
- ICN Model Confidentiality Waiver
- **Merger Remedies Guide** (2016)

“Overall, 72% of ICN members responding to the survey indicated that MWG work product has contributed to changes in their merger review regimes”. (ICN MWG comprehensive assessment – 2011)
POLICY DEVELOPMENTS
Study on geographic market definition

- Report by Centre for Competition Policy of University of East Anglia
- Supports Commission's approach to geographic market definition, taken together with its analysis of external competitive constraints
- No fundamental review of Notice on definition of relevant market necessary
- Some technical suggestions for improvement or clarifications
Evaluation of procedural and jurisdictional aspects of EU merger control

- August 2016: publication of evaluation roadmap
- Public consultation on evaluation launched in October 2016.
- Topics covered in public consultation:
  - Explore potential for further simplification
  - Assessment of functioning of current turnover based thresholds and of need for additional deal-size value-based threshold
  - Functioning of referral system
  - Technical aspects of investigative framework
- Currently examining replies to the consultation