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Publicis/Omnicom: regulators and the global market for marketing

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Summary

Nothing raises anti-trust eyebrows like a mega merger, and the proposed Publicis/Omnicom combination last week is certainly that. The deal will have to be approved by competition regulators in Europe, the US and Asia. The companies themselves are confident of regulatory approval for the merger, and they are probably ultimately right. But in getting there they will be dealing with regulators whose views of consolidation in digital industries are being shaped by a deep suspicion of scale and a shifting view of how 'market power' works on the internet. Here we look at the three basic questions for regulators and one potential wildcard for the parties – China.

Nothing raises anti-trust eyebrows like a mega merger, and the proposed Publicis/Omnicom combination this week is certainly that. Combining the French and American group would create the largest advertising and marketing conglomerate in the world, with a substantial presence Europe, the US and Asia. The deal will have to be approved by competition regulators in all these markets. The companies themselves are confident of regulatory approval, and they are probably ultimately right. But in getting there they will be dealing with regulators whose views of consolidation in digital industries are being shaped by a deep suspicion of scale and a shifting view of how 'market power' works on the internet.

What and where is the market for marketing?

As with almost any antitrust case for a large multinational, there will be two important cuts of the market share numbers. This will determine the relevant geographical and product markets regulators will use to assess the deal. The first concerns products and services. For multinational conglomerates with a wide product offering this is key to determining their market power. Regulators have generally treated marketing services across advertising, public relations and brand development and management as 'substitutable' – none require the specialisation that defines them as a separate market segment. The smaller the market segments – breaking a market down into healthcare or financial services PR, for example - the more likely that a single player may appear to have the kind of dominance that competition regulators get nervous about.

The most recent European precedents on this come from the European Commission's judgement in the merger of UK WPP Group and US Grey Group in 2005. Clearing the merger without conditions, the Commission accepted WPP's argument that the two agencies operated in a single market for 'marketing communications services' that need not be further segmented. They also accepted the parties' argument that no distinction should be made between different types of media – so no market segmenting by internet or TV focus, for example.

This precedent looks pretty secure ten years on. If anything, the boundaries between communications media have been even further blurred by digital content and the delivery of marketing content to mobile devices. Any credible marketing agency offers services across most or all channels, often with the

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same core content. The key exception to this will be media-buying, which the European Commission judged a separate market segment in the WPP/Grey case and which will be treated the same here. For the reasons discussed below, this is where regulatory concerns will be focused.

The second important cut of the numbers will be based on geographies. The European Commission accepted in the WPP/Grey case that markets for marketing services were largely national on account of linguistic or other cultural features. The interesting thing here will be if Publicis/Omnicom are tempted to try and argue that this national fragmentation of markets is being replaced by an international market for marketing services. They would do this because the scale of the new company in a global context – an estimated fifth of the global media buying market, for example - looks a lot less strong than some of its positions in national markets, such as the estimated 40 percent share of media buying the group will have in the US.

The European Commission was sceptical about this argument in 2005. Even with the blurring of geographical lines by the internet and the industry's own hype about global campaigning and capabilities, both sides are likely to accept that marketing is still essentially a national business. It will be interesting how the European Commission chooses to assess the European market in this respect. Effectively, it will be making a judgement on whether language and national differences still trump the internet-driven integration of the European digital single market for marketers. The probability is that they will conclude that European markets are still national – which will keep the focus on concentration in each individual market.

Market(ing) power?

When regulators turn to the question of 'market power' they will be looking at some of the fundamentals of the modern marketing model. Publicis/Omnicom, like WPP before them, will argue that their scale is a red herring in terms of market power, especially in advertising. Both are conglomerates in which subsidiary agencies compete aggressively against each other, in part to manage the conflict of interests that would arise if a single large agency sought to service competing clients. The merged group will simply do this on a larger scale.

Blocking a merger requires an effective 'theory of harm'- a convincing case that a combination will limit competition in a way that harms customers. With most of the business of a large marketing services agency done with other businesses, the usual regulatory concern about the impact of concentration on consumers is harder to show. The regulatory assumption with the marketing industry has typically been that barriers to entry are low and that clients will switch quickly to more innovative players if they feel squeezed or unsatisfied. Again, the digital quality of much modern marketing content only reinforces this. There will be corporates and competitors who grumble that consolidation means more homogeneity in approach and strategic advice, but regulators are likely to conclude that low barriers to entry should mean that innovators can still easily take business away from the big, slow and unimaginative.

However, there are a couple of areas where regulators will take a harder look. The first is in media buying, where the role of the agencies as an intermediary between advertisers and media will be scrutinised closely, especially in the US where the two merged agencies will be a huge player. In 2005, the European Commission was concerned by the potential power of the merged WPP/Grey group to dictate terms to television and print, especially in Germany. However, it concluded ultimately that the 'countervailing power' of the media players was sufficient to keep things competitive. This time around regulators are, if anything, more likely to side instinctively with the agencies in their claim that the value in consolidation lies in driving better terms with large dominant digital content platforms like Google, Yahoo and Facebook.

These platforms may take a shot at the merger, but they are a bit short on political capital. Indeed, neither side has a huge amount of instinctive policymaker support. The prospect of an arms race in which big digital content platforms require highly

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consolidated digital content providers to balance out their market power is not something regulators are particularly relaxed about. In fact, there are some strong and interesting parallels with the music industry, where Universal and EMI argued in their own merger defence last year that the market power of I-Tunes and other content platforms meant rights holders had to fight ever harder for a reasonable return.

Regulators may also be uncomfortable about the big data angle on the transaction, which is increasingly central to targeting marketing and is one of the key rationales for the Publicis/Omnicom merger. Technically complex to gather and expensive to analyse effectively, it is an area in which consolidation could potentially act as a check to new market entrants in the eyes of regulators. What Publicis/Omnicom present as big data expertise could strike regulators as an unhealthy development. In reality, the tendency of large consumer-facing corporates to build their own data analysis capabilities as much as pass this data over to their marketers probably means regulators will remain wary but acquiescent.

What if China doesn't buy it?

A final unpredictable may be China, where both Omnicom and Publicis are active – Publicis' media buyer VivaKi is a major Chinese player. Publicis and Omnicom appear to be calculating on Chinese merger clearance by the end of the year. The last few years have provided a series of object lessons about betting on quick clearance in China, even when the market share numbers look good. The recent Glencore/Marubeni case in China was a reminder that the Chinese merger control process follows its own political prerogatives and can quickly stray into policy issues much wider than simply anti-competitive behaviour. With state-backed television the biggest seller of advertising in China by a long way, and state-backed radio also a significant consumer, there is every reason to expect the Chinese authorities, led by the Ministry of Commerce (MOFCOM), to want to take a poke under the hood of this merger. This could potentially slow things down significantly.

The odds on the merger going through look good enough, although forced divestments in sensitive areas such as media buying and in the US cannot be ruled out. Precedents like the WPP/Grey case help set the basic terms for a merger review, but the dramatic evolution of digital marketing over the last decade makes 2005 feel a long time ago. The development of online giants like Google and Facebook and the issues around big data and the evolution of a competitive digital economy have all left regulators pondering what, if anything, their obligations are in an increasingly digital marketplace. They are likely to use the process to air and refine some growing anxieties about markets and marketing in a digital world.

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