CPI's Europe Column Presents:

Economic Evidence and the Rights of the Defense: UK vs EU Merger Control

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The issue of procedural fairness in UK and EU merger control has come under the spotlight in two court rulings: the findings of the Competition Appeal Tribunal ("CAT") in *Sainsbury/Asda*,[2] and the judgment of the European Court of Justice ("ECJ") in *UPS*.[3] The rulings raise important questions over protection for fundamental rights in merger control procedure, in the context of the increasingly crucial role played by economic evidence in complex cases.

Sainsbury/Asda: lack of procedural fairness in time given for responses to economic evidence disclosed

The *Sainsbury* case arose in the context of a Phase 2 investigation by the UK's Competition and Markets Authority ("CMA") into the proposed merger between Sainsbury and Asda. It concerned the CMA's practice of disclosing "Working Papers" detailing its economic analysis during the review process, for the parties' review and comment. The parties challenged the timeframes they were given to respond to the Working Papers as well as the date set for the main hearing in the investigation arguing that the CMA had breached the principle of procedural fairness.

The CAT noted that between November 9 and November 28, the CMA had provided 19 Working Papers to the parties for their review, totaling approximately 850 pages. Nine of these, or over 450 pages, were received on November 27-28, of which six were received late at night or in the early hours. The Working Papers were complex in nature and were accompanied by a large volume of underlying data. Despite the very significant burden this placed on the parties, the deadline for the parties' responses to all of the Working Papers was set (following an extension) as just over two weeks from receipt of the final papers (December 17), overlapping with the December 14 date set for the main hearing.

The CAT found that the CMA had not followed a fair process. It noted that although fairness did not require that the parties be given as much time as they wished for responses, an extension should have been granted, owing to the exceptional magnitude and complexity of the Working Papers, the detailed work that would be required from the parties' own economists to respond, and the closeness of the prescribed response date to the date for the hearing. The CAT was clear that the CMA was not obliged by the relevant guidelines to disclose such Working Papers, but that once the CMA had done so, the parties' procedural rights were engaged.

Accordingly, the CMA's decisions as to the relevant deadlines were quashed and the points remitted to the CMA for reconsideration.

UPS: rights of the defense infringed by failure to disclose amendments to econometric model relied on in prohibition decision

In sharp contrast to the relatively rapid in-process resolution reached in *Sainsbury/Asda*, the January 16, 2019 judgment in *UPS* arrived almost six years after the end of the merger review. The judgment concerned the appeal by the European Commission ("Commission") against a General Court judgment finding of a lack of

procedural fairness in the Commission's approach. The case focused on the disclosure of economic evidence by the Commission in its 2012/2013 review of the proposed acquisition of TNT by UPS, which the Commission had ultimately prohibited. The General Court ruled that the Commission's failure to inform the parties of material changes to an economic model on which the Commission had gone on to rely in the prohibition decision, constituted an infringement of the rights of the defense.

On appeal by the Commission, the ECJ upheld the General Court judgment, stating that the Commission was required to reconcile the need for speed in merger control proceedings with the rights of the defense. The Court noted that observance of the rights of the defense required the parties to be enabled to "make known effectively their views on the accuracy and relevance of all the factors that the Commission intends to base its decision on." It found that it was "necessary" that, where the Commission intended to rely on an econometric model, both the model and the methodological choices underlying the model were disclosed to the parties. The Court also referred to the General Court's finding that the final version of the model had been adopted over two months before the final decision in the matter.

Fair access to economic evidence

The two cases illustrate the differing approaches taken at UK and at EU level to the disclosure of economic evidence. The CAT found that the CMA placed an unfair burden on the parties in *Sainsbury/Asda* by disclosing large volumes of detailed economic evidence, essential to the defense, with very little time for the parties to review or respond to the material. However, arguably, the parties to UK proceedings are fortunate in receiving such material up front for their analysis, at a point when the authority's approach may not yet be set in stone.

Where, as is increasingly true in merger control, the authority's case depends on economic analysis, it is essential that parties should be fully informed of the nature of that analysis. A basic principle of procedural fairness is that parties should know the case against them. However, by contrast to the approach taken by the CMA in *Sainsbury/Asda*, the EU Commission has typically taken a sparser approach to the disclosure of evidence. In *UPS*, for example, the Commission argued that it was not required to disclose, to or allow the parties the opportunity to comment on, changes to the underlying econometric analysis – partly on the basis that, the Commission alleged, such an approach would be incompatible with the time limits set by the EU Merger Regulation.

In response to the *UPS* and *Sainsbury/Asda* cases, the ECJ and the CAT have stated clearly that it is for the authority to address the apparent risk of conflicts posed by the expanded role of economics, and the unchanged requirements of procedural fairness/the rights of the defense in the context of prescribed statutory timetables. As is clear from the judgments in *UPS* and *Sainsbury/Asda*, the central role now played by economic evidence in merger reviews means that it is essential that the parties should be able to review and understand that evidence before the authority has reached its final conclusions.

Availability of timely redress for procedural failings

It is striking that in *Sainsbury/Asda* the parties were able to challenge the CMA's approach whilst the investigation was ongoing and the issue remained live. The application was made and heard within three days, with the judgment handed down within two working days of the hearing.

By contrast, as noted, the final judgment in the *UPS* litigation was handed down on January 16, 2019, almost six years after the conclusion of the merger review in question. It is clear from *UPS* and the surrounding circumstances that such a delay in getting to a final judgment can lead to serious consequences, both in terms of the outcome for the parties, and, potentially, wasted regulatory time and cost. UPS is now taking action against the Commission, claiming EUR 1.742 billion in damages for losses which UPS says it incurred as a result of the now-overturned prohibition of the contemplated transaction. ASL, an Irish aviation firm which had agreed to buy TNT Airways as part of the commitments offered in *UPS*, is also claiming damages of EUR 263.6 million.

Wider issues in UK and EU merger procedure

The judgments in *Sainsbury/Asda* and *UPS* come in the context of a wider evolution in the approach taken at UK and at EU level to merger reviews, with several factors placing a greater burden on the review timetable. The increased focus at both EU and UK level on internal documents as a source of evidence, particularly at Phase 2, has given rise to an additional workstream. This can prove extremely burdensome for the parties and the authorities, especially in complex cases.

In its recent "Guidance on requests for internal documents in merger investigations," the CMA refers to the need for internal requests to be proportionate to the complexity of the matter at hand, suggesting an awareness of the potential for excessive administrative requirements arising from extensive document requests. However, some of the aspects of the guidance which formalize the process could be counterproductive and give rise to an increased administrative burden, if not applied flexibly. An example is the requirement for the parties to provide a detailed description of the methodology used to locate documents, At EU level, similar guidance on internal document requests is imminent, and is expected to crystallize the Commission's practice and procedure.[4]

Expanding the analysis of economic evidence in pre-notification

One possible approach to reconciling the need for procedural fairness with the demands of statutory merger review timetables, would be for more of the economic analysis and internal document review in complex cases to take place during pre-notification.

In the UK context, currently, according to comments made by the CMA in *Sainsbury/Asda,* pre-notification in UK merger control typically lasts anywhere from one week to four months – and lasted around three months in *Sainsbury/Asda*. As the

CAT suggested, had the CMA extended pre-notification as requested by the parties in *Sainsbury/Asda*, such that it was able to disclose the Working Papers in a more staggered manner and further from the date of the hearing, the court action undertaken in *Sainsbury/Asda* could have been avoided.

Conclusion

It is clear that authorities need to take a realistic approach to setting the pre-notification timetable, taking into account the additional time that will be required in complex cases. However, speed and certainty remain key to commercial decision-making and should be kept at the forefront of the decision-makers' minds in this increasingly challenging area. With that in mind, the references to proportionality in the CMA's guidance on requests for internal documents are welcome; it remains to be seen how the new guidance is implemented in practice. It is to be hoped that the EU will take a similar approach and will also include proportionality front and center in the anticipated EU guidance on internal document requests. More broadly, there are lessons to be drawn from the lengthy time taken to achieve a final resolution of the procedural dispute in *UPS*, as contrasted with *Sainsbury/Asda*, and the significant post-UPS damages actions. If the *UPS* experience were to serve as a springboard for reform of EU procedural practice, the ultimate outcome of the lengthy *UPS* saga could yet be a net positive.

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[2] *J Sainsbury PLC and Asda Group Limited v. The Competition and Markets Authority* [2019] CAT 1.

[3] Case C-265/17 P *European Commission v. United Parcel Service*, *Inc*.

[4] For more information on the focus by antitrust authorities on internal documents, see our *Global Trends in Merger Control Enforcement* report, February 2019.