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The European Commission approves upon commitments acquisition in the household and body care market (Unilever, Sara Lee)

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European Commission, 17 November 2010, Unilever, Sara Lee Body Care

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Imposing a broad remedy to address competition issues, the European Commission cleared Unilever‘s acquisition of Sara Lee‘s household and body care business on 17 November 2010. This merger decision is a reminder that the EC has the power to seek a remedy from merging parties that goes further than might appear strictly necessary and further than expected. In some cases, the imposition of broad remedies may materially undermine the rational and value of the deal and also delay the deal and impose additional costs.

I. Remedies in EU Merger Control

As in most merger control regimes, in the European Union transactions are presumptively legal but subject to review by the competition authority. For transactions involving parties with significant turnover in the EU, the relevant authority is the European Commission. If the EC finds that the merger creates substantive problems in the structure of competition in the relevant markets, it can prohibit the transaction from being implemented. Such prohibition decisions are relatively rare. One reason for this is that often the parties can offer a set of remedies that allay the competitive concerns.

The EC has some discretion in assessing the acceptability of the proposed remedies. The EC's Remedies Notice lays down a number of criteria that the Commission will take into account in assessing a proposed remedy. A remedy must be able to eliminate the competition concern, should be a permanent solution, should be capable of ready and effective implementation, and should not require onerous monitoring by the Commission. Even if a remedy eliminates the competition concern (such as by divesting business activities accounting for the market share added by the transaction), the Commission still must be convinced that the remedy is workable in practice.

Crafting a remedy remains in the hands of the notifying party. The Commission is not in a position to unilaterally impose conditions to an authorization decision, but only on the basis of the parties' proposed commitments. The limits of a remedies package thus are only constrained by the parties' invention and willingness to commit. A typical remedies package could include a combination of solutions, such as business divestitures (with potential for carve outs where

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divestiture is disproportionate or impracticable), the divestiture of production capacity, and conduct commitments.

II. Licensing and brand divestiture

Compared to a business divestiture, a more limited remedy for an acquiring party may require that it grant a licence to a third party to use a brand or even the divestiture of a brand. In sectors in which brand name is important for competition, merging parties have offered long term licences for key brands in order to obtain clearance. Such arrangements can be attractive to merging parties, as it offers a ‘temporary' solution but ultimately the brand will ultimately revert back to the owner.

The EC is wary of accepting licensing remedies, given the inherent uncertainties involved and the ongoing ability of the licensor to continue to influence the licensees' conduct. The EC therefore will carefully test a proposed license commitment. In some cases the Commission has demanded more than licensing, requiring the complete divestiture of the brand to address competition concerns. Further, a brand divestiture may involve products or geographies that are not directly affected by the transaction.

The potential breadth of a licensing commitment is acutely demonstrated in the remedy in the Unilever/Sara Lee decision, in which the EC allowed the merger with a commitment to divest Sara Lee‘s Sanex brand of deodorants. Despite the fact that deodorant market competition concerns were found in only seven Member States, the remedy ultimately offered and accepted covered the whole EU. And the remedy required licensing the entire range of Sanex brand products, including the unaffected product markets of shower gels and hand soaps.

III. Consequences for business

There is no reason to believe that the broad remedy required in Unilever/Sara Lee is an indicator of a new and more aggressive approach by the EC. But this case is a useful reminder that narrow licensing remedies limited to the affected product or geographic markets will not always be sufficient. Merging parties should evaluate whether a significant brand divestiture, covering a range of products and geographies, may have to be sacrificed to convince the EC that the remedy will replace the competition lost by the transaction. This is a case-by-case exercise, depending on the competitive conditions at the time of the review in the sector in question. Remedies that what may have worked in one market or for one business may not be easily transposed to another transaction.

The scope of the merger remedy required can be critical to the success of the transaction. A requirement to offer remedies that go beyond the strict competitive concern may affect the rationale and value of the deal. It may also have material consequences in terms of process, delaying clearance and requiring extra cost, time, and effort.

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