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The Competition Law Firm

Two significant merger control judgments in 24 hours, one UK and one EU, underline the importance of judicial control in merger decisions. In the first, the UK Competition Appeal Tribunal (the Tribunal) upheld the UK Competition & Markets Authority's first ever decision to prohibit a merger on vertical foreclosure grounds. In the second, the General Court quashed the Commission's prohibition decision on due process grounds for failure to disclose the final version of its economic analysis.

Euclid Law acted for the main complainant in the ICE/Trayport case before the CMA.

ICE/Trayport

When the CMA prohibited ICE's acquisition of trading platform Trayport, it was the first prohibition of a merger by the CMA since its inception and the first full divestment ever in a vertical merger by UK competition authorities. See https://www.linkedin.com/pulse/ice-trayport-cma-doldrums-oliver-bretz. The Tribunal upheld the CMA's decision in all but one respect.

The Tribunal did not think that there was any special elevated evidential burden on the CMA just because this was a vertical merger. The Tribunal considered there was no deficiency in the CMA's general approach to the competitive effects over the long term. When looking to the future, the Tribunal accepted that any assessment is likely to be imprecise and unpredictable.

Although the Tribunal acknowledged that a divestiture remedy is intrusive, it confirmed the CMA's wide margin of discretion. While behavioural remedies are often accepted in vertical cases, the Tribunal upheld the CMA's view that ICE's separation remedy proposal in this case would be ineffective. The CMA would also have been justified in rejecting the proposal as a result of the unacceptable monitoring risks it would entail.

The Tribunal concluded, however, that the requirement also to unwind the new commercial agreement between the parties was insufficiently reasoned. The Tribunal described the CMA's reasons in this respect as "too cursory and too conclusory to meet the standards of intelligibility and adequacy". That said, the Tribunal remitted the matter to the CMA for re-consideration, as it considered that there was sufficient material in the decision upon the basis of which the CMA could lawfully conclude that termination of the agreement is required.

Overall, this judgment is an important victory for the CMA. The Tribunal essentially confirms the CMA's wide margin of discretion even in vertical cases that are generally recognised to lead to greater efficiencies, and did not interfere in the CMA's assessment of longer term foreclosure effects, or its choice of a draconian divestment remedy. Although it found the CMA's reasoning inadequate in respect of the new agreement, this only emphasises the need for the CMA to be rigorous in its drafting of its final report.

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UPS/TNT

The General Court has struck down the Commission's decision of January 2013 prohibiting the merger of UPS and TNT, on the grounds that the Commission infringed the parties' rights of defence.

The Commission relied on an econometric model to identify the Member States where there were significant competition concerns. Various versions of the model were exchanged during the procedure, but the final version (which reduced the number of Member States from 29 to 15) contained a different variable. Although the Court recognized that the merger control process requires speed, the adoption of the final version two months before the decision meant that the Commission had enough time to communicate it to the parties. The Court concluded that it was sufficient that the parties may have been better able to defend themselves (even just a "slight chance") had they had the final version, and it was not necessary to prove that the Commission's decision would have in fact been different.

While the judgment constrains how the Commission deals with the further development of evidence at the later stages of its procedure, such constraints should still be manageable within an efficient process. And in a process geared to find the right answer (and not just the expected answer) to the competition question, the Commission must be prepared for meaningful engagement on the economic analysis. It is hoped that this judgment does not, however, discourage the Commission from relying on complex economic evidence in future cases.

The four years taken to reach this judgment means that TNT has now fallen into the arms of rival FedEx, and it is of little commercial relevance to the parties. The contrast with the five months by the CAT above could not be starker. That judicial control of Commission decisions is now limited to those willing to pay to make a point of principle underlies the urgent need for reform.

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