



European Commission

# Competition

CRA Conference: *Economic Developments in European  
Competition Policy*

Brussels, 9 December 2009

# Merger control: A new transatlantic convergence?

**Nadia Calviño**

Deputy Director General  
DG Competition, European Commission



## Outline

- Merger Control and Economic Crisis
- Overview of recent merger activities
  - Evolution of intervention rate
  - Significant cases
- Administrative system of EU Merger control
- Types of issues recently investigated
- Remedies – Recent Developments
- Conclusions



## 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; less conglomerate / more horizontal concentrations)
- 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
  - 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 to play a more important role?



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

### 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.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.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
- 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

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

- 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



## Administrative system of EU Merger control

- Symmetry of standard of proof between prohibition and clearance decisions
  - Article 2, paragraphs 2 and 3, ECMR
  - No presumption of legality or of illegality in EU merger control regime
  - *Bertelsmann* judgment: the Commission is required to either approve or prohibit a notified concentration in accordance with its assessment of the economic outcome attributable to the concentration which is most likely to ensue
- Need for sufficient evidence for either course of action (clearance / prohibition)
  - *Tetra Laval* judgment: the Commission must put forward evidence that is factually accurate, reliable and consistent and contains all the relevant data that must be taken into consideration in appraising a complex situation and capable of substantiating the conclusions drawn from it
- Control of Commission merger decisions (clearance with or without conditions / prohibition) by the Community Courts



## Types of issues recently investigated (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
- **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 to entry
  - Remedy: conditional clearance subject to divestment of GBI’s business in Portugal



## Types of issues recently investigated (II)

- **Less common non-coordinated and 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



## Remedies – Recent developments

- 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
  - E.g.: 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



## Conclusions

- Consistent and stable merger enforcement in the EU
- Variety of issues examined in the last months:
  - 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)
- Transatlantic cooperation has been key:
  - Despite procedural differences and timetables, common grounds are systematically found to the benefit of parties and of competition enforcement