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Exceptional Approval of Major Mergers: London and Brussels Compared

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I. INTRODUCTION

The merger between Halifax Bank of Scotland and Lloyds TSB attracted a remarkable amount of interest in Scotland, where the Bank of Scotland had for over 300 years had iconic status. It issued its own banknotes and was probably the oldest and best-known Scottish company. In the 1980s and 1990s, it was a pillar of the relaunched Edinburgh-based financial services industry. Unfortunately, when the tsunami of the financial crisis hit, the Bank of Scotland was placed too close to the water's edge, and a symbol of the thrift, prudence, and diligence by which Scots try to be guided was drowned, along with a number of other, even larger, financial institutions. Before the huge scale of the disaster had dawned, Lloyds TSB saw an opportunity for a merger with a weakened bank possessing a very high reputation and a large geographic footprint in Scotland. The idea of a merger was endorsed, even promoted (so it seemed) by U.K. ministers.

The disappearance of an independent Bank of Scotland aroused much more popular passion than a merger of two pharmaceutical manufacturers, road-builders, or telecommunications suppliers. A group of skeptics about the merits of the merger met and found common cause in feeling uneasy about it. Towns with branches of two banks might now have only one. Businesses wanting to procure a loan would find their choice of lender reduced. Some of the skeptics were shareholders in HBOS, several were account-holders, and all of them expressed an interest in challenging the legality of a merger which would reduce competition in banking services in Scotland. Accordingly, the group (the Merger Action Group or "MAG") sought legal advice and retained the services of a solicitor, a sole practitioner, long established in Glasgow and experienced in large public hearings. He in turn sought the advice of

specialist counsel in Brussels. The challenge, if there was to be one, would be to the legality of the decision of Secretary of State Mandelson on October 31, 2008. That decision invoked a newly-enacted ground of public interest for not applying the normal competition rules. Although an extraordinary and a retrospective measure, it had been adopted pursuant to the applicable statutes. The ministerial decision was, however, subject to judicial review. The deadline for challenging it was November 28, 2008. Instructions to proceed were given on Sunday, November 23, 2008, and the requisite application on behalf of MAG was filed with the Competition Appeal Tribunal ("CAT") on November 28.

Although MAG's members were based in Scotland, its avowed objective was the maintenance of a strong, competitive banking sector in the United Kingdom as a whole. More specifically, its goals included the availability of a range of banking services on competitive terms, support for consumer choice, avoidance of dominance of a small number of large banks, effective competition in the banking sector, and maintaining employment in the banking sector. A website was opened, allowing members of the public to offer support in various ways. Some 600 people expressed support for MAG's objectives by this means (counsel even received fan mail about the merger from a variety of persons).

Proceedings moved with remarkable speed. Within an hour of the filing, the staff of the CAT requested the serving of electronic copies on other parties by telephone. On December 3, the CAT heard argument on the applicable law; on December 5 skeletons were exchanged; on December 8/9 argument was heard and on December 10, judgment was rendered, finding firmly in favor of the Secretary of State.

Those who have served as counsel in a case are under a special duty of prudence when commenting publicly on any aspect of the case. This article will not review the merits of particular arguments of substance. The judgment has been rendered, is very clear, and has not been appealed. Instead, it is worth noting and reflecting upon a number of broader points of principle and process presented by the procedure. Before doing so, it will be helpful to recall the context in a little more detail.

II. POLITICAL MERGER DECISIONS

In previous decades, major mergers in the United Kingdom were often blocked or not blocked on competition grounds by the decision of the minister on whether to refer the matter for examination under the competition rules. Such a reference was decided on political, policy, economic, and competition law considerations. The advice to the minister would take into account many relevant factors, but the decision was at the end a political one. The United Kingdom has long renounced such interventions as a routine matter, recognizing the modern consensus in most advanced economies that politicized enforcement of the competition rules is to be avoided. However, the statute permits the minister to elect not to refer to a “public interest” merger to the Competition Commission pursuant to Part 3, Chapter 2 of the UK Enterprise Act 2002, whereby the Competition Commission would otherwise conduct a thorough review of the competition consequences of the merger. Such action can be justified on the grounds of “public interest considerations”. Pursuant to Section 58 of the Act, there were the following public interest considerations: (i) the interests of national security; (ii) the need for accurate presentation of news and free expression of opinion in newspapers; (iii) the need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers.

The Act allowed for further categories of consideration to be added, which enter into force after the Secretary of State has obtained Parliamentary approval for the new text. On September 18, the Secretary of State proposed a new public interest consideration: interest of maintaining the stability of the UK financial system.” The amendment was laid before Parliament and came into force on October 24, 2008. On the same day the Office of Fair Trading (“OFT”) advised that the merger would likely result in a substantial lessening of competition. Notwithstanding this advice, the ministerial decision on October 31 allowed the parties to avoid a lengthy phase II investigation by the Competition Commission and the need to provide any behavioral or structural remedies which might result.

September and October saw immense and unprecedented levels of turbulence on financial markets. Some governments or agencies favored nationalization or other forms of direct public support, others favored

mergers. There was no evident consensus among governments about how to react to the turmoil.

A merger between HBOS and Lloyds TSB was the route favored by the management of both banks. A link between the two had first been considered in 2006, but merger discussions were abandoned due to competition law concerns. During August 2008, in a very different economic landscape, the parties again reviewed the possibility of attempting a merger. Press reports stated that Sir Victor Blank, Chairman of Lloyds TSB, and the Prime Minister had discussed favorably the possibility of a merger. The agreement to merge the two banks was signed on September 17, 2008. Various ministers stated that the law would be changed to facilitate the deal's passage through the regulatory process. The Prime Minister's office issued a statement confirming that the government would “introduce legislation in order to facilitate the takeover.”² On the day the deal was announced, the Chancellor of the Exchequer stated: “we have made a decision that we will waive the competition requirements in relation to these two banks, that's not going to get revisited.”³

Lord Mandelson, the Secretary of State (newly-appointed from his post as European Commissioner), decided on October 28 not to accede to the recommendation of the OFT and instead to approve the merger. That decision was appealed by MAG on November 28, 2008. The bases of the application were broadly that the minister's discretion had been fettered by statements made by the Prime Minister and members of the Cabinet, and that the decision itself was erroneous in that it made errors of law and fact.

Matters before the CAT moved swiftly. At the Case Management Conference to settle venue, applicable law, and timing, MAG argued that the appeal should be considered in light of Scots law on judicial review and should be heard in Scotland. The Secretary of State and the banks argued that the laws of England and Wales should be applicable on the grounds that the deal had nationwide effects not restricted to Scotland; that this was a decision by a London-based minister relating to the stability of the U.K. financial system; and that the legal teams for the respondent and interveners were qualified in England and Wales. The Tribunal stated that the United Kingdom did not have a federal system, meaning there was no default jurisdiction for matters that concerned the nation as a whole: the Tribunal still had to determine where the center of gravity of the dispute lay. The Tribunal agreed with MAG's arguments regarding the applicable law on the basis that the circumstances surrounding the dispute pointed to Scotland rather than any other jurisdiction. For logistical reasons, it was decided to hold the hearing, which needed to be conducted urgently, in London.

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After the hearing, the Competition Appeal Tribunal firmly rejected MAG's substantive claims. The Tribunal was not convinced that the minister's discretion had been fettered or that the decision was defective in any way. The evidence, it said, demonstrated that the minister had kept an open mind throughout the process and that the earlier statements of other government ministers had not fettered his discretion.

III. UK AND EUROPEAN PROCEDURES COMPARED

The case highlights two differences between how the U.K. authorities and the European Commission handle major merger cases. First, the concept of political intervention is exceptional in U.K. cases, and the exercise of that power is subject to close judicial review as well as to extensive disclosure. Secondly, the United Kingdom managed the case with astonishing speed and efficiency, and conducted a hearing which was far more rigorous than its EU equivalent.

The level of disclosure thereby afforded to the Applicants far exceeded what would be made available in Brussels. The question was whether the Prime Minister and the Chancellor of the Exchequer had decreed that the deal would go through and whether the Secretary of State had granted an approval which had been politically preordained, rather than reaching an independent view on the basis of the relevant factors at his disposal. In response to this, the Department for Business, Enterprise & Regulatory Reform produced several hundred pages of material showing that properly relevant considerations had been brought before the minister. The civil service had armed him with a mass of evidence, submissions, and analyses relevant to his decision. The Tribunal decided that this material rebutted arguments that the Prime Minister had fettered the minister's discretion.

IV. ACCESS TO THE DOCUMENTS BEFORE THE MINISTER

The U.K. Act enables the minister to issue an intervention notice in mergers where public interest considerations are relevant. Such interests do not need to be specifically listed in the legislation at the time of intervention; it is sufficient if, in the minister's opinion, they ought to be.⁴ The Act then requires the minister to take such action as is within his power to ensure that the definition of the new public interest is finalized as soon as practicable.⁵ In the HBOS/Lloyds TSB case, the relevant resolution was laid before Parliament on October 7 and came into force on October 24. The minister's intervention then allows him, after receipt of the OFT's report, to decide whether or not to make a reference to the Competition Commission for further investigation. The law also allows him to clear the merger without a referral to the Competition Commission if the minister decides that public interest considerations outweigh any potentially adverse competitive outcome. Lord Mandelson took this option in his decision on

October 28, considering that the stability of the U.K. financial system trumped competitive concerns and competition law. In this exceptional case, the intervention worked to the advantage of the merging parties, but in the other exceptional case (BSkyB) it did not.

The intervention of a government minister in the competition law process, where a deal is endorsed notwithstanding contrary advice from the competition authority, was much noted and discussed in competition law circles. Such interventions are few in the United Kingdom. Within the European institutions, politicians have an active involvement in applying competition law. Final decisions in competition cases are adopted by the College of Commissioners, 27 political figures, of whom 26 have seen no evidence and have heard no argument from the party most affected. It is a matter for satisfaction that in a democracy the creation of retroactively effective legal criteria which are exercised by a minister qua politician is an exceptional event. It is equally satisfactory that the determination of the minister and the very text of the materials he considered can be subject to close judicial scrutiny. Internal briefing documents for European Commissioners would not be accessible in the same way.

V. EFFICIENCY OF PROCEEDINGS

MAG made its application to the CAT for review of Lord Mandelson's decision on November 28, 2008 under section 120 of the Act. In view of the imminence of the HBOS shareholders' meeting, the minister and the banks requested that the proceedings be conducted under an abridged timetable. The period for interveners to serve notice of their intention to intervene was shortened to 48 hours from the normal period of 3 weeks specified under the rules. On December 3, the day of the case management hearing, the CAT ordered that skeleton arguments be filed on December 5 and that the hearing was to take place on December 8 (a mere 10 days after the application had been made by MAG). The CAT dispensed with the need for a defense to be served, relying instead on skeleton arguments in lieu of any defense pleadings. In normal circumstances the respondent would have had six weeks to submit its response.⁶ The hundreds of pages of material about what documents were before the minister were supplied one working day before the hearing.

Although the appeal was not concerned with the competitive merits of the merger, being restricted to the legality (and not the desirability) of the minister's decision, it is nonetheless remarkable that a tribunal was able to deliver a fully reasoned answer of 93 paragraphs on December 10, within two weeks of receiving an application. Cooperation between the parties helped achieve this swift outcome (notably in accepting electronic exchange of documents); but more important factors were the availability of a dedicated competition tribunal with full-time staff and appropriate resources, and the CAT's

procedural rules which give it the flexibility to adapt to the urgent circumstances of a case. While a swift handling of the MAG case was made easier by the fact that there were only well-focused, narrow issues to be addressed, past merger cases, larger matters, have been handled by the CAT efficiently in less than four months.

An expedited procedure was introduced in the European Court of First Instance in 2001. The vast majority of applications for this fast-track procedure have been in the context of European Commission merger decisions. Some of the better-known merger cases have benefited from this procedure, notably *Schneider/Legrand*⁷ and *Tetra Laval*,⁸ but even under this procedure an expedited conclusion will still take from 9 months to a year after submission of the application.

The willingness of the Tribunal to condense proceedings to the extreme in order to minimize disruption to an important merger is to be welcomed, although this places considerable strain on small teams. The shortness of the timetable made it difficult for the voluminous responses and evidence to be properly considered before the hearing began. That said, it is difficult to criticize speed in the conduct of judicial proceedings. It is equally excellent that the parties' respective arguments were considered at a public hearing in which they were advanced, challenged, clarified, and decided upon by the three members of the Tribunal. Their decision was based on legal grounds, and it would be unimaginable that political concerns would creep in. The CAT is, in this respect, wholly superior to the European Commission, where hearings are conducted in the absence of the decision-maker and where the decision-makers are political figures not judicial ones. The ultimate decision in Brussels may well be wise, but it is infinitely less satisfactory for counsel and for the process of justice.

Every large economy is confronting the challenge of responding to the pressure of the financial crisis without discarding ostensible or genuine respect for the applicable

competition rules. The exceptional circumstances of the present economic climate and the perceived role that such mergers can play in the overall recovery of the economy may mean that they are spared normal scrutiny. In Brussels, one could say that political intervention is very much part of the process, since every decision is submitted for adoption to a college of political figures. On the other hand, politicians in the United Kingdom benefit from wide discretionary power to override the regulatory process and alter the applicable statutory criteria. Their EU counterparts cannot.

Two final points of interest for the future may be made. A small coalition of concerned citizens, anxious about the effect of a bank merger on their businesses' access to capital and on choice in banking services, was heard, admitted to the proceedings despite reservations, and taken seriously even if unsuccessfully. It should be remembered that even if the merger was lawfully consummated, it remains the case that the normal rules of competition law are applicable to the banking sector in Scotland and elsewhere in the United Kingdom.

Ian Forrester heads the White & Case office in Brussels. He has a wealth of experience advising companies, as well as sovereign states and other governmental authorities, industry associations and private individuals, on EU law, especially competition law, trade law, customs, internal market rules, intellectual property and constitutional rights in a variety of sectors, including broadcasting, chemicals, information technology, pharmaceuticals, software and sport. He has been involved in many leading cases, including *Magill*, *IMS* and *Microsoft*.

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¹ The authors helped act for the MAG in the proceedings before the CAT.

² Morning press briefing from September 30 2008,

www.number10.gov.uk/Page17020.

³ Today, BBC Radio 4, 18/09/08.

⁴ Section 42(3) Enterprise Act 2002.

⁵ Section 42(8) Enterprise Act 2002.

⁶ Rule 14(1) The Competition Appeal Tribunal Rules 2003.

⁷ *Schneider Electric SA v European Commission*, Case T-310/01, ECR [2002] II-4071, *Schneider Electric SA v European Commission*, Case T-77/02, ECR [2002] II-4071.

⁸ *Tetra Laval BV v European Commission*, Case T-5/02, ECR [2002] II-4381, *Tetra Laval BV v European Commission*, Case T-80/02, ECR [2002] II-4519.