

# BIICL 10<sup>th</sup> Anniversary Merger Conference

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***Back to the Future:***  
*Reflections on the Last Decade and  
Predictions for the Next*

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## Overview

1. From structural to more effects based approach
2. Putting European Merger Control on the map
3. Successes and failures
4. Lessons to be learnt

## 1. From structure to effects based approach

- **Alcatel/AEG Kabel (1991)**
  - Breaking ranks with a godfather (BKARTA)
- **Closeness of substitution concept widely applied under the dominance test**
  - Volvo/Scania (2000)  
A merger of two 'Mercedeses' - in Sweden
  - Philips/Agilent (2001)  
Skip market definition and center on effects on competition; importance of competition on innovation
  - GE/Instrumentarium (2003)  
Making bidding data analysis respectable
- **Effects based analysis in the context of oligopolistic dominance**

## 2. Putting Europe on the Map

- **Glencore/Lonrho(1996)**
  - A South African marriage creating a worldwide duopoly in platinum – prohibition confirmed by the Court
- **Boeing/McDonnell Douglas (1997)**
  - US/EU disaccord; a courageous Commissioner; behavioral remedies – “the Europeans did it for Airbus...”
- **GE/Honeywell (2001)**
  - US/EU disaccord, about the predictability of conglomerate effects – “effects only dimly discernible” (CFI)
- **Enhanced EU/US cooperation:**
  - Increasing convergence since 1997
  - Kick-start for the ICN

### 3. Successes and Failures

- **The One-Stop Shop and strict deadlines**
  - Commission have proven ability to take reasoned (and mostly reasonable) decisions within short deadlines
- **The trilogy of defeats (2002)**
  - Airtours/First Choice – coordinated effects, gap case, damages
  - Schneider/Legrand – unilateral effects, French champions, damages
  - Tetra/Sidel – conglomerate effects
  - Bad economics or bad (insufficient) facts?
- **Judicial review has been (and continues to be) healthy – angst of judicial censure has sometimes lead COMP to “over-investigate” (ex Sony/BMG/Impala)**
- **Monti’s Christmas package**
  - The best possible test (SLEC plus dominance)
  - Horizontal Merger Guidelines
  - Checks and Balances

### 4. Lessons Learnt ?

- Post MTF record is mixed: more economics - but steady increase in length of pre-notifications
- Massive gap of procedural requirements between Phase 1 and Phase 2 determines choice of procedure: few Phase 2 cases, but (too) many “long” Phase 1 cases
- Market definition and market shares are still key to far too many cases – despite enhanced CE team and so-called “more effects-based approach”
- ‘Invitations’ to resort to efficiencies (eg. Olympic/Aegean; Deutsche Börse-NYSE) not (yet?) taken up by the Commission
- In comparison with other mature authorities, DG Competition fails to retain experienced case handlers