MERGERS

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EU Merger Policy
I. Introduction

I. Introduction

II. Merger Theory

Jurisdiction – which mergers do we control?

Substance – what do we control?

III. Merger Practice

Procedure – merger control step by step

Organisation – how we work

EU Merger Policy
I. Introduction

The Four Principles of EC Merger Control

- Mandatory notification of concentrations with EU wide dimension *before* implementation, *but:*
- Strict legal deadlines - guarantee rapid decision-making ("guillotine" mechanism) and legal certainty for undertakings
- Exclusive competence of the Commission to review concentrations with EU-wide dimension ("One-stop-shop") in an administrative procedure (no court involved in dec.)
- Consistent application of market-oriented, competition-based assessment criteria (no non-competition-based factors to be taken into account – despite rec. 23)

EU Merger Policy
I. Introduction

The Legal Framework

- **Two regulations…**
  - *Regulation 139/2004 (**EC Merger Regulation** – "ECMR")*
  - *Regulation 802/2004 ("**Implementing Regulation**", including "Form CO", Simplified Form CO, Form RS)*
- **…and a number of notices :**
  - Horizontal Guidelines (substantive issues – "test")
  - Non-horizontal guidelines (vertical/conglomerate mergers)
  - "Best Practice" Guidelines (procedure)
  - Consolidated Jurisdictional Notice (turnover calculation, concentration, full-function joint venture, undertakings concerned)
  - Case allocation
  - Ancillary restrictions
  - Simplified procedure
  - Remedies
  - Relevant markets
  - Access to file
    - See internet: "http://ec.europa.eu/comm/competition/mergers/legislation"
      - See EC Merger Control (green book, available in the library - for free)

EU Merger Policy
II. Merger Theory

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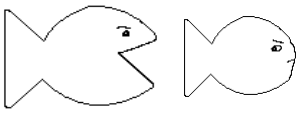
EU Merger Policy
II. Merger Theory

What is a "merger"?

Two main forms (in theory):

- Mergers (rare):
  (Art 3(a) ECMR)

- Acquisitions
  (Art 3(b) ECMR)
  - Sole control
  - Joint control (joint ventures)



EU Merger Policy
II. Merger Theory

What is a "merger"?

- Key notion: **Concentration**
  - ***Concentration = change of control***
  - ***Control*** *= decisive influence*
  - ***Decisive influence*** *= determination of strategic business behaviour (majority of share not decisive: even minority shareholders might have veto rights, impact on business plan, major investments, …)*
- Lots of important follow-up questions (e.g. question of control / turnover to be taken into account can decide jurisdiction; one or more transactions?)
- Details: see notices…

Horizontal, vertical, conglomerate

Definitions:

- Horizontal merger
  - a merger between companies that are actual or potential competitors in the same relevant market
- Vertical merger
  - a merger between companies that have an actual or potential supplier-customer relationship
- Conglomerate merger:
  - a merger that is neither purely horizontal nor purely vertical

EU Mergers: Horizontal and Vertical

In general:

- Purely Vertical mergers combine complements--things you *combine* to produce or achieve something
- Purely Horizontal mergers combine substitutes--*alternative* ways of producing or achieving something

Substantive analysis of merger cases ("the test")

- Reform 2004: The mystery of the "SIEC" (**S**ignificant **I**mpediment of **E**ffective **C**ompetition)

Before: creation or strengthening of a dominant position (and thereby SIEC)

Now: **Significant impediment of competition** (in particular as a result of dominance)

Dominance is still the most important criterion

Substantive analysis of merger cases ("the test")

- **Structural *ex-ante* analysis** of post-merger market conditions (unlike Art. 102)
  - Will the merged firm be able to increase prices, reduce output/quality post-merger?
  - Market- / competition-based test
- **Possibilities:**
  I. **Non-coordinated effects:**
     - Most relevant case: **dominant position**
     - Non-coordinated effects (= US "unilateral effects") in oligopolies, without creating dominance: now explicitly covered
  II. **Coordinated effects** (or: "collective dominance")
  III. **Conglomerate effects**

EU Merger Policy

II. Merger Theory

- Some basic principles of microeconomics
- How can mergers produce anticompetitive effects?
- How can mergers generate welfare-enhancing efficiencies?
- A few words on mergers and innovation

Substantive analysis of merger cases ("the test") non-coordinate effects

- Still the main test: Does the concentration create/strenghten a **dominant position**?
  - Dominant position = ability of a firm to behave independently from competitors, customers, suppliers (ECJ, La Roche)
  - Problem: -> How to prove?
- **Ex-ante prognosis** requires structured, economy-based approach (see Hor. Guidelines):
  1. Analysis of the parties' market position
  2. Mitigating factors (potential competition etc.)
  3. Efficiencies / Failing firm considerations

Substantive analysis of merger cases ("the test")

1. Analysis of the parties' market position

- Definition of the relevant markets
- **Product market** (product substitutability: demand-side and supply-side; e.g. "SSNIP" test)

SSNIP = Small but Significant Non-transitory Increase in Prices

- **Geographic market** (same conditions?)
  - Entry barriers: tariffs, transport costs (SSNIP-test)
  - Low imports; price differentials
    - Local: e.g. Cement
    - National: e.g. Beer
    - EU/EEA/European-wide e.g. Automotive supply
    - World-wide: e.g. aluminium, large aircraft

Substantive analysis of merger cases ("the test")

1. Analysis of the parties' market position

- **Market shares:**
  - No thresholds for dominance (but: 50%-presumption, see GE); individual assessment of all factors necessary
  - *Relative* market shares are important
  - Single dominance or collective dominance?
- **HHI** = **H**erfindahl-**H**irschman-**I**ndex (see. "Horizontal Guidelines");
  - Market shares pre-/post-merger squared (Δ HHI increases with higher market shares)
  - HHI is only an indication (e.g. Δ below 150)
  - No HHI-thresholds !

Unilateral vs. coordinated effects

- Non-coordinated (Unilateral) effects:
  - The merged firm finds it profitable to individually raise price post merger (even if other firms in the market continue to compete to the best of their ability)
- Coordinated effects:
  - The merger creates or reinforces a situation where competition is reduced by coordinated interaction (=collusion)

Coordinated effects

- EC Horizontal Merger Guidelines
  - A merger may change "the nature of competition in such a way that firms that previously were not coordinating their behaviour, are now significantly more likely to coordinate and raise prices or otherwise harm effective competition. A merger may also make coordination easier, more stable or more effective for firms, which were coordinating prior to the merger." (§22)

Terminology

- Collusion vs. Coordinated effects
  - Collusion/coordinated interaction: a state where there is no or only rudimentary competition and
  - Coordinated effects, i.e. the change in the state of competition
- Express vs. tacit collusion
  - Express collusion = cartel
  - Tacit collusion = no explicit agreement or concertation
- "Collective dominance" (EU legal concept) = collusion

Bringing a coordinated effects case

- Must prove:
  1. Firms can reach an understanding on the terms of coordination
  2. Collusion post-merger is sustainable
  3. There is a co-ordinated effect

1. Reaching terms of coordination

Reaching terms of coordination

- Coordination may take many forms, e.g. coordination on prices, market shares, customer categories, geographic regions, …
- Reaching terms of coordination more difficult when
  - market context is complex (many firms, many products, differentiated products, …)
  - market context is changing (volatile demand, innovation, …)
  - market players have diverging interests (e.g. maverick vs. established players, cost differences, …)

Ways to "meet minds"

- *How* do firms reach an understanding on the terms of coordination?
  - Importance of "focal points"
    - High prices better for all suppliers
    - Cheap talk (announcements)
    - Maintaining status quo
    - Other focal outcomes (e.g. preserve certain price differentials)
  - Learning through trial & error
    - Every time a player increases his price he checks whether this results in an increase or a decrease in profits. If it increases his profits the movement in this direction is continued. If it does not, it is reversed.

2. Assessing whether collusion is sustainable

Collusion: problem of sustainability

- In normal market settings, each firm has a constant incentive to compete (make profitable sales to customers)
- When there is collusion, prices are high and it becomes all the more attractive to undercut rivals and make more sales. What makes companies refrain from doing so?
  - Implicit understanding that this hurts coordination in the future
  - Gains from future coordination higher than gains from short term competitive behaviour

Collusion: Game theoretic foundations

- Game theory (interactive decision theory)
  - analyses strategic situations where the ultimate outcome depends on the actions of all players, so that what strategy is best for one player depends on what it anticipates the others will do

Repeated interaction

- Collusion may emerge when firms interact frequently and conjecture that any attempt to undercut the collusive price will be detected and followed by (some sort of) retaliation from competitors.
- The profit loss imposed on a deviating firm by retaliation must be sufficiently large to prevent the short-term benefits from "cheating" on the collusive arrangement;
  - These short-term benefits, as well as the magnitude and likelihood of retaliation, depend in turn on the characteristics of the industry.

Retaliation

- Retaliation refers to the firms' reaction to a deviation from the collusive path. It can take many forms, some being more effective than others
  - A simple form of retaliation consists in the breakdown of collusion and the restoration of "normal" competition and profits.
  - More sophisticated forms of retaliation may inflict tougher punishments and thereby allow sustaining higher collusive prices (e.g. temporary price wars, selective actions targeted at reducing the profits of the deviant firm).
- It must be in the best interest of the firms to carry on the retaliation once a deviation has occurred.

Comparing gains and loses

- Since retaliation arises in the future while deviations generate immediate profits, the ability to collude depends on the relative importance of current profits compared to future profits in the firms' objective, as reflected by their discount factor.

(Critical) factors for sustainability

- Market transparency
  - allows to distinguish deviations from demand shocks
- Number of competitors
  - the long-run benefit of maintaining collusion is reduced if the gain is to be shared among many;
  - and the short-run gain from deviation increases
- Entry barriers
  - Easy entry would erode the profitability of collusion.
  - firms lose less from retaliation if entry occurs anyway
- Frequency of interaction (or of price adjustments)
  - allows firms to react more quickly to a deviation by one of them. Thus, retaliation can come sooner.
  - related: if purchases are lumpy the incentive to deviate is high

(Influential) Factors

- Demand growth
  - today's profits are small compared with tomorrow's ones.
- Innovation makes collusion on prices less easy to sustain
  - It reduces both the value of future collusion and the amount of harm that rivals will be able to inflict if the need arises.
- Multi-market contacts
  - increases the frequency of the interaction
  - it may allow softening asymmetries that arise in individual markets.
  - may allow the firms to sustain collusion in markets where the industry characteristics alone would not

Other influential factors

- Capacity constraints have ambiguous effects
  - a capacity-constrained firm has less to gain from undercutting its rivals
  - capacity-constraints limit firms' retaliatory power
- Cost (and capacity) asymmetry (and quality differentiation)
  - Low cost firms gain more from undercutting their rivals and have less to fear from retaliation from high-cost firms

Other influential factors

- Horizontal differentiation appears ambiguous.
  - It limits the short-term gains from undercutting rivals, since it becomes more difficult to attract their customers
  - It also limits the severity of price wars and thus the firms' ability to punish a potential deviation.
  - But likely reduces scope of collusion: it is hard to infer the relevant information from their own prices and quantities
- Structural links
  - Cross-ownership reduces the gains derived from undercutting the other firm.
  - a firm can punish a deviating partner by investing less in a joint venture
- The presence of a "ringmaster"
  - A 'dominant' firm can enforce discipline

Practical difficulties

- Practical difficulties to establish the sustainability of collusion:
  - The relevant quantities cannot be observed directly (collusive profits, deviation profits, punishment loses, discount rate)
  - Many factors affect these quantities (in different ways and to different degree). Most often, a given market will have some characteristics that facilitate collusion, and some that tend to hinder collusion.

3. Assessing co-ordinated effects

What changes through the merger?

Mechanism:

- The merger may induce some structural market changes
  - e.g. the number of firms may decrease, firms may become more symmetric, or a maverick firm might be involved in the merger etc.)
- These changes may have an impact on the possibility to reach the terms of understanding and the sustainability of collusion

Some factors unlikely to be affected

- Mergers may have a limited impact on the factors that help sustain collusion…
  - Demand and product characteristics, market transparency or frequency of interaction
  - Exogenous entry barriers
  - Buying power (reduces the profitability of collusion and large buyers may be able to break collusion)
  - Existence of credible commitment not to deviate (e.g. MFC… but can be costly to retaliate)
  - Existence of credible commitments to retaliate (e.g. meet competition clauses)

➥ In many cases, the set of collusive equilibria remains virtually unchanged by a merger – coordination was possible pre-merger as it is post-merger. The likelihood of coordination has not increased significantly.

Factors more likely to be affected

- Mergers may increase the sustainability of collusion by
  - Reducing the number of participants in a very concentrated market
  - Elimination of "maverick"
  - Creating structural links
  - Increasing symmetry: it is easier to collude among equals, that is, among firms that have similar cost structures, similar production capacities, or offer similar ranges and quality of products.
  - Increasing multi-market contacts

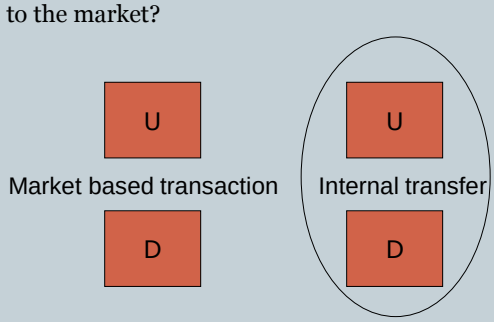
Non-horizontal mergers

Vertical mergers

- Examples of a vertical relationship:
  - producer and retailer
  - car parts producer and car producer
  - cement producer and concrete producer
  - electricity producer and distributor
- Vertical mergers have implications which differ from horizontal mergers: a horizontal merger is a merger between competitors, whereas a vertical merger is a merger between players that are *complementary*
  - Vertical merger does not lead to a loss of direct competition between the merging parties
  - Substantial scope for efficiencies (because of complementarity)

Theory of the firm

- What decides the boundaries of a firm?
  - To get a final product/service to the final customer requires a number of sub-products and sub-services
  - Which of these activities should a firm do themselves and which should be left to the market?



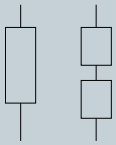
Theory of the firm (2)

- Advantages of being independent:
  - External pressure from competition keeps each entity "on their toes"
  - Easier to manage smaller entities
  - Better focus on core activities
  - …
- Advantages of being integrated
  - Easier to align activities
  - Internalize externalities
  - …

Vertical externalities

- Before the merger: U and D in a complementary relationship, but acting independently, not taking (full) account of the impact of each other's decisions on the other party
  - Well known problem: "double marginalisation" (when both U and D put a margin on their price, final prices end up too high from the viewpoint of the vertical structure as whole(*) ➔ both U and D have an interest in the other party reducing its price)
  - more broadly: considerable scope for efficiencies

(*) "What's worse than a monopoly? Two monopolies !



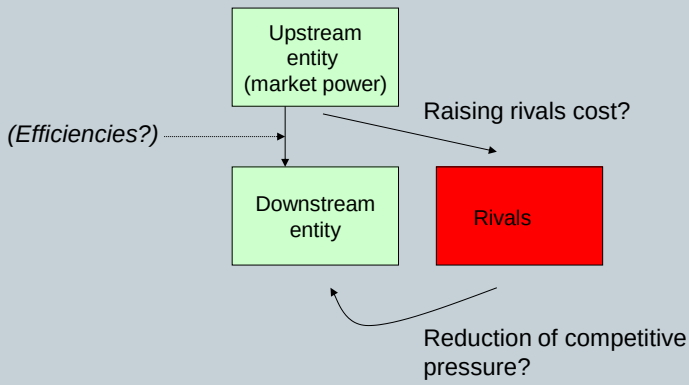
Vertical mergers

- There are many reasons why vertical mergers may be good for consumers
  - Internal transfers may be better than market based transfers
  - Incentives may be better aligned
- So what could possibly be wrong with a vertical merger?

Foreclosure

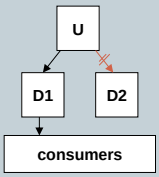
- Potential concern is that vertical mergers may lead to foreclose of competitors, i.e. affect the ability or incentive of competitors to compete. This, in turn, may result in a negative impact on consumers
  - NB. (Terminology) Foreclosure need not lead to the exit of rivals. Rather it refers to "any instance where rival firms' access to supplies or markets is reduced as a result of the merger, thereby reducing these companies' ability and/or incentive to compete" (cf. §18 draft EU NHMG)
- Two forms:
  1. input foreclosure
  2. customer foreclosure

1. Input foreclosure



➔ *Net effect on consumers ?*

- Consider an upstream monopoly (e.g. essential facility)



(U merges with D1)

- Question: if U is already in a monopoly position, why does it need a merger to increase its profits ?

"Single monopoly profit"

- Possible answers (= possible incentives to foreclose):
  - U may be hindered in its ability to capture these potential monopoly rents
    - government regulation;
    - presence of another, less efficient alternative to U (cf. limit pricing);
    - the inability to commit to selling the monopoly output and not more (cf. patent licensing)
    - inability to price differentiate
    - U may not be the only input (variable vs. fixed input proportions)
  - U may want to prevent entry
    - prevent entry by D1 or D2 (vertical integration)
    - raise entry barriers for outsiders, by making two-level entry imperative
  - if D1 is active in other markets as well and there are demand or cost interdependencies between the M-product and the other markets, it may be worthwhile to team up

An analytical framework

- Examine:

  1. Ability to foreclose
  2. Incentive to foreclose
  3. Likely impact on effective competition

  (in practice, these aspects are often examined together since they are closely intertwined)

  - EU NHMG,

(i) Ability to foreclose

- Necessary conditions for the merged entity to have the ability to foreclose
  - the input must be important (e.g. in cost terms)
  - merged entity must have market power upstream
    - E.g. other upstream rivals are less efficient, offer less preferred alternatives (product differentiation), cannot expand easily (e.g. capacity constraints)
    - Input foreclosure may also expose downstream rivals to independent upstream suppliers with increased market power
    - Entry barriers upstream
- Possible counter-strategies of downstream rivals

(ii) Incentive to foreclose

- Incentive to foreclose depends on the degree to which it is profitable
- Merged entity faces possible trade-off between
  - profit loss due to no longer supplying to downstream rivals and
  - profit gain due to expanding sales downstream and/or being able to raise price in that market
- Incentive to foreclose may be higher in case
  - Profits upstream are low (compared with downstream)
  - Possibility to expand downstream high
  - Merged entity has high market share downstream

Incentive to foreclose (cont'd)

- (EC context:) The Commission examines both the incentives to adopt foreclosure conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful.
  - Relevant factors for assessing legal disincentive (on the basis of a summary analysis):
    - the conduct would be clearly, or highly probably, unlawful
    - the likelihood that the illegal conduct could detected
    - the penalties which could be imposed

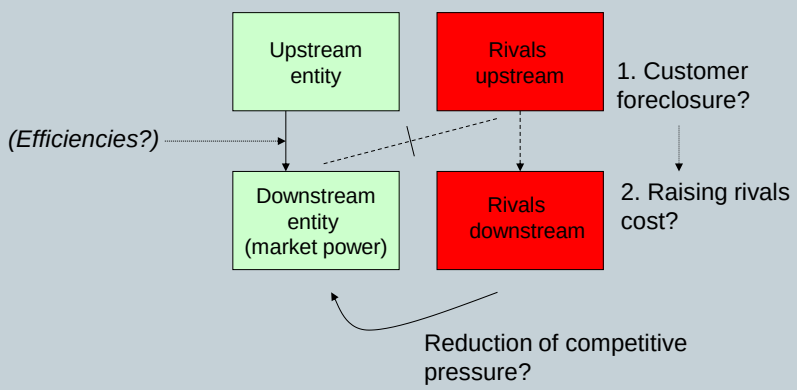
(iii) Impact on competition

- Focus: any impact on consumers downstream?
  - A merger that raises rivals' costs may hurt other competitors, but does it also hurt competition (consumers)? Raising rival's cost is one thing, raising the price above the competitive level is another.
    - Input foreclosure more likely to produce significant consumer harm when proportion of foreclosed rivals is high or foreclosed rivals are close competitors
    - Merger may allow merger entity to raise entry barriers
  - Countervailing factors: Countervailing buyer power, entry, efficiencies (possible internalisation of double mark-ups; aligned incentives, ...)

Time dimension

- When a vertical merger leads to increases in the price at which rivals can obtain inputs, it may impact their variable costs (direct effect) and allow the merged entity to raise price in turn. Consumer harm can occur in the short run.
- When a vertical merger primarily impacts upon the revenue streams of rivals, any impact on consumers is generally more delayed and more uncertain: may depend on a sequence of events (extent to which rivals are induced to exit or to forego expansion in the future, absence of counter-strategies, ...)
  - Anticompetitive scenario much more difficult to establish
  - Entails trade-off between (likely) short term consumer benefits and (anticipated) longer term consumer harm

2. Customer foreclosure



➔ *Net effect on consumers ?*

Customer foreclosure (cont'd)

- The decision no longer to procure from upstream rivals may raise their costs and/or reduce their revenue streams. To the extent that this reduces their ability and incentive to compete, downstream rivals of the merged entity may be faced with higher input costs (=input foreclosure)

- Analytical framework:
  1. Ability to foreclose
  2. Incentive to foreclose
  3. Likely impact on effective competition

Customer foreclosure (cont'd)

- Foreclosure by reducing rivals' customer base bears similarities to raising rivals' costs scenario, but the competitive harm generally more delayed and more uncertain: may depend on a sequence of events (absence of counter-strategies, reduced investment levels, ...)

Other non-coordinated effects

- The merged entity may, by vertically integrating, gain access to commercially sensitive information regarding rivals' upstream or downstream activities
  - For instance, by becoming the supplier of a downstream competitor, a company may obtain critical information, which allows it to price less aggressively in the downstream market to the detriment of consumers.

Coordinated effects

- General principle: Co-ordination more likely to emerge in markets where it is fairly easy to establish the terms of co-ordination and where co-ordination is sustainable
  - Sustainability requires that
    - the companies involved can monitor each other's market behaviour (market transparency)
    - there is a credible 'deterrence mechanism' (disciplining mechanism) to ensure adherence
    - outsiders and customers cannot undermine the co-ordination
- A vertical merger may have an effect on these conditions

3. Conglomerate mergers

- Conglomerate merger: a merger that is neither purely horizontal or purely vertical

Useful distinction:

- Complementary products
  - e.g. printers and cartridges; razor blades and shaving foam; aircraft avionics and aircraft engines; machines and spare parts
- Neighbouring products
  - e.g. whisky and gin; milk and yoghurt; carton packaging machines and PET packaging machines
- Independent products
  - unrelated products

Conglomerate mergers (cont'd)

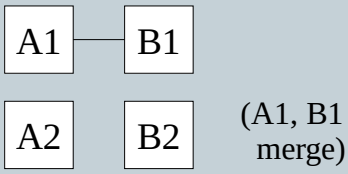
- Conglomerate mergers generally have no negative effects on competition.
  - No loss of direct competition
  - Efficiencies: Due to specialization through division of labour it is often more efficient that certain components are marketed together rather than separately.
    - Cost savings can derive from some form of economy of scope (either on the production or the consumption side, e.g. one-stop-shop).
    - Value enhancements can result from better compatibility and quality assurance of complementary components
    - Pricing efficiencies

Conglomerate mergers (cont'd)

- Potential competition concern: foreclosure, as a result of e.g.
  - Tying
    - the purchase of one good (the tying good) requires that customers also purchase another good from the producer (the tied good) whenever they need the good
  - Bundling
    - the goods are sold as a package only (pure bundling) or as a package in addition to being sold individually (mixed bundling)
  - Portfolio effects/range effects
    - sales driven by the preference of customers to procure a variety of products

Conglomerate mergers (cont'd)

- Setting:



- Analytical framework:
  1. Ability to foreclose
  2. Incentive to foreclose
  3. Effect on competition (consumers)

Bundling/tying: complementary products

- Possible effects of bundling/tying
  - A demand effect
    - bundling/tying may change the demand for rivals' products (in terms of volume and elasticity), keeping prices constant
      - "Mixing-and matching" of products no longer possible (pure bundling)
  - A price effect
    - bundling/tying may go with a change in pricing incentives for the merged firm, further changing the demand for rivals' products
      - A "double marginalisation" argument applies "Mixing-and matching" of products no longer possible: changes pricing incentives. Bundling/tying products may be a way to commit to a more aggressive pricing strategy

Bundling/tying of compl. prod. (2)

- Demand & price effects → may reduce revenue streams for rivals, which may reduce their incentive to invest (e.g. in product or process innovation), or to enter the market in the first place
- Other effects in the short run are conceivable too
  - Effects on the intensity of competition in the short run: "softening of competition" by segmenting the market; reducing the elasticity of demand of rivals
  - Customer harm through a reduction in choice (no mix-and-match)

Challenges

- Need to show:
  - Anti-competitive effect follows directly from the merger (i.e. it is merger specific). The merger can change conduct (i.e. merger specificity – e.g. merger creates bundling opportunity)
  - Future conduct is profitable (i.e. credible & thus likely)
  - Competition is foreclosed or mitigated
  - Consumers are worse off than in the absence of the merger (may entail comparing short run – likely – efficiencies and – anticipated – longer term harm)
- Unfortunately there does not exist a set of observable factors in a constant and robust association with each of the above steps.

Necessary conditions…

- Market power in at least one of the components in the tie or bundle (tying good)
- The market for the other component (tied good) has basic conditions that are conducive to market power. For example it might be imperfectly competitive due to economies of scale.
- There must be a common pool of customers that is large relative to the pool of buyers for either the tying or the tied good separately.
- Competitors are unable or unwilling to match the tie or bundle either by counter-merger or teaming-up with each other.

Foreclosure – neighbouring products

- Neighbouring products: the products may not be complements, but feature a demand side link in that they are bought by a common pool of customers
- Demand-side link provides scope for leveraging market power, i.e. increasing sales in one market by coupling sales to the other market through bundling/tying
  - Difference with complementary products
- Effects bear similarities to customer foreclosure;
  - emphasis is on causing revenue shortfalls for rivals;
  - effects on the intensity of competition in the short run are possible too

Portfolio effects

- Portfolio effects/range effects: sales driven by the preference of customers to procure a variety of products
  - e.g. software varieties with hardware; one-stop shop principle for procurement
- Foreclosure effects not so much from bundling/tying (i.e. things imposed by the producer), but rather from the "one-stop shop"/variety element
- Foreclosure through portfolio effects bears similarities to customer foreclosure
  - emphasis is on causing revenue shortfalls for rivals;
  - effects on the intensity of competition in the short run are possible too

Conclusion

- Foreclosure concerns:

  - scenarios of raising rivals' cost more likely to be of concern when they result in direct upward pressure on competitor's prices

  - anti-competitive scenarios involving reducing rivals' revenues less pervasive, but possible. Difficulty with distinguishing it with "competition on the merit". May entail comparing short run (likely) efficiencies and (anticipated) longer term harm

Substantive analysis of merger cases ("the test")

2. Additional factors for the assessment

- Actual / **potential competition** (new entrants? Supply-side-substitutability? Close competitors?)
- **Barriers to entry**/to switch supplier (technical, regulatory)
- Countervailing **buyer power** (or supplier power) [...]

3. Efficiency / Failing Firm considerations

- **Efficiencies**
  - Does the merger create efficiencies (synergies) to the benefit' of the consumer? (e.g. marginal cost savings -> lower prices)
  - Restrictive approach: must be merger specific, verifiable
  - See: P&G/Gillette; Korsnäs/AssiDomän; Inco/Falconbridge; Ryanair/Aer Lingus
- **Failing Firm defence**: No causal merger - SIEC
  - Anyway forced out of the market?
  - No less anti-competitive measure available

EU Merger Policy
II. Merger Theory

Remedies (also: "undertakings", "commitments")

- a proportionate solution for competition problems

- **Legal basis:** principle of proportionality; Art. 6(2)/8(2) ECMR (see CFI/Cementbouw)
- Structural vs. behavioural:
  - Preference for "structural" remedies: divestiture of production facilities or whole subsidiaries ("viable business") in overlapping areas
  - Behavioural remedies: (obligation to behave pro-competitive…) not excluded (CFI: Tetra, ARD, but problems)
- **Procedure:** Proposed by the parties (not by the Commission); strict deadlines (20 WD phase I, 65 WD phase II)
- **Effectiveness**: Phase I: clear cut, to remove "doubts"; Phase II: must remove identified competition concerns; Verified in a market test; problem: inseparable businesses
- **Monitoring necessary** (Trustees/COM); "conditional" clearance decision -> may be revoked; Remedies Unit -> 2004: Remedies Network

See: Remedies Notice; Model Commitments; Remedies Study; Model Arbitration Mandate

EU Merger Policy
III. Merger Practice

III. Merger Practice

EU Merger Policy
III. Merger Practice

Where to notify?

Distribution of competencies EU <–> Member States

- **Basis: Subsidiarity/Proportionality**
- **Possible criteria:**

  - **Regional scope of activities** ("transnational" case?)
  - **Market Share** (only "important" cases)
  - **Turnover** (big companies = important cases)
- **EU solution: turnover based + cross-border element**

As a rule of thumb: combined turnover > 5 bn -> EU

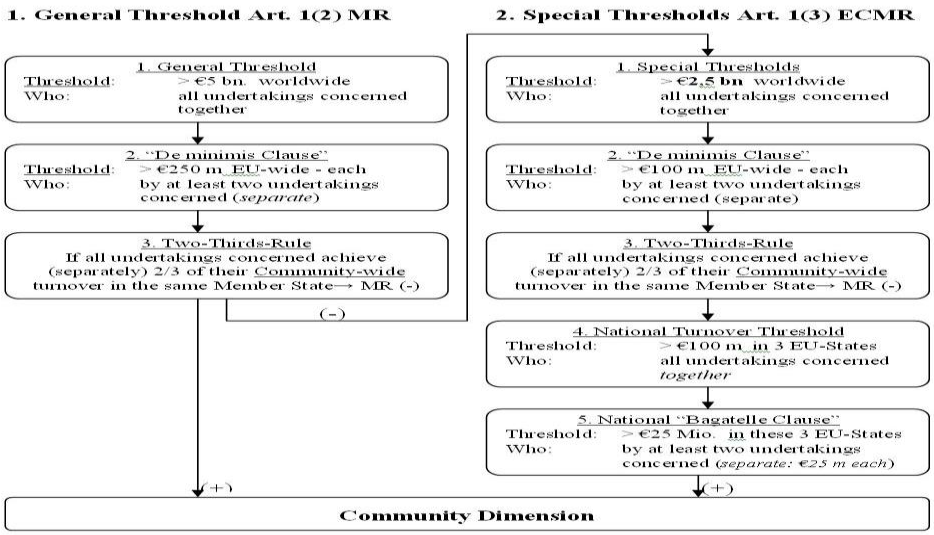
EU Merger Policy

Where to notify?
Community dimension –> EU notification thresholds

(see Art. 1 and 5 ECMR; notice on turnover)

- **Standard thresholds:**
  - World-wide turnover € > 5 billion (combined)
  - European-wide > € 250 million
  - *unless:* 2/3 of each parties' turnover in one Member State (MS)
- **Revised (additional) thresholds (1997)**
  - World-wide turnover € > 2.5 billion (combined)
  - European-wide > € 150 million
  - In each of at least 3 MS > € 100 million
  - At least two parties > € 25 million in these MS
  - *unless:* 2/3 of each parties' turnover in one MS

EU Merger Policy



EU Merger Policy
III. Merger Practice

Where to notify? (MS<=>EU)

<-> Referrals

(extended in 2004, see Art. 4, 9, 21, 22 ECMR, Form RS, Case allocation notice)

- **Pre-notification referrals**
  - **COM -> MS**, Art. 4(4) – although Community dimension (parties' request)
  - **MS -> COM**, Art. 4(5) – although *no* Community dimension (parties' request)
- **Post-notification referrals**
  - **COM -> MS**, Art. 9 – although Community dimension (MS request; problem: then freedom to decide?)
  - **MS -> COM**, Art. 22 – although *no* Community dimension (MS request; assessment for specific MS)

EU Merger Policy
III. Merger Practice

Where to notify?

- **Legitimate interests clause:**
  - Art. 21(4) – MS can claim "legitimate interests"…
  - … e.g. security (Art 296 EC), media
  - *but:* no abuse – exclusive EU competence! (BNL; Unicredito; Endesa/E.ON/ENEL; Abertis; Suez; …)
- **Extraterritorial aspects:**
  - GE/Honeywell, Oracle/Peoplesoft, MCI/Worldcom, Microsoft, …
  - CFI (Gencor): Effects doctrine – OK !
  - "Continental divide"?

EU Merger Policy
III. Merger Practice

The Merger Procedure
a somewhat special experience…

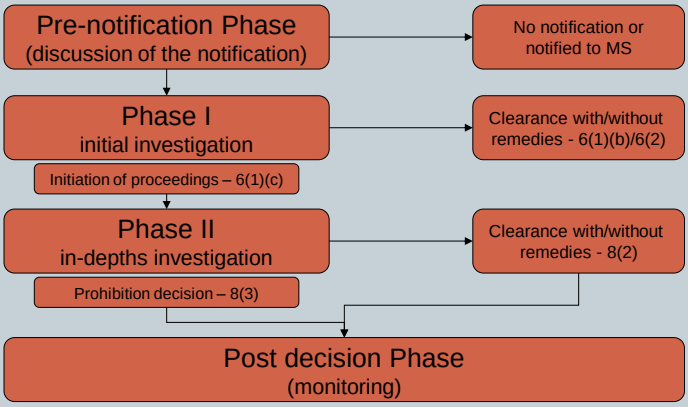
- Historic reasons: Merger Regulation was only adopted subject to rigid conditions ("guillotine" – mechanism)
- Answer: Creation of a special "Task force":

- Specific organisation to cope with **the tight deadlines:**
  - **Case teams**
  - **Flat hierarchy**
  - **Modern working tools**

The Merger Task Force (MTF)

EC Merger Policy
III. Merger Practice

Steps of a Merger Procedure



EU Merger Policy
III. Merger Practice

1. "Phase 0": pre-notification

- Discussion of the case (jurisdiction, details of Form CO/Form RS, waivers; investigation possible – with agreement of parties)
- A case team is formed, consisting of a case manager (head of unit) and, normally, 2 to 4 case handlers
- Notification when agreement/bid concluded or intended (new Art.4)

2. "Phase I"

- Simplified procedure? (low market shares, small joint ventures,...)
- **Market investigation – Article 11 letters**
- Remedies negotiations
- 25 working days (WD) from notification for decision-extended to 35 WD if remedies proposed within 20 WD
- **Decision:**
  - **6(1)(b): Clearance with/without commitments**
  - **6(1)(c): "Serious doubts" remain -> initiating of proceedings**
  - **6(1)(a): (rare): no jurisdiction**

Model Art.11

Majority of cases end in Phase I (~ 90%)

EU Merger Policy
III. Merger Practice

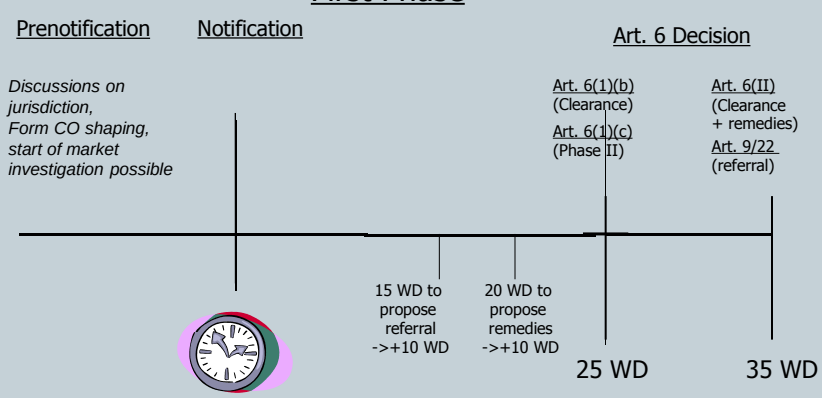
3. "Phase II"

- In-depth investigation
- Questionnaires to customers, competitors, consumer associations etc. "Art. 11 letters" to the parties; telephone interviews; sometimes: site visits
- Statement of objections
- Written reply by the notifying parties
- Oral Hearing (with third parties)
- Commitment negotiations
- Advisory Committee on Concentrations
- Final Art. 8 decision

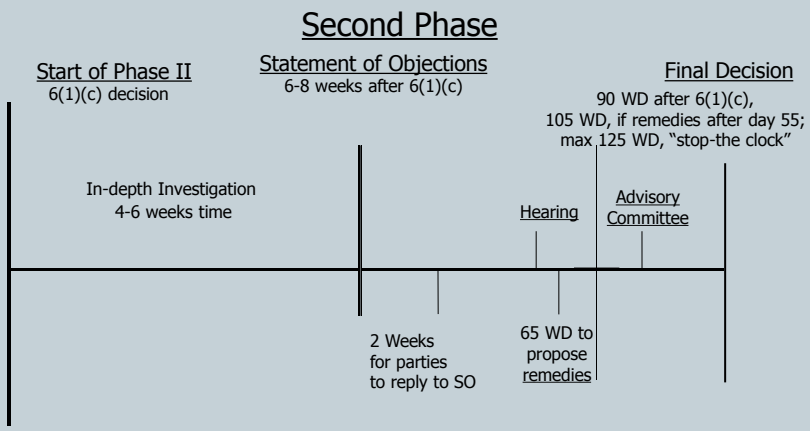
If failure to meet deadline, merger deemed approved ("guillotine")

EU Merger Policy
III. Merger Practice

First Phase



EU Merger Policy
III. Merger Practice



EU Merger Policy
III. Merger Practice

4. Post-decision Phase

- Monitoring of implementation
  - Compliance with conditions and obligations (trustee/COM)
  - Possibility to revoke clearance decision if breach
- Judicial review ?
  - EC Court of First Instance (within 2 months)
  - Appeal on grounds of legality of decision
  - Accelerated procedure and interim relief possible

EU Merger Policy
III. Merger Practice

4. Post-decision Phase

- Importance of judicial review
  - Jurisdiction [e.g. Cemetbouw, Gencor etc.]
  - Procedure [e.g. Schneider I; Sony/BMG I/II (SO); Akzo/Nestlé/Kayserberg/Endemol (access to case file etc.)]
  - Substance: [e.g. Schneider/Airtours/Tetra I/II/Sony BMG (standard of proof; Art. 81/82 as deterrent, etc.); GE/Honeywell; Sun,...]
  - Damages: SchneiderI: (+); Airtours: (-); Schneider II: (-?);