Lear Competition Conference

Panel on Merger Remedies

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Economics in merger remedies

- What may happen:
  - Remedies may be offered in “phase 0”, phase 1, phase 2
  - “Let’s park that and see…” (limits if data from third parties needed)
  - With the EC, remedies are broad-brush / clear-cut until S/O in Phase 2 (but can be significant)
  - Then more precise focus on removing SIEC
- Economics relevant to asking the right questions and, in some cases, doing quantitative assessments
  - For notifying parties (in EC, whole case and Form RM)
  - Contesting third parties
  - Those claiming to be viable purchasers

Economics in merger remedies

- If planning remedies, clearly have to consider economic effects as you evaluate what is the counterweight to the perceived issue
  - Relative repositioning of the merged entity to others
- But economics is not all
  - Scope for judgment between solutions offered (e.g. strict economic logic of remedy (efficiency) v. coverage/size (scope)
  - "L'art du possible"
  - "Business savvy" considerations (how the business really works)
- Difficult part may be the analysis of the incentives for the acquirer and its potential to use the assets effectively

Structural v. behavioural remedies

- Practical issue is that if there is a risk that the purchaser ends up with a hold separate, then he has to consider what "walk away" and valuation rights he has (e.g. if potential synergies not realised)
  - I.e. It goes to the initial drafting of the SPA or related agreements
- Structural questions very different to behavioural
  - Can you sell to a suitable purchaser promptly?
  - Will this reduce barriers to entry? (access commitments)
  - Will it work and can you monitor? (e.g. access conditions)
- In a worldwide case you may have both types of remedy
  - *Drager/Airshields* case (UK)
  - (Also clearly in mixed packages of remedies)

Structural v. behavioural remedies (2)

- All merger control authorities appear to favour structural remedies, with some favouring up-front buyers (i.e. no implementation until purchaser for divested assets/business agreed/approved)
- Few behavioural commitments in Phase 1 undertakings (less than 5%?)
- UK approach on remedies appears widely respected (risk assessment categories for different types of remedy)
- Chinese issue at the moment (hold separates/firewalls)
  - E.g *Seagate/Samsung*, *Western Digital/Viviti*, and now *Marubeni/Gavilon*

Practical issues in design/implementation

- Take time to design, plan, evaluate and implement
  - "Phase 0" can be long; day extensions in Phase 1 & 2; "time out" (stop-the-clock, re-filing)
- Bear in mind third party inputs
  - "You must be joking"
  - Strategic counters / genuine points!
- What happens if cannot complete
  - Could happen (especially in the recession)
  - Especially if requirements demanding in circumstances or markets changing
  - New decisions? Or "l'art du possible" (again)?

Practical issues in design/implementation (2)

- Different remedies imply different structures
  - Sales, access, firewalls
  - Different solutions often required worldwide because of local market conditions (e.g. South African *Unilever/Sara Lee* case; also part of the recent Chinese decisions).
- Trustee is often more of a facilitator rather than a policeman
  - Needs to maintain integrity, yet not be too legalistic
  - Willingness to find solutions
  - Issues may come up which the case team never realised might happen, yet a decision has been taken.
- Need for review provisions (*Shell/Montecatini*)

Further reading

John Ratliff and Frédéric Louis, "*International Merger Remedies*", Chapter in the Merger Control Review (Enclosed)

Excellent slide presentations on Merger Remedies in an EU/China meeting on remedies October 2012

http://www.euchinacomp.org/index.php/mergers