Merger control
telecommunications

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Perfect competition

- Sellers and buyers are so numerous that none can have a perceptible effect on the price
- Consumers can register their preferences through market transactions at fully known market prices
- All relevant prices are known to each producer and also all combinations of input prices
- Every producer has equal access to all input markets and there are no artificial barriers to production

Most mergers fail

- The cultures clash
- There are boardroom schisms
- The management fails to integrate the firms
- The business fit was poor
- The premium paid was too high
- The acquisitions generate too much debt
- There are regulatory delays

None of these justifies an authority in blocking a merger.

Mergers and acquisitions

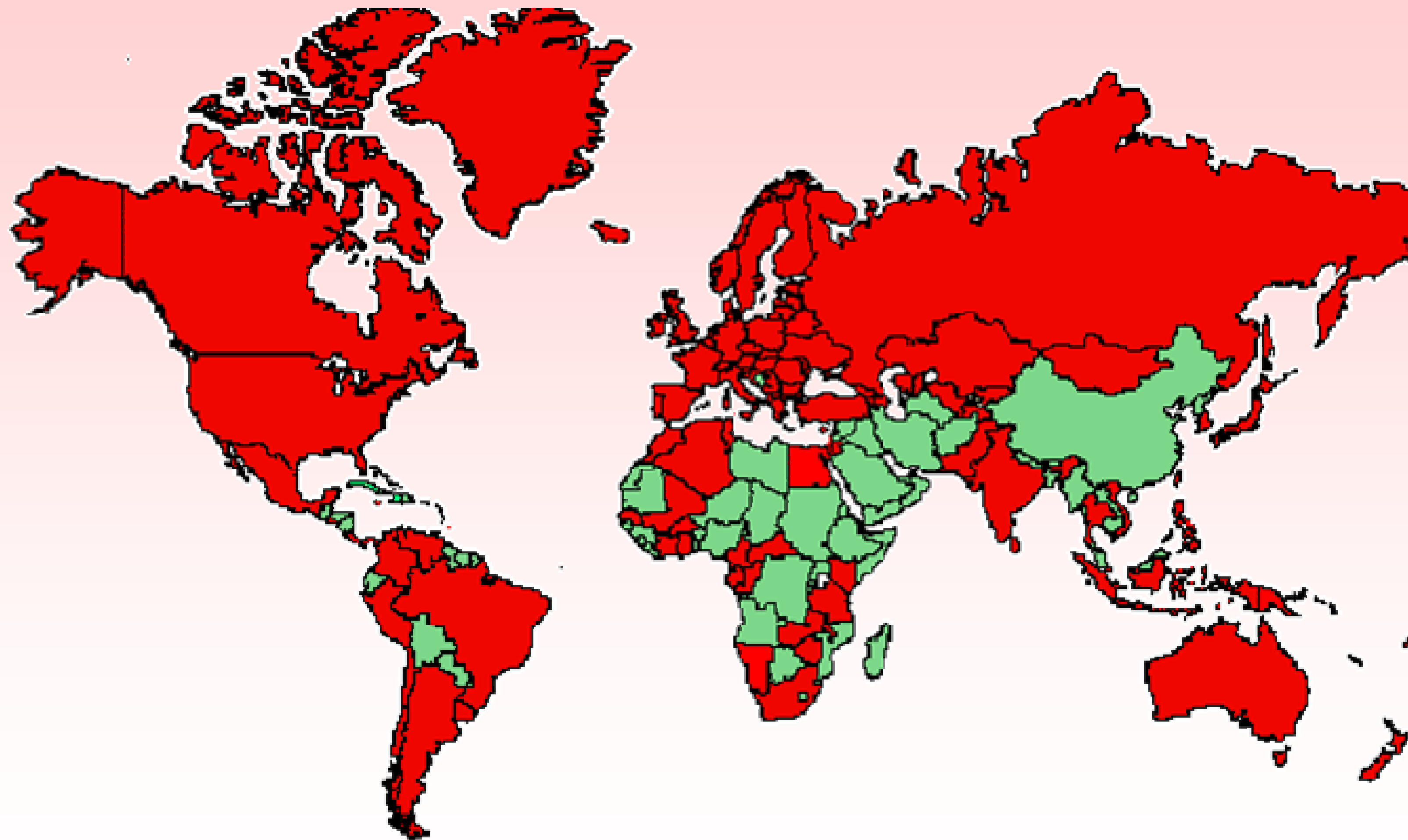
- Many options for companies
- Full acquisition
- Joint venture
- Merging of interests
- Franchising
- Adoption of common standards

Competition law

- Competition is seldom perfect
- The law is used to protect competition, but not competitors
- Measures against:
  - the abuse of dominance
  - collusion and cartels
  - discrimination and tied sales
- The approval of mergers

For historical reasons it known as antitrust law in the USA.

Competition laws enacted - 2005



Source: FTC.gov

National competition authorities

- Enforcement agencies for competition law
- Pro-competitive champions
- In rare cases, sectoral regulators:
  - in advance of competition law:
    - Hong Kong, SAR
    - Singapore
  - concurrent with sectoral powers:
    - Greece
    - United Kingdom

United States of America

- Antique origins in colonial English common law
- Statutes of the US Congress:
  - Sherman Act (1890) prohibits:
    - conspiracies in restraint of trade
    - monopolisation or attempts at monopolisation

    (both apply to foreign commerce)
  - Clayton Act (1914) prohibits:
    - discrimination
    - tied sales
    - acquisitions that substantially lessen competition

§ 1 Sherman Act

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 2 Sherman Act

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§7 Clayton Act

No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Monopoly

- Possessing a monopoly is not Illegal
- It depends on:
  - how you obtained the monopoly
  - what you do with the monopoly

United States of America

- Notification by merging parties to the:
  - Federal Trade Commission (FTC)
  - Department of Justice
- Notification of transfer of licence by telecommunications operators or broadcasters to the
  - Federal Communications Commission (FCC)

USA merger guidelines

- Joint FTC and Department of Justice
- To prevent anti-competitive mergers, but not deter pro-competitive or competitively neutral mergers
- Markets:
  - definition
  - measurement and concentration
- Potential lessening of competition through:
  - coordinated interaction
  - unilateral effects
- Market entry
- Failing firms

http://www.ftc.gov/bc/docs/horizmer.htm

The effects of the merger

- Comparison of two states of the world:
  - with the merger
  - without the merger
- Can infer the unobserved state of world:
  - natural experiments
  - theory-based inferences

Vertical merger

- a manufacturer of cars acquiring either:
  - distributor or dealer
  - manufacturer of exhaust systems or windshields
- a manufacturer of jeans acquiring either:
  - clothing retailer
  - producer of denim cloth or of machines to manufacture jeans

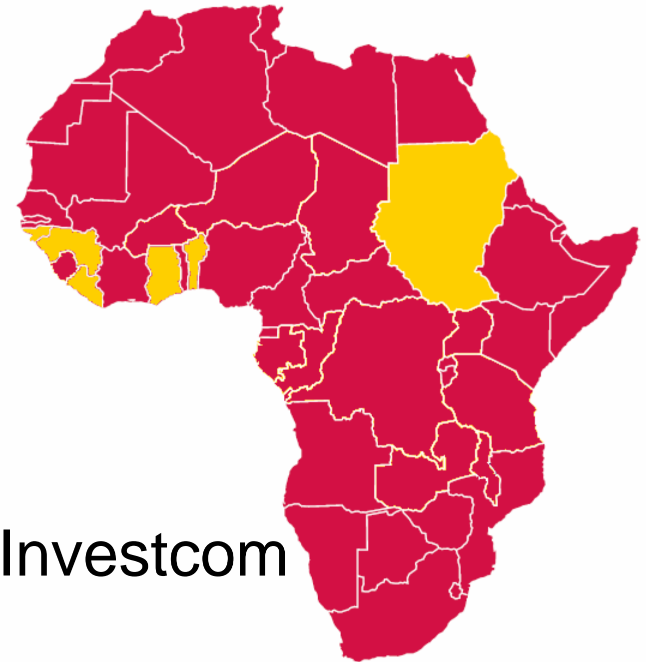
Cisco - a serial acquirer

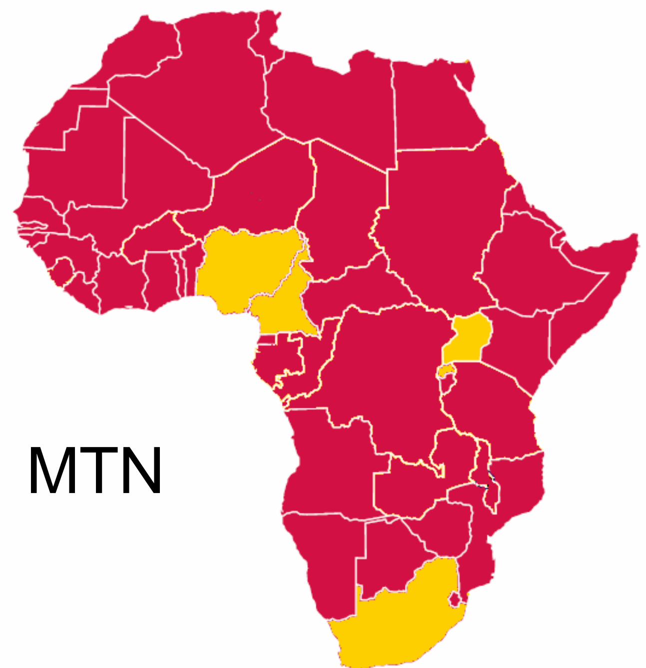
- Linksys (home networking company)
- Scientific Atlanta (cable modems and set-top boxes)
- Meetinghouse Data Communications Inc. (802.1X supplicant security software)
- Arroyo Systems (middleware for time-shifted media, including video on demand)

This is a means to ensure it has access to technologies that it has not managed to develop itself.

MTN

- Investcom in:
  - Africa
  - Syria and Yemen
  - Cyprus
- Acquired by MTN for US$ 5,500 millions
- MTN was already in:
  - Nigeria and Cameroon
  - Uganda and Rwanda
  - South Africa





Horizontal mergers

- Two recent cases in the USA
  - SBC acquired AT&T (then renamed itself AT&T)
  - Verizon acquired MCI (now Verizon Business)
- Part of a pattern of consolidation in the USA in fixed and mobile

Conglomerate acquisitions

ITT

- the classic conglomerate of the 1970s
- telephone exchanges to Sheraton hotels
- all treated as investments

Market definitions

- Geographical:
  - not too far away to compete
- Service/product:
  - not too different to compete
- Substitutability:
  - supply
  - demand

European Union

- Competition law provisions in European Community Treaty, date back to 1950s:
  - provision of state aid
  - granting of special or exclusive rights
  - cartels
  - abuse of monopoly
- EC Merger Regulation 4064/89/EEC:
  - notification to the European Commission
  - approval with or without commitments
  - appeals to European Court of Justice

Merger regulation 139/2004/EC

- Reviewed as part of the usual policy cycle
- Building on experiences and jurisprudence
- Also on collaboration with other countries
- Significant reforms
- Refinement of the tests
- New processes appear to be working well

Transparency

- Optional pre-notification meetings
- Notification in the *Official Journal*
- Invitation of public comments
- Hearings with parties
- Consultation with Committee of Member States
- Decision by full European Commission
- Publication of decision:
  - blanking out of commercially sensitive data

Global One - 1996

- France Telecom and Deutsche Telekom
- Joint venture aimed at corporate customers both nationally and in Europe
- Decision by the EC under Article 85 of the EC Treaty
- The EC used approval to force the operators (and governments) to accept market opening
- Later Sprint joined, but the merger failed, being absorbed into France Telecom

Telia-Telenor - 1999

- A proposed merger by the “incumbent” operators in Norway and Sweden
- Both owned by their respective governments
- The merger had the potential to create or to strengthen a dominant position as a result of which effective competition would have been significantly impeded
- It was eventually abandoned
- The conditions are guidance for any similar mergers
- Telia later merged with Sonera (Finland) under very similar terms

Case M.1439

Terms for Telenor-Telia

- Telia (Sweden) divestitures:
  - Norwegian activities in domestic and international voice telephony services, data communication services, supply of PABXs and provision of Internet services
  - Telia InfoMedia Television AB, including Telia's cable TV business in Sweden
- Telenor (Norway) divestitures:
  - the 33% shareholding in Telenordia: domestic and international voice telephony services, Internet and data communications and enhanced global services
  - the 50% shareholding in Internordia, active in Sweden in the supply of PABXs
  - the shareholdings in firms in Sweden supplying directories
  - Telenor's cable TV business in Norway
- Republic of Ireland:
  - Either Telia will divest itself of its shareholding in Eircom or Telenor will divest itself of its shareholding in ESAT Digifone
- Local loop unbundling:
  - Allow competitors access to their local access networks to provide any technically feasible services on non-discriminatory terms.

Worldcom and Sprint - 1999

- Two corporations based in the USA but with global interests:
  - Internet backbone
  - supplying multi-national companies
- Considered by both the EU and US authorities
- The parties granted waivers to enable the EU and US authorities to share information and documents
- The Department of Justice sued to block the merger
- The EC concluded that the proposed commitments were insufficient to remedy the competition concerns
- In June 2000, Worldcom and Sprint informed the EC of their intention to abandon the merger, nonetheless, the EC proceed to forbid the merger

There was a major EU/USA disagreement on the acquisition of Honeywell by General Electric. It was approved in the USA, but blocked by DG Competition

Case M.1741

BellSouth and E-Plus

- BellSouth acquired Vodafone's shareholding in the German mobile operator E-Plus Mobilfunk GmbH
- It was one of four mobile telephony operators in Germany
- E-Plus was jointly controlled by BellSouth (22.51%), Vodafone (17.24%) and VR Telecommunications (60.25%)
- Vodafone had been required to dispose of its holding in E-Plus as part of the approval of its acquisition of Airtouch (which had held the 17% of E-Plus (Case M.1430)
- BellSouth, VEBA or RWE were not active in the market for mobile telephony in Germany or on any upstream or downstream markets
- It would not give rise to any horizontal or vertical relationships or increase in market shares
- It would not lead to the creation or strengthening of a dominant position
- Furthermore, the current transaction will eliminate the competition concerns identified in the Vodafone/Airtouch transaction

Case M.1817

Vodafone - Mannesmann

- One of the most bitterly contested mergers
- Acquisition of a very large Germany company against the decision of its management
- Vodafone already had extensive mobile operations from previous acquisitions
  (Belgium, France, Germany, Greece, Italy, Netherlands, Portugal, Spain, Sweden & UK)
- Mannesmann had acquired Orange in 1999
  (Austria, Belgium, France, Germany, Italy and Switzerland & UK)
- Eventually, Vodafone wrote off the entire value of the Mannesmann acquisition, though it had paid with shares

Case: M.1795

Vodafone commitments

- The de-merger of Orange to remove the competitive overlaps in:
  - Belgium
  - United Kingdom
- Mannesmann was to sell all its shareholdings in Orange
- Enabling third party non-discriminatory access to the merged entity’s integrated network so as to provide advanced mobile services to their customers

Telefónica acquired O_2 - 2005

- O2, formerly BT cellular interests, in:
  - Germany
  - Ireland
  - United Kingdom
  - Isle of Man
- O_2 will be kept as a separate entity because of cultural differences in management styles

- Telefónica de España:
  - Spain
  - Czech Republic
  - Morocco
  - 16 licences in Latin America (acquired from BellSouth)
- Telefónica undertook to leave the FreeMove Alliance

Telefónica paid £17.7 billion (~US$ 31.5 billion)

Case M.4035

Telstra Clear - New Zealand

- Considered by the Commerce Commission in late 2001
- TelstraSaturn to acquire Clear Communications
- TelstraSaturn was substantially owned by Telstra (owned by Australian Govt.)
- Clear was a wholly owned subsidiary of British Telecommunications plc
- TelstraSaturn provided: cable TV, Internet and data services, business Internet services and web design
- Clear provided: voice, data, Internet and e-commerce services and an Internet Service Provider
- The Commission was satisfied it would not have, nor would be likely to have, the effect of substantially lessening competition in any of the affected markets

Herfindahl-Hirschman Index

- A measure of market concentration
- Sum of the squares of the market shares
- On a defined market
- With an appropriate measure:
  - call minutes?
  - total revenues?
  - numbers of customers? (problem of counting pre-paid)
  - each will give a different answer!

- Less than 1000 unconcentrated
- Between 1000 and 1800 moderately concentrated
- Above 1800 highly concentrated

HHIs in mobile access markets

Hong Kong merger case

- CSL and New World wanted to merge
- Telstra would own 76% of the merged firm (itself 50% owned by the Australian Government)
- Could have substantially lessened competition, the HHI was already 2100-2200
- OFTA permitted the merger because:
  - effective MNP meant an established pattern of customers switching
  - 3G was causing customers to look for new offers
  - multi-play bundled offers were appearing
  - MVNOs had entered the market

The national interest

- In addition to economic tests, public authorities may consider the "national interest"
- One recent case in USA caused controversy, with a Dubai company acquiring an interest in port operations
- Other cases in the USA
  - NTT acquired Verio, a large ISP with significant backhaul networks
  - Deutsche Telekom AG acquired Voicestream a GSM operator
- Section 8 of the US Constitution gives the Congress the power to govern trade, therefore it can and does hold hearings on these issues which will influence public authorities

United Kingdom

- Enterprise Act 2002 reduced the basis for intervention on the basis of the “national interest”
- Secretary of State can certify such a merger
- Open to judicial review

Extra-territoriality

- The merging parties are foreign and the transaction is outside the country
- The actions are lawful under the applicable foreign law
- Raises the issue of “judicial imperialism” as well as the “clash of competing national laws” in a “horizontal legal system”
- Usually fiercely resisted by other governments

Global cooperation of NCAs

- International Competition Network (ICN)
  http://www.internationalcompetitionnetwork.org/

- OECD Competition Committee
  - global forum
    http://www.oecd.org/document/60/0,2340,en_2649_37463_2732220_1_1_1_37463,00.html

Conclusions

- Well-established case law in major developed countries
- A stable merger approval process requires:
  - a substantive case law
  - regular administrative reviews
- Many common elements to (dis)approval of mergers and acquisitions
- Defining markets is not an exact science
- There are different interpretations of:
  - the national interest
  - extra-territoriality

Thank you

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