EUROPEAN COMMISSION

Cecilio Madero Villarejo

Deputy Director-General Mergers
Directorate-General for Competition

Recent Developments in Merger Control

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

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Competition

1 Introduction

Ladies and Gentlemen:

It is a pleasure for me to have the opportunity to take a step back together with all of you from the day-to-day business. I will look back at recent development in European merger control and give an outlook at what can be expected going forward.

And it is indeed a good time to take stock: As of December last year the Juncker-Commission passed the baton on to the von der Leyen-Commission. At first sight, there does not appear to be much change for the Directorate General for Competition since Margrethe Vestager will remain responsible for the Competition portfolio as Executive Vice-President. Nevertheless, a new Commission comes with new ideas and creates new dynamics. President Ursula von der Leyen already coined the new Commission as a *"geopolitical Commission committed to sustainable policies".* In addition, the end of the term of the Juncker Commission is a good opportunity for me to pay public tribute of respect and appreciation for President Jean-Claude Juncker and his achievements during the last five years.

2 Merger Control in Numbers

One obvious trend in recent years was a sharp increase in transactions. During the last years, we received 5% to 10% more notifications each year than in the previous one until we hit a new record high in 2018 with 414 notifications. Even though DG Competition received 382 notifications in 2019 and thus slightly less than in 2018, 2019 still marks the second highest number of notifications in the last twelve years and the third highest number of notifications since the establishment of merger control on an European level – surpassed only by the number of notifications in 2018 and in 2007.

A figure that rose even more than the number of notifications is the number of simplified cases. In particular since 2014, when the Commission introduced a package of simpler and business-friendly procedural rules, the percentage of simplified cases jumped from around 60% to almost 70% and continued to increase steadily to about 75% today.

While simplified cases that are cleared without a detailed investigation form one end of the broad spectrum of merger cases the Commission is dealing with, the opposite end is made up of cases in which the Commission considers it necessary to intervene. The overall rate of intervention (counting remedies in Phase-I and Phase-II cases, withdrawals in Phase-II and prohibitions) has remained constant during the last years, fluctuating in a band between 5% and 8%.

Measured in such intervention rate, the Commission has thus neither intervened in more nor in less cases compared with the average interventions in previous years. Nevertheless, the year 2019 saw three prohibitions, which is a relatively unusual number in a twelve month period. The reasons why a case has been prohibited instead of clearing it conditionally are by their very nature very case-specific.

Nevertheless, the three concentrations that had been prohibited in 2019 raise questions that also surface in other recent cases and will continue to surface in debates to come. I will therefore briefly set-out the situation the Commission faced in these three cases.

3 The three prohibitions in 2019

On the 6th of February, for the very first time, the Commission had to announce the prohibition of two merger cases on the same day. That did not constitute a trend, however. While the circumstances that led to the three prohibitions in 2019 were very different, there can be some common lessons learned from these cases.

3.1 Wieland/ Aurubis

In Wieland/ Aurubis, the Commission was concerned that the acquisition would have eliminated the competitive pressure on the industry leader Wieland from Aurubis, one of its most important challengers and close competitor in the market for rolled copper products. Together, the parties would have had a combined market share of more than 50% in value while only one other competitor would have had a market share of more than 20%, making the transaction basically a 3-to-2 in the market for rolled copper products.

In addition, Wieland would have gained sole control over Schwermetall, which currently has operational independence from its two parent companies Wieland and Aurubis. The Joint Venture manufactures pre-rolled strips, which are used as an input in the manufacturing of rolled copper products. Following the merger, Wieland could have thus raised the production costs of its remaining competitors which would have further strengthened the dominant position of the merged entity in rolled copper products.

The remedies proposed by the parties were not sufficient to fully address these competition concerns. While Wieland offered to divest two plants of Aurubis that manufacture rolled copper, it was not willing to address the concerns stemming from its acquisition of control over Schwermetall. In addition to not addressing these concerns relating to pre-rolled strips, Wieland was also unable to show that a buyer that loses access to pre-rolled strips from Schwermetall would have been able to recreate the competitive pressure from the two plants proposed for divestiture.

3.2 Siemens/ Alstom

The proposed concentration between Siemens and Alstom would have brought together the two largest suppliers of various types of railway and metro signalling systems as well as of trains and rail wagons in Europe. While the activities of the parties overlapped in several areas, the Commission found serious concerns only with regard to certain mainline and urban signalling markets as well as for very high-speed rolling stock, which are trains operating at speeds of 300 km per hour or more.

The merged entity would have become the clear market leader in a number of mainline and urban signalling markets identified by the Commission, removing strong competition between the parties. For very-high speed trains the transaction would even have created a dominant player. This conclusion was based on either an EEA-wide market for very high-speed trains or a worldwide market except for South Korea, Japan and China, which are not open to competition.

Contrary to what is still alleged today, in both areas, the Commission carefully considered the possible future global competition from Chinese suppliers outside their home market. The answer was clear: today as well as in the foreseeable future, meaning in this case a period of five to ten years, no competitive constraint is to be expected. For signalling, Chinese producers have not yet even tried to participate in a single tender in Europe. The market for very high-speed trains, on the other hand, has very high barriers to entry. In addition to several safety rules which vary between national states and world regions, a positive track record is an essential criterion. However, the Chinese producer of very high-speed trains has not yet successfully installed a single very high-speed train outside of China. Therefore, its competitive constrains on Siemens and Alstom will likely stay limited for many years to come.

The remedies proposed by the parties did not fully address these competition concerns on a lasting basis. For signalling systems, the parties proposed to divest a mix of assets from Siemens and from Alstom that was not a standalone and future proof business. In addition, for the concerns relating to very high-speed trains, the parties offered alternatively a train that was not capable of running at very high speeds or only a license of Siemens' very high speed technology that would have been subject to multiple restrictions and carveouts so that the buyer would not have been able to fully compete with the merged entity.

3.3 Tata Steel/ ThyssenKrupp/ JV

The third prohibition concerned the creation of a joint venture between Tata Steel and ThyssenKrupp that would have combined their flat carbon steel and electrical steel activities in the EEA. The Commission found that such concentration would have created a market leader for metallic coated and laminated steel products for packaging in general and for tinplate in particular and would have eliminated an important competitor in automotive hot dip galvanised steel products.

During its investigation, the Commission carefully investigated the role of imports. However, it concluded that customers have high qualitative requirements and short delivery times for these special steel types so that imports would not have been sufficient to ensure effective competition following the concentration.

Also in this case, the remedies offered by the parties would not have fully addressed these concerns. In metallic coated and laminated steel products for packaging, the proposed remedy would have only covered a small part of the overlap. In automotive hot dip galvanised steel products, the proposed divestment did not include sufficient finishing assets in the relevant geographic areas. Moreover, for both markets, the proposal lacked assets for the necessary steel input.

4 Lessons learned from these cases

Looking back at these prohibitions in 2019, you could ask whether a prohibition was inevitable in each case. In my view, it was not. One needs to keep in mind that it is ultimately upon the parties to propose remedies that fully address the competition concerns. The Commission can only review the proposals submitted by the parties but is not in a position to impose a solution it deems adequate.

In all three cases, the Commission was convinced that the proposals did not meet the required threshold of fully addressing its concerns. In each of these cases, this conclusion was shared by a majority of the market participants that had responded to the respective questionnaire from the Commission. But this outcome would not have been inevitable.

There might be transactions that are better left in the drawer and that – at least from a competitive perspective – are not capable of a suitable remedy. This can be the case for companies active only in one, already very concentrated market that acquire their main competitor that is also only active in this market. In such a situation it seems difficult to imagine a remedy that would fully address the competition concerns short of abandoning the transaction.

However, this was not the situation at hand in these three cases. Siemens and Alstom have very diversified portfolios and while their activities overlapped in many markets, the number of markets in which the Commission found concerns have been rather limited. In Wieland/ Aurubis, the remedy proposal completely ignored the concerns relating to Schwermetall. In Tata Steel/ ThyssenKrupp, the parties were also rather unwilling than unable to fully address the competition concerns.

However, neither of these concerns should have surprised the respective parties. In some of these cases, more time might have even helped to find a remedy that could have fully addressed the competition concerns. Therefore, as a first lessons learned, I would like to incite parties to start thinking about potential remedies early and in particular to engage with the Commission about such possible solutions as early as possible. The European Merger Regulation and its Implementing Regulation set out strict timelines for merger cases. With today's integrated businesses, carving-out the activities relating to certain markets can be a complex and difficult exercise – for the parties to plan but also for the Commission to evaluate. Therefore, parties should start this process as early as possible.

A second important point relates to the competitive constraint from competitors outside the EEA. Over the last years, questions concerning the competitive pressure from Asian or specifically Chinese producers have become more and more relevant. While the Commission fully acknowledges that these producers might play an important role in the market dynamics and that in certain markets competitive pressure from such players might counteract potential effects from a concentration, such finding has to be based on solid evidence. Most often, however, the respective assertions by the notifying parties are not.

5 Review of Market Definition

Apart from looking at the these lessons learned, the three prohibitions in 2019 – and in particular the one in Siemens/ Alstom – fuelled a public debate about merger control that touches upon many additional aspects. Keywords that surfaced frequently included "Ministererlaubnis", "geographic market definition", "European champions" or "potential competition". Some of these topics are more for the European legislator than for DG Competition. As regards the former, let me cite the then-Director General Johannes Laitenberger from February 2019: *"I am not in a position to prejudge a democratically legitimate legislative process".*

I would, however, like to address the issue of market definitions. In the three prohibitions, DG Competition has thoroughly investigated the relevant markets. The decisions and the market definitions used therein diligently reflect the market realities. The Commission investigated these carefully by sending questionnaire to market participants and by requesting additional information. As Commissioner Vestager recently put it: *"Defining markets isn't like agreeing the border between two countries, by drawing a line on a map. It's more like charting a coastline. The shape is already there – our job is just to measure it as accurately as we can. And nothing we do will change the shape of that coastline itself."*

I am convinced that these decisions correctly depict the actual market structures.

However, absent from these individual cases, we have to be mindful that markets and their conditions are evolving. The current *"Commission notice on the definition of the Relevant Market for the purposes of Community competition law"* is more than 22 years old and dates from 1997. Therefore, it is indeed time for us to review the notice. As our Vice-President Vestager said in December 2019 when she announced this review:

“We want to be sure that the guidance [the notice] gives is accurate and up to date, and sets out a clear and consistent approach to both antitrust and merger cases across different industries, in a way that’s easily accessible”.

I ask you all to try remembering 1997. I did a bit of research myself. The domain “facebook.com” came online in March 1997. The domain name “google.com” had been registered in September 1997 as successor to a search engine called “BackRub”. A company named Netflix was established in 1997 and the first commercial DVDs had just been sold.

A lot has happened since then. I mean – really a LOT. This is not to say that our market definitions have been static since 1997. As Margrethe Vestager pointed out herself, the term “market definition” might give the wrong impression that the competition authority actually makes a choice how to define the market. This is far from the truth. Instead, we are looking into the actual competitive structures and try to anwer the question *“Can customers turn to someone else if prices go up, quality down or innovation stops?”*

However, as my previous examples of what happened in 1997 show, the current notice comes from a time when digital markets played hardly any role at all. Modern ways to communicate and transfer data have not only created new markets and entire industries but also revolutionized traditional industries like agriculture. It is thus a good time to take stock and review whether these changes require amending the notice on market definition.

In her previously mentioned speech, Vice-President Vestager referred for example to the assessment of constraints from outside the market that might still have an impact on competition inside a given market. She mentioned the assessment of imports in the Tata Steel/ ThyssenKrupp case – even though the Commission had rejected a sizable impact of such imports for the reasons I set out before.

Another area we might want to look at are the way digital services are provided. Very often, digital companies do provide several different services. While these services might not be interchangeable and thus belong to different product markets, they are all designed to work well together in an overall ecosystem that makes it more difficult to switch to another provider of one or several of these services.

6 Challenges by Digitalization

This last point already shows another trend that is likely to continue in the following years. Even outside of questions of market definition the digital economy will continue to pose challenges for the enforcement of competition rules. The good thing about this is that maybe for the first time we experience a truly global debate. Competition authorities around the world are faced with the same challenges and – mostly – the same digital players. This has resulted in a rich debate with an immense variety of contributions from the Commission's Special Advisers, the Furman Report, the ACCC report and many others, as well as other related initiatives such as the FTC hearings and the states' Attorney General investigations.

For merger control, I see at least two important questions in this area. One relates to the role of data and the other to what has been named "killer acquisitions".

As regards data, the Commission has progressively developed an approach to assess the role of data in merger cases. When reviewing Apple/ Shazam, the Commission used the so-called "4 Vs" for comparing one set of data against another set of data: Variety, Velocity, Volume and Value. With each case, we will continue to fine-tune this approach further.

As regards "killer acquisitions", meaning the acquisition of a company with the only aim to shut it down while picking up its technology and key staff, the prospect of such acquisitions occurring is indeed troubling from a competition point of view. The known examples of these acquisitions raise, however, complex questions that require further in-depth review. Therefore, it is still too early to speculate whether and how the Commission can or should react to such concentrations. And in any case, it pertains to Vice-President Vestager to be precise in this respect *"le moment venu".*

With this, I would like to close my hopefully short speech not without thanking you for your kind attention!