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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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, 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 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, 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 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, 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 Cable Europa and other v Commission, the CFI confirmed these principles in the context of a referral in totality of a concentration by the Commission to a national authority. Cable Europa and the other applicants had been participants in the procedure regarding the proposed concentration between Sogecable, Canal Satellite 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 concentra-
tion 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 (allow-
ing 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 2000, the Competition Commission had to decide on
whether the concentration should be rejected or approved. The
applicant, Schuster Ventures was dissatisfied with the outcome of the
decision and decided to file a complaint with the Court of First In-
stance (CFI). The CFI had the power to reverse or modify the decision
of the Commission. The CFI found that the Commission had failed to
consider the relevant aspects of the case and that the decision was
lawful and binding. The applicant was therefore entitled to bring a
complaint to the CFI. However, the applicant did not bring a com-
plaint to the CFI and the decision of the Commission was therefore
final. The applicant could not bring an action for failure to act.

The ECJ found that the time period within which the applicant had asked
the Commission to call into question the decision was four months
from the date of the decision. At any time during that period the applicant
could have asked the Commission to call into question the decision.
The applicant therefore had not taken the necessary steps to bring the
case to the CFI.

Legitimate interests and jurisdiction of the Commission

In article 230 EC, the possibility for Member States to limit ex post any
distortions of competition is stated. However, the.article only gives the
Commission the power to decide whether a concentration is lawful and
binding. In this case, the Commission had jurisdiction 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 for-
nal 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 Mem-
ber State had acted in contravention of that article, regardless of
whether the Member State had provided the Commission with the
request 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 appeal15 contains
interesting statements regarding the standard of merger review by
the Commission and subsequent judicial review by the CFI. In par-
icular, 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 con-
centration “would very probably lead” to the creation or strength-
ing 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 Gen-
eral supported this view by reference to the ability of the Commis-
ion and Member States to limit ex post any distortions of

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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 CableEuropa20 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.21 Following the position it took in the Philips case21, 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)22 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 Airtours23 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 judgment24 also provided clarification on the important issue of commitments.25 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.
3 Case C-12/03 P, Commission v Tetra Laval, 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.
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.
17 Case C-367/95 P, Commission v Sytraval, judgment of 2 April 1998.
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.
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).