

Judicial review of merger decisions in EU Member States

Sweden, Ireland, European Union, France, Italy, United Kingdom, Mergers, Judicial review, Foreword, Appeal proceedings, All business sectors

In a landmark judgment of 19 March 2009, the Irish High Court annulled a prohibition decision of the Irish Competition Authority ("CA") blocking the acquisition by Kerry Group of Breeo Foods [1]. As a result of the annulment, Breeo Foods became part of the Kerry Group on 26 March 2009 [2], just seven days after the High Court's judgment and less than seven months after the CA's initial decision to prohibit the transaction [3].

The CA's 29 August 2008 decision had prohibited the merger after a five month in-depth review, finding that it would substantially lessen competition across the markets for rashers, non-poultry cooked meats and processed cheese. The relevant reasoning of the CA was twofold. It concluded: (i) that private label brands would not provide sufficient competition to constrain the newly-merged entity; and (ii) that Irish retailers did not possess sufficient countervailing buyer power to resist a sustained price increase. As with many "Phase II" cases, the decision was detailed and complex.

The High Court, however, found that the CA's prohibition was "vitiating by material error" and "fundamentally flawed" inter alia for failing adequately to take into account countervailing buyer power constraints. The case represented the first appeal of a CA merger prohibition decision (which was only the CA's third prohibition decision since the provisions of the Irish Competition Act regarding merger control came into effect in January 2003) and is remarkable for a number of reasons.

First, the judgment establishes a more rigorous standard of review than is typical in judicial reviews of administrative decisions under Irish law. The Court stated that it "will be entitled to intervene to set aside a material economic conclusion if it is shown to be incorrect because it is unsupported by or inconsistent with the clear effect of the evidence, information or data upon which it is based." Justice Cooke, having recently returned to the Irish High Court from the EU's Court of First Instance ("CFI") (where he had heard both the *Microsoft* [4] and *Airtours* [5] cases), explicitly referred to the standard of review adopted by the CFI in the *Tetra Laval* [6] and *Microsoft* [7] cases, and effectively endorsed the EU-level "manifest error" standard of review. Indeed, Justice Cooke scrutinised the exact probative value of the evidence relied upon by the CA and explicitly questioned its robustness. Although this article will not deal in detail with "standard of review" questions (focusing instead on the timing and consequences of judgments in review), two observations can be made in relation to the High Court's approach in this regard: (i) the nature of review is such that both the CA and parties to mergers notified in Ireland will be well advised to support future decisions and/or submissions with convincing and well substantiated evidence; and (ii) the EU-level rules clearly influenced the High Court.

Second, although not explicitly mentioned in the judgment, the High Court's annulment of the CA decision meant that the parties could immediately close the transaction. This is in stark contrast with the EU-level approach to judicial review in merger cases (and that of a number of Member States), where a successful appeal dictates that a transaction will be sent back to the Commission to be re-assessed.

Third, the comparatively short time delay between CA decision and High Court judgment meant that the deal, although initially blocked, was still completed shortly after the annulment. Again, this stands in stark contrast to the leading cases at EU level where the time delays involved in challenging a prohibition decision often dictate that transactions have long

since been abandoned by the time the CFI hands down its judgment. The prospect under the Irish system of a swift judgment, allied to the fact that parties can go ahead and complete a transaction immediately after a High Court annulment, will likely incentivise transaction parties to consider bringing appeals against any future CA prohibition decisions.

On 7 April 2009, the CA announced that it had appealed the High Court's annulment to the Irish Supreme Court [8], meaning that there may yet be further chapters to the Kerry/Breeo merger review story. However, notwithstanding the fact that the CA has appealed, the case already raises a number of interesting questions regarding the judicial review mechanisms applicable to merger decisions both at EU level and at Member State level. Before examining some of these questions, however, two preliminary points should be made.

First, in merger control, judicial review mechanisms need to cover a number of distinct situations. Arguably, the most important - and most distinct - situations are: (i) the Kerry/Breeo situation, in which the parties to the deal themselves seek to challenge a prohibition decision; and (ii) the situation in which an aggrieved third party seeks to challenge what it considers to be an erroneous approval decision. The commercial imperatives are slightly different in the two scenarios.

Where a third party challenges an approval decision, the alleged harm arising out of the erroneous administrative decision would (in the ordinary course) be incurred by the third party as a result of the changed structure of competition on the market(s) affected by the transaction. This harm may take some time to emerge as the transaction parties' activities are integrated and the structure of competition gradually changes.

In relation to appeals by transaction parties, however, the alleged harm arising out of an erroneous prohibition decision is to the deal itself and to the direct financial interests of those involved. In the commercial world, companies' priorities and fortunes can change rapidly. Commercial deals are often somewhat ephemeral - the product of assessments made at a common point in time that a given combination (on particular terms and at a particular price) is the best option available for all relevant stakeholders (including directors, shareholders, creditors and employees). This is one reason why the mere prospect of a lengthy Phase II merger review can cause the abandonment of a transaction. Any delay and uncertainty associated with a Phase II merger review are amplified manifold when it comes to prohibition decisions requiring (often lengthy) challenge before the relevant review court. The delay and uncertainty involved in litigation may lead parties simply to abandon transactions on receipt of a prohibition decision, notwithstanding the fact that they may have strong grounds of challenge. The timing applicable to challenges brought by transaction parties to prohibition decisions, therefore, is perhaps even more important than that relating to third party challenges [9].

An extensive comparative review of appeal regimes is beyond the scope of this article, but the authors would nevertheless like to highlight a number of points (including in relation to cases reviewed in previous e-Competitions articles) which emerge from the landmark Kerry/Breeo case and which relate to: (i) the period of time from administrative decision to Court judgment; and (ii) the effects and consequences of judgment.

1. Period of Time from Administrative Decision to Court Judgment

Speed is of the essence in the fast-paced area of merger control. Given that the EU merger control regime (like the majority of Member State regimes) renders filing mandatory and imposes a suspensory obligation, if judicial review entails significant delays, a judgment overturning a prohibition decision may come too late to save a transaction. Equally, in the case of a third party challenge, markets (particularly in innovation-driven sectors) may develop at such a pace that a judgment in review serves little purpose [10].

As a result of two high profile EU cases, in which judgments were handed down after significant delays (three years post merger in *Airtours* [11], four years in *Kali und Salz* [12]), a "fast-track" appeals procedure was introduced for merger

cases in the CFI [13]. The current average time period between Commission merger decision and CFI judgment in review is in excess of twelve months. This may not appear on its face unreasonable when compared with other types of litigation, but it must be recalled that the case is thereafter re-assessed by the Commission (and often subjected to a further Phase II investigation), thereby delaying implementation of the transaction - or certainty as to the terms of any unwinding - still further.

How does this compare to the time periods prevailing in Member States? Some Member States also have fast-track procedures in place. In Belgium, for example, a case will be fast-tracked if a third party applicant can demonstrate that implementation of the merger risks affecting market conditions irreversibly. In France, a ruling may be handed down after as little as five months (in the Coca-Cola case) [14] or as much as two years (in Métropole Télévision) [15]. Other Member States have committed to reducing the delays resulting from an appeal. Despite the lack of a fast-track procedure in Denmark, for example, the reviewing court can consider setting strict time limits to minimise delay, meaning that an appeal can take as little as four months. Sweden's Stockholm District Court has also signalled its readiness to reduce appeal times. For instance, in the Copiax/Assa Abloy case [16], the District Court stated that unnecessary delays must be avoided as they may risk compromising legal certainty.

For its part, the Irish Competition Act also provides for an accelerated appeals process. It requires parties to appeal within one month of the CA's determination and the Court to determine any appeal within a further two months, insofar as practicable (though, as witnessed in the Kerry/Breeo case, a slightly longer time period may be more realistic). In some Member States, the time period from decision to review judgment is broadly similar to that now prevailing under the fast-track procedure at EU level. In Poland and Portugal, for example, proceedings tend to be concluded in around 12 months.

In other jurisdictions, however, the interval between administrative decision and court judgment can be even greater than in the EU. In Italy, for example, an average of around two years passes before the Consiglio di Stato reaches a judgment on appeal. In some cases, the interval has been as much as three years [17]. Evidently, there are significant discrepancies in review periods. In circumstances in which national competition authorities (NCAs) cooperate extensively in the context of the European Competition Network, and in which cross-border transactions may require simultaneous examination by a number of NCAs, such discrepancy in the timing of judgments in review may, in and of itself, deter parties from seeking the redress to which they consider themselves entitled.

There may also be a case for allowing transaction parties access to a separate, (even) more fast-tracked appeal process. The circumstances in which any such procedure is utilised would of course be limited by the number of prohibition decisions in each jurisdiction (seldom more than one or two per year) so would not entail too significant a demand on the time of the reviewing court. This contrasts with the fact that there may be multiple third party challenges to the transactions approved in the course of a year by a given agency. As such, whereas a generalised fast-track procedure applicable to the full range of challenges - from third party approval challenges to transaction party prohibition challenges - might impose too great a burden on court systems that are already overworked, a procedure limited only to transaction party challenges might entail no such problems.

One thing appears clear beyond doubt - in an area of law in which Member State governments, NCAs and national reviewing courts frequently look to the European Commission and the Community courts for guidance (e.g., Justice Cooke's citing of the judgments in *Microsoft* and *Tetra Laval*) - there appear to be few delays as egregious as the CFI's own delay in pronouncing judgment in the *Airtours* and *Kali and Salz* cases.

2. Consequences of a Court Judgment

At an EU level, if a merger decision is annulled, it is referred back to the Commission, which is then tasked with issuing a

second decision. It was suggested in a 2007 UK report that the CFI should be allowed to issue a binding judgment on mergers without any additional involvement of the Commission [18]. This option is available to the UK's specialist Competition Appeal Tribunal (CAT) under section 120(5) of the Enterprise Act 2002 (although it has not yet been used and its precise manner of exercise remains untested). In the context of the 2007 UK report, Sir Christopher Bellamy, former President of the CAT, remarked that the ability to make a final determination was "a highly desirable power particularly in merger cases [...] that avoids the obvious ping-pong of sending[a case]back and forwards". For its part, the Kerry/Breeo judgment - and the subsequent closing of the transaction - clearly illustrates that, in Ireland, parties can go ahead with transactions after successful appeals of prohibition decisions.

The domestic rules in Ireland and the UK may be showing the Commission and the CFI the way forward in this regard. Clearly, the fast-track system put in place for CFI merger reviews is rendered significantly less effective when the case has to be referred back for a further (often in-depth and lengthy) Commission review. That second review can take in excess of six months and can, in practice, cause an even greater delay when "stop-the-clock" and pre-notification procedures are taken into account. In *Impala v Commission* [19], in the context of a third party challenge to an approval decision, the CFI took two years to issue its judgment quashing the Commission's July 2004 Sony/BMG decision. The parties duly re-notified the transaction and the deal was cleared for a second time on 3 October 2007, a delay of 15 months from the CFI's judgment and a delay of over three years from the Commission's initial clearance. Kerry/Breeo, in contrast, involved a delay of just seven months from the CA prohibition to the High Court judgment permitting the parties to go ahead with the transaction.

The comparison may appear unfair given that Kerry/Breeo relates to an action brought by one of the parties to the transaction whereas *Impala v Commission* concerns a third party challenge. However, the consequences of a CFI judgment would be the same in both types of case - i.e. the transaction would need to be re-notified and reviewed again. One of the more high-profile merger cases currently pending before the CFI is Ryanair's appeal of the Commission's June 2007 prohibition of its attempt to purchase Aer Lingus [20]. Ryanair's offer had lapsed by the time the CFI commenced its review but there was nothing to suggest that it could not have been resurrected in the event of a swift reversal by the CFI. (Indeed, Ryanair notified a second proposed purchase of Aer Lingus in January 2009.) However, despite being lodged in September 2007, Ryanair's appeal remains pending before the CFI.

It appears that the UK and Ireland have recognised the advantages of acting not only swiftly but also decisively in relation to merger reviews. The recent Kerry/Breeo case is one of the best examples of decisive Member State level merger review but the possibility also exists in the UK and renders the filing of judicial review applications (one of the most important checks and balances on the powers of decision-making agencies) much more attractive to transaction parties and third parties alike. It also ensures that the main aim pursued by reforms such as the introduction of fast-track appeal procedures (i.e. improved access to justice), is actually achieved in practice.

Conclusion

Focusing on the benchmark set by the Irish High Court's judgment in Kerry/Breeo, this article has looked briefly at the timing and consequences of merger reviews at EU level and at Member State level. A number of points emerge.

First, merger review periods - especially in relation to challenges brought by the transaction parties themselves - are still too long, both at EU level and in the majority of Member States. Most transactions blocked by the relevant agency will fail in the period between decision and court judgment in review. In and of itself, this suggests that the review function is not working as it should.

Second, while the CFI may have introduced a "fast-track" procedure in response to criticisms arising out of the delay in pronouncing on earlier cases, that fast-track procedure will not have the desired impact unless and until the CFI is able to

decide definitively on cases under review. The referral back to the Commission of decisions which have been annulled in whole or in part by the Community courts can add around a year to the period between the initial (erroneous) decision and a corrected version on which the parties can rely. In the commercial world, adding a year to the review period risks rendering that review wholly ineffective.

Third, there may be somewhat different timing considerations applicable to different types of merger review. Given the immediacy of the harm that may result from an erroneous prohibition decision, challenges by transaction parties of such decisions appear to merit the swiftest consideration and the most decisive action by a reviewing court. As such, where proposals for fast-track procedures meet with opposition from those emphasising the resultant additional burden on the court system, it may be possible to provide for procedures that are limited to transaction party challenges to prohibition decisions. Such challenges would be limited in number by the relatively small amount of prohibition decisions in any given year.

Finally, in circumstances in which there is significant cooperation between the Commission and NCAs and where there is an increasing number of cross-border transactions requiring review in multiple Member States, there may be a case for harmonising both: (i) the time periods between administrative decision and reviewing court judgment; and (ii) the consequences of a reviewing court judgment to annul the initial decision. To take a practical example, if a merger fell to be reviewed in Ireland and Italy and were subject to an in-depth examination and two separate (but equally erroneous) NCA prohibition decisions, the parties' chances of seeking swift and definite redress - and the likely timing thereof - would vary significantly as between the Irish and Italian review courts. If there is indeed a case for aligning the review periods and processes more closely, that alignment should use the Irish system as its benchmark.

The views expressed in this article are exclusively those of the authors and do not necessarily reflect those of Sidley Austin LLP and its partners. This article has been prepared for academic purposes only and does not constitute legal advice.

[1] Irish High Court, 19 March 2009, Case n° 2008 145 MCA, Rye Investments Ltd. v. The Competition Authority [2009] IEHC 140. See Orla Lynskey, *The Irish High Court annuls the determination of the Competition Authority to block a merger in a landmark ruling (Kerry/Breeo), e-Competitions*, n° 26224.

[2] Kerry Group press announcement of 26 March 2009, available at: http://www.kerryfoods.co.uk/news_in...

[3] CA news release of 29 August 2008, available at: <http://www.tca.ie/NewsPublications/...>

[4] CFI, September 17th, 2007, Microsoft v. Commission, Case T-201/04.

[5] CFI, June 6th, 2002, Airtours v. Commission, Case T-342/99, [2002] ECR II-2585.

[6] CFI, October 25th, 2002, Tetra Laval v. Commission, Case T-5/02, [2002] ECR II-4381.

[7] CFI, September 17th, 2007, Microsoft v. Commission, Case T-201/04.

[8] According to the CA's website, the appeal to the Supreme Court has been made in accordance with section 24(9) of the Competition Act 2002, which specifies that an appeal to the Supreme Court may only be made on a question of law. (See CA news release of 7 April 2009 at: <http://www.tca.ie/NewsPublications/...>)

[9] Or, indeed, challenges to conditional approvals, where it is often the precise terms of the conditions and/or their impact on the structure of the market that is at issue.

This document is protected by copyright laws and international copyright treaties. Non-authorized use of this document constitutes a violation of the publisher's rights and may be punished by up to 3 years imprisonment and up to a €300 000 fine (Art. L 335-2 CPI). Personal use of this document is authorised within the limits of Art. L 122-5 CPI and DRM protection.

[10] In common with the EU, many Member State review systems provide for the possibility of interim measures, which can alleviate the risk of third parties suffering harm pending judgment in review. However, the tests for eligibility for interim measures are often difficult to satisfy.

[11] CFI, June 6th, 2002, *Airtours v. Commission*, Case T-342/99, [2002] ECR II-2585.

[12] ECJ, March 31th, 1998, *France and SCPA and EMC v. Commission*, Joined Cases C-68/94 and C-30/95, [1998] ECR I-1375.

[13] Article 76a of the CFI Rules of Procedure.

[14] French Administrative Supreme Court (Conseil d'Etat), 9 April 1999, n° 201853, *The Coca-Cola Company*.

[15] French Administrative Supreme Court (Conseil d'Etat), n° 278652, 27 October 2004, *Société Métropole Télévision/Ministère de l'économie, des finances et de l'industrie*. See: William Simpson, *The French Administrative Supreme Court upheld a merger in the audiovisual sector conditional to remedies (Métropole Télévision)*, *e-Competitions*, n° 21098.

[16] Stockholm District Court (Stockholms tingsrätt), 19 September 2008, Decision n° T12100-08, *Copix AB and Assa Abloy AB*, See : Liana Aleshkina, *The Stockholm District Court dismisses action brought by the Swedish Competition Authority to block a merger (Copix - Assa Abloy)*, *e-Competitions*, n° 22056.

[17] Case C5151 *Società Esercizi Commerciali Industriali S.E.C.I. - Co. Pro.B. - Finbieticola/Eridania - Eribrand*.

[18] B. Bishop, *The House of Lords*, Report of 23 April 2007, paragraphs 156-161.

[19] CFI, July 13th, 2006, *Impala v. Commission*, Case T-464/04, [2006] ECR II-2289.

[20] European Commission, 27 June 2007, Case COMP/M.4439 - *Ryanair/Aer Lingus*, See : Stanislas Martin, *Décision d'interdiction : Interdiction d'une concentration dans le secteur du transport aérien en l'absence de remèdes possibles (Ryanair/Aer Lingus)*, *Concurrences*, N° 1-2008, p. 137, n° 15325.

Stephen Kinsella | Sidley Austin (Brussels) | skinsella@sidley.com

Anouck Meier | Sidley Austin (Brussels) | ameier@sidley.com

Patrick Harrison | Sidley Austin (Brussels) | pharrison@sidley.com