ICN Merger Working Group

Teleseminar on Merger Remedies
10 February 2010
Welcome by Irish Competition Authority
Teleseminar agenda

I Introduction by MWG Co-Chair

II Panel discussion
   • The remedies universe and choice of remedies (OFT / CC)
   • Structural remedies (OFT / CC)
     – Presentation on a structural remedy case (FTC)
   • Behavioral remedies (OFT / CC)
     – Presentation on a behavioral remedy case (JCRA)

III Panelist reactions to case studies and advice on practical application

IV Q&A with audience
Introduction of Panelists

• Adam Land – Director of Remedies & Business Analysis
  UK Competition Commission

• Eve Cinnirella – Principal Case Officer, Mergers
  UK Office of Fair Trading

• Rob van der Laan – Senior Competition Investigator
  Jersey Competition and Regulatory Authority

• Dan Ducore – Assistant Director, Bureau of Competition
  US Federal Trade Commission
Introduction by MWG Co-Chair
Choice of remedies
Choice of remedies (1)
The Remedies Universe

‘Remedies universe’

Structural remedies

Divestiture and prohibition

Behavioral remedies

Intellectual property remedies

Enabling measures

Controlling outcomes

Very occasionally the preferred remedy may be a recommendation to Government or some other body
Choice of remedies (2)
Basics of UK approach

• Consider **effectiveness** of remedy options *then* proportionality

• **Risk based** approach
  
  – No remedy is completely “risk free”
  – **Identify** risks associated with each remedy option
  – **Evaluate** the extent to which risks can be addressed
  – **Manage** the risks of your preferred option, through careful remedy design and implementation
Choice of remedies (3)
UK view on structural vs. behavioral

• **Structural remedies** generally have advantages
  – Structural solution to a structural problem
  – Directly restore competition lost through the merger, including dynamic benefits of rivalry
  – Relatively clean cut solution - do not require ongoing monitoring, enforcement and/or cooperation between the parties

• But sometimes **behavioral remedies** may be preferred
  – If structural remedies are unavailable (e.g. jurisdictional issues)
  – If competitive harm is expected to be short-lived (e.g. rail franchises)
  – If merger generates large customer benefits that would be lost through divestiture (NB vertical mergers)
Structural remedies
Structural remedies - principles

• **Aim:**
  - restore the competition lost as a result of the merger by *either* creating a new source of competition *or* strengthening an existing source of competition *through* disposal of a business or assets

• **Critical success factors:**
  - Appropriate divestiture package
  - Suitable purchaser
  - Effective divestiture process
Structural remedies - risks

• **Composition risks**
  – Is the divestiture package sufficient to enable the purchaser to be a viable competitor?

• **Purchaser risks**
  – Criteria for suitable purchaser. Merger parties may prefer to sell to weak or inappropriate purchaser.

• **Asset risks**
  – Will the competitive capacity of the divestiture package deteriorate before it is sold?

• These risks can normally be overcome by careful remedy design (e.g. up-front buyer, interim measures, divesting businesses rather than assets)
Structural remedies at first stage

• On average OFT accepts 5 to 6 merger remedies a year
• OFT starting point is to restore competition to pre-merger levels
• Remedy must be ‘clear-cut’, effective and proportionate
• Remedy must not be too narrow
• Structural vs. behavioral (31 vs. 3) - policy preference for competitive market structures over regulated markets
• Procedural safeguards used by OFT:
  – Up-front buyer (to ensure there is a willing buyer with the necessary expertise, incentives and finances to run the business)
  – No structural link between parties
  – No risk of new competition concerns
Implementation issues

- Process and timescales
- Managing risks during divestiture process
- Use of monitoring and divestiture trustees
- Purchaser approval
- Final approval of divestiture and Sale & Purchase Agreement (SPA)
FTC structural remedy case study

• Lafarge Acquisition of Blue Circle (2000)
• In North America, #3 Acquiring #5
• Cement plants and terminals serving
  • Great Lakes Region
  • Syracuse, NY
Great Lakes

- Lafarge
- Southdown
- Blue Circle
- Essroc
- St. Lawrence
- Federal White
Northeast

- Lafarge
- Blue Circle
- Essroc
**Great Lakes Remedy** - Blue Circle Business
- Complete:
  - 2 cement plants; one grinding facility
  - all terminals in the Great Lakes
  - all barges, tugs, and trucks
  - all quarries used to produce cement at the plants

**Not Up-Front**
- Hold Separate; Trustee if Needed

**Syracuse Remedy** – Terminal

Syracuse, NY Terminal to Glens Falls Lehigh
- Up-front Buyer
- Therefore, no Hold Separate needed
Behavioral remedies
Behavioral remedies - principles

• **Aim:**
  – Restore the loss of competition through enabling measures (e.g. lower barriers to entry);
  or, as a last resort
  – Mitigate the harm to consumers by controlling outcomes (e.g. price caps)

• **Circumstances of use:**
  – To support structural measures (e.g. LSE mergers) or
  – As main remedy (<20% of UK cases e.g. Macquarie / NGW)
Behavioral remedies - risks

- **Specification risks**
  - Can we define the required behaviour?
- **Circumvention risks**
  - Can parties go around our remedies?
- **Distortion risks**
  - Can we avoid creating market distortions?
- **Monitoring and enforcement risks**

- Addressing these risks may not always be feasible and can add to cost and complexity of behavioral remedies
Behavioral remedies – implementation and monitoring

Implementation

• Negotiating undertakings with merger parties
• Issues regarding benchmarking on price (eg dealing with inflation)
• Other QRS issues

Monitoring

• Monitoring compliance is resource intensive
• 3rd party monitors can reduce burden on OFT
• Changes in circumstances
JCRA behavioural remedy case studies

• Short introduction of Jersey
  GNI = £3.7b, 90k inhabitants, 118 km²

• Short introduction of JCRA
  Competition (Jersey) Law 1 November 2005
  40 Merger Decisions, of which
  3 approval with conditions, of which
  2 behavioural remedies and 1 structural remedy
JCRA behavioral remedy case study I

• Spar chain of 11 convenience stores proposed to acquire other chain of 12 convenience stores

• Substantial lessening of competition in one particular area within Jersey

• Consideration of structural remedy: not considered viable

• Consideration of behavioral remedy: imposed uniform pricing in Jersey
JCRA behavioral remedy case study II

• Acquisition by leading agricultural customer JRPM of John Deer tractor dealer.
• Input foreclosure: access to spare parts by competitors of JRPM that have John Deer tractors
• Consideration of structural remedy: not viable
• Consideration of behavioral remedy: imposed service level agreement that would make discrimination breach of contract.
Panellists reactions to case studies
Advice on practical application

• Issues that can come up where there is an international dimension

• Encourage early discussion with parties

• Parties’ incentives not always aligned with those of the agency

• Use of monitoring / divestiture / hold separate trustees
Q&A with audience

Questions from the audience to panelists
For more information on this and other topics:

www.internationalcompetitionnetwork.org