THE NATIONAL LAW JOURNAL

Antitrust
Globalization and the E.U.

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The globalization of the world economy is being matched by the globalization of antitrust law as U.S. and foreign companies increasingly undertake transactions with multinational implications. The U.S. antitrust agencies—the Federal Trade Commission and the Justice Department's Antitrust Division—and the European Commission routinely work closely together reviewing proposed mergers with effects in both the United States and Europe. Recent examples include WorldCom/Sprint, which was blocked in both the United States and Europe; Exxon/Mobil, which was allowed to proceed with some divestitures; and AOL/Time Warner, which is still pending.

There has also been a remarkable level of substantive convergence between U.S. and European Union merger law–far more than anyone would have predicted only a decade ago when the E.U. merger review regime began. For example, practitioners would find it difficult to identify significant differences between the standards for market definition in the United States and the European Union. The E.U. has also begun to use oligopoly theory similar to that articulated in the U.S. Merger Guidelines in its merger evaluations Indeed, E.U. Commissioner Mario Monti recently stated, "our experience in operating the [cooperation] agreements, with the U.S. in particular, has demonstrated that such cooperation can be highly effective in merger cases, substantially reducing the risk of divergent or inconsistent rulings....Cooperation to date has helped to build confidence between the [E.U.] and the U.S. authorities and has facilitated an increasingly convergent approach toward the analysis of markets and anticompetitive effects, as well as regarding appropriate remedies."

This convergence and cooperation has now extended to the area of merger remedies. Again, the E.U. appears to have been greatly influenced by developments in the United States and is moving in the direction of remedies imposed by the U.S. agencies, particularly by the FTC. This should be a matter of substantial interest to companies involved in or considering mergers with multi-jurisdictional dimensions because the FTC's divestiture policies have been the subject of considerable debate [see "Antitrust Law: What's the FTC up to?" NLJ, April 10].

Trans-Atlantic merger control working group

The E.U. and the United States recently established a working group on trans-Atlantic merger control. According to Commissioner Monti, the first topic on the agenda for the working group is an in-depth study of U.S. and E.U. approaches to merger remedies.

Remedies are a critically important aspect of any significant merger investigation, in part because the statistics show that some relief is imposed in most mergers subject to serious investigations.

For example, the U.S. agencies issued second requests for 98 mergers in fiscal year 2000; 20 transactions were abandoned in the face of agency concerns; seven transactions were challenged in court; and 53 transactions resulted in consent decrees or other relief—i.e., there was relief in 80% of these cases. The statistics in the European Union are even more dramatic, with some relief in virtually all Phase II cases. In the first eight months of 2000, there were Phase II proceedings in 13 mergers; two mergers were prohibited; 10 mergers were allowed with conditions; and only one merger was cleared without conditions. So any company involved in or contemplating a transaction posing significant antitrust issues would be well advised to consider the likelihood of remedies.

The evolving approach to new remedies

The U.S. approach to remedies has been heavily influenced by the FTC's *Study of the Commissions Divestiture Process*, which found that past FTC remedies were less effective than previously believed. This has led the FTC to revise its remedies procedures to require divestiture of an ongoing business rather than selected assets, to scrutinize the qualifications and preparedness of potential buyers and to prefer "up-front" buyers.

In speeches in September, Commissioner Monti, E.U. Director General Alexander Schaub and Merger Task Force Director Goetz Drauz discussed the need for more effective remedies and the lessons they were deriving from the FTC's study. These speeches followed the *Report on Remedies in EU Competition Law in 1998*, and a draft study by the E.U., *Notice on Commitments under the Merger Regulation*. Commissioner Monti has also announced plans to issue a new regulation on remedies by year end.

The E.U. has identified a number of elements to be considered in developing an effective merger remedy, many based on procedures used by the FTC:

n The remedy must restore the competition that was lost as a result of the merger. The FTC has moved to eliminate any increased concentration from the merger, as was done in Exxon/Mobil and Albertsons/American Stores.

n DOJ, the FTC and the E.U. prefer structural rather than behavioral remedies because a structural remedy is more likely to be effective and requires less ongoing monitoring. However, especially in vertical transactions, behavioral remedies that reduce barriers to entry or expansion have been allowed in both the United States and the European Union, such as Time Warner/Turner here and Vodaphone/Mannesman in Europe.

n The preferred remedy for issues of competitive overlap in both the United States and the European Union is the divestiture of an ongoing business that is severable from other businesses maintained by the merging parties and stable on a stand-alone basis, rather than divestiture of selected assets.

This can be seen in Exxon/Mobil. The FTC and the E.U. insisted on divestiture of the nonintegrated Exxon jet lubricants business rather than Mobil's business. The E.U. prohibition of the WorldCom/Sprint merger was based in part on concern that Sprint's Internet business was too closely intertwined with its other telecom businesses to be divested effectively.

- The remedy must establish an effective competitor that can restore the lost competition. For example, the European Commission recently rejected as insufficient the buyers proposed by Total/Elf/Fina for gas stations in France.

- The FTC has a preference for an up-front buyer to let the agency vet the buyer in advance and to reduce the risk of delayed or unsuccessful divestitures. Commissioner Monti and Director General Schaub recently indicated that the E.U. is also considering requiring up-front buyers as a condition for final approval, to reduce risks from selling divested assets over a long transitional period. However, this will be difficult to achieve on the E.U.'s tight schedule.

- The FTC routinely requires the inclusion of "crown jewel" provisions to increase the size, scope and attractiveness of the assets to be divested. The E.U. has indicated that it also is using crown jewel provisions. For example, in a recent transaction, Unilever agreed to divest its entire "Benedicta" sauce business in France in order to make the divested business more attractive to potential buyers, which was beyond the remedy needed to address the competitive overlap.

- Both the FTC and the E.U. "market test" proposed remedies by discussing them with competitors, potential buyers of divested assets and customers. These discussions can lead to revisions in proposed remedies, including increasing the package of assets to be divested or selecting different buyers.

- Both the FTC and the E.U. prefer divestiture to an experienced firm in a related business. However, the E.U. has cautioned that the increasing concentration in many industries means that there may not be acceptable, experienced buyers.

- Both the E.U. and the FTC have expressed concern that some remedies being proposed are too complex. This was apparently one basis for the E.U. decision to prohibit the proposed Alcan/Pechiney/Alusuisse merger.

It's imperative to address the remedy question ASAP

In today's world, it is critically important that companies considering multinational mergers with potential competitors address the issue of remedies at the earliest possible time. Failure to do so runs the risk that the transaction will be prohibited because the deadlines pass before remedies are approved. The E.U. prohibited Volvo's proposed acquisition of Scania in part because the remedies deadline passed without an agreement.

In WorldCom/Sprint, the parties attempted to withdraw their filing to prevent an adverse ruling, but the E.U. said that it was forced to prohibit the merger despite the withdrawal because a loophole might otherwise have allowed the companies to close. In EMI/ Time Warner, the parties submitted additional proposed remedies too late in the process but avoided an adverse ruling by withdrawing the notification and terminating the underlying agreement.

Changes to the E.U. Merger Regulation that took effect in 1998 made it possible for the E.U. to accept remedies during Phase I of its review, which occurs in about 10% of cases. However, the time frame for remedies during Phase I is particularly tight because remedy commitments must be offered at the latest three weeks into the four- to six-week review.

Remedies in Phase I must be sufficiently clear-cut to address all of the E.U.'s concerns because the E.U. does not have time to carry out any in-depth market-testing of the proposed measures. As a result, Phase I remedies are typically possible only if there have been extensive pre-filing discussions with the E.U.

Phase II review grants a bit more time

The time period for Phase II review is more extended (four months), but the time period in which to resolve E.U. competitive concerns through remedies is compressed and can only be extended in exceptional circumstances. If the E.U. has competitive concerns about a transaction, it identifies those concerns in a formal statement of objections, which is typically served on the parties about two months into Phase II. The parties have an opportunity to respond and to request a hearing to address those concerns.

Under E.U. procedures, remedies must be formally proposed before the end of the third month of the four-month review period in order to allow an opportunity for "market testing" and internal review and discussion with the member states. Thus, as a practical matter, the period for the parties to identify unresolved competitive issues and propose remedies to address those concerns is short—usually only a few weeks. If the parties do not meet that schedule, the E.U. may not consider the proposed remedies, as in Volvo/Scania and Time Warner/EMI. Indeed, during its recent AOL/Time Warner review, the E.U. said it was increasingly likely that it would prepare draft decisions to block big mergers because companies were leaving remedies offers to the last minute.

The remedies process is further complicated if the transaction is subject to review in the United States as well as in Europe because there are no deadlines in the former. The U.S. agencies and the E.U. communicate as closely about remedies as they do about the merits of their competitive concerns, so the parties are often engaged in simultaneous remedies discussions on both sides of the Atlantic. Moreover, the negotiations with the U.S. agencies, and particularly the FTC, are far more detailed and time-consuming than those in Europe. As a result, sometimes, as in Exxon/Mobil, Guiness/Grand Met, BOC/Air Liquide and AOL/Time Warner, the E.U. finishes ahead of the U.S. agencies, which increases the risk of different, or even inconsistent, outcomes in the United States and Europe.

It is critically important that U.S. and E.U. counsel closely coordinate and cooperate during the remedies phase to minimize these risks.

It is also important to understand that E.U. staff will not propose remedies; that obligation rests exclusively with the parties. Commissioner Monti stated recently, "[I]t falls to the merging parties to propose packages of remedies. As Bob Pitofsky has said, 'We are not merchant bankers,' a sentiment with which I entirely agree: It is not our role, as a competition authority, to seek to prescribe what may or may not constitute adequate remedies."

Parties should identify competitive issues posed by a deal and consider the range of remedies necessary to cure those issues.