RECENT DEVELOPMENTS IN EU MERGER CONTROL

College of Europe
Advanced EU Competition Law - Conquer the legal complexities of the EU
13 July 2012

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Recent developments

- Notable cases
- Post-merger conduct
- Third-party appeals
- Minority acquisitions
- The priority rule
- Tougher remedies
NOTABLE CASES
Blocked: Aegean – Olympic

• Combination of the only two scheduled carriers active in Greece. Athens Airways had stopped operating in mid-2010.

• Competed head to head:
  • 18 domestic routes
  • 10 international routes.
EC rejects argument that airlines compete against other means of transportation, like ferries.

Adding ferries in the market would add Anek as a player and would reduce the parties’ combined share to 40-50%.

But ferries found not to be an adequate alternative:

- Travel time on ferry is double for some routes
- Ferries operate less frequently
- Pricing is different, so are pricing strategies
- Airlines do not monitor ferries as competitors

Thus, a 5-10% price increase in airlines would not cause enough people to switch to ferries to be unprofitable.
Blocked: Aegean – Olympic

- New entry unlikely
  - High airport charges
  - Brand recognition

- No suitable remedy
  - Slots only a suitable remedy for congested airports
  - Not true in Greece, so releasing slots won’t encourage entry
• Combination would create a “quasi-monopoly” in European financial derivatives traded globally on exchanges.

• The two largest exchanges for derivatives, competing head to head as each other’s closest competitors. Other players, like Chicago Mercantile Exchange, are marginal.
Blocked: Deutsche Börse/ NYSE Euronext

- Rejects that parties compete with “over the counter” derivatives:
  - Exchange traded derivatives are highly liquid, relatively small size (100,000 Euro per trade) and involve standardized contracts
  - Customers use them for different purposes
- Combination of two “vertical silos” (trading and clearing) with 90% share. A new entrant would need to enter both services.
- Proposed remedy rejected
Dawn Raid: Caterpillar – MWM

- Combination of industrial engine makers
- EC stops the clock and raids the parties:
  - Suspicion of providing misleading data
  - Suspicion of gunjumping
- EC raids a third party because it did not provide requested bidding data within 30 days
- Deal clears unconditionally
- EC later acknowledges that the raids were conducted “simultaneously” under the merger and antitrust rules.
BASF - INEOS

- Combination of various resins businesses (styrene monomer, polystyrene, acrylonitrile-butadiene-styrene)
<table>
<thead>
<tr>
<th>Supplier – All Products</th>
<th>Share</th>
</tr>
</thead>
<tbody>
<tr>
<td>BASF</td>
<td>20-30%</td>
</tr>
<tr>
<td>INEOS</td>
<td>10-20%</td>
</tr>
<tr>
<td>Polimeri</td>
<td>10-20%</td>
</tr>
<tr>
<td>Total</td>
<td>10-20%</td>
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<tr>
<td>Styron</td>
<td>10-20%</td>
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<tr>
<td>Synthos</td>
<td>5-10%</td>
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<tr>
<td>Imports</td>
<td>0-5%</td>
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BASF - INEOS

<table>
<thead>
<tr>
<th>Supplier - ABS</th>
<th>Share</th>
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<tbody>
<tr>
<td>INEOS</td>
<td>20-30%</td>
</tr>
<tr>
<td>BASF</td>
<td>40-50%</td>
</tr>
<tr>
<td>Styron</td>
<td>20-30%</td>
</tr>
<tr>
<td>Polimeri</td>
<td>5-10%</td>
</tr>
</tbody>
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- Parties’ arguments:
  - Three is enough
  - Importers have spare capacity
  - Parties focus on different products
- Contradicted in the market testing and rejected
### BASF - INEOS

<table>
<thead>
<tr>
<th>Suppliers of Medical-grade ABS</th>
<th>Share</th>
</tr>
</thead>
<tbody>
<tr>
<td>BASF</td>
<td>5-10%</td>
</tr>
<tr>
<td>INEOS</td>
<td>70-80%</td>
</tr>
<tr>
<td>Sabic</td>
<td>10-20%</td>
</tr>
<tr>
<td>Others</td>
<td>0-5%</td>
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</tbody>
</table>

- EC finds easy entry by other ABS suppliers, since only barrier is to obtain regulatory approval, which takes 12-18 months
- No one complained in the market test
- But the remedy would cover this anyway.
POST-MERGER CONDUCT
Google- Motorola

- Google owns Android, the leading operating system for mobile devices. Motorola makes mobile devices.
- Rationale: Google obtains 8,000 patents, to help defend Android in global litigation.
Google- Motorola

• Vertical issue: Google’s Android operating system an input into mobile devices. Would Google favor Motorola to foreclose competing mobile phones?
  • Motorola’s share in mobile devices less than 5%.
  • Google’s money comes from advertising via Android.
  • So no incentive to deprive rest of the market of Android.
Google- Motorola

• Acquisition of standard essential patents. Concerns:
  • Google raises royalty rates
  • Google forces licensees into cross-licenses => less innovation
  • Google excludes competitors => Android market power
Google- Motorola

• Deal cleared unconditionally
  • Google sent letters promising to abide by FRAND commitments, but the Commission recognizes this is no guarantee
  • Forced cross-licensing unlikely since rationale was to protect Android ecosystem rather than impede competition
Google- Motorola

- Anticompetitive post-merger could be handled if it happens
  - “Any incentive that Google would have to use Motorola Mobility’s SEPs to significantly impede effective competition is diminished because of the Commission’s enforcement policy under Articles 101 and 102 TFEU with respect to FRAND commitments.”
  - Google will consider the threat of counter-suits for patent infringement “prior to engaging in behavior that could significantly impede effective competition.”
  - Raising royalty rates is not “merger specific”
Microsoft - Skype

- Microsoft owns Linc, an enterprise video conferencing product. Skype is the largest consumer video conferencing product, currently a closed system.

- One concern is whether Microsoft could foreclose consumer video conferencing competitors by:
  - Integrating Skype with Windows
  - Degrading the interoperability between Skype and competing operating systems, especially mobile
  - Bundling Skype with Windows
Microsoft - Skype

• Microsoft did not have an incentive to degrade interoperability with other operating systems because doing so would make Skype less valuable.

• Tying not likely to have an anticompetitive effect because it doesn’t guarantee that Skype would be used. (c.f. Microsoft decision)

• Bundling unlikely because Skype is free (for now).
Microsoft - Skype

- Third parties express concern that Microsoft would have Skype interact with Linc but not other enterprise video conference competitors.

- The result would be to give Linc an advantage (market power?), especially for sales to enterprises who have consumer call centers.

- “Skype does not offer a ‘call center’ product,” so the Commission concludes that “Microsoft has no ability to engage with Skype in such a strategy.”
Microsoft - Skype

• Consistent with Intel – McAfee?
  • Intel’s microprocessor and McAfee’s security software.
  • Potential foreclosure through interoperability, bundling and technical tying.
  • Commission requires commitments:
    • Guarantee security software rivals access to information about Intel chip developments
    • Promise not to impede functioning of competing software
  • EC said the decision “should be read carefully” as it may indicate “what the policy is for this type of very sophisticated case.”
What are the implications for conglomerate effects cases?

- Bundling
- Tying and technical tying
- Interoperability
THIRD PARTY CHALLENGES
Third Party Appeals

• Appeal against Microsoft – Skype by Cisco Systems
• Appeal against IAG – British Midland (BMI) by Virgin Air
  • Airline combination cleared with commitments to release 14 daily slot pairs at London Heathrow to facilitate new entry
  • IAG promise to carry connecting passengers to feed the long-haul flights of competing airlines out of Heathrow
  • Virgin claims the remedy is insufficient to recreate competition lost by BMI
Third Party Appeals

• Both cases involve appeals from a Phase I decision
  
  • Don’t need to show that the merger is anticompetitive, only that the EC should have enough doubt to warrant going to Phase II.
  
• Virgin: The deal was approved “with lightning speed” and “waved through in just 35 working days.”
MINORITY ACQUISITIONS
Minority Acquisitions

- A concentration requires a “change of control”
- EC will present findings on whether there is a significant “enforcement gap” regarding acquisitions of minority interests
- Some member states enforce against acquisitions of minority interests: Germany, Austria, the United Kingdom
Minority Acquisitions

- Potential Concerns:
  - Influencing the target’s competitive conduct
  - Facilitating coordination
  - Input or customer foreclosure
  - Change the buyer’s unilateral behavior
THE PRIORITY RULE
The Priority Rule

- Seagate acquisition of Samsung’s hard disk drive business, notified 19 April 2011
- Western Digital acquisition of Viviti Technologies (formerly Hitachi), notified 20 April 2011
- Seagate/Samsung cleared without remedies, but remedies required for Western Digital/Viviti
## The Priority Rule

<table>
<thead>
<tr>
<th>Supplier</th>
<th>All HDDs</th>
<th>Mission Critical HDD</th>
<th>Bus. Critical Enterprise 3.5”</th>
<th>Desktop 3.5”</th>
<th>Mobile 2.5”</th>
</tr>
</thead>
<tbody>
<tr>
<td>Seagate</td>
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<td>60-70%</td>
<td>30-40%</td>
<td>30-40%</td>
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<tr>
<td>Samsung</td>
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<td>-----</td>
<td>0-5%</td>
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<td>HGST</td>
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<td>10-20%</td>
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<tr>
<td>Toshiba</td>
<td>10-20%</td>
<td>-----</td>
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<td>-----</td>
<td>10-20%</td>
</tr>
</tbody>
</table>
The Priority Rule

• “It is easier to coordinate among few players than among many.”

• Samsung is not particularly strong.

• HGST is looking to expand and would not participate in coordination.

• Western Digital is appealing while it looks for a remedy
TOUGHER REMEDIES
Tougher Remedies

• Deutsche Börse – NYSE

• Offer to divest overlapping derivatives products, but assets too small and not diversified to compete on a stand alone basis.

• Did not agree to divest overlapping interest rate derivatives, only to provide access to the combined firm’s clearing for some categories of new contracts.
Tougher Remedies

- Caterpillar – MWM
  - Commitments offered and rejected in Phase I to deal with vertical concerns (extend contracts to avoid input foreclosure)
  - “Commitments in Phase I can only be accepted where the competition problem is readily identifiable and can be easily remedied.”
  - Deal cleared unconditionally in Phase II
Q&A and Final Observations
Thank you

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