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# Recent developments in EU merger control

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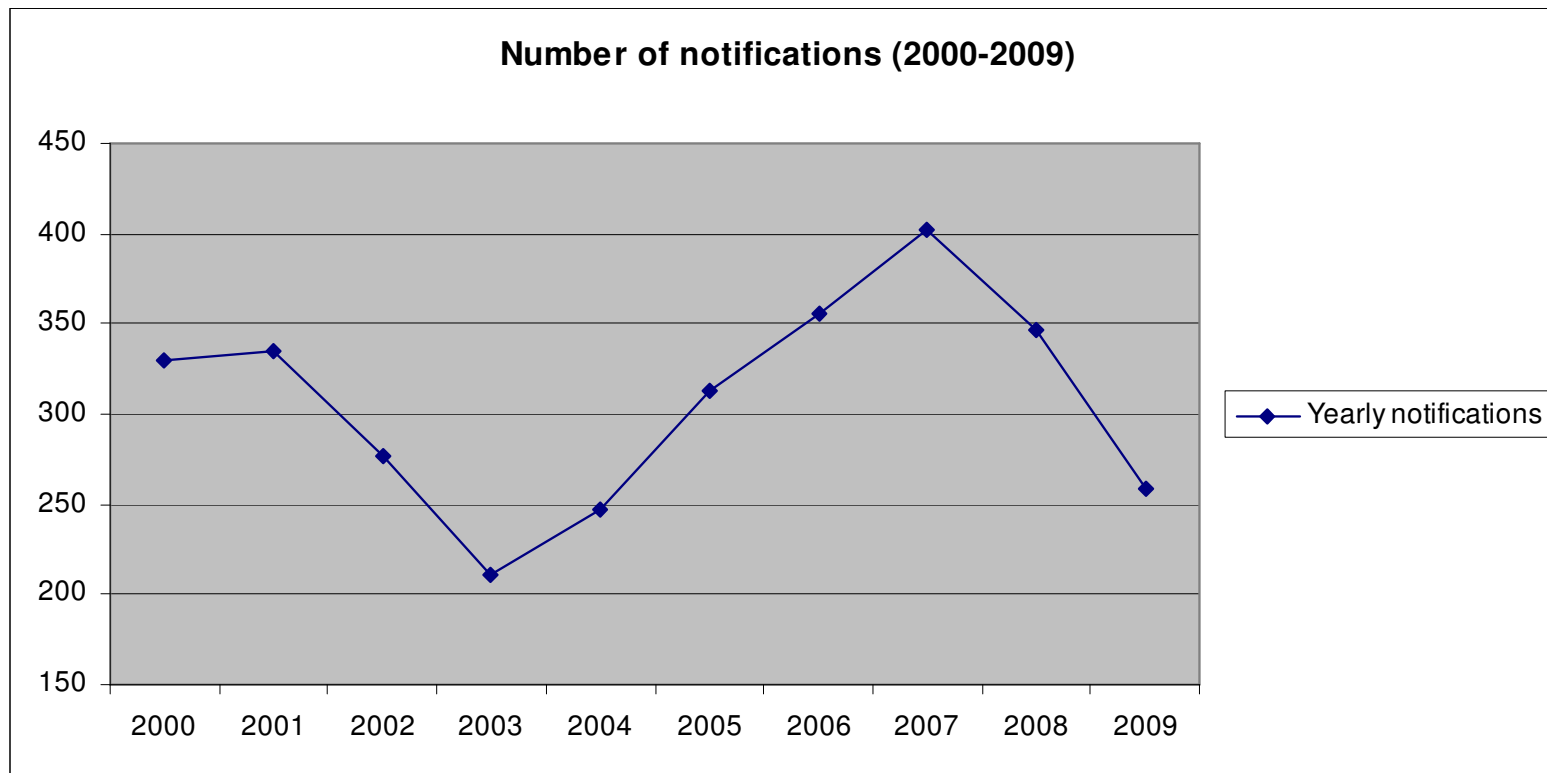


## Outline

- Overview of recent merger activities
  - Evolution of intervention rate
  - Significant cases
- Merger Control and Economic Crisis
- Types of issues recently investigated
  - Horizontal effects
  - Non horizontal effects
- Recent Developments
  - Remedies
  - Procedure
- Conclusions



## Overview of merger activities Merger Notifications





## Merger Control and the Economic Crisis

- Reduction in the number of cases but not in their complexity
  - Crisis has not affected all sectors (e.g. continuity in energy & pharma vs worsening in air transport sector) and companies equally
  - Changes in the type of concentrations and underlying rationale (less financial investment-driven / more industrial consolidation; less expansion-driven / more defensive transactions)
- EU merger control instruments allow for appropriate application in circumstances of economic crisis, whilst ensuring effectiveness of competition policy
  - Generally, economic context can be taken into account to a sufficient extent: *Microsoft/Yahoo, KLM/Martinair*
  - However, uncertainty and instability in some markets can pose challenges in terms of predictability of future market developments & assessment of counterfactual
  - The specific case of the banking sector: rescue mergers
  - Failing firm defence has not played an important role



## Overview of merger activities: significant cases in 2008/2009/2010

### Art. 8(2) (conditions & obligations)

- M.5440 LUFTHANSA / AUSTRIAN AIRLINES
- M.5335 LUFTHANSA / SN AIRLHOLDING
- M.5153 ARSENAL / DSP
- M.5046 FRIESLAND / CAMPINA
- M.4919 STATOILHYDRO / CONOCOPHILLIPS
- M.4980 ABF / GBI BUSINESS
- M.4513 ARJOWIGGINS / M-REAL ZANDERS REFLEX
- M.4726 THOMSON / REUTERS

### Art. 8(1)

- M.5529 ORACLE / SUN
- M.5141 KLM / MARTINAIR
- M.4874 ITEMA HOLDING / BARCOVISION DIVISION
- M.4942 NOKIA/NAVTEQ
- M.4854 TOMTOM/TELE ATLAS
- M.4956 STX / AKER YARDS
- M.4731 GOOGLE / DOUBLECLICK
- M.4747 IBM / TELELOGIC
- M.4734 INEOS / KERLING
- M.4781 NORDDEUTSCHE AFFINERIE / CUMERIO

### Abandonments

- M.5454 DSV / VESTERHAVET / DFDS
- M.5262 BONNIER / SCHIBSTED / RETRIEVER
- M.4799 OMV / MOL
- M.4985 BHP BILLITON / RIO TINTO
- M.4989 ALO / MX

### Art. 6(2) (conditions & obligations)

- M.5650 FRANCE TELECOM / DEUTSCHE TELEKOM
- M.5721 OTTO/ PRIMONDO
- M.5664 BILFINGER BERGER/MCE
- M.5661 ABBOTT/SOLVAY PHARMA
- M.5644 KRAFT/CADBURY
- M.5611 AGILENT/VARIAN
- M.5599 AMCOR/ALCAN
- M.5597 TOWERS PERRIN/WATTSON WYATT
- M.5579 TLP/ERMEWA
- M.5549 EDF / SEGEBEL
- M.5421 PANASONIC / SANYO
- M.5496 VATTENFALL / NUON
- M.5476 PFIZER / WYETH
- M.5467 RWE / ESSENT
- M.5152 POSTEN / POST DANMARK
- M.5406 IPIC / MAN FERROSTAAL AG

### Art. 6(2) (cont.)

- M.5355 BASF/CIBA
- M.5253 SANOFI-AVENTIS/ZENTIVA
- M.5364 IBERIA/VUELING/CLICKAIR
- M.5224 EDF / BRITISH ENERGY
- M.5295 TEVA / BARR
- M.5384 BNP PARIBAS / FORTIS
- M.5096 RCA / MAV CARGO
- M.5005 GALP ENERGIA / EXXONMOBIL IBERIA
- M.5232 WPP / TNS
- M.5180 MANITOWOC / ENODIS
- M.5114 PERNOD RICARD / V & S
- M.5190 NORDIC CAPITAL / CONVATEC
- M.5020 LESAFFRE / GBI UK
- M.4835 HEXION / HUNTSMAN
- M.5086 BAT / SKANDINAVISK TOBAKSKOMPAGNI
- M.5121 NEWS CORP / PREMIERE
- M.5047 REWE / ADEG
- M.5075 VIENNA INSURANCE GROUP / EBV
- M.5009 RANDSTAD / VEDIOR
- M.4961 COOKSON / FOSECO
- M.4898 SAINT-GOBAIN / MAXIT
- M.4963 REXEL / HAGEMEYER



## Types of issues recently investigated : horizontal effects (I)

- Vast majority of thoroughly investigated cases concerns **horizontal issues**
- **Classical non-coordinated effects** (dominance cases): e.g. Iberia/Vueling/Clickair, Lufthansa/SN Airholding, Lufthansa/Austrian Airlines, Friesland/Campina, Vattenfall/Nuon & RWE/Essent, Teva/Barr, Sanofi-Aventis/Zentiva, Pfizer/Wyeth
- Oracle/Sun:
  - Horizontal overlap in the database market led by Oracle and Sun-owned MySQL product could be regarded as an important competitive force
  - The transaction was cleared after careful consideration of new elements in Phase II, inter alia:
    - MySQL does not compete with Oracle in large parts of high-end segment
    - Competitive constraint of other players
    - Oracle unlikely to have ability and incentives to degrade or eliminate MySQL, also in view of its public pledges and contractual offers
    - In the medium term possible replacement by open source Postgres and/or fork of MySQL
- Microsoft/Yahoo:
  - In principle, 3-to-2 merger in the critical sector of search advertising
  - Comprehensive analysis including advertisers, publishers and users
  - Market investigation did not reveal any concerns.



## Types of issues recently investigated : horizontal effects (II)

- **Non-coordinated effects in oligopolistic markets** (“gap” cases): e.g. EDF / Segebel
  - Acquisition by EDF of the second largest electricity operator in Belgium (Segebel) after the incumbent (GDF Suez Electrabel)
  - Removal of EDF as a potential significant entrant: reduced incentives of EDF to continue its plans to build additional electricity generation capacity in Belgium
  - Remedy: divest assets related to planned power station projects (immediately / in case EDF were not to invest by a set date)
- **Coordinated effects**: e.g. ABF/GBI
  - Referred to Commission by Spain, Portugal & France under Article 22 ECMR
  - 3 to 2 merger / Mature markets / Homogeneous products / Market transparency / High barriers



## Types of issues recently investigated: Non-horizontal effects

- Less common **non-horizontal issues**
  - **Vertical issues** (in the context of horizontal merger): RWE/Essent
    - Overlaps in electricity and natural gas markets in NL and DE
    - Apart from raising horizontal concerns in the German wholesale electricity and gas markets, the transaction also gave rise to a vertical relationship between the upstream market for gas short-distance wholesale supply and the downstream market for gas retail sales in RWE's market area, resulting in customer foreclosure
    - Remedy addressing both horizontal and vertical concerns: divestiture of Essent's controlling shareholding in Stadtwerke Bremen AG
  - **Minority shareholdings**: IPIC/Man Ferrostaal
    - IPIC via AMI: leading melamine producer
    - MAN Ferrostaal: 30% shareholding in company active in high-pressure melamine production technology (key input); minority shareholding may give decisive influence on decision-making for technology licensing
    - Concerns: Foreclosure of non-vertically integrated melamine producers in relation to his technology
    - Remedy: full divestiture of shareholding



## Recent developments: Remedies (I)

- New Remedies Notice: rationale
  - Commission's Remedies Study / ECJ case law
- Remedies & Economic Crisis
  - No change in design: divestitures remain “benchmark”
  - Priority: viability (clearer criteria for scope of divestiture; safeguards to ensure viability and competitiveness of divested business)
  - Procedural Issues (upfront buyer solutions; deadlines for divestitures)
- Extensive cooperation with other jurisdictions
  - Orange/T-mobile (D Telekom/France Telecom/UK JV)
  - Panasonic/Sanyo:
    - Concerns in several batteries markets
    - Remedies: divestment of several businesses
    - Constant contact with FTC & JFTC in the framework of respective bilateral cooperation agreements
    - Different procedures and timetables



## Recent developments: Remedies (II)

- **Pharma sector**: Teva/Barr, Sanofi-Aventis/Zentiva, Pfizer/Wyeth
  - Past practice: divestment of medicines limited to countries where concerns arise, together with brand names, marketing authorizations and know-how
  - Novelties:
    - If required for reasons of viability, EEA-wide divestitures
    - Additional safeguards to preserve viability of divestitures (e.g. option on sales staff, stricter purchaser criteria, grouping of divestment products as a viable package, divestment of manufacturing facility)
- **Airline sector**: Iberia/Vueling/Clickair, Lufthansa/SN Airholding, Lufthansa/Austrian Airlines
  - Release of slots at congested airports without compensation in a 20 minutes' window and without limitations regarding peak hours
  - Slots (initially) earmarked with regard to problematic routes
  - Transfer of grandfather rights if slots used regularly in a minimum period



## Recent developments: Procedure

- **Standstill provision is a key cornerstone of the Regulation (Electrabel/CNR)**
  - Significant fine (EUR 20 million) for implementation before approval.
  - Clear-cut case of acquisition of control
  - The transaction was implemented during a significant period (more than 3 ½ years) and the acquirer had experience under the Merger Regulation.
- **Use of derogations under Article 7(3)**
  - Exceptionally, derogations have been granted when conditions are appropriate (e.g. no substantive issues and bankruptcy risk)...
  - ...but many times a timely notification would bring the same result



## Conclusions

- Consistent and stable merger enforcement in the EU despite the crisis
- Variety of issues examined in 2008-2009:
  - Horizontal issues
  - Vertical issues
  - Coordinated effects
  - “Gap” cases
- Viability and effectiveness of commitments remain key priority
  - Challenge, in the current economic context, of finding suitable remedies (and appropriate buyers)