Merger Control Procedure

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Outline

• EU merger control in perspective (differences with the US system, statistics.)
• Main procedural steps and timeline
• Pre-notification discussions and formal notification
• Phase I
• Phase II
• Referrals
• Remedies
• Q&A
EU merger control in perspective – EU/US model

• EU model:
  - Exclusive competence of the European Commission to examine and authorize mergers with a Community Dimension
  - European Commission often accused of being judge and prosecutor
  - Judicial review by the General Court/CJEU

• US model:
  - Two agencies with jurisdiction: FTC/DOJ
  - Only a court can prohibit a concentration if it restricts competition: agency needs to litigate its cases
Timeline

- **Notification**: 2 weeks to 1 month
- **Clearance/Remedies/Second Phase**: 25 to 35 WD
- **Clearance/Remedies/Prohibition**: Up to 125 WD

**Working days**

- **Prenotification**: 2 weeks to 1 month
- **First phase**: 25 to 35 WD
- **Second phase**: Up to 125 WD
Standstill obligation

• High fines for breach (up to 10% of annual revenue, and/or 5% of daily revenue for each day of infringement), e.g. Electrabel / Compagnie Nationale du Rhône fined €20 million

• Exception: possibility to implement a public bid or a series of transactions in securities if:
  – (i) the merger has been notified and
  – (ii) the acquirer does not exercise voting rights

• Derogations (only granted in exceptional cases, in less than 3% of cases, e.g. serious financial distress)
Pre-notification discussions

• Voluntary and confidential
• To ensure a smooth post-notification process
• At least two weeks before formal notification (typically start after submission of case allocation request)
• Typically discussions take place on the basis of a draft Form CO (in particularly difficult cases face to face meetings including business people may be necessary)
• Commission will usually come back within a week requesting further information
• Private practitioners have voiced complaints about unduly lengthy and burdensome pre-notification discussions (sometimes lasting over a month in cases that raise no substantive issues)
Formal Notification

- Short form CO/Long form CO
- Qualification for Short Form: No “affected” markets
  - Horizontal overlap between the parties
    - No market with combined market share >15%.
  - Vertical overlap between the parties
    - No market with individual or combined market share >25%
- Simplified procedure (in addition to Short Form requirements, JVs with sales and/or assets in the EEA below €100 million, and changes from joint to sole control)
Phase I

- Incomplete notification
- Requests for information ("Art. 11 request")
  - "Simple" requests
  - Requests by decision
- State of Play meeting: before 15 WD, if case team is having serious doubts.
- Possibility to offer commitments before 20th working day to avoid opening phase II
- Leads to extension by 10 working days
Phase I

Possible outcomes phase I:

- Art.6(1)(a) decision: no jurisdiction
- Art.6(1)(b) decision: unconditional approval
- Art. 6(2) decision: conditional approval (see later section on “remedies”)
- Art. 6(1)(c): serious doubts (opening of “phase II”)
Phase II

- Further Article 11 requests
- Second State of Play meeting (two weeks after initiation): to discuss parties comments on opening of Phase II decision
- Third State of Play meeting (before SO)
- Statement of Objections (SO)
- Access to the file
- Oral hearing
- Fourth State of Play (after SO response and hearing)
- Remedies (before Advisory Committee)
Phase II

• Commission less inclined to adopt SOs after M.3333 – Sony/BMG

• No SO, typically when remedies are offered early on in the process, or when the parties persuade the case team early on that there are no issues (e.g. M.4942 – Nokia / Navteq; M.4731 – Google / DoubleClick; M.6410 – UTC / Goodrich; M.5675 – Sygenta / Monsanto’s Sunflower Seed Business…)

Phase II

- Possible outcomes phase II
  - Article 8(1) unconditional approval
  - Article 8(2) conditional approval (remedies)
  - Article 8(3) prohibition decision
Referrals

• Referrals requested by the parties prior to notification
  – Article 4(4) concentration having CD affecting competition in a distinct market within a MS
  – Article 4(5) concentration not having community dimension but notifiable in at least three MS
• Referrals by the Commission to an NCA at their request (Article 9)
  – Merger having CD but threatens to significantly affect competition within MS area constituting distinct relevant market, or affect competition in a distinct MS market which does not represent a substantial part of the common market.
• Referrals to the Commission by an NCA (Article 22)
  – Merger not having CD but affecting trade between MS and threatening to distort competition within MS(s)
Referrals

• Article 4(4) and 4(5)
  – Filing of RS (“Reasoned Submission”) form
  – Commission transmits without delay to all MS
  – Referred MS can objet within 15 WD of reception
  – If MS disagrees (even a single one) no referral
Referrals

• Article 9 (from Brussels to MS)
  – Within 15 WD of notification MS informs COM of its own initiative or upon COM’s invitation
  – Commission may or may not decide to refer whole or part of the case
  – COM to take referral decision within 35 WD phase 1 and 65 WD phase II
  – NCA shall decide within 45 WD of complete notification
Referrals

• Article 22 (from MS to Brussels)
  – NCA must request within 15 WD of reception of notification
  – COM informs other MS and they can join request within 15 WD
  – After 10 additional WD COM must decide whether to take the case
  – COM shall proceed according to usual timeline
  – Article 22 used to prevent forum shopping: e.g. M.5969—SC Johnson/Sara Lee
Art. 4 (4) full referrals to Member State
Art. 4 (4) partial referrals to Member States
Art. 4 (5) referrals
Art. 22 referrals
Art. 9 (3) full referrals
Art. 9 (3) partial referral
Remedies

- At least in theory, must be put forward by the parties (not imposed by the Commission)
- Capable of entirely eliminating the concerns identified
- Capable of being implemented effectively within a short period of time
- Structural better than behavioral
- In Phase I they must be clear-cut and straightforward
Divestments

Divestment remedies must consist of:

i. viable business that if,

ii. operated by a suitable purchaser,

iii. can compete effectively with the merged entity on a lasting basis.
Viability

• Stand-alone business always preferable (but single products, or asset bundle can also be accepted).
• May have to include key personnel, manufacturing capacity, etc.
• Commission can require inclusion in the divestiture package of assets unrelated to the product or geographic market concerns where identified (See Case COMP/M.1990 – Unilever/Amora-Maille, See Case No IV/M.1578 - Sanitec/Sphinx)
• Divestment can include target or acquirer assets or both, but Commission dislikes “cherry picking”
Viability

• Crown-Jewel divestments:
  – When there is uncertainty about the possibility of transferring the assets or finding a suitable purchaser for them
  – As good or better than the main divestment
  – Often used as alternative to an up-front buyer solution
  – Requires that both the main and the crown jewel business are held separate.
Suitable purchaser

• Business has to be transferred to a purchaser in whose hands it will become an active competitive force in the market

• Requirements:
  – Independence
  – Sufficient financial resources
  – It must not create new competition problems nor give rise to a risk that the implementation of the commitments will be delayed
  – Specific requirements (industrial, rather than financial purchaser, with access to infrastructure or production capacity, already active in the sector, etc.)
Suitable purchaser

Independence:

• Absence of financial or structural links to divesting parties
• Seller financing or earn-outs not welcomed
• Avoid situations in which the divested business remains entangled to the retained business for long periods of time (through long-term supply or purchase agreements)
Suitable purchaser

• Sufficient resources, expertise and incentive
  – Need to present detailed business plan including: addition of headcount, sales projections, planned investments in R&D, appointment of distributors, management CVs, etc.
  – Monitoring trustee will want to meet with future management of business
Suitable purchaser

- No *prima facie* competition concerns that could delay or make acquisition impossible
- Acquisition by suitable purchaser could require filing with Commission or Member State (unnecessary duplication)
- Can a fix be fixed?
Different forms of divestment

- Standard
- Fix-it-first
- Up-front buyer
- Self-help remedies?
Standard

• Most common type of divestiture
• Commission is confident that assets are attractive and that a suitable purchaser will be found
• Parties can close the underlying merger but divested business is held separate
• Sale of business within a fix time-limit (typically 6 months) after adoption of decision (alternatively, from the date of acceptance of public takeover bid, or if merger is pending approval in another jurisdiction after clearance decision in that jurisdiction, e.g. Pfizer / Wyeth)
• Risk of asset degradation
• If suitable purchaser not found “fire-sale”
Up-front buyer

• Typically required when Commission believes that the number of potentially suitable purchasers is reduced
• Parties are often given the chance to offer a crown-jewel instead
• Parties cannot close until buyer is approved by the Commission
Fix-it-first

• Typically offered in a second-phase (35 working days of the first-phase to tight to find and enter into binding agreement with purchaser)
• But can also be done in first phase (Case COMP/M.5075 – Vienna Insurance Group / EBV, or Case No COMP/M.3136 GE / AGFA NDT)
• Commission will not assess divested business in a vacuum
• It will clear purchaser and merger in a single decision enabling parties to close right away
Fix-it-first

- Avoids monitoring trustee and hold separate
- Lets parties tailor package to the buyer *but* :
- Exposes them to a buyer lobbying the Commission for more and better assets
- “Officially” Commission loves them, because they reduce uncertainty and the risk of asset degradation.
- In reality not so keen (time constraints, and one step after the other mind-set)
Self-help remedies

- Possibility of circumventing buyer approval process
- Does the Commission have a legal basis to oppose them?
- *Kaysersberg SA v Commission* (Case T-290/94):
  - P&G agreed that VPS’ baby nappy business was to be separated, and transferred to a trustee, with a mandate to sell it within a short period of time
  - Sale of business to third-party was not monitored or approved by Commission, but was partially the basis for the Commission’s decision.
  - According to CFI: “Since there was no transfer of control…the business was not covered by the concentration” the Commission had no power under the Merger Regulation to “adopt a position in regard to the choice of the third party.”
Monitoring Trustee I

• Oversees compliance with the commitments under supervision of the Commission
• Parties propose potential Trustee(s) to the Commission
• Trustee shall
  – be independent of the parties → Case T-452/04 Éditions Odile Jacob v Commission
  – possess the necessary qualifications to carry out its mandate
  – not be exposed to a conflict of interest
• Trustee is appointed by the Commission … but hired and remunerated by the parties
Other actors in the divestiture process

• Hold separate manager
  – Responsible for management of the divested business in the interim period, particularly relevant for carve-outs
  – Appointed by the parties
  – Acts under the supervision of the Monitoring Trustee
  – Timing - usually also appointed up-front

• Divestiture Trustee
  – irrevocable, exclusive mandate to sell the business at no minimum price to a suitable purchaser

• Industry or other experts (appointed by one of the Trustees)
Thank you

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