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T-Mobile/Orange and Cisco/Tandberg: Commission accepts complex Phase I remedies

Frederic Depoortere (Skadden, Belgium) · Thursday, July 8th, 2010

When the Commission's Remedies Notice was published in 2008, many commentators thought the Notice's requirements for parties to a concentration to offer an acceptable remedy were too demanding. The concern was that especially under the short and strict timeframe in Phase I, it would be close to impossible to convince the Commission to accept anything else than a straightforward divestiture commitment. In addition, the Notice confirmed the Commission's general reluctance to accept behavioural remedies.

Two recent cases show that the Commission is able to process and accept more complex remedies, even in Phase I and even if they contain certain behavioural elements.

On 1 March 2010, the Commission approved the merger between T-Mobile and Orange, the numbers three and four in mobile communications in the UK, subject to conditions. Procedural issues were complex: the UK Office of Fair Trading had asked for a referral of the case to the UK and it was only through close coordination with the OFT and OFCOM, the UK telecoms regulator, that the Commission could convince the OFT to withdraw its referral request.

The Commission and the OFT raised two concerns that needed to be remedied. The first concern related to a competitor of the parties, 3UK, a Mobile Virtual Network Operator, which had a national roaming agreement in place with Orange and a radio access network (RAN) sharing agreement with T-Mobile. 3UK complained that the merger would create an incentive for T-Mobile to terminate the RAN sharing agreement early so as to harm 3UK's position as a competitor in the UK. The second concern related to the fact that after the merger, the parties would hold a combined amount of contiguous spectrum at the 1800 MHz frequency level which was significantly larger than their competitors, which could lead to the parties having the only full-speed 4G (or Long Term Evolution/LTE) network in the short to medium term.

In order to address the first concern, the parties offered to amend the 3UK agreements, for example by cancelling certain early termination rights and establishing a fast-track dispute resolution mechanism. In a first stage, the Commission objected that the offer could not be accepted as it depended on the agreement of a third party (3UK) not bound by the commitments. It was only when the parties amended their proposed changes to the agreement and actually executed the amended agreement with 3UK, that the Commission accepted the new agreement as a remedy. The second concern was addressed by a commitment of the parties to divest part of their combined 1800 MHz spectrum band, either by private sale or in an auction organized by OFCOM. A first

portion of the spectrum would be cleared and surrendered by September 2013 and a second portion by September 2015.

The 3UK remedy can be considered as behavioural and the spectrum divestiture commitment is clearly not a simple divestiture comparable to the sale of a business. In addition, the timeframe for the spectrum divestiture is much longer than what the Commission generally accepts for divestiture commitments (six months). Presumably, the strong involvement of OFCOM contributed to the Commission accepting these rather atypical remedies.

The second decision, issued on 23 March 2010, relates to Cisco's acquisition of a rival supplier of video communications solutions ("VCS"), Tandberg. According to the text of the decision, end-customers and distributors were generally supportive of or at least neutral about the transaction. However, based on competitor complaints, the Commission raised concerns about interoperability between the combined firm's systems and those of competitors, especially at the high end of the VCS markets (for example, dedicated-room or telepresence systems). The concerns were maintained even in the face of the development by Cisco of the so-called TIP protocol, which enables interoperability between Cisco and non-Cisco endpoints. Cisco had publicly launched TIP and circulated protocol license agreements to its competitors and had made it available on the internet for third parties.

In order to address the concerns, Cisco agreed to divest its copyrights to TIP and assign the responsibility for managing and updating TIP to an independent industry body. If an existing body (the International Multimedia Telecommunications Consortium) did not accept, Cisco would create an independent not-for-profit consortium itself. In addition, Cisco would publish an open source library, request that the independent industry body assume stewardship over the library and participate in the open source development efforts along with other interested developers. Last, Cisco committed to implement and support TIP on its existing and future products.

The Cisco/Tandberg remedy as well as the T-Mobile/Orange remedies show that fears about the Commission's Remedies Notice are not always warranted. A Phase I investigation can be extremely short, especially in complex cases and even if parties take time for longer pre-notification discussions with the case team. In the two cases discussed above, and despite the short deadlines, the Commission was willing to work through and accept complex sets of remedies, which included significant behavioural elements.

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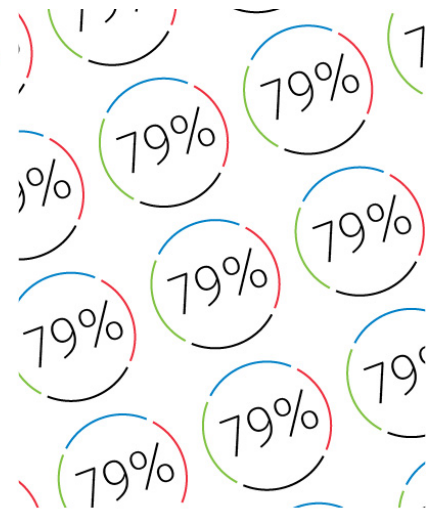
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