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Status quo of structural assumption in merger control

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Public discussion on merger control in the last few years of has put the spotlight on two elements of contemporary merger analysis: market definition and market concentration, of which the former has raised considerable debate, in particular. It has been asked if market definition has de facto become superfluous to merger analysis due to some modern developments in merger assessment techniques, and if not, has its role still changed? Along with this debate, a more intense discussion on the role of market concentration in merger analysis has been revived. By somewhat generalizing, overall the discussion has made us face the question: are the days of traditional structural assumption really over and, if so, to what extent?

On the recent development

In recent years, public discussion on the role of market definition has largely been inspired by two issues, in particular: The birth of new quantitative techniques to analyse the competitive effects from proposed mergers and the issuing of new merger guidelines; the US merger guidelines in 2010, in particular.

A couple years ago, new quantitative assessment techniques, such as the UPP (Upward Pricing Pressure) and IPR (Indicative Price Rise) tests focusing more directly on the unilateral effects of the merger, came to challenge the traditional approach relying on market definition as useful – and practically necessary – elements of the analysis in mergers involving differentiated products. Though they were certainly not the first quantitative techniques to challenge the traditional status quo of market definition in the assessment, they probably represent the most serious attempt so far.

The discussion on the actual role of market definition in merger assessment was considerably further intensified by the issuing of the new US Merger Guidelines in 2010. Along with the discussion regarding the possible adoption of the UPP test in the 2010 guidelines, the wording of the guidelines raised considerable debate as to whether this actually meant that it was possible to set aside market definition in the decision-making.

The growing interest as to the merger's unilateral effects (in the differentiated products industries) in the academic literature and the hereto related modern economic techniques, such as the UPP test, to analyse such effects has also challenged the traditional role of market concentration. One has started to question the rationale of market concentration in merger assessment all the more, both as to the screening of potentially anticompetitive transactions and the assessment of competitive effects. This development is now also visible e.g. in the 2010 guidelines, which expressly note the potential meaninglessness of the calculation of market shares and concentration in the assessment (See section 6.1).

Structural assumption today

The debate as to the assessment of competitive effects is nothing new as such, as from the theoretical point of view, it has raised interest for ages (think e.g. the battle between the traditional Chicagoan and Harvardian Schools). The issue is recognizable in the development of the US merger guidelines during the years, whereby also a change in the role of structural measures clearly comes out. One only needs to compare the 1968 US Merger Guidelines to the USMG 2010 to realise this. Long before the 2010 guidelines we have moved far away e.g. from the assumptions of 1968 Merger Guidelines, which gave considerably more meaningful – sometimes perhaps even rather decisive – role to Concentration Ratios, in particular.

The 2010 guidelines clarify that HHI's and market shares are but one assessment factor, assessed "in conjunction with other evidence". They can sometimes play only a minor role or maybe even have no meaningful role at all as to the final enforcement decision. This certainly seems a meaningful clarification particularly as to the differentiated products mergers, in which a firm's market share may give rather a false picture of its market power. But rather than demonstrating anything fundamentally new, it clarifies the status quo.

More importantly, the discussion regarding new quantitative techniques and the wording of the 2010 guidelines have again reminded us that HHI's and market shares do not necessarily provide such good screening devices. In other words, there clearly are situations in the differentiated products industries where deciding on whether or not we should proceed to a more in-depth ("Phase II") analysis merely on the basis of traditional structural measures does not offer a practical option, effectively.

Today the traditional role of competitive effects and market definition is somewhat blurred. To what extent this is due to the recently issued merger guidelines (such as the US 2010 guidelines), however, probably depends on one's point of comparison. On the one hand, a rigorous step-wise approach has really not corresponded to the practice for a long time anymore, not at least regarding the "grey zone" cases, in which the competitive problem is not immediately visible. Despite of the formulation of the traditional merger decisions, in such cases one typically cannot proceed in a rigorous step-wise manner by first determining the relevant market and then moving to the competitive effects. On the contrary, the merger assessment typically requires keeping "all the pieces of the puzzle" on the table throughout the analysis, whereby market definition et cetera are interrelated "elements" of the analysis rather than separate "steps". Moreover, assessing unilateral effects in the differentiated products mergers rigorously step-wise – by first defining products either "in" or "out" of the market (which is often arbitrary) then considering the market concentration and assessing the potential competitive effects in the traditional way – may simply offer a meaningless approach. In this respect, the role of market definition and competitive effects has de facto been partly redefined a long time before the recently issued merger guidelines, such as the US 2010 guidelines.

On the other hand, comparison of the wordings of the US 1992 and 2010 guidelines certainly leaves some room for speculation as to whether the new wording was indeed meant as a statement of de facto superfluous market definition. However, the fairly intense public debate seems to indicate that this view is far from reality, at least if one considers the relevant US (and EU) case law. One can hardly consider making a prohibition decision or a conditional merger approval without also including a section dealing with the delineation of the relevant market. The tradition lives deep. Considering that the function of the merger guidelines is to describe the competition authorities' past experience in the decision-making rather than to explain theoretical constructions that may one day come true, it may well be argued that this was not the true aim of the 2010 US guidelines.

One may still wonder why so confusing a formulation of the wording? One explanation is that the guidelines in fact aim to describe the authorities' practice in that in some cases (i.e. certain differentiated products mergers) the market definition indeed has not got anything to offer to the analysis, expect for the formal reasons if one needs to go to the court. The situation is clearly unsatisfactory if this is true. This probably gives bit too rosy a picture of the true usefulness of quantitative techniques in the analysis. As the fairly intense public debate during the last years seems to show, all quantitative techniques suggested so far are subject to problems. Further, any application of quantitative techniques is always also subject to the consideration of other factors such as entry and product repositioning. And how can one consider entry if one does not have a market for the entry to take place in? In other words, market definition is not done only for the market shares and HHI's.

Another explanation relates to the differences on the approaches of economists and lawyers. The increasing influence of economics and economists is clearly visible in the 2010 guidelines, for example. This is natural considering that economics is an integral and valuable constituent of competition policy. However, in the end it is the approach of law and especially that of the courts that counts. In competition policy making, one faces serious problems if one forgets that. In point of fact, should one consider e.g. Commissioner Thomas J. Rosch's statement on the release of the 2010 horizontal merger guidelines (http://www.ftc.gov/os/2010/08/100819hmgrosch.pdf), this is what may very well have happened in the formulation of the 2010 guidelines.

Should this be true, the confusion relating to the recent debate particularly on the role of market definition well shows how competition policy making is practically married to two disciplines – economics and law. This may sometimes be troublesome since the approach among the practitioners of these disciplines may, indeed, sometimes be rather different. Yet, the author's personal experience is that the coexistence and cooperation is falling better into place year by year. In the end, it is probably merely a matter of finding a correct “wavelength” to the working.

All in all, the structural assumption is still very much alive in today's competition policy, although it has been redefined from what it used to be back in the old days. In practice, we still do not seem to have tools to analyse mergers without paying sufficient attention to the relevant market. This also applies to the use of quantitative techniques. In today's merger analysis, quantitative analysis rather offers complementary tools to the qualitative evidence. It also requires other than mere theoretical developments for the quantitative techniques to make market definition useless. In practice, the final keys of change are in many respects in the hands of courts and judges who decide the cases.

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