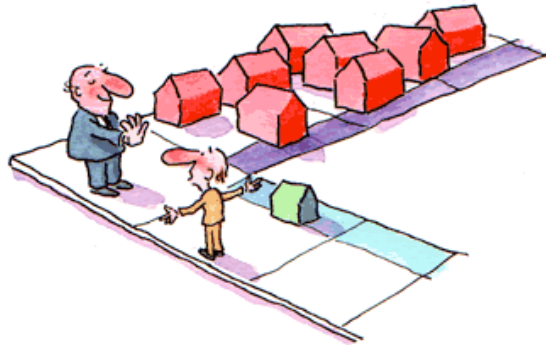


Merger policy

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Structure

- Basis
 - Why merge?
 - Merger regulation
 - Procedure and Oracle / Sun example
- Analyzing mergers
 - Legal requirements
 - Economic harm

Basis

Why merge?

- Efficiencies
 - Economies of scale and scope
 - Management efficiency
- Increase in market power
- Start-up exits
- Non-economic reasons...

Why control?

- Some policy reasons:
 - Efficiency losses because of short term decisions
 - Concentration of wealth
 - Unemployment and regional policy (e.g. private equity firms that wreck companies)
 - Overseas control (e.g. must be two-way)
 - Special sectors (e.g. media)

Merger regulation

- First merger regulation adopted as recently as 1989, before that article 82 enforcement
- Current: COUNCIL REGULATION (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings
 - “A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.”
Art 2(3)

Procedure

- Companies negotiate the deal, announce and notify the merger to authorities, but put it on hold until the authorities have cleared it
- Today hundreds of jurisdictions have merger policy, thus global mergers have to face increasing legal costs
 - Some examples of major mergers: AOL/TimeWarner, Exxon/Mobil, Ford/Volvo, Renault/Nissan etc.
 - Inside Europe a “one-stop shop” policy

When to notify?

Either following

- conclusion of the agreement
- announcement of a public bid
- acquisition of control

Or

after manifestation of good faith intent to do so

Notification

- Mandatory for all concentrations with a Community dimension¹
- Such concentrations shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a Commission decision, or on the basis of a presumption (certain exemptions for public bids).

Phase I deadline commences

- On the date when the complete notification is received by the Commission

Phase I: Initial Examination

- Detailed appraisal via: request for information, interviews, inspections carried out by the competent Authorities of the Member States and the Commission
- Member States can request referral within 15 working days of notification.

Phase I deadlines

Article 6 decision to be taken

- within 25 working days after receipt of the complete notification
- unless increased to 35 working days if a Member State makes a 9(2) request, or
- unless increased to 35 working days if the undertakings concerned offer commitments

Article 6: decision

- 6(1)a : the concentration does not fall within the scope of the Merger Regulation
- 6(1)b : the concentration does not raise serious doubts as to its compatibility with the common market: approval
- 6(1)c : the concentration raises serious doubts: phase 2 of procedure

Phase II deadline commences

- On the date of the Article 6(1)c decision

Phase II: Initiation of proceedings

- Detailed appraisal via: request for information, interviews, inspections carried out by the competent Authorities of the Member States and the Commission
- Declaration of incompatibility is preceded by the issuing of a statement of objections, with a right for the parties to access the file and to request a formal oral hearing
- Advisory Committee of Member States: meeting and delivery of opinion

Phase II deadlines

Article 8 decision to be taken

- within 90 working days of initiation of proceedings, or
- within 105 working days if the notifying parties offer commitments later than 55 working days from initiation of proceedings.

Extension of up to 20 working days upon request by, or with the agreement of, the notifying parties: maximum duration of phase II = 125 working days

Two months from the date of the decision to lodge an appeal

Article 8: final decision

- 8(1): approval in case of compatibility with the common market
- 8(2): approval with conditions and obligations rendering the concentration compatible with the common market
- 8 (3): prohibition in case of incompatibility with the common market
- 8(4): dissolution of the merger in case of premature implementation or implementation in breach of a condition for clearance
- 8(5): interim measures
- 8(6): revocation of a clearance decision in case of incorrect information or breach of obligation

Possibility: Review by the European Court of First Instance and ultimately by the European Court of Justice

Some statistics

I.) NOTIFICATIONS

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	Total
Number of notified cases	11	64	59	59	95	110	131	168	224	276	330	335	277	211	247	313	356	402	347	203	4218
Cases withdrawn - Phase 1	0	0	3	1	6	4	5	9	5	7	8	8	3	0	3	6	7	5	10	2	92
Cases withdrawn - Phase 2	0	0	0	1	0	0	1	0	4	5	5	4	1	0	2	3	2	2	3	2	35

October

V.) SECOND PHASE DECISIONS

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	Total
Art 8.1 compatible (8.2 under Reg. 4064/89)	0	1	1	1	2	2	1	1	3	0	3	5	2	2	2	2	4	5	9	0	46
Art 8.2 compatible with commitments	0	3	3	2	2	3	3	7	4	7	12	9	5	6	4	3	6	4	5	3	91
Art 8.3 prohibition	0	1	0	0	1	2	3	1	2	1	2	5	0	0	1	0	0	1	0	0	20
Art 8.4 restore effective competition	0	0	0	0	0	0	0	2	0	0	0	0	2	0	0	0	0	0	0	0	4

October

Example: Oracle + Sun

- Merger plan announced Apr 2, 2009
- Sun stockholders accept the offer Jul 16, 2009
- **Phase I:** Commission notifies Oracle Jul 30, 2009
- US DOJ clears the merger Aug 20, 2009
- **Phase II:** Commission starts study Sep 3, 2009
- Commission statement of objections Nov 9, 2009
- Oracle can now reply; final Commission decision expected in 4 months meaning by early March

“The proposed transaction would bring together two major competitors in the market for databases. The database market is highly concentrated with the three main competitors of proprietary databases – Oracle, IBM and Microsoft – controlling approximately 85% of the market in terms of revenue. Oracle is the market leader in proprietary databases, while Sun's MySQL database product is the leading open source database.

The Commission's preliminary market investigation has shown that the Oracle databases and Sun's MySQL compete directly in many sectors of the database market and that MySQL is widely expected to represent a greater competitive constraint as it becomes increasingly functional. The Commission's investigation has also shown that the open source nature of Sun's MySQL might not eliminate fully the potential for anti-competitive effects.”

Questions

- What happened in the United States?
- What has happened in Europe?
 - Why is Commission skeptical?
 - What has been Oracle's / US DOJ's response?
What options does Oracle have?
 - What happens next in the procedure?

Legal experts say that Oracle could opt to divest MySQL in an effort to appease European regulators -- though Oracle's statement Monday seemed to eliminate that possibility. Some critics have warned that Oracle, which offers proprietary database software, could squelch further development of MySQL. However, Oracle said in its statement that "it is well understood by those knowledgeable about open-source software that because MySQL is open source, it cannot be controlled by anyone. That is the whole point of open source. "While Oracle's software is generally deployed by large corporate customers to crunch internal data, MySQL is often used for smaller tasks such as operating Web sites. Oracle also noted that the database market features a number of large competitors, including Microsoft Corp.

// MarketWatch news



► *Recommended Servers for MySQL*

The world's most popular open source database





Analyzing mergers

What should be shown?

- Legal requirements...
- Competitive harm
 - Unilateral, coordinated and vertical
- Evidence
 - Interviews, expert reports, economic analysis etc.
- Counterfactual: merger analysis necessary includes comparison to the current alternative of the world without the merger

Community dimension

- “A concentration has a Community dimension where:
 - (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and
 - (b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

- (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million;
- (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;
- (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and
- (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.” Art 1(2) and 1(3)

Control

- “Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:
 - (a) ownership or the right to use all or part of the assets of an undertaking;
 - (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.”

Unilateral harm

- $A + B \rightarrow AB$ with market power \rightarrow increase in prices, reduction in output etc
- Cf. article 82 analysis

Coordinated harm

- $A + B + C + D \rightarrow AB + C + D \rightarrow$ likelihood of collusion and cartel behavior increases
- Cf. article 81 analysis

Vertical harm

- A and C distribute to B; A merges with B, C is cut from downstream distribution
- A distributes to B and C; A merges with B, C is cut from upstream supply