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Desde 1992

Instituto Brasileiro de Estudos de Concorrência,  
Consumo e Comércio Internacional

# EU Merger Control



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# Outline

- Scope of EU merger control ?
- When to notify ?
- Who should notify ?
- How to notify before the European Commission ?
- Merger review by the European Commission
- Remedies: problem or not problem ?
- What can be done until clearance ?
- Key statistics

# Scope of merger control

- Operations at stake:
  - Merger of two or more companies
  - Direct or indirect acquisition of control over another company (sole control and joint control) → any circumstance likely to result in a decisive influence
  - Creation of a joint-venture performing on a lasting basis all the functions of a “full function” joint-venture
- Merger thresholds:
  - Revenue thresholds and not market shares
  - Identify the jurisdiction: European Commission (exclusive jurisdiction) or one or several National Competition Authority(ies) of (a) Member State(s)

# When to notify?

- Before the implementation of the operation subject to authorization (*closing*), but
- After concluding the acts constituting the operation
  - Possibility to notify a proposed concentration which is sufficiently advanced and concrete (e.g. letter of intent)
  - Anticipate a conditional conclusion in the acquisition agreements

# Who should notify ?

- In the event of an acquisition: the purchaser
- In the event of a public takeover bid: the company making the offer
- In the event of a merger or the creation of a joint venture (acquisition of joint control): all the parties (joint notification)
- In any case, the cooperation of the target is required to obtain the necessary information to complete the notification form, in particular the confidential estimates of its market share on the affected markets

# How to notify before the Commission ?

- Pre-notification phase
  - Strongly encouraged
    - At the latest two weeks before the notification itself
    - Confidential meetings with a « *case team* »
  - Numerous objectives
    - Request the advice of the Commission in the event of doubts on the « controlability » of the operation (qualification, calculation of turnover thresholds, national or European jurisdiction, etc.)
    - Ensure that the « *case team* » accepts the definition of the markets for products in question and their geographical scope
    - Identify potential competition issues
- Notification phase
  - Form CO: identify the affected market(s)
  - Simplified form for operations unlikely to raise competition issues

# Merger review by the Commission

- Two review phases, depending on the competition issues raised
- Type of review
  - Compatibility test = analysis of a significant affect on competition
  - Creation or strengthening of a dominant position
  - Conglomerate effects
  - Economic efficiency gains...
- Identify the possible remedies / corrective measures (structural / behavioural commitments)
- Litigation
  - examples: Schneider/Legrand, Impala cases

# Remedies: problem or not problem ?

## Why remedies ?

- Objective: to eliminate competition issues resulting from a notified concentration
- To be approved by the commission, commitments must:
  - Resolve all difficulties related to the creation or reinforcement of a dominant position, and be proportional to the stated purpose,
  - Durably reestablish the conditions for effective competition in the common market,
  - Not contain uncertainties concerning their possible outcome,
  - Be able to be put into place easily, quickly and effectively,
  - Not require later control following implementation.
- Method: the Commission's Merger Remedies Notice
  - Reviewed in 2007

# Remedies: problem or not problem ?

## When remedies ?

- It is up to the notifying parties to put forward commitments (CFI, General Electric v Commission, 2005)
- Parties can submit commitments within not more than 20 working days from the date of the receipt of the notification
- However, the Commission bears the burden of proof for establishing whether the operation, despite the commitments, leads to a significant impediment of competition (CFI, EDP v Commission, 2005)
- During Phase I: considerable strategic advantage for those seeking to shorten the duration of the procedure
- Commitments in Phase II

# Remedies: problem or not problem ?

## What type of remedies ?

- Structural commitments
  - Commitments which are structural in nature « are, as a rule, preferable » (CFI, 1999, Gencor; § 9 of the Notice)
  - Divestitures: sale of a complete business / of part of a business (Masterfoods/Royal Canin, 2002), severance of links with competitors
  - Commission's focus on the viability of the divestiture business (Posten AB / Post Danmark, 2009)
- Behavioural commitments
  - Ex. in the telecommunication sector: granting access to a key network (Vodafone Airtouch / Mannesmann, 2000) or infrastructure (English, Welsh & Scottish Railway Holdings, 2007)
  - Drawbacks: require monitoring, more vulnerable to manipulation
  - Often a « package » of structural and behavioural commitments (Air France / KLM, 2004)
- Others: Chinese walls (ex: Areva/Urenco, 2004), granting IP rights, etc.
- Proportionality of the remedies
  - The Commission must accept the least onerous set of remedies which is likely to resolve the competition concerns (CFI, 2003, Babyliiss)

# Remedies: problem or not problem ?

## Follow-up: implementation and control

- Divestitures:
  - Role of the monitoring trustee (ex: Areva/Urenco/ETC, 2004)
  - The Commission cannot pass off its responsibilities onto the trustee (Microsoft case, CFI, 2007)
- Review of remedies
  - Upon request of the parties, the Commission may grant an extension of deadlines, modify or substitute the commitments (rare)
- Litigation
  - dispute resolution mechanism via arbitration proceedings
  - for the parties as well as third parties
- Question: are remedies efficient ?

# What can be done until clearance ?

- The operation must not be put into effect until authorization is obtained from the Commission (« suspension », pursuant to art. 7 of Regulation 139/2004)
- Exception:
  - This does not prevent the implementation of a notified public bid, provided the acquirer does not exercise the voting rights attached to the securities
  - Derogation on a case-by-case basis: « reasoned request »

# Key statistics (I)

- Number of notified cases from 2000 to 2009:
  - 330 / year in average
  - Examples: 11 notified cases in 1990, 330 in 2000, 402 in 2007, 259 in 2009
- Cases withdrawn – phase I:
  - 5,6 cases / year in average since 2000
- Cases withdrawn – phase II:
  - 2,4 cases / year in average since 2000

## Key statistics (II) – Referrals (since 2004)

- Under art. 4 § 4 (pre-notification full or partial referral to a Member State):
  - 8 to 9 cases / year in average, accepted in more than 90% of cases
- Under art. 4 § 5 (pre-notification referral to the Commission of a merger which does not have a community dimension, but which could be reviewed by at least 3 MS):
  - over 30 cases / year in average, accepted in 96% of cases
- Under art. 22 (one or more MS request the Commission to examine a concentration that does not have a Community dimension but affects trade between MS)
  - between 2 and 3 cases / year in average, accepted in most cases
- Under art. 9 (the Commission fully or partially refers a notified concentration back to the competent authorities of a MS):
  - 4 to 5 cases / year in average, accepted in most cases

# Key statistics (III)

- First phase decisions
  - Compatible (including decisions under simplified procedure): 286 / year in average
  - Compatible with commitments: 15 / year in average
- Second phase decisions
  - Proceedings initiated: over 10 / year in average
  - Over 75% are declared compatible
  - Around 50% of these are declared compatible with commitments
  - Prohibition: 2 cases only since 2004 (!)
- Remedies: figures in 2008
  - 24 decisions (19 phase I, 5 phase II)
  - Type of remedy: 9 purely structural (divestiture), 3 behavioural (incl. access obligations), 14 mixed (divestiture with supporting behavioural commitments)
  - Implementation safeguards: crown jewels (4), fix-it-first (1), up-front buyer (2)

# Concluding remarks

- The EU merger control:
  - A « paper tiger » ? Prohibited operations are very rare...
  - A rather political control ?
  - In any case, key role of remedies in negotiating with the Commission

Thank you for your attention !



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