

Practical Aspects of International Cooperation in Merger Cases:

Assessment & Remedies

ICN MWG Teleseminar, January 16, 2014

Agenda

1. Introduction (Moderator - Ted Henneberry)
2. Case Presentation #1-UGC/Goodrich
 - a) U.S. Department of Justice (Kevin Quin, Patty Brink)
 - b) Comment/Intervention:
 - i. European Commission (Antonio Seabra Ferreira)
 - ii. Canada (Melissa Fisher)
 - iii. NGA (Gotz Draus, Jose Alexandre Neto)

Agenda

3. Case Presentation #2- Nestle/Pfizer

a) Mexico (Oscar Martinez Quintero)

b) Chile (Fernando Columa Rios)

c) Pakistan (Dr. Joseph Wilson, Rafia Kiani)

d) Comment/Intervention

NGA (Gotz Draus, Rachel Brandenburger, Jose Alexandre Neto),
ACCC (Suzie Copley)

4. Questions/Comments (Moderator)

ICN MWG Teleseminar: Cooperation on Remedies in *UTC-Goodrich*



Patty Brink, Director of Civil Enforcement
Kevin Quin, Trial Attorney
January 16, 2014

Comments and opinions represent those of the presenter and do not necessarily reflect the views of the U.S. Department of Justice.

Background

- United Technologies Corporation (Hartford, Connecticut, USA)
 - Aircraft turbine engines
 - Generators
 - Engine control systems
- Goodrich Corporation (Charlotte, NC, USA)
 - Generators
 - Engine control systems
- Date of agreement: September 21, 2011
- \$18.9 billion acquisition, largest merger in aerospace industry

Affected Products

- Large Main Engine Generators
- Aircraft Turbine Engines
- Engine Control Systems



Investigative Process

- Effort to coordinate timing
- Joint discussions with parties
- Draft filings provided to both agencies
- Video- and tele-conferencing of party meetings in late stages
- Joint calls with third parties
- Waivers from parties and third parties allowing exchange of documents

Decision Process

- Regularly scheduled calls between agencies
- Discussion of likely remedies
- Exchange of draft commitments and decree

Remedies

Divestitures:

- Goodrich engine controls business
 - West Hartford, Connecticut, USA
 - Montreal, Canada
- Goodrich electrical power business
 - Pitstone, Buckinghamshire, UK
 - Twinsburg, Ohio, USA
- Goodrich share of Aerolec joint venture (generators)
 - Manufacturing located in Europe
- Goodrich's share of AEC joint venture (engine controls)

Remedies (cont'd)

Non-divestiture remedies:

- US: Extension of Rolls-Royce option to purchase aftermarket service business
- EC: Offer Rolls-Royce option to acquire Goodrich's engine nozzle R&D project

Divestiture Process

- Joint approval of proposed hold separate managers
- Joint approval of proposed monitoring trustee
- Discussion of proposed divestiture buyers, including review of documents
- Regular discussion of issues related to hold-separate period and divestitures

Recommendations

- Investigative Stage
 - Coordinate timing when feasible
 - Makes joint consideration of issues possible
 - Avoids leveraging of early decision from one agency
 - Avoids conflicting remedies
 - Exchange filings as soon as possible
 - Conduct joint interviews with parties and third parties
 - Both agencies hear the same evidence
 - Reduces burden on third parties
 - Request confidentiality waivers from parties and third parties early in process
 - Facilitates exchange of information between agencies
 - Arrange for regular discussion of issues between agencies when possible

Recommendations (cont'd)

- Decisional Stage
 - Hold inter-agency discussion of final competitive issues as early as possible
 - Request opportunity to be present at senior-level pre-decisional meetings with parties
 - Coordinate timing
 - Coordinate remedy agreements to the extent possible
- Remedies Stage
 - Coordinate selection of hold separate managers and trustees
 - Coordinate review of proposed divestiture buyers
 - Coordinate monitoring of decree obligations



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International Cooperation

Oscar Martinez Quintero
Federal Commission for Economic Competition
January, 2014

Merger



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Objectives



- Overview the main characteristics of the case and show the effects and results found.
- Show the kind of international cooperation policies applied.
- Explain the process and usefulness of these international cooperation “tools” used in the present case.

Transaction



- The entire Pfizer Nutrition's baby formulas business by Nestle.
- Brands: *SMA Gold, S-26, Promil Gold, Progress Gold, SMA Gold Transición, SMA AR Gold, Nursoy Gold, SMA sin lactosa Gold, SMA HA Gold and SMA Comfort Gold.*
- Including a manufacturing unit.
[unique Pfizer plant in Latin America.]

Relevant markets

- Three relevant markets:
 - Starter Infant Formula and Follow-On Milk (IFFO).
 - Growing-Up Milks (GUM).
 - Specialized formulas.
- Geographic dimension is national.
- Baby formulas have no substitutes.

Market analysis



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- Three main competitors in the markets (Nestle, Pfizer and M&J). [66%-98%].
- Another competitors are in the market only by imports.
- High entry barriers.
- Low price elasticity of demand.

Merger effects



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- Nestle would have obtained:
 - A market share of: 37% in specialized, 71% in IFOO and 88% in GUM.
 - An average price increase of 2.8% to 11.5% depending on the relevant product.
 - The most part of installed capacity in the relevant markets.
 - An enhanced market bargaining power with whole and retail sellers, boosting its brands portfolio.

Findings

- No-authorized.
- Nestle takes the second step on the legal proceedings, “Reconsideration Appeal” (RA).
- RA allows a remedies proposal evaluation before decision making.
- Which remedies would be satisfactory?
 - Background and international experience.
 - Feed-back with others jurisdictions.
- Remedies were imposed.

Imposed remedies



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- Pfizer Nutrition business full assets divestiture.
- Pfizer trademarks exclusive license to a third party, approved by FCEC [for a 10-years period].
- An additional 10-years black-out period.

International Cooperation

- The kind of international cooperation:
 - Analytic: theoretical approaches, methods of analysis and general views about the case (waivers not required).
 - Procedure: document exchange (waivers required).
- For the Mexican Jurisdiction, both were applied.

Analytical Cooperation



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- Background in international experience
- Feed-back with some jurisdictions more advanced in the analysis of the case, where the transaction was first notified.
 - Australia
 - South Africa
- Feed-back with another jurisdiction about the analysis of the case.
 - Chile
 - Colombia

Procedure Cooperation



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- Waivers
- Market information
- Alignment of remedies

Conclusions



- Both kind of international cooperation were crucial in the case analysis and did help to:
 - Achieving an appropriate theoretical analysis frame work.
 - Orientate the imposition of appropriate remedies.
 - Standardization of approaches to the remedies applied (single buyer in several regions).
- Cooperation was beneficial in order to achieve a better market performance.



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Nestlé-Pfizer Nutrition

FERNANDO COLOMA
ECONOMISTA
FISCALÍA NACIONAL ECONÓMICA, CHILE

SANTIAGO, 16 JANUARY 2014

Some facts about the case in Chile

- Market Concentration

	Stage 1	Stage 2	Stage 3	Specialties	Total
Nestlé Chile	61,9%	64,3%	29,3%	42,6%	57,5%
Pfizer Nut.	23,4%	22,8%	52,5%	19,1%	24,7%
Abbott	12,9%	11,2%	15,3%	13,8%	12,8%
Danone	1,8%	1,6%	2,9%	24,5%	5,1%
Nestlé Chile + Pfizer Nut.	85,3%	87,2%	81,7%	61,6%	82,2%

- Entry Barriers

- i. Medical marketing
- ii. Brand loyalty
- iii. Restrictions in advertising

- No efficiencies specific to Chile

- Other issues:

- i. No production sites in Chile
- ii. Small population does not provide R&D incentives to acquirer

International Cooperation

- Contact with agencies of Mexico, Colombia, Ireland and Australia.
- Kind of information shared:
 - i. Market features
 - ii. Competitive diagnostic of the merger
- Of Special importance communication with Mexican agency:
 - i. Production site located in Mexico
 - ii. Largest market presenting anticompetitive effects: Size of the market could provide incentive to R&D
- Results of the cooperation:
 - i. Similar analysis of the case among competitions agencies brought more confidence to our case team.
 - ii. Long term remedies depended mainly on Mexican decision.
 - iii. Our main focus turned to maintaining Pfizer's business as usual in the short term.

Remedies Design

As result of common concerns among many Latin American agencies, Nestlé offered a settlement to divest the Latin American business of Pfizer as a package. The settlement was subject to long negotiations in Chile that aimed to address concerns about:

1. The ability of the acquirer to preserve the competitiveness of the business in the long run.
2. Maintaining a well functioning business in the short term.
3. Transferring to the acquirer all innovation project with high probability of materialization.
4. Divestment of production site and agreement for the supply of special products in the short term.

Creating a Competition Culture



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Practical Aspects of International Cooperation in Merger Cases: Substantive Assessment & Remedies

Acquisition of Pfizer Nutrition Business by Nestlé S.A.

Dr. Joseph Wilson, Chairman CCP & Ms. Rafia
Shahid Kiani, M & A

Brief: Merger Control Provisions in Pakistan



- ▶ Threshold test in Regulation 4 of the Competition (Merger Control) Regulations, 2007:
 - Gross assets of undertaking is above PKR 300 million (USD 3 million)/or combined gross assets of undertakings is above PKR 1 billion (USD 10 million); or
 - Annual turnover of undertaking is above PKR 500 million (USD 5 million)/or combined turnover of undertakings is above PKR 1 billion (USD 10 million); &
 - Value of transaction is PKR 100 million (USD 1 million) or more; or
 - Acquisition of 10% voting shares or more
- ▶ The Substantive Test in Section 11(1) of the Competition Act, 2010 states: “no undertaking shall enter into a merger if it substantially lessens competition by creating or strengthening a dominant position in the relevant market”

The Transaction



► Merger Parties

- Acquirer: Nestlé S.A., a Swiss company, is active worldwide in the production, marketing & sale of a large variety of food and beverage products. Nestlé is present in Pakistan through Nestlé Pakistan Ltd
- Target: Pfizer Nutrition; Infant Nutrition Business of Pfizer Inc. An American Multinational Pharmaceutical corporation. Pfizer is present through its indirect subsidiary, Wyeth Pakistan

► Transaction: Acquisition of the entire Pfizer Nutrition (Infant Nutrition Business of Pfizer Inc.), by Nestle S.A. for a consideration of USD 11.85 billion (equivalent to PKR 1,117.929 billion in 2012)

Phase I Review of the Transaction



- ▶ Phase I began: 06 June, 2012
- ▶ Relevant Product Markets:
 - Infant and Follow-On Milk (IFFO Milk) – babies aged 0-12 months &
 - Growing-Up Milk (GUM) – babies aged 12 months and older
- ▶ Relevant Geographic Market: Nation-wide
- ▶ Brands of infant nutrition products of Nestlé in Pakistan: IFFO Milk: NAN, Lactogen, AL110, Lactogen Recover, Pre-NAN. GUM: Lactogen 3 & NNS.
- ▶ Brands of infant nutrition products of Pfizer Inc. (Wyeth Pakistan) in Pakistan: IFFO Milk: SMA 1 & 2, Promil Gold & S-26 LF. GUM: Progress Gold & SMA



Market Analysis & Competition Assessment

- ▶ Market Shares:
 - IFFO Milk: Nestlé S.A. > 40%, Pfizer Inc. < 5%
 - GUM: Nestlé S.A. > 40%, Pfizer Inc. < 5%
- ▶ Competitors in the Relevant market: Imported products
 - IFFO Milk: Morinaga, Meiji, Fabimilk, Mead Johnson, Biomil, Celia, Cow & Gate, Nutrilon, Abbott & Nuzzer
 - GUM: Meiji, Mead Johnson, Biomil, Fabimilk, Cow & Gate & Abbott
- ▶ Pfizer Inc. (Wyeth Pakistan) : a very small market player



Competition Concerns

- ▶ Nestlé S.A. was a dominant market player holding more than 40% market share in IFFO milk & GUM
- ▶ Nestlé S.A. would further strengthen its dominant position
- ▶ Difficult for new entrants to compete with Nestlé S.A.
- ▶ Elimination of a potential competitor – lesser choice for consumers
- ▶ Low price elasticity of demand for IFFO milk & GUM products of Nestlé S.A.



Phase II Review & International Cooperation

- ▶ Phase II initiated: 05 July, 2012
- ▶ Type of Cooperation between Australian Competition & Consumer Commission (ACCC) & CCP: Informal & analytical through telephone calls & teleconferences
- ▶ Major competition concerns discussed:
 1. HHI index showed IFFO milk and GUM to be concentrated markets in Pakistan. Nestlé was strengthening its dominant position in the relevant market; &
 2. The elimination of a potential competitor in the relevant market that might have lead to a reduced choice for consumers



The Legal Provisions for International Cooperation

- ▶ No restriction on the exchange of information between competition agencies in the Competition Act, 2010
- ▶ Confidentiality: Due to the confidentiality of the market data provided by Nestlé & Pfizer Inc, the market share data was not shared with the ACCC



International Cooperation & Findings

- ▶ Problem identified: revelation of asymmetric information submitted to two different competition agencies:
 - CCP: Nestlé was willing to pay USD 11.85 billion to keep the brand & brand following of Pfizer Inc. (Wyeth Pakistan) in Pakistan
 - ACCC: Nestlé was willing to divest the Pfizer Nutrition business through an exclusive license to an approved purchaser by the ACCC



Remedies

- ▶ Commitment provided by Nestlé: “Pfizer (Wyeth) products will continue to be available for a period of three years from the date of the closing of the transaction in Pakistan”
- ▶ Approved by CCP: 9 October, 2012 based on the above condition



Information Exchanged & Discussed

- ▶ Relevant product market definition – if separate markets should be defined for IFFO milk & GUMs or should there be a broader market for both markets
- ▶ Brand loyalty – including recommendations of physicians/nurses
- ▶ Reduction in the level of choice – the effect of the merger on the level of choice
- ▶ Theory of harm
- ▶ Asymmetric information submitted by merger parties to CCP and ACCC



The Benefits of the International Cooperation

- ▶ Highlighted: competition concerns & remedies
- ▶ The importance & relevance of the reduction in the level of choice
- ▶ Broader view of the infant nutrition industry globally of Nestlé & Pfizer through the information exchanged with the ACCC
- ▶ Future steps of Nestlé regarding the transitional process of the Pfizer nutrition products to Nestlé, which was conveyed to ACCC by Nestlé
- ▶ Remedies discussed in order to address the asymmetric information provided by the merger parties



Competition Commission of Pakistan
Creating a Level Playing Field

Thank you

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