# Kluwer Competition Law Blog

## The Commission too lenient in merger control? Really?

Frederic Depoortere (Skadden, Belgium) · Friday, September 10th, 2010

An increasing number of voices are claiming that the Commission's enforcement policy under the ECMR is becoming too lenient. At the end of last year, two Commission officials, Mr. Parplies and Mr. Maier-Rigaud, published a detailed study on the drop in enforcement decisions (prohibitions, approvals with conditions and termination of merger agreements resulting from the Commission's decision to open a Phase II). See *EU Merger Control Five years After the Introduction Of The SIEC Test: What Explains The Drop In Enforcement Activity*, [2009] ECLR, 565. Professor Budzinski of the University of Southern Denmark published an article comparing the drop in enforcement actions in the U.S. and the EU. See *An Institutional Analysis Of The Enforcement Problems In Merger Control*, [2010] European Competition Journal, 445. And even a panel on non-horizontal mergers at an upcoming conference on the ECMR bears the title "did the EC become too lenient?"

Messrs. Parplies and Maier-Rigaud mainly point to two potential causes for their claim of reduced enforcement: imperfect third party intervention in Commission proceedings (mixed incentives of competitors to intervene and suboptimal intervention by consumers and consumer organizations) and the fear of the Commission to be overturned on appeal. The authors find it more likely that parties to a concentration would appeal a prohibition decision than third parties would appeal an approval decision.

There is clearly something to say in favour of facilitating access of consumers to the Commission's review process. And it may well be that, at least for some time, the judgments in *Airtours*, *Tetra, Schneider* and *GE/Honeywell* had a somewhat stifling effect on the Commission's willingness to wage fierce battles on less well-established theories.

Nonetheless, the Impala appeal against the *Sony/BMG* decision shows that third parties can and do appeal approval decisions. In addition, the fact that the four judgments above caused the Commission to take more account of the possibility of judicial review in its decision-making process can only be positive. Last, a number of recent cases show that at least in recent years, the Commission has not shied away from in-depth analyses (and sometimes enforcement) of relatively novel economic theories. Proferssor Budzinski's article calls them "controversial cases" – *Friesland/Campina, Tom Tom/TeleAtlas, Google/DoubleClick, Oracle/Sun*, to name a few.

Professor Budzinski makes a different argument in relation to the interplay between Commission and General Court. Given the increased importance of complex economic analyses in merger decisions and the lack of specific knowledge in the courts to assess such analyses, courts fear making mistakes. As a result, courts tend to find against the plaintiff (the authority trying to prohibit a merger) unless the plaintiff can show "beyond reasonable doubt" that the merger should be prohibited. Based on this reasoning, Professor Budzinski suggests that the burden of proof for authorities has significantly increased with the introduction of complex industrial economics in merger control.

Professor Budzinski applies this argument to merger control both in the EU and the U.S. However, there is a fundamental difference between the two, which undermines the viability of the argument at least with regard to the EU. In the U.S., the authority could be seen as a "plaintiff" who must obtain a court decision to enjoin a merger. In the EU however, the Commission can prohibit a merger without court intervention and it is the parties who need to prove on appeal to the General Court that the Commission's decision is flawed and must be annulled.

In addition, and perhaps more importantly in this context, the General Court has consistently held that the Commission has a significant margin of discretion in making complex economic assessments. While the Court will verify whether the Commission has sufficient evidence to support the analysis, it is much more deferential on the question whether or not the complex theories are appropriate in the Commission's decision.

One could even make the argument that the Commission's margin of discretion, sanctioned by the courts, in applying complex economic assessments, makes it more prone – or at least less inhibited – to apply novel economic theories than is the case for the U.S. authorities. But that is a different debate.

Professor Budzinski also makes the argument that with the introduction of industrial economics into merger control, complex economic analysis has become more fundamental to the review calculus than consumer/customer reactions or internal documents reflecting the parties' intent. Again, at least as far as the EU is concerned, it is far from clear that this is accurate. On the contrary, there is a constant line in the four court judgments (as well as the Impala judgment) that the Commission is obliged to support its arguments as much as possible with evidence such as internal documents and third party reactions.

Where does all this leave us on the issue of whether the Commission is becoming more lenient? Messrs. Parplies and Maier-Rigaud highlight the recent decrease in the percentage of enforcement decisions relative to all decisions, but neither article provides a thorough discussion of the reasons for that decline other than that the Commission has become more lenient. One alternative is that companies have become more careful and reluctant to enter into a merger agreement if they know that there is a significant enforcement risk. Especially with the current levels of market uncertainty, embarking on a merger project with a high risk of enforcement (and a prolonged Commission investigation) presents a significant cost to companies. Another explanation could be that the structural approach to merger control, used before the introduction of industrial economics, lead to over-enforcement. Or as Jorge Padilla puts it in a recent publication (LECG XPRT Forum, May/June 2010): "it is more likely that the review process has become more thorough and careful rather than weaker."

I tend to agree. The European Commission has not become more lenient and certainly not too lenient. Professor Budzinski's "controversial cases" indicate that the Commission has not become afraid to apply and take enforcement action on the basis of novel theories, but industrial economics provides a more solid basis to analyze them. These cases show that Commission enforcement under the ECMR is alive and well.

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