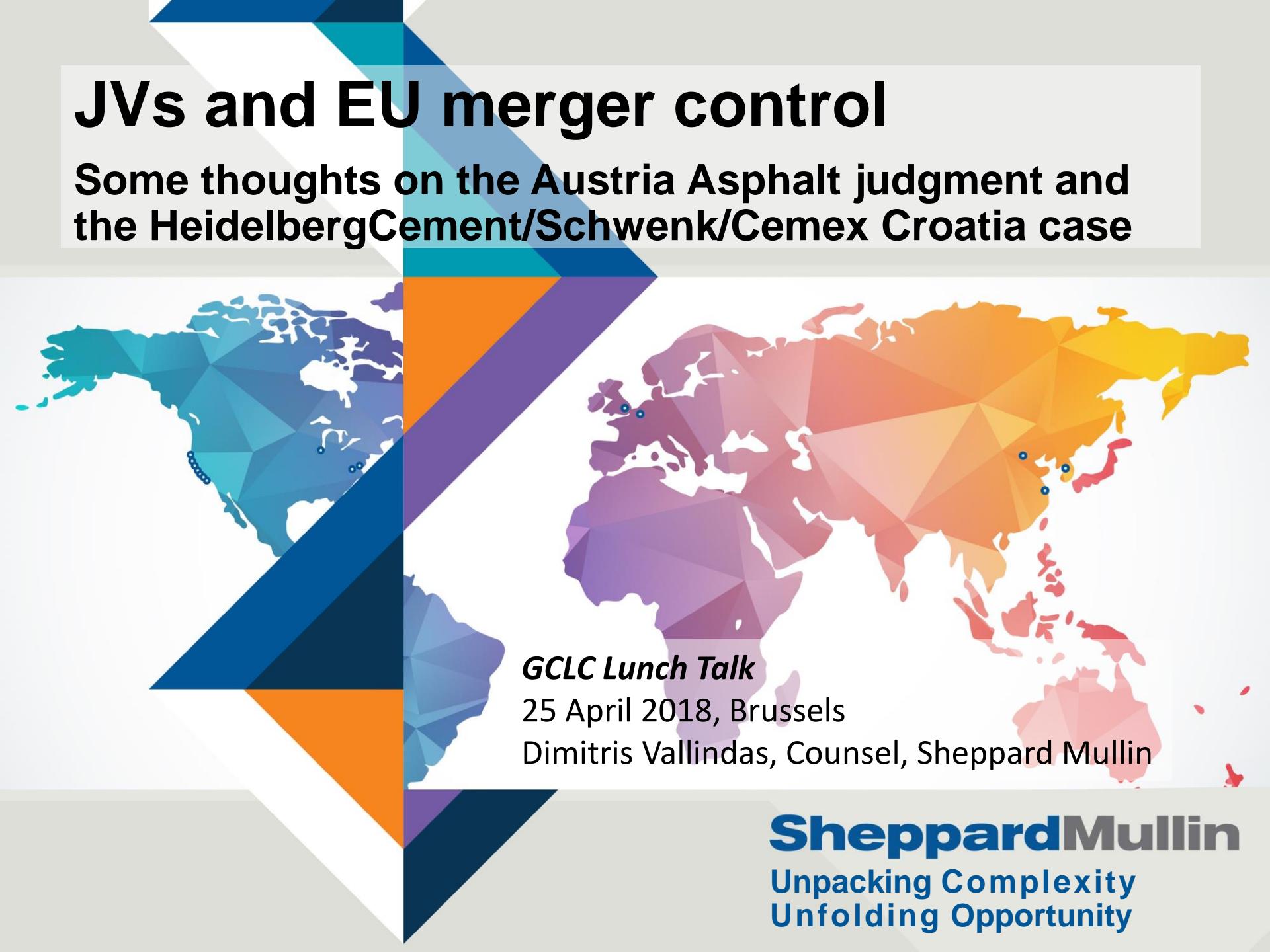


JVs and EU merger control

Some thoughts on the Austria Asphalt judgment and the HeidelbergCement/Schwenk/Cemex Croatia case



GCLC Lunch Talk

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SheppardMullin
Unpacking Complexity
Unfolding Opportunity



Content

- Some additional thoughts on the Austria Asphalt judgment
- The HeidelbergCement/Schwenk/Cemex Croatia case



The Austria Asphalt judgment

- Commission's decisional practice was inconsistent: clarification necessary
- Best example is M.6068 ENI/AcegasAps decision:
 - §9: “*... no need to assess the full-functionality criterion...*”
 - §10: “*... operation consists in a concentration within the meaning of Article 3(4) of the Merger Regulation.*”
- Even in Austria Asphalt Commission's services said to the parties that deal was not notifiable but legal service held opposite position before Court



The Austria Asphalt judgment

- Question asked concerned situation in which previous exclusive owner remains jointly controlling parent
- Court seems to have to have taken broader approach:
 - §23: “*...Regulation No 139/2004 does not draw any distinction in its recitals between a newly created undertaking resulting from such a transaction and an existing undertaking hitherto subject to sole control by a group which passes to the joint control of several undertakings.*”
 - §28: “*... Article 3(4) thereof must be interpreted as referring to the creation of a joint venture, that is to say to a transaction as a result of which an undertaking controlled jointly by at least two other undertakings emerges in the market, regardless of whether that undertaking, now jointly controlled, existed before the transaction in question..*”
 - §35: “*... Article 3 of Regulation No 139/2004 must be interpreted as meaning that a concentration is deemed to arise upon a change in the form of control of an existing undertaking which, previously exclusive, becomes joint, only if the joint venture created by such a transaction performs on a lasting basis all the functions of an autonomous economic entity.*”
- No reference to initial exclusive owner remaining as jointly controlling parent → need to amend para. 91 of the Jurisdictional Notice?



The Austria Asphalt judgment

- Court ruled that only JVs having lasting effect on structure of the market are caught by EUMR
- But is full-functionality necessary for such an effect?
 - Counterfactual: if JV will supply both parents, wouldn't absent the transaction production capacities be available for third parties after supply of initial parent?
 - Isn't competition between parents dampedened through entitlement to part of JV's profits?
- Parallel with minority shareholdings?



The Austria Asphalt judgment

- Restructuring of Art. 3 between Reg. 4064/89 and 139/2004 seems to indicate distinction between acquisition of control and FFJVs
- If new parent replaced previous owner in exact same case, would the transaction be notifiable?
- Practical issues:
 - More notifications (Austria, Germany, Poland)
 - Form RS if 3 national filings likely not possible as not a “concentration” under the EUMR?
 - Will all NCAs apply the same test?



HeidelbergCement/Schwenk/Cemex Croatia

- On 5 April 2017 Commission blocked acquisition of Cemex Hungary and Cemex Croatia by DDC
- DDC is a Hungarian JV jointly controlled by HeidelbergCement (HC) and Schwenk
- DDC operates in Hungary, Croatia and parts of the Western Balkans
- At parties' request, assessment of transaction's potential effects in Hungary referred to HCA
- Commission focused exclusively on acquisition of Cemex Croatia



HeidelbergCement/Schwenk/Cemex Croatia

- In August 2015 DDC initiated consultation process with DG COMP on “undertakings concerned”
- In November 2015 DG COMP informed parties that undertakings concerned were HC, Schwenk, Cemex Hungary and Cemex Croatia
- Parties only challenged this after 6(1)(c) decision (not a challengeable act – T-902/16 and T-907/16)



HeidelbergCement/Schwenk/Cemex Croatia

- Commission based its finding on significant involvement of HC and Schwenk in:
 - The initiation
 - The organisation and
 - The financing of the transaction
- The fact that Schwenk was less involved than HC is irrelevant, but it did go further than simply not oppose HC's involvement
- DDC's role was of a supportive character, fulfilling tasks allocated to it



HeidelbergCement/Schwenk/Cemex Croatia

- Paragraphs 146-147 of the Jurisdictional Notice not entirely clear:
 - 146. *Where the acquisition is carried out by a full-function JV (...) and already operates on the same market, the Commission will normally consider the JV itself and the target undertaking to be the undertakings concerned (and not the JV's parent companies).*
 - 147. *Conversely, where the JV can be regarded as a mere vehicle for an acquisition by the parent companies, the Commission will consider each of the parent companies themselves to be the undertakings concerned, rather than the JV, together with the target company. This is the case in particular where the JV (...) has no full-function character (...). The same applies where there are elements which demonstrate that the parent companies are in fact the real players behind the operation. These elements may include a significant involvement by the parent companies themselves in the initiation, organisation and financing of the operation. In those cases, the parent companies are regarded as undertakings concerned.*



HeidelbergCement/Schwenk/Cemex Croatia

- On substance, in-depth investigation because of concerns in supply of grey cement in southern Croatia
- Cemex Croatia: largest cement producer in Croatia
- DDC and HC: largest cement importers in Croatia
- Parties were direct competitors



HeidelbergCement/Schwenk/Cemex Croatia

- CMS of 45-50% in relevant markets and more than 70% in Dalmatia
- In addition, DDC had recent strategy to increase sales in Croatia, resulting in reduced prices
- Construction materials: sold within relatively short distance from manufacturing site (catchment area ~250kms); longer distance for competitors meant higher costs and limited possibilities to expand



HeidelbergCement/Schwenk/Cemex Croatia

- Parties offered to terminate lease for cement terminal in Metkovic port and found new lessee
- Commission found that proposal was not a viable divestiture of a standalone business:
 - Storage facility and not production plant
 - No existing customers
 - No brands
 - No sales staff
 - No established access to cement
 - Lessee would be less cost-competitive
 - Limited capacity of terminal
 - Due to location likely to sell outside Croatian markets



HeidelbergCement/Schwenk/Cemex Croatia

- Case shows Commission's strong preference for structural commitments (as does DB/LSE)
- Holcim/Lafarge and HC/Italcementi showed that significant divestments were required
- Surprising that parties expected to obtain Commission's approval with limited remedy
- Parties have challenged Commission's decision (T-380/17) both on jurisdiction and substance (incl. if Commission could prohibit Cemex Hungary acquisition after it had referred it to HCA)



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