Mergers in the telecommunications sector: An overview of EU and national case law

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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 - like Intel with its acquisition of McAfee - 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.

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, 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.
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 of the EUMR, that the Commission review a transaction which does not have a Community dimension but threatens to significantly affect competition in the Member State making the request. For example, in Apax Partners/Telencor 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.

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 consulta-
tion 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

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