mlex

AB EXTRA

Eurotunnel/SeaFrance: Unbridgeable gap over the Channel?

Matt Evans and Marguerite Lavedan examine the recent Eurotunnel/SeaFrance case, which demonstrates how different national approaches to substantive merger assessment can scuttle the best efforts of agency cooperation

Matt Evans

Matt Evans is a partner based in the London office of Jones Day. He advises on a wide range of both transactional and behavioural EU and UK competition law matters. Matt works with clients in a range of sectors, in particular telecoms, technology, music, fast moving consumer goods and financial services.

Marguerite Lavedan

Marguerite Lavedan is an associate based in the London office of Jones Day. She is an Avocat registered with the Paris bar. Marguerite advises on all aspects of European, UK and French competition law including merger control, cartels and anticompetitive agreements. She has particular experience in national and international cartel investigations.

EUROTUNNEL/SEAFRANCE: UNBRIDGEABLE GAP OVER THE CHANNEL?

Matt Evans and **Marguerite Lavedan** examine the recent Eurotunnel/SeaFrance case, which demonstrates how different national approaches to substantive merger assessment can scuttle the best efforts of agency cooperation

"(..) encourage you all to continue to look for convergence – such as in the working group on mergers – improve the framework for cooperation on individual cases; and make progress with the practical, day-to-day guidance to competition authorities." [1]

Commissioner Almunia's words at this year's International Competition Network annual conference indicate that cooperation between competition authorities remains a work in progress. The recent Eurotunnel/SeaFrance case demonstrates that different national approaches to substantive assessment can stymie the best efforts of agency cooperation. This article examines why the UK Competition Commission ("CC"), which recently decided to prohibit Eurotunnel from operating ferry services at the port of Dover following its acquisition of three SeaFrance vessels, reached a different conclusion from the French Autorité de la Concurrence ("Autorité"), which had cleared the deal in late 2012. Following a summary of the merger review timetable and of the Autorité's and CC's common ground, the article examines the different approaches taken by the CC and the Autorité on the substance – in particular with regards to the "counterfactual" and remedies – and takes a look at this transaction in the wider context of international merger control cooperation.

Chronology of the transaction on both sides of the Channel

Following a period of heavy losses, ferry operator SeaFrance was placed in liquidation. In May 2012, the French Commercial Court (the "Court") overseeing the liquidation process received bids for SeaFrance assets from several companies, including Eurotunnel – which operates the railway tunnels under the Channel – and three ferry operators: P&O Ferries, Stena RoRo and DFDS/LD. Around the same time, Eurotunnel informed the Autorité of its potential acquisition of SeaFrance assets. The Autorité exceptionally agreed that Eurotunnel would be free to complete the transaction without having to wait for French merger clearance. On June 11, 2012 the Court chose Eurotunnel as the buyer of SeaFrance's assets on the grounds that it offered the best outcome for creditors and was the only bid that would preserve the employment of former SeaFrance employees. On August 20, 2012, Eurotunnel launched ferry services between Calais and Dover under the MyFerryLink brand.

Under UK merger law, parties to a deal qualifying for review by the UK Office of Fair Trading ("OFT") are not obliged to notify the transaction for merger clearance. If they do not notify, they run the risk that the OFT will open a merger investigation on its own initiative. The OFT opened such an investigation into Eurotunnel's proposed acquisition of SeaFrance on June 22, 2012. Ten days later, as the UK and French merger reviews were underway, Eurotunnel completed its acquisition. However, the OFT had concerns that the deal may substantially lessen competition in the provision of short-sea cross-Channel transport services and, on October 29, referred the acquisition to the CC for an in-depth investigation. The following week, on the other side of the Channel, the Autorité conditionally cleared the transaction. Subsequently, on June 6, 2013, the CC reached a different conclusion from the Autorité and decided to prohibit Eurotunnel from operating ferry services at the port of Dover.

Broad agreement on market definition and impact of the deal on competition

The respective UK and French competition authorities (the "Authorities") found plenty of common ground. They both identified the short-sea cross-Channel transport services to passengers and freight customers as the relevant markets. They also largely reached the same conclusion: that the acquisition would restrict competition for short-sea cross-Channel transport services.

In France, the Autorité found that the transaction could lead to a restriction of competition through conglomerate effects on the cross-channel freight market. Eurotunnel would be able to use its strong position on the market to offer deals combining ferry and train in order to encourage freight carriers to use its MyFerryLink services. Since Eurotunnel would be the only company able to offer a bundled deal, this advantage could discourage existing or potential competitors. The Autorité concluded that this might lead to a reduction in frequency or even the closure of some routes. Eurotunnel offered remedies to address the Autorité's concerns and as a result is restricted in its ability to bundle services across its tunnel and ferry operations for five years from the date of the Autorité's decision.

In the UK, the CC concluded that the transaction could be expected to result in a substantial lessening of competition in the freight and passenger markets, leading to an increase in the prices charged both by Eurotunnel and ferry operators in the two relevant markets. The CC also found that Eurotunnel's decision to acquire the SeaFrance ferries was mainly to prevent its rival DFDS/LD from buying them. The CC's remedy was to give Eurotunnel an opportunity to sell the two larger ferries it had acquired, failing which it would be prohibited from operating ferry services at Dover.

The CC concluded that the transaction could result in a substantial lessening of competition in the freight and passenger markets

Notwithstanding the broad common ground between the Authorities, their analyses departed in important respects, leading to the different outcomes. The main areas of discrepancy between the Authorities' decisions appear to relate to (i) the approach to the counterfactual, (ii) the likely exit of DFDS/LD and (iii) the impact of overcapacity on Eurotunnel's ability to raise prices.

A striking difference in analysis of the counterfactual

The most notable difference in analysis relates to the counterfactual. The counterfactual is an analytical tool used in assessing the question of whether a merger restricts competition. It involves a comparison of the competitive situation post-merger against the competitive situation without the merger – i.e. what would have happened absent the transaction.

The Autorité considered that any situation that would have resulted following a different decision by the Court on the liquidation of the assets or their sale to another operator was too hypothetical to be considered as the counterfactual. It concluded that the appropriate counterfactual was either the situation that existed prior to the liquidation of SeaFrance in November 2011 or the situation that existed prior to the launch of the MyFerryLink services in August 2012 – and that its assessment remained broadly the same under either scenario. The Autorité's choice of counterfactual is surprising, not least because its decision also states that the failing firm defense did not apply because DFDS/LD would have been an alternative purchaser for SeaFrance's assets.

The approach taken on the other side of the Channel was materially different. The CC considered the two counterfactual scenarios identified by the Autorité. However, it decided to rule out the pre-merger situation, as SeaFrance had been in liquidation since November 16, 2011. Instead, it considered what options would have been available to the Court had Eurotunnel not bid for the former SeaFrance assets. In particular, in accordance with UK Merger Assessment Guidelines,[2] the CC assessed whether there were likely to have been other buyers whose acquisition of the SeaFrance business or its assets would have produced a better outcome for competition. The CC noted that the sealed bid process had revealed other bidders interested in purchasing the liquidated assets. It concluded that, irrespective of the approach taken, the most likely outcome absent the merger would have been one in which DFDS/LD acquired one, two or three of the vessels and continued to operate five vessels over the short sea crossing, having replaced one or more of its existing vessels with the acquired vessels. The counterfactual therefore showed an alternative which seemed less harmful to competition on the freight and passenger markets than the Eurotunnel purchase.

Other divergent conclusions

The Authorities' analyses differed on two other points: the likely exit of DFDS/LD and the impact of overcapacity on Eurotunnel's ability to raise prices. The CC found that there was excess capacity on the market and that the additional competition from MyFerryLink was likely to result in DFDS/LD exiting the Dover-Calais route in the short term. In contrast, the Autorité found that the excess capacity would prevent Eurotunnel from raising prices and that any increase in tunnel prices would likely benefit P&O by diverting a significant share of demand to ferries. The Autorité did not take into account a likely exit of DFDS/LD because the evidence before it did not suggest that DFDS/LD would soon withdraw from the Dover-Calais route.

Why did the analyses differ?

There appear to be two main reasons for the discrepancy in the Authorities' analyses. First, there is a material difference in

how the counterfactual is treated on either side of the Channel. UK merger guidelines explicitly state that the application of the substantial lessening of competition test involves an analysis of the counterfactual. They discuss in detail the approach to the counterfactual, and decisional practice provides numerous precedents for the analysis of counterfactual situations. In contrast, there are no specific rules or guidelines on the analysis of the counterfactual in the context of merger decisions under French law, except for the analysis of the failing firm scenario.[3] As far as the authors are aware, this is also the first time that the Autorité has so explicitly referred to the notion of "counterfactual" in one of its merger decisions.

Although the different approaches to the counterfactual partly explain the inconsistent decisions in this case, such discrepancies arising from an analysis of the counterfactual are likely to remain rare. This is because, in practice, the analysis of the counterfactual tends to influence the substantive assessment of mergers only in exceptional circumstances, such as the failing firm scenario or so-called "parallel mergers".[4] There is little room for divergent counterfactuals in the vast majority of merger cases.

The second main reason for the inconsistent decisions is that the OFT's decision to refer the transaction to the CC for an in-depth investigation, following the Autorité's Phase I clearance in France, meant that a more detailed review of internal documents was carried out on the UK side. In particular, as the CC noted in its decision, the Autorité did not see any of the internal Eurotunnel documents that led the CC to find that Eurotunnel's rationale for the deal was primarily a desire to prevent DFDS/LD from acquiring the vessels at a low cost and driving down prices. The OFT decision does not refer to such documents, which may mean that they only emerged during the CC's review – after the Autorité's decision. The CC also noted in its decision that it was able to assess the impact of the MyFerryLink service on DFDS/LD's performance – something the Autorité noted was not available to it at the time of its review.

It is likely that the Authorities exchanged information on the case during the course of their respective reviews

Shortcomings in merger control cooperation between competition authorities

The proliferation of merger control regimes in recent years and the increase in the number of deals requiring merger clearance in many jurisdictions has resulted in agencies around the world demonstrating a wish to ensure that investigations and, where appropriate, remedies, are consistent. Cooperation has been promoted through an increasing number of bilateral or multilateral agreements between competition agencies, and through fora such as the Organisation for Economic Cooperation and Development, the International Competition Network and, within the European Union ("EU"), the European Competition Network.

Cooperation between agencies, through informal communication of non-confidential information from their respective investigations and the formal exchange of confidential information (usually with a waiver from the merging parties) has helped competition authorities around the world to reach consistent, or at least non-conflicting, outcomes. However, *Eurotunnel/SeaFrance* shows that international cooperation remains a work in progress. Although this is not a first in the history of multi-jurisdictional mergers – a notable example being the 2001 GE/Honeywell merger which was cleared by the US Department of Justice but then blocked by the European Commission – such conflicting outcomes are rare.

The divergent analyses in *Eurotunnel/SeaFrance* are unfortunate, not least because the Authorities identified the same product and geographic markets and, given the nature of those markets, one would have expected the impact of the deal to be identical on both sides of the Channel. It is also surprising that two well-established members of the European Competition Network, which has published best practices on cooperation between EU national competition authorities in merger reviews, should reach different conclusions. It is likely that the Authorities exchanged information on the case during the course of their respective reviews. It is to be hoped that the OFT and Autorité recognised the risk that the UK and French regimes may reach different conclusions, based on the fact that they took different approaches to the counterfactual and that the CC's information gathering powers may have revealed important factual evidence that neither the OFT nor Autorité had uncovered. That said, unless the Autorité had been willing to adopt the UK approach to the counterfactual and, by doing so, had shared the OFT's Phase I concerns, it is not clear what else the Authorities could have done. For example, the Autorité is not permitted to "stop the clock" in a Phase I review – which it otherwise might have done pending the OFT's decision, in an attempt to align the near-parallel investigations – and therefore had to take a decision either to clear the deal or refer it to a Phase II investigation before the OFT had made its decision on referral.

In theory, the Authorities could have decided to transfer jurisdiction to the European Commission under Article 22 of the EU Merger Regulation. For practical reasons, however, this may often not be realistic or desirable. The referral request must be made within 15 working days of the date on which the transaction was made known to the national competition authorities, which may not be sufficient time for authorities

to realise that there is a real risk that their final assessments may conflict with one another. Yet extending this timetable, or devising a default referral system for deals that affect trade between member states and significantly threaten trade within one or more member states, are unattractive options – not least because they are likely to increase uncertainty and costs for businesses. It may be that only the convergence of merger assessment guidelines, or of competition regimes themselves, can overcome the differences that remain between merger control authorities as to their substantive analysis of transactions.

CC hampered in its choice of remedies

Eurotunnel/SeaFrance is notable not only for the apparent shortcomings in international merger control cooperation as regards substantive assessments, but also for the fact that proceedings in France hampered the CC's ability to impose effective remedies to address its competition concerns.

By way of background, where the CC concludes that a transaction may be expected to result in a substantial lessening of competition, its preference is to impose structural remedies to address its concerns – such remedies represent 85 percent of the CC's conditional clearance decisions.[5] Amongst structural remedies, partial divestments are by far the most common form (over 70 percent of the cases). Prohibitions are rare.

In *Eurotunnel/SeaFrance*, the CC's provisional view was that divestiture of the MyFerryLink business or the assets was likely to be an effective remedy. However, it transpired that the Court had imposed an order prohibiting the sale of the vessels for a period of five years. That prohibition may only be lifted by the Court through a process involving consultation with relevant French government ministers. The uncertainty of such a process for the timing and outcome of a divestiture led the CC to find that there was no guarantee that a divestment remedy would be effective. It therefore concluded that an effective and proportionate remedy would be to prohibit Eurotunnel from operating ferry services out of Dover. The prohibition will apply to any vessels for two years, and to the two largest ferries Eurotunnel acquired from SeaFrance for 10 years (the third vessel is quite old and currently not in use). Before the prohibition at Dover takes effect, Eurotunnel will have, should it so wish, six months to sell its two largest ferries to one or more purchasers approved by the CC.

This is the third time that the CC has imposed a so-called "partial prohibition" in a merger case and the first time it has done so in the context of a completed acquisition.[6] Notably, one of the two previous cases also involved ferry services. In 2004 the CC prohibited Stena from acquiring control of any or all of P&O's Liverpool-Dublin ferry services, while clearing the acquisition of the Fleetwood-Larne route. In the current case, however, the CC's choice of remedies was influenced by Court's sale prohibition order, which to large extent tied the CC's hands.

What next?

The CC's decision ensures that all Dover-Calais ferry services are run by companies competing with Eurotunnel's train operations. In the meantime, Eurotunnel has lodged an appeal before the Competition Appeal Tribunal against the CC's decision. If it succeeds, all well and good. If it fails, it will have to choose between operating the SeaFrance ferries out of a port other than Dover, selling the ferries, or keeping them mothballed for 10 years. This extraordinary outcome derives from the exceptional circumstances of the case, and should not be interpreted as setting a new trend. Instead, the case is a reminder of the importance for merging parties to ensure that they have a strategy in place to coordinate merger filings across jurisdictions. Perhaps more importantly, though – since there is no suggestion that Eurotunnel did not have such a strategy in place – it highlights that cooperation may sometimes not be sufficient to guarantee consistent competition enforcement and that beyond cooperation, EU competition authorities should "*continue to look for convergence.*" ■

Matt Evans is a partner and Marguerite Lavedan an associate in the antitrust & competition practice at Jones Day. They are based in the London office. The views expressed in this article are personal to the authors and do not reflect the view of Jones Day or any of its clients.

Footnotes

1 See http://europa.eu/rapid/press-release_SPEECH-13-360_en.htm

2 Merger Assessment Guidelines, CC2 / OFT 1254, September 2010.

3 The conditions of the failing firm scenario have been set out in a judgment by the French supreme administrative court « Conseil d'Etat » in Société Royal Philips Electronic, February 6, 2004, n°249267.

4 "Parallel mergers" are when two mergers affecting the same markets are notified at the same time or around the same time thereby creating overlapping review periods. The question for the competition authority is how, if at all, should the second transaction be taken into account in the analysis of the first transaction.

5 Statistics based on all merger enquiries imposing remedies since the entry into force of the Enterprise Act 2002 in June 2003 to June 26, 2013.

6 The other two cases where partial prohibitions were imposed by the CC were the Stena/P&O decision of February 5, 2004 and the Rank/Gala decision of February 19, 2013.