

Session 102.2:

The Race to Clear Mergers –

**While US Approvals Zoom By,
The EU Drifts on a Sea of Doubts**

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What This Presentation is About: Time!

- As an M&A deal becomes reality, the CEO asks the legal department (via the CFO, M&A department, investment bankers, etc.):

“Will we get all the regulatory approvals we need in time for the closing date?”

“We will have these things set down by lawful counsel, and straight away ... lest the bargain should catch cold and starve.”

- Cymbeline

In the Nick of Time, ICN Saves the Day

- International Competition Network’s “Recommended Practices for Merger Notification Procedures” (2002-05)
-- to answer the CEO’s query, all these must be “practiced”:
 - Merger reviews completed within a reasonable period of time
 - Expedited review and clearance of notified transactions that do not raise material competitive concerns
 - Effective, efficient, transparent and predictable review process
 - Balance between protecting the confidentiality of third-party submissions and procedural fairness

EU Merger Review: The Beginnings

- EU merger review procedure went into effect September 1990
- In reaction to Commission's two-year average to process notifications of agreements, EU Council:
 - Imposed one-month Phase I, and “deemed” approval if Commission missed the deadline
 - “Elite” Merger Task Force created by Commission

EU Merger Review: Today

- 2004 amendments extended Phase I to five weeks, with two-week extension possible for remedies
- “Pre-notification” can be longer than Phase I
- The Merger Task Force has been disbanded
- Is the 18-week Phase II now opened “on demand” if a third party complains?

... How did this happen???????????

US Merger Review - Comparison

- In the Bush administration, the number of “Second Request” investigations and ultimate court challenges to mergers dropped dramatically
- Probable “turning point” was courts’ rejections of challenges
 - by DOJ to Oracle/PeopleSoft in 2004
 - by FTC to several deals in 2004-07

Press Declares US Merger Review “Dead”

● Wall Street Journal:

“The federal government has nearly stepped out of the [merger] antitrust enforcement business, leaving companies to mate as they wish.”

-- January 16, 2007

US Case Study: Alcatel/Lucent Merger

- First substantive contact with DOJ on April 7, 2006
- DOJ Request for “Voluntary” Production of Documents and Information sent April 11 after meeting with parties
- HSR notification filed May 8
- “White Paper” on one product market submitted May 9
- Clearance on June 7 by “early termination” (just before expiration of 30-day HSR waiting period)

Conclusion: US Merger Review Isn't Dead ... Just Reborn!

- Practice tip: notify global deals in the US first
 - At least until new administration's agency staff in place, quick US approval likely, with positive effect on EU
 - Could help explain why Alcatel/Lucent EU pre-notification and clearance were relatively “quick”:
 - First substantive contact with D-G COMP on May 3, 2006
 - start of “pre-notification”
 - Form CO notification filed June 16
 - Unconditional Phase I clearance on July 24

Don't Look at Einstein: Why EU Time is Slowing Down

- Fast clearances in US aided by understanding that a Second Request is often a deal-killer
 - FTC strategic plan issued end of 2006:
Second Requests only when enforcement action is certain
- But the EU must justify every outcome in a decision reviewed by the Court of First Instance

“Time travels in divers paces with divers persons”

- As You Like It

Enter the 21st Century: The CFI Finally Discovers the Commission!

- In a series of appeal judgments, in 2002 for the first time the CFI reversed Commission decisions which had prohibited mergers:
 - Airtours; Schneider/Legrand; Tetra Laval/Sidel
- These judgments criticized the Commission for superficial investigations and too many unproven assumptions
- Immediate practical consequences:
 - In cases raising doubts, the Commission demanded production of unprecedented amounts of internal documents from notifying parties
 - The Commission announced the Merger Task Force would be disbanded!

Impala (2006) – The CFI Rocks the House

- Impala v. Commission (July 2006), involved the Commission's clearance of Sony BMG, the merger of Sony and Bertelsmann's music businesses
- In an appeal by a third-party complainant -- an association of independent music companies -- the CFI handed down another "first": the Court annulled a Commission decision which approved a merger!
- The Commission was criticized again for superficial investigation
 - Factual issue: Was the market "transparent" enough to allow "collective dominance" between Sony BMG and the other major music houses

After Impala: Complainants Have Their Way

- During the year following Impala, the Commission launched Phase II investigations in two cases in which
 - Phase II resulted in unconditional clearance
 - The Commission didn't even issue a Statement of Objections
- The decisions (both in 2007) were:
 - Thales/Alcatel Alenia Space
 - Travelport/Worldspan
- What was going on?

EU Case Study: Thales/AAS – Prelude (2005)

- Alcatel Alenia Space (AAS) was a JV formed from the satellite businesses of Alcatel and Finmeccanica
- When notified in March 2005, Alcatel Space's arch competitor Astrium (of the EADS group) led vigorous lobbying as a third-party complainant
- Alcatel Space itself had complained in 1999 about aspects of the creation of Astrium, resulting in a Phase II and commitments!

EU Case Study: Thales/AAS Prelude (Continued)

- Issues in the 2005 case were strong overlaps in two types of satellite subsystems:
 - Tracking Telemetry & Command equipment
 - Radar Altimeters
- The Commission accepted behavioral commitments in Phase I (see Alcatel/Finmeccanica/AAS & Telespazio):
 - Technology licenses to create second suppliers
 - Arbitration in case of price increases
- Astrium's reputed threats to appeal were ignored

EU Case Study: complaint vs. Thales/AAS

- In October 2006, Thales and Finmeccanica notified the divestment of Alcatel's shares in AAS to Thales
- Astrium complained again, alleging vertical dominance:
 - Thales could leverage its dominant position in a satellite component, Traveling Wave Tubes, combining them with
 - AAS's production of a component called Electronic Power Conditioners (EPCs),
 - Leading to dominance in a downstream product, Traveling Wave Tube Amplifiers

EU Case Study: Thales/AAS Phase II

- This time, Astrium succeeds - Phase II is opened!

“Thus the Whirligig of time brings in his revenges.”

- Twelfth Night

- Why such a change in the Commission’s approach to the same sector in less than two years?
 - After Impala, a threat by a third party to appeal Phase I clearance was taken seriously!
 - D-G COMP demanded a huge document production and even visited AAS’s factory, hoping to make the resulting 100-page Phase II clearance decision in 2007 “appeal proof”?

Thales/AAS: Conclusions

- Since it found all the complainants' allegations to be unsupported, D-G COMP should have completed its investigation in Phase I instead of delaying four months:
 - Thales lost time in Phase I, thinking D-G COMP's focus would be on remedies as in the past
 - No adequate opportunity was given for rebuttal in Phase I
 - Only a few key documents/facts about the small capacity for, and obsolescence of, AAS's EPCs were really necessary to the decision, which relied heavily on economic theory
- The original priority goal of the Merger Regulation
– speedy review – failed!

Travelport/Worldspan: Thales/AAS Methods Cloned?

- Involved the merger of the no. 2 and no. 4 electronic travel service suppliers – “Global Distribution Systems” (GDS) – reducing market players from four to three
- GDS distributes offerings of “travel service providers” – airlines, car rentals, hotels, etc., to travel agents
- D-G COMP opened Phase II to assess whether the merged company could become individually dominant or whether collective dominance could occur among the remaining three

Travelport/Worldspan: Results

- Like in Thales/AAS, Phase II clearance (2007) was unconditional, without even a Statement of Objections
 - As to the allegation of individual dominance:
In case of price increases, both travel service providers and travel agents could switch to other GDSs
 - As to the allegation of collective dominance:
Since pricing in the market was not transparent, collective dominance unlikely

Travelport/Worldspan: Critique

- Why couldn't D-G COMP have dismissed its concerns in Phase I instead of Phase II?
 - The clearance decision was only 35 pages, not even close to the 100 pages of Thales/AAS
 - The decision again relied heavily on economic theory
 - Key facts seemed relatively few
 - Did spring vacation interfere???

Looking to ICN, What Reforms Are Needed?

- Merger reviews completed within a reasonable period of time
 - Not reasonable to trigger six-month reviews whenever appeal is threatened by a third party – otherwise this new tactic becomes very tempting to competitors!
 - Speed of clearance, not avoiding possible humiliation on appeal, is the priority
- Expedited review and clearance of notified transactions that do not raise material competitive concerns
 - Phase II clearance without conditions arguably creates presumption that the case should have been cleared in Phase I

What Further Reforms Are Needed?

- Effective, efficient, transparent and predictable review process
 - D-G COMP must inform the notifying parties of the content to be rebutted, the moment a serious complaint is filed!
 - Better guidelines and case law must enhance predictability of outcome of “oddball” complaints like vertical effects
- Balance between protecting the confidentiality of third-party submissions and procedural fairness
 - To prevent manipulation of the process, more information may have to be released to the notifying parties about the identity and motives of complainants, as well as their allegations

In Sum, It's Time for a Change:

**The EU Must Not Forget
The Merger Regulation Was Built for Speed**

● **Delay kills deals!**

“O, call back yesterday, bid time return!”

- Richard II