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# The more technical, the better? Economic evidence in merger assessment

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Economics has an increasingly important role in merger assessment. Hardly anyone can imagine trying to build a solid major merger case anymore without paying at least some attention to the indirect evidence gained from analyzing the set of indicative economic factors of the case at hand. Whilst there are differences e.g. between different NCA's and the European Commission and as to whether one also talks about a major or minor case, the rationale for intervention (if and how the proposed merger would likely harm consumers) still seems increasingly lean on the economic analysis of (economic) theories of harm. With increased knowledge of economics and use of economic evidence in the decision-making, also the use of more and more technical (quantitative, often empirical econometric analysis based) economic argumentation has clearly gained a bigger role in the analysis. This is a good thing as long as it can really help us to better assess the proposed merger and gain more correct results from the analysis – and it can. Yet, as recently seen, one should not praise the technical nature of economic argumentation for its own sake.

Technical vs non-technical economic evidence

In recent years, we have seen major merger decisions e.g. by the European Commission, which rely on different levels of sophistication as to the empirical economic evidence. A reason for this, in general, is rather simple: the same sophistication of technical, empirical economic analysis is not possible in every case. The application of very sophisticated technical economic analysis in the merger assessment at least potentially suffers from many constraints, such as the availability and reliability of data. Two major mergers – Ryanair/Aer lingus (COMP/M.4439) and Olympic/Aegean Airlines (COMP/M.5830, not yet published) – are good examples. In Ryanair/Aer lingus, the European Commission used and also relied on rather sophisticated economic analysis. Arguably the same level of sophistication was not, however, replicated in the recent investigation of another airline merger, the Olympic/Aegean, despite of the parties' repeated claims. This was primarily due to the fact that certain pre-conditions required for a more technical empirical analysis were not met, as I explain below.

The Ryanair was brought before the General Court ("GC") in Luxembourg, which gave its judgment in July 2010. One issue concerned a claim put forward by the parties that the findings made on the basis of non-technical, non-quantitative economic evidence needed to be backed up by technical economic evidence. The GC disagreed with the parties stating that "the applicant's assertion that the 'non-technical evidence' cannot be taken into account unless it is supported by 'technical evidence' cannot be upheld. There is no need to establish such a hierarchy."(1)

As the GC set out in its Ryanair decision, traditional non-technical economic evidence can be relied upon in the absence of a more sophisticated technical economic analysis. Furthermore, "[i]t is the Commission's task to make an overall assessment of what is shown by the set of indicative factors used to evaluate the competitive situation. It is possible, in that regard, for certain items of evidence to be prioritised and other evidence to be discounted."(2) Hence, relying on the "non-technical evidence", which is not supported by some specific technical economic evidence, may indeed be enough considering that the merger assessment is an overall assessment of all available evidence. There is no clear hierarchy between the technical and non-technical economic evidence, as stated by the GC. Very sophisticated, technical economic analysis can certainly be useful, but it is by no means sine qua non. In short, technical econometric and survey analyses (as prepared and applied e.g. in the Ryanair decision), for instance, do not constitute benchmark for a prohibition decision. This is definitely good news for all lawyers; the bad news, however, is that it is only trained economists (if sometimes even they) who can say whether proper, reliable technical evidence actually is sufficiently available.

So, when is it?

It is obvious that whether or not sophisticated economic evidence can and should be used requires a case-by-case assessment. From the practical point of view, the big question is that how can we know when this is so?

Good guidance as to whether such evidence would be adequately available can be found from different sources, of which the European Commission's Best Practices for the submission of economic evidence and data collection in competition cases probably presents the most obvious one (the newest version of which can be found here). The guidelines have been discussed in many different instances, including this Blog's site.

Furthermore, the Commission has recently laid down some principles in its Olympic/Aegean merger decision. Namely, the use of sophisticated quantitative empirical analysis requires at least the following three pre-conditions to be met:(3)

1. All of the necessary data are available to implement the chosen empirical methodology and the available data are of adequate quality;

2. Empirical analysis in mergers necessarily involves the use of historical data. However, these data need to be a good indicator of the likely impact of the merger on future competition; and

3. There has to be sufficient variability in the data to identify references for comparison.

In short, the availability and reliability of relevant data have an impact on to the extent to which the analytical approaches adopted to analyse the merger can differ from case to case. In the end, decisions have to be taken based on reliable evidence – be it direct or indirect, economic or other – that is sufficiently available in a particular case and within the strict time limits set out in the Merger Regulation.

The large amount of potentially relevant evidence necessary to consider in an overall assessment also means that one may find pieces of contradictory evidence that do not support certain conclusion. Important in this case is the totality of all available evidence, or indicative factors, not single pieces of it. As the European Commission puts it in its Ryanair decision,

> "the Commission's assessment of the competitive impact of this transaction involves a complex legal and economic analysis, the result of which is not based only on certain parts of the collected evidence, but on the totality of all the available evidence. The fact that single pieces of evidence (answers to questions, result of econometric studies) may not support a certain conclusion, cannot as such put into question the Commission's assessment, since the Commission cannot base its decision on one single piece of evidence, but must collect as many pieces of evidence as possible, analyse all available facts and opinions and weigh all the available evidence when deciding on the compatibility of a transaction with the common market."(4)

Hence, all single pieces of e.g. economic evidence do not have to support a specific conclusion. It is clear that the decision-maker, such as the European Commission, has always some level of discretion. Evidently, this must also be so; the world and the relating economic reality is just too complex for us to have simplistic rules, so some discretion will always be left to the decision-maker.

In short, more technical does not inevitably also mean better when it comes to presenting supporting economic evidence. In fact, as it has only recently been noted regarding the GC's Ryanair decision that the GC showed its readiness to accept the usefulness of the evidence provided by quantitative economic analysis and also that "it is by no means mandatory".(5) Yet, in practice it still seems that every once in awhile the technical nature of economic analysis is almost praised for its own sake, not for what it can give to analysis.

(1) T-342/07 Ryanair, para.136.
(2) T-342/07 Ryanair, para.136.
(3) The non-confidential version of the decision has not yet been published, but the three points have been referred to in some public writings and presentations, such as Kühn et al. "Economics at DG Competition, 2010-2011, Rev Ind Organ (2011) 39:311-325, p.314 also referred to herein.
(4) COMP/M.4439 Ryanair/Aer lingus, para.38.
(5) Kühn et al. "Economics at DG Competition, 2010-2011, Rev Ind Organ (2011) 39:311-325, p.316.

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