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ACADEMY OF EUROPEAN LAW

"Cases on Mergers"

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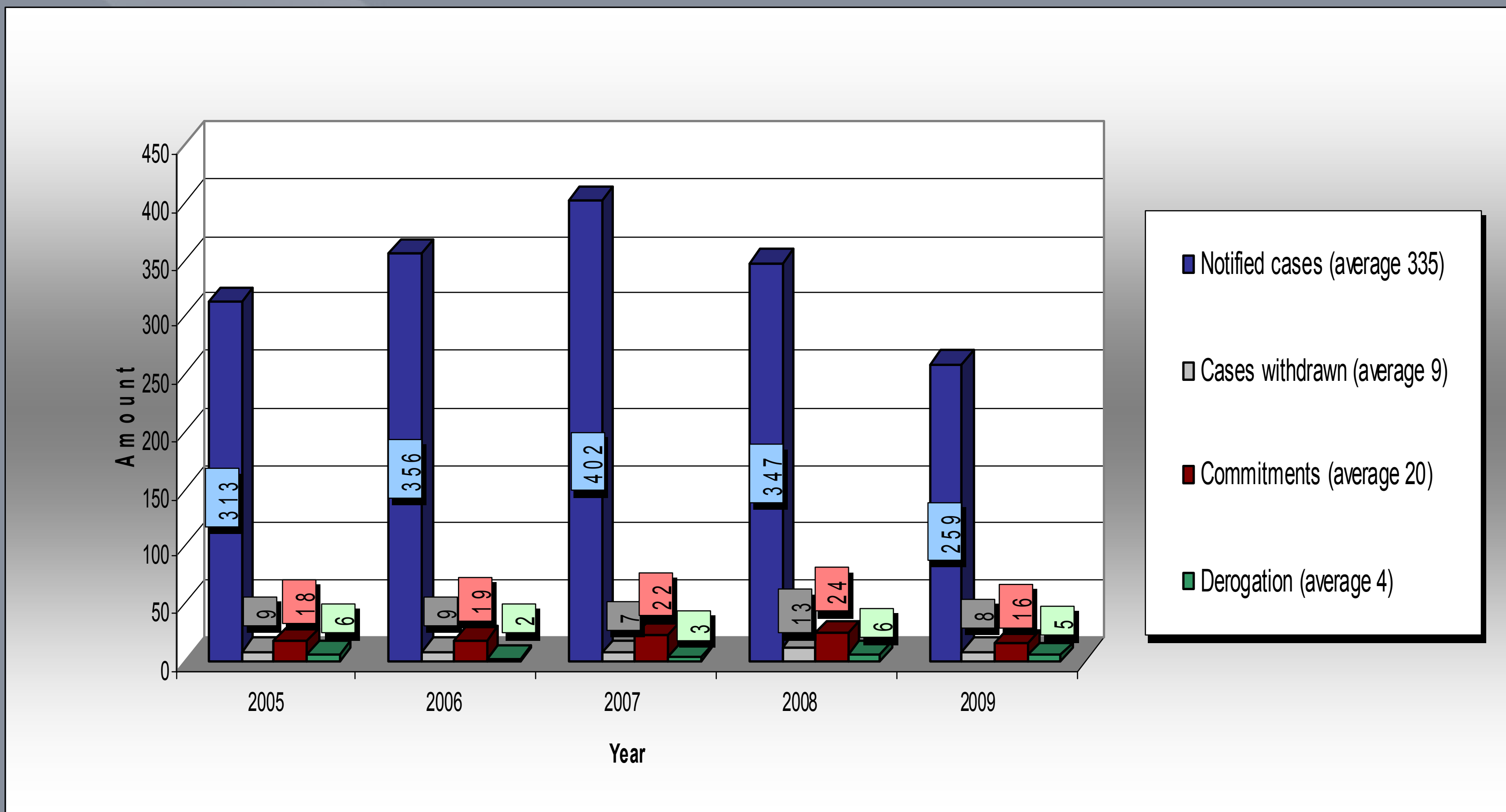
Outline

- **Introduction**
  - » Statistics and observations
- **Substantive issues recently investigated**
  - » Horizontal mergers
    - Single firm concerns
    - Non–coordination in oligopolistic market
    - Coordinated effects
  - » Non-horizontal mergers
- **Miscellaneous: damages; procedure**

EU Merger Statistics



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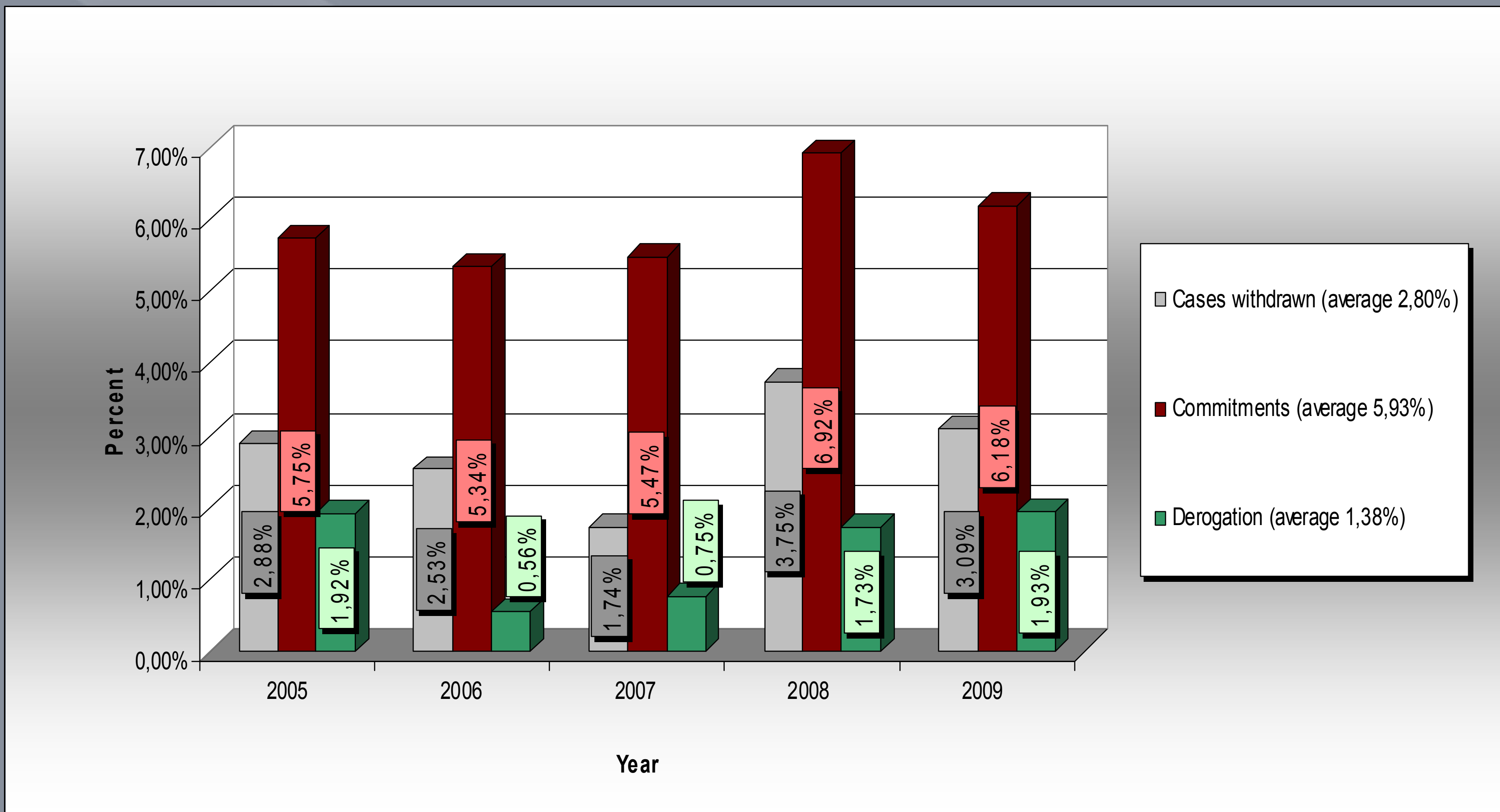
EU Merger Statistics



Horizontal Mergers

Overview

- Single firm concerns: pricing behaviour without considering the reaction of competitors (i.e. dominance; classical non-coordinated effects)
- Non-coordinated effects in oligopolistic markets ("gap" cases): merger will eliminate direct competitive constraints without need for any collusion from competitors
- Coordinated effects: merger increases likelihood of tacit collusion between the companies remaining on the market to increase prices

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Single Firm Concerns: Airlines

- **Airline mergers**
  - » *Ryanair/Aer Lingus*
    - merger between two largest airlines on the Dublin airport
    - horizontal, not complementary and similar business model
    - monopoly or dominance on 35 routes
    - substantial barriers to entry
    - remedies insufficient
    - ⇒first prohibition decision in the airline industry
    - Appeal by Ryanair to the GCEU

Single Firm Concerns: Airlines

- **Airline mergers**

  » *Iberia/Vueling/Clickair*

    - Acquisition of low cost airlines Vueling and Clickair by Iberia
    - restriction of competition or even monopoly on 19 routes
    - high combined shares of slots at Barcelona-El Prat and Madrid-Barajas
    - remedies included transfer of slots
    - remedies more than 150 additional roundtrips per week
    - ⇒ first phase clearance with commitments
    - likelihood of entry acknowledged but Monitoring Trustee appointed
    - reduction of the utilization period for transferred slots

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Single Firm Concerns: Airlines

- **Airline mergers**
  - » *Lufthansa/bmi*
    - Merger of complementary airlines
    - LH unlikely to start operating flights on bmi routes
    - No SIEC on any of these routes
    - ⇒ first phase clearance without commitments

Single Firm Concerns: Airlines

- **Airline mergers**

  » *Lufthansa/SN Airholding*

  - Acquisition of 45% shares (and option for further 55% shares) by LH in parent of Brussels Airlines
  - Phase II investigation showed that concentration would have created a monopoly with respect to the routes from Brussels to Hamburg and Munich and competition concerns on the routes Brussels-Frankfurt and Brussels-Zurich.
  - LH committed to offer slots allowing new entrants to operate flights on each of the four routes plus grandfathering rights, participation in frequent flyer programme etc. under the supervision of a Monitoring Trustee
  - $\Rightarrow$ second phase clearance with commitments

Single Firm Concerns: Airlines

- **Airline mergers**

  » *Lufthansa/Austrian Airlines*
  - Acquisition of Austrian Airlines by LH
  - Phase II investigation showed competition concerns namely on the routes from Vienna to Frankfurt, Munich, Stuttgart, Cologne and Brussels.
  - LH committed to offer slots allowing new entrants to operate flights on each of the five routes plus grandfathering rights, participation in frequent flyer programme etc. under the supervision of a Monitoring Trustee
  - $\Rightarrow$ second phase clearance with commitments

Single Firm Concerns: Airlines

- **Airline mergers**

  » *KLM/Martinair*

  - Acquisition by KLM of 50% in Dutch airline Martinair from 50/50 JV partner Maersk
  - Phase I investigation showed competition concerns on routes Amsterdam - Curacao and Amsterdam - Aruba.
  - remedies rejected
  - Phase II investigation revealed that effects of the proposed transaction would be limited because
    - KLM already controls Martinair jointly
    - Martinairs competitive strength has been constantly decreasing and they need KLM's to renew its long-haul passenger fleet
    - Customer survey indicated that most passengers would either not travel at all or travel elsewhere in case of price increase ⇒ limited potential for price increases
    - merged entity constrained by competitor ArkeFly
  - ⇒ second phase clearance without commitments

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Single Firm Concerns: Pharma

- **Pharma mergers**

  » *Pfizer/Wyeth*

    - Acquisition by Pfizer (US) of Wyeth (US)
    - In human health care activities were largely complementary
    - In overlap markets sufficient number of actual and potential competitors
    - Pfizer proposed divestments in various vaccine areas and several pharmaceutical areas and in one medicinal feed additives area.
    - Pfizer also offered to divest Wyeth's vaccine manufacturing facility in Sligo, Ireland, at the option of the purchaser of the vaccines divestment business ("crown jewel").
    - Carve-out remedies accepted
    - $\Rightarrow$ clearance with commitments

Single Firm Concerns: Pharma

- **Pharma mergers**

  » *Merk/Schering-Plough and Sanofi-Aventis/Merial*

  - Merck/Schering-Plough merger announced in March 2009
  - Overlap in animal health only through 50/50 JV of Merck with Sanofi-Aventis
  - Exit from JV (and unconditional clearance of Sanofi-Aventis/Merial merger) before notification
  - ⇒ clearance without conditions due to removal of overlap

Single Firm Concerns: Pharma

- **Pharma mergers**
  - *TEVA/Barr and Sanofi-Aventis/Zentiva*
    - Acquisition of Barr (US) by TEVA (Israel); both generic manufacturers of pharmaceuticals and of generic manufacturer Zentiva (Czech Republic) by original manufacturer Sanofi-Aventis Europe (France)
    - Market definition according to ATC – generally starting at level 3 which indicates therapeutic indication, i.e. intended use
    - Here analysis based not only on ATC3 level but also at ATC4 (i.e. molecule) level
    - Companies' portfolios were largely complementary but overlaps and competition concerns were met through divestments in national markets
    - ⇒ clearance without conditions due to removal of overlap

Single Firm Concerns

- **Energy mergers**
  - *StatoilHydro/ConocoPhilips*
  - *Vattenfall/Nuon*
  - *RWE/Essent*
  - *EDF/British Energy*
  - *GALP Energia/Exxon Mobil Iberia*
- **Others**
  - *Friesland/Campina*
  - *Arsenal/DSP*
  - etc.

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Non-coordinated Effects in Oligopolistic Markets

- ***EDF/Segebel***
  - » EDF acquired second largest electricity operator in Belgium after incumbent GDF Suez, Electrabel
  - » Removed EDF as potential significant entrant into various Belgian electricity markets, notably Belgian wholesale electricity market
  - » Reduced incentive for EDF to build additional electricity generation capacity in Belgium
  - » Remedy: immediate divestment of assets of one of the two companies in charge of carrying out the new power station projects
- ***REWE/ADEG***

Coordinated Effects - Impala

- ***Sony/BMG-Impala***
  - » EC cleared Sony/BMG merger (2004)
  - » GCEU annulled the clearance decision (2006)
  - » ECJ set aside the GCEU judgement and confirmed Airtours criteria (2008):
    - » (1) Transparency and monitoring of deviations
    - » (2) Deterrent Mechanisms
    - » (3) Reactions of Outsiders
    - » and no mechanical and abstract application

Coordinated Effects – ABF/GBI

- ***ABF/GBI* Business**
  - » Case referred to EC by France, Portugal and Spain under Art. 22 ECMR
  - » 3 to 2 merger
  - » Mature and transparent markets
  - » Homogeneous products
  - » High barriers to entry
  - » Remedy: Divestment of GBI‘s business in Portugal and Spain plus production capacities

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Non-horizontal Mergers

Non-horizontal Mergers

- **Vertical issues**
  - „Purely“ vertical cases
  - Vertical issues in horizontal mergers
- **Minority shareholdings**
- **„Mixed“ cases**

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Vertical Mergers: Benefits & Concerns

- **Economic literature shows pro-competitive benefits (e.g. production and organization efficiencies)**

- **Vertical concerns**

  » Input foreclosure
    - Restrict supplies/raise prices to competitors

  » Customer foreclosure
    - Merged entity stops purchasing from competitors

  » Access to competitively sensitive information

  » Coordination

TomTom/Tele Atlas

- TomTom (NL) sells portable navigation devices (PND)
- Aquisition of Tele Atlas (NL), provider of navigable digital maps
- Backward integration
- Rationale: better maps more quickly and cheaply by using TomTom‘s customer information
- Concern: Input foreclosure (trade-off between upstream losses and downstream gains)

TomTom/Tele Atlas

- **Foreclosure possible …**
  - » High ms in upstream market
  - » Navigable maps important input
- **but unlikely**
  - » Maps less than 10% of PND prices
  - » Not all PND manufactures would pass on price increase
  - » Long term contract Garmin-NAVTEQ
  - » Low switching cost etc.
- ⇒ **unconditional clearance**

Further Purely Vertical Cases

- ***Nokia/NAVTEQ***
- ***Itema/Barcovision***

  » Similar market structure as *TomTom/Tele Atlas*: upstream duopoly and important market position downstream

  » Input foreclosure but small part of downstream product

  » cleared unconditionally in second phase

Vertical Issues in Horizontal Mergers

- ***RWE/Essent***

  - Horizontal merger with overlaps in gas and electricity markets in the Netherlands and gas and electricity markets in Germany but mostly moderate market shares and sufficient number of competitors post merger
  - Vertical relationship between upstream market for gas short-distance wholesale supply and downstream market for gas retail sales in RWE's market area resulting in customer foreclosure
  - Remedy: divestment of swb

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Minority Shareholdings

- ***IPIC/MAN Ferrostaal***

  - » IPIC through ist subsidiary AMI is one of the three largest manufacturers of high-grade melamine in the EEA
  - » 30% shareholding and decisive influence of MAN in Eurotecnica which offers only freely available technology for high-grade melamine production
  - » This would allow IPIC post acquisition to foreclose access to melamine production technology
  - » Minority shareholding divested ⇒ clearance

Mixed Cases

- ***Google/DoubleClick* (online advertising)**
  - » Google sells space on its website and intermediation services through which text ads are served on the pages of AdSense members
  - » DoubleClick sells ad serving technology to publishers and advertisers
  - » Conglomerate, vertical or diagonal merger?
  - » Several theories of harm suggested, e.g. increase of DC tools price; degrade DC tools quality; tying DC tools with AdSense

Miscellaneous

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Damages in Merger Cases

- ***Schneider/Commission***
  - Schneider/Legrand merger prohibited
  - GCEU quashed merger and divestment decision
    - Violation of Schneider's rights of defence
  - GCEU awarded damages to Schneider for
    - Expenses incurred for second EC investigation and
    - Lower on-sale price in return for deferral
    - No damages for loss of asset value because absence of that breach would not mean that merger had been cleared
  - ECJ set aside the GCEU judgement partly and found that the losses resulting from the lower on-sale price were not directly caused by the EC's breach

Damages in Merger Cases

- ***MyTravel/Commission***
  - » Airtours (now MyTravel)/First Choice merger prohibited
  - » GCEU quashed merger decision
    - Oligpolistic dominance not proven
  - » GCEU turned down MyTravel's damage claim
    - The concept of a breach of Community law sufficiently serious to give rise to the non-contractual liability of the Community does not comprise all errors or mistakes which, even if of some gravity, are not incompatible with the normal conduct of an institution responsible for overseeing the application of competition rules, which are complex, delicate and subject to a considerable degree of discretion.

Procedure

- **Dawn raid in ongoing merger procedure (*INEOS/Norsk Hydro*)**
- **20 mio. EUR fine for acquisition of control without prior EC approval (*Electrabel/CNR*)**
- **Suspension of investigation (GCEU, T-145/06, *Omya/Commission*)**

Thank you very much for your attention!

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