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ANTITRUST NEWS

Expert on European Commission's Merger Thinking Sounds Off

Who would have thought that the planned merger of two U.K. tour operators could have such an impact on the European Commission (EC)?

But **NERA Economic Consulting VP Lawrence Wu** said **AirTour PLC**'s attempted $1.54 billion buy of **First Choice Holidays PLC** in 1999 changed how the EC reviews antitrust cases.

The EC blocked the combination of the second and fourth largest tour operators in the U.K., finding that the "merger would create a dominant oligopoly, in which three leading suppliers would restrict capacity," according to the EC's decision in the case.

AirTour appealed the decision to the European Court of First Instance, which overturned the ruling in 2002, finding that the merger would not decrease competition and criticizing the EC's methods of gathering evidence. The ruling came too late, however, to revive the deal but caused substantial changes to EC regulations, effected December 2003, Wu said.

"The court's decision was a strong signal to the EC that it had to do more homework," said Wu.

Shortly after the release of *The Economics of Antitrust: New Issues, Questions and Insights*, Wu, a former staff economist with the Federal Trade Commission, who edited the book, spoke with *Mergers & Acquisition Report* about the state of merger reviews in the EC.

The decision, Wu said, "and other decisions by the Court of First Instance were among the drivers behind the EC's recent merger regulation reform. Since then, the EC published new regulations and appointed a chief competition economist."

Court Rejects the EC's Argument

One of the changes relates directly to the AirTour decision. When handing down its decision the court used the "collective dominance" argument to block the merger. But with the Court of First Instance overturning, and in essence ending, the use of "collective dominance" as a basis for rejecting a merger, the EC decided to move toward the U.S. model, which analyzes whether or not a merger substantially lessens competition.

But moving toward the U.S. model also meant switching to the empirical method of evaluating mergers, which the U.S. has used for years, Wu said.

Wu focuses on three cases—for two of which he served as an expert witness—to demonstrate the EC's growing acceptance of econometrics, or applying statistical theories, in its merger reviews. Until recently, the EC used a qualitative method in forming its decisions.

The first was **Volvo AB**'s 2000 acquisition of **Scania AB** for $7.4 billion. While blocking the merger in 2000, the EC used econometrics to support the traditional analysis that the merger impeded competition by creating a company with a dominant market position in several European countries.

In approving **Royal Philips Electronics**' 2001 purchase of **Agilent Technologies Inc.** for $41.7 billion, the EC again used econometric studies to support its decision.

However, in approving **General Electric Co.**'s $2.4 billion acquisition of **Instrumentarium Corp.** in 2003, the EC used econometric studies to prove that in several markets the two companies constrained each other's pricing.

What does this mean to U.S companies seeking to make an acquisition in Europe? Probably not a lot since econometric studies have been used in merger decisions for years here. Moreover, the changes in EC regulations move the EC into alignment with the U.S.

But Wu does advice for U.S. companies. "There are a few things that firms are going to have to know before going before the EC," Wu said. "First reviews are going to be more stringent. Companies are going to have to deal with U.S. and EU regulatory review, and those two agencies coordinate.

"The recent reforms are an improvement, and the result will certainly include an increased emphasis on economic thinking and analysis. For the EC, the reforms present a challenge because of the number of countries and products that may have to be analyzed quickly and at the same time."—*S.G.*