

SHEARMAN & STERLING_{LLP}



Bay Area Antitrust Seminar Series

What High-Tech Companies Need to Know About EU & International Merger Control

November 19, 2010

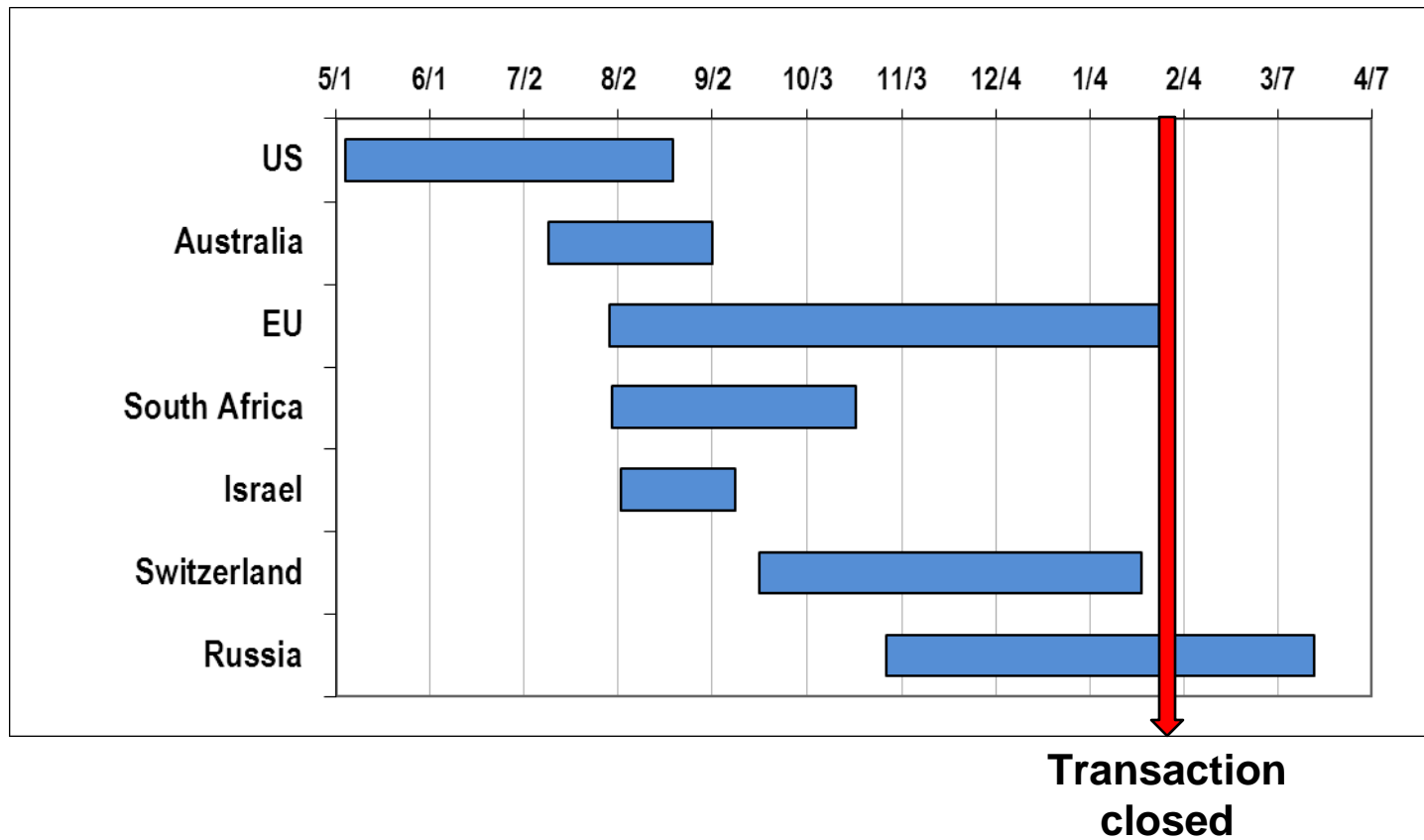
The Four Seasons Hotel
East Palo Alto, California

8:00AM - 9:30AM

1.5 California CLE Credits

Shearman & Sterling LLP Speakers:
Hans Jürgen Meyer-Lindemann
Matthew Readings
Lisl Dunlop
Dale Collins

Oracle/Sun Microsystems Merger Filings



Filings also made in Brazil, Canada, China, Japan, Korea, Mexico and Turkey.



Filters / safe harbours

Horizontal overlaps

- Affected market threshold
 - 15% combined market share
- Presumption that no concern
 - 25% combined market share
 - HHI/concentration levels
 - 1000 to 2000 and delta below 250
 - Above 2000 and delta below 150


Vertical/conglomerate links

- Affected market threshold
 - 25% combined market share
- Presumption that no concern
 - 30% combined market share



Market definition

- *... the precise delineation of the product market can be left open since no competition concerns arise on the basis of any of the plausible market definitions*
- Closing down a case on market share filters / safe harbours typically requires consideration of a range of relatively narrow potential markets
- Can be challenging in hi-tech cases
 - Product / functionality level
 - High-end vs low-end
 - Industry vertical
- Industry classifications and share of supply data often used as starting point
 - e.g. Gartner / IDC



Closeness of competition

- Substitutability of parties' products versus competitors' products
- Hi-tech factors
 - Functionality, price, customer type etc
- Qualitative vs quantitative evidence and analysis
 - Internal documents and third party questionnaires
 - Win/loss data etc (data permitting)
- *IBM/Telelogic*
 - High combined market shares – up to 70% on Gartner data
 - But products not close substitutes, so cleared (in Phase II)
 - Modelling and requirement management tools



Other issues

- Loss of an important competitive constraint
 - *Oracle/Sun - MYSQL*

- Impact on innovation
 - Drivers of innovation
 - *IBM/Telelogic* analysis

- Constraint from competitors
 - Substitutability of products
 - Switching costs/barriers
 - Obstacles to expansion (IPR)
 - Repositioning / new entry



Foreclosure issues

- Wide range of potential foreclosure strategies / theories of harm
 - Refusal to supply a key input, or only at a higher price or with an inferior product
 - Withdrawing/degrading inter-operability
 - Bundling/tying
 - Access to confidential information

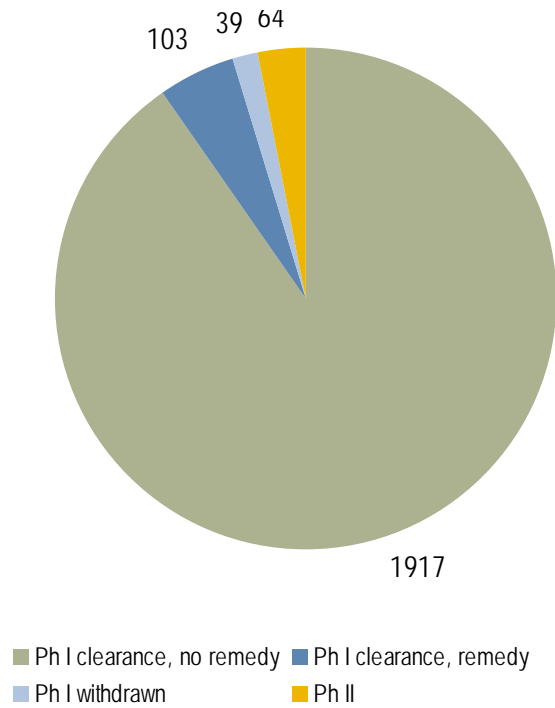
- Ability and incentive ?
 - Technical ability, competition/alternatives and profitability (gains vs losses)

- Significant detrimental impact on competition ?
 - Extent of foreclosure – e.g. integrated competitors, contractual protection etc

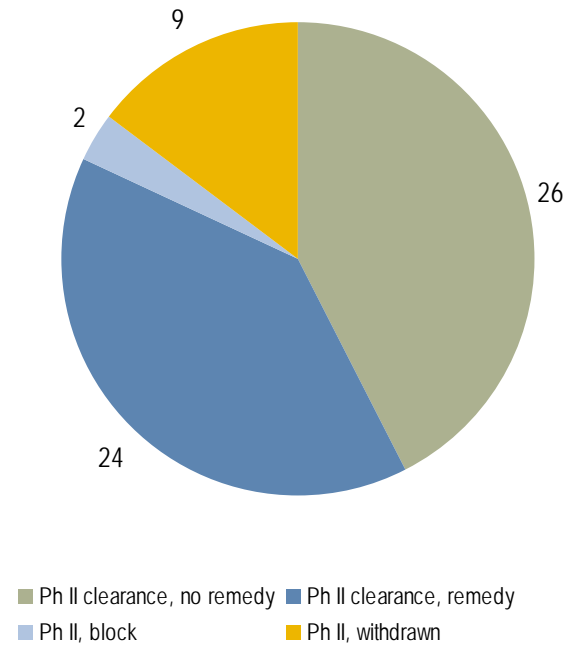
- Efficiencies

Commission intervention since 2004

Cases notified to Commission

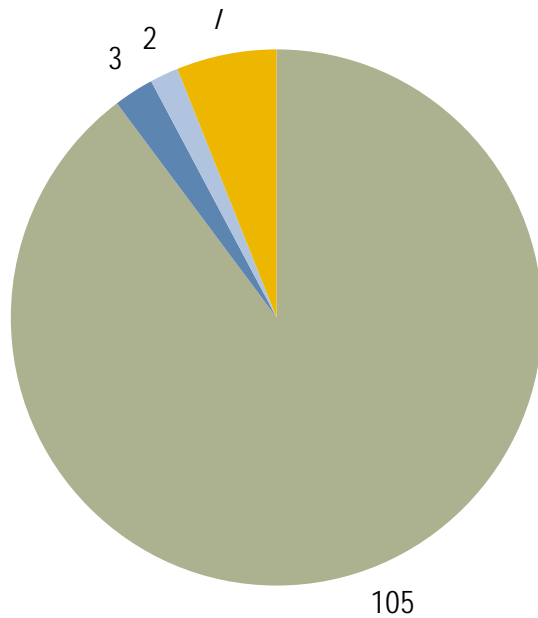


Phase II cases



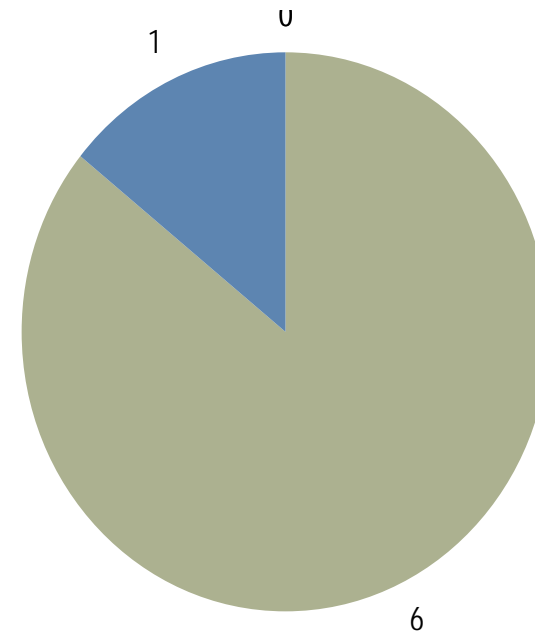
Hi-tech cases since 2006

Hi-tech cases notified to Commission




■ Ph I clearance, no remedy ■ Ph I clearance, remedy
 ■ Ph I withdrawn ■ Ph II

Phase II hi-tech cases



■ Ph II clearance, no remedy ■ Ph II clearance, remedy
 ■ Ph II, block ■ Ph II, withdrawn

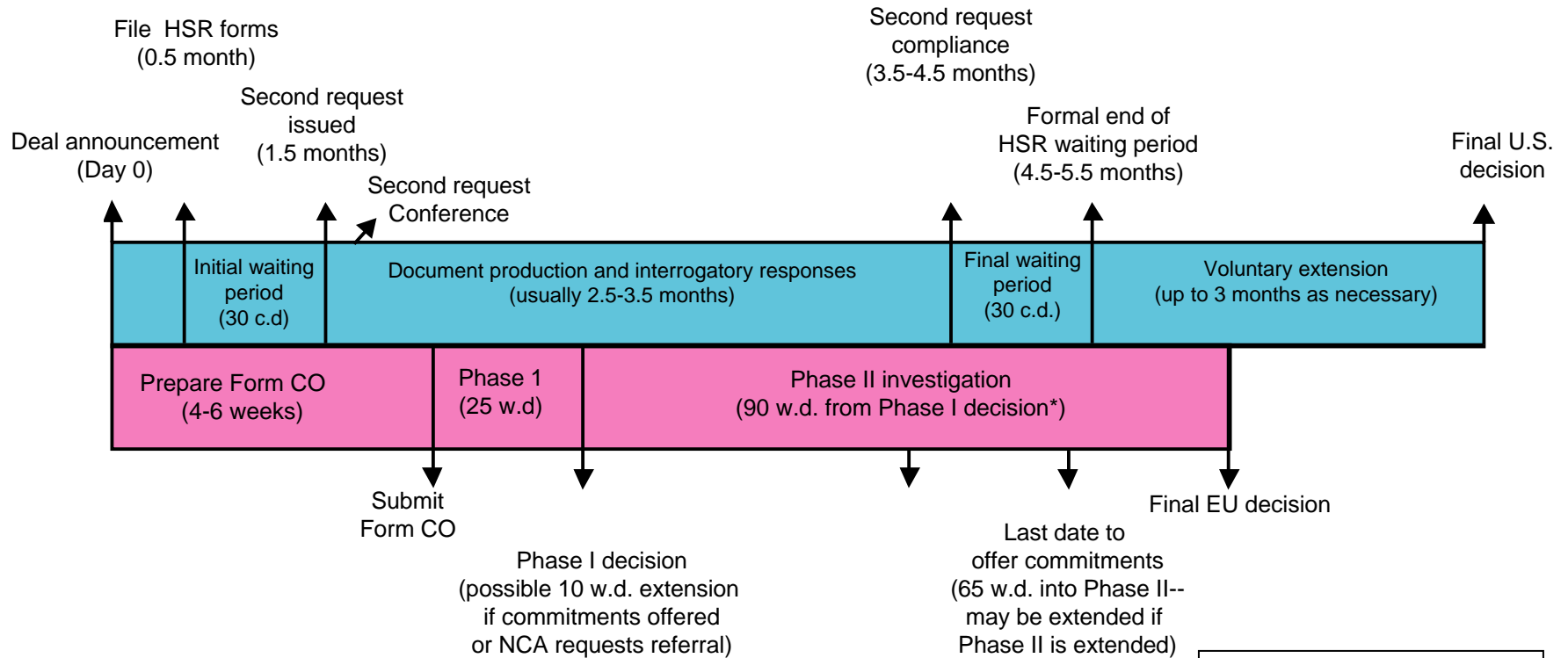
Only 7 hi-tech phase II cases. None blocked or withdrawn.
 SOs issued in 2 cases – both cleared unconditionally – TomTom/Tele Atlas
 and Oracle/Sun. Remedies in one case – Thomson/Reuters.



Situations to watch out for

- No.1 by a distance ?
 - Segment share > 40% ?
- Direct and close competitors ?
 - First and second choices for customers ?
- Target a key driver of competitive dynamics ?
 - Rapidly increasing segment share ?
- Control of scarce resource / key input ?
 - 'Must have' product ?
 - Interoperability issues ?

US-EU Review Timetables



c.d. Calendar days
w.d. Working days

Statement of Objections (around 45-50 w.d into Phase II)
Oral hearing (around 55-60 w.d into Phase II)

- * Phase II extensions
- May be extended to 105 working days if parties offer commitments after 54th day of Phase II
 - May be extended to 110 working days on request or consent of the parties
 - Maximum extension of Phase II: 125 working days



Procedural and cultural influences

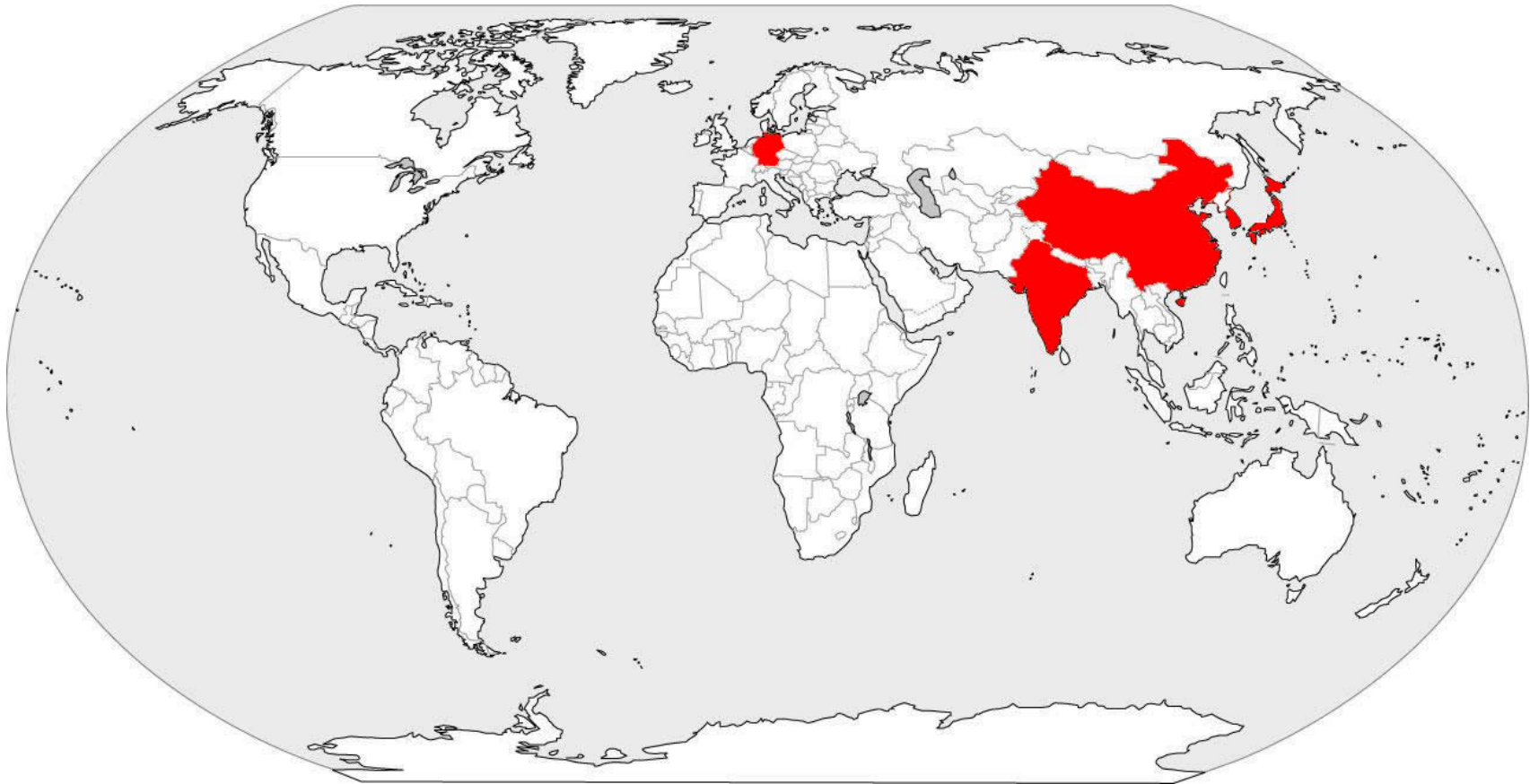
- Commission takes final decision, no need to go to Court
- Reasoned clearance decision to write up (and defend)
 - Significant information burden (pre-notification process)
 - Lengthy clearance timetable even where no real concerns (> 3 months)
- Rigid timing and procedure / focus on written submissions
- Reliance on third parties
- Case team composition



Practical tips

- Find efficient way to provide 'market share' data requirements
 - Gating item for notification
 - Look to work with industry research e.g. Gartner
- In parallel, work out best way to get case team comfortable on substance
 - If overlap, don't overdo market definition / shares arguments
 - Bottom up product comparison – parties and competitors
 - Use business people to educate case team
 - Face to face meetings / conference calls early in the process
 - Internal documents to substantiate arguments
- Constructive and regular dialogue with Deisenhofer (Head of Unit)
 - Establish informal communication channels with more junior case team members

International Merger Control – Key Jurisdictions to Watch



International Merger Control – Other Common Filing Jurisdictions

