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Recent Developments in Merger Analysis and Policy

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Overview



- Dealing with the “merger wave”
- Legal framework: Main reform projects:
 - Non-horizontal merger guidelines
 - Jurisdictional notice
 - Remedies notice
- Important merger cases in 2007
- Outlook

Legal Framework



- Completed:
 - New Merger Regulation, SIEC test
 - Horizontal Merger Guidelines
 - Non-horizontal Merger Guidelines
 - Jurisdictional Notice
- Ongoing project:
 - Remedies Notice (adoption expected in early 2008)

Merger Reform: Non-horizontal Merger Guidelines



- Non-horizontal Merger Guidelines adopted on 28 November 2007
- Complement existing Horizontal Merger Guidelines
- Follow extensive consultation with stakeholders and Member States: Strong endorsement
- Enhance transparency and predictability of Commission's merger enforcement policy
- Three-step approach provides framework for rigorous analysis; focus on consumers in downstream markets
- Guidelines reflect analytical approach Commission has taken in recent merger investigations
- Philips/ Intermagnetics
- Johnson&Johnson/ Pfizer Consumer Healthcare
- Thales/ Finmeccanica/ Alcatel Alenia Space/ Telespazio
- Evraz/ Highveld

Merger Reform: Non-horizontal Merger Guidelines



- General principle: Non-horizontal mergers are generally less likely to create competition concerns than horizontal mergers
 - no loss of direct competition between the merging parties
 - possible complementarity of merging parties and scope for efficiencies
- However, there are circumstances in which non-horizontal mergers may significantly impede effective competition
 - merger may change the ability and incentive to compete on the part of the merging company and the competitors in ways that cause harm to consumers
- Commission applies three-step analysis:
 - Ability to foreclose
 - Incentive to foreclose
 - Likely impact on effective competition
- Assessment of competitive effects based on:
 - Consumer welfare standard
 - Integrated assessment of efficiencies

Merger Reform: Consolidated Jurisdictional Notices



Scope and Sources:

- Consolidation of current jurisdictional Notices
 - Concept of Concentration
 - Joint Ventures
 - Undertakings concerned
 - Calculation of Turnover
- Jurisdictional Notice covers all issues relevant for Commission's original jurisdiction under Merger Regulation
- Sources
 - New Merger Regulation
 - Recent jurisprudence, *i.e.* judgments in Cementbouw and Endesa
 - Decisional practice of Commission
- Adopted on 10 July 2007

Merger Reform: Remedies Policy



Objective of the review:

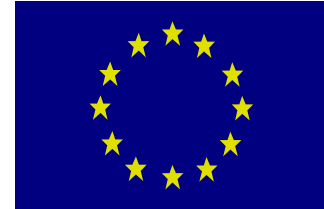
- Incorporate conclusions from the Commission's Remedies Study
- Incorporate recent jurisprudence
- Reflect experience gained in recent Commission practice
- Update with regard to changes introduced in 2004 Merger Review

Main elements of the reform:

- Better and more structured information on commitment proposal, in particular divestiture object, to allow proper Commission assessment – new "Form RM"
- Clearer criteria on the scope of the divestiture and a suitable purchaser
- Strengthened safeguards for carve-out solutions and the interim preservation of the business to be divested

Adoption of revised notice expected in early 2008

Merger Decisions in 2007



- Ryanair/ Aer Lingus
- Sony/ BMG II
- Universal/ BMG
- Fortis/ ABN AMRO
- Other remedy cases

Ryanair/ Aer Lingus (i)



Ryanair/ Aer Lingus (ii)



- Extensive empirical investigation (in addition to usual market survey)
 - Customer survey
 - Cross-section regression
 - Panel data regression
- Results:
 - Competition between secondary and primary airports serving same destination city
 - Ryanair pricing constrains Aer Lingus, and vice versa
 - Robust, statistically significant results
 - Efficiencies unlikely to counteract competitive harm
 - Prohibition decision on adopted on 27 June 2007
 - Ryanair lodged appeal on 10 September 2007

Sony/ BMG II



- Commission investigated again whether co-ordinated effects could be shown based on criteria set out in the CFI judgement
- Investigation took into account actual market developments since original decision
- Econometric analysis to detect possible collusion; comprehensive data set:
 - all net prices, discounts and wholesale prices
 - all CD chart albums
 - sold by all major record companies
 - top customers in all EEA-countries
 - period 2002-2006
 - also assessed digital downloads
- No evidence of co-ordinated behaviour

Universal/ BMG



- Market for music publishing rights (mechanical, performance, synchronisation, online)
- Traditional media: National collecting societies charge uniform tariffs
- Competition concerns in online publishing rights for Anglo-American song repertoire:
 - Individual publishers have begun to grant EEA-wide licences to selected collecting societies, who act as agent
 - Pricing power shifts from collecting societies to publishers
 - Merged firm would control large share of songs (>50% of chart hits in some countries)
 - Would become „must-have“ partner
- Remedy: Universal/ BMG to divest important catalogues, covering Anglo-American copyrights and contracts with authors

Fortis/ ABN AMRO



- Main affected markets: retail and commercial banking (SMEs) in the Netherlands
- Highly concentrated market, especially in commercial banking: four banks control >90% of market
- Post-merger HHI >3000, delta >400
- Stable market shares, rivals' ability to expand limited by product differentiation (sector expertise, branding) and asymmetric information
- Fortis smallest of Top 4 banks, but effective & aggressive competitor
- Fortis/ ABN AMRO would be market leader, >40% market share
- First-phase investigation finds likely consumer harm (SIEC) through unilateral effect
- Remedy: divest competitive overlap

Other Remedy Cases



- There have been a significant number of first-phase clearance decisions with divestiture remedies in 2007
- Early clearance with clear-cut, viable remedies
- Examples in 2007:
 - Danone / Numico (baby foods)
 - Kraft / Danone Biscuits (biscuits)
 - Luvata / ECO (heat exchange products)
 - Schering Plough / Organon Biosciences (animal health products)
 - SCA / Procter & Gamble (tissue paper)
 - Schneider Electric / APC (electrical equipment)

Outlook



- The current record merger activity poses a challenge for competition authorities.
- The European Courts have made clear that the Commission must build solid cases for both clearance and prohibition decisions.
- The new Merger Regulation together with a set of clear guidelines provide the legal framework for assuring consistency and legal certainty.
- Main challenge: Maintain our consistent enforcement policy and improve investigative techniques.