Kluwer Competition Law Blog

Geographic Market Definition in EU Merger Cases

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DG COMP has published a study by the University of East Anglia analysing the European Commission's approach to geographic market definition in recent cases. It has reviewed ten cases from 2008-2014 where geographic market definition was a key issue. The study looked at the Commission's geographic market analysis in terms of the methodology used and the conclusions reached on the basis of the available evidence; how the Commission incorporated constraints from outside the geographic market in its competitive assessment; and whether a more flexible approach to supply-side substitution could have been considered. The report contains detailed analysis of the evidence used in each of the ten cases on geographic market definition.

The report reaches the following conclusions:

- There is no evidence that the Commission's approach is leading to poor merger decisions.
- The Commission's practice regarding geographic market definition is generally well-evidenced and in line with its Notice on Market Definition. Where markets are drawn narrowly, the Commission usually gives careful consideration to evidence of competitive constraints outside the market.
- The Commission will typically draw on a wide range of evidence. In several cases, responses to the Commission's market investigation appear to provide the bulk of the evidence base for its decision.
- Statistical and quantitative evidence was not the sole decisive evidence for any case.
- The report does not find that the Commission should take a more flexible approach to supply-side substitution in market definition. There will always be caveats around the weight placed on market shares but markets shares within geographic markets that are defined on the basis of the Notice on Market Definition are likely to be more meaningful than would be shares within geographic markets which are widened on the basis of supply substitution by imports.

The report recommends the following improvements:

- Greater clarity that market definition is a useful framework for competitive analysis, but is not an end in itself. There would be a concern if the Commission's decision on a particular geographic market definition automatically determined a particular competitive assessment. It should not be an issue if geographic markets are drawn narrowly so long as the competitive assessment fully considers the competitive discipline provided by firms located outside the geographic market. Parties that successfully argue for a wider geographic market should not expect a guaranteed merger clearance, especially if they are close competitors within the wider market. The report implies that parties perhaps place too much importance on market definition, going to great lengths to argue for a wider market and lower market shares, but the evaluation of constraints should be within the overall competitive assessment rather than at the market definition stage.

- Greater clarity that supply substitution by imports will not typically be accepted as an argument for widening the geographic market. This is quite controversial, as parties will frequently seek to argue that there is potential for suppliers outside of a particular geographic area to import into that area and so constrain prices. Widening the market in this way could have the potential benefit of reducing market shares of the merging parties. However, in the ten cases reviewed in the report, despite giving consideration to the parties' arguments, the Commission did not accept that imports (usually from Asia) were sufficient to widen the geographic market. The report recommends that the Commission should exclude the option of widening the market on the grounds of supply substitution by imports. If the Commission follows this recommendation, it will be very difficult going forward to persuade the Commission that there is merit in such an argument. However, there would still be merit in making the argument around the impact of imports at the competitive assessment stage (though this would not have the advantage of potentially lowering the parties' market shares).
- Consideration to the approach of calculating capacity shares to include "swing capacity" and "rapid entrants" including from outside the geographic market – an approach currently taken in the US Merger Guidelines. The UK Merger Assessment Guidelines also allow for the inclusion in the market of rapid entrants who would supply into the market if there was a small price incentive.
- Greater willingness to define geographic markets on the basis of isochrones. The Commission's geographic market definition is nearly always a Member State, a group of Member States, or wider. This is a different approach to that taken by national competition authorities, such as the UK CMA, which tends to place great emphasis on the impact on local competition when assessing mergers in a number of sectors, such as retailers, cinemas, and bowling alleys for example. The CMA has recently considered the impact on competition at local and national levels (*Pure Gyms/The Gym; Poundland/99p Stores*). The Commission does not typically focus on local analysis (and perhaps this is logical, as such issues are more likely to be relevant to analysis carried out by national competition authorities) but the report finds that where transport costs are a significant determinant in constraining the size of the geographic market, it should consider that markets might be defined on the basis of isochrones. If the Commission follows this recommendation, parties may find that, for certain mergers, they will need to provide data on the length of time consumers are willing to travel to reach the location of purchase of the goods/services, and then use that information to construct isochrones. Indeed, the Commission is already starting to change its practice and recently used isochrones in a number of recent mergers in the cement industry *(Holcim/Cemex West; Holcim/Lafarge; Cemex/Holcim Spain*). If the Commission continues down this path, parties may find themselves having to provide substantial amounts of data broken down in a way that would allow isochrones to be calculated, in addition to the significant volumes of data that they are already required to submit.
- A more formal methodology for treatment of transport costs. The way in which these are analysed varies greatly from case to case – further thinking about a suitable methodological framework may be appropriate.
- Greater care in defining separate upstream manufacturing and downstream distribution markets, and greater clarity about the role of vertical integration in geographic market definition. This could be helpful as it might lead to a wider geographic market at either the manufacturing or distribution level.

The report is available at http://ec.europa.eu/competition/publications/reports/study_gmd.pdf

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