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ICN Merger Working Group workshop - Conglomerate Mergers

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Overview



What are conglomerate mergers?

Conglomerate effects – *back in fashion?*

Recent EU conglomerate mergers and case studies

Key takeaways

| What are Conglomerate Mergers?



What are Conglomerate Mergers?

Conglomerate Mergers

- “**Conglomerate mergers** are mergers between firms that are in a relationship which is neither purely horizontal (as competitors in the same relevant market) nor vertical (as supplier and customer). In practice, the focus is on mergers between companies that are active in closely related markets (e.g. mergers involving suppliers of complementary products or of products which belong to a range of products that is generally purchased by the same set of customers for the same end use).” (EC Non-Horizontal Merger Guidelines, para.91)

Complementary Products/Services

- Products or services which “...are worth more to a customer when used or consumed together than when used or consumed separately.” (EC Non-Horizontal Merger Guidelines, footnote 3)

Conglomerate Effects

Back in Fashion?



EC's Scrutiny of Conglomerate Mergers

GE/Honeywell (2001) and *Tetra Laval/Sidel* (2003) prohibitions (mainly) based on conglomerate issues




Both annulled on appeal in early 2000s – EU Courts set a high bar for prohibition based on conglomerate theories of harm



EC adopts Non-Horizontal Merger Guidelines in 2008

“whereas...in the majority of circumstances will not lead to any competition problems, in certain specific cases there may be harm to competition” (para.92)



EC did not abandon conglomerate theories of harm

Warning shot in 2011: M.5984 *Intel/McAfee* (Phase I with commitments)



A number of cases since 2016 (including Phase II investigations), most of which were cleared subject to remedies (*see below*)

Conglomerate Mergers - Effects

Usually have positive effects (efficiencies)

- Economies of scale (combination of products)
- “*One-stop shop*” for customers (lower transaction costs)

Rarely negative effects

- Leveraging of market power
- Foreclosure

Conglomerate Mergers – Types of Foreclosure

Tying

- Purchaser of a good is also required to purchase another good
- Technical vs contractual tying

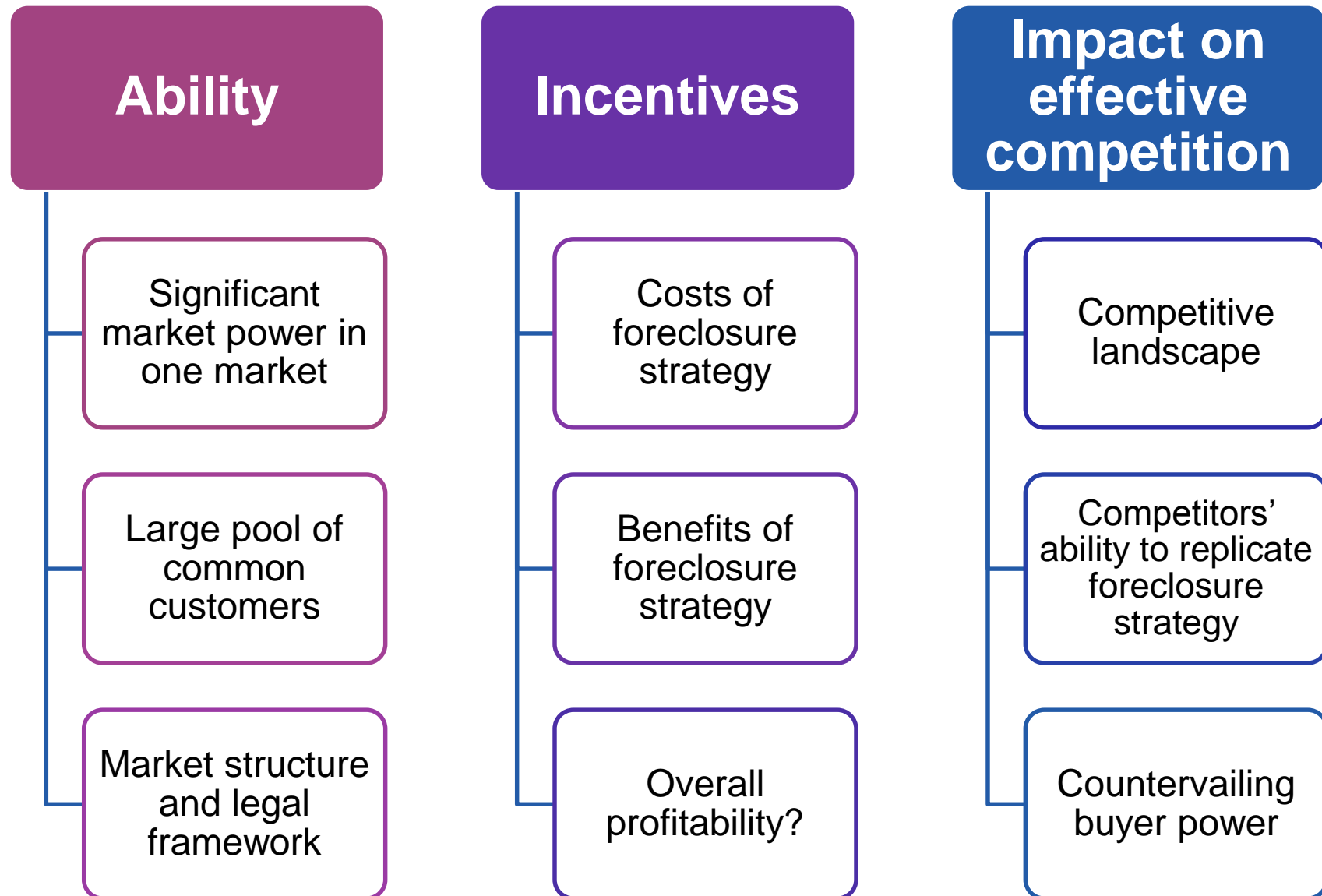
Pure bundling

- Products only available jointly in fixed proportions

Mixed bundling

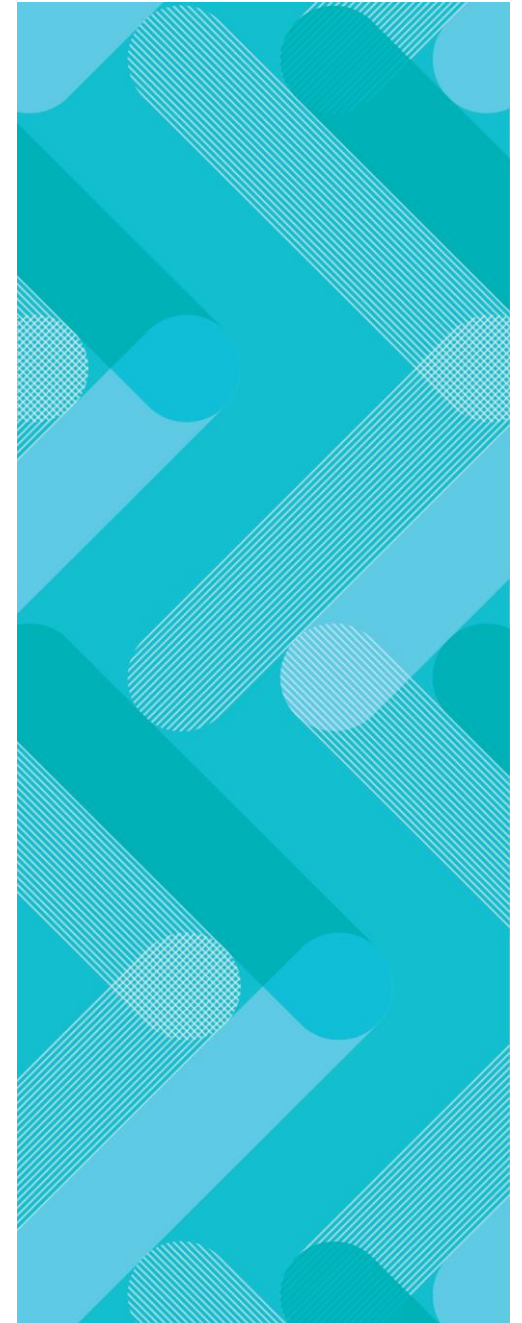
- Products are available separately, but sum of stand-alone prices is higher than the bundled price
- *E.g.* rebates when made dependent on the purchase of other goods

Conglomerate Mergers – Assessment of Foreclosure





Recent EU Conglomerate Mergers and Case Studies



Recent EU Conglomerate Mergers (2016-2018)

Phase II

- M.8306 *Qualcomm/NXP Semiconductors* (Phase II with commitments) (2018)
- M.8394 *Essilor/Luxottica* (Phase II) (2018)
- M.8084 *Bayer/Monsanto* (Phase II with commitments – however, bundling concerns were not proven during Phase II) (2018)

Phase I

- M.7873 *Worldline/Equens/Paysquare* (Phase I with commitments) (2017)
- M.8314 *Broadcom/Brocade* (Phase I with commitments) (2017)
- M.7822 *Dentsply/Sirona* (Phase I with commitments) (2016)
- M.8124 *Microsoft/LinkedIn* (Phase I with commitments) (2016)

Majority of recent conglomerate cases were cleared by the EC subject to remedies

Qualcomm/NXP Semiconductors

Dominant/Strong market positions

- Qualcomm: baseband chipsets supplier
- NXP: supplier of semiconductors (including near-field communication (NFC) and secure element (SE) chips) and the MIFARE technology used as a ticketing or fare collection platform
- Parties had dominant or strong market positions with highly complementary products and held significant amount of IP related to NFC chips

EC's concerns

- EC opened a Phase II investigation *primarily* on the basis of the following conglomerate concerns (in some cases, these could also be characterised as vertical/interoperability):
 - ability and incentive of merged entity to make it more difficult for other suppliers to access NXP's technology
 - ability and incentive of merged entity to degrade the interoperability of Qualcomm's baseband chipsets and NXP's NFC and SE chips with rivals' products
 - combination of Qualcomm's and NXP's significant NFC IP portfolios could lead to increased bargaining power of the merged entity allowing it to charge significantly higher royalties for its NFC patents

Remedies

- Qualcomm gave a mixture of structural and behavioural remedies:
 - license MIFARE for an eight-year period on terms at least as advantageous as at the time of the merger clearance thus enabling competitors' access to MIFARE so that they can compete effectively with the merged entity
 - ensure the same interoperability for a period of eight years between Qualcomm's baseband chipset and NXP's NFC and SE chips as with competing products
 - not to acquire NXP's standard essential NFC patents, or certain of NXP's non-standard essential NFC patents, and to not assert those patents that it would acquire

Microsoft/LinkedIn

Complementary Businesses

- LinkedIn operates a professional social networking platform, while Microsoft's flagship products include the Windows line of operating systems and the Microsoft Office suite of productivity software
- Microsoft and LinkedIn had complementary businesses in professional social network services and customer relationship management software solutions (there was also a minor overlap in the online advertising market)

EC's concerns

- The EC had concerns *inter alia* because Microsoft could use its strong market position in operating systems (Windows) for personal computers (PCs) and productivity software (including Outlook, Word, Excel and Power Point) to strengthen LinkedIn's position among professional social networks – in particular, it would be able to:
 - pre-install LinkedIn on all Windows PCs
 - integrate LinkedIn into Microsoft Office and combine LinkedIn's and Microsoft's user databases
 - shut out LinkedIn's competitors by not providing them with technical information required to operate with Microsoft's products

Remedies

- To appease the EC's concerns, Microsoft offered the following commitments (for a period of five years):
 - unbundle its PC products from LinkedIn, *i.e.* ensuring there was no requirement on PC manufacturers/distributors to preinstall LinkedIn on Windows and allow users to remove LinkedIn from Windows, if this is preinstalled
 - allow competing professional social network service providers to maintain current levels of interoperability with Microsoft's Office suite of products through the so-called Office add-in program and Office application programming interfaces
 - grant competing professional social network service providers access to 'Microsoft Graph', a gateway for software developers to build applications and services that can access data stored in the Microsoft cloud (*e.g.* contact information, emails), which can be used by software developers to drive subscribers and usage to their professional social networks

Bayer/Monsanto (bundling concerns not proven during Phase II)

Market players

- Bayer: second largest supplier of pesticides worldwide
- Monsanto: largest supplier of seeds worldwide
- Transaction creates the largest global integrated seed and pesticide player

EC's concerns

- EC opened a Phase II investigation *inter alia* based on a bundling theory of harm
- Investigation into whether the merged entity would have the ability to exclude competitors through bundling of seeds and pesticide products at distributor or grower level

Remedies

- Bundling concerns were not proven during Phase II investigation, so remedies were offered only in relation to horizontal concerns

Essilor/Luxottica (Phase II clearance without remedies)

Complementary products

- Essilor: largest supplier of ophthalmic lenses (worldwide and in Europe)
- Luxottica: largest supplier of eyewear (worldwide and in Europe), with well-known brands including Ray-Ban and Oakley
- Both companies sell their products to opticians who then sell finished spectacles and sunglasses to consumers

EC's concerns

- The parties mainly sell complementary products, which do not compete with each other
- However, the EC opened a Phase II investigation based on conglomerate concerns, primarily that the merged entity might leverage its powerful eyewear brands to make opticians buy its lenses and exclude other lenses suppliers from the markets, or vice versa, through practices such as bundling or tying

Conclusions

- EC cleared the transaction following a Phase II investigation concluding that it did not raise competition concerns as:
 - Luxottica's strongest brands in frames and sunglasses were not generally essential products for opticians (in line with Luxottica's market share of less than 20% in frames in Europe)
 - the merged entity would not be able to exploit any market power in sunglasses to shut out competing suppliers of lenses as sunglasses are sold mostly without visual correction and account for a small portion of opticians' revenues
 - the merged entity would have limited incentive to engage in tying and bundling because of the risk of losing customers
 - the merged entity would not be able to exclude rival eyewear suppliers from the market since Essilor has insufficient market power and incentives to shut out Luxottica's competitors
 - no competition concerns due to the elimination of emerging competition as Luxottica's limited activities in lenses and Essilor's limited activities in eyewear were unlikely to play an important role for competition in the foreseeable future

Key Takeaways



Key Takeaways – Is the Recent Focus on Conglomerate Theories of Harm Merely a ‘Coincidence’?

- EC continues to review conglomerate mergers and their effects on competition
 - Three cases were referred to Phase II between 2016-2018
 - Majority of conglomerate cases between 2016-18 were cleared subject to commitments (but no recent prohibitions based on conglomerate theories of harm)
- Non-Horizontal Merger Guidelines provide the framework of analysis
- Although it is rare for conglomerate mergers to be the main focus of the EC, it can happen in specific situations in particular where issues are akin to vertical (interoperability). If so:
 - careful preparation would be required: plan strategy, analyse carefully including by using economists; review carefully internal documents; if serious, consider raising issues in pre-notification contacts with the EC case team)
 - suitable remedies might need to be considered early in the process, especially when timing is tight

The focus on bundling in recent merger cases is a ‘coincidence’
(Commissioner Vestager, 26 September 2017)



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