Who's in Charge: Jurisdiction in European Merger Filings and the Sogecable Case [top]

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The recent decision of the European Court of First Instance (the "Court") in the Sogecable case[1] provided welcome relief to the occasionally beleaguered European Commission (the "Commission"), confirming that it still gets things right in many of the high-profile EU merger disputes before the Court. The Court rejected a request by several Spanish cable TV operators in two separate, but subsequently joined, cases to annul a Commission referral to the Spanish antitrust authorities. The review related to the proposed integration of Via Digital (the number two Spanish pay-TV operator) and Sogecable (the main Spanish pay-TV operator). Subsequently, the deal was cleared by the Spanish antitrust authorities, albeit subject to numerous conditions.

In reaching its decision, the Court examined several issues of broader significance, including: (i) third party standing to challenge Commission referral decisions in merger cases; (ii) the limits of the Commission's discretionary power in such referrals; and (iii) the definition of relevant geographic markets in the media area. More generally, the decision is linked to jurisdictional questions at the heart of the currently proposed changes to the EU's merger notification system.

Accordingly, we first discuss the current framework for merger review cross-referrals between the Commission and the EU Member States. We then examine the outcome of the Sogecable case, both at the EU and the Spanish level. We conclude with a look at the referral related provisions in the Commission's proposed reform of the European merger review.

Referrals under the Current Regime

The EU system for the review of large-scale mergers is set forth in the EC Merger Regulation ("ECMR").[2] This provides for a one-stop-shop antitrust review by the Commission of mergers, acquisitions and certain joint ventures, to the extent these have a "Community dimension" by meeting the jurisdictional thresholds defined in Art. 1 ECMR. The Commission has the exclusive power to review such "concentrations" with a Community dimension, but there are two referral procedures creating exceptions to this rule:

- Article 9 ECMR allows the Commission to refer the examination of a concentration with a Community dimension to one or

[1] Cableuropa and others v. Commission, Joined Cases T–346/02 and T–347/02, judgment of September 30, 2003, not yet reported in ECR.

[2] Available at: http://europa.eu.int/comm/competition/mergers/legislation/regulation/consolidated/en.pdf.

several EU Member States, upon their request, if the concentration

(a) […] threatens to create or to strengthen a dominant position as a result of which effective competition will be significantly impeded on a market within that Member State, which presents all the characteristics of a distinct market, or

(b) […] affects competition on a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the common market.[3]

- Article 22(3) ECMR allows EU Member States to refer to the Commission concentrations without a Community dimension. The Commission may decide on such cases insofar as the relevant concentration affects trade between EU Member States. Since 1997, two or more Member States can submit referrals under this article jointly to the Commission.[4]

- Referrals under Article 9 and 22(3) are the exception: based on a rough estimate, Article 9 referrals take place in less than 5% of the cases, and Article 22(3) referrals are even less common. When they do take place, however, such referrals tend to be high-profile and controversial.

Contrary to the relatively clear-cut jurisdictional thresholds defining "Community dimension" under the ECMR, the criteria for Article 9 or 22(3) referrals allow for a substantial margin of interpretation. Inevitably, this may result in politicized decisions and conflicts between private parties, the Commission or the Member States' antitrust authorities. The Commission frequently rejects Member States' requests for Article 9 referrals.[5] While Member States have been reluctant to escalate their jurisdictional conflicts with the Commission to the European Court of Justice, both Article 9 and Article 22(3) referrals have been challenged occasionally by private parties,[6] a situation likely to continue. Thus, although the outcome in Sogecable was not surprising, it still offers helpful guidance on the principles governing Commission referrals to the Member States.

The Sogecable Case

Proceedings Before the Commission and the Spanish Authorities

On July 3, 2002, the Commission received a notification of a proposed concentration between Sogecable S.A. ("Sogecable") and DTS Distribuidora de Television Digital S.A. ("Via

[3] In addition, under Article 6 of Protocol 24 to the European Economic Area (EEA) Agreement, the Commission may refer a case to the competent authorities of an EFTA State, if a transaction has its main impact in that EFTA State.

[4] The first such joint referral was made in December of 2001, by five EU Member States, in Promatech/Sulzer Textil (Case M.2698).

[5] A high profile and early example in the media sector was the Commission's decision in MSG Media Service, Case IV/M.469, decision of November 9, 1994.

[6] In addition to the Sogecable case discussed in this article, see also Royal Philips Electronics vs Commission, Case T–119/02, decision of April 3, 2003, not yet reported in the ECR, relating to another Article 9 reference. For examples of Court cases linked to Article 22(3) references by EU Member States see Endemol Entertainment Holding vs. Commission, Case T–221/95, [1999] ECR II–01299; Kesko v Commission, Case T–22/97, [1999] ECR II–03775.

Digital") through a stock swap. At the time of the notification, Sogecable was jointly controlled by Promotora de Informaciones S.A. ("Prisa") and Groupe Canal+ S.A. ("Canal+"). Via Digital was owned by Admira, an affiliate of Telefónica, the leading Spanish telecommunications operator. The new, merged entity would be jointly controlled by Sogecable's parents.

Sogecable controlled Canal Satelite Digital, one of the only two operators of digital satellite TV platforms in Spain, and was also active in the provision of subscriber services, the production and sale of theme channels, the production, distribution and exhibition of feature films, and the acquisition and sale of sporting event media rights. Prisa was a major Spanish media group operating in the press, publishing, radio and pay-TV sectors, and the publisher of "El Pais" the Spanish newspaper with the largest circulation. Canal+ was a cinema and TV affiliate of the Vivendi group. Via Digital operated a digital satellite TV platform in Spain, and was also active in the production, sale, acquisition, reproduction, distribution and exhibition of audiovisual works.

On July 12, 2002, the Commission received a request from the Spanish authorities for the referral of the case pursuant to Article 9 ECMR, on the grounds that the proposed concentration threatened to create or strengthen a dominant position, as a result of which effective competition could be significantly impeded on distinct product markets in Spain linked to the broader pay-TV market. These markets included those for: broadcasting rights; the production and commercialization of theme channels; technical services for pay-TV; software licenses for conditional access (CAS) and application programming interface (API) technology; administrative services for pay-TV; open TV (TV advertising); the production and commercialization of audiovisual works; feature film production and distribution; TV signal distribution services; satellite capacity; fixed telephony and data transmission; Internet access; and Internet portals.

The Commission proceeded to examine the markets concerned and concluded that those in which the concentration threatened to create or strengthen a dominant position had indeed a solely national (Spanish) geographic dimension. The Commission argued that the pay-TV market was national in scope owing to linguistic and cultural barriers. Within the Spanish pay-TV market, the parties were the two main players competing against cable operators whose territorial coverage was limited. The parties had a combined market share of 75–85% in terms of subscriber numbers and of more than 90% in terms of sales. These factors and the existence of considerable barriers to market entry (e.g., the limited access to pay-TV content) led the Commission to conclude that the notified transaction threatened to create a dominant position in the Spanish pay-TV market.

Further, the Commission held that the related markets for the acquisition of premium films and broadcasting rights on premium sporting events were also national in scope, since broadcasting rights are granted generally on an exclusive basis for a given linguistic zone, which in this case corresponded to the Spanish territory. Owing to the exclusive contracts entered into by the parties with the main Hollywood studios and the main Spanish football clubs, the transaction threatened to create a dominant position in the Spanish market for the acquisition of premium content for pay-TV. The Commission also saw a real risk that the transaction could create a dominant buyer of theme channels in Spain. Together with premium content, theme channels are a necessary part of a pay-TV offering.

Finally, the Commission considered that the creation of a structural link between the largest pay-TV operator and Telefónica could strengthen the latter's dominant position in a

number of Spanish telecommunications markets, such as the ones for the provision of Internet access and fixed telephonic services.

Accordingly, the Commission decided to refer the case to the Spanish Competition Authorities.[7] On October 13, 2002, after a second phase investigation of the merger, the Spanish Tribunal for the Defense of Competition, in a controversial decision, decided to clear the merger subject to ten conditions.[8] Not only did four of its members vote against the merger's approval, but the decision also was inconsistent with the findings of a report by a group of technical experts, as well as with the non-binding report of Spain's telecommunications regulator, the Telecommunications Market Commission. The Tribunal's decision was revised by the Spanish Government, which increased the number of conditions to 34.[9] This expanded list essentially was similar to, albeit more detailed than, the one imposed by the Tribunal, and dealt mainly with the acquisition of premium TV-content, such as Hollywood films and football games.

The Court's Decision

The Commission's referral of the case to the Spanish authorities was not met with enthusiasm by competitors of the notifying parties in Spain. They were apparently concerned about the Prisa and Telefónica groups' strong political influence with the Spanish authorities. On November 22, 2002, a number of Spanish cable TV operators, including Cableuropa, Aunacable and several regional pay-TV operators asked the Court to annul the Commission's decision. The parties requested the expedited procedure provided under Article 76a of the Court's Rules of Procedure, and the Court adopted its decision ten months later, on September 30, 2003.

The Court first examined the circumstances under which third parties can be "directly and individually concerned" by a Commission referral to a Member State under Article 9 ECMR, and therefore entitled to challenge the Commission's referral before the Court. The Court highlighted that Article 9 referrals produce direct and automatic legal consequences for those parties that would be entitled to challenge a Commission decision under the ECMR if the referral had not taken place. The Court also remarked that the applicants had participated in the pre-referral procedure before the Commission, had responded to "Article 11 requests" for information from the Commission, and would be affected competitively by the merger. For these reasons, the applicants were "directly and individually concerned" parties entitled to challenge the Commission's referral decision.

The Court generally concurred with the Commission's analysis that the geographic markets concerned were limited to the territory of Spain despite the involved parties' international group structures and operations. The applicants had failed to provide a credible broader definition of the relevant geographic markets.

The applicants had argued that the Commission's decision to refer the case to the Spanish authorities was inconsistent with its previous policy of refusing such referrals in similar media mergers. The Court held that it was irrelevant whether the Commission had departed

[7] Case COMP/M.2845–Sogecable/Canal Satelite Digital/Via Digital, Commission Decision of August 14, 2002, available at http://europa.eu.int/comm/competition/mergers/cases/decisions/m2845_es.pdf.

[8] Informe del Tribunal de Defensa de la Competencia en el expediente de concentración económica C74/02 Sogecable/Via Digital.

[9] "Acuerdo del Consejo de Ministros de 29/11/2002," available at http://www.mineco.es/dgdc/sdc/Acuerdos%20Consejo%20Ministros/N–280_1_ACM.htm and http://www.mineco.es/dgdc/sdc/Acuerdos%20Consejo%20Ministros/N–280_2_ACM.htm.

from its previous policy in similar media deals, so long as it had still acted within the limits of its discretionary powers under Article 9. These limits had not been exceeded in the present case. The Commission would not be entitled to refer the case if it had reason to believe, at the time of the referral, that the Spanish authorities did not have sufficient means and were not in a position to review the merger properly. This was not the case, however, as the Spanish authorities had "done their homework" in their request, by identifying sufficiently the potential threats to competition. Further, the validity of the Commission's decision was not impacted by any actual or alleged weaknesses in the subsequent review undertaken by the Spanish authorities. Finally, the Court found the Commission's market analysis and justification of the referral in its Article 9 decision sufficiently clear and detailed.

Accordingly, the Court rejected the applications for annulment in their entirety.

The Proposed New EU Regime for Cross-Referrals

On December 11, 2002, the Commission proposed substantial amendments to the ECMR.[10] These are expected to be adopted in time to apply as of May 1, 2004—referred to as the "Big Bang"—when the EU expands to 25 Member States and important reforms to the whole EU antitrust system enter into force.

The proposed changes focus on procedural improvements to the existing EU merger review system and aim, inter alia, to streamline the system of referrals under Articles 9 and 22 ECMR by:

- "mirroring" more closely and simplifying the criteria for referral in both directions. In future requests for Article 9 referrals, Member States would not have to provide an assessment of the threat of the creation or strengthening of a dominant position and present elaborate preliminary conclusions (as the Spanish authorities had to do in the Sogecable case). It would be sufficient for the Member States' authorities to demonstrate that the concentration would significantly affect a distinct market within the Member State concerned—an easier test to meet;

- allowing requests for, and decisions on, referrals under Article 9 and 22 at the pre–notification stage. Under the present system, these requests and decisions can only take place post-notification, subject to strict deadlines that limit the notifying parties' ability to argue their case, and often result in significant delays in the follow up. The new procedure should give private parties better control over the referral process, and presumably should help accelerate the whole referral process;

- conferring exclusive jurisdiction on the Commission if all or at least three of the Member States having national jurisdiction over the concentration agree to an Article 22 referral. Under the present regime, the allowed scope of the Commission's powers in Article 22 referrals and the residual competence of Member States are subject to interpretation and uncertainty; and

- allowing the Commission to invite Member States to refer to it a case under Article 22 or request the Commission to refer a case to them under Article 9. The current referral system can only be triggered by a

[10] The proposal was subsequently published in the EC Official Journal (OJ C 20/4 of January 28, 2003) and is available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2003/c_020/c_02020030128en00040057.pdf.

Member State request, and while the Commission may accept or reject it, it cannot take the first initiative in the overall process.

At least on their face, these proposed changes make sense, even though they are unlikely to prevent future conflicts. Procedural improvements are not sufficient to counterbalance the vast variance in the substantive quality, independence and reliability of national antitrust authorities across the EU, a situation soon to be aggravated by the entry of ten new Member States with limited resources and only recent experience in merger reviews and EU-type antitrust enforcement in general. Private parties may dislike the prospect of having their mergers reviewed by a mixed basket of national regulators across an enlarged EU, instead of a one-stop shop in Brussels. Further, new Member States' antitrust agencies may feel a need to preserve their self-respect by requesting Article 9 referrals whenever they are entitled to; and partial referrals of certain territorial, product or other aspects of major deals by the Commission to the Member States will be legally vulnerable, given the associated procedural complications and the difficulties of reaching consensus, within a limited timeframe, on the distinct product markets involved in such deals and their exact geographic scope. Against this background, the proposed changes by the Commission are in the right direction and will, at a minimum, ensure some basic "EU rules of engagement" in the jurisdictional conflicts ahead.