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Mergers: can competition authorities agree to disagree?

Jacques Steenbergen and Alexis Walckiers, respectively Director General and Chief Economist of the Belgian Competition Authority, argue for a common approach to merger review by competition authorities. Even when similar methods are used, however, competition authorities may not always reach the same conclusions on the likely effects of a merger in their jurisdiction. The authors conclude that different views about the effects of a proposed concentration should not prevent competition authorities from seeking an agreement on desirable remedies

Competition authorities review mergers that may have the capacity to modify the conditions of competition—for instance, through the increased ability of the merged company to internalise the effects of competitive constraints that they imposed on each other pre-merger. Authorities also have the power to block some proposed mergers, or impose significant remedies, when it is unlikely that post-merger competitive constraints will be sufficient to ensure that rivalry continues to place sufficient discipline on the undertakings.

Many sizeable transactions involving international businesses are subject to review by more than one competition authority, in which case it is important that jurisdictions reach consistent outcomes, to ensure that the full benefits of the merger arise. We explain in this article that international differences in the assessment methods of merger control have significantly reduced over time. In our opinion, the increased use of sound economic tools to assess the likely effects of mergers helps in reaching more coherent assessments across countries.

Outcomes cannot, however, be expected to be always identical. Differences in resources available to competition authorities may determine the economic techniques used; our view is that we should aim at corporate information schemes that are likely to make comparable data available across borders. Moreover, even if agencies across the globe use the same assessment methods, it is always possible that their conclusions on the likely effects of a merger will differ, because of the divergent post-merger market conditions expected across jurisdictions. Different outcomes of this nature are healthy. They justify the existence of national merger control and are likely to remain, given that we are unlikely to achieve a true one-stop merger control for all transactions that affect more than one jurisdiction. These differences should not, however, stop competition authorities seeking to discuss remedies in order to prevent the remedies imposed in one jurisdiction affecting the expected benefits of the merger in another jurisdiction.

Assessment methods

To assess whether a proposed transaction is likely to harm competition, competition authorities need not only to predict the post-merger conditions of competition, but also to decide whether any identified negative effect is sufficiently important to block the merger, or require remedies. There are two broad sources of potential cross-border differences in the assessment methods:

- **economic assessment methods**: competition agencies use different methods to try to predict the post-merger conditions of competition, such as establishing tentative market definitions, or identifying or quantifying competitive effects, competitive harm and efficiencies;
- **substantive tests**: a number of these tests have emerged across the globe to assess whether a merger is compatible with competition requirements. Nonetheless, as explained below, international convergence improved when the EU moved from

The views expressed in this article are those of the authors.

using a *dominance* test to using a *significant impediment to effective competition* (SIEC) substantive test, with its adoption of the 2004 EU Merger Regulation.[1]

Substantive tests

The EU's first Merger Regulation required the assessment of whether a concentration 'creates or strengthens a dominant position as a result of which competition would significantly be impeded'.[2] The emphasis on dominance in the substantive test led competition authorities to focus their analysis on structural issues, such as market definition and market shares. The adoption of the 2004 EU Merger Regulation implied a change in substantive test, since it established the principle that 'a concentration which would significantly impede effective competition … in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.'[3]

In contrast to the earlier regulation, by reversing the wording of the test, the European Commission made it clear that the creation or strengthening of a dominant position is only one possible theory of harm under which a concentration may be challenged.[4] More precisely, Röller and de la Mano explained that, under the new SIEC test, the Commission assesses whether the proposed merger will not only lead to single dominance, but also facilitate collective dominance:

> The rearrangement of the two-limb test articulates SIEC as (the single) sufficient condition for incompatibility and eliminates 'dominance' as a necessary condition for SIEC itself. As a result, the Commission is now able to assess how a given concentration affects what would happen to prices, outputs and other important features of an oligopolistic market—including efficiencies—if firms responded in an individually rivalrous way to market conditions, without any increased likelihood of engaging in tacit collusion.[5]

By further opening the scope for the assessment to coordinated effects and moving towards a more effects-based approach to competition, the Merger Regulation reform of the European substantive assessment has resulted in a greater global convergence of merger control, especially in regard to the UK or US substantive tests (ie, significant or substantial lessening of competition).[6]

Economic assessment methods

It is not clear, however, whether the new substantive test caused or accompanied international convergence. According to Levy,[7] significant convergence on substantive and procedural issues has been achieved since the early 1990s, notwithstanding the different substantial tests. Convergence further intensified with the publication of the EU Horizontal Merger Guidelines in 2004,[8] wherein the Commission reduced its focus on structural issues, such as market definition and market shares, and put more weight on the assessment of the nature and significance of competition between the merging parties. More specifically, although the Commission states in the Guidelines that market shares are 'normally important factors' in the assessment of market power and increases in market power, it also explains (in para 27) that 'market shares and additions of market shares only provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors.'

Not surprisingly, the Commission suggests using these additional metrics in particular when the merging firms produce differentiated goods. In such markets, the traditional approach—starting with market definition, and followed by the measurement of market shares and concentration—is a poor predictor of the competitive effects of a merger, for at least two reasons. First, in such markets it is particularly complex to distinguish products that are part of the same relevant market—ie, the set of products that are regarded as substitutable. This is because the relevant market is a discrete answer to a continuous problem, and in differentiated product industries some products are close substitutes, while others are more distant substitutes. Second, assuming that a relevant market can be defined, the likely competitive effects of the merger between two companies with the same market shares will depend on whether their products are close substitutes.

The recently published US merger guidelines move even further away from structural issues in merger analysis.[9] In these guidelines, the Department of Justice and the Federal Trade Commission not only state that market concentration is a useful tool—to the extent that it illuminates the merger's likely competitive effects—but also confirm that market definition is not an end in itself or a necessary starting point for merger analysis. The guidelines also refer explicitly to alternative indicators, namely diversion ratios, upward-pricing-pressure and merger simulations. Similarly, in their joint merger assessment guidelines, the UK Office of Fair Trading and the UK Competition Commission also refer to the usefulness of diversion ratios, in addition to variable profit margin and customer price sensitivity, in assessing post-merger competitive constraints in differentiated product markets.[10]

Should the European Commission review its Horizontal Merger Guidelines or its Notice on market definition to follow the recent moves in the USA and the UK? This is a much-debated subject. In particular, the Notice on

market definition has not been revised in line with the more recent Horizontal Merger Guidelines. It still contains references to the dominance test (in para 10), and does not reflect the increased reliance by the Commission on less structural indicators in the competitive assessment of mergers.

Resources required to undertake more detailed economic assessments

Merger assessment is a difficult exercise because, unlike cartel and Article 101 infractions, it requires competition authorities to form a view on the nature of post-merger competition. Economic analysis can shed light on the competitive impact of a merger, and more sophisticated economic techniques can be useful in the course of the assessment, but they can also be costly to implement:

> More complicated techniques can at times provide significant additional insight into the potential competitive impact of a merger than can simple techniques. However, the downside to such techniques is that they are frequently highly resource intensive.[11]

Constraints on resources may lead competition authorities to adopt different economic techniques when assessing cases. In particular, to the extent that economic tools (eg, merger simulation) require significant investments before they can be used in practice, competition authorities will not attempt to acquire the relevant skills unless they expect to review a significant number of complex mergers.

A perspective from Belgium

Merger review is not a priority in a small, open economy like Belgium. Indeed, most concentrations that are likely to affect the conditions of competition in the country are also likely to affect them in neighbouring countries, and most significant concentrations have a community dimension under the EU Merger Regulation and are therefore notified to the European Commission. Moreover, if mergers were to have an adverse impact on the Belgian competitive environment, firms active in neighbouring countries could be expected to enter the national market, provided that barriers to entry are not too significant.

In economies like Belgium, therefore, the benefits of merger control are likely to be low compared with the benefits of antitrust enforcement.[12] Resting on such reasoning, in 2006 the Belgian legislator reviewed the 'loi sur la protection de la concurrence économique' (law to protect economic competition) to avoid scarce resources being used to control mostly unproblematic mergers. More specifically, it was decided to raise the thresholds of merger notification—mergers must now be notified if the joint turnover of undertakings concerned in Belgium is larger than €100m and the turnover in Belgium of at least two of the companies is larger than €40m—and to further simplify the simplified procedures (Article 7.1 of the Law). It is interesting to note that these changes do not seem to have significantly affected the number of mergers that require remedies or the opening of phase 2 procedures (ie, a more in-depth inquiry after the initial review of the case), which have remained fairly stable at fewer than three per year.

Given the limited resources available for merger review, the Belgian Competition Authority is unlikely to seek to master the most complex econometric tools available unless similar tools also serve the fight against cartels and abuses of dominance.

Nevertheless, it is our opinion that agencies that do not use the most sophisticated techniques must try to ensure that the results of less complex analyses are not misleading. The lack of resources available within competition authorities should in any case not increase the false-negative merger assessments in a country.

Agree to disagree on the effects of a merger, but not on the remedies

As indicated above, it is important to recognise that even if all competition authorities across the globe were to use the same economic assessment method and substantive test, this would not ensure that their conclusions on the likely effects of a merger in their jurisdictions would be identical. This is also the view of Joaquín Almunia, Vice President of the European Commission, and the Commissioner for Competition:

> Of course, divergences cannot always be avoided, and nor should they be. There will be cases where a merger or a cartel affects the EU differently to the US. There will be cases where, with the best intentions in the world, reasonable people can disagree on the right outcome. That's not a crisis, that's just life.[13]

When it comes to remedies, however, divergent requirements may be much less healthy. Remedies imposed on merging companies in one jurisdiction can have an impact on their operations in other jurisdictions. Using the terms of the US–EU Merger Working Group Best Practices on Cooperation in Merger Investigations, such inconsistent remedies 'may frustrate the agencies' respective remedial objectives'.[14]

One can easily think of conflicting remedies. For example, the divestment of a brand or a business unit might be required to avoid competitively harmful effects

in one market, but the same divestment might impede the achievement of significant benefits in another market. In contrast, a brand or a business unit might not be viable in a sub-set of the markets where it is active, and therefore requiring divestments only in these markets might not address the expected harmful effects.

The EU merger control procedures have therefore been designed to reduce potential conflicts within the EU, and agencies across the globe collaborate to avoid imposing inconsistent remedies. In the recent past, EU and US competition authorities have shown that they cooperate actively in relation to the remedies that they seek to impose on merging companies. According to Commissioner Almunia:

> One of the best examples of EU–US co-operation was just a couple of months ago, with the Cisco-Tandberg merger that was dealt with in parallel by the European Commission and the Department of Justice. Commitments accepted by the European Commission were considered by the Department of Justice in its decision not to challenge the merger.[15]

Other recent cases of cross-border cooperation include Panasonic/Sanyo, Pfizer/Wyeth, Agilent/Varian and Schering-Plough/Merck.

Unfortunately, looking for consistent remedies might impose difficult choices where the costs and benefits of a proposed transaction across markets need to be weighed against each other. Moreover, the search for coordination can be further impeded by the presence of different timelines and procedures across jurisdictions. Finally, to the extent that the coordination of remedies is difficult among a large number of agencies, the interests of smaller jurisdictions that are not members of larger entities (eg, the EU) might not be taken appropriately into account.

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[1] Council Regulation (EC) No. 139/2004 of 20th January 2004 on the control of concentrations between undertakings.
[2] Ibid, para 24.
[3] Ibid, Article 2:3.
[4] Levy, N. (2010), 'The SIEC Test Five Years On: Has it Made a Difference?', *European Competition Journal*, **6**:1, pp. 211–53.
[5] Röller, L.-H. and de la Mano, M. (2006), 'The Impact of the New Substantive Test in European Merger Control', *European Competition Journal*, **2**:1, p. 8.
[6] In the UK, competition authorities seek to establish whether a proposed transaction will *significantly lessen competition*, or whether sufficient post-merger competitive constraints will remain to ensure that rivalry continues to discipline the commercial behaviour of firms. The USA and other jurisdictions estimate whether proposed mergers might *substantially lessen competition*, or tend to create a monopoly.
[7] Levy (2010), op. cit.
[8] European Commission (2004), 'Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings', *OJ* C31/05.
[9] US Department of Justice and Federal Trade Commission (2010), 'Horizontal Merger Guidelines', August 19th.
[10] Office of Fair Trading and Competition Commission (2010), 'Merger Assessment Guidelines', September.
[11] International Competition Network (2005), 'ICN Investigative Techniques Handbook for Merger Review', p. 11.
[12] See, for example, Steenbergen, J. and Waverman, L. (2005), 'Do We Need European Merger Control?', pp. 203–23, in C. Robinson (ed.), *Governments, Competition and Utility Regulation*, Cheltenham UK/Northampton MA USA: Edward Elgar (in association with the Institute of Economic Affairs at the London Business School) (publication of the 13th series of the Beesley Lectures on Regulation held in 2003).
[13] Almunia, J. (2010), 'New Transatlantic Trends in Competition Policy', speech given at a conference organised by Friends of Europe in Brussels, June 10th, p. 3.
[14] US–EU Merger Working Group Best Practices on Cooperation in Merger Investigations, available at http://www.ftc.gov/opa/2002/10/mergerbestpractices.shtm, p. 1.
[15] Almunia (2010), op. cit., p. 2.

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