

ANTITRUST HOT TOPICS FOR THE BUSINESS LAWYER - MERGERS

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Hot Topics - Mergers

- A. US Developments
- B. European Developments
- C. Canadian Developments
- D. Other International Developments
 - ICN
 - Other countries



US DEVELOPMENTS



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US Developments - Procedure

- HSR amendments
 - Covered by Harry Robins



US Developments - Cases

- Nestle/Dreyer's
 - Product market definition case
 - FTC decision (unanimous) to challenge
 - Unilateral effects in market for “super premium ice cream”
 - Concern about going from 3 to 2
 - Resolved by consent decree
 - Divestiture order
 - Novel behavioural commitments to overcome weakness of purchaser entity. Merged entity commitments to:
 - Distribute products
 - Utilize divested distribution assets in “sufficient volumes” to enable profitable operation

US Developments - Cases

- Genzyme / Novazyme
 - Innovation market case
 - FTC decision (3-1-1) to close investigation
 - All about the facts
 - Majority
 - Rejects presumptions of anticompetitive effects
 - Focus on factual analysis
 - No evidence to support theories of harm
 - Dissent
 - Advocates presumption of anticompetitive effects in markets with few innovators



US Developments - Cases

- RJ Reynolds Tobacco / BAT
 - Product market, coordinated effects case
 - FTC decision (unanimous) not to challenge
 - Industry consolidating from 4 to 3
 - FTC based no SLC conclusion on:
 - Broadly defined product markets – “cigarettes”
 - Lack of evidence that parties were close competitors in any market segment
 - Market characteristics did not support coordinated behaviour

US Developments - Cases

- Aspen Technology / Hyprotech
 - DOJ challenge of non-notifiable merger
 - 3 to 2
 - Primarily concerned about unilateral effects
 - Narrowly defined, highly specialized product markets
 - High barriers to entry
 - One small remaining competitor
 - Consent decree requires divestiture



US Developments - Cases

- Univision / Hispanic Broadcasting
 - Merger party had minority but significant interest in close competitor
 - DOJ challenge resolved on consent
 - Concern about competitive effects in advertising markets (Spanish – language radio)
 - Consent decree requires:
 - Divestiture of some stock (reduce 30% holding to 10%)
 - Conversion of remaining stock to non-voting
 - Giving up governance rights (i.e. nominee directors, decision veto)



US Developments - Cases

- Oracle / Peoplesoft
 - Product market definition case
 - DOJ (and 10 states) challenge – presently before courts (N. Dist. C.A.)
 - Focus on product market definition
 - Government argues “high function software” market
 - 3 to 2
 - Concerns about unilateral effects and coordinated behaviour
 - No demonstrable effective remaining competition

US Developments - Cases

- Trend analysis/take-aways:
 - Facts are king!
 - Market definition remains key to analysis
 - Innovation market analysis now (appropriately) more fact driven with focus on effects
 - Mergers in concentrated industries subject to investigation/challenge, even if not notifiable
 - Focus on substance over form

EUROPEAN DEVELOPMENTS



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European Developments

- “Big bang” on May 1, 2004
 - 10 new countries joined EU
 - New substantive merger test
 - Horizontal Merger Enforcement Guidelines
 - Process improvements
 - Best Practices Guidelines
 - Other changes

European Developments – New Merger Rule

- Substantive test reformulated:

A concentration which would significantly impede effective competition,... in particular as a result of the creation or strengthening of a dominant position...

- SLC-like (effects test), but perhaps different
- Closes perceived gap in dominance test

European Developments – New Merger Rule

- Practice Implications
 - Dominance test likely to remain key analytical test
 - More economics
 - Focus on effects
 - Larger role for efficiencies?
 - Too soon to tell

European Developments – Merger Guidelines

- Analytical framework similar to US/other similar guidelines
 - Similar to SLC analysis (ability to raise price/lower innovation etc.)
 - Focus on unilateral and coordinated effects
 - Efficiencies are relevant mitigating factor
 - Fact based
 - Must benefit consumers, be merger-specific and verifiable

European Developments – Process Improvements

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- Variety of measures designed to improve process of merger review:
 - Flexibility on when to file notification
 - Any time prior to signing
 - No longer required within 7 days of signing
 - Waiting periods extended slightly
 - Phase I
 - 25 working days (no remedies)
 - 35 working days (remedies proposed)
 - Phase II
 - 90 working days (with possible extension of 15 days)



European Developments – Process Improvements

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- New measures (cont.)
 - Best Practices Guidelines
 - Emphasis on communications
 - Voluntary “state of play” meetings (parties/Commission)
 - Voluntary “triangle” meetings (parties/complainants/Commission)
 - Enhanced access to “key documents”
 - Jurisdictional changes
 - Greater flexibility to refer matter to Commission and to particular Member States
 - Greater fines
 - Failure to notify
 - Providing misleading information
 - New forms



CANADIAN DEVELOPMENTS



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Canadian Developments

- Cases
 - Relatively few contested cases (typical)
 - BC Rail / CN Rail
 - Merger of rail operations
 - Concerns about
 - Interlining arrangements
 - Horizontal effects on rail transport
 - Consent agreement
 - Unique, interventionist behavioural remedies

Canadian Developments

- Merger Enforcement Guidelines
 - Revised draft issued for comment
 - Generally, sound economics and closer to US MEGs
 - Areas of particular interest:
 - Lack of precision around importance/use of statutory “purpose clause”
 - Adding third analytical element to definition of merger
 - “de facto control”
 - Extensive discussion on coordinated effects analysis
 - factor checklist based
 - Re-work of efficiencies analysis
 - Final guidelines by Autumn



OTHER INTERNATIONAL DEVELOPMENTS



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Other International Developments

- International Competition Network (ICN)
 - Network of enforcement agencies
 - Genesis (3 years ago) in response to proliferation of new merger regimes
 - Recent studies focused on:
 - Best practices recommendations
 - Monitoring adoption
 - More focus on actions
 - Greatest impact on emerging nations

Other International Developments

- Number of countries with regimes continue to grow
 - China (2003)
 - Singapore (2004)
 - East European countries

