

Kluwer Competition Law Blog

Size and noise

Max Findlay (Max Findlay Associates, United Kingdom) · Sunday, April 29th, 2012

The bigger they are, the harder they fall and the sounds of the crash get louder as the legal controls get weaker.

Take, for instance, the recent £807.2m sale of Edinburgh airport to Global Infrastructure Partners. This is the latest disposal following the original recommendation by the UK Competition Commission (CC) that BAA's airport operating empire should be broken up. Before approving the Edinburgh deal, the CC reviewed potential buyers to ensure that they met its criteria on things such as expertise, financial resources and independence from BAA. The CC will now consult on draft undertakings provided by GIP that prevent any resale of the airport within five years unless the new purchaser satisfies the CC's criteria.

So far, so normal. A monopolistic behemoth is slowly being cut down to size against a background of high-profile and bitter courtroom battles. Some lawyers may possibly raise half an eyebrow at the fact that Global Infrastructure Partners now own Edinburgh, Gatwick and London City airports and might therefore look a tad overdominant themselves. But that's a fight for another day and everything here is being run in an orderly manner according to competition rules.

Move up the food chain, however, and the level of legal control isn't quite so all-encompassing. Last December, the European Commission launched an investigation into whether Apple and a bunch of publishers have behaved anticompetitively over the sales of ebooks. More recently, the US Department of Justice announced that it is suing Apple along with the publishers for allegedly fixing the price of ebooks.

At the time of writing, Apple and most of the publishers are said to be trying to settle in Europe. The competition commissioner Joaquin Almunia has revealed that he has received settlement offers from Apple and all the publishers except Penguin. Back in the States, however, Apple together with publishers Macmillan and Penguin are fighting the DoJ. Apple argues that it is a hero for breaking Amazon's "monopolistic grip" on the ebook market and that the price-fixing charges are "simply not true"; Macmillan says the DoJ's terms are too onerous; and Penguin insists that it has done nothing wrong. In contrast, Hachette, Harper Collins, and Simon and Schuster have settled with the regulator.

At one level, this is just another legal row that the companies involved will eventually sort out. But at another, many people are wondering if this is another indication that the Apple iceberg is finally cracking, even if the fissures are on the far side of the imposing mountain of ice looming up in front of us.

The danger signs have been there for some time: the protracted intellectual property battles with Samsung and others draining corporate attention away from what's happening in the world; the irresistible rise of the Google Android system; Steve Jobs's death and the loss of corporate cool; the tardy response to the Flashback virus outbreak and the continuing PR disaster over deaths and sweatshop working conditions at Foxconn where iPads and iPhones are made ; and (perhaps most fatally of all) changing fashion. Apple is starting to look old.

Lawyers will say (with some justification) that most of these things have nothing to do with them. But if the iceberg really does start to crack, there is likely to be a period of considerable commercial upheaval worldwide that temporarily at least overpowers the protections afforded by competition law structures. This is because, in a crisis, market forces will always trump legal rules, leaving the legal professionals to clear up the mess afterwards.

Finally, you get to the point where legal controls disappear altogether. The most spectacular example is the News Corp/ BSKyB disaster and the culture secretary Jeremy Hunt. Events are currently moving so fast that even a snapshot of the present position is impossible. But the key point is this. Sixteen months ago, the European Commission cleared the competition aspects of the News Corp/BSkyB merger. The only thing left was the vaguely defined UK media plurality test.

Passing this would be a shoo-in, the lawyers said. All the rules have been met, they said, high-fiving one another in gleeful anticipation of a shining new dawn on the horizon. Then, as the world knows, the deal collapsed spectacularly for reasons that had nothing to do with law. And right now, the culture secretary, who had a quasi-judicial role in the assessment of the transaction, is being widely denounced for allegedly passing confidential information to News Corp during its bid for BSKyB. Whatever happens next will be very noisy and have nothing to do with competition law because, at this level, politics (like market forces) beats the rules. As Dirty Harry so memorably observed in Magnum Force, a man's got to know his limitations. The same goes for competition lawyers.

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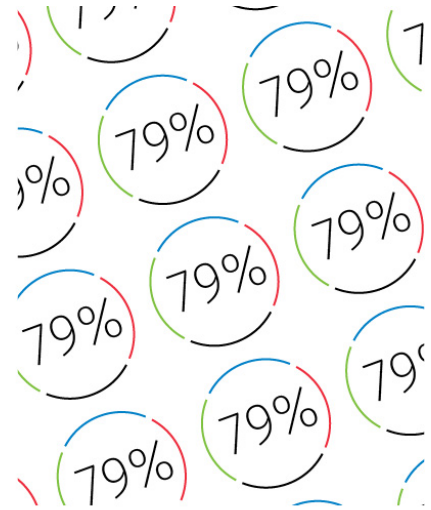
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