

Keynote speech:

Reflecting on 20 years of the EU Merger Regulation

Modern EU and UK Merger Control: 20th Anniversary Two Decades of Regulation 139/04 and the Enterprise Act Regime
London, 27 February 2024

Introduction

My thanks to the organisers for inviting me. I am delighted to be with you to reflect on this landmark anniversary of 20 years of the EU Merger Regulation. I will give you my take on where we are and where we are going.

Putting the EUMR into context

First, where are we? Well let's step back and assess how far we have come, and our story should start in 1989, when the European Community Merger Regulation was adopted. There were of course other 'minor' events that year – a wall came down in Berlin for example. Equally in 2004, when the regulation we are celebrating today was adopted, the major event was undoubtedly the admittance of 10 new Member States that changed the European Union for ever.

Yet it is rather fitting the dates of the EC and EU Merger Regulations are intertwined with key years in European history, as they are an important part of the European economic story.

And we should not underestimate the crucial role that the Merger Regulation has played in keeping markets competitive in Europe. Since its creation, the Merger Regulation has had a dual role of facilitating the reorganisation and

restructuring of firms – notably on a cross-border basis within the EU - and at the same time preserving and promoting competition in the Single Market. It has facilitated “unproblematic” M&A through the efficiencies created by the one-stop-shop across the EU, the transparent and predictable process, and the independent character of the regulator with an exclusive mandate based solely on a competition assessment. At the same time, it has prevented, or required modifications to, mergers that would harm competition in the EU.

We did, however, realise sometime after 1989 that, while we should preserve these important merits, some changes were warranted to the original EC Merger regulation.

Why were these changes required?

Well, a bit like people, some regulations are already *born great*, some *achieve greatness*, and some *have greatness thrust upon them*.¹ While the ECMR was certainly borne of good thinking, and did lead to significant achievements, it was the crisis of 2002 that was really the turning point that spurred the Commission to produce a greater regulation and framework, in the form of what we know today as the EUMR.

When I refer to a crisis, I refer of course to the trio of judgments annulling the prohibition decisions adopted in 1999 in *Airtours/First Choice*, and later in 2001 in *Tetralaval/Sidel* and *Schneider/Legrand*. The judgements were in June 2002 and October 2002, respectively.

Let me add a personal note: 2002 was the year when I landed in DG COMP after several years in the EU General Court (where the *Airtours* case had been extensively debated) and previously in a law firm. As you can imagine, this was a very interesting period and I had the privilege to work during these years with

¹ William Shakespeare, *Twelfth Night*.

my co-panellists: the new DG, Sir Philip Lowe, Carles Esteve Mosso and Henrik Røller (as first Chief Economist).

I think it's fair to say the champagne wasn't flowing at DG COMP back then; the judgments were very critical of the Commission and made clear that the Commission was going to be held to a high standard of proof by the Courts. At the time, Commissioner Mario Monti said: *I believe that, in a certain time, with more hindsight, we will say that these judgements, no matter how painful, came at a right moment.*² And now, precisely with the benefit of that hindsight we can confirm that Mario Monti was right. It was due to the deeper retrospection thrust upon us because of that experience that we were able to push forward more rigorous, and all-encompassing reforms which truly changed EU merger control – I believe - for the better.

The 2004 substantive reforms

The reforms ushered in with the 2004 Merger Regulation were both procedural and substantive.

On substance what was key was the replacement of the dominance test with the SIEC test, while keeping the notion of dominance as one possible instance of SIEC. This move gave clarity to our ability to intervene in “gap” cases – i.e. mergers arising in oligopolistic markets but not raising single or collective dominance issues. Fundamentally, it also gave a greater focus on the “effects-based” approach, as advocated at the time on both sides of the Atlantic, including for cases based on dominance findings.

² Speech by Prof. Mario Monti at the European Commission/IBA Conference on EU Merger Control Brussels, 7 November 2002, available here: https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_02_545.

And there was certainly a committed and convincing British contingent, to whom the reform of the test owes a lot, starting with our then DG Sir Philip, but also other vocal heads of NCAs, namely Dr John Fingleton and Sir John Vickers.

I distinctly recall Sir John reminding us³ of the conversation between Alice and Humpty Dumpty in *Through the Looking Glass* when Humpty Dumpty said that his words mean whatever he chooses them to mean: *'The question is', said Alice, 'whether you can make words mean so many different things.'*⁴ As recommended by Sir John, rather than trying to make our dominance test mean many different things, the Member States agreed unanimously (some after some persuasion) to adopt the more straightforward option of a more expansive test.

The SIEC test allows us clearly to intervene not only in cases giving rise to dominance but also in cases below that threshold that still give rise to competition concerns. I say clearly, but as you know, there has been a continuous debate the past 20 years about *the meaning of words*: when, on what basis, and with what evidence, the Commission can legitimately intervene in a so-called 'gap case'.

Fortunately, we got welcome clarity after 20 years from the Court of Justice, our true *master of words*, in the *CK Telecoms* judgment last July on some of these fundamental points – notably that horizontal mergers in “gap” cases are also subject to a standard of “balance of probabilities”, as indeed are all mergers.

And the reasons for the SIEC test remain more important than ever. For we continue to care very much about oligopolistic markets and regularly intervene in 'gap cases'. Just recently we had *Orange/Masmovil*, a 4-to-3 telecoms

³ Speech by Sir John Vickers at the EC/IBA Merger Control conference, Brussels.

⁴ Lewis Carroll, *Through the Looking Glass*.

transaction requiring significant fix-it-first remedies for clearance. And last year we adopted a conditional clearance in *MOL/OMV Slovenia* in the retail fuel sector (in which we found both unilateral and coordinated effects – showing the continued relevance of the *Airtours* framework).

But dominance has also continued to feature strongly in our assessments and in our interventions, showing that any fear that dominance would become an exception post-2004 EUMR was not justified.

Preventing problematic consolidation in already concentrated markets is our ‘bread and butter’ and this is shown by our track record over the last 20 years. Looking further back, we had key cases like *ENI/EDP/GDP* (2004), *Ryanair/Aer Lingus* (2007), *Deutsche Börse/NYSE* (2012), *Outokumpu/Inoxum* (2012), *Hutchison/02* (2016) or *Siemens/Alstom* (2019) in energy, air transport, financial services, steel, telecoms, and rail equipment, to name a few. But this variety continues to this day.

At a time when there is a lot of media focus on interventions in tech and digital deals, I think it is also important to recognise that most of our interventions continue to be due to horizontal concerns in a broad set of established industries from construction, to ship-building, to publishing. Considering the increasing market concentration across industries we, and other enforcers, necessarily need to remain vigilant.

Apart from the change in the test, another important reform was the introduction of Horizontal Merger Guidelines to provide greater certainty and transparency as to how the Commission carries out its assessment of such mergers and underlining the move to an effects-based approach. The notions of “close competitors” and “important competitive force”; the test for potential

competition; the burden of proof for efficiencies, are all concepts that are now part of merger practice and more importantly the EU case-law.

These Guidelines also made clear that our mandate is not only to look at price competition but also other parameters that are important to competition. We have always taken an expansive approach to consumer welfare in the EU as endorsed by the Courts – protecting “competition” is not an objective that only encompasses price but also quality, choice and innovation. And innovation competition is not just a tech, or biotech issue – it can be relevant in any industry notably where R&D is important.

And while in 2004 we underlined our focus on horizontal mergers, that does not mean we did away with examining vertical and conglomerate mergers. On the contrary, it was made clear when we announced the reforms that while Horizontal Merger Guidelines would be first, guidelines for vertical and conglomerate mergers would follow, as they did in 2008 in the form of the Non-Horizontal Merger Guidelines. And we have continued to be very attentive to the potential harmful effects of non-horizontal mergers already for a long time. This goes for non-horizontal mergers in traditional industries as well as within the tech or bio-tech spaces.

2004 procedural reforms

Procedurally, there were also important changes brought about by the reforms. We improved the efficiency of our merger reviews by enhancing the referrals system with our Member States.

From an organisational standpoint, DG COMP was restructured into a matrix organisation and checks and balances were reinforced, to ensure a balance of views on all cases. And we established a Chief Economist Team to ensure

mainstream economic principles were injected into our reviews and to make our appraisals as robust as possible.

More flexibility was brought into the timeline; to enable the Commission to extend it when warranted in complex cases.

We adopted Best Practices, in the spirit of cooperation and better understanding between DG COMP and the legal and business community. This allowed for further efficiency of investigations and to ensure a high degree of transparency and predictability of the review process.

Overall, our procedures have benefited from this enhanced engagement – it leads to better enforcement. For as a result we play our role ever conscious of the duty to always take a rigorous approach to enforcement, based on a good understanding of market trends and realities; to engage on substance with the parties and stakeholders during our review process, and to aim for consistency in outcomes (notably avoiding double standards).

Continued modernisation but on the basis of a principled framework

And this has been our goal for the last 20 years. Now, it would be naïve to consider we have got everything right in the last 20 years. And that does not mean we have not had to adapt to new challenges or that our toolbox, or our enforcement, has remained static.

For example, we have just further simplified our merger procedures so that we can ease red-tape for businesses and allow us to focus our resources on the cases that matter.

Our rethink of our guidance on Article 22 is also an example where we have adapted to make up for the inevitable occasional shortcomings of a turnover based system.

We have just adopted a new Market Definition Notice, too. We kept to the underlying principles that made it a valuable tool for the Commission and the business community alike. But the new Notice is updated to bring it in line with new market realities.

And our approach continues to be firmly grounded in economics, as inspired by the 2004 reforms. That does not mean we have to quantify everything: qualitative and quantitative evidence must be taken together, and we assess the body of evidence as a whole. But, we remain dedicated to an effects-based approach based on facts and evidence, and an assessment made under a principled framework.

Our thinking has also developed when it comes to remedies. We introduced a Remedies Notice in 2008, which is still the backbone of our assessment, emphasising the necessary priority of divestiture remedies over any other kind. But we have shown we can exceptionally accept other solutions provided they are effective when merited by the market situation, and vice-versa that we are not afraid to adapt when tougher solutions are required, as we are doing in airlines.

Importance of judicial review

Of course, merging parties, and even third parties, have the right to disagree with our decisions. Rigorous judicial review is a fundamental tenet of our system and that is one thing that has certainly not changed in the last 20 years. Of course, like most parties, we would also welcome a faster process. But, in the

meantime, we take our decisions in full awareness that every point of fact, law and procedure, may ultimately be scrutinised by the European Courts. While it brings challenges for us, particularly as investigations become more and more data-intensive and the body of evidence increases ten-fold, we recognise that it has a natural disciplining effect on the Commission to ensure our decisions are as solidly based on the facts, evidence, and grounded in the law as possible.

So, we need to be objective and rigorous. But when issues arise, we must be bold and vigorous, even if they are “untested”: every time there is evidence of likely competitive harm – even if there is no “precedent” – we must not hesitate to intervene and defend our assessments in front of the Courts.

And this is precisely what we are doing in cases like *Illumina/Grail* and *Booking/eTraveli* for instance.

The same goes for infringements of our procedural rules, which we must vigorously uphold.

Conclusions

To conclude, you need a principled framework – yet a sufficiently flexible one which allows you to deal with new issues *à droit constant*. You don’t have to change the black letter law each time for it to still evolve with the times.

When necessary, we have pushed boundaries within our framework in accordance with novel market realities: be it adapting to digital ecosystems, zero price markets, and targets with no turnover yet immense competitive potential; green innovation competition as it becomes a key competitive parameter in traditional industries, or new consumer preferences for organic products; globalisation as well as the de-globalisation of markets; taking into account new

regulatory frameworks (financial services, GDPR, DMA); or now Artificial Intelligence. We will continue to be bold when needed.

Yet could we do better and is it time for some changes again? Well, there are always many ways to achieve greatness. We will take stock, we will listen – we have our own conference coming up in April where we will further delve into these topics. It is important to reflect. No competition authority is an island, and we can all learn from each other as well as the broader stakeholder community. Legal and economic debates on substantive tests, guidelines, jurisdictional thresholds are all welcome.

But in these interesting debates, we should not forget another fundamental test which is a competition authority's threshold for withstanding pressure. For as Mario Monti noted, competition enforcement is surrounded by all kinds of pressures, and the key test "*is the willingness and ability of...antitrust authorities to resist those pressures*".⁵

So, there are elements that we should not compromise on, and those are the foundations since 1989 that have allowed merger control to play its role in promoting competitive markets in Europe - to the benefit of all players, and on all markets.

The *meaning of words* matters but what you do with them matters more. For we have seen what can be achieved under a durable and principled framework – grounded in the rule of law – which prioritises consistency, promotes transparency and allows facts and evidence to prevail above all.

⁵ Speech by Prof. Mario Monti, International Competition Network Inaugural Conference, Naples, 2002, available here: https://ec.europa.eu/commission/presscorner/api/files/document/print/en/speech_02_473/SPEECH_02_473_EN.pdf

I look forward to seeing what the next 20 years brings!

Thank you.