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Efficiencies as a meaningful defence in merger control

Brussels, 15 June 2012

Trends and Developments in Global Competition Law

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Agenda

1. **Efficiencies in screening**: should we assume some efficiencies in all mergers?

2. **Efficiencies in the competitive effects analysis**: is the two step approach right?

3. **Offsetting efficiencies in other markets**: should we accept some consumer harm if others are better off?

Where do we stand?

What we take as given…

"I like aggressive competition, also from dominant companies, I don't care if it may hurt competitors, as long as it ultimately benefits consumers." – Kroes, as quoted in the Wall Street Journal, 26 September 2005

…but also true:

No cases (officially) turned based on efficiencies

Are we now aligned in all jurisdictions?

- We say that consumer welfare is top priority
- But dismiss evidence on efficiencies when it counts
- Is this the right approach?

When there is "hard" evidence, we should allow cases to be turned based on efficiencies

Should we assume efficiencies in all mergers?

Thresholds imply efficiencies

- Thresholds are accepted: Market share, HHI…
- However, economic theory (on unilateral effects) suggests (weakly) negative effects of all mergers
- We assume efficiencies without being open about it

UPP puts the spotlight on it

- UPP as a screening device requires an efficiency assumption: 5%? 10%?
- In fact, this is true for all merger simulation work

We should be more open about assumed efficiencies

This would encourage more merger simulation and make merger control more precise

Should we omit efficiencies in notifications?

No cases turned (?)

- No decision has identified efficiencies as the turning evidence (on either side of the Atlantic)
- But we argue efficiencies in many cases – why?

Role of efficiencies in the competitive effects analysis

- Show that there is a motive for merging that is not anti-competitive
- Efficiencies may play a bigger role than can be viewed in the decisions

Hard (and soft) evidence on efficiencies have a place in merger control

How should authorities use evidence on efficiencies?

Integrated or two-step approach?

- There is only one price: economic analysis incorporates efficiencies in the competitive effects analysis
- Generally jurisdictions follow a two-step approach: (1) harm (2) efficiencies
- This shifts the burden of proof

Cautious approach is justified

- Companies have information that authorities do not
- Companies can present things in a (too) positive light
- Shifting the burden of proof seems like the right approach

If and only if efficiencies are proven should they be included in an integrated analysis

Examples

T-Mobile/ATT (US)

- Efficiencies did not turn the case

Pioneer/Pannar (SA)

- Static and dynamic efficiencies acknowledged

Deutsche Börse/NYSE (EU)

- Efficiencies did not turn the case

RTL/P7S1 VoD platform (G)

- Increase in reach acknowledged but found insuffient

Efficiency arguments count

Should we accept some consumer harm if others are better off?

Authorities hesitant to trade off usefulness between individuals

- Unless there is a “local” remedy, harm to few cannot usually be exchanged against benefit for many
- Some jurisdictions allow improvements in general economic conditions to be taken into account (rarely applied)
- Some jurisdictions allow improvement in competitive conditions in other markets to be taken into account

Cautious approach is in line with a popular welfare concept: Pareto efficiency

- Do not allow changes if one is worse off
- Criteria can be criticized for being overly restrictive

There is a need for more discussion on this point

- Need contributions from welfare economics

Inconsistent approaches across jurisdictions warrants further discussion