

EU merger control in 2011

A look at some of the most significant trends and cases of last year

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Looking at the numbers

The European Commission's merger control statistics show a recovery in M&A activity. In 2011, the Commission received more merger notifications (at time of writing expected to be around 350) than in the previous two years. The amount is similar to 2008 (347), but not as high as the peak of 2007 (402). This upward trend, however, remains volatile with the number of notifications tapering off in the last few months of 2011. Perhaps consistent with the increased number of merger filings, there was a greater number of Phase II cases in 2011 (eight compared to four in 2010).

There was one prohibition decision in 2011 (Olympic/Aegean Airlines), the first merger prohibition decision since Ryanair/Aer Lingus in 2007. However, Commissioner Almunia stressed at the press conference announcing the decision that "prohibition decisions will remain rare, since in most cases we are able to accept the solutions proposed by the parties".

First-come, first-served

In 2011, there were two merger decisions in the IT sector that confirm the notification date priority or "first-come, first-served" rule. This rule concerns the Commission's practice of taking the date of notification as determinative for its substantive assessment in situations where it is reviewing two transactions concerning the same markets simultaneously.

In Seagate Technology's acquisition of the hard disk drives (HDD) business of Samsung Electronics, Seagate filed its notification one day before Western Digital made its filing in connection with its acquisition of Hitachi Global Storage Technology (renamed Viviti Technologies), also active in the HDD business. Although Western Digital had signed and announced its deal first and both it and Seagate were engaged in prenotification discussions with DG Competition, the fact that Seagate filed first resulted in dramatically different consequences for each of these deals. Seagate's acquisition was assessed without reference to Western Digital's transaction. (Competition from each of Western Digital and Hitachi was taken into account in concluding that the transaction would not significantly impede effective competition since, in the markets of concern, at least three strong competitors were active in one market and four in the other market.) However, Western Digital's transaction was judged as if the consolidation brought about by the Seagate transaction had already occurred, so that, in the markets of concern, it was considered as a three to two merger in one market and a four to three merger in the other market.

The result of the application of this rule of practice was that Seagate/Samsung Electronics was cleared in Phase II without conditions, while (over a month later) the Western Digital transaction was approved but subject to commitments by Western Digital to sell essential production assets for the manufacture of a certain type of hard disk drive, together with

a plant, transfer or licensing of IP rights, transfer of personnel and supply of components to the buyer. In addition, Western Digital could not close the acquisition of Hitachi's HDD business before it signed a binding agreement for the divested business with a suitable buyer approved by the Commission.

This priority rule is not new. Western Digital has lodged an action with the General Court challenging it. However, pending any change in the rule, the impact for future parallel transactions in consolidated markets is that there will be a race to file. The challenge is that the notifying parties do not have control over when a final notification is made, since they are dependent on the Commission case team giving them the go-ahead to file the definitive document, following a review, usually of multiple drafts. If the Commission considers it necessary to apply a priority rule, it would be fairer to the parties to apply a priority rule that was triggered by the signing of a binding agreement or submission of a case allocation request form, as these dates are more firmly within the control of the notifying parties.

Third party rights

The *Test-Achats* judgment in October emphasised the importance of third parties providing their comments to the Commission on a merger within the formal review period if they later want to challenge the Commission's merger decision.

In Case T-224/10 *Association belge consommateurs test-achats ASBL v European Commission*, the General Court (GC) found that an application by a Belgian consumer group, ABCTA, for the annulment of the European Commission's decision approving conditionally the EDF/Segebel merger was inadmissible. The GC considered that the locus standi of third parties concerned by a merger must be assessed differently, depending on whether they rely on defects affecting the substance of a decision (the first category), or submit that the Commission infringed procedural rights which are granted to them by the acts of EU law governing the monitoring of mergers (the second category).

With respect to the first category, the GC found that ABCTA was not individually concerned by the Commission's clearance decision. ABCTA was affected only by reason of their "objective and abstract status as energy consumers". With respect to the second category, the GC ruled that the right of a consumer organisation to be heard is subject to two conditions: first, the merger must relate to goods or services used by final consumers, and, second, an application to be heard by the Commission during the investigation procedure must actually have been made in writing by the association.

Although ABCTA satisfied the first condition, it did not satisfy the second one. ABCTA wrote to the Commission two months prior to the notification expressing its concerns about the merger, but had not applied for its right to be heard following the notification of the merger.

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ABCTA also challenged the Commission's decision to reject a request from the Belgian competition authorities for partial referral of the merger. The GC recalled that a third party is entitled to challenge a Commission decision to uphold a national competition authority's referral request. However, it held that third parties are not entitled to challenge a non-referral request. This is because the procedural rights and judicial protection that EU law confers are not in any way jeopardised by a non-referral decision. This contrasts with a referral decision, where third parties are deprived of the opportunity of review by the Commission of the lawfulness of a transaction.

Minority shareholdings

When the European Commission, in 2007, prohibited Ryanair's acquisition of rival airline Aer Lingus, it could do nothing to review (under merger control rules) the impact of Ryanair's build-up of a 29.8% minority stake in Aer Lingus, since the stake did not give Ryanair control over Aer Lingus for the purposes of the EU Merger Regulation. This minority acquisition is now under review by the UK Office of Fair Trading.

In a speech in March 2011 at a conference to mark 20 years of the EU Merger Regulation, Commissioner Almunia stated that there "is probably an enforcement gap" concerning the acquisition of minority shareholdings that do not give rise to a "change of control" under the EU Merger Regulation. DG Competition is currently reviewing the results of a study that has gathered data on minority shareholdings across the EU over the last 10 years. An item for review next year will be whether the Commission should allow for the review of minority acquisitions under EU merger control rules. Certain national competition regimes, such as the UK and Germany, allow for the review of minority interests. If it does decide to act, the path to change may not be easy, since the Commission will probably need to secure an amendment to the EU Merger Regulation, which requires the unanimous approval of the Council of Ministers.

Interaction with other agencies

In November, the European Commission announced that it and the heads of EU national competition authorities had agreed a set of best practices on co-operation in merger review. These practices had been developed within the merger working group of the European Competition Network (ECN).

The best practices' stated aim is to enhance co-operation in merger cases where the EU Merger Regulation does not apply and where the merger needs to be notified in more than one EU member state. The document discusses a number of areas for the facilitation of the merger review process, including the exchange of certain basic non-confidential information, the alignment of review timetables, regular contacts with regard to timing and decisions to open in-depth investigations, and discussions on substantive analysis such as market definition or possible anticompetitive effects. Merging parties and third parties are encouraged to provide waivers of confidentiality to all authorities where the merger can be reviewed.

A month before the publication of these guidelines, the Federal Trade Commission, the Department of Justice's antitrust division and the European Commission published revised best practices for cases where the Commission and a US agency are reviewing the same merger. The document

establishes as a key objective that when the US agencies and the European Commission are reviewing the same merger, both have an interest in reaching, insofar as possible, consistent, or at least non-conflicting, outcomes. The best practices set out procedures in the areas of communications between reviewing agencies, co-ordination on timing of reviews, collection and evaluation of evidence, and remedies.

Chinese state-owned enterprises

The growth of the Chinese economy has led to many more transactions by Chinese acquirers being reviewed by the European Commission. In 2011, it reviewed a number of transactions involving Chinese state-owned enterprises, including DSM-Sinochem JV, China National Bluestar-Elkem, Huaneng-OTPPB-Interger and PetroChina-Ineos JV.

An important consideration in these cases has been whether the state-owned enterprise in question can be considered to be an economic unit "with an independent power of decision" or whether it is part of the state. This distinction is crucial for the purposes of turnover calculation and the competitive analysis of a transaction. In DSM-Sinochem, the Commission declined the parties' invitation to regard Sinochem as an economic unit with independent power of decision. It was not persuaded by relevant Chinese legislation which indicated that Sinochem acted independently of the Central State-owned Assets Supervision and Administration Commission of the State Council (Central SASAC). The Commission pointed to anecdotal evidence including information on Central SASAC's website, an isolated statement in Sinochem's annual report and an OECD report. It held that "in the absence of representation by the Chinese state and accompanying evidence", it was not possible to conclude whether or not Sinochem enjoyed an independent power of decision. It held, however, that the issue could be left open, since the transaction would not result in a significant impediment to effective competition even if all Central SASAC-owned companies were deemed to act as one entity.

The Commission has shown that it will rigorously examine the question of independence when it comes to transactions involving state-owned enterprises. There is a risk in the future of detailed and long review procedures for transactions involving Chinese state-owned enterprises if it is necessary in order to establish jurisdiction, or, for the purposes of the substantive assessment, to establish definitively whether the entity can be treated on a standalone basis or must be considered as part of a group of companies under common control of the state.

Remedies

In January 2011, the European Commission, by granting conditional clearance to Intel's acquisition of McAfee in the US, demonstrated its willingness to accept behavioural remedies to address mergers that would otherwise give rise to competition issues. According to Commissioner Almunia, "the commitments submitted by Intel strike the right balance, as they preserve both competition and the beneficial effects of the merger". However, the precedent value of this decision may be limited to conglomerate mergers where the parties are active in complimentary markets and seems unlikely to signal a change in stance as regards the Commission's clear preference for structural remedies, in particular in horizontal merger cases.