Merger Control:

Overview of the EU legislaton

6 November 2019

Alexandre BERTUZZI

COMP A.2

Merger Control

I. Legislative framework

a. Merger Regulation

b. Implementing Regulation

c. Notices and guidelines

II. Key principles and concepts

Up-to-date info on the relevant COMP website:

https://ec.europa.eu/competition/mergers/legislation/legislation.html

I. Legislative framework

Merger Regulation

COUNCIL REGULATION (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)

- Framework setting out the Commission's powers in merger control

- Key concepts:
  - Concentration
  - EU dimension ("one-stop-shop")
  - Substantive test - "SIEC"

- Procedural rules:
  - Prior notification and suspension
  - Time limits and decisional powers
  - Referrals to/from NCAs
  - Information requests, inspections and fines

Implementing Regulation

COMMISSION REGULATION (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (as amended by Regulation (EC) No 1033/2008 and Implementing Regulation (EU) No 1269/2013)

- Additional rules for the enforcement of the Merger Regulation:
  - How to notify (Form CO, Short Form)
  - Reasoned submissions for referrals (Form RS)
  - Calculation of time limits and "stop-the-clock"
  - Rights of defence/right to be heard (statement of objections, access to file, confidential information, hearing)
  - Commitments (time limits, procedure, Form RM)

Notices and guidelines

A. Commission consolidated jurisdictional notice (OJ C 95, 16 April 2008)

B. Simplified procedure

C. Case referrals

D. Notices on substance:

- **Non-horizontal Guidelines** (OJ C 265, 18 October 2008)
- **Horizontal Guidelines** (OJ C 31, 5 February 2004)
- **Relevant Market**
- **Remedies**
- **Ancillary restraints**

E. The role of the Hearing Officer

F. Access to file

G. Abandonment of concentrations

Best practice guidelines

- **Best practices on the disclosure of information in data rooms** (2015)
  - Standard data room rules
  - Standard non-disclosure agreement
- **Guidance on the preparation of public versions of merger decisions** (2015)
- **Best practices on divestiture commitments** (2013)
  - Model text for divestiture commitments
  - Model text for trustee mandates
- **Best Practices on the submission of economic evidence** (2011)
- **Best practices on merger control proceedings** (2004)

II. Basic principles and concepts

Jurisdictional Notice

Clarifies **key concepts** for determining jurisdiction under the EUMR

When is a transaction caught by the EUMR?

1. **Concentration (Article 3, Recital 20), i.e. <u>change of control on a lasting basis</u>**
   - Merger or acquisition of sole or joint control
   - Intended to relate to operations which bring about a <u>lasting change in the structure</u> of the market
2. **Having an EU dimension (Article 1)**
   - Depends on turnover generated by the undertakings concerned by the concentration and the geographical allocation of that turnover

Control

Exercising "**decisive influence**" on an undertaking to determine strategic decisions (Art. 3(2)), i.e. power to impose or block actions which determine the strategic commercial behavior of an undertaking (para. 62 JN)

Control, key issues

- Who acquires control?
- How is control acquired (de iure, de facto)?
- Type of control (sole/joint)
- Object of control (businesses, assets…)
- Lack of joint/sole control (shifting majorities)
- Changes in quality of control (sole to joint, etc.)
- Changes of controlling parties' identity
- Joint Venture, full-functional

EU dimension

- **Identify the operations which have an impact in the EU**
- **Turnover used as a proxy for the economic resources involved in the operation**
- **Two sets of thresholds: Article 1(2) and Article 1 (3) EUMR**
- **Most important threshold: Article 1(2): 3 criteria**
  - Combined aggregate world-wide turnover > € 5bn
  - EU-wide turnover of at least two undertakings concerned > € 250 m
  - Not all of the undertakings concerned generate two-thirds of their respective turnover in one and the same MS

EU dimension, methodology

- Identify “undertakings concerned” by the concentration
- Calculate turnover of undertakings concerned
- Are the turnover thresholds in Article 1 EUMR met?

Calculation of turnover

Can be complex, key rules to remember:

- **Group turnover, not just that of undertaking concerned**
- **Audited accounts of preceding year**
- **Adjustments in case of major acquisitions or divestments**
- **Geographical allocation of turnover**
- **Date for establishing jurisdiction - the earlier of:**

  Date of Notification

  Date of conclusion of agreement, announcement of public bid, acquisition of controlling interest
- **Specific rules in Article 5(3) for banks, insurance undertakings, etc.**

Market definition

- Significant Impediment to Effective Competition (SIEC) is assessed on a given relevant product and geographic market → important role, but only first step in the overall assessment

- Used to identify the universe of competitive constraints on the parties

- **Product market**: all products considered interchangeable by customers
  - **First, demand-side substitutability (for customers)**
  - **Also, where appropriate, supply-side substitutability (for suppliers)**

- **Geographic market**: area where the conditions of competition are sufficiently homogeneous and different from neighbouring areas

Merger guidelines

Two types of mergers

- **Horizontal Mergers**
  - Unilateral effects
  - Coordinated effects

- **Non-Horizontal Mergers**
  - Vertical
  - Conglomerate

- Effects on prices, but also for instance on choice, quality and innovation

Guidelines on horizontal mergers

Horizontal mergers may significantly impede effective competition in two ways:

- **Non-coordinated (= unilateral) effects:** a merger may diminish the degree of competition by eliminating important competitive constraints on one or more firms, which consequently would have “increased market power”, even without resorting to coordination
- **Coordinated effects:** a merger may create or reinforce a situation where competition is reduced by coordination

Unilateral effects

Market shares and concentration levels

Initial indication of market structure and competitive strength of various players

- Market shares:
  - **50% or more: indication of dominance**
  - **Between 40 and 50%: typically problematic**
  - **Below 40%: typically less problematic but no safe harbour**
  - **Below 25%: typically no problem**
- Concentration levels: HHI index

Other key factors

- **Closeness of competition**

  Homogeneous vs differentiated products

  Degree of substitutability between the merging parties' products

- **Customers' ability to switch**

  Importance of multi-sourcing

- **Competitors' ability to expand output**

  Particularly important in case of homogeneous products

- **Hinder competitors' expansion (raising rivals' costs)**
- Elimination of **"maverick"** firms

Countervailing factors

- Buyer power
- Entry
- Efficiencies
- Failing firm

- **Case by case assessment**
  - take into account the specificities of each industry/market

Guidelines on non-horizontal mergers

Different competition concerns than horizontal mergers

- **No loss of direct competition between competitors**
- **Possible complementarity of merging parties**
- **Potentially significant efficiencies**

Non-horizontal mergers may raise competition concerns

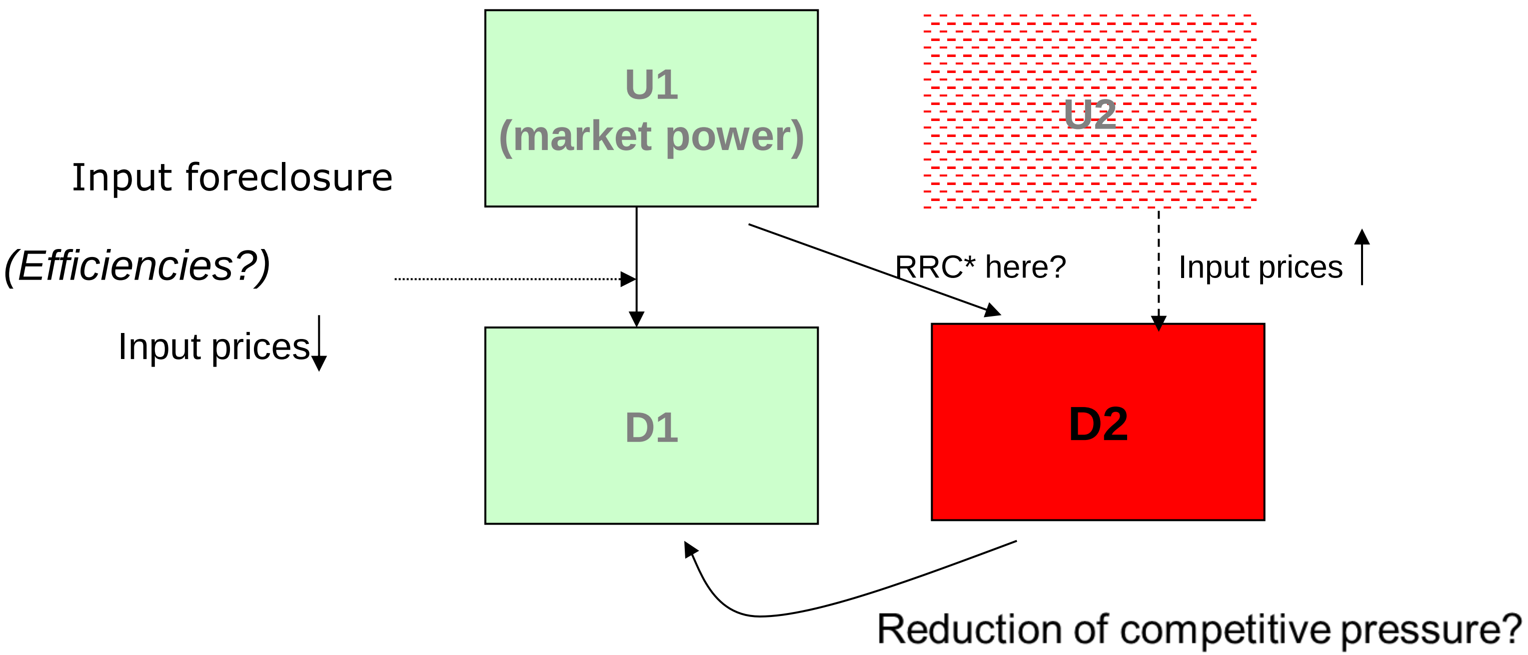
- **Ability and incentive for merged entity (and competitors) to compete in ways that cause consumer harm:**
- **Foreclosure**
- **Coordination**

Vertical mergers - efficiencies

There are many reasons why vertical mergers may be good for consumers

- Eliminate/reduce double mark-ups
- Coordinate the production and distribution process to save costs
- Align incentives of the parties with regard to investments in new products, new production processes and in the marketing of products

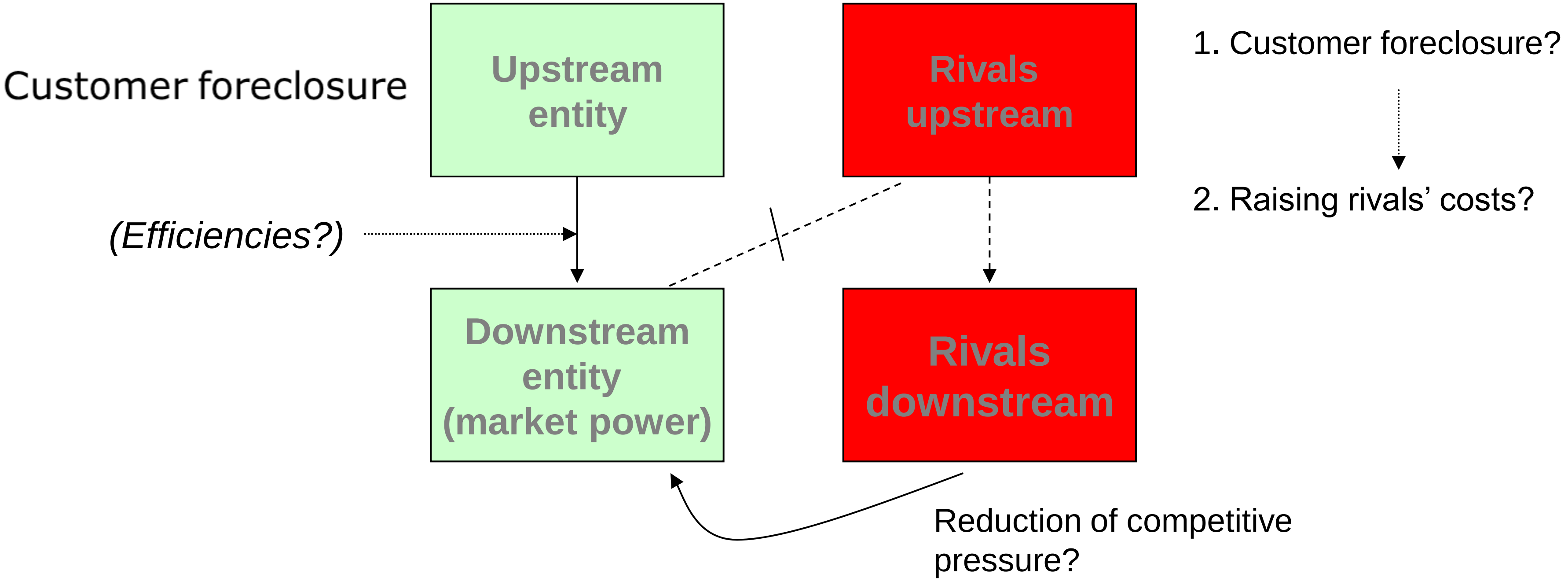
Vertical mergers - competition issues



*RRC: Raising Rivals' Costs

➔ *Net effect on consumers ?*

Vertical mergers - competition issues



→ *Net effect on consumers ?*

Conglomerate mergers

- Mergers between firms that are in neither a horizontal (as competitors in the same relevant market) nor a vertical relation (as suppliers or customers) in relation to each other

- Conglomerate mergers of particular interest are mergers between companies that are active in closely related markets (e.g. mergers involving suppliers of complementary products or products that belong to the same product range)

Simplified cases

- Positive exercise in streamlining: vast majority of cases
- Most thresholds to apply the simplified procedure are **market-share based.**
- Market shares for **all "plausible markets":**
  - Product and geographic markets, **including plausible alternatives.** Long-standing practice
  - **Further guidance** on what markets are plausible:

  - Previous decisions of the Commission and the EU Courts
  - Companies' business documents and market studies

Remedies Notice

Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 (2008/C 267/01)

- **Sets out general principles for acceptable remedies**
  - must entirely eliminate the competition concerns
  - comprehensive, effective and capable of being implemented effectively within a short period of time and with a requisite degree of certainty
  - effective monitoring possible
  - structural remedies (divestments) preferable
  - behavioural remedies only accepted under exceptional circumstances
- **Specific requirements for proposed remedies**
- **Main requirements for implementing remedies**
  - monitoring and divestiture trustee(s)

Ancillary Restraints Notice

Commission Notice on restrictions directly related and necessary to concentrations (2005/C 56/03)

- Provides guidance on the interpretation of the notion of ancillary restraints (i.e. restrictions directly related to and necessary for a merger)
- Clearance *decisions "shall be deemed to cover restrictions directly related and necessary to the implementation of the concentration"*
- Only the Merger Regulation applies for ancillary restraints whereas non-ancillary restraints may be caught by Article 101 or 102 TFEU
- The merging parties have to determine themselves whether or not a restriction is ancillary
- Commission will assess only if the issue presents *"novel and unresolved questions giving rise to genuine uncertainty"*

Waivers and pre-notification

- Forms **encourage case teams to give waivers** to provide certain information

  - Benchmark: is the information truly necessary for the assessment?

  - 9 candidate categories of information identified for waivers

- Immediate notification possible when no reportable markets in the EEA (ex-EEA JVs, 25% of simplified cases).

Thank you!

Back-up

Merger Simplification Package: Main changes and implications

The Simplification Package

- **The Package:**
  - New Notice on the Simplified Procedure
  - Revised Form CO, Short Form CO and Form RS
  - Some technical amendments to the Implementing Regulation
- **Objective:**
  - Streamline procedures and **cut red tape**
- **Effects:**
  - save cost and time for business
  - focus Commission resources on problematic cases
- **Entry into force:** 1 January 2014

The new thresholds for the simplified procedure

Horizontal overlaps: combined market share <20%

Vertical relationships: market share in upstream and downstream markets <30%

New! Horizontal overlaps: combined market share >20% but <50% and HHI delta <150

Result: 60-70% of cases treated under simplified procedure

Form CO, Short Form CO streamlined

- Market share **thresholds for affected markets** increased to 20% (horizontal overlaps) and 30% (vertical links)

- Market share **thresholds for conglomerate links** and **markets in which parties potentially compete** increased to 30%

- When market shares are lower**, no market information** needs to be provided

- Some **market information sections deleted or tailor-made** for different cases