

Kluwer Competition Law Blog

Economic evidence and analysis at the early stages of EU merger control proceedings

Frederic Depoortere (Skadden, Belgium) · Tuesday, January 17th, 2012

“In appropriate cases, DG Competition may discuss in advance with the addressees or other affected parties the scope and the format of the Data Request. DG Competition may also explain the analysis that it intends to perform with the requested data in order to improve the efficiency of the data collecting process and to ensure the data is of adequate quality. This is particularly the case in the later stages of an investigation as early requests could be of a more general nature and aimed primarily at better understanding the functioning of the market in question.”

The language above is quoted from paragraph 55 of the Commission’s [Best Practices on submission of economic evidence](#), the most recent version of which was published last October.

In an increasing number of more complex concentrations, the Commission’s Chief Economist Team (CET) routinely requests large sets of detailed information at a very early stage, including during pre-notification. Such information typically includes detailed data on past customer sales transactions, bidding data, and product-level price, margin and fixed/variable cost information over an extended period of time.

This type of information cannot be characterized as being *“of a more general nature and aimed primarily at better understanding the functioning of the market in question.”* Therefore, in cases where the CET requests and receives such detailed information at the pre-notification stage or early in Phase I, it is preferable, if the parties so desire, to start the dialogue with the parties and their economists as soon as the data are requested. In addition, the dialogue should go beyond an explanation of *“the analysis that [CET] intends to perform with the requested data in order to improve the efficiency of the data collecting process and to ensure the data is of adequate quality.”* It is best if the CET can share and discuss the results of its analyses with the parties.

With regard to the types of analyses and models which the CET can run on the basis of the above information requested at the pre-notification stage or in Phase I, I understand from speaking with a number of economists that this is not the main question. While it is always a good idea to confirm with the CET, economists are generally fairly comfortable that they know what the CET will do with such

information.

There are two reasons why the dialogue should go beyond a discussion of which analysis is performed.

First, as paragraph 14 of the Best Practices indicates, *“otherwise valid economic analysis may not always produce unambiguous results when applied to the facts of a competition or merger case. Contradictions may result from differences in the data, differences in the approach to economic modelling or in the assumptions used to interpret the data or differences in the empirical techniques and methodologies.”* While it may be clear which analysis or model the CET will typically run on the basis of a given set of data, there always exist different possibilities in terms of approach, assumptions chosen and variables used. Such differences can be outcome-determinative. Presumably, the parties will have an informed view on which assumptions and variables best capture the reality of the markets and industry concerned, and a discussion with the parties and their economists can only help the CET in choosing the most appropriate way forward.

The second reason why an early detailed CET data request should also trigger a close dialogue with the parties is a more general matter of policy. Often, the Commission reaches an initial view as to whether a transaction is likely to raise competition problems at a relatively early stage in the proceedings. In cases where the CET performs detailed analyses and runs models on the basis of a sizeable dataset received from the parties in pre-notification or in Phase I, its conclusions can have an important impact on the Commission’s initial reactions. It is therefore important that the parties have a chance to provide input on such conclusions, if possible replicate the CET’s analysis and discuss possible differences in approach. As a general matter, the EU Merger Regulation is an administrative (as opposed to adversarial) process, whose goal is to come to the correct outcome in the most efficient way possible. As such, open, early and continuous discussions between the Commission and the parties should always be encouraged. This is a clearly one example where such discussions are desirable.

Is there an argument that discussions between the parties and the CET are a waste of resources, in that the CET requests the information at an early stage largely to get acquainted with the markets involved and will not necessarily use them to come to important conclusions? Not really. As described above, the CET’s early data requests are very detailed and require the companies involved to dedicate significant resources to gather the information. Presumably, the CET invests time and resources to process the data and run one or more analyses and models relevant for the assessment of the notified concentration. The additional step of sharing the analysis and results with the parties should require only a comparatively limited investment.

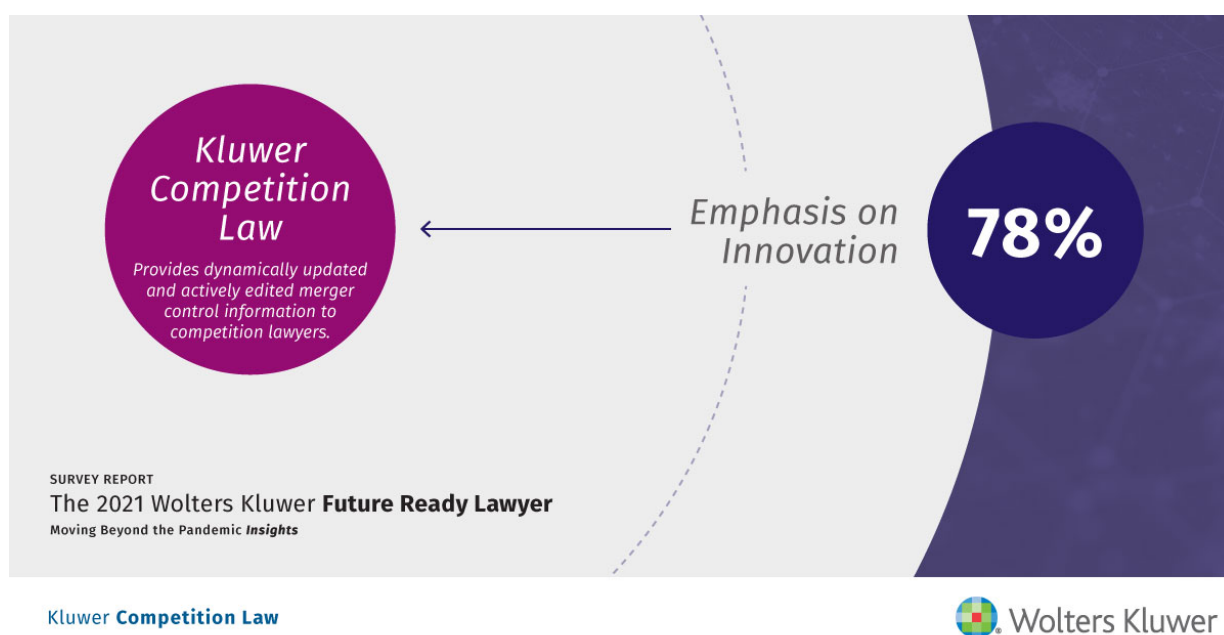
Given the CET’s practice of sending detailed data requests to parties at an early stage in the merger proceedings, it would be a good idea to formulate more clearly the principle of an early, detailed and ongoing dialogue with the parties in the next version of the Best Practices.

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