EUROPEAN COMMISSION

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Merger enforcement: getting the priorities right

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

EU Competition Law: Current Issues in a Global Context
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Competition

I would like, first, to thank King's College, and in particular its Centre of European Law, for inviting me to participate in this year's conference on *EU Competition Law: Current Issues in a Global Context.* Let me commend you for your long and well proven excellence in teaching and research on EU Law and for your initiative to organise, for a second year in a row, a main conference here in Brussels.

In this address, I would like to develop a topic that I already evoked last month at a lunchtime lecture at King's College: what should be the priorities for a merger enforcer? How should these priorities fit into the overall enforcement practice of a competition authority?

Today, on the basis of data from the last two years (2015-16), I will examine what have actually been the enforcement priorities of the European Commission. I will look at:

- how often the Commission has found that a merger would lead to a significant impediment to effective competition;
- what types of mergers it has opposed most often;
- what theories of harm it has identified on most occasions; and
- what remedial action the Commission has accepted in order to address these competition concerns.

We are in a period of intense restructuring of European and global industry, where the numbers and value of mergers and acquisitions have been increasing year after year, and are now reaching pre-crisis levels. It is therefore a particularly important time to understand how the Commission operates its merger control regime. Transparency on this matter should help companies and advisers planning new deals to anticipate whether they will face serious antitrust scrutiny and, if so, how best to deal with it.

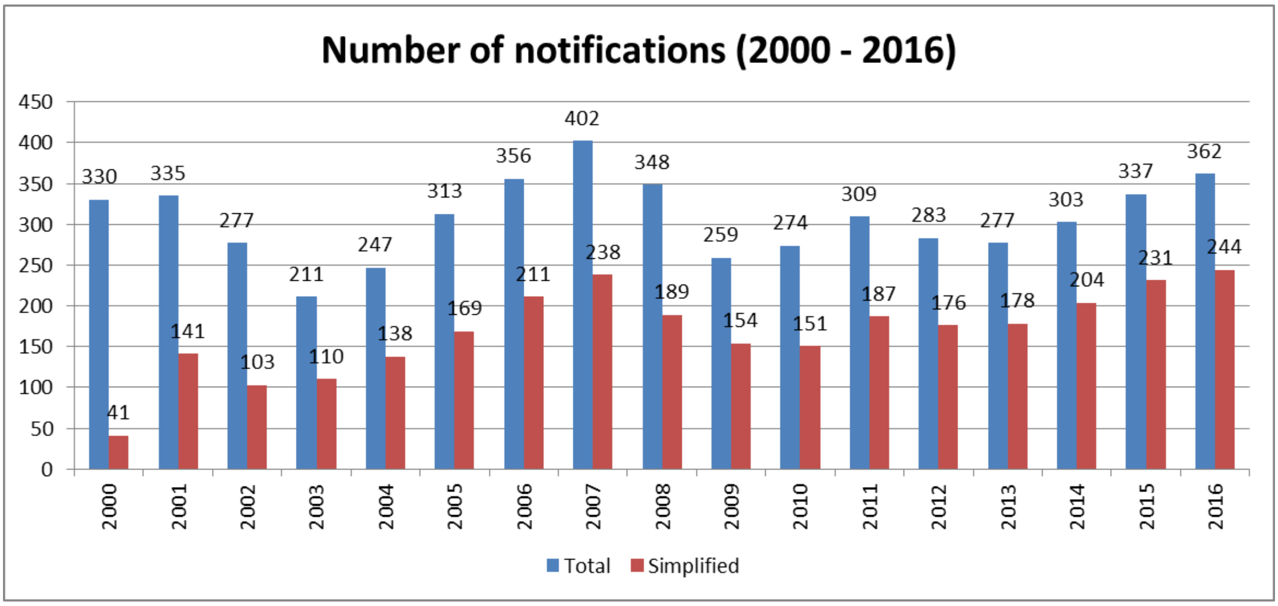
In analysing the actual merger enforcement of the Commission, I will try to dispel some common misunderstandings.

These misunderstandings can arise for two main reasons. Firstly, not all enforcement activities are reported equally. The media tend to follow and report more intensely on those cases that are particularly controversial or innovative, for example, where it can be argued that new approaches or theories of harm are being tested. And once adopted, these are the decisions that are most discussed in conferences and seminars. This is fully understandable, but it means that if we attempt to identify the actual enforcement priorities of the Commission by following media reports, we may get a distorted picture. We could get the impression that the Commission often pursues complex theories, that it is often "at the innovative edge" of enforcement, whereas, in reality, the bulk of our enforcement practice, our "bread and butter", is based on well-established precedents and decisional practice, and is far less controversial than you might expect. In other words, as you will see, the daily work of enforcers is mostly about examining "run of the mill" cases and finding a way to eliminate competition concerns in the most effective and efficient way possible.

Secondly, misunderstandings can arise because there is a general belief that there is no space for prioritisation in enforcing merger control, in particular in regimes like ours based on compulsory notifications and administrative adjudication. There is some truth to this: the Commission does not have prosecutorial discretion. Contrary to a judicial system, like in the US, the Commission cannot decide which cases to pursue or not, but has to take a decision on each notified merger.

However, this does not mean that there is no margin for the Commission to develop an enforcement policy that takes into account the likelihood of harm that different types of mergers could create. This enforcement policy, which is based on jurisprudence, sound economic theory, and practical experience, is embodied in our administrative guidelines. Scrutiny by the Courts of the decisional practice of the Commission sets the boundaries of this administrative enforcement policy and contributes to its evolution over time.

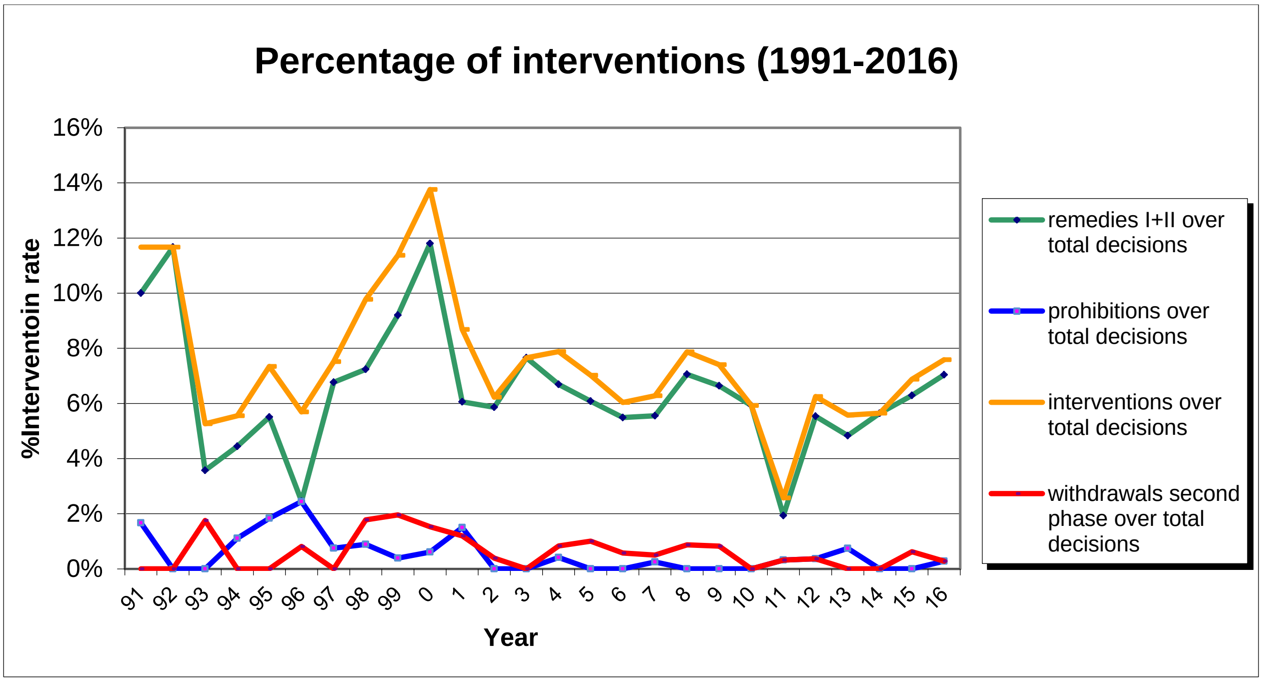
So now, let's examine the actual merger enforcement practice of the Commission. Let's start briefly by having a look at the evolution of notified cases.



In 2015, the Commission received 337 notifications and in 2016, this figure reached 362. This was the second busiest year ever for EU merger control with 30% more cases than in 2013. This upward trend continues into the first months of 2017; if we extrapolate for the full year, then the 400 notifications per year threshold could be breached - as in 2007, just before the crisis started.

Most of these notifications do not raise competition concerns and can be dealt with quickly and easily; in the last two years, the Commission treated close to 70% of all merger notifications under our simplified procedure (without a market investigation). You can see that both the absolute number and the proportion of simplified cases have increased recently, reflecting changes which the Commission introduced into our procedures to allow us to reduce substantially the administrative burden for many businesses and to concentrate resources on the most complex cases,.

More important for our purposes today, however, is the evolution of interventions by the Commission in notified cases. By interventions, we mean all the cases where, due to competition concerns, the initial plan by the merging parties had to be changed.



The Commission intervened in 22 cases in 2015 and in 27 cases in 2016. In the large majority of cases, such intervention takes the form of conditional approval, where the initial merger plan is modified by remedies that resolve the competition concerns. We also count prohibitions and abandonments in the second phase as interventions, although these are much more exceptional occurrences (1 prohibition and 3 abandonments in the previous two years). Exceptionally, in the first few months of 2017, the Commission prohibited two concentrations – London Stock Exchange/Deutsche Börse and Heilderberg/Schwenk/Cemex - but the overall proportion of prohibitions since EU merger control rules came into force in 1990 remains well below 1%.

The overall intervention rate - the ratio between interventions and total decisions adopted - was 7% in 2015 and 8% in 2016. While this rate has slightly increased in recent years, it remains within the 5-8% bandwidth, which has characterised our merger enforcement in the last 15 years.

Let's now zoom in on these intervention cases, and look at why the Commission considered that a competition concern could arise.

The first point to remark is that in all but three of these cases, the merger in question was a horizontal one: a merger between competitors. And in all these horizontal merger cases, the basic theory of harm was a likely increase in prices post-merger due to non-coordinated effects: the elimination of competition constraints between the merging firms, which could also allow non-merging firms to raise prices.

In other words, more than 90% of intervention cases were based on the most straightforward theory of harm in merger analysis: the elimination of direct price competition between close market operators. There may be disagreements on the facts or evidence presented in regard to some specific cases, but there is ample consensus that horizontal mergers, in the absence of efficiencies, are potentially the most damaging for the economy and for consumers. In a period where concentration appears to be increasing in many industries, it makes a lot of sense that these cases are clearly at the focus of merger enforcement by the Commission.

To give just a few examples, the mergers between Ball/Rexam[1] in aluminum cans, Halliburton/Baker Hughes[2] in services to the oil industry, AB InBev/SAB Miller[3] in beer, Merck and Sigma-Aldrich[4] in chemicals or, more recently, London Stock Exchange/Deutsche Börse[5] as regards the clearing of fixed interest rate instruments, would have eliminated direct competition between two main market players, created a de facto monopolist or a strong market leader well ahead of rivals and led to significant price increases to the detriment of consumers. Clear remedial action was necessary in all cases to remove these concerns and, when

[1] Case M.7567 Ball/ Rexam.
[2] Case M.7477 Halliburton/ Baker Hughes.
[3] Case M.7881 AB InBev/ Sabmiller.
[4] Case M.7435 Merck/ Sigma-Aldrich.
[5] M.7995 Deutsche Börse/ London Stock Exchange Group.

the parties proved unable or unwilling to provide such remedial action, the mergers were ultimately blocked or abandoned.

A similar focus emerges if we examine the enforcement activity of the Commission in antitrust: prosecuting and sanctioning price-fixing or market-sharing cartels between competitors - the most damaging collusive practices for the economy and consumers - is a well-established priority for the Commission. In the last five years, the Commission has adopted 58 final decisions, establishing and sanctioning infringements or making commitments binding; 31 of these decisions (53 % of the total) sanction cartel infringements.

Prosecuting cartels and anti-competitive horizontal mergers represents, therefore, the bulk of the antitrust and merger enforcement activity of the Commission. These are not only the most harmful practices for competition and consumers, but also those where the theoretical and empirical grounds for enforcement are strongest. The risk of enforcement errors in these areas is therefore lower, which is also a significant factor to take into account. The picture that emerges from an overall view of the antitrust and merger activity of the Commission is, therefore, of a consistent enforcement policy focused on the most damaging practices, on the basis of well-established legal precedent and decisional practice.

The impact on consumer welfare of Commission enforcement in these two core areas is, indeed, significant. Following well-established OECD evaluation methodologies, the Commission estimates every year the impact of its core enforcement activities. For 2015, customer benefits deriving from cartel enforcement are estimated at a value of between €0.99 billion and €1.49 billion. The figure for merger enforcement is estimated at between €1.08 billion and €2.69 billion[6]. The figures for 2016 are going to be published shortly[7]. But, very likely, the most important impact of this enforcement activity is not on the

[6] DG Competition, Annual Activity Report 2015 available on http://ec.europa.eu/info/publications/annual-activity-report-2015-competition_en
[7] The 2016 Annual Activity Report will be made available soon on http://ec.europa.eu/info/publications

potential harm of investigated activities, but on the harm of activities that never occurred thanks to the strong deterrent impact of clear and determined enforcement activity. And, while this cannot be measured, the harm avoided from potential anti-competitive mergers that never leave the boardroom or dissuaded potential collusive activity, is likely to be more important even than the harm that is actually prevented or sanctioned though enforcement action.

Such clear priorities go beyond Commission enforcement of EU competition law. National authorities in the EU's Member States are also key enforcers of EU antitrust law and consistently prosecute cartels as their main priority. In the first ten years of the functioning of Regulation 1/2003[8], the Commission and national competition authorities in the EU adopted more than 260 decisions to stop cartels throughout the EU's Single Market. This consistent focus on the most potentially damaging competition practices across the European Competition Network is, in my view, one of the most significant developments that results from the major overhaul of the antitrust regime back in 2004.

Moreover, if we look at these issues in a global context, as this conference aims to do, we see little divergence across competition authorities' approaches to cartels and horizontal mergers. Divergences might sometimes arise at the margins, on the way we examine non-horizontal mergers or regarding foreclosure theories more broadly, but there is ample global consensus on the harmful nature of the practices that constitute the bulk of our enforcement activity. I think it is worth keeping in mind these fundamentals when you read, here and there, reports emphasising the different approaches amongst agencies in different parts of the world, very often based on a very narrow and limited assessment of the respective enforcement practices.

Let's now go back to merger interventions. As I explained before, short-term non-coordinated effects on prices was the basic concern in the large majority of cases; 46 out of 49 in the last two years. But we should not forget that the

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[8] Commission staff document: Ten Years of Antitrust Enforcement under Regulation 1/2003, available on http://ec.europa.eu/competition/antitrust/legislation/regulations.html

medium-term effect of a merger, for instance on innovation or entry, can often be much more significant than short-term price effects. Competition authorities, therefore, should also examine these more dynamic effects of mergers. In the last two years, in a number of the mergers assessed, the Commission´s assessment identified other forms of negative impact on competition, in addition to the direct negative impact on prices.

First of all, in at least 5 cases, the Commission raised concerns due to the negative impact that the merger would have on innovation. Competitive dynamics change across industries and, in many of them, innovation is a key component of competition. It is necessary, therefore, for competition authorities to assess the longer-term impact that mergers would have on innovation. Competition agencies, however, do not have a crystal ball. Such an assessment is feasible in some cases, where innovation requires a long and well-paced process, like in the pharmaceuticals or agro-chemical industries, but may not be possible in other cases, where innovation tends to follow more disruptive and less predictable paths.

In recent years, the Commission has identified innovation issues, on top of price effects, in various industries. The majority of cases concerned the pharmaceutical and medical devices industry. In Novartis/GSK[9], Medtronic/Covidien[10] and Pfizer/Hospira[11], for instance, competition concerns arose not only with regard to current products but also with regard to pipeline products: products still in the development phase. But innovation concerns were also identified in other sectors, notably in the GE/Alstom[12] case with regard to gas turbines for power plants, a very concentrated global market with high barriers to entry and very intensive and long Research and Development (R&D) processes. The Commission concluded that the merger would have led to the elimination of a strong innovator and the termination of a major R&D project, with clear harm for consumers. Innovation concerns were also part of the second

[9] Case M.7275 Novartis/ Glaxosmithkline Oncology Business.
[10] Case M.7326 Medtronic/ Covidien.
[11] Case M.7559 Pfizer / Hospira
[12] Case M.7278 General Electric/ Alstom (Thermal Power – Renewable Power & Grid Business).

phase investigation in Halliburton/HughesBaker,[13] a deal eventually abandoned by the parties. More recently, already in 2017, innovation issues have figured in the investigation of the merger of Dow and DuPont[14], two major worldwide agro-chemical players. The investigation concluded that the two merging parties were close competitors on actual products and on the development of pipeline products, as well as at earlier stages of R&D (referred to in the decision as "innovation spaces"). The Commission concluded therefore that the merger would have negatively affected innovation in this industry. The Commission finally approved the merger with the divestiture of a substantial part of DuPont's pesticides business, including its R&D facilities. The inclusion of the R&D facilities was required both to ensure the long-term viability of the divested overlap business and to address the additional innovation competition concerns.

As Commissioner Vestager stated at the time of adoption of the Dow/DuPont decision, the Commission's intervention in this case aimed to protect "innovation for safer and better products in the future". The Court has also recognised the importance of assessing the impact of mergers on innovation and confirmed the Commission's approach to carrying out this assessment in its judgement in the Deutsche Börse/New York Stock Exchange case.[15] Other jurisdictions, such as the US[16], also examine these issues regularly. And the matter is also clearly relevant from a macroeconomic policy perspective: fostering innovation and productivity growth is one of the most pressing issues today within the EU. You can therefore expect that the Commission will continue to pursue these issues in the context of merger assessment.

Another area which the Commission has identified as a form of negative impact of a merger on competition is coordinated effects. In two cases[17] both in mobile telecoms markets, the Commission established that the merger would create an

[13] Case M.7477 Halliburton/ Baker Hughes.
[14] Case M.7932 Dow/ DuPont
[15] Judgment of the General Court of 9 March 2015 in Case T‑175/12, *Deutsche Börse AG, v Commission*, paragraphs 157-178.
[16] See, for instance, Applied Materials/Tokyo Electron (2015) or Halliburton/Baker Hughes (2016).
[17] Cases M.7758 Hutchinson 3G Italy / Wind / JV and M.7419 TeliaSonera/ Telenor/JV.

increased likelihood of market coordination given the expected post-merger concentrated and symmetrical market structures and market transparency, and given evidence of previous attempts at market coordination. With regard to AB InBev/Sab Miller[18], the third case concerned, enhanced price leadership structures plus increased opportunities to discipline actors across markets were some of the relevant factors which led to concerns of coordinated effects. Back in 2002, the Court established a high bar with regard to proving coordinated effects,[19] which have been identified in few cases since. However, this recent practice shows that the Commission is determined, when evidence supports it, to identify these types of concerns.

Finally, in the last two years (2015-16), the Commission identified concerns of a non-horizontal nature in five merger cases; in three of them exclusively and in two, in addition to horizontal issues[20]. In these cases, consumer harm does not result from the elimination of direct competition within the same market, but rather from anti-competitive foreclosure practices. In other words, consumer harm results from the risk that the merged entity deprives competitors from access to essential inputs or to consumers, or otherwise attempts to leverage its market power into another market. As a result, the merger ends up affecting negatively the competition parameters in the markets at hand.

A good example of these non-horizontal issues can be found in the Microsoft/LinkedIn[21] decision, where the Commission found that the transaction as initially notified could have significantly enhanced LinkedIn's subscriber and active user base by pre-installing the LinkedIn App on all Windows PCs and by denying competing professional social networks access to the flagship Microsoft Office products. The Commission cleared the transaction subject to two commitments from Microsoft. First, to ensure that Windows PC manufacturers

[18] Case M.7881 AB InBev / Sabmiller.
[19] Judgment of the Court of First Instance [General Court] of 6 June 2002 in Case T-342/99, *Airtours v Commission.*
[20] Cases M.8124 Microsoft/LinkedIn; M.7822 Dentsply/ Sirona, M. 7194 Liberty Global/ Corelio/ W&W/ De Vijver Media JV, M.7724 ASL/ Arianespace, M.7873 Worldline/ Equens/Paysquare.
[21] Case M.8124 Microsoft/ LinkedIn.

and distributors would be free to not pre-install a LinkedIn app, and that users would be able to remove the app from their Windows PCs. And second, that competing professional social networks continue to have access to the key application programming interfaces of the Microsoft Office suite (and thus able to at least maintain the current level of interoperability with these products).

While the Commission has analysed non-horizontal issues in numerous cases, the fact that it has concluded that concerns arise in only a handful of them seems consistent with the well-established jurisprudence of the Court in this area.[22] While the Court clearly concluded that non-horizontal mergers do not benefit from any presumption of legality, it also indicated that they are less likely to significantly impede effective competition than horizontal mergers, and are more prone to efficiencies. In view of this, when the negative effect on competition would not arise directly, as in horizontal mergers, but would need to be proved by establishing chains of cause and effect "dimly discernible in time", particularly convincing evidence is required.

Finally, there is one last issue to examine with regard to the types of concerns raised by the Commission in recent years when assessing mergers. Sometimes people wonder in how many cases the merger would lead not only to a significant impact of effective competition, but also to the creation or strengthening of a dominant position. Actually, this issue has lost some relevance since the 2004 reform of the Merger Regulation, in which introduced an effects-based test. In this context, once a significant impact on effective competition is established, often on the basis of evidence of short-term unilateral effects on price, it is not always necessary in practice to discuss whether the legal criteria for creation or strengthening of dominance are also met. Final decisions, therefore, do not always make this distinction.

The introduction of the Significant Impediment to Effective Competition - SIEC - test in 2004 was also aimed at eliminating any potential gap in the scope of the

[22] See, for instance, the judgment of the Court of First Instance [General Court] of 14 December 2005 in case T-210/01, *General Electric Company v Commission*, paragraph 61.

Merger Regulation, in particular by covering those mergers in oligopolistic markets where competition would be affected even if the creation or strengthening of dominance might not be established. These situations (sometimes referred to as "gap cases") would normally arise in mergers between sufficiently close competitors in concentrated markets with high barriers to entry, where non-coordinated effects could nevertheless arise, but not leading to the creation of a market leader. It has also become apparent since that "gap cases" could also have arisen in a non-horizontal context. Indeed, to establish concerns of a vertical or conglomerate nature, it is necessary that the merged entity holds substantial market power in one of the markets affected and, therefore, has the ability to foreclose competitors from accessing it: for example, it controls an essential input and forecloses access to it. However, anti-competitive effects, such as higher prices, could well arise from such practices in markets (for example, the downstream market) where the merger would not create or strengthen a dominant position.

In view of the above, one could wonder how many "gap cases" are actually caught nowadays by the SIEC test. This is not an easy question to answer because, as I explained before, the Commission does not always make this distinction explicitly in its decisions. However, in our attempt to answer it, we have examined all the intervention decisions of the Commission in the last two years to identify those where a "gap case" is described. While not fully exempt of some subjectivity, this exercise may be useful to understand the overall relevance of these situations.

In 2015, of 22 interventions, six "gap cases" have been identified. In 2016, of 27 interventions, 10 could be considered as "gap cases" (these include also decisions where a "gap" issue would only arise in some of the markets where concerns are identified). Overall, therefore, such situations arise in roughly a third of the intervention cases of the last two years. The main examples are the Commission decisions with regard to mobile telecommunications mergers, where the Commission established that the reduction from 4 to 3 mobile network operators in some markets would have likely led to a negative impact on prices. Similar issues have arisen in other market configurations, for instance with regard to office supplies, in Staples/Office Depot[23] or to chemicals, in Merck/Sigma-Aldrich[24].

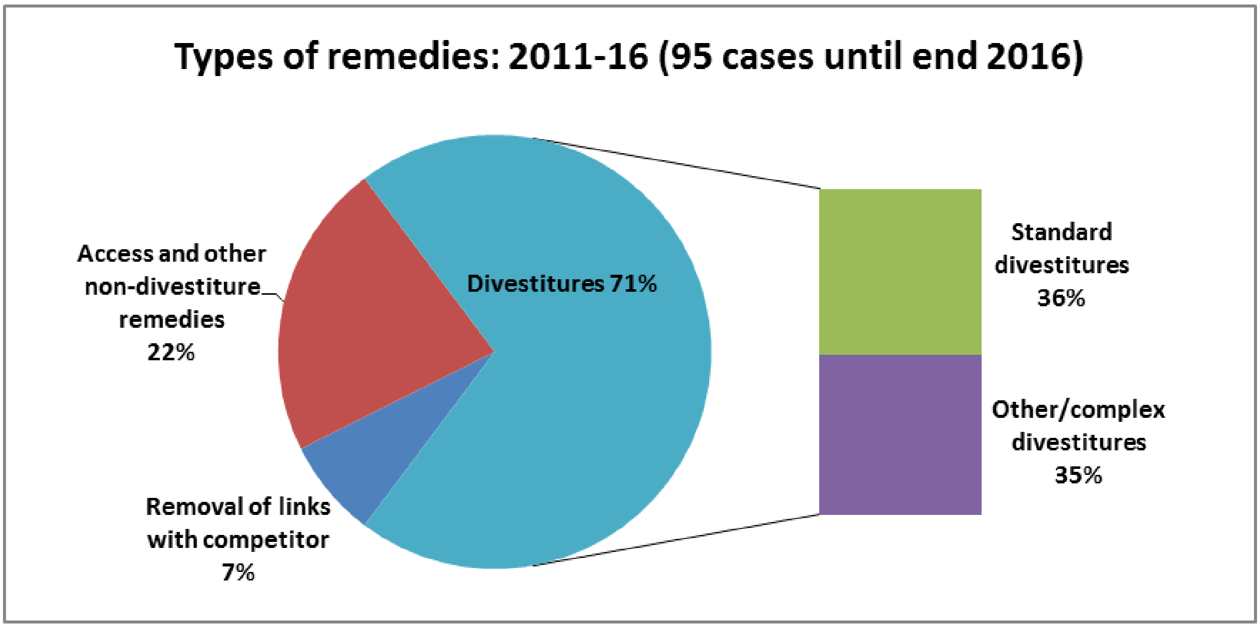
The fact that around a third of merger enforcement involves "gap" issues shows how necessary the 2004 reform of the Merger Regulation was in order to unambiguously align the legal framework with market reality. Indeed, the evidence gathered in these investigations proves clearly that in concentrated oligopolistic markets, mergers can lead to price increases even in the absence of dominance. This concern was already well established in the analysis of other leading competition authorities worldwide and by economic theory, and is supported by empirical data resulting from ex post analysis in different jurisdictions.

Some claim that the 2004 changes have led to more aggressive enforcement by the Commission. I disagree. The move to a more effects-based analysis plays in both directions. As we have seen, it may allow the Commission to cover "gap cases", but it has also allowed it to approve mergers based on lack of closeness or on entry and dynamic considerations. The examination of overall intervention rates, which I presented at the beginning, confirms this: 2004 did not trigger a trend of rising intervention rates. On the contrary, there seems to be stability, with intervention rates fluctuating post-2004 within a fairly narrow band.

Examining the enforcement practice of the Commission on the basis of the types of concerns identified, as we have been discussing until now, only gives a partial perspective. In the area of mergers, as we have seen, prohibitions and abandonments are very rare. Most of the intervention cases are resolved with remedies. Examining the solutions that the Commission favours is as relevant as focusing on the concerns that it raises.

[23] Case M.7555 Staples / Office Depot.
[24] Case M.7435 Merck / Sigma-Aldrich.

On this front, the Commission has been very consistent over time. It has always expressed a clear preference for structural remedies. This is easy to explain. Mergers bring about permanent structural changes to the market. Remedies should therefore ideally also provide for a permanent structural solution rather than a (temporary) behavioural one. A merger enforcer does not have the ambition to become a market regulator; it has a preference for a punctual intervention that removes the competition concerns once and for all, and ensures competitive outcomes for the market . The Merger Remedies Notice clearly expresses this preference.



In its enforcement, the Commission has been very consistent through this policy preference. In the last 5 years (2011-16) the Commission approved 95 cases with remedies. In 71% of these cases, the remedy was a divestiture. Among the remaining cases, 7% were solved with removal of links with competitors. This is the type remedy in, for instance, some maritime transport cases, where exiting a consortium may be sufficient to remove the concerns raised by the merger. The remaining 22% cases mostly involved access remedies, usually to remove foreclosure concerns, but also, exceptionally, to facilitate market entry and eliminate horizontal issues, for instance by allowing access to slots in congested airports in aviation cases.

If we zoom in on the divestitures, more than half of them concern the selling of an existing stand-alone business, which is well established as the best way to minimise the risks inherent in any imposed divestiture. In view of this, in some cases, the Commission requires divestitures which go well beyond the overlapping markets in order to ensure that a viable business can operate post-merger.

Unfortunately, companies are not always structured along antitrust markets and, often, it is not possible to divest such stand-alone entities. These most complex divestitures, usually involving carve-outs of existing businesses, represent 35% of all the imposed remedies. In view of the risks involved in these situations, the Commission will usually require a number of safeguards, in regard to the scope of the remedy, the buyer and/or the divestiture process. This is an area where the Commission is deploying increased efforts and where important progress in terms of viability and competitiveness of the remedies accepted is well visible. This does not mean, however, that any competition concern can be remedied. In cases where the risks involved in the divestiture appear to be too high, and where the viability and competitiveness of the remedy cannot be properly guaranteed, the operation will not be able to proceed.

Finally, in the area of mergers, on top of the substantive decisions that we have been assessing until now, the Commission sometimes also adopts decisions to sanction infringements committed by parties or, exceptionally, third parties, in the course of its procedures. The decision announced yesterday to impose a 110 million euro fine on Facebook[25] for providing misleading information in the course of the investigation into its acquisition of WhatsApp is a good example of this. Commissioner Vestager also announced yesterday that the Commission had sent a Statement of Objections to Altice[26] for "gun-jumping" – implementing a deal before receiving Commission approval.

[25] Case M.8228 Facebook/WhatsApp (Art. 14.1 procedure).
[26] Case M.7993 Altice/PT Portugal (Art. 14.2 procedure).

These are two examples of how the Commission will take action to ensure respect of the rules that govern our procedures. The Commission can only conduct in-depth analysis of the impact of mergers within the very short deadlines prescribed by the Merger Regulation, if the companies involved submit complete, true and timely information. And the Commission cannot ensure that competition problems will not materialise if the parties do not respect the standstill obligation of the Regulation and do not implement the merger before they have received the final approval from the Commission. Investigating and sanctioning the provision of misleading information and gun-jumping practices are a pre-requisite to effective and timely merger control, in the interest of companies and consumers alike. As the Commissioner also indicated yesterday, the Commission is currently investigating other instances of possible violations of procedural obligations.

To conclude, I hope that this overview of the Commission enforcement practice of recent times has given you a complete and realistic overview of the priorities of the Commission. As we have seen, in the area of mergers, while not overlooking any type of consumer harm, the core of our enforcement practice is focussed on avoiding negative effects on prices deriving from the elimination of direct competition. The Commission makes substantial efforts to ensure that mergers can be approved with clear-cut and effective structural remedies. This may look less intellectually stimulating, more boring even, than what a more superficial reading of media reports on our activity may suggest. But focusing relentlessly on our core tasks and striving to perform these better and more efficiently every day, is the best service we can give to the European citizens and to ensure that markets really deliver for them.

Thank you very much for your attention.