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Intellectual property rights in merger cases

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Overview

- **Balancing IP protection and the potential for anti-competitive restrictions in merger review**
  - Merger review: prospective analysis of effects of the merger in the market (compared to relevant counterfactual)
  - IP rights taken into account as factual elements in that analysis

- **Jurisdiction: transfer/licence of IP rights as "concentration"?**
  - Yes, if intangible assets (brands, patents, copyrights, etc.) constitute a business with a market turnover
    → Jurisdictional Notice, para 24, and *Microsoft/Yahoo*

- **Substantive assessment of IP issues in merger cases**
  - Horizontal effects: IP rights as means of exercising market power / barriers to entry
  - Vertical/conglomerate effects: IP rights as means of input or customer foreclosure

- **IP rights at the remedies stage**
  - IP rights as assets to be included in the divestment business
  - Divestiture/licence as self-standing commitment

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Unilever/Sara Lee (2010)

Merger clearance conditional on brand divestiture going beyond area of actual concerns

- Acquisition by Unilever of Sara Lee's household and body care business

- The merger would have resulted in a very strong leadership position of Unilever and removed a competitive force in a number of deodorants markets through the combination of the parties' brands (Unilever's Dove and Rexona with Sara Lee's Sanex)

  → Competition concerns in Belgium, the Netherlands, Denmark, the UK, Ireland, Spain and Portugal

- The parties committed to divest Sara Lee's Sanex brand and related business across the EEA and for all product categories

  - A brand divestiture limited to the product and geographic markets where there were competition concerns would not have constituted a viable and effective remedy

    - Geographic/product split of the brand, complex re-branding exercise

Syngenta/Monsanto (2010)

Merger cleared subject to comprehensive divestiture of IP rights

- Merger between two leading sunflower seed suppliers in Europe
- Merged entity would have high combined market shares, leaving limited prospects for entry and expansion
- Ability to foreclose competitors downstream by reducing its exchanging and licensing activities upstream
- Combined effect is a significant reduction in innovation
- Viable and sustainable remedy package that replicates Monsanto position pre-merger

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IPIC/MAN Ferrostaal (2009)

Risk of input foreclosure through minority stake in firm owning an essential technology

- IPIC via AMI: leading melamine producer
- MAN Ferrostal: 30% shareholding in Eurotecnica, a company active in high-pressure melamine production technology (key input); minority shareholding gave decisive influence on decision-making for technology licensing
- Concerns: Foreclosure of non-vertically integrated melamine producers in relation to his technology
- Remedy: full divestiture of shareholding in Eurotecnica

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Cisco/Tandberg (2010)

Merger cleared subject to divestiture of a standard-essential technology

- Horizontal overlap in the videoconferencing equipment market
- No industry standard for interoperability – risk that merged entity would impose its own technology as a *de facto* standard
- Phase I clearance with a interoperability remedy aiming to resemble an open standard-setting process
- Licensing remedy not considered sufficient

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Intel/McAfee (2009)

Remedy to grant access to technical information to remove concerns of conglomerate effects

- Companies active in neighbouring and complementary markets: Intel in CPUs and McAfee in internet security

- Theories of harm:
  - Technical tying between Intel CPUs and McAfee security products
  - Lack of compatibility of McAfee products with non-Intel CPUs / Lack of interoperability of other security vendors with Intel CPUs

- Phase I clearance with remedies:
  - McAfee competitors will be able to run software on Intel CPUs and will have access to all necessary Intel technical info
  - Intel will avoid hampering of McAfee products running on computers using CPUs sold by competitors of Intel

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Google/Motorola (2011)

No merger-specific risk of foreclosure related to standard-essential patents

- Google has no incentive to prevent Motorola's competitors from using the Android operating system
- With respect to Motorola's standard-essential patents for mobile phone technology:
  - The merger does not change the market situation regarding competitors' access to Motorola's standard-essential patents
  - The merger does not materially change Google's ability to incentivise customers to take up its services (such as search or advertising)

  → Any possible antitrust issues relating to the use of standard-essential patents in the industry would not arise specifically as a result of the merger

Microsoft/Nokia (2013)

Post-merger incentives of the seller not relevant for merger assessment

- Unconditional clearance of Microsoft's acquisition of Nokia's mobile phone and tablet business (without patent portfolio)
- Investigation showed that Microsoft had no ability and/or incentives to foreclose post-merger
- Possible incentives of Nokia (seller) as regards licencing of its retained patent portfolio post-merger outside the scope of merger control