

# European Competition Law Update

Merger Control

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# Merger Analysis

## Key Trends & Policies

# 2009 Merger Statistics

- Reduction in number of cases notified to the European Commission and OFT has continued:
  - EC: 259 cases in 2009 vs. 347 in 2008 and 402 in 2007
  - OFT: 65 cases in 2009 vs. 81 in 2008 and 113 in 2007
- 5 EC Phase II Decisions opened in 2009:
  - 2 withdrawn, 3 cleared with conditions
  - *Oracle/Sun Microsystems* cleared unconditionally in Jan 2010 – decision awaited
- 7 CC references in 2009:
  - CAT appeals in connection with 3 of these and Court of Appeal decision in *Sky/ITV*

# Key EU and UK procedural developments

## De Minimis Exception: Market Size Thresholds

*The OFT may exceptionally decide not to refer a merger to the CC if it believes that the market(s) to which the duty to refer applies are not of sufficient importance to justify a reference*

Size of Market(s)	OFT Approach
>£10m	“Generally refer”. If “marginally exceeds” may consider exception, but would only apply if case “extremely marginal”
£6m - £10m	OFT will consider applying the exception. Note <i>Stagecoach/Eastbourne</i> : OFT “unlikely” to apply exception to £6m market unless other factors strongly suggest it should
£3m - £6m	OFT will consider applying the exception
< £3m	OFT will generally apply the exception, but particular facts may result in a reference

# *De Minimis* Exception: Other Factors

1. Are “clear-cut” undertakings in lieu available?
2. Is the consumer harm resulting from the merger likely to exceed materially the costs of a reference? Consider:
  - Market size
  - Magnitude of competition lost
  - Strength of the OFT’s concerns
  - Duration of the merger’s impact
3. What is the deterrent effect that would be lost through application of the *de minimis* discretion?

Note: Very difficult to assess *de minimis* on a “quick look”. OFT will still assess whether there is a SLC before considering the application of the *de minimis* discretion, which can result in significant cost and regulatory burden for the parties

# Developments in Competition Commission procedure

- Standard of proof before the CC:
  - *Sky/ITV*: Court of Appeal agreed not necessary for the CC to apply the balance of probabilities standard at each step of its analytical process
- Procedural fairness before the CC:
  - *Sports Direct/JJB*: Sports Direct appealed CC decision to redact certain information from working documents. CC agreed to reconsider its decision on the redactions.
  - *Ticketmaster/Live Nation*: CTS Eventim deprived of a fair hearing on its views as to the reversal of the CC's provisional findings? CC agreed case is arguable and asked CAT to remit the decision to the CC
  - *BAA*: Decision on apparent bias has implications for all cases before the CC
  - *Stagecoach/Preston*: also been appealed on substantive and procedural grounds

# Report on the functioning of Reg. 139/2004

- “Stock-taking exercise”
- Assessment of jurisdictional thresholds and referral mechanisms
- No measures proposed, but: Commission may present proposals to revise the notification thresholds or referral mechanisms
- No clarifications of discretionary limits (e.g., extended pre-notification period; “stop-the-clock” practice; “flood” of information requests)



## Failure to notify: *Electrabel* decision

- €20m fine for gun-jumping
- In 2007 Electrabel consulted Commission on issue of acquisition of sole control. SO sent to Electrabel in 2008
- Commission decision in June 2009 found that Electrabel had acquired sole control of CNR in 2003. Electrabel had implemented this without Commission approval
- Decision to impose fine based on:
  - Gun-jumping regarded as a serious infringement
  - Electrabel should have known better: a large company with access to legal expertise and familiarity with EC merger legislation and procedure
  - Length of the infringement (December 2003 – August 2007)
- BUT Commission recognised the fact that Electrabel had disclosed the situation voluntarily and its cooperation with the Commission as mitigating factors
- Fine could have been significantly higher if transaction had a significant impact on competition

## *Electrabel* - Implications

- Emphasises importance of assessing whether an acquisition of a minority shareholding has to be notified
- Larger companies expected to have the necessary resources and expertise to know when to notify. Question of notification may be relevant on an ongoing basis
- Signals stricter approach by the Commission going forwards?
- NCAs also show an increasing readiness to impose considerable fines for similar breaches
- Absence of competition concerns will not protect from fines
- *Electrabel* decision is currently on appeal

# The Increasing Significance of Economic Evidence

# Best Practice for the Submission of Economic Evidence

- CC and European Commission have both published best practice guidelines on the submission of economic evidence and data
- Some common themes .....

  - Clarity and transparency on underlying assumptions and choice of methodology
  - Replication of results
  - Testing robustness

- CC emphasises that economic evidence should be comprehensible to non-economists
- European Commission encourages parties to consult DG Competition regarding the types of empirical analyses that they consider useful. Pre-merger discussions should also routinely deal with data issues

# The Significance of Economic Evidence: the CC's Perspective

- Allows for a more systematic assessment of data
- Enables more robust inferences to be drawn from data
- Useful when conclusions rest on balancing different factors
- BUT, there are some potential downsides .....
- Decision makers may not put the right weight on complex economic evidence
- Focus on data-rich sectors
- Required standard of proof may be harder to meet

## Some examples .....

- *Kraft/Cadbury*: Parties' simulation of the effects of the merger in the UK + Ireland suggested that significant price increases unlikely despite high combined market shares
  - Commission carried out a series of tests of the model and replicated the simulation. The conclusion on price increases held
- Price elasticity, gross margins and diversion ratios have been used to predict illustrative post-merger price increases and the closeness of competition in the retail sector: *Sports Direct/JJB*, *Holland & Barrett/Julian Graves*
- Variety of quantitative analytical techniques adopted in a number of other CC/European Commission decisions

## Going forwards .....

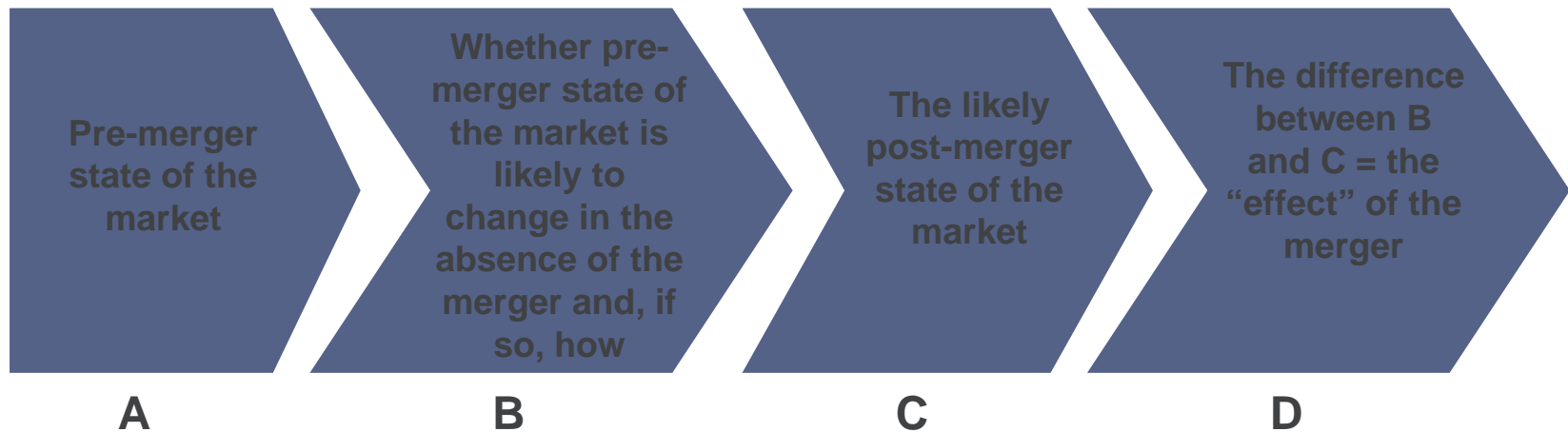
- Use of a variety of empirical and quantitative assessments by both the parties and the authorities likely to continue to increase
- Availability of data is key
- Emphasis on clarity and transparency of economic evidence
- European Commission Best Practice Guidelines expected to be adopted. Likely to encourage increased dialogue on submission of economic evidence and data at an early stage of the case

# Use of the Counterfactual in Merger Control Analysis



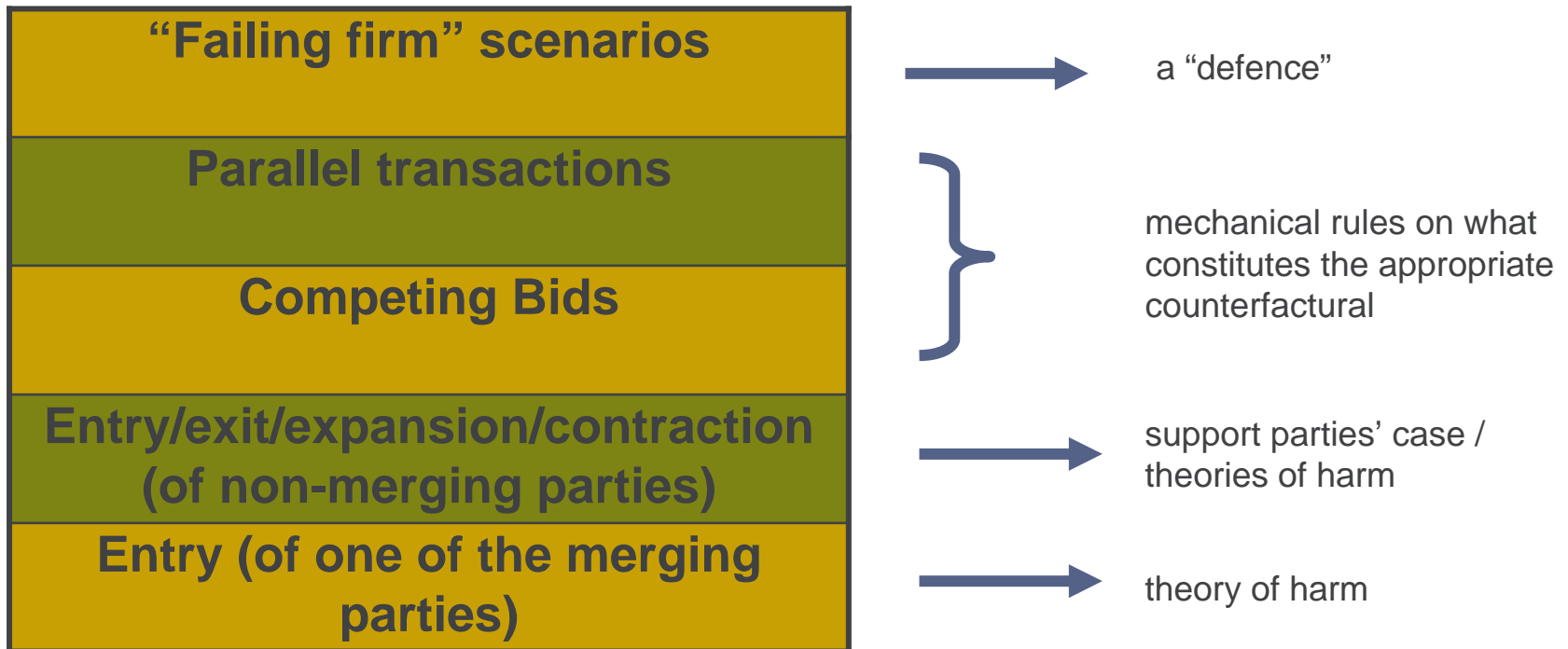
# The Counterfactual: A Straightforward Concept

Part of the substantive analysis



N.B: B is often a non-issue, so D is often derived from the difference between A and C (the default position)

# The Many Guises of the Counterfactual and its Practical Implications



⇒ Are counterfactuals (in innovative markets; better, as opposed to new, competitors) being considered without strict acknowledgement?

# Some Thoughts on the Standard of Proof/Evidentiary Thresholds

## The Statutory Tests

OFT: it “is or may be the case that.....it may be expected that the merger will result in a substantial lessening of competition” (the realistic prospect test)

CC: it results, or may be expected to result, in a substantial lessening of competition

EC: it “would significantly impede effective competition in the common market or a substantial part of it”

## Failing Firm Claims

- “Sufficient compelling evidence” (for the OFT)
- Joint OFT/CC guidelines:
  - Inevitability of exit
  - No substantially less anti-competitive alternative buyer
  - Failure is not substantially less anti-competitive
- EC, similar criteria – not applied since 2001
- OFT/CC rejected in number of recent cases

## Entry (of one of the merging parties)

- “The OFT will consider (...) the most competitive realistic counterfactual position.” (para.4.21, Joint OFT/CC guidelines)
- On entry, “the asymmetry of the reference test requires the OFT to move beyond its initial presumption (...) more normally treated as theories of harm” (para.4.24, Joint OFT/CC guidelines)
- Cf OFT decision in Air France/VLM

# More Thoughts on the Standard of Proof/Evidentiary Thresholds

## – Competing and Parallel Bids

### – Joint OFT/CC guidelines:

- OFT examines each competing bid separately
  - If only one transaction referred, CC counterfactual likely to be pre-merger competitive conditions
  - If 2 or more transactions referred, CC counterfactual unlikely to involve any of the referred mergers
  - Parallel bids: OFT likely to consider whether statutory test met regardless of whether or not the parallel transaction proceeds. For the CC, the relevant counterfactual will depend on whether it expects that parallel transaction to proceed
- See *Capita/IBS* and *Northgate/Anite*

## – Entry (of a third party)

- Merger eliminates a potential entrant. Only pivotal if competition ineffective (market power)
- If entry is pivotal, must evaluate impact of entry in the counterfactual
- *Ticketmaster/Live Nation* – foreclosure of a unique 3<sup>rd</sup> party entrant

## Some Final Thoughts

- Court of Appeal in *Sky/ITV* does not set the bar too high
- The counterfactual encompasses a multiplicity of scenarios – is a uniform approach possible and/or desirable?
- Economic evidence/internal documents are likely to prove decisive
- Coping with the counterfactual in practice:
  - Early questioning of clients
  - Early review of all documents
  - Early engagement with the authorities (two-way process)