Judicial review in EU merger control: recent developments

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Ever since the Court of First Instance (CFI) annulled three prohibition decisions in 2002, judicial review in EU merger control has commanded a considerable amount of attention. The importance of judgments from the CFI and the European Court of Justice (ECJ) derives not only from the effect they have on the individual case decided and as a matter of judicial precedent; at least as important is the effect these judgments have on the day-to-day practice of the Commission in all subsequent cases.

This report covers the period from September 2005 until August 2006, which brought four judgments relating to merger control, all from the CFI. These cases will be discussed below. The second part of this chapter will identify trends that can be discerned within the jurisprudence of the courts and in particular of the CFI.

Major cases decided

General Electric/Honeywell

Four and a half years after what constitutes perhaps the Commission’s most controversial prohibition decision, that of the planned merger between General Electric (GE) and Honeywell, the CFI affirmed that decision on 14 December 2005. By that time the matter had become one of academic interest only. While endorsing the Commission’s analysis of horizontal overlaps, the judgment criticises its analysis of the vertical and in particular conglomerate aspects of the merger. Though the CFI ruling invalidated the most important aspects of the reasoning supporting the prohibition (in particular, the conglomerate ones), it did not annul the decision. The prohibition was based on a number of independent concerns identified by the Commission, including those related to the horizontal effects that the CFI upheld.

Conglomerate effects

As regards conglomerate effects in particular, it was required to show that the entity would engage in such conduct; that, on the basis of convincing evidence, there existed the likelihood that the entity would engage in such conduct; and that this conduct would lead to the creation of a dominant position on those relevant markets in the near future.

Although the bar to be cleared by the Commission to establish conglomerate effects had been set very high, the Court was careful not to jettison the theory entirely. On the contrary, examples of circumstances that may be considered to constitute sufficient evidence were offered. These included internal company documentation demonstrating an intention to act in this way and economic assessment showing that such behaviour would have been in the company’s commercial interests. In the absence of documentation, the Court was left with the economic assessment carried out by the Commission, and found that this had failed to consider some relevant factors. In particular, the Commission had not taken account of the possible costs that would be incurred through the pursuit of the foreseen promotion scheme. The Court also held that even assuming that the share-shifting practices were to have been put into effect, the Commission had not sufficiently established that a dominant position on the various markets for avionics and non-avionics products would be created.

Bundling

Bundling refers to the practice of packaged offers. The Commission was concerned that the broad range of complementary products controlled by the merged entity would lead to bundling. Financed through cross-subsidisation, bundling would allow for short-term price reductions but would in the long term drive out competitors to the detriment of consumers. In setting out the Tetra Laval standard, the Court highlighted again the need for rigorous economic and legal scrutiny in case of reliance on the prediction of future conduct. And again the level of examination carried out by the Commission was found wanting. The Commission had failed to consider the potentially harmful economic and legal consequences arising from an extreme commercial stance with regard to bundling. Were the merged entity to have refused to supply certain products without the bundling of other products, potential purchasers could be deterred and legal consequences arising from the abuse of a dominant position under article 82 of the EC Treaty could follow. In short, the Commission had made a manifest error of assessment of the merged entity’s future use of bundling.

Prohibition upheld despite the Court’s finding of manifest errors

Although the merger was classified as a conglomerate one and despite finding that the Commission, in its assessment of conglomerate (and vertical) effects had committed manifest errors, the Court considered that the various instances resulting in the creation or strengthening of dominant positions found by the Commission constituted independent pillars, each of which was on its own sufficient to sustain the prohibition decision. Accordingly, the Court...
affirmed the decision on the basis of the horizontal overlaps in the markets for large regional jet engines, for corporate jet engines and for small marine gas turbines, where dominant positions would be strengthened or created. This technique is similar to the one used by the same chamber of the CFI (the second) in EDP v Commission, where the Court held that even though the Commission’s analysis of the natural gas markets was fundamentally flawed, this error did not affect the Commission’s analysis of the downstream (and closely connected) electricity markets.

Nevertheless, the Court’s conclusion that ultimately preserved the validity of the challenged decision, though flawed in many respects, is not free from doubt. The competitive analysis of markets usually cannot be seen in isolation. This practice of the CFI, therefore, severely raises the bar for annulments of Commission merger prohibitions in multi-market mergers. Further, if GE and Honeywell had known that the Commission’s conglomerate analysis, on which much of the administrative procedure concentrated, would be judged insufficient, they could have focused their efforts on offering remedies that would have eliminated the horizontal overlaps.

Conclusions
The judgment confirms that the Commission’s purely structural analysis in assessing horizontal mergers, relying on market shares and conditions of competition, makes it easier to justify prohibitions in these situations. On the other hand, the complex analysis inherent in the Commission’s behavioural approach to conglomerate (and vertical) mergers, starting with the assumption of behaviour that may or may not be commercially reasonable and which in case of a pre-existing dominant position would violate article 82 of the EC Treaty, places an almost insurmountable burden on the Commission.

Air France/KLM
On 14 July 2006, the CFI dismissed easyJet’s challenge of the phase-I conditional clearance of Air France’s acquisition of KLM. The applicant had put forward several pleas, claiming in particular that the Commission committed errors of assessment as regards the effects of the concentration in certain routes where the parties’ activities did not overlap and relating to the sufficiency of the commitments.

The CFI rejected all pleas as either inadmissible or unfounded, in the latter case often finding that the applicant did not adduce ‘any evidence’, any ‘relevant evidence’ or evidence ‘to the requisite legal standard’ to support its arguments. When recalling the test for the judicial review of merger decisions, the CFI made no reference to what are now widely regarded as seminal judgments in this respect, the Tetra Laval rulings of the CFI and the ECJ. It only referred to its own rulings in Petrolessence and EDP, as if to show that there is still some reticence to acknowledge that, based on the Tetra Laval test, the scope for the judicial review of merger decisions is now ‘sweeping’.

Sony/BMG
The direct dismissal of all challenges to the Commission’s clearance decision in Air France/KLM might have been explained by the lower burden of proof on the Commission if it clears a merger as opposed to prohibiting it. Nevertheless, this judgment stands in stark contrast to the strict scrutiny and annulment of the Commission’s clearance decision in Sony/BMG. In this case, after issuing a statement of objections preliminarily concluding that the merger would strengthen a position of joint dominance in several markets for recorded music and online music, the Commission ultimately ended up clearing the merger without remedies. The Independent Music Publishers and Labels Association (Impala) challenged the clearance and obtained a favourable ruling from the CFI. This time the third chamber of the CFI quoted and applied the strict standard of judicial review spelled out by the ECJ in Tetra Laval II and held that the Commission had not met its burden of proof that the clearance was justified. This case differed from Airline and Airtours in that here it was not the creation but the strengthening of a joint dominant position that was at stake. The CFI observed that, since the starting point was the pre-existence of a collective dominant position, the analysis is of a somehow less prospective nature and could be based on established facts, past or present showing the significant impediment of competition resulting from the joint market power of a few players.

This judgment has caused considerable concern in European industry, as it would tend to show that clearance decisions, even if taken after an extended phase II investigation, will not necessarily stand up to legal challenges. The case, which was treated under the old EC Merger Regulation, has now reverted to the Commission, which may decide to issue another clearance decision.

The major flaw in the Commission’s decision, in our view, was the methodology adopted in the reasoning of the decision, wherein the concerns originally identified in the statement of objections are spelled out very clearly and the countervailing factors, including those based on economic evidence submitted towards the end of the investigation by the merging parties, were described only relatively briefly towards the end of the decision. This methodology is appropriate for phase II clearances with remedies, where, following the description of the concerns, the Commission then goes on to show that the remedies adopted will indeed remedy those concerns. This methodology does not work where the result is an unconditional clearance. Common sense and this ruling now strongly advocate in favour of the Commission not relying on the statement of objections as the main basis for the structure and wording of the final decision in such cases. Obviously, a U-turn – such as the one made mid-course by the Commission in this case – should be possible and is positive as it shows the Commission’s openness to the submission of new evidence following on the statement of objections as well as the functioning of the internal checks and balances within DG COMP. But, when it happens, the only appropriate approach is for the Commission to find and take the time to draft a consistent and coherent clearance decision, particularly well reasoned as to the final outcome.

This case is also important because it clearly shows that third parties are a force to reckon, as they can win on appeal in case their views are not sufficiently heard or considered during the administrative proceedings. The Commission will be even more careful to seriously consider the arguments put forward by third parties, particularly when these arguments were initially followed in the statement of objections.

Endesa/Gas Natural
As part of the extended takeover battle over Endesa, the target challenged the Commission’s decision of 15 November 2005 in case COMP/M.3986 finding that it was not competent to review the Gas Natural/Endesa transaction since that merger had no Community dimension. The CFI dismissed the application in its entirety, in a judgment that confirms that the rules and criteria to determine the Community dimension of a concentration must allow the Commission to take an unequivocal decision on its jurisdiction, based on objective and audited accounts.

It is worth mentioning that, because of the very particular circumstances of the case, Endesa, contrary to the usual mode, requested both interim measures and the fast-track procedure. It obtained the adjudication under the accelerated procedure (in seven and a half months) but was not granted the interim measures it
requested, namely a suspension of the application of the Commission decision, and an order requiring the Spanish competition authorities (to which the Gas Natural/Endesa merger was notified) to suspend all national merger control proceedings. The CFI decision not to grant the interim measures sought by Endesa was not made because the merits of the case were already being decided under the fast-track procedure.

**Tendencies in the case law**

**Expedited procedure**

On 12 October 2005, the CFI adopted a number of changes to its rules of procedure, including with respect to article 76a of the rules concerning ‘expedited procedures’, better known as ‘fast-track’ cases. In its decision, the CFI notes that the modifications are made “in light of recent experience” and are necessary “to adapt the rules to the needs of the efficient organisation of the conduct of proceedings”. In substance, codifying the recent CFI practice, the changes to article 76a are intended to limit the number of pleas in law, arguments and overall length of both the original application and the defence. First, the applicant is now required to enclose an abbreviated version of the application and a (shortened) list of the annexes to be considered should the case be decided under the expedited procedure. Second, when it decides to adjudicate a case under this procedure the CFI may prescribe conditions as to the volume of the pleadings, the subsequent conduct of the proceedings and the pleas in law and arguments on which the Court will decide. Non-compliance with such conditions may result in the withdrawal of the decision to adjudicate the case under the expedited procedure. As we have argued based on experience, severe limitations to the scope of an application in fast-track cases may constitute serious drawbacks to the quality and depth of the legal and economic debate where the litigious matter is particularly complex.

**Uneven standards being applied by different chambers of the CFI?**

This year’s CFI’s rulings show that, as in other areas of law, the fate of a particular merger decision challenged in Luxembourg may be substantially influenced by the chamber dealing with the case. With all the necessary caveats and notwithstanding the truism that each case is different and comparisons are always questionable, a reader of the recent rulings where merger decisions were challenged could easily have the impression that – in practice – not all chambers of the CFI apply the same standard of judicial review. Some seem to follow a theory of judicial restraint, in line with the Commission’s view that it has a wide margin of discretion in assessing complex matters of an economic nature, whereas others are willing to subject the Commission’s decisions to a more thorough scrutiny.

**Burden of proof for clearances and prohibitions**

An analysis of the judgments of recent years, including the ones reported here, reveals that the burden of proof resting on the Commission to defend its conclusions is the same for clearance and prohibition decisions. As will be recalled, Advocate General Tizzano, in his famous dictum in *Tetra Laval II*, had proposed that, in cases of doubt, the Commission should err on the side of clearing a merger. This dictum was not followed by the ECJ in that case and it certainly was not applied by the CFI in *Sony/BMG*, although, ironically, the Commission’s U-turn from its statement of objections could have been motivated by considerations similar to those expressed by AG Tizzano. Indeed, in *Sony/BMG*, the CFI used the same standard of judicial review to scrutinise a clearance decision in a joint dominance case as had been used by the ECJ in *Tetra Laval II* in reviewing a prohibition decision in a conglomerate case.

**Conglomerate mergers**

To date, the Commission has lost both instances in which it tried to prohibit a merger based on conglomerate concerns. Whereas in *Tetra Laval/Sidel* the Commission’s prohibition was based solely on conglomerate concerns and was therefore annulled, in *GE/Honeywell* the prohibition was upheld only on the basis of the correctness of the Commission’s concerns as regards the horizontal aspects of the case. The two Commission defeats in respect of its analysis of the conglomerate effects of a case seem to have a clear explanation. In conglomerate cases the Commission has chosen a methodology based not on structural factors, such as market share, removal of pre-existing competitive constraints on the merging parties, etc., but on a chain of events, which starts with the assumption of certain behaviour being adopted by the merged entity; behaviour, which would often violate article 82 of the EC Treaty and therefore not necessarily be likely to be adopted. This analysis is invariably complicated and fraught with uncertainties. Unless the Commission decides to undertake a more structural analysis of conglomerate markets, the guidelines for vertical and conglomerate mergers, which are still expected in draft form sometime in 2006 or 2007, will find it very hard to enunciate a tenable standard.

**Conclusion and outlook**

The judgments emanating from the CFI and the ECJ continue to influence the Commission’s merger control practice and, overall, this influence is certainly leading to improvements in the Commission’s treatment of mergers. There is, however, at present a clear danger that the Commission, in trying to satisfy the Community courts’ sometimes very rigorous standards of judicial review, will become overly cautious and conservative and in particular accord disproportionate weight to the views voiced by third parties. A balance will need to be struck to ensure that the Commission’s decisions will be equally robust to withstand challenges from the merging parties as well as from third parties.

**Notes**

2. Vertical effects were analysed in a way similar to conglomerate effects and will not be discussed here.
4. It is important to note that the *Tetra Laval I* ruling was delivered after the Commission’s decision in *GE/Honeywell*.
5. Case T-87/05, *EDP (Energías de Portugal) v Commission*, ruling of 21 September 2005, not yet published in the ECR.
10. Here it would have been difficult to devise any effective remedies which would have been effective and at the same time palatable to the merging parties.
11. See paragraph 328, where the Court, quoting from *Tetra Laval II* (paragraph 39), reminds that “[w]hilst the [ECJ] recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission’s interpretation of information of...
an economic nature. Not only must the Community Courts, inter
alia, establish whether the evidence relied on is factually accurate,
reliable and consistent but also whether that evidence contains all
the information which must be taken into account in order to assess
a complex analysis and whether it is capable of substantiating the
conclusions drawn from it”.

12 See also paragraph 248 where the CFI explicitly mentioned the words
“solid evidence” to remind what is required for the Commission to
ban a merger on grounds of collective dominance as theory of harm:
“It follows from the case-law of the Court of Justice (Cases C-68/94
and C-30/95 France and Others v Commission (known as ‘Kali und
Salz’) [1998] ECR I-1375, paragraph 222) and of the Court of First
Instance (Airtours v Commission, paragraph 63) that the prospective
analysis which the Commission is required to carry out in the context
of the control of concentrations, in the case of collective dominance,
requires close examination of, in particular, the circumstances which,
in each individual case, are relevant for assessing the effects of the
concentration on competition in the reference market and that the
Commission must provide solid evidence”.

declaring a concentration to be incompatible with the common market
and the EEA Agreement (Case IV/M.1524 - Airtours/First Choice) (OJ
2000 L 93, p 1), annulled by the CFI in Case T-342/99, Airtours v

14 See paragraphs 249-253.

control of concentrations between undertakings (OJ 1989 L 395, p 1).

16 Cases T-417/05, Endesa v Commission, ruling of 14 July 2006, not
yet published in the ECR, and T-417/05 R, Endesa v Commission,
order of 1 February 2006, not yet published in the ECR.


18 Arguably, in the EDP v Commission and Impala v Commission (SONY/
BMG; see paragraphs 545-553) cases.

19 See Impala v Commission, at paragraph 546, with reference to an
attitude adopted by the parties qualified as “scarcely compatible
with the letter or the spirit of the expedited procedure”, when only
non-binding, more general CFI ‘practice instructions’ were in force
(OJ 2002 L 87, p48, at paragraph VI). In Impala v Commission, the
CFI indirectly refers to them as mere ‘recommended norms’ (see
paragraph 547).

20 See M Bay, J Ruiz Calzado, A Weitbrecht, ‘Judicial review of mergers
in the EU and “fast-track” procedure’ in The European Antitrust Review
2006, Global Competition Review, p38.


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