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Antitrust & Competition Insight

In association with Hogan & Hartson LLP

October 2007

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Foreword

Welcome to this seventh edition of the Antitrust & Competition Insight – brought to you by mergermarket in association with leading international law firm Hogan & Hartson LLP.

This report brings you an update on the key deals and issues affecting M&A activity in North America, Europe and beyond. We hope that this quarterly newsletter will provide corporate, advisory and investor readers with timely, informed and objective intelligence.

In addition, the Antitrust & Competition Insight leverages off **mergermarket's** sister company **dealReporter** – bringing you a listing of live deals sitting with the regulatory authorities. Furthermore the report provides features and case studies that explore and help resolve many of the problems faced by corporations and bankers when conducting M&A and avoiding unnecessary antitrust and competition complications in their daily operations.

On page 3, John Redmon discusses the European Court of First Instance's decision to uphold the European Commission's 2004 ruling relating to Microsoft abusing its dominant market position. In the second article Corey Roush and Logan Breed analyse the scope of permissible unilateral conduct on the internet with particular reference to the recent case of LiveUniverse Inc. v MySpace Inc. On page 9, David Saylor examines the US Department of Justice's decision to use novel divestitures and licensing requirements to address foreclosure concerns in Monsanto's acquisition of Delta Pine Land. Elsewhere Sandra Pointel, **dealReporter's** regulatory correspondent on page 12 writes on the European Commission's draft Energy bill.

Also in this edition of the newsletter are regional round ups of a number of antitrust issues across the globe; this can be found on page 15. In the final article, Catriona Hatton and Jean-Michel Coumes write about the European Commission's draft Notice on Remedies in merger cases.

We hope you find this latest edition of interest. We would welcome any feedback you might have for the forthcoming newsletter in December please email Katie Jones kjones@hhlaw.com with your input.

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European CFI upholds EC's ruling in Microsoft case

Introduction

In March 2004, the European Commission – following an extensive five year investigation – found that Microsoft had infringed Article 82 of the EU Treaty, which prohibits dominant firms from abusing their market power. In essence, the 2004 Decision found that Microsoft had abused its power in the market for PC operating systems ("OSs") in two respects: (1) by refusing to supply rival vendors of "work group server" OSs with certain technical information that would enable non-Microsoft work group servers to interoperate with Microsoft's dominant desktop and work group server OSs; and (2) by tying its Windows Media Player to its dominant Windows PC OS. At the heart of the EC's decision was the principle that dominant firms have a special responsibility to ensure that they do not do business in such a way as to foreclose competition on the merits and injure consumers. The EC concluded that Microsoft – primarily by leveraging its PC OS market power into the markets for work group server OSs and media players – had violated EU competition law and ordered it to disclose the required interoperability information and to unbundle its media player from the Windows PC OS. In June 2004, Microsoft appealed this decision to the Court of First Instance ("CFI") in Luxembourg, and yesterday, the CFI issued its ruling, upholding the Commission's findings of liability in all material respects, but overruling some details of the remedial structure established by the Commission.

Although the CFI's detailed 248-page decision will undoubtedly be the subject of intensive study for some time to come, this article will provide some initial observations concerning the decision and briefly summarize some of its findings.

Initial Observations

It is generally recognized that the CFI's ruling on the Microsoft appeal has considerable importance, not only because of the important antitrust issues it raises (e.g., the legality of bundling and extending long-standing client OS power through technical tying), but for other reasons as well. The Financial Times has recently stated that the EC has "staked its reputation as the world's toughest antitrust watchdog on the Microsoft case". And the Commission itself has stated that: "What is at stake in this case is whether Microsoft can regulate the market.... or whether the market is allowed to function properly from the choice of more innovative products". Accordingly, as a result of the CFI's decision, the EC has emerged from this confrontation as a stronger and more credible antitrust enforcer. Conversely, to the extent that Microsoft may have hoped that its CFI appeal might enable it to avoid full compliance with the 2004 decision, that hope is effectively eliminated. Indeed, Microsoft is currently subject to a €280.5m fine based on the Commission's finding that it has failed to make "complete and accurate" disclosures of interoperability information as required by the Commission and that decision is currently the subject of a separate appeal in the CFI.

Second, to the extent the EC is empowered by this decision, it may have ramifications in several investigations into other high tech companies, including Qualcomm and Intel. Moreover, another complaint has been filed against Microsoft in the EC, raising somewhat similar interoperability issues in connection with its new Vista PC OS, Office 2007 and certain server-side middleware. To the extent these new cases raise issues similar to those decided favorably to the Commission by the CFI, it increases the likelihood that those investigations will be vigorously pursued.

Third, the CFI's decision, while important, does not, in any sense, "push the envelope" of EU antitrust law. Although the CFI had several opportunities on this appeal to make "new law", it appears to have generally relied on well-established principles of EU law. It is also helpful to recall that Microsoft

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has previously been found liable in the US for antitrust violations involving related issues, and regulators in Japan and Korea have also found that Microsoft has violated their competition laws. Accordingly, it is difficult to argue that the CFI's decision represents any sort of radical departure from normal antitrust principles. Rather, Microsoft's extraordinary, extremely durable market power in PC operating systems, as well as network effects and other unique characteristics that affect software markets, tend to make it a likely target for regulators.

Finally, while Microsoft has another avenue of appeal open to it (to the European Court of Justice), the scope of that appeal would be limited to points of law, which would make it much narrower than the CFI appeal just decided. Microsoft stated, following announcement of the CFI's decision, that it has not yet decided whether to pursue further appeals.

Brief Summary of the Decision

Although it is clearly impossible to summarize the CFI's 248-page decision in the limited space available, some points of interest are noted below.

A. Interoperability Issues

In its 2004 Decision, the Commission found that Microsoft's longstanding dominance in the PC OS market had resulted in a situation in which third party work group server OS vendors had to be able to interoperate fully with the Windows domain architecture (including the Windows PC OS and Microsoft's work group server OSs) in order to viably compete in the "work group" server market (which the Commission defined as the market for servers that provide file and print and user identity management services). The Commission further found that Sun Microsystems had requested the requisite interoperability information, but that Microsoft had refused to provide it. The Commission found that this refusal constituted an abuse by Microsoft of its market dominance and, accordingly, a violation of Article 82 of the EU treaty. Based on this decision, Microsoft was ordered to disclose complete and accurate documentation that would enable non-Microsoft workgroup servers to achieve full interoperability with Windows PCs and servers.

In its appeal of the Commission's March 2004 Decision, Microsoft argued (among other things), (1) that the Commission had erred in insisting on disclosures sufficient to enable "full" interoperability, which it claimed would result in its competitors "cloning" Microsoft's work group server operating systems; and (2) that the information that the Commission had ordered Microsoft to disclose included Microsoft's "intellectual property" ("IP") (i.e., information subject to patent, copyright or trade secret protection), and that the Commission had failed to establish the "exceptional circumstances" which, under EU law, must be shown to justify such compulsory IP licensing.

1. The Requisite Degree of Interoperability

The Commission concluded, and the CFI agreed, that – to compete viably with Windows work group server OSs – competing work group server OSs had to be able to interoperate with the Windows domain architecture (including both client/server and server/server interoperability) on an "equal footing" with Windows. The Court found that Microsoft's obligation to supply sufficient technical information to enable third parties to achieve this level of interoperability arose from Microsoft's "special responsibility", as a dominant supplier, not to allow its conduct to injure competition. The Court rejected Microsoft's contention that – by ordering disclosures sufficient to achieve this high level of interoperability – the Commission was, in effect, requiring that Microsoft's competitors be able to "clone" Microsoft's products. Rather, the Court agreed with the Commission that the disclosures ordered (which were limited to technical specifications, as opposed to Microsoft's implementation) would not result in non-Microsoft work group server OSs functioning internally in the same way as Windows work group server OSs, nor would it result in Microsoft's competitors developing the same products as Microsoft. On the contrary, the CFI found that "the aim pursued by the Commission is to remove the obstacle for Microsoft's competitors represented by the insufficient degree of interoperability with the Windows domain architecture in order to enable those competitors to offer work group server operating systems which differ from Microsoft's on important parameters, such as, in particular, reliability, processing speed or the innovative nature of certain functionalities."

In sum, the CFI affirmed the Commission's conclusions that the lack of full interoperability with Microsoft's work group server OS was an impediment to competition and that a high level of interoperability – far from resulting in the creation of

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Microsoft clones – would enable consumers to choose non-Microsoft work group servers based, e.g., on superior security or reliability characteristics rather than being forced to choose Microsoft products based on interoperability considerations.

2. The "Intellectual Property" Issues

As a general matter, even a dominant company has the exclusive right to its intellectual property and can refuse to license it; however, it is established under EU law that, in certain "exceptional circumstances", such a refusal can constitute an abuse under Article 82. While the parties disagreed about whether Microsoft had established that any of its protectable IP was required to be disclosed, and also about what was legally required to establish "exceptional circumstances", both the Commission and the CFI analyzed the case by assuming these issues were resolved most favorably to Microsoft – i.e., that Microsoft had been ordered to license protectable IP and that the legal standard was as Microsoft had argued. However, even assuming these issues were resolved in Microsoft's favor, the CFI held that the Commission had shown that exceptional circumstances did exist in this case and that the Commission's decision was justified.

Specifically, the Court identified three circumstances, drawn from EU case law, which, taken together, would warrant the compulsory licensing of a dominant company's IP: (1) the refusal to disclose must relate to a product or service that is "indispensable" to one seeking to engage in competition in an adjacent market; (2) the refusal must exclude any effective competition in that adjacent market; and (3) the refusal must prevent the appearance of a new product for which there is potential consumer demand. The CFI affirmed the Commission's conclusion that each of these criteria had been met in the Microsoft proceedings.

As to the "indispensability" of the refused interoperability information, the CFI found (consistent with its earlier conclusions on the requisite level of interoperability) that Microsoft – because of its quasi-monopoly on the PC OS market and the tight technological and privileged links that Microsoft has established between its Windows PC OS and its work group server OS – had been able to impose the Windows domain architecture as the "de facto" standard for work group computing and that those seeking to viably compete with Microsoft's work group server OSs had to be

able to interoperate "on an equal footing" with Microsoft's products.

As to the elimination of competition requirement, the Court approved the Commission's determination that Microsoft already, at the time of its decision, had more than a 60% share of the work group server market and that the Commission had correctly concluded that Microsoft's refusal to supply the requested interoperability information created a risk of the elimination of competition. The CFI further found that its conclusion was supported by information showing Microsoft's rapidly increasing share of work group servers.

Third, the CFI also upheld the Commission's determination that Microsoft's refusal to supply information was stifling the appearance of new products. Specifically, the Court agreed that – due to the lack of adequate interoperability between competing work group servers and the Windows domain architecture – more and more consumers were becoming locked into a homogeneous Windows solution. This has resulted in consumers being unable to choose competing products, despite their superiority in reliability, security and other areas.

Finally, the Court rejected Microsoft's contention that forced disclosure and licensing of interoperability information would deprive it of its incentive to innovate. The Court noted, among other things, that Microsoft has acknowledged that similar disclosures ordered in the US have not prevented it from continuing to innovate.

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B. The Tying Case

As noted above, the CFI also confirmed the Commission's 2004 decision that Microsoft had unlawfully bundled its Windows Media Player ("WMP") with its Windows PC OS. In so holding, the CFI noted that each of the four elements required for a tying claim in the EU had been satisfied in the Commission's decision. Specifically, the CFI upheld the Commission's findings that (1) Microsoft had a dominant position in the market for the tying product (here the Windows PC OS); (2) the tying product and the tied product (i.e., WMP) were two separate products; (3) consumers had no ability to obtain the tying product without the tied product; and (4) competition in the tied product market (i.e., the market for media players) was foreclosed.

As to Microsoft's dominance in the market for PC OS, the "tying" product market, the Court noted that Microsoft did not dispute its dominance.

With respect to the "separate product" issue, the Court rejected Microsoft's argument that media functionality is an integral part of the PC operating system, which, it contends, is constantly "evolving". Microsoft made somewhat similar arguments in response to tying claims asserted by the US Department of Justice ("DOJ") when Microsoft bundled its Web browser, Internet Explorer, into the Windows PC OS. That tying claim, however, was never resolved on the merits because the DOJ chose not to pursue it after it had been remanded on appeal for consideration under a somewhat different legal standard. Accordingly, the CFI's ruling on Microsoft's WMP bundling seems to represent the first occasion, at least in the US or the EC, upon which Microsoft has been held liable after appeal, for bundling other software products into its dominant PC OS. Here, the CFI acknowledged that, in the rapidly evolving IT industry, products which may initially be separate can subsequently come to be viewed as a single product. Nonetheless, the Court found that a number of facts supported the Commission's conclusion that WMP and the Windows PC OS were separate products, including the facts that (1) the PC OS is systems software, whereas WMP is an application; (2) other sellers offer media players separately from the PC OS; (3) even Microsoft sells versions of WMP separately for use on other PC OSs (e.g., Apple); (4) Microsoft advertises WMP separately from the PC OS; and (5) a "not insignificant number" of customers acquire media players separately from their PC OSs.

The CFI also upheld the Commission's finding that consumers are unable to acquire the Windows PC OS without WMP.

The Court found that Microsoft's decision to integrate WMP into Windows PS OS rendered it indisputable that customers buying the PC OS had no choice but to also obtain WMP. Also Microsoft conceded that it was not technically possible to uninstall WMP. As a result, the coercion required to establish a tying claim was both contractual and technical.

Fourth, the CFI found that competition was being foreclosed as a result of the tie. Because Microsoft only offered OEMs the version of Windows that bundled WMP, that afforded Microsoft a significant advantage through the ubiquitous distribution of WMP. Rival media player vendors were, as a result, placed in the position of having to sell customers a product which they already had at no separate charge.

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Get out of MySpace - What is permissible conduct on the Internet? LiveUniverse Inc. v. MySpace Inc

In the recent case LiveUniverse, Inc. v. MySpace Inc., 2007 U.S. DIST. LEXIS 43739 (C.D. Cal. June 4, 2007), a US federal district court was asked for the first time to assess whether a "social networking" website may prevent its users from posting links on its website to competitors' web pages. The court found that such conduct was not "exclusionary" under Sherman Act § 2 and, therefore, dismissed the complaint with prejudice for failure to state a claim. The court also found that there was a lack of causal antitrust injury, which was an independent ground for dismissal.

Beyond its significance for social networking sites, this case helps shed light on the bounds of permissible unilateral conduct on the Internet more broadly. In particular, it establishes that (1) even if a website arguably has a dominant position in a relevant antitrust market, the Sherman Act does not require it to allow its competitors to "free ride" on its success and (2) a website may make product design changes to prevent such "free riding."

MySpace is a popular social networking website (www.myspace.com) that enables visitors to create personal profiles containing text, graphics, and videos, as well as to view profiles of their friends and other users with similar interests. LiveUniverse owns a similar website called "vidilife" (www.vidilife.com). In its complaint, LiveUniverse alleged that MySpace committed three anticompetitive acts.

First, it alleged that MySpace "destroyed users' ability to load and display their vidiLife videos on the MySpace system by redesigning its platform so that all links to vidiLife video content embedded by MySpace users in their online profiles no longer function." LiveUniverse, Inc., at *33-34. Second, it alleged that MySpace "deleted all references to vidilife.com." Id. at *34. Third, it alleged that MySpace "blocked users not only from mentioning vidiLife.com on the MySpace system, but also from embedding links to the vidiLife website in their personal profiles." Id. LiveUniverse also claimed that MySpace's design changes "ha[d] no legitimate business purpose and [we]re solely intended to maintain and extend [MySpace's] monopoly in Internet-based social networking and advertising on Internet-based social networking sites in the United States by stifling competition and enlarging existing barriers to entry." Id. at *34-35. LiveUniverse argued, as a result, that MySpace had violated Section 2 of the Sherman Act and California Business & Professions Code § 17200. MySpace, on the other hand, argued that it had no duty to allow links to vidilife from its website; and in any event, it had several legitimate business justifications, including avoiding potential copyright infringement liability if its users posted links to infringing content on vidilife.com and preventing free-riding by its competitors.

The court began its analysis from the baseline principle that even a monopolist has no general duty to deal with its competitors. Despite that baseline principle, the Supreme Court in Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985), carved out a narrow exception when the parties had a prior course of dealing that was terminated without sufficient business justification. While subsequent Supreme Court cases referred to Aspen Skiing as "at or near the outer boundary of § 2 liability," see Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004), LiveUniverse nevertheless

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[2] LiveUniverse also "asserted that MySpace blocked users from using social networking services offered by stickam.com, another Internet-based social networking service, and it deleted all references to yet another social networking site, revver.com." LiveUniverse, Inc., at * 34.

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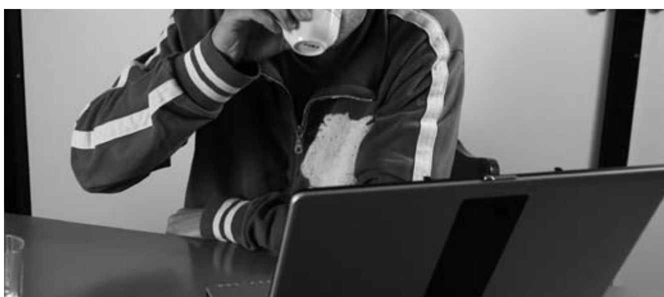
argued that its allegations fit into the Aspen Skiing exception because MySpace's "practice of allowing users the unfettered ability to reference other websites, including rival websites, was a prior course of dealing in the market." LiveUniverse, Inc., at *40-41. The court rejected this argument, stating that LiveUniverse's complaint "concerns the relationship of LiveUniverse and its users; the [complaint] contains no allegations of an affirmative decision or arrangement between MySpace and LiveUniverse to cooperate in any way, not even an informal agreement relating to their respective websites." Id. at *41. In short, the court ruled that to fall within the ambit of Aspen Skiing, a plaintiff must allege an affirmative and conscious course of dealing between the parties – which LiveUniverse failed to do.

Moreover, the court found MySpace's "free riding" argument persuasive. The court cited Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370 (7th Cir. 1986), in which the Seventh Circuit distinguished Aspen Skiing and held that because a plaintiff has no right under antitrust law to benefit from its competitor's sales force, a company is permitted to implement policies preventing its sales force from referring customers to its competitors. Similarly, the LiveUniverse court stated that "by eliminating any references to vidiLife.com and by deleting links to that site, MySpace may be viewed as merely preventing LiveUniverse from advertising its website free of charge on the MySpace site." Id. at *43.

Even though the lack of anticompetitive conduct was sufficient to justify dismissal of LiveUniverse's Section 2 claim, the court also addressed the issue of antitrust injury, which is a cornerstone element of every antitrust claim. Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, (1977). As a result, harm to an individual competitor – rather than harm to competition – is insufficient. Here, LiveUniverse argued that MySpace's alleged conduct was a barrier that prevented new competitors from entering the alleged market. Further, LiveUniverse alleged that MySpace's alleged conduct "diminished the quality of the consumer experience, thus injuring consumers and competition as a whole." Live Universe, Inc., at *50. The court forcefully disagreed:



> Here, the harm to consumers that Live Universe has alleged is fanciful. The "long hours" that consumers devoted to "self expression" have not been wasted; the content they created is still available, and readily accessible. Internet aficionados easily move from one website to another in seconds. Although purporting to address the impact on competition generally, LiveUniverse really complains about the impact on LiveUniverse itself.

Id. at *51.

The court contrasted LiveUniverse's arguments with the facts in Aspen Skiing, where the defendant's refusal to continue offering an "all mountain" ticket forced customers to either "(1) purchase an additional ticket and waste one day of their six-day joint ticket; (2) obtain a refund, which could take all morning and entailed the forfeit of the six-day discount; or (3) leave the mountain and waste time getting to one of the other ski areas." Id. at *51-52. The alleged injury to consumers in this case – being forced to go from one website to another without using a link on the first website – "presents nothing comparable to the hassles endured by the Aspen skiers." Id. at *52. Therefore, the court held that LiveUniverse's allegations failed to constitute cognizable antitrust injury.

The MySpace case reflects several potentially broad principles that could affect future unilateral conduct cases pertaining to online companies. First, the general rule that even an alleged monopolist has no duty to deal with its competitors applies equally to the Internet. Second, Aspen Skiing requires an affirmative course of prior dealing. It is not sufficient merely to allege that the defendant changed a unilateral policy – the plaintiff must allege that the defendant halted an active cooperation or partnership with the plaintiff. Third, even an alleged monopolist has the right to prevent its competitors from free-riding by gaining free advertising through links from the monopolist's site. Finally, the antitrust injury requirement may present a higher bar for antitrust plaintiffs in online markets where the "hassles" of moving from one website to another are low. At a minimum, the case may indicate that antitrust injury arguments based on analogies to the harm suffered by customers in brick-and-mortar cases may not be successful where online customers can quickly and easily navigate the Web.

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Setting a precedent: examining the DOJ's decision on Monsanto/Delta & Pine Land

DOJ's Monsanto/Delta & Pine Land consent decree uses novel divestitures & licensing requirements to address foreclosure concerns

Over eight years ago, chemical and agricultural powerhouse Monsanto agreed to acquire America's largest cottonseed grower, Delta & Pine Land, for whose germplasm Monsanto and rival biotech pioneers were developing genetically-engineered traits, such as herbicide tolerance and insect resistance. Monsanto failed to obtain antitrust clearance for the Delta transaction despite precipitously selling off its own competing cottonseed company (Stoneville) during the course of the US Department of Justice (DOJ) investigation. The DOJ apparently had vertical foreclosure concerns that were not addressed by the Stoneville sale and could not be remedied through a mutually acceptable consent decree. Consequently, Monsanto abandoned the Delta transaction.

Fast forward to August 2006. After re-acquiring Stoneville, Monsanto again announced its intention to buy Delta and expressed its willingness to divest Stoneville a second time to take care of the obvious horizontal concentration problem at the cottonseed grower level. Some observers wondered whether a Republican-led Justice Department that had shown little concern for vertical foreclosure issues would simply approve the merger based on a fix-it-first divestiture of Stoneville and require no other structural or behavioral relief. The actual outcome contained some surprises of general antitrust significance.

Novel 2007 consent decree

On May 31, 2007, the Antitrust Division did permit the merger. The Division insisted that the Stoneville divestiture be accomplished through a formal consent decree rather than a fix-it-first sell-off. Of far greater significance, however, were the other novel features of the DOJ's consent decree – additional divestitures and licensing requirements – designed to ensure that Monsanto's biotech rivals are not foreclosed from bringing their genetically-engineered traits to cottonseed growers and cotton farmers. The decree required that Monsanto:

* Divest some of the proprietary lines of cottonseed germplasm owned by Delta, as well as cottonseed germplasm and technology held by Monsanto separate from Stoneville, to the buyer of Stoneville. This would create an "enhanced" partner for Monsanto's biotech rivals to work with in producing genetically-traited cottonseeds. This move was interesting in that it is very unusual for the DOJ to re-engineer downstream market structure by divesting not just the acquirer's overlapping business but also some of the acquired company's overlapping business to create a stronger potential partner for upstream firms.
* Divest some of Delta's other proprietary lines of cottonseed germplasm to a second company, a trait developer that had been working with Delta. The move to require separate divestitures to two different companies is quite rare in DOJ consent decrees.
* Impose various complicated restrictions on Monsanto's licensing practices that will require considerable policing by the Division, including assurances that cottonseed growers can incorporate rival traits in seeds that also have desired Monsanto traits. The DOJ strongly prefers structural remedies and normally eschews behavioral restrictions that require ongoing monitoring.

Also noteworthy is the fact that the decree is focused on preserving competition to Monsanto from rival technologies that are not yet fully developed and approved by regulators

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and were unlikely to enter the commercial marketplace, even absent the merger, for two or more years into the future. Normally the DOJ's merger enforcement efforts focus on preventing the elimination of existing competition not preserving the opportunity for inchoate rivalry to become concrete years down the road.

For the aforementioned reasons, this settlement should be of broad interest to anyone proposing or opposing a pure vertical merger or a horizontal merger with vertical overtones, particularly in industries involving the development and licensing of proprietary technology.

The industry and the players

As mentioned, Monsanto is a leading licensor to seed companies of genetically-modified traits, such as herbicide tolerance and insect resistance, subject to patent and other proprietary rights. A trait is incorporated (and multiple traits are "stacked") into specific seed "lines," the varieties of germplasm developed through selective breeding to improve quality, disease resistance, yield, and climate suitability. In the US MidSouth and Southeast, Delta's cottonseed germplasm is of such desirable quality that the company had at the time of the decree a dominant (79% and 87%, respectively) share of sales to farmers. Monsanto's own cottonseed company Stoneville was a distant second (17% and 8%, respectively).

Historically, Monsanto has been several years ahead of its biotech rivals in developing and obtaining regulatory approvals, and placing its genetic traits for cottonseed into commercial production, for which it obtains lucrative payments from farmers. Over 96% of all traited cottonseeds sold in the US, including Delta's and Stoneville's, contain one or more Monsanto inventions, i.e., its Roundup Ready herbicide tolerance trait, its Bollgard insect resistance trait, and/or second generation refinements of these traits. Prior to the Delta merger announcement, however, Delta was also cooperating with several of Monsanto's rivals to enable them to commercialize their traits in Delta elite germplasm. For several years, Monsanto rival Syngenta worked with Delta to incorporate Syngenta's VipCot insect resistance trait into lines of Delta cottonseeds that would be ready for marketing as traited seeds by around 2009. Similarly, in 2006, DuPont entered into a joint venture with Delta aimed at commercializing DuPont's Optimum GAT herbicide tolerance trait in Delta seeds beginning around 2010.

How the consent decree addressed the DOJ's concerns

Because the merger eliminated head-to-head competition between Delta and Stoneville for cottonseed sales to farmers and because in that downstream business, entry barriers are high and post-merger concentration would be extremely high (well over 90%), the consent decree required Monsanto to divest Stoneville. The decree also mandated that Stoneville receive a license for Monsanto's present and future cottonseed traits on reasonable terms as favorable as Delta had received from Monsanto prior to the merger. These divestiture and licensing remedies are standard fare, designed to reinstate horizontal competition in a form that will persist. The rest of the decree, as we have said, is quite unusual and precedent-setting.

The DOJ was concerned that Monsanto's downstream vertical integration with a cottonseed company as competitively significant as Delta would diminish opportunities for other trait developers to incorporate their innovations in the germplasm varieties most demanded by farmers. It would also lead to fewer choices and higher prices for traited cottonseed than would be the case absent the merger. Monsanto's biotech rivals needed an alternative "platform" or "partner" to replace Delta. Given the many years and large investment it would take to establish a rival platform of elite cottonseed

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germplasm varieties, trait developers could not simply start their own cottonseed breeding companies from scratch. Nor could they buy or create joint ventures with small growers to create a competitively adequate alternative platform.

Rather than sue to enjoin the merger because of these vertical effects, the DOJ crafted a decree requiring additional divestitures and licensing provisions to help create an alternative platform formed around the divested Stoneville business.

- The decree required that Stonebridge's assets be "enhanced" by certain assets currently held by Delta in the form of 20 lines of conventional germplasm suitable for the MidSouth and Southeast.
- Monsanto was required to further enhance Stoneville by divesting to Stoneville's buyer additional cottonseed germplasm and molecular technology that had been developed separate from Stoneville at Monsanto.
- Monsanto was required to include in the enhanced business being divested certain rights to use the output of a germplasm breeding program Monsanto had developed with small independent cottonseed growers separate and apart from Stoneville.
- Fourth, to ensure a prompt and fully compliant divestiture of the enhanced Stoneville, the decree made clear that Monsanto would be required to rapidly sell off the crown jewel it had acquired, namely Delta itself, if Monsanto failed to timely divest the Enhanced Stoneville Assets. [As it happened, Monsanto did divest the Enhanced Stoneville Assets to Bayer CropScience in time.]

The decree addressed several other vertical concerns. Prior to the merger, Delta served as a platform partner for inserting Syngenta's VipCot insect resistance trait into 43 elite Delta cottonseed germplasm varieties that would eventually be commercialized. Given that a Monsanto-owned Delta would have no incentive to foster competition against parent Monsanto's Bollgard traits, the merger would have the effect of blocking or at least delaying Syngenta's most promising route to market. Consequently, the decree obliged Monsanto to offer Syngenta, working alone or in conjunction with a partner of Syngenta's choice, the right to acquire and complete these 43 seed lines for commercialization, including stacking the VipCot trait and cross-breeding to develop additional lines.

Finally, the decree sought to ensure platform/partner opportunities for Monsanto's rival trait developers by requiring Monsanto to revise its licenses for its widely used traits to allow stacking of non-Monsanto and Monsanto traits in the same seed line. Consequently, even if a seed grower wished to include popular Monsanto traits, it would not be barred from having certain rival traits incorporated into the same seeds.

Conclusion

In conclusion, the Monsanto/Delta decree demonstrates that the DOJ will indeed consider vertical foreclosure effects in analyzing mergers and other arrangements and, in the right circumstances, may insist on unusually creative divestiture and licensing remedies as the price for antitrust clearance.

By David J. Saylor, Hogan & Hartson LLP, Washington

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EC draft energy package: proposals likely to be watered down but heading towards progress

Proposals made by the European Commission aimed at boosting competition in energy markets are likely to be watered down but will not go away, according to competition lawyers. Since January, the Commission has made it clear that its preferred solution to improve competition in European gas and electricity markets would be for a directive to enforce full ownership unbundling of generation and transmission networks.

Aware of the resistance of some member states, most vociferously France and Germany, the Commission also disclosed on 19 September details of an alternative option involving independent system operators (ISOs). In this case the transmission networks would be run by a separate entity but still be owned by the large energy companies.

However, government and businesses in France and Germany, home to energy giants E.On, RWE, Electricite de France (EDF) and Gaz de France (GDF), have already rejected the ISO solution, describing it as "too complex" to implement. It is understood that services of the French minister of economy Christine Lagarde, the French Minister of Finance, remains opposed to full ownership unbundling and considers the ISO to be "extremely complicated" and not the "right solution".

Meanwhile, the German Minister for Economics and Technology, Michael Glos, currently opposes ownership unbundling and any plans for a break up of companies. A spokesperson for the minister said although Glos is generally supportive of the introduction of an ISO as an alternative route for countries opposing a break up, current suggestions are considered far too bureaucratic, complex and economically unattractive.

German and French businesses have also raised strong concerns about the ISO as it is currently being proposed. Both GDF and EDF said their company's transmission system, GRT Gaz and Reseau de Transport d'Electricite, respectively, operated independently and pointed out that no complaints against them had ever been by lodged by operators using them. The companies have called for measures to improve competition in Europe to focus on a more harmonised regulatory framework rather than ownership unbundling.

Meanwhile in Germany, RWE questioned the logic of the Commission's recommendations and described the proposed regulations as "unacceptable in their current form". RWE Energy chairman and RWE board member Berthold Bonekamp said in a statement the EC's plan was contradictory and self-defeating. RWE would support an independent regional operation with the aim of further developing a European electricity market, he added.

Competition experts nevertheless believe progress will be made although proposals are likely to be watered down in order to be accepted by member states. Furthermore, Energy commissioner Andris Piebalgs may well be open to discuss alternatives. A lot of debates and counter proposals are anticipated but more liberalisation and unbundling of the energy markets is likely in some areas in the next five to 10 years although not everywhere at the same pace.

The break-ups of energy giants are, however, still some way off as member states are unlikely to agree to a legislative change in that direction in the near future. Break-ups will only be possible if member states opt for an ownership unbundling legislation and France and Germany are not expected to agree to this.

Neelie Kroes, the competition commissioner, previously indicated she would use existing competition rules to impose far-reaching structural remedies, although it would be unlikely that they go as far as splitting the gas and electricity companies up. Competition experts have indeed pointed out that the Commission could face difficult legal issues if it were to tackle problems such as abuse of a dominant position with a break-up. Furthermore, the Commission cannot require all companies to split up without a legislative background and asking only one of them to do so could give rise to other

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EC draft energy package: proposals likely to be watered down but heading towards progress

competition problems. As a result large fines against abusive firms are more likely to be imposed by the Commission.

Kroes may well have recognised the importance of the legislative back up as she indicated in her presentation of the new proposal that "no matter how strict the competition rules, the Commission needed more comprehensive structural remedies and new legislation to tackle problems in the energy markets in a horizontal manner."

With regard to non-EU companies, such as Russian giant Gazprom, complying with unbundling requirements, all competition experts said this would be less controversial and even welcomed by some member states. Jose Manuel Barroso, president of the Commission, indicated that third country companies should not be allowed to acquire control of a European business if they do not follow EU rules for ownership unbundling. He promised "tough conditions on ownership of assets by third country companies to make sure they play on the same rules."

Nevertheless, under this proposal, an unbundling of Gazprom's businesses would not be enough for the Russian company to acquire a majority stake or more in a European company. "It's a necessary but not sufficient condition as we would need to have a wider energy EU/Russia agreement," said Piebalgs.

By Sandra Pointel, dealReporter

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Tuesday, October 23, 2007

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mergermarket's regional round-ups

Europe: **Belgium/Netherlands/Spain/ United Kingdom**

EC extends its deadline for ABN Amro/Fortis investigation

The European Commission (EC) has extended its deadline for the investigation of the merger between ABN Amro and Fortis to 3 October after remedies were offered. It is understood that the competition concerns raised by the EC relate to overlaps in the small and medium enterprises (SME) and retail markets. According to a sector analyst, ABN Amro and Fortis have around a combined 25%-30% market share in the Dutch commercial/SME banking sector which would make the merged entity a clear market leader. However, it has been propounded that such issues are not insurmountable. A standard remedy would be to address any overlaps with the disposal of problematic branches and therefore it is considered unlikely that the investigation will go to Phase II. Fortis spokesman, the company is continuing dialogue with the EC in light of the proposed remedies. Elsewhere, the EC cleared the ABN Amro/RBS and ABN Amro/Santander deals on 19 September. According to a Fortis spokesman, the company is continuing dialogue with the EC in light of the proposed remedies.

North America/Europe: **Canada/UK**

Reuters/Thomson merger notified to EC; preliminary decision by 8 October

The US$8.7bn merger between Thomson and Reuters has been notified to the EC. According to a statement, the EC is to decide on the deal by 8 October and at the end of this Phase I investigation the EC could either clear the deal – with or without conditions – or launch a Phase II investigation which could last up to 90 working days.

Asia/North America: **Japan/United States**

Antitrust probe launched over Maruha/Nichiro deal

Alaskan state officials have launched a probe into the merger between Japanese fish processors Nichiro and Maruha who both run major fishing and processing facilities in Alaska. The transaction has raised concerns at state level in Alaska about the potential for consolidation of their operations and hence potentially lower wages for domestic fisherman. Ed Sniffen, an Anchorage-based senior assistant attorney general is leading the probe after Governor Palin sent letters to the US Department of Justice (DOJ) and Federal Trade Commission (FTC) encouraging increased scrutiny of the deal. A merged Maruha and Nichiro Holdings would have projected annual revenues of approximately US$8.3bn.

North America: **United States**

Verizon could have to dispose of assets as part of Rural Cellular acquisition

Verizon Communications, the listed New York based telecommunications service provider, could be forced to sell assets as part of its US$2.7bn acquisition of Rural Cellular. Although Verizon is not anticipating having to sell any assets, the Federal Communications Commission (FCC) could mandate divestures if it feels the merged entity would have too much spectrum or market share. The FCC did at one time require that all wireless providers cap their level of spectrum at 50 megahertz in a market but these standards have been relaxed of late. Potential issues could arise with Rural Cellular's GSM network in the Northeast, South and Northwest and more particularly in Vermont and Washington.

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Europe: **Austria/Germany**

EC opens Phase II investigation into AEE's buy of Lentjes

The EC has opened a Phase II investigation into the proposed acquisition of German engineering company Lentjes by its Austrian competitor Austrian Energy & Environment (AEE). The EC's initial investigation found that the deal may create competition problems given the two companies' overlapping activities in the engineering and supply of municipal incineration plants. The Phase II investigation will also verify whether the acquisition could lead to foreclosure of competitors in the markets for plants based on fluidised bed technology, especially as Lentjes is one of the few suppliers of a specific flue gas desulphurisation technology. The EC now has until 12 December to take a final decision on whether competition within the European Economic Area will be significantly affected by the proposed transaction.

Europe: **United Kingdom**

GAME's acquisition of Game Station referred to CC by OFT

The Office of Fair Trading (OFT) in the UK has referred the acquisition by The GAME Group of Game Station to the Competition Commission (CC). John Fingleton, the chief executive of the OFT, claimed that the deal could be harmful to consumers and lead to a rise in prices as it involves the loss of competition between two parties who in some market segments are each other's largest competitors. Despite this Fingleton did concede that the merged entity would face competition from Amazon and play.com as well as more generalist retailers such as HMV, Virgin and Woolworths. The CC is expected to report back its findings by 23 January 2008.

North America: **United States**

DOJ issues second request in CommScope/Andrew deal; CommScope willing to divest assets

The DOJ has issued a second request for additional information regarding CommScope's pending acquisition of Andrew Corporation. Along with its largest competitor RFS, Andrew has approximately 80% of the market share in the wireless coaxial business. Adding CommScope's market share to Andrew's gives the three companies a market share of over 85% and as a result it is reported that the DOJ is seeking the divesture of CommScope's wireless coaxial business as a remedy for deal approval. However, CommScope no longer breaks out the revenue for specifically its wireless coaxial business although it was part of a group that generated US$40m in revenue in 2004.

CommScope has said that it could be willing to divest assets that generate revenues in excess of US$225m in order to receive antitrust approval. If the DOJ requested the divesture of cable assets, possible buyers could include network cable manufacturers such as Beldon and Encore Wire. The transaction remains subject to completion of other customary closing conditions as well as antitrust approval from the EC, Brazil, Taiwan, South Africa and Russia. CommScope has a market capitalization of US$3.4bn.

Europe: **Netherlands**

EC to investigate TomTom/Tele Atlas

The national competition authorities have approved the request from TomTom and Tele Atlas for the transaction to be referred for review to the EC. This request was made by the parties in order to allow the EC to review the deal as opposed to separate national competition authorities. Additionally, TomTom and Tele Atlas are also preparing for filing with the US competition authorities. The two companies are aiming to gain approval of the transaction by competition authorities in the EU and the US by the end of this year.

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Europe: **France/Netherlands**

EC investigation of Danone/Numico to focus on three European markets

The EC's investigation of Danone's €11.9bn acquisition of Royal Numinco, the Netherlands based consumer foods company, is likely to focus on competition issues in Belgium, Portugal and France. Numinco has a presence in infant milk and baby foods in both Belgium and Portugal although the combined entity is expected to raise few antitrust issues in these countries. It is more likely issues will arise with Danone-owned Bledina, the leader in the baby foods market in France. The transaction has been notified to the EC and the deadline for the Phase I investigation is 17 October, which could be extended by 10 working days if remedies are offered.

North America/Europe**:** **United States/Germany**

SonyBMG merger to finally get EC approval?

The merger of Sony BMG, a 50:50 joint venture between Sony and Bertelsmann, is reportedly set to gain antitrust approval from the EC, three years after the deal was originally announced. Although the EC could come up with a surprise decision, it is more likely that the deal will be cleared. The EC has until 10 October to make a final decision regarding the transaction. Bertelsmann's 50% in Sony BMG is valued at approximately €2.5bn.

Europe: **Belgium/Germany**

Phase II investigation into Cumerio/ Norddeutsche Affinerie deal

The EC has opened a Phase II investigation into the planned acquisition of Cumerio by Norddeutsche Affinerie (NA). The EC's preliminary market investigation found that the proposed transaction raises doubts as to its compatibility with the Single Market and the European Economic Area (EEA) agreement. The EC now has until 5 February to decide whether the takeover would significantly impede competition. Competition Commissioner Neelie Kroes noted, "After this transaction, NA would become by far the largest provider of copper shapes to the European market. It is the EC's duty to thoroughly analyse the consequences of such a transaction to ensure that it would not harm business and consumers."

North America: **Canada**

Astral Media could be forced to dispose of assets over Standard Broadcasting buy

Astral Media might have to sell assets in order to gain approval from the Canadian Radio-television and Telecommunications Commission (CRTC) over its proposed US$1.6bn acquisition of Standard Broadcasting. Indeed, the CRTC could order Astrel to dispose of certain assets to stop the combined entity having too many holdings in one market.

North America: **United States**

XM/Sirius antitrust approval could come as early as October

Sirius Satellite Radio and XM Satellite could see antitrust approval over their proposed US$5.6bn merger as early as October this year. The two companies are arguing that audio entertainment in the US is a rapidly evolving competitive market and that competition includes traditional commercial radio. Furthermore, Mel Karmazin, CEO if Sirius, has claimed that iPods and other mp3 players are similar competitors due to the fact that a consumer can put on headphones and listen to something they have programmed. Consequently, Sirius and XM Satellite believe the Federal Communications Commission (FCC) should look at the broader market where there is ample competition. It is likely that the DOJ will look at whether advertisers and consumers deem satellite radio different to traditional forms of radio.

A compelling argument in favour of the two companies is the "a la carte" proposition. Under such a proposition subscribers would be allowed to choose 50 channels for US$6.99 – a 46% decrease from the current subscription rate of US$12.95. "A la carte" programming will be available around one year following the merger. Sirius Satellite Radio has a market capitalisation of around US$5bn.

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European Commission draft Notice on Remedies in merger cases: a step in the right direction?

While the transactions which are prohibited by the European Commission on antitrust grounds such as GE Honeywell, grab the newspaper headlines, those transactions where the parties have to offer a remedy receive far less public attention. Yet of the transactions which the Commission has considered problematic from an antitrust perspective, the vast majority resulted in clearances subject to remedies, as opposed to an outright prohibition. The price of getting a problematic deal through the EU will generally centre on whether the parties can come up with the right remedy or package of remedies such as: divestment of part of the merging businesses; licensing of intellectual property rights to third parties; exiting a joint venture; or granting competitors access to some of the merging parties facilities. The proposed remedy must be such as to eliminate the competitive problem identified by the Commission. The parties then, often with little practical guidance from the Commission, face the tricky task of devising a remedy that will be satisfactory to the Commission without going beyond what is necessary and further sacrificing the value of the deal.

In this context, the legal and business community have welcomed the opportunity to comment on the Commission's draft Notice on Remedies. The draft Notice would replace the existing Remedies Notice published in 2001 and aims to provide more in-depth and up to date guidance on the types of remedies which the Commission will consider and the process and timing for proposing and implementing remedies.

The Commission's decision to revamp the 2001 Notice was prompted by the results of a Commission's study on remedies in 2005 and recent developments in European Courts' case law. The Commission's study assessed the effectiveness of remedies applied during a reference period of four years (1996-2000) in a number of merger cases. The results of the study suggested that remedies which fell short of divesting part of the merging businesses, were not effective to address the antitrust concerns in most cases. The study also identified a number of problems with the implementation of divestitures. In parallel, the European Court of Justice ('ECJ') in *Tetra Laval Sidel* (Case C-12/03 *Commission v. Tetra Laval*) called into question the Commission's almost systematic policy of rejecting behavioral remedies (promises to behave/ refrain from behaving in a certain way). The ECJ confirmed that behavioral remedies in certain instances can constitute an adequate remedy.

The draft Notice attempts to provide guidance on remedies which takes into account these developments. However, the Commission remains convinced that divestitures are still the best remedy in most cases, at least where the merging parties are direct competitors, and continues to be very sceptical about the usefulness of behavioural remedies to solve antitrust issues. The draft Notice also indicates that the Commission will assess more thoroughly whether the proposed remedies are adequate to address the competition concerns. In particular, it imposes more stringent requirements on companies in relation to the implementation of their remedies. If the draft remains unchanged, companies may have a harder time devising suitable remedies to address antitrust concerns arising from their mergers and acquisitions.

1. More detailed guidance

The draft Notice provides more detailed guidance on many issues relating to proposed remedies, including on the nature and scope of the appropriate remedy, the characteristics of suitable purchasers, and the process for submission of remedies. In particular, it gives a useful insight on situations where companies should either resort to an upfront purchaser requirement or fix-it-first remedy.

The draft Notice deals with remedies under four main topics.

- First, the Commission sets out the general principles governing the implementation on remedies and describes the allocation of responsibilities between the Commission and the parties. The Commission is in charge of identifying

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the competition concerns, whereas the parties bear the responsibility of devising remedies that would adequately solve these concerns. If the parties propose remedies the scope of which go beyond what is necessary to eliminate the competition concerns, the draft Notice specifies that the Commission has no possibility to amend or correct the situation.

- Second, the Commission describes the different types of remedies that may be used by the parties. Like the current Notice, the draft Notice sets out the Commission's preference for structural remedies and, in particular, divestitures. In this respect, the Commission recalls that the divestiture of a viable business constitutes the most effective remedy in case of horizontal mergers since it is supposed to eliminate the competitive overlap and needs no further monitoring from the Commission. The Commission nevertheless considers that certain non-divestiture remedies may adequately solve competition concerns in certain cases, such as granting access to key infrastructure or technology, terminating long-term exclusive contracts or removing links with competitors. The Commission also briefly discusses other types of remedies such as re-branding commitments. Last, in spite of the Tetra Laval judgment, the draft Notice reiterates the Commission's previous position that behavioral remedies are only acceptable in exceptional circumstances.

In comparison to the 2001 Notice, the draft Notice seeks to provide further guidance on when up-front buyers or fix-it first remedies are needed:

- An 'upfront purchaser' requirement means that the parties cannot close the main transaction before entering into a binding agreement for the business to be divested with a purchaser approved by the Commission. The Commission considers upfront purchaser requirements particularly suitable when there are obstacles to the divestiture, for example due to the existence of third party rights on the divested business, or when there is a significant risk that the proposed divested business would degrade in the interim period.
- In cases of 'fix-it-first' remedy, the purchaser for the divested business is identified by the parties and approved by the Commission and the binding agreement is concluded before the Commission approves the main transaction. The draft Notice recommends that it is used in situations where the identity of the purchaser is crucial to the effectiveness of the remedy, for example, where there is only a limited number of suitable purchasers for the divested business.
- Third, the Commission summarises the main procedural aspects of proposing remedies. The Commission recalls the distinction between remedies that are offered in the first phase review of a merger and those that are offered in a second stage more in-depth review. In order to approve a problematic merger in a first phase review, the Commission requires that the remedies are such that they clearly fix the competition problem outright. Phase I remedies must be submitted within 20 working days from the date of notification. In Phase II, the parties have 65 working days from the date of initiation of proceedings to submit remedies.
- Fourth, the Commission sets out requirements for the implementation of the remedies in the period following adoption of the Commission's clearance decision and the closing of the transaction (referred to as 'interim period'). As is currently the case, the draft Notice requires the parties to appoint a monitoring trustee in order to ensure compliance with the remedies and a divestiture trustee in case the parties would not find a suitable purchaser within the period fixed by the Commission (assuming that an upfront purchaser is not required). However, in contrast to the existing position, the draft Notice sets out a standard time frame as guidance for the completion of the divestiture - '*The Commission will normally consider a period of around six months to be suitable* ….' . If the parties do not succeed in finding a purchaser within that timeframe, the Commission will normally consider an additional period of three months as appropriate. In case of a fix-it-first remedy these time limits will be shorter since the purchaser will be identified and approved during the course of the administrative proceedings before the Commission.

2. Lack of flexibility?

2.1. No modification of Commission's position on behavioral remedies

The draft Notice reiterates the Commission's strong preference for structural remedies. At para. 69 of the draft,

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the Commission specifies that '*non-structural types of remedies, such as promises by the parties to abstain from certain commercial behavior (e.g., bundling products), will generally not eliminate the competition concerns resulting from horizontal overlaps. In any case, it may be difficult to achieve the required degree of effectiveness of such a remedy due to the absence of effective monitoring of its implementation [….] Therefore, the Commission may examine other types of non-divestiture remedies, such as behavioral promises, only exceptionally in specific circumstances, such as in respect of competition concerns arising in conglomerate structures.*'

This statement confirms that companies will have difficulties to save their mergers/acquisitions on the basis of behavioral remedies alone, at least in the case of mergers between direct competitors. The fact that the Commission is willing to consider behavioral remedies primarily in the context of conglomerate mergers also diminishes their role since, post Tetra Laval, the Commission is less likely to tackle this type of merger.

The Commission's position on behavioral remedies will likely be a disappointment for legal and industry circles, which expected a more flexible approach from the Commission following the *Tetra Laval* case. In practice, the Commission may find a 'mid-way' approach by accepting, in certain instances, mixed packages combining behavioral remedies with some access remedies and divestitures. Some examples of these mixed packages have been found in recent Commission decisions[1] although these mixed packages may not be acceptable if they are too complex (see below).

2.2. Stringent requirements on structural remedies

The draft Notice is imposing more stringent requirements on structural remedies. This is reflected in several parts of the draft, notably in relation to the scope of the divested business and suitability of the purchaser. The main risk of this approach is that the Commission may seek to over-regulate the remedy to the detriment of the flexibility that is necessary in the negotiation of remedies. In addition, there is also a risk that a toughening of the Commission's approach

may induce companies to increasingly propose remedies that would exceed the scope of what is needed to address the competition concerns.

- **Scope of divested business**

  As regards the scope of the divested business, the draft Notice specifies that the divested business has to include *all* the assets and personnel that are necessary to ensure its viability and competitiveness. Such assets or personnel have to be included even if they are part of another business unit of the divesting entity.

  The Commission sets its preference for the divestiture of a stand-alone business and, in cases of remedies that necessitate a carve-out of an existing business, the Commission will not accept commitments unless it is certain that a viable business will be divested. The Commission specifies that a combination of assets belonging to different businesses will present risks as to the viability of the divested business. Although the Commission is not rejecting such remedies out of hand, it is clear that the parties will have more work to do in order to justify their effectiveness.

[1] In Honeywell's acquisition of Novar, Honeywell undertook to divest the entire Italian fire alarm systems business of ESSER Italia and to grant an exclusive license to the use of the ESSER trademark for fire alarm products sold in Italy. In addition, Honeywell undertook to license to the purchaser of the divested business all the technology necessary to manufacture the fire alarm products, enter into a transitional supply contract and commit to a non-compete obligation. In Procter & Gamble/ Gillette, Procter & Gamble was required to divest its battery toothbrush business and grant a two year exclusive license for the co-brands used on the divested brand of battery toothbrushes in the EEA. It also committed not to re-introduce the licensed brands in the countries for which the license has been granted within a minimum period of four years after the termination of the license agreements.

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- **Suitability of the purchaser**

  The draft Notice also seems to impose stricter requirements on the suitability of the purchaser. At para. 49, the Commission specifies that the acquisition of the divested business by a financial purchaser, as opposed to an industrial purchaser, will not remove the competition concerns '*even considering that [the purchaser] could obtain the necessary management expertise (e.g., by recruiting managers experienced in the sector at stake…*'. This preference for purchasers other than financial players is likely to complicate the parties' task in markets where the number of potential industrial purchasers is limited.

- **Non-divestiture remedies**

  In its study, the Commission suggested that 'access' remedies such as the termination of exclusive rights or granting access to key infrastructure or technology have worked in a limited number of cases. The draft Notice clearly specifies that such remedies will be acceptable if it is sufficiently clear that they will bring new competitors on the market or eliminate foreclosure effects linked to the merger.

  In practice, the Commission will be more likely to accept packages of remedies combining some access remedies with some divestitures. This trend, which has emerged in recent Commission decisions, may nevertheless find some limitations in practice on the basis of some statements in the draft Notice that the Commission will be reluctant to accept complex remedy packages. It will be important to see how the Commission will apply this principle in the future. An excessively rigid approach on the acceptance of complex remedies may not only considerably limit the parties' options but may also be at odds with the economic reality in view of the increasingly complex nature of mergers.

  The Commission is also likely to be more demanding on the procedure and conditions under which access will be granted. In its study, the Commission considered that one of the main flaw of access remedies was the definition of appropriate contractual terms for effective access (e.g., in terms of scope and financial conditions). As a follow-up, the draft Notice specifies that access remedies have to include all '*necessary requirements*' that will enable the beneficiary of the access to use the infrastructure or the technology in an effective manner. The draft Notice particularly refers to requirements on the parties to keep separate accounts for the infrastructure and/or to set-up a rapid dispute resolution system via arbitration proceedings.

- **IP Licensing**

  The draft Notice contains controversial statements about a specific type of access remedy, i.e., IP licensing. While the Commission accepts that where the antitrust issue arises from a market position in technology or IP rights, a license may be the best remedy, the draft Notice rejects the granting of IP licenses as potentially effective remedies in most other circumstances. The Commission states that '*The granting of licenses to IP rights instead of a divestiture may be acceptable to the Commission only if a divestiture of a business is not possible and the granting of a license is as effective as a divestiture.*'

  If confirmed, this statement will significantly reduce the instances where an IP license will be considered as a suitable remedy. Again, this lack of flexibility is disappointing and likely to draw widespread criticism from the legal and business community.

  Furthermore, the Commission adds that '*a divestiture of the technology or the IP rights is the preferable remedy as it eliminates a lasting relationship between the merged entity and its competitors.*' The Commission may accept a mere licensing in certain specific circumstances but makes it clear that '*Where there might be any uncertainty as regards the scope of the licence or its terms and conditions, the parties will have to divest the underlying IP right, but may obtain a licence back.*' Such a preference for IP divestitures as opposed to IP licensing certainly makes it more difficult for parties to address the antitrust issues through remedies which relate to intellectual property.

Conclusion

The Commission is still considering the numerous submissions it has received on the draft Notice. It expects to adopt the Notice in its final form before the end of the year. It remains to be seen whether in light of the concerns raised by legal and industry groups, the Commission will adopt a more flexible approach to remedies in the final version of these guidelines.

By Catriona Hatton and Jean-Michel Coumes, Hogan & Hartson LLP, Brussels

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Live deals – Europe

Deal	Terms	Ann. Date	Est. Comp	Days to comp	Sett. Date	Target Country	Target Mkt Cap (m)	Net Sprd	Change	Ann. Return
ABN AMRO / Barclays plc	1 ABN = 2.13 BAR + EUR13.15	23 Apr 2007	04 Oct 2007	13	16 Oct 2007	Netherlands	EUR69,425m	-12.28%	-1.35%	-320.21%
ABN AMRO / RFS Holdings B..	1 ABN = 0.296 RBS + EUR35.60	29 May 2007	05 Oct 2007	14	17 Oct 2007	Netherlands	EUR68,077m	1.07%	-0.36%	25.97%
Altadis SA / Imperial Tobacc.	1 ALT = EUR50.00	18 Jul 2007	31 Oct 2007	40		Spain	EUR12,565m	1.92%	0.02%	17.06%
Aluminium de Gr. / Mytilineos Hold.	1 ADG = 0.3954 MTL	28 Mar 2007	30 Nov 2007	70		Greece	EUR640m	1.12%	0.66%	5.75%
ASM Brescia SpA / AEM SPA	1 ASM = 1.60 AEM	04 Jun 2007	31 Dec 2007	101		Italy	EUR3,211m	0.45%	-0.23%	1.60%
Bank Austria Cr. / UniCredit Group	1 BAU = EUR129.40	26 Mar 2007	31 Oct 2007	40		Austria	EUR28,689m	-8.87%	0.00%	-78.99%
Bank BPH SA / UniCredito Ital.	1 BPH = 33.13 UNI	12 Jun 2005	31 Dec 2007	101		Poland	EUR6,789m	-15.29%	-1.18%	-54.73%
Capitalia SpA (. / UniCredit Group	1 CAP = 1.12 UNI	20 May 2007	10 Oct 2007	19		Italy	EUR17,775m	0.23%	-0.04%	4.16%
Cassa di Rispar. / Intesa Sanpaolo.	1 BFR = EUR6.73	26 Jul 2007	18 Jan 2008	119		Italy	EUR5,467m	1.97%	-0.08%	5.99%
CompleTel Europ. / Altice B2B Fran.	1 COM = EUR35.50	17 Sep 2007	31 Oct 2007	40		France	EUR654m	1.00%	0.00%	8.86%
Cumerio SA (For. / Norddeutsche Af.	1 CUR = EUR30.00	25 Jun 2007	31 Oct 2007	40		Belgium	EUR751m	3.45%	-0.36%	30.70%
Depfa Bank plc / Hypo Real Estat.	1 DPF = 0.189 HRE + EUR6.80	23 Jul 2007	26 Oct 2007	35		Ireland (Republic)	EUR4,826m	1.76%	-0.52%	17.82%
Domestic and Ge. / Advent Internat.	1 DAG = GBP14.25	07 Sep 2007	31 Dec 2007	101		United Kingdom	GBP502m	3.26%	-0.38%	11.67%
Eiffage SA / Sacyr Valleherm.	1 EIF = 2.40 SAC	19 Apr 2007	30 Nov 2007	70		France	EUR7,085m	-24.52%	-0.73%	-126.07%
Endesa SA / Enel Energy Eur.	1 END = EUR40.16	11 Apr 2007	01 Oct 2007	10	10 Oct 2007	Spain	EUR42,371m	0.35%	-0.03%	11.61%
Friends Provide. / Resolution Plc	1 FRP = 0.307 RES	25 Jul 2007	31 Dec 2007	101		United Kingdom	GBP3,756m	20.60%	-5.01%	73.70%
Getronics NV / KPN NV	1 GTN = EUR6.25	30 Jul 2007	12 Oct 2007	21	26 Oct 2007	Netherlands	EUR763m	0.97%	0.00%	16.08%
Grupo Agbar / Hisusa	1 AGB = EUR27.00	10 Apr 2007	31 Oct 2007	40		Spain	EUR4,007m	1.05%	0.04%	9.33%
Imperial Chemic. / Akzo Nobel NV	1 ICI = GBP6.70	13 Aug 2007	30 Nov 2007	70		United Kingdom	GBP7,703m	4.60%	-0.74%	23.65%
Irish Continent. / Adonia Aella Li.	1 ICG = EUR24.00	08 Mar 2007	19 Oct 2007	28		Ireland (Republic)	EUR588m	-4.00%	0.00%	-50.34%
Irish Continent. / Moondurster Limi.	1 ICG = EUR22.00	15 Jun 2007	15 Oct 2007	24		Ireland (Republic)	EUR588m	-12.00%	0.00%	-175.20%
IXEurope Plc / Equinix Inc.	1 IXE = GBP1.40	28 Jun 2007	14 Sep 2007	Completed	28 Sep 2007	United Kingdom	GBP253m	0.18%	0.00%	N/A
Kemira GrowHow . / Yara Internatio.	1 KMR = EUR12.12	24 May 2007	27 Sep 2007	6	04 Oct 2007	Finland	EUR664m	1.00%	-0.25%	52.14%
Laidlaw Interna. / FirstGroup plc	1 LWI = USD35.25	09 Feb 2007	05 Oct 2007	14		USA	USD2,767m	1.12%	0.12%	27.22%

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Deal	Terms	Ann. Date	Est. Comp	Days to comp	Sett. Date	Target Country	Target Mkt Cap (m)	Net Sprd	Change	Ann. Return
LHS Telecom Gmb. / Ericsson AB	1 LHS = EUR22.50	05 Jun 2007	17 Sep 2007	Completed	18 Oct 2007	Germany	EUR329m	-0.44%	0.00%	N/A
Lindex AB / KappAhl Holding.	1 LDX = EUR11.0056	13 Aug 2007	27 Sep 2007	6	04 Oct 2007	Sweden	EUR792m	-4.43%	-1.40%	-231.01%
Metrovacesa S.A. / Sacresa	1 MVC = 0.585 GEC	02 Mar 2007	09 Nov 2007	49		Spain	EUR8,092m	-11.78%	-0.68%	-85.99%
Norgani Hotels . / Aberdeen Asset .	1 NGH = EUR11.1971	10 Sep 2007	19 Sep 2007	Completed	10 Oct 2007	Norway	EUR476m	-6.91%	-0.87%	N/A
Norgani Hotels . / Oslo Properties.	1 NGH = EUR12.078	17 Sep 2007	24 Sep 2007	3	03 Oct 2007	Norway	EUR476m	0.41%	-0.94%	37.78%
OMX AB / Nasdaq Stock Ma.	1 OMX = 0.502 NDAQ + EUR10.22	25 May 2007	31 Dec 2007	101		Sweden	EUR3,379m	-16.44%	-6.29%	-58.82%
OMX AB / Borse Dubai	1 OMX = EUR24.4657	17 Aug 2007	31 Oct 2007	40		Sweden	EUR3,380m	-12.66%	-7.14%	-112.73%
Reuters Group p. / The Thomson Cor.	1 RTR = 0.16 TMS + GBP3.525	15 May 2007	31 Jan 2008	132		United Kingdom	GBP8,243m	6.71%	0.01%	18.41%
Royal Numico NV. / Groupe Danone S.	1 NUM = EUR55.00	09 Jul 2007	31 Oct 2007	40	12 Nov 2007	Netherlands	EUR10,353m	1.20%	-0.11%	10.65%
Sirti SpA / Euraleo	1 SRT = EUR2.65	27 Jul 2007	31 Dec 2007	101		Italy	EUR577m	2.02%	-0.39%	7.23%
Sondex Plc / Drilling and Wi.	1 SDX = GBP4.60	03 Sep 2007	26 Oct 2007	35	26 Oct 2007	United Kingdom	GBP260m	0.99%	0.06%	10.02%
Suez SA (former. / Gaz de France S.	1 SEZ = 0.9545 GAZ + EUR5.4996	27 Feb 2006	31 Mar 2008	192		France	EUR50,805m	-2.33%	0.24%	-4.40%
Tele Atlas N.V. / TomTom N.V.	1 TELA = EUR21.25	23 Jul 2007	30 Nov 2007	70		Netherlands	EUR1,836m	3.71%	-0.25%	19.07%
Telelogic AB / IBM Corporation.	1 TEL = EUR2.2514	11 Jun 2007	09 Oct 2007	18		Sweden	EUR553m	0.59%	-1.01%	11.24%
Univar NV / Ulysses Luxembo.	1 UVR = EUR53.50	09 Jul 2007	04 Oct 2007	13	18 Oct 2007	Netherlands	EUR1,588m	0.94%	-0.17%	24.60%
Uralita SA / Nefinsa SA	1 URA = EUR7.00	03 Sep 2007	30 Nov 2007	70		Spain	EUR1,367m	1.16%	0.15%	5.94%
Vivartia S.A. (. / Marfin Investme.	1 VIV = EUR25.00	17 Jul 2007	08 Oct 2007	17	12 Oct 2007	Greece	EUR1,817m	0.89%	-0.08%	18.00%
Wavefield Insei. / TGS-NOPEC Geoph.	1 WAV = 0.505 TGS	30 Jul 2007	30 Nov 2007	70		Norway	EUR964m	0.35%	-0.86%	1.82%
Wegener NV / Mecom Group plc	1 WGR = EUR17.70	08 May 2007	04 Oct 2007	13	18 Oct 2007	Netherlands	EUR789m	0.45%	0.00%	11.84%
Xansa Plc / Groupe Steria S.	1 XSA = GBP1.30	30 Jul 2007	17 Oct 2007	26	31 Oct 2007	United Kingdom	GBP466m	1.17%	0.00%	15.78%

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Live deals – Asia

Deal	Terms	Ann. Date	Est. Comp	Days to comp	Sett. Date	Target Country	Target Mkt Cap (m)	Net Sprd	Change	Ann. Return
Adelaide Bank L. / Bendigo Bank Li.	1 ADB = 1.075 BEN	09 Aug 2007	30 Nov 2007	70		Australia	AUD1,532m	2.56%	-0.20%	13.34%
Ambuja Cements / Holcim Limited .	1 GAC = INR154.00	23 Aug 2007	06 Nov 2007	46	21 Nov 2006	India	INR189,201m	23.79%	-0.60%	188.80%
AmInvestment Ba. / AMMB Holdings B.	1 AMIP = USD1.0632	19 Jun 2007	31 Jan 2008	132		Malaysia	USD1,403m	2.75%	-0.26%	7.60%
Bank of Oversea. / Citibank Overse.	1 BOC = USD0.3576	09 Apr 2007	15 Nov 2007	55		Taiwan	USD405m	5.58%	-0.16%	37.03%
Baotou Aluminum. / Aluminum Corpor.	1 BTA = 1.48 CHALCO	02 Jul 2007	15 Nov 2007	55	29 Nov 2007	China	CNY25,856m	16.74%	0.00%	111.11%
Bolnisi Gold NL / Coeur d'Alene M.	1 BGN = 0.682 CDM + AUD0.004	03 May 2007	15 Nov 2007	55		Australia	AUD794m	4.34%	-4.71%	28.81%
Calpis co ltd / Ajinomoto Co In.	1 CLP = 0.95 ANM	11 Jun 2007	01 Oct 2007	10	30 Nov 2007	Japan	JPY103,084m	0.57%	0.52%	20.63%
China Oriental . / Smart Triumph	1 COGC = HKD4.00	20 Jun 2007	02 Oct 2007	11	12 Oct 2007	Hong Kong	HKD12,201m	-4.76%	-9.47%	-158.01%
Coles Group Lim. / Wesfarmers Limi.	1 CGL = 0.2843 WES + AUD4.00	02 Jul 2007	30 Nov 2007	70		Australia	AUD17,946m	4.20%	0.30%	21.88%
Consolidated Mi. / Pallinghurst Re.	1 CSM = AUD4.10	23 Feb 2007	22 Sep 2007	1	13 Oct 2007	Australia	AUD1,091m	-14.58%	-1.63%	-5322.90%
Consolidated Mi. / Territory Resou.	1 CSM = 1.50 TTY + AUD2.00	17 Jul 2007	14 Oct 2007	23	15 Oct 2007	Australia	AUD1,091m	-31.15%	-1.38%	-494.27%
Consolidated Mi. / Palmary Enterpr.	1 CSM = AUD3.95	31 Aug 2007	31 Dec 2007	101		Australia	AUD1,091m	-17.71%	-1.57%	-64.00%
Diamond City Co. / AEON Mall Co., .	1 DIC = 0.80 AEM	20 Mar 2007	21 Aug 2007	Completed	30 Oct 2007	Japan	JPY207,190m	5.98%	9.45%	N/A
Enric Energy Eq. / Charm Wise Ltd	1 EEE = HKD5.92	07 Aug 2007	12 Oct 2007	21	22 Oct 2007	Hong Kong	HKD5,235m	-48.88%	-2.89%	-849.54%
Flight Centre L. / Pacific Equity .	1 FCN = AUD16.50	21 Jun 2007	30 Nov 2007	70		Australia	AUD2,154m	-27.63%	-1.00%	-144.08%
Golden Hope Pla. / Synergy Drive S.	1 GHP = 1.04 SNY	27 Nov 2006	15 Nov 2007	55		Malaysia	USD3,409m	0.70%	-0.81%	4.66%
Highlands & Low. / Synergy Drive S.	1 HLD = 0.97 SNY	27 Nov 2006	15 Nov 2007	55		Malaysia	USD1,342m	0.68%	-0.81%	4.48%
Home Building S. / Bank of Queensl.	1 HBS = 0.844 BOQ	31 Aug 2007	31 Jan 2008	132		Australia	AUD536m	-12.17%	-2.25%	-33.65%
HPA Limited / Salmat Limited	1 HPA = AUD2.725	18 Jul 2007	19 Oct 2007	28	02 Nov 2007	Australia	AUD292m	8.57%	0.43%	111.66%
IWL Limited / Commonwealth Ba.	1 IWL = AUD6.44	01 Aug 2007	12 Nov 2007	52	26 Nov 2007	Australia	AUD352m	1.42%	0.32%	9.95%

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Deal	Terms	Ann. Date	Est. Comp	Days to comp	Sett. Date	Target Country	Target Mkt Cap (m)	Net Sprd	Change	Ann. Return
Kimberley Diamo. / Gem Diamonds Li.	1 KIM = AUD0.70	19 Jul 2007	02 Nov 2007	42	23 Nov 2007	Australia	AUD289m	3.70%	0.00%	32.19%
Kumpulan Guthri. / Synergy Drive S.	1 GUT = 0.81 SNY	27 Nov 2006	15 Nov 2007	55		Malaysia	USD1,878m	1.28%	-0.81%	8.50%
LG Petrochemica. / LG Chemical	1 LGPC = 0.4805 LGC	05 Jul 2007	01 Nov 2007	41	02 Nov 2007	South Korea	USD2,280m	1.25%	-1.08%	11.13%
Malaysian Indus. / Permodalan Nasi.	1 MIDF = USD0.544	13 Aug 2007	26 Nov 2007	66	15 Oct 2007	Malaysia	USD530m	1.25%	-0.69%	6.89%
Matsuzakaya Hol. / The Daimaru, In.	1 MTZ = 0.7143 DMR	14 Mar 2007	03 Sep 2007	Completed	31 Oct 2007	Japan	JPY153,892m	-0.44%	0.00%	N/A
Mitsubishi UFJ . / Mitsubishi UFJ .	1 MUS = 0.001 MUFG	28 Mar 2007	30 Sep 2007	9	23 Nov 2007	Japan	JPY737,640m	-1.57%	-1.01%	-63.87%
Mitsukoshi Ltd / Isetan Company .	1 MTKS = 0.34 ISTN	23 Aug 2007	01 Apr 2008	193	31 May 2008	Japan	JPY246,878m	1.66%	-0.21%	3.14%
Multiplex Group / Brookfield Asse.	1 MXG = AUD5.05	12 Jun 2007	28 Sep 2007	7	22 Oct 2007	Australia	AUD4,179m	1.20%	0.20%	62.70%
Nichiro Corpora. / Maruha Group In.	1 NIC = 0.905 MAR	12 Apr 2007	01 Oct 2007	10	30 Nov 2007	Japan	JPY26,319m	0.68%	-1.06%	24.87%
Nien Made Enter. / Global Viewcomp.	1 NME = USD1.251	31 Jul 2007	18 Oct 2007	27	25 Oct 2007	Taiwan	USD536m	2.13%	-0.53%	28.81%
Nippon Restaura. / Doutor Coffee C.	1 NRS = 1.687 DTR	26 Apr 2007	01 Oct 2007	10	30 Nov 2007	Japan	JPY51,600m	1.27%	-0.24%	46.32%
Nova Energy / Toro Energy	1 NOV = 5.50 TOR	06 Aug 2007	12 Oct 2007	21	02 Nov 2007	Australia	AUD195m	23.79%	-2.10%	413.57%
PCH Group Limit. / Cape PLC	1 PCH Group = AUD1.30	13 Sep 2007	12 Dec 2007	82		Australia	AUD226m	0.77%	0.39%	3.42%
PT Perusahaan P. / Indofood Agri R.	1 LSIP = USD0.70	26 May 2007	30 Nov 2007	70		Indonesia	USD796m	-3.74%	-0.64%	-19.50%
Rayong Refinery. / Aromatics Thail.	1 RRC = 0.339 ATC	23 Jul 2007	31 Dec 2007	101		Thailand	USD2,132m	2.58%	0.02%	9.33%
Sanyo Shinpan F. / Asahi Enterpris.	1 SSF = JPY3623.00	26 Jul 2007	13 Sep 2007	Completed	24 Sep 2007	Japan	JPY137,755m	-0.19%	1.36%	N/A
Sesa Goa / Vedanta Resourc.	1 SESA = INR2036.00	24 Apr 2007	19 Sep 2007	Completed	05 Oct 2007	India	INR90,977m	-11.91%	0.00%	N/A
Shanghai Power . / Shanghai Electr.	1 SPT = 7.32 SEG	30 Aug 2007	31 Dec 2007	101		China	CNY36,397m	-48.20%	0.00%	-174.19%
Sime Darby Berh. / Synergy Drive S.	1 SIM = 1.23 SYN	27 Nov 2006	15 Nov 2007	55		Malaysia	USD7,003m	5.23%	0.80%	34.72%
SK Energy Co Lt. / SK Holdings Co .	1 SKE = 0.739 SKH	29 Aug 2007	23 Oct 2007	32		South Korea	USD14,916m	-14.35%	-0.65%	-163.73%

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Deal	Terms	Ann. Date	Est. Comp	Days to comp	Sett. Date	Target Country	Target Mkt Cap (m)	Net Sprd	Change	Ann. Return
Southern Cross . / Consortium of M.	1 SBC = AUD17.05	03 Jul 2007	26 Oct 2007	35	02 Nov 2007	Australia	AUD1,228m	1.52%	-0.66%	15.81%
Symbion Health . / Healthscope Lim.	1 SYB = 0.4424 HSP + AUD1.8546	29 May 2007	28 Sep 2007	7	28 Sep 2007	Australia	AUD2,679m	5.39%	0.15%	280.87%
Taiwan Polyprop. / Lee Chang Yung .	1 TPP = 0.6991 LCY	10 Aug 2007	31 Dec 2007	101		Taiwan	USD253m	-5.81%	-0.57%	-20.98%
Toho Tenax Co.,. / Teijin Ltd.	1 TTX = 1.15 TJN	28 May 2007	01 Sep 2007	Completed	31 Oct 2007	Japan	JPY101,689m	-2.29%	-1.76%	N/A
United Test and. / Affinity Equity.	1 UTAC = USD0.788	26 Jun 2007	30 Oct 2007	39	02 Nov 2007	Singapore	USD1,177m	0.48%	-0.28%	4.54%
Zhejiang Supor . / SEB Internation.	1 ZJSC = CNY18.00	16 Aug 2006	31 Oct 2007	40		China	CNY6,708m	-52.77%	0.90%	-469.77%

Source: **dealReporter**, as of 20 Sept 2007

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Live deals – America

Deal	Terms	Ann. Date	Est. Comp	Days to comp	Sett. Date	Target Country	Target Mkt Cap (m)	Net Sprd	Change	Ann. Return
21st Century In. / American Intern.	1 TCI = USD22.00	15 May 2007	28 Sep 2007	7		USA	USD1,931m	0.18%	-0.09%	8.31%
Abitibi-Consoli. / Bowater Inc.	1 ABI = 0.1204 BO	29 Jan 2007	31 Oct 2007	40		Canada	USD810m	0.90%	-1.28%	8.03%
Accredited Home. / Lone Star Funds	1 AHL = USD11.75	04 Jun 2007	30 Sep 2007	9		USA	USD293m	-14.67%	0.00%	-60.85%
Acxiom Corporat. / Acxiom Acquisit.	1 AXC = USD27.10	16 May 2007	30 Oct 2007	39		USA	USD1,770m	19.96%	-0.27%	182.18%
AG Edwards Inc / Wachovia Corpor.	1 AG = 0.9844 WACH + USD35.80	31 May 2007	31 Dec 2007	101	04 Jan 2008	USA	USD6,535m	0.20%	-0.23%	0.72%
Alabama Nationa. / Royal Bank of C.	1 ANB = USD80.00	06 Sep 2007	31 Jan 2008	132		USA	USD1,579m	3.23%	0.07%	8.85%
Alcan Inc / Rio Tinto Limit.	1 ALC = USD101.00	12 Jul 2007	23 Oct 2007	32	02 Nov 2007	Canada	USD36,501m	1.67%	0.00%	18.48%
Alliance Data S. / Blackstone Capi.	1 ADSC = USD81.75	17 May 2007	31 Dec 2007	101		USA	USD6,246m	3.00%	-0.64%	10.73%
Alltel Corporat. / Alltel Acquisit.	1 ALL = USD71.50	20 May 2007	17 Dec 2007	87	21 Dec 2007	USA	USD24,059m	2.67%	-0.09%	11.08%
Andrew Corporat. / CommScope Inc	1 AND = USD15.00	27 Jun 2007	31 Dec 2007	101		USA	USD2,161m	8.07%	0.08%	28.88%
Applebee's Inte. / IHOP Corp	1 APPL = USD25.50	16 Jul 2007	31 Dec 2007	101		USA	USD1,896m	2.57%	0.08%	9.21%
Aquila Inc (for. / Great Plains En.	1 AQI = 0.0856 GPE + USD1.80	07 Feb 2007	30 Apr 2008	222		USA	USD1,502m	5.96%	0.60%	9.76%
Archstone-Smith. / Archstone-Smith.	1 ARCH = USD60.75	29 May 2007	05 Oct 2007	14	12 Oct 2007	USA	USD13,157m	1.76%	0.34%	42.80%
Arrow Internati. / Teleflex Incorp.	1 ARW = USD45.50	23 Jul 2007	24 Sep 2007	3	26 Sep 2007	USA	USD2,057m	0.15%	-0.02%	14.06%
Avaya Inc / Sierra Merger C.	1 AVA = USD17.50	04 Jun 2007	30 Oct 2007	39		USA	USD7,630m	3.18%	0.36%	29.05%
Bausch & Lomb / Warburg Pincus .	1 BL = USD65.00	16 May 2007	22 Oct 2007	31	24 Oct 2007	USA	USD3,460m	2.15%	0.03%	24.56%
BCE Inc / BCE Consortium	1 BCEI = USD41.3264	30 Jun 2007	30 Jan 2008	131		Canada	USD32,314m	3.29%	-0.10%	9.10%
Bolnisi Gold NL / Coeur d'Alene M.	1 BGN = 0.682 CDM + AUD0.004	03 May 2007	15 Nov 2007	55		Australia	AUD794m	4.34%	-4.71%	28.81%
Cablevision Sys. / Charles Dolan f.	1 CBL = USD36.26	02 May 2007	26 Nov 2007	66	30 Nov 2007	USA	USD10,106m	4.80%	0.78%	26.14%
Canadian Hotel . / British Columbi.	1 CHIP = USD17.914	01 Aug 2007	30 Dec 2007	100		Canada	USD919m	-5.88%	-1.32%	-21.24%
Catalina Market. / Hellman & Fried.	1 CMC = USD32.50	17 Apr 2007	30 Sep 2007	9		USA	USD1,477m	2.33%	0.45%	85.05%
CDW Corporation / Madison Dearbor.	1 CDW = USD87.75	29 May 2007	29 Sep 2007	8		USA	USD6,859m	1.28%	0.12%	51.96%

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Deal	Terms	Ann. Date	Est. Comp	Days to comp	Sett. Date	Target Country	Target Mkt Cap (m)	Net Sprd	Change	Ann. Return
Ceridian Corp. / Ceridian Consor.	1 CEN = USD36.00	30 May 2007	24 Oct 2007	33		USA	USD5,026m	2.71%	-0.03%	29.10%
CheckFree Corpo. / Fiserv Inc	1 CFC = USD48.00	02 Aug 2007	31 Dec 2007	101		USA	USD4,121m	2.43%	-0.37%	8.71%
Chittenden Corp. / People's United.	1 CHC = 0.8775 PPU + USD20.35	27 Jun 2007	30 Mar 2008	191		USA	USD1,570m	1.24%	-0.07%	2.36%
Clear Channel C. / Clear Channel A.	1 CLEAR = USD39.00	16 Nov 2006	31 Dec 2007	101		USA	USD18,913m	3.78%	0.39%	13.52%
Coinmach Servic. / Babcock & Brown	1 DRY = USD13.55	15 Jun 2007	31 Oct 2007	40		USA	USD676m	5.45%	0.16%	48.50%
Community Banks. / Susquehanna Ban.	1 COMB = 1.332 SUS + USD3.40	01 May 2007	15 Nov 2007	55		USA	USD766m	1.00%	0.07%	6.52%
Cytyc Corporati. / Hologic Inc	1 CYTY = 0.52 HOLO + USD16.50	20 May 2007	20 Oct 2007	29		USA	USD5,120m	1.32%	-0.21%	16.07%
Dade Behring Ho. / Siemens AG	1 DADE = USD77.00	25 Jul 2007	30 Jun 2008	283		USA	USD6,260m	1.05%	-0.11%	1.35%
DJO Inc. / ReAble Therapeu.	1 DJOI = USD50.25	16 Jul 2007	16 Nov 2007	56		USA	USD1,150m	2.91%	-0.17%	18.62%
Dobson Communic. / AT&T Inc (forme.	1 DOB = USD13.00	29 Jun 2007	30 Dec 2007	100		USA	USD1,934m	2.12%	-0.16%	7.67%
Dow Jones & Com. / News Corporatio.	1 DOWJ = USD60.00	01 Aug 2007	15 Nov 2007	55	21 Nov 2007	USA	USD4,933m	0.70%	-0.05%	4.59%
EDO Corporation / ITT Corporation.	1 EDC = USD56.00	17 Sep 2007	31 Jan 2008	132		USA	USD1,202m	-0.92%	-1.68%	-2.52%
Energy East Cor. / Iberdrola SA	1 EAC = USD28.50	25 Jun 2007	25 Jun 2008	278		USA	USD4,240m	6.22%	-0.16%	8.14%
Equity Inns Inc. / Whitehall Stree.	1 EQU = USD23.00	21 Jun 2007	30 Oct 2007	39	02 Nov 2007	USA	USD1,244m	2.88%	-0.23%	26.24%
First Charter C. / Fifth Third Ban.	1 FIRST = 0.6306 FIFTH + USD9.30	16 Aug 2007	31 Mar 2008	192		USA	USD1,053m	4.22%	-2.48%	7.97%
First Data Corp. / Kohlberg Kravis.	1 FRC = USD34.00	02 Apr 2007	25 Sep 2007	4	01 Oct 2007	USA	USD25,444m	0.62%	-0.12%	45.37%
First Republic . / Merrill Lynch	1 FRP = 0.366 MLC + USD27.50	29 Jan 2007	21 Sep 2007	Completed	22 Sep 2007	USA	USD1,723m	-0.69%	-0.11%	N/A
Florida Rock In. / Vulcan Material.	1 FRI = 0.189 VMY + USD46.90	19 Feb 2007	08 Oct 2007	17	11 Oct 2007	USA	USD3,987m	3.62%	0.61%	73.31%
Foxhollow Techn. / EV3 Inc	1 FOX = 1.45 EV + USD2.75	22 Jul 2007	05 Oct 2007	14	11 Oct 2007	USA	USD775m	0.56%	0.07%	13.53%
Gateway Inc / Acer Incorporat.	1 GATE = USD1.90	27 Aug 2007	31 Dec 2007	101		USA	USD699m	1.60%	-0.55%	5.74%
Genesco Inc / The Finish Line.	1 GEN = USD54.50	18 Jun 2007	18 Oct 2007	27		USA	USD1,063m	16.58%	-1.18%	216.10%

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Deal	Terms	Ann. Date	Est. Comp	Days to comp	Sett. Date	Target Country	Target Mkt Cap (m)	Net Sprd	Change	Ann. Return
GlobalSantaFe C. / Transocean Inc	1 GLO = 0.4757 TRAN + USD22.46	23 Jul 2007	31 Dec 2007	101		USA	USD17,372m	-0.13%	-1.13%	-0.47%
Greater Bay Ban. / Wells Fargo & C.	1 GBAY = 0.7959 WFA	04 May 2007	05 Oct 2007	14	10 Oct 2007	USA	USD1,457m	1.89%	-0.83%	46.03%
Guitar Center I. / Bain Capital LL.	1 GUIT = USD63.00	27 Jun 2007	09 Oct 2007	18	12 Oct 2007	USA	USD1,766m	5.25%	-2.47%	100.77%
Harman Internat. / Harman Consorti.	1 HII = USD120.00	26 Apr 2007	31 Dec 2007	101		USA	USD7,353m	6.90%	0.05%	24.71%
Harrah's Entert. / Hamlet Holdings.	1 HAR = USD90.00	19 Dec 2006	31 Dec 2007	101		USA	USD16,210m	3.32%	0.37%	11.87%
Hearst Argyle T. / The Hearst Corp.	1 HAT = USD23.50	24 Aug 2007	05 Oct 2007	14		USA	USD2,403m	-8.20%	-0.29%	-199.61%
Hilton Hotels C. / Blackstone Grou.	1 HILT = USD47.50	03 Jul 2007	12 Oct 2007	21	18 Oct 2007	USA	USD18,143m	2.04%	-0.11%	33.86%
Horizon Offshor. / Cal Dive Intern.	1 HORF = 0.625 CDI + USD9.25	11 Jun 2007	01 Dec 2007	71		USA	USD573m	9.68%	-0.88%	49.06%
Huntsman Corpor. / Hexion Specialt.	1 HUNT = USD28.00	12 Jul 2007	31 Mar 2008	192		USA	USD5,852m	6.18%	-0.16%	11.69%
James River Gro. / D E Shaw & Co	1 JRIV = USD34.50	11 Jun 2007	30 Nov 2007	70		USA	USD491m	6.32%	1.33%	32.48%
Keystone Automo. / LKQ Corporation.	1 KYST = USD48.00	17 Jul 2007	17 Nov 2007	57		USA	USD788m	0.67%	-0.04%	4.22%
Kyphon Inc / Medtronic Inc	1 KPHN = USD71.00	27 Jul 2007	27 Jan 2008	128		USA	USD3,173m	1.94%	-0.29%	5.48%
Laidlaw Interna. / FirstGroup plc	1 LWI = USD35.25	09 Feb 2007	05 Oct 2007	14		USA	USD2,767m	1.12%	0.12%	27.22%
Lyondell Chemic. / Basell Holdings.	1 LND = USD48.00	17 Jul 2007	31 Dec 2007	101		USA	USD11,821m	2.92%	-0.35%	10.43%
Manor Care Inc. / The Carlyle Gro.	1 MCI = USD67.00	02 Jul 2007	31 Dec 2007	101		USA	USD4,747m	3.27%	-0.32%	11.69%
Meridian Gold, . / Yamana Gold Inc	1 MDG = 2.235 YMG + USD6.4935	19 Jul 2007	15 Oct 2007	24		Canada	USD3,493m	0.81%	-5.23%	11.79%
Myers Industrie. / GS Capital Part.	1 MYRS = USD22.50	24 Apr 2007	01 Dec 2007	71		USA	USD738m	7.09%	-1.66%	35.95%
Northern Orion . / Yamana Gold Inc	1 NOR = 0.543 YAM	19 Jul 2007	15 Oct 2007	24		Canada	USD1,017m	4.16%	-9.54%	60.70%
Nuveen Investme. / Nuveen Consorti.	1 NII = USD65.00	20 Jun 2007	21 Dec 2007	91		USA	USD5,013m	3.01%	-0.07%	11.95%
Oakley, Inc / Luxottica Group.	1 OAK = USD29.30	20 Jun 2007	20 Nov 2007	60		USA	USD2,006m	1.14%	-0.18%	6.82%
Opsware Inc (fo. / Hewlett-Packard.	1 OPW = USD14.25	23 Jul 2007	27 Sep 2007	6		USA	USD1,503m	0.07%	0.00%	3.66%

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Deal	Terms	Ann. Date	Est. Comp	Days to comp	Sett. Date	Target Country	Target Mkt Cap (m)	Net Sprd	Change	Ann. Return
Palmarejo Silve. / Coeur d'Alene M.	1 PSG = 2.715 CDM + USD0.003	03 May 2007	15 Nov 2007	55		Canada	USD862m	4.92%	-1.17%	32.04%
Pathmark Stores. / The Great Atlan.	1 PSI = 0.1296 GAT + USD9.00	05 Mar 2007	31 Oct 2007	40		USA	USD671m	1.31%	0.11%	11.63%
Penn National G. / Penn National A.	1 PNG = USD67.00	15 Jun 2007	15 Aug 2008	329		USA	USD5,130m	11.74%	0.17%	12.99%
PHH Corporation. / GE Capital (Gen.	1 PHC = USD31.50	15 Mar 2007	05 Oct 2007	14	12 Oct 2007	USA	USD1,339m	25.85%	2.17%	628.99%
Playtex Product. / Energizer Holdi.	1 PYX = USD18.30	12 Jul 2007	01 Oct 2007	10	05 Oct 2007	USA	USD1,155m	0.44%	-0.06%	14.57%
Pogo Producing . / Plains Explorat.	1 POGO = 0.682 PLAIN + USD24.88	17 Jul 2007	31 Dec 2007	101		USA	USD3,091m	2.96%	0.08%	10.60%
PolyMedica Corp. / Medco Health So.	1 PLM = USD53.00	28 Aug 2007	31 Dec 2007	101	03 Jan 2008	USA	USD1,199m	1.36%	-0.12%	4.86%
Rally Energy Co. / Citadel Capital	1 RAE = USD7.0569	01 Aug 2007	19 Sep 2007	Completed	19 Sep 2007	Canada	USD833m	-2.84%	-1.42%	N/A
RARE Hospitalit. / Darden Restaura.	1 RAR = USD38.15	16 Aug 2007	31 Oct 2007	40		USA	USD1,165m	0.26%	-0.11%	2.34%
Reddy Ice Holdi. / GSO Capital Par.	1 RDI = USD31.25	02 Jul 2007	16 Oct 2007	25		USA	USD579m	17.70%	0.53%	248.51%
Reuters Group p. / The Thomson Cor.	1 RTR = 0.16 TMS + GBP3.525	15 May 2007	31 Jan 2008	132		United Kingdom	GBP8,243m	6.71%	0.01%	18.41%
Rural Cellular . / Verizon Wireles.	1 RCC = USD45.00	30 Jul 2007	28 Feb 2008	160		USA	USD674m	3.90%	0.02%	8.85%
Ryerson Inc. (f. / Platinum Equity.	1 RYE = USD34.50	24 Jul 2007	30 Nov 2007	70		USA	USD874m	4.67%	0.19%	24.02%
Sequa Corporati. / The Carlyle Gro.	1 SEQ = USD175.00	09 Jul 2007	20 Oct 2007	29	25 Oct 2007	USA	USD1,360m	3.65%	0.10%	44.39%
Sierra Health S. / UnitedHealth Gr.	1 SHS = USD43.50	12 Mar 2007	31 Dec 2007	101		USA	USD2,372m	2.64%	0.07%	9.46%
Sirenza Microde. / RF Micro Device.	1 SMI = 1.7848 RFD + USD5.56	13 Aug 2007	29 Dec 2007	99		USA	USD845m	1.79%	-0.52%	6.55%
SLM Corporation. / SLM Acquisition.	1 SLMC = USD60.00	16 Apr 2007	30 Nov 2007	70		USA	USD19,828m	24.38%	0.79%	125.32%
Solectron Corpo. / Flextronics Int.	1 SLCT = USD3.89	04 Jun 2007	04 Oct 2007	13		USA	USD3,565m	-0.77%	1.00%	-19.95%
Station Casinos. / Fertitta Colony.	1 STA = USD90.00	26 Feb 2007	26 Sep 2007	5		USA	USD5,014m	2.69%	-0.19%	163.81%
Stelco Inc. / US Steel Corpor.	1 STL = USD37.218	26 Aug 2007	31 Dec 2007	101		Canada	USD1,027m	-1.69%	-1.20%	-6.04%
Suncom Wireless. / Deutsche Teleko.	1 SCW = USD27.00	17 Sep 2007	30 Jun 2008	283		USA	USD1,519m	5.30%	-0.58%	6.82%

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Deal	Terms	Ann. Date	Est. Comp	Days to comp	Sett. Date	Target Country	Target Mkt Cap (m)	Net Sprd	Change	Ann. Return
The Topps Compa. / Topps Acquisiti.	1 TOP = USD9.75	06 Mar 2007	02 Oct 2007	11	06 Oct 2007	USA	USD372m	1.46%	0.00%	44.31%
TierOne Corpora. / Capital Source .	1 TIER = 1.08 CSF + USD6.80	17 May 2007	17 Nov 2007	57		USA	USD470m	6.48%	0.41%	40.79%
Tribune Company / Tribune Acquisi.	1 TRBC = USD34.00	02 Apr 2007	31 Dec 2007	101		USA	USD6,538m	24.22%	1.83%	86.68%
TXU Corp / TXU Acquisition.	1 TX = USD69.25	26 Feb 2007	02 Nov 2007	42	19 Oct 2007	USA	USD31,290m	1.64%	0.03%	13.95%
United Rentals,. / Cerberus Capita.	1 URE = USD34.50	23 Jul 2007	19 Nov 2007	59	23 Nov 2007	USA	USD2,648m	6.42%	-2.35%	39.03%
Ventana Medical. / Roche Holding A.	1 VMS = USD75.00	25 Jun 2007	01 Nov 2007	41		USA	USD3,182m	-11.18%	-11.18%	-97.16%
Washington Grou. / URS Corporation	1 WGI = 0.772 URC + USD43.80	28 May 2007	31 Dec 2007	101		USA	USD2,564m	0.18%	-0.32%	0.63%
Western Oil San. / Marathon Oil Co.	1 WOS = 0.2076 MOC + USD22.3066	31 Jul 2007	30 Oct 2007	39		Canada	USD6,134m	-9.34%	-1.51%	-85.20%
Williams Scotsm. / Ristretto (fka .	1 WSI = USD28.25	19 Jul 2007	31 Oct 2007	40	06 Nov 2007	USA	USD1,205m	1.88%	-0.30%	16.69%
XM Satellite Ra. / Sirius Satellit.	1 XMR = 4.60 SSR	19 Feb 2007	19 Feb 2008	151		USA	USD3,827m	8.79%	-1.29%	21.10%

Source: **dealReporter**, as of 20 Sept 2007

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