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Microsoft/Yahoo! – the concept of a concentration

Frederic Depoortere (Skadden, Belgium) · Sunday, August 8th, 2010

The Commission's recent decision approving Microsoft's acquisition of Yahoo!'s Search Business (including internet search and search advertising) contains an interesting application of the definition of a concentration under the Merger Regulation.

In December 2009, Microsoft and Yahoo entered into a License Agreement and a Search and Advertising Services and Sales Agreement. Microsoft will acquire a 10 year exclusive license to Yahoo!'s core search technologies and will have the right to integrate these technologies into its own web search platform. In addition, Microsoft agreed to hire more than 400 Yahoo! employees.

Yahoo! will exclusively use Microsoft's search engines on Yahoo!'s sites, even though Yahoo! retains the right to design the user experience when presenting internet search results received from Microsoft.

Given that the business transferred is not incorporated, the Commission needed to investigate whether the agreement gives rise to a concentration, in that (i) the transferred assets constitute the whole or part of an undertaking that is a business with a market presence to which a turnover can be attributed and (ii) there is a change of control over these assets on a lasting basis. See paragraphs 24 and 28 of the Commission's Consolidated Jurisdictional Notice.

First, even though Microsoft does not acquire ownership over Yahoo!'s search technology, the Commission considered that a 10-year license is sufficient to be considered a transfer of assets, especially since the license is exclusive as to Yahoo! as well, in that Yahoo! will not be able to use its technology to operate a separate search business. The facts that Microsoft will hire 400 Yahoo! employees and that all Yahoo! customers will be migrated to Microsoft further contribute to the Commission's conclusion that the agreements constitute a transfer of a business. Last, the business generates revenues which will now accrue to Microsoft, given that Yahoo! will be contractually obliged to exit the search and advertising markets.

The 10-year duration of the agreements was considered sufficient to be considered a transfer on a lasting basis, given the relevant markets characterized by rapid technological developments and the fact that early termination of the agreements seem unlikely to occur. The Commission concluded that as a result, Yahoo! is de facto definitively divesting its ability to compete in internet search and search advertising.

Even though the Microsoft/Yahoo! agreements do not constitute a transfer of a business in the traditional sense of the term, the Commission's pragmatic approach to the issue allowed the parties to have their agreements reviewed under the Merger Regulation and benefit from its fixed review periods.

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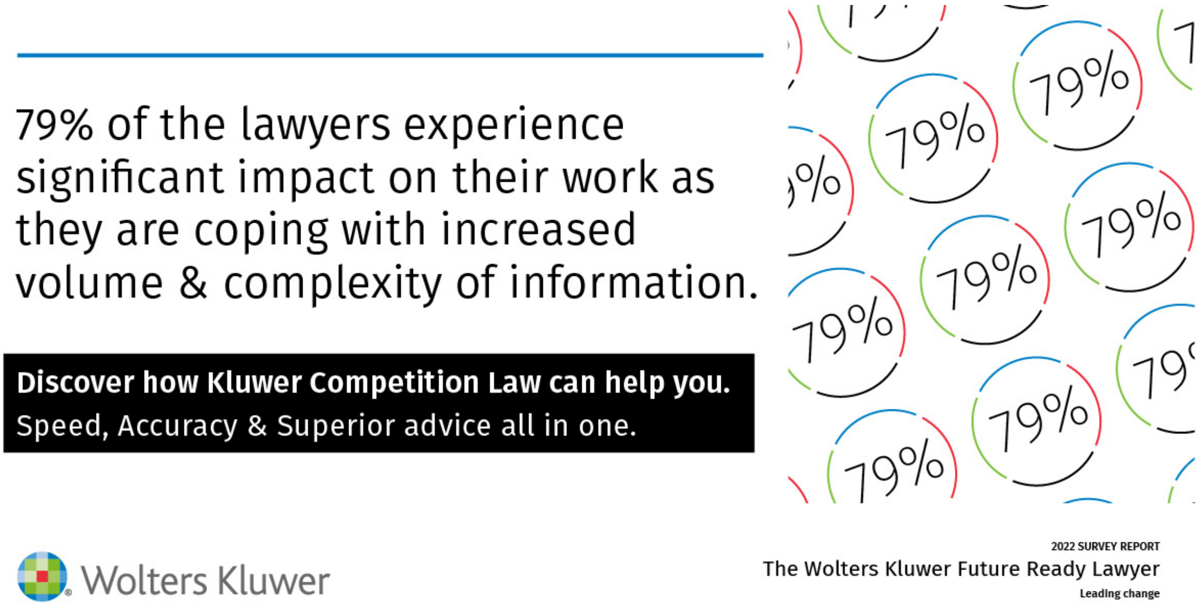

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