

# Refining the EU merger control system

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## Introduction

Thank you very much to the Studienvereinigung, and especially Frank Montag, for inviting me to be with you today.

You might be surprised to hear this, but talking with lawyers has turned out to be one of the pleasures of my job.

I appreciate how a legal way of thinking can help keep us focused on the most important issues in a case.

And I think what is true for individual cases is also true for competition enforcement in general. Successful enforcement is all about focusing on the things that matter.

## Taking stock - merger control in the EU

Take merger control, for example. In the 16 months that I have been here, I have seen how the merger review process works. Our system has a whole range of good features, from guaranteed timing, through the detailed way we reason our decisions, to the fact that a single procedure can cover 31 different countries. Overall the system works very well – both in substantive and in procedural terms.

We all know that big mergers can transform an industry. They can affect fundamental aspects of the economy, like electricity generation in last year's deal between General Electric and Alstom. Or they can affect things many of us use every day, like soft drink cans in the merger between Ball and Rexam which we approved in January.

And in this digital age, we find that mergers often affect competition for a service that's offered free of charge. Often what attracts users to a service isn't its price or any inherent quality, but how many other people use it. And sometimes data can be the most valuable asset a company owns. Fortunately, our rules allow us to take all of these issues into account when we review a merger. Our test is nimble enough to be applied in a meaningful way to the "new economy", which is after all not so new anymore.

But only a few transactions actually have the potential to harm customers – be they consumers or businesses. Most of them are too small to make much difference, or they don't involve companies that compete very closely with each other.

So a successful merger control system has to be selective.

It has to recognise that mergers are a normal part of business, an expression of the drive to grow and succeed. So mergers that don't seriously harm competition should be dealt with quickly and simply.

But it must also be ready to intervene firmly when competition is at risk.

And I think that's exactly what our system does in the EU.

We got a lot of attention last year for launching in-depth investigations in 11 cases. That's more than in any year since 2007. But it's still only 3% of the mergers that were notified to us – less than the average for the previous 25 years.

On the other hand, we dealt with more than 300 cases in Phase I – in other words, without the need for an in-depth investigation.

And I'm not just talking about small cases. Last week, we approved Dell's takeover of EMC, the largest ever merger in the IT business, in Phase I.

Or take Holcim's purchase of Lafarge. That deal created the world's biggest cement company, with operations in more than 90 countries. It raised competition issues in seven EU countries. But because the companies worked with us to find a solution to those issues, we managed to clear the merger in Phase I.

So I think we've shown that we can act fast, without compromising on our commitment to protect competition.

## **Procedural obligations**

But that's only possible because we all play our part. And that means companies and their advisors, as well as the Commission.

To take good decisions, you need the right information. And a lot of the information we need comes from the companies involved in a merger. So it's thanks to their cooperation that we can deliver decisions quickly, without compromising on the quality of our work.

That's why I worry when I see signs that some companies aren't taking their duty to supply information as seriously as they should. Because if we don't get full and accurate information, the system just doesn't work.

The same goes for companies that “jump the gun”, by putting a merger into effect before they get our approval. If they do that, any damage to competition might already be done before we can take our decision.

So we keep a very close eye on whether companies are complying with the procedural rules. And I won't hesitate to take action if we suspect that they haven't. Because we cannot allow companies to undermine a successful system by breaking the most basic rules.

## Looking ahead - simplification

But even a system that is working well can be improved.

I have asked DG Competition to examine some potential areas for improvement. Some of these have been identified in the 2014 White Paper on merger reform, others have emerged since then. So which areas am I talking about?

The White Paper on merger reform identified some options for refining our system by doing even more to focus on the things that matter. In the area of procedures, we've had very positive feedback on the ideas for simplification in the White Paper. That is very welcome.

But I think we still need to ask whether we can go even further. If some types of merger hardly ever cause concerns, why ask for a formal notification at all?

For example, when it comes to antitrust and state aid, we know from experience that some agreements, and some types of aid, are very unlikely to cause problems with competition. And we can use that knowledge to exempt those situations from the rules. In the same way, I want to build on our experience with mergers, so that transactions that are unlikely to do much harm to competition can go through even more quickly and simply than they do now.

I'm open to ideas about how we can do that. The only condition is that simpler procedures mustn't stop us dealing with competition problems when they arise.

## Minority shareholdings

Of course, focusing on what matters isn't just about simpler procedures. It's also about having the power to act when you need to.

That's why the White Paper suggested that we look at situations where a minority shareholding give one company influence over another.

That type of influence could certainly affect competition. But shareholdings change hands all the time, and only a tiny handful of those deals are likely to raise issues. So the question is, how do you get at those needles, without toppling the haystack?

That's not an easy question to answer. That's why, when we met last year, I said we needed to think more deeply about how it could work. Since then, we've been looking at the issue very carefully. And we've asked a team of experts to study how the system works in the countries that have it.

It's still too early to say where our reflections will lead us. But we'd need to see compelling evidence that the system could work at European level - without creating a lot of complexity - before we took any more steps in this direction. And what I've seen so far hasn't convinced me that this is a change we absolutely have to make to our system.

## Notification thresholds

So at this stage, I don't believe this issue calls for a change to the rules. But to be sure we can intervene where it matters, we also need to know that our rules can cope with new ways of doing business.

Take the digital economy. This isn't just one sector among many. Everything we do, from communicating with friends to the appliances in our homes, is going digital and connected. So mergers in this area don't just affect how we buy goods and services. They can change the way we live, and the opportunities we have.

That makes it especially important that we get to see the mergers that really matter in the digital world. But that doesn't always seem to be guaranteed.

Take Facebook's purchase of WhatsApp in 2014. Facebook paid 19 billion dollars to buy WhatsApp, a company with 600 million customers. A substantial proportion of those users were in Europe. And yet the merger didn't have to be notified to the Commission, because WhatsApp's turnover wasn't high enough.

The issue seems to be that it's not always turnover that makes a company an attractive merger partner. Sometimes, what matters are its assets. That could be a customer base or even a set of data. In the pharmaceutical sector, it might be a new drug that's been developed but not yet approved for sale. Or a company might be valuable simply because of its ability to innovate.

A merger that involves this sort of company could clearly affect competition, even though the company's turnover might not be high enough to meet our thresholds. So by looking only at turnover, we might be missing some important deals that we ought to review.

But before we think about changing our rules, we need to be sure we fully understand what's at stake.

We need to know which important mergers we think we might be missing. And we have to see how we could pick out the transactions that matter, without also covering a lot of mergers without much effect on competition in Europe.

For example, the value of a merger could be a good guide to its importance. But we'd need to pick just the right level, to cover the mergers we need to see, without making life harder for innovative startups. Can we identify the right threshold, or would we be better off relying on cases being referred to us from the national authorities? After all, those referrals have already allowed us to see some important mergers that didn't meet our thresholds, not least the deal between Facebook and WhatsApp.

All these questions deserve careful thought. I have asked DG Competition to reflect on them, but it's a discussion that needs to extend more widely. So I'm glad that the German Monopolies Commission, for example, is already contributing to the debate. And I want to encourage more of you to get involved.

But whatever we decide in the end, it has to meet one fundamental principle: there should be no doubt whether you need to notify a particular merger. So whatever test we choose has to be easy to apply, and has to give a definitive answer.

## Conclusion

So I'm confident that our merger control system works well. At the same time, we may well be able to do even better in targeting the transactions that really matter.

We must, of course, get the balance right. So simplification is important, but it mustn't come at the expense of our ability to protect competition. And the cost of closing any gaps in our ability to deal with important transactions mustn't outweigh the benefits.

Because I think that ultimately, what matters in EU merger control is that it works for everyone – businesses and consumers alike. And I'm determined to make sure that stays true in the years to come.

Thank you.