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Judicial review of mergers

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Abstract

After the significant and much publicised appeals heard by the EC courts in 2002 and early 2003, 2004 has been a quieter year for judicial review of merger cases. Nevertheless, 2004 has seen judgments and opinions that further develop EC merger control law, albeit largely on procedural points. On the substantive side, Advocate General Tizzano delivered his opinion1 in the appeal against the judgment of the Court of First Instance ('CFI') in the Tetra Laval case, where he focused on the standard of proof required in Commission merger decisions and the scope of permissible judicial review of those decisions. The eagerly awaited judgments of the European Court of Justice ('ECJ') in the Tetra Laval case3 and also of the CFI in GE's challenge to the GE/Honeywell prohibition4 and in WorldCom/MCI5 will provide further guidance on the scope of judicial review, as well as on the substantive appraisal of mergers. In the meantime, the Commission has pressed forward with its overhaul of the EC merger review system. Whilst these reforms were initiated with the publication of the Green Paper prior to the defeats sustained by the Commission at the CFI, the need for reform became clear as a result of the dramatic events of 2002. With the reforms it has now put in place, the Commission is hoping to address some of the criticisms voiced in recent years.

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After the significant and much publicised appeals heard by the EC courts in 2002 and early 2003, 2004 has been a quieter year for judicial review of merger cases. Nevertheless, 2004 has seen judgments and opinions that further develop EC merger control law, albeit largely on procedural points. On the substantive side, Advocate General Tizzano delivered his opinion[1] in the appeal against the judgment of the Court of First Instance ('CFI') in the *Tetra Laval* case[2], where he focused on the standard of proof required in Commission merger decisions and the scope of permissible judicial review of those decisions. The eagerly awaited judgments of the European Court of Justice ('ECJ') in the *Tetra Laval* case[3] and also of the CFI in GE's challenge to the *GE/Honeywell* prohibition[4] and in *WorldCom/MCI*[5] will provide further guidance on the scope of judicial review, as well as on the substantive appraisal of mergers. In the meantime, the Commission has pressed forward with its overhaul of the EC merger review system. Whilst these reforms were initiated with the publication of the Green Paper prior to the defeats sustained by the Commission at the CFI, the need for reform became clear as a result of the dramatic events of 2002. With the reforms it has now put in place, the Commission is hoping to address some of the criticisms voiced in recent years.

This chapter examines recent EC judicial review cases and the guidance that they provide on various aspects of merger review, including the operation of the referral system from the Commission to national authorities and the standing of third parties to obtain judicial review of Commission decisions. They also provide important clarification of the Commission's ability to accept commitments in phase I cases.

Recent judicial review cases

Rights of third parties—standing to challenge a merger decision

Prior EC court judgments in this area had established that third parties who are not direct competitors can have standing to challenge a merger clearance decision. In its 2003 *Babyliss* judgment[6], the CFI examined whether the Commission's decision to clear the concentration between SEB and Moulinex was open to challenge by Babyliss, a third party who had taken part in the Commission's procedure. The CFI held that Babyliss had standing to challenge the clearance decision even though it was present in only one of the 13 product categories that were affected by the merger. The CFI noted that Babyliss was at least a potential competitor for the remaining twelve product categories, in particular given that, even prior to entering the retail market, there was competition among suppliers to be listed with distributors.

The recent *ARD v Commission* decision[7] also concerned a third-party challenge and elaborated further on the standing of third parties to challenge merger decisions. In this case ARD, a company providing free-to-air TV services in Germany, appealed the Commission's decision to clear a concentration between Kirch Pay TV and BSkyB involving the markets for pay TV, digital interactive services and the acquisition of broadcasting rights. The CFI found that the 'direct and individual concern' test could be met by a third party which was not present on the market that was the subject of a substantive clearance decision and which was not even a potential competitor to the parties. Unlike the *Babyliss* scenario[8], ARD was not present on any of the markets affected by the decision and could not be considered as a potential competitor in anything other than a hypothetical sense. The CFI decided that, where an undertaking's monopoly position is strengthened, an action brought by an operator present in a neighbouring upstream or downstream market could be admissible, particularly where there was evidence of some competition between the markets and the potential for future convergence between them.

Rights of third parties—standing to challenge a referral decision

The *SEB/Moulinex* case[9] had given rise not only to a challenge of the Commission's clearance decision, but also to a challenge regarding the Commission's decision to refer part of the merger back to the French authorities. This latter appeal was brought by Philips Electronics. In its 2003 judgment[10], the CFI held that a third party can be 'directly and individually concerned' and thus challenge a decision by the Commission under Article 9(2) of the Merger Regulation to refer a notified concentration to a national authority. The CFI found that a positive referral decision produces direct and automatic legal effects on third parties because it removes the possibility for the proposed concentration to be examined under the Merger Regulation, thereby preventing third parties from availing themselves of the legal protection conferred upon them by the Treaty. The requirement for individual concern was met because the partial referral removed the possibility for those third parties to challenge assessments before the CFI which they otherwise could have done had the referral not been made.

In *Cableuropa and other v Commission*[11], the CFI confirmed these principles in the context of a referral in totality of a concentration by the Commission to a national authority. Cableuropa and the other applicants had been participants in the procedure regarding the proposed concentration between Sogecable, Canalsatellite and Via Digital. They had responded to the Commission's requests for information and had provided comments on the acceptability of the proposed concentration. The CFI found that the applicants were directly concerned by the Commission's decision to accede to the request of the Spanish authorities to refer the matter to them. As regards individual concern, the CFI held that third parties who would have availed themselves of the right to be heard, had the Commission not referred the case and instead opened phase II proceedings, would have been individually concerned by a final decision and were

therefore similarly concerned by the decision to refer the concentration to a national authority.

This case law confirms the extension to the area of mergers of the more flexible interpretation which prevails in competition law of the 'directly and individually concerned' criteria of Article 230 EC (allowing private parties to challenge a Community act), as opposed to the much stricter interpretation applying under the *Plaumann* case law.[12]

Rights of third parties—right to a decision

In September 2003, the ECJ gave judgment in the appeal by Schlüsselverlag JS Moser GmbH ('Moser')[13] against the CFI's dismissal of its action for a declaration under Article 232 EC that the Commission had failed to act by not adopting a decision under the Merger Regulation regarding a concentration between two Austrian undertakings. The concentration had been approved by the Austrian authorities in January 2001 and Moser had lodged a complaint with the Commission in May 2001, claiming that the concentration had a Community dimension and should have been notified to the Commission. The Commission considered that the concentration did not meet the thresholds for Community jurisdiction and replied to that effect to the applicant. Following further discussions concerning the issue of control over certain of the parties, the Commission informed the applicant in November 2001 that it still considered that it did not have competence under the Merger Regulation and so could not adopt a decision in the matter. The applicant appealed to the CFI, who dismissed the application as inadmissible.[14] The CFI found that the Commission's November 2001 letter constituted an act capable of challenge under Article 230 EC and that there was no failure to act. In particular, the CFI found that the November 2001 letter expressed the view of the Commission, even though it was signed only by the head of the Merger Task Force.

In the appeal, the Commission had argued that it was not, in any event, under an obligation formally to define its position on the complaint. The ECJ rejected this argument. It held that the Commission is solely responsible for taking the decisions provided for by the Merger Regulation (exclusive jurisdiction) and therefore cannot argue that it is not required to take a decision on the very principle of its competence under that Regulation. It further held that the Commission cannot be justified in avoiding "its obligation to undertake, in the interests of sound administration, a thorough and impartial examination of the complaints which are made to it" and to "give a reasoned response to a complaint that it has specifically failed to exercise its competence".

However, the ECJ found that the applicant's complaint to the Commission was out of time. It held that, if the Commission could be required to make a determination on the compatibility of a concentration outside a reasonable period, this would cause the requirements of legal certainty and of continuity of Community action to be disregarded. Such a possibility would allow third parties to have the Commission call into question a decision taken by competent national authorities, even after the exhaustion of possible legal remedies against such a decision in the legal system of the Member State concerned. In this case, the concentration had been notified to the Austrian authorities in September 2000 and approved in January 2001. At any time during that period the applicant could have asked the Commission to examine whether the concentration had a Community dimension. However, it did not do so until May 2001 (four months following the national clearance). In these circumstances, the ECJ found that the time period within which the applicant had asked the Commission to act was not reasonable and that it was therefore not open to the applicant to bring an action for failure to act.

This case serves as a warning to complainants to ensure that they do not delay in bringing a complaint to the Commission. It also provides some additional security for complainants that they are entitled to receive a decision from the Commission as long as they comply with the timeliness requirement. In the area of mergers, this judgment is a confirmation of the position already adopted by the European courts in other areas of competition law, ie Articles 81 and 82 EC cases (eg *Automec I*[15] and *II*[16]); state aid cases (eg *Sytraval*[17]); and Article 86 EC cases (eg *max.mobil*[18]).

Legitimate interests and jurisdiction of the Commission

Also important from a procedural perspective, was the judgment of the ECJ in *Portugal v Commission*[19], concerning the possibility for Member States under Article 21 of the Merger Regulation to take measures to protect national legitimate interests. This case concerned a concentration whereby Secilpar (a Spanish company) together with Holderbank (a Swiss investment company) proposed to acquire Cimpor-Cimentos de Portugal, a former public undertaking. The proposed acquisition was notified to the Commission for approval under the Merger Regulation and to the Portuguese Minister for Finance for authorisation to acquire the voting capital of Cimpor. The Minister refused to provide authorisation, inter alia because the acquisition would have entailed the withdrawal of Cimpor from the Portuguese capital market and it was incompatible with the Portuguese government's strategies for restructuring the sector. The Portuguese government sent a copy of its decision to the Commission, which took the view that the Portuguese government had failed in its duty under Article 21 of the Merger Regulation to give the Commission prior notice of its intention to disallow a concentration, to inform the Commission of the interests it was seeking to protect by that measure, and to allow the Commission to assess the compatibility of those reasons with Article 21. The Commission took a formal decision finding that the reasons of the Portuguese government for disapproving the proposed acquisition were not compatible with Article 21 of the Merger Regulation.

This decision was appealed by the Portuguese government. One plea put forward was that the Commission had no competence to adopt the contested decision in the absence of any communication from the Portuguese government concerning the interests protected by the national measures. The ECJ rejected this plea and held that the Commission has jurisdiction under Article 21(3) (now Article 21(4), of the Merger Regulation—applicability of national legitimate interests to notified concentrations), to take a decision that a Member State had acted in contravention of that article, regardless of whether the Member State had provided the Commission with the requisite notification of its action. To hold otherwise, according to the ECJ, would render the article ineffective by giving Member States the possibility of easily circumventing the controls therein.

Scope of judicial review and the Commission's standard of proof

The Advocate General's opinion in the *Tetra Laval* appeal[20] contains interesting statements regarding the standard of merger review by the Commission and subsequent judicial review by the CFI. In particular, as regards the standard of proof required to prohibit a merger, the Advocate General found that the Commission must not prohibit a merger unless it is persuaded "on the basis of solid elements gathered in the course of a thorough and painstaking investigation and having recourse to its technical knowledge" that the notified concentration "would very probably lead" to the creation or strengthening of a dominant position. In cases where it is impossible to arrive at a clear distinct conviction that such a likelihood is greater than the likelihood that there will be no creation or strengthening of a dominant position, the merger must be cleared. The Advocate General supported this view by reference to the ability of the Commission and Member States to limit ex post any distortions of

competition if a dominant position was created or strengthened. He also referred to the fact that a concentration, which has not been challenged within the time limits set down in the Merger Regulation, is automatically deemed to be cleared, so as to avoid unjustifiably restraining the parties' freedom of economic activity.

The CFI in *Cableuropa*[21] also dealt with the standard of proof required in merger reviews, but in relation to the decision to refer a concentration to a national authority for review.[22] Following the position it took in the *Philips* case[23], the CFI held that the conditions for referral under Article 9(2) of the Merger Regulation are matters of law and must be interpreted on the basis of objective factors. This required the EC courts, charged with judicially reviewing a decision under that article, to carry out "a comprehensive review as to whether a concentration falls within the scope of Article 9(2)(a)". The CFI emphasised that, for Article 9(2)(a)[24] to be applicable, two cumulative conditions must be satisfied: (i) the concentration must threaten to create or strengthen a dominant position as a result of which competition will be significantly impeded on a market within the Member State concerned, and (ii) that market must present all the characteristics of a relevant market. However, even though the CFI considered that it must "carry out a comprehensive review" of whether those conditions are met, it nonetheless did so in the light of the standard of review set down in *Airtours*[25] namely that, in matters of market definition, the Commission's findings will stand in the absence of a "manifest error of assessment". Therefore, although the CFI is prepared to carry out a thorough review of Commission referral decisions, it has signalled that it is not willing to subject the Commission to a higher standard of proof than the Commission would face in relation to the same issues had it retained jurisdiction over a concentration rather than passing it to a national authority.

Substantive review—commitments

The *ARD* judgment[26] also provided clarification on the important issue of commitments.[27] ARD had taken an active role in the review of the concentration between Kirch PayTV and BSkyB and was given the opportunity to review the parties' proposed commitments and one revision to those commitments. It challenged the Commission's phase I clearance of the concentration, following acceptance of those commitments. In dismissing ARD's appeal, the CFI confirmed a number of important points regarding the acceptance of commitments by the Commission in phase I cases:

- Prior negative decisions in relation to the same/similar markets do not automatically mean that phase I commitments cannot resolve the competition concerns arising in a given case, as each merger must be reviewed in the light of its own particular circumstances and impact on the market
- Commitments that may appear to be purely behavioural but are aimed at resolving a structural problem (such as undertakings to allow access to the market by third parties) are capable of remedying the serious competition problems identified
- As a general matter, commitments go beyond the general monitoring provided for in Article 82 EC because they are imposed as preconditions for clearance. Therefore, they transfer the burden of proof of compliance to the undertakings concerned and their breach can lead to revocation of the clearance
- When reviewing the efficacy of commitments to resolve the identified competition concerns, individual commitments should not be viewed in isolation but in the overall context of all the commitments undertaken

Conclusion

The EC courts are continuing to influence positively the development of merger control through their willingness to engage proactively in the review of Commission decisions, whether decisions to refer concentrations to national authorities or decisions on the substance of concentrations themselves. In particular, the CFI has been keen to solidify further the rights of complainants and interested parties to challenge such decisions before the EC courts. However, whilst the CFI has demonstrated a continuing willingness to examine challenges to Commission decisions, it has nonetheless been less critical of Commission decisions than in previous years. For example, it has confirmed a number of principles regarding the acceptance of commitments in phase I that the Commission will be grateful to have upheld. It has also made clear that the Commission does not face a higher standard of review than the 'manifest error of assessment' standard in relation to its findings under the referral procedure. At a time when the Commission is seeking to move forward with its merger reforms and to put the past criticisms behind it, the judicial review cases of the past year will surely be welcomed.

Nonetheless, with the judgments from the CFI and ECJ in the cases concerning *Tetra Laval*, *GE/Honeywell* and *Worldcom/MCI* expected in the near future, the EC courts are certain to provide further important guidance on substantive issues. The Commission's merger reform process will also continue to evolve as those judg-

ments are given, for example in the development of guidelines on vertical and conglomerate mergers. The influence of the EC courts on merger control in the EU is therefore set to continue.

Notes

1 Case C-12/03 P, *Commission v Tetra Laval*, opinion of Advocate General Tizzano, delivered 25 May 2004.
2 Case T-5/02, *Tetra Laval v Commission*, judgment of 25 October 2002.
3 Case C-12/03 P, *Commission v Tetra Laval*, still pending.
4 Case COMP/M.2220, *General Electric/Honeywell*, Commission decision of 3 July 2001; on appeal case T-210/01, *General Electric v Commission*, still pending and Case T-209/01, *Honeywell International v Commission*, still pending.
5 Case COMP/M.1741, *MCI WorldCom/Sprint*, Commission decision of 28 June 2000; on appeal case T-310/00, *MCI v Commission*, pending.
6 Case T-114/02, *BaByliss v Commission*, judgment of 3 April 2003.
7 Case T-158/00, *ARD v Commission*, judgment of 30 September 2003.
8 See footnote 6.
9 Case COMP/M.2621, *SEB/Moulinex*, Commission decision of 8 January 2002.
10 Case T-119/02, *Royal Philips Electronics v Commission*, judgment of 3 April 2003.
11 Joined Cases T-346/02 and T-347/02, *Cableuropa and Others v Commission*, 30 September 2003.
12 Case 25-62, *Plaumann v Commission*, judgment of 15 July 1963.
13 Case C-170/02 P, *Schlüsselverlag JS Moser and Others v Commission*, judgment of 25 September 2003.
14 Case T-3/02, *Schlüsselverlag JS Moser and Others v Commission*, order of 11 March 2002.
15 Case T-64/89, *Automec Srl v Commission*, judgment of 10 July 1990.
16 Case T-24/90, *Automec Srl v Commission*, judgment of 18 September 1992.
17 Case C-367/95 P, *Commission v Sytraval*, judgment of 2 April 1998.
18 Case T-54/99, *max.mobil v Commission*, judgment of 30 January 2002, under appeal, C-141/02, *Commission v max.mobil Telekommunikation Service*.
19 Case C-42/01, *Portugal v Commission*, judgment of 22 June 2004.
20 See footnote 1.
21 See footnote 11.
22 The new Merger Regulation facilitates referral decisions before the formal filing of notifications and simplifies the conditions for referral.
23 See footnote 10.
24 These conditions have been simplified under the reform of the Merger Regulation.
25 Case T-342/99, *Airtours v Commission*, judgment of 6 June 2002.
26 See footnote 7.
27 The issue of commitments had already been discussed in previous cases *Kali* and *Salz* (Cases C-68/94 and C-30/95, *Kali und Salz*, judgment of 31 March 1998) and *Coca-Cola* (Joined Cases T-125/97 and T-127/97, *The Coca-Cola Company and Coca-Cola Enterprises v Commission*, judgment of 22 March 2000) and *Gencor* (Case T-102/96, *Gencor v Commission*, judgment of 25 March 1999).