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CONCURRENCES LAW & ECONOMICS WEBINARS
The future of EU and UK merger control enforcement

Webinar – 17 September 2020*

Webinar organised in partnership with Compass Lexecon and Skadden, as part of Concurrences Law & Economics Webinar series.

Giorgio Motta

Giorgio Motta introduced the webinar by recalling the difficult task of merger control, which consists of predicting the future by looking at the past. The same method shall be applied in times of uncertainties to the upcoming developments of EU and UK merger control enforcement. The main issue relates to the aftermaths of the judgement (Case T-399/16, *CK Telecoms v Commission*) by which the General Court of the European Union annulled the European Commission Decision prohibiting the acquisition of Telefónica by Hutchison (Case COMP/M.7612, *Hutchison 3G UK/Telefónica UK*). Although the Commission appealed before the Court of justice, this judgement questions, *inter alia*, the standard of proof, the role of efficiencies, the value of economic assessment, as well as the scope of judicial review. He questioned Guillaume Loriot on the grounds of appeal put forward by the Commission in that respect.

Guillaume Loriot

Guillaume Loriot recalled that Regulation no. 139/2004, as well as Horizontal Merger Guidelines (the "Guidelines"), are the result of a large consultation to ensure that the Commission's approach of merger control would be in line with economic reasoning. In his opinion, the legality of the Commission's Guidelines is not at stake in the *Hutchison* case. The tension comes from the decision of the General Court not to follow the Guidelines. Although the Commission has several pleas for the appeal procedure, those can be summarised in three main chapters.

First, the Commission questions the standard of proof. Until now, merger control cases were decided using the balance of probabilities as a standard (see Case T-5/02, *Tetra Laval v Commission* and Case T-464/04, *Impala v Commission*)

In that respect, Regulation no. 139/2004 is neutral towards mergers. In practice, it is not a low standard. Merger cases are decided based on extensive investigations. The Commission has a real duty to motivate that a merger is more likely than not to significantly impede effective competition ("SIEC"). Yet, in the *Hutchinson* judgement, the General Court has set a new standard. Not only should the Commission demonstrate that significant impediment of effective competition is more likely than not, but it should also demonstrate that there is a strong probability for this.

Second, the Commission discusses basic substantive concepts of merger control. In particular, there is a debate regarding non-coordinated effects in the absence of dominance. The General Court requires the Commission to demonstrate that the merged entity would have the power to determine by itself the parameters of competition and be a price maker. Such standard amounts to a *de facto* dominance test. This is not in line with the purpose of Regulation no. 139/2004, which is to prevent any significant harm to competition, even in oligopolistic settings where several players have market power. Hence, imposing a dominance test on the Commission would run counter the will of the legislator. Other issues relate to the conditions to be met in order to find non-coordinated effects, as well as the importance of competitive forces and closeness of competitors. Regarding these issues, the Court did not follow the Commission's Guidelines (albeit not ruling on their legality).

"THE COMMISSION DOES NOT INTEND TO CHANGE ITS PRACTICE DRAMATICALLY. IT WILL CONTINUE TO REVIEW ECONOMIC ARGUMENTS AND ALL PIECES OF EVIDENCE."
GUILLAUME LORIOT

Third, the Commissions seeks clarification regarding the burden of proof. The traditional rule is that it is for the parties to put forward efficiencies likely to be expected from the merger. However, the decision considers that the Commission should be required to make an *ex officio* analysis of some standard efficiencies to integrate them in its price analysis (*i.e.* end of duplication, production modes, and redundancies). It should be borne in mind that Regulation no. 139/2004 does not set a low standard. The Commission wants to maintain a high level of economic and facts-based analysis. It refuses to adopt a "tick the box" approach. In a recent speech, Commissioner Vestager highlighted that she wants to facilitate mergers which do not raise issues and focus on more problematic mergers.

After being asked about the future developments in EU merger control, Guillaume Loriot acknowledged that the judgement creates uncertainty. Yet, the Commission does not intend to change its practice dramatically. It will continue to review economic arguments and all pieces of evidence. The concepts enshrined in the Guidelines are sound from an economic perspective and will continue to provide a basis to assess horizontal mergers. From that perspective, the appeal judgement of the Court of justice will be very important.

Guillaume Loriot finally pointed out the challenges of the *Hutchinson* judgement. In particular, the significance of a price increase may vary depending on the characteristics of markets. Therefore, a single threshold would not be workable. The judgement is also questionable in light of judicial review requirements. The General Court considers that the Commission was not persuasive in its SIEC assessment. However, the judgement makes a comparison with other similar cases, which is not acceptable from a methodological point of view. Indeed, the Commission decides on the facts of each case. Last, there is a more fundamental question as to the overreliance on the price increase, which may not be relevant for all markets. Prices do not matter or are difficult to quantify when it comes to issues like killer acquisitions, assessment of markets dynamics etc.

Tom Smith

Tom Smith stressed that it is difficult to identify a given policy trend in the CMA enforcement policy. Indeed, each merger is decided on a case-by-case basis in light of the particular facts at stake. In addition to this, Phase 2 cases are reviewed by independent panels and not directly by the CMA. He insisted on the fact that merger control enforcement is evolving in an uncertain world at the moment. During the Covid-19 crisis, the CMA had to decide *JD Sports/Footasylum* and *Amazon/Deliveroo* merger cases, while the economy was in turmoil.

"MERGER CONTROL ENFORCEMENT IS EVOLVING IN AN UNCERTAIN WORLD AT THE MOMENT."
TOM SMITH

In that context, the CMA operated within its normal deadlines and adopted a "business as usual" approach. Against that background, the CMA had recently to decide on mergers affecting fast-moving markets, in the digital sector or the DNA sequencing industry. In that context, there is no safe way to avoid uncertainty. If the CMA 'errs on the side of caution', that means it would be clearing problematic mergers that harm customers. In order to have a prospective vision of these industries, it looks into the parties' internal documents. However, the CMA is working to adapt its toolkit to these new challenges.

First, it created a digital markets task force. It published an extensive report in July 2020 on digital advertising markets. *Inter alia*, the CMA recommends the government to adopt a specific regulatory framework for gatekeepers. The CMA is now consulting on whether such a regime should entail different jurisdictional and substantive tests for mergers. From a jurisdictional point of view, gatekeepers could be required to notify all mergers, irrespective of any thresholds. From a substantive point of view, the substantial lessening of competition test could be retained but with a different standard of proof, and merger control review could extend to non-competitive factors, such as the impact of the transaction on data protection.

Second, the CMA is revising its merger assessment guidelines, which were published ten years ago. The purpose of this revision is to have a more accurate understanding of the digital economy. In order to do so, the CMA intends to consult widely all professionals and practitioners.

Asked about future procedural steps regarding merger control and Brexit, Tom Smith recalled the current uncertainty about the negotiations between the European Union and the United-Kingdom. Nevertheless, companies who intend to notify a merger in the coming months may contact the CMA at an early stage.

Lorenzo Coppi

Lorenzo Coppi provided his understanding of the *Hutchinson* judgement. According to him, it is not necessary to revise economic tools since the General Court did not find any error of fact. However, the General Court is questioning what "significant" means in the SIEC test. The General Court points out that it is not sufficient to rely on the fact that a four players market is concentrated and that a reduction to three players would amount to an impediment of competition. This would imply a quasi *per se* prohibition of this kind of merger.

Therefore, the General Court requires the Commission to substantiate the significant impediment of competition. It provides guidance to do so. When a dominant position is not created or strengthened, the SIEC test is satisfied if the effects of the merger would be the same as the ones of a dominant company. Although the judgement mentions the "price maker/price taker" hint (para. 90), it is only an example that the threshold is met.

"THE GENERAL COURT IS RIGHT TO RULE THAT NOT ALL PRICE EFFECTS ARE SIGNIFICANT ENOUGH TO MEET THE LEGAL THRESHOLD."
LORENZO COPPI

However, what is the specific economic threshold for enforcement? Until recently, there was a concern among lawyers and economists that any positive gap would be used by the Commission to conclude that the SIEC test was satisfied. It was not clear what level of price effect was acceptable. The General Court is right to rule that not all price effects are significant enough to meet the legal threshold. Economic tools will always show the price effect. The interest of this case is therefore to provide guidance.

From a broader perspective, Lorenzo Coppi considers that there has been more robust merger enforcement in the European Union and the United-Kingdom over the recent years. This may be an answer to the feeling that antitrust agencies have been too lenient in the past. Nevertheless, the General Court is now signalling that the intensity of enforcement is not left to the regulator's discretion. Instead, it is enshrined in the law.

Regarding the possibility for EU Courts to appoint economic advisors, Lorenzo Coppi expressed his approbation. This system exists in many member States. Over the past decade, EU Courts have developed an expertise in dealing with complex economic reasonings (see Case T-411/07 *Aer Lingus v Commission* and Case T-194/13*, UPS v Commission* for example). Nevertheless, economic experts could answer precise questions from the Courts in order to help them in their assessment. In any case, economists may only enlighten judges but cannot decide on the law. It is important that the Courts do not delegate their power.

Frederic Depoortere

Frederic Depoortere analysed the practical consequences of the *Hutchinson* case. Antitrust clearance is one of the main concerns when companies merge. Not only merger control affects the timing of the transaction, but it also entails a risk of enforcement.

"THE COMMISSION NEEDS TO CLARIFY WHAT WILL CHANGE IN ITS ASSESSMENT OF HORIZONTAL MERGERS."
FREDERIC DEPOORTERE

Timing is not affected by recent developments in the case law. In many transactions, merger control is the main obstacle between signing and closing. Getting antitrust approval may take up to a year when the parties have to request clearance from several competition agencies. Recent initiatives of Commissioner Vestager to shorten and simplify EU merger control are important. Similar adjustments would be welcomed from the CMA. Indeed, although CMA investigations do not prevent closing, they have in practice the same effect on timing as legal systems which provide for a standstill obligation.

The risk of enforcement is also looked at carefully when companies decide to merge. Although the prospective analysis of merger control is difficult, companies expect a certain level of predictability. This does not mean that the law should be over-simplified. In the past, some feared that the growing use of economic analysis would threaten predictability. Since then, it was demonstrated that a high degree of sophistication and technicity does not prevent parties to have a clear idea of the possible outcome of their case.

Nevertheless, the *Hutchinson* decision has a major impact on the predictability of future decisions. In the long run, this judgement provides clear guidance as it defines what the Commission can and cannot do: dominance seems to become again the main criteria and we know what to expect from economic analysis. However, the shorter effects of the judgement are a problem, in particular since the Commission decided to appeal. There is a tension between the Guidelines and the judgement, which creates uncertainty. In that aspect, the Commission needs to clarify what will change in its assessment of horizontal mergers.

From a practical point of view, the CMA has also shown more active enforcement over the recent years, whether it relates to jurisdictional issues or new theories of harm in the tech sector. Companies are more and more worried about CMA. From that perspective, the revision of guidelines will provide certainty to practitioners and companies.

In light of the above, companies need to anticipate the antitrust consequences of a merger as early as possible because the level of uncertainty has increased. Additional guidance from the Commission and the CMA seems to be the best way to address this uncertainty.