



The Concept of Undertakings Concerned under the EU Merger Regulation

EUTCP AML Competition Week
Xi'An China
9 October 2012

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EU Jurisdiction

Pre-conditions for EU jurisdiction:

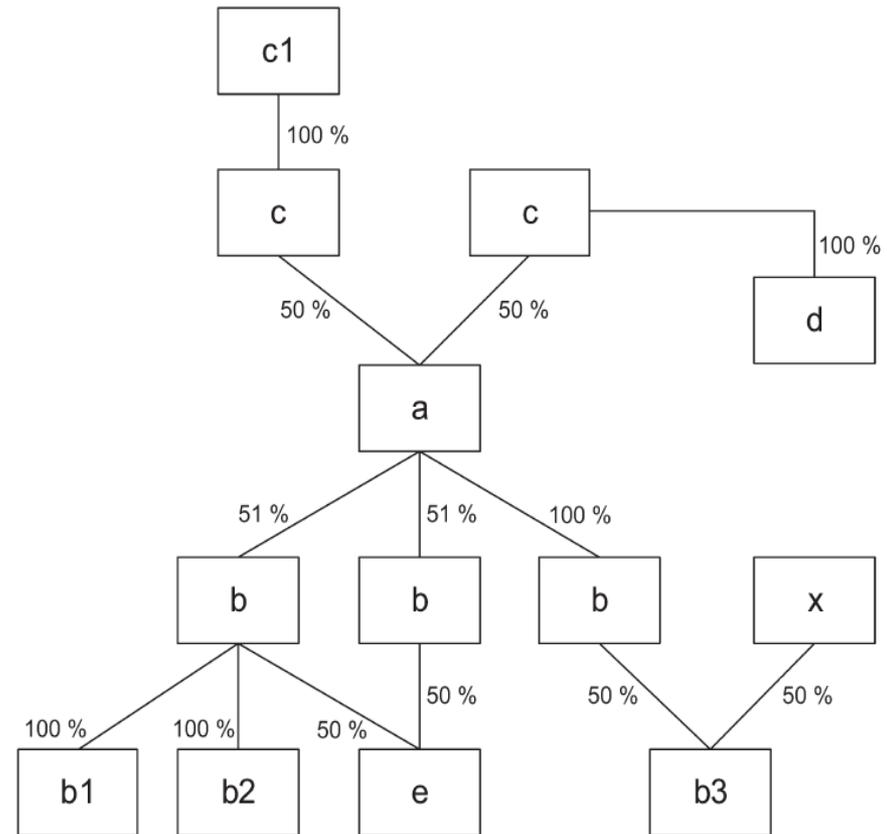
- i. **Concentration** of two or more undertakings (Art 3 EUMR), and
- ii. Satisfaction of turnover **thresholds**: a proxy for economic resources involved (Art 1 and 5(4) EUMR)

Concentration

- Concentration is a **change of control** on a lasting basis resulting from:
 - **Merger** between previously independent undertakings or parts of undertakings (Article 3(1)(a) EUMR)
 - **Acquisition of control** of the whole or parts of one or more undertakings whether by purchase of securities or assets, by contract or by any other means (Article 3(1)(b) EUMR)
 - Creation of a **full-function JV** (Article 3(4) EUMR).

Turnover: Undertakings

- **Group turnover**, not just that of the undertakings concerned
- The companies taken into account:
 - the undertaking concerned [a];
 - its subsidiaries [b], the companies that it jointly controls with third parties [b3] and their own subsidiaries [b1 and b2];
 - its parent companies [c] and their own parent companies [c1];
 - subsidiaries of the parent companies [d];
 - companies jointly controlled by two or more companies of the group [e].
- Vendor (in acquisition of sole control) and 3rd parties [x] are excluded



(Art 5(4) of Merger Regulation)

Turnover: SOEs

- Special rules for SOEs: to avoid an overly wide 'group' concept encompassing the entire public economy
- Only take account of undertakings making up an **economic unit** with an **independent power of decision** (Commission Jurisdictional Notice, paras 192-195)
- Turnover of other companies owned by the State is ignored

SOEs: Independent power of decision (1)

Relevant (non-exhaustive) criteria for determining “independent power of decision” of an SOE:

- *Possibility* of the State to influence commercial strategy (e.g. business plan, budget)
- *Possibility* of the State to coordinate conduct or facilitate coordination
 - Degree of interlocking directorships
 - Safeguards against sharing of commercially sensitive information (Case M.5549 – EDF/Segebel (2009), para 174)₆

SOEs: Independent power of decision (2)

- Exercise of **State's administrative supervisory powers** does not necessarily exclude the SOE's independent decision-making power if analogous to minority shareholder safeguards (Jurisdictional Notice, paras 66 and 71)

Concentration in case of SOEs

- If the target and acquirer are **both State-owned enterprises (SOEs)** owned by the same State/public body:
 - Concentration (notifiable): pre-transaction both SOEs are part of different economic units with independent decision-making power
 - Internal restructuring (non-notifiable): post-transaction the different economic units will continue to have an independent decision-making power

(Jurisdictional Notice, para 52)

Substantive assessment in SOE mergers

- Substantive analysis of the effects on competition may differ depending on the universe of companies to be considered from the acquiring SOE's side
- May need to go up "the chain of control" to find the independent decision-maker (SOE, ministry, State) and take account of activities of the relevant undertakings controlled by it
- In previous cases the Commission often assessed the effects both under the narrowest and the broadest approach

Mergers involving SOEs (1)

- Case M.5508 *Soffin/Hypo Real Estate*

Result: German ministry found to have influence on the public bank

- Commission analysed detailed operating structures of the company/ministry of finance
- Competitive assessment included other banks controlled by the ministry/state
- Left open who is the ultimate entity (ministry, government, State) as no problem even under 'worst case scenario'

- Case M.5549 *EDF/Segebel*

Result: French electricity company found to be independent of the State

Mergers involving SOEs (2)

- Case M.6082 – *China National Bluestar/Elkem*
- Case M.6113 – *DSM/SINOCHEM/JV*
- Case M.6151 – *PETROCHINA/ INEOS/ JV*
- Jurisdiction: the parties achieved the required turnover irrespective of whether the relevant SOE enjoyed an independent power of decision
- Competitive assessment: left open who is the ultimate entity (SOE, SASAC, State) as no problem even under 'worst case scenario'

Conclusion

- Case-by-case assessment based on the aforementioned criteria
- Jurisdiction: the Commission examines notifiability during pre-notification discussions
- Substantive assessment: look closely at the potentially related companies but leave open if non-decisive
- Same strict standards for EU and foreign SOEs:

"I remain firmly convinced that EU merger control must remain anchored to its own rules and purposes at all times, irrespective of the nationality of the companies concerned." (Vice-President Joaquín Almunia, St. Gallen, 8 April 2011)