MAIN POINTS

- Econometric evidence played a role in eliminating concerns in a number of Member States (para 201).
- The Commission seems to have used a different model for the estimation of the price concentration and for the prediction of the price effect of the merger (para 206 and 207).

  "Although the use of a discrete variable had been discussed repeatedly during the administrative procedure, it does not appear from the file that that was also the case as regards the use of different variables at the different stages of the econometric analysis" (paragraph 208).

  - We have to deduce that the precise model used for prediction itself was not discussed either.
- These changes are, for the Court, not negligible (paragraph 205).
- From an economic perspective, it is also unusual to use a different model to estimate and predict the effects of a merger. This requires some explanations.

APPRECIABILITY

- Paragraph 210 says:

Accordingly, the applicant's rights of defence were infringed, with the result that the contested decision should be annulled, provided that it has been ***sufficiently demonstrated by the applicant not that, in the absence of that procedural irregularity, the contested decision would have been different in content, but that there was even a slight chance that it would have been better able to defend itself .***

- The French version should not translate into "slight" but rather that there is some real possibility:

"non que […] la décision attaquée aurait eu un contenu différent, ***mais bien qu'elle aurait pu avoir une chance, même réduite, de mieux assurer sa défense****".*

- This is consistent with the Solvay judgement paragraph 57, quoted here by the Court, referring to *"documents [that]* ***could have been useful for its defence."***

- Knowing the Court, there clearly must be an element of appreciability here;
  - The rights of defense are there such that the approach is sound.
  - Giving the parties a real possibility to comment is a necessary condition for sound decisions.
  - Therefore, procedure and substance are closely linked in this case.

IS THIS REALLY ABOUT ECONOMICS?

- It is easy to accuse the economic nature of the evidence, however, the case simply says that economic evidence has to be reviewed/communicated with the same degree of rigour as any other type of evidence (quote of Solvay).

- As it is the Commission's duty to arrive at an unbiased and comprehensive assessment, if has to use efficient tools:
  - Economic theory and econometric techniques are certainly an improvement over assessment of unilateral effects based solely on market shares, and are the only tools available to balance efficiencies.

- There is no such thing as informal economics.
  - People use models and econometrics because this is the only rigorous and transparent way to do economic reasoning.
  - There is a big cemetery of economic intuitions that have been proven wrong by proper economic modelling.
  - When economists make economic arguments, they should be prepared to back them up formally or by quoting an academic paper (otherwise one has to assume they are wrong).

- On the parties' side, economics can only help when facing formalistic rules.
  - Mergers without efficiencies normally increase price, there is nothing to acknowledge here.
  - The question is whether the price effect is economically *significant* and then offset by efficiencies
  - In this sense, economics cannot backfire, it cannot be used against the parties.

- The parties will have incentives to submit econometric evidence and then the Commission will have to assess it.

WHO IS SQUEEZED?

- The case is captivating in the sense that both sides complain that the other side was late.
  - What is even more captivating is that they are both correct.
- The first time the parties can see the Commission's fully fletched analysis is in the SO, which is quite late.
- Then, they have very tight legal deadlines to reply.
- When the reply to the SO comes, the time pressure on the Commission is already untenable
  - What happens in the last two month of a case (including Christmas in this case)?
- Moreover, the Commission has to be able to take the reply into account or this is pure red tape.
  - And then what if there was a mistake in the SO or if the parties indeed have a good suggestion?

> *"the applicant was already able, during the administrative procedure, to have a significant influence on the development of the econometric model proposed by the Commission, since it raised technical problems to which it provided solutions, as the Commission expressly acknowledges." (paragraph 214)*

LESSONS FOR THE FUTURE

UPS-TNT should have been a milestone case where quantitative analysis was used successfully to balance verifiable efficiencies.

- It was a missed opportunity.

In January we submitted with Xavier Boutin a contribution for reform of ECMR.

- The diagnosis we put forward there resonates particularly strongly post UPS-TNT.

Merger control, today more than ever, requires a through and serene debate around economic evidence.

- SOs in merger control become comparable to antitrust SOs (in length and complexity)
  - The variability of potential harm and efficiencies is particularly high in the new economy.
- The current merger procedures should be reformed to allow time and resources for the assessment of complex cases.

INTERACTIONS BETWEEN PARTIES AND THE COMMISSION

- The interactions between the parties and the Commission stopped too early in UPS TNT.

- Interactions have to stop at some point, however, the debate on economic evidence frequently requires several written interactions (e.g. in academia the revise and resubmit procedure).

- A very ambitious reform would be to move to two exchanges of pleadings.
  - This is the case in many civil or arbitration courts, as well as in front of the ECJ or some NCA (e.g. France).
  - In practice, this also seems to be the case for many antitrust cases where SSOs and LoF become more common.
  - One could envisage the possibility of an expedited procedure (as in front of the ECJ) waiving the second round of pleadings.

- In any event, one needs to release the time pressure and allow for more flexibility:
  - There are reasons for the existence of legal deadlines on the Commission.
  - But why should parties have so little time to reply to an SO? They are the ones who will want to move quickly.
  - Shouldn't parties be allowed to submit evidence or remedies at any point in the procedure, provided that this extends the deadlines of the Commission accordingly?

DOES THE COMMISSION NEED TO CONTROL SO MANY MERGERS?

- It is in all parties' interests that the Commission focuses resources on the important cases.
  - Currently, an overwhelming number of the notified cases are not problematic.
- We encourage the Commission to engage in a reform similar to the 2003 antitrust reform.
  - This could be done by a properly framed system of voluntary notification (an amalgam of the EU and US systems).
- The parties would be allowed to notify as in the current system.
  - We propose to consider introducing a notification fee.
- However, they would only be required to disclose their intentions to the Commission by submitting an electronic form containing readily available information about the merger (similar to the HSR document).
  - The parties should make their intentions regarding the transaction public, or at least inform their largest customers and suppliers.
- The Commission would have a limited period of time to receive complaints and use its market investigation tools.
  - It could then take no action (no need for a decision to pave the way for the implementation of the merger).
  - It could also open proceedings (i.e. enter phase II directly).
- Parties to unproblematic mergers would have incentives not to notify.
- Parties to potentially problematic mergers would have incentives to notify.
  - The publicity ensures they will be noticed.
  - The only way to get an equivalent of phase I clearance (including with remedies) would be to voluntarily notify.

FURTHER THE ECN

- The Commission mentions in its own documents that the ECN is not working perfectly yet.

- We first propose to increase the efficiency of one stop shopping by letting parties self-assess whether their operation affects trade between Member States.

- If they believe it does, they would then either voluntarily notify to the Commission, or simply disclose their intentions to merge by submitting the electronic form mentioned earlier.
  - Member States would naturally be able to request a referral, but they would have the burden to prove that either trade is not affected, or that they are better placed than the Commission to control the merger.

- Moreover, there has not been any systematic review of the effective application of the new substantive test by Member States.
  - We would welcome such a review, followed by a public consultation on the ways to promote more convergence in the competitive assessments and rights of defence (access to economic evidence) in the EEA.

OUR PROPOSALS AVAILABLE ON SSRN

For more details regarding our proposals for more efficient ECMR please see:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929312

Comments and suggestions most welcome.