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The EU's merger control regime regularly produces headlines in the business news reminding deal makers how important it is to get it right with the European Commission. Not all of the stories about Brussels have a happy ending. However, based on the number of prohibition decisions (and withdrawals), the telecommunications sector continues to be among the less problematic ones with parties regularly managing to get their deals cleared. This is even true in cases involving mavericks and if the sector is defined more broadly to include networks and services other than the traditional ones allowing for point-to-point communication.

In fact, the major challenge that businesses face, especially where there is pressure to close a deal quickly, is to navigate the jurisdictional minefield that sees cases referred by the Commission to national competition authorities or vice versa, with the associated - and unwelcome - delays. Besides the delays, merger statistics show that merging parties also have reason to worry about a possibly stricter review of their deals by the national authorities under their national merger control rules compared to a review carried out by the European Commission under the EU Merger Regulation.

With the 'convergence phenomenon' finally becoming reality (and technological divisions that used to help in defining telecommunications, broadcasting and IT markets becoming less relevant), questions of market definition and competitive effects are increasingly complex to assess. In *Microsoft/Skype*, for example, the European Commission had to review the transaction's effects on consumer and enterprise communications integrating a wide range of functionalities (instant messaging, voice and video calls) across various platforms (PCs, smart phones, tablets) and operating systems.

While the *Microsoft/Skype* deal did not raise any concerns, more challenging though ultimately successful reviews have been experienced by three other major IT companies. With its *Tandberg* acquisition, *Cisco* [1] - like *Intel* with its acquisition of *McAfee* [2] - forced the Commission to think outside its remedies toolbox arguably marking the return of behavioural remedies as an acceptable solution. And *Oracle* pushed its *Sun Microsystems* acquisition through with an even more creative (remedies?) solution - after having provoked a public clash between the US Department of Justice and the European Commission over the latter's review of the deal [3].

In the traditional telecommunications sector, the European Commission's and national competition authorities' more recent analysis of telecoms mergers has not been limited to the well-known access considerations but has shown a marked interest towards ensuring the survival of mavericks in fairly consolidated and thus concentrated post-liberalization markets. At EU-level, in *T-Mobile Austria/tele.ring* [4], for example, the Commission found that the deal resulted in the elimination of a firm which, pre-merger, had exerted considerable competitive pressure on the pricing behavior of *T-Mobile Austria* and its main competitor *Mobilkom*.

The 'maverick' theory is also applied by the Commission in cases where neither of the merging parties was a maverick, but the merger threatened the survival of a third party which could be considered as such. In *T-Mobile/Orange*, for example, the Commission concluded that the joint venture between the UK subsidiaries of *Deutsche Telekom* and *France Telecom* endangered the survival of *3UK*, the smallest mobile network operator in the UK but a 'leader in pricing and service innovations' and hence, in the Commission's view, 'an important driving force for competition' in the UK market [5].

At national level, in *Belgacom/Scarlet* for example, the Belgian competition authority found that *Belgacom*'s acquisition of DSL-provider *Scarlet* would deprive the Belgian market of an innovative competitor with a small market share but a developed optical glass fibre network [6]. By contrast, in *Iliad/Liberty Surf*, the French authorities investigated a merger between two telephony and internet providers but found that, rather than eliminating a maverick, the merger was likely to strengthen a fierce competitor, noting that the acquirer *Iliad* appeared to be a key driver of competition in the market. Accordingly, the merger was cleared without conditions [7].

In maverick cases, remedies have to be designed to create (where the merger results in the elimination of one of the parties as maverick) or to strengthen (where the survival of a third party maverick is at stake) a player which would likely be able to play a maverick role. However, *T-Mobile Austria/tele.ring* illustrates both the difficulties that authorities have in substantiating theories of harm on grounds of the elimination of a maverick and the far-reaching scope of any remedy that the parties will have to accept in order to fill the competitive gap that results from the elimination of the maverick. In these cases, the identity of a suitable purchaser is critical.

With regard to remedies in general, while in the past merger cases provided the Commission with the opportunity to 'fix' certain shortcomings of sector-specific regulation through the imposition of 'regulatory' remedies (*e.g.*, open access obligations) as a condition for clearance, the Commission has made less use of this approach in the current, advanced stage of the post-liberalization era. Instead, as demonstrated by *T-Mobile/Orange* and *T-Mobile Austria/tele.ring* (and also *Cisco/Tandberg*), the general effects-based analysis is carried out which, on a case-by-case basis, selects the appropriate remedy depending on the theory of competitive harm identified by the Commission.

Finally, parties to a telecoms merger must pay particular attention to strategic questions concerning referrals and the significant consequences of a referral request on the timeline of the deal and its substantive review. After all, telecommunications and related markets tend to have strong national, and at times even regional, characteristics in terms of network coverage, linguistic focus for content and marketing, and price. Accordingly, relevant geographic markets in this sector are usually defined as being national in scope, potentially opening up the application of the EU Merger Regulation's referral regime.

The EU's referral regime provides that a referral may be triggered after a notification and, since the new Merger Regulation took effect in 2004, also before a filing has been made: (i) Articles 4(4) and 4(5) of the EU Merger Regulation provide for the possibility of pre-notification referrals at the initiative of the notifying parties; while (ii) Articles 9 and 22 provide for the (often problematic) possibility of post-notification referrals triggered by the Member States. The 2004 amendments to the EU Merger Regulation introduced further deadlines in order to reduce the time delays caused by the post-notification referral system.

However, in practice, as illustrated by numerous merger reviews since 2004, time delays caused by post-notification referrals are still significant and vary greatly thereby making the process less predictable than it should be. For example, in 2011, the Commission decided to refer the review of the acquisition of German regional cable operator *KBW* by *Liberty Global Inc.*, to the German competition authority. The Article 9 referral request added significant time to the clearance timetable, resulting in a total duration of approximately eight months from the time of notification to the Commission until clearance (subject to remedies) by the *Bundeskartellamt*.

This delay may have been primarily due to the substantive concerns raised by the merger and extensive remedies discussions in the late stages. However, the Commission's initial review period was extended by ten days in order to consider Germany's referral request, and nearly a month elapsed between the Commission's decision granting the referral and the notification being accepted in Germany, hence commencing the national review. It would appear that the German competition authority was not particularly happy either about the fact that the merging parties had originally filed in Brussels ignoring the well-known national sensitivities of their deal.

While *Liberty*'s cable saga was ultimately successful, another deal collapsed following a referral by the Commission to the German competition authority with the latter's review resulting in a prohibition decision. In 2010, a planned joint venture between German broadcasters *ProSiebenSat.1* and *RTL* was first notified to the Commission. However, following an Article 9 referral request, the Commission referred the review to the German and the Austrian competition authorities and the German competition authority prohibited the joint platform as it would further strengthen the dominant duopoly between the two groups on the market for TV advertising.

Another potential pitfall for merging parties is the possibility for a Member State to request, pursuant to Article 22(1) of the EUMR, that the Commission review a transaction which does not have a Community dimension but which affects trade between Member States and threatens to significantly affect competition in the Member State making the request. For example, in *Apax Partners/Telenor Satellite*, the UK's Office of Fair Trading asked the Commission to review the deal, noting that at least one relevant geographic market was likely to be EEA-wide and submitting *prima facie* evidence that the deal would threaten competition within the UK. The transaction was eventually cleared by the Commission [8].

Therefore, merging parties are well advised to address jurisdictional questions with the European Commission and the national competition authorities concerned at an early (ideally pre-notification) stage - in particular in cases with well-known national sensitivities resulting in a rather high referral risk. Ignoring national sensitivities and filing a deal directly with the Commission without any consultation on jurisdictional questions is unlikely to be met with much sympathy by the disgruntled national authority which, in most cases, will have the last word on the deal's destiny.

NOTES

[1] European Commission 29 March 2010, Case COMP/M.5669, Cisco/Tandberg. See Frederic Depoortere, *The European Commission approves a merger between competitors in software applications for businesses (Oracle Corp/PeopleSoft)*, 29 March 2010, e-Competitions n° 35749 and John Gatti, *The European Commission clears, subject to divestment, the acquisition of a vendor of videoconferencing products with dual headquarters in Norway and in the US by US company (Cisco/Tandberg)*, 29 March 2010, e-Competitions n° 37503.

[2] European Commission, 26 January 2011, Case M.5984, Intel/McAfee. See Jean-Mathieu Cot, Alice Blanchet, *Conglomerate effects - Commitments : The European Commission clears an acquisition in the ICT sector subject to commitments (Intel/McAfee)*, Concurrences N° 2-2011 and Dominique Berlin, *Conglomeral effects - Behavioural commitments : The European Commission clears, subject to important behavioural commitments, a concentration between, the worldwide leader on the market of central processing units of computers as well as on the market of chipsets, and a very important actor on the market of security system for computers (Intel/McAfee)*, Concurrences N° 3-2011.

[3] European Commission, 21 January, 2011, Case M.5529, Oracle/Sun Microsystems. See John Gatti, *The European Commission approves the acquisition of US hardware and software vendor by a US software company (Oracle/Sun Microsystems)*, 20 January 2010, e-Competitions n° 37504; Andrea Lofaro, *The European Commission clears in Phase II a merger in computer programming activities sector conducting the economic analysis based on a dynamic theory of harm (Oracle, Sun Microsystems)*, 21 January 2010, e-Competitions n° 35692; Carl-Christian Buhr, Sabine Crome, Adrian Lubbert, Vera Pozzato, Yvonne Simon, Robert Thomas, *The European Commission unconditionally clears merger between two US software undertakings (Oracle, Sun Microsystems)*, 21 January 2010, e-Competitions n° 34855; David Hull, *Merger clearance - Remedies: The EU Commission unconditionally clears a merger on the database market after self-enforcing public pledges alleviating competition concerns (Oracle/Sun Microsystems)*, Concurrences N° 3-2010 and Vera Pozzato, Carl-Christian Buhr, Sabine Crome, Adrian Lubbert, Yvonne Simon, Robert Thomas, *The European Commission unconditionally clears merger between two US software undertakings (Oracle, Sun Microsystems)*, 21 January 2010, e-Competitions, n° 34855.

[4] European Commission, 26 April 2006, Case COMP/M.3916, T-Mobile Austria /tele.ring. See John Gatti, Mary Loughran, *The European Commission clears, subject to conditions, an acquisition in the mobile telephony market (T-Mobile Austria/Tele.ring)*, 26 April 2006, e-Competitions, n° 38274; Johannes Luebking, *The European Commission authorizes subject to remedies a merger between two Austrian mobile networks providers applying the new test introduced by the EC Merger Regulation to an undertaking which would not become the market leader after the transaction (T-Mobile Austria/tele.ring)*, 26 April 2006, e-Competitions, n° 36750 and Stanislas Martin, *«Gap Case«: The EC clears under conditions the first «gap case« since the entry into force of the Merger Regulation 139/2004 and the SIEC test (T-Mobile Austria / tele.ring)*, Concurrences N° 1-2007.

[5] European Commission, 1 March 2010, Case COMP/M.5650, Orange/T-Mobile. See Didier Theophile, Henrik Nordling, *Modification of network sharing agreement : The European Commission clears a merger between two mobile operators in the UK subject to commitments relating to the divestment of spectrum and reinforced guarantees regarding a network sharing agreement concluded with the sectoral «maverick« (T-Mobile ; Orange)*, Concurrences N° 3-2010; Jocelyn Guitton, Boryana Hristova, Vera Pozzato, *The European Commission conditionally approves joint-venture between two UK mobile network operators (T-Mobile, Orange)*, 1 March 2010, e-Competitions, n° 34854; Frederic Depoortere, *The European Commission clears in phase I a merger in mobile industry accepting complex remedies proposed by merging parties (T-Mobile, Orange)*, 1 March 2010, e-Competitions n° 35777 and John Gatti, *The European Commission clears, subject to remedies, a merger between French and German telecommunications companies in the UK (Orange/T-Mobile)*, 1 March 2010, e-Competitions, n° 37502.

[6] See Robin Kerremans, *The Belgian Competition Council approves upon remedies the take-over of alternative DSL-provider by the incumbent (Scarlet/Belgacom)*, 7 November 2008, e-Competitions, n° 23527.

[7] See Tania Van den Brande, *The French Minister of economics clears telecom merger without remedies after investigating possible coordinated effects and elimination of a maverick (Iliad/Liberty Surf)*, 22 August 2008, e-Competitions n° 23603.

[8] European Commission, 20 August 2007, Case COMP/M.4709, Apax Partners /Telenor Satellite. See John Gatti, Mary Loughran, *The European Commission refers the examination of a proposed acquisition in the satellite communications services to the UK OFT (Apax Partners/Telenor Satellite)*, 20 August 2007, e-Competitions, n° 37771.

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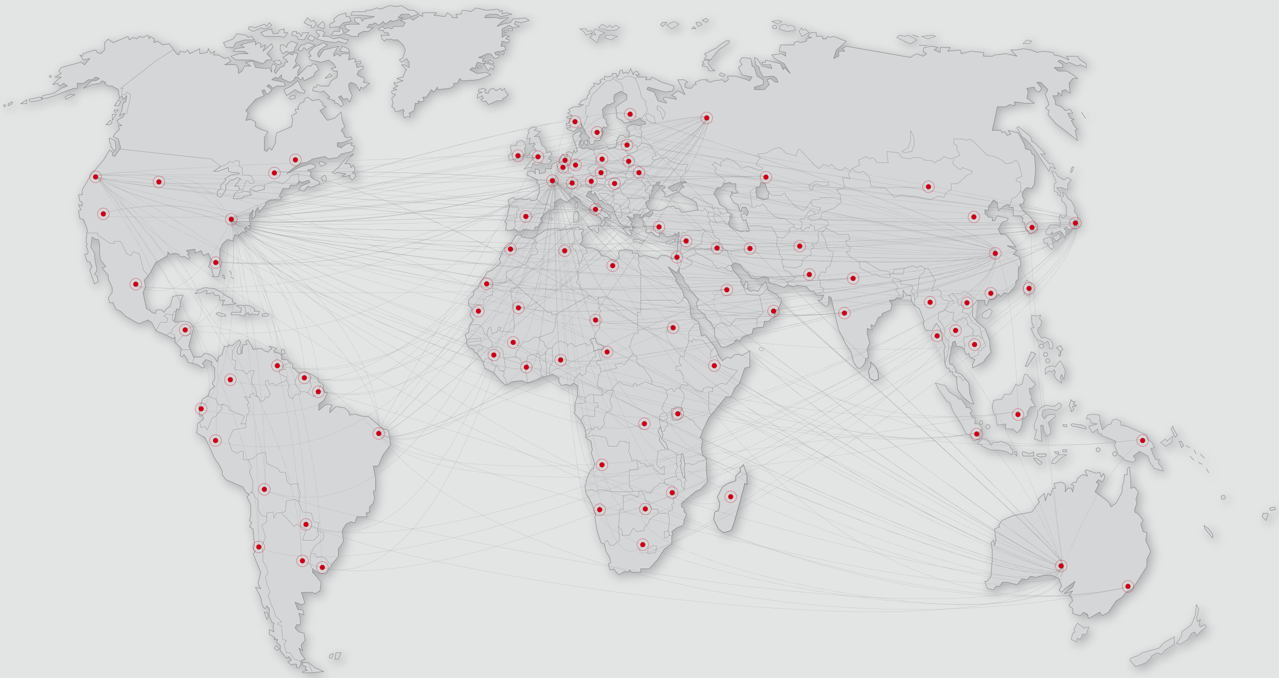

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