

December 2008

 Assessing the
 Efficacy of
 Structural
 Merger
 Remedies

CCP Policy Briefings

Assessing the Efficacy of Structural Merger Remedies: Choosing Between Theories of Harm?

BACKGROUND

- For markets where dominance is found, the European Commission (EC) intervenes either by prohibiting merger outright or, more commonly, requiring a remedy. Typically the remedies are structural, requiring the divestment of certain assets.
- There is an important potential trade-off inherent in structural merger remedies: between single dominance and collective dominance.¹ Antitrust authorities need to ensure that a sufficiently viable competitor to the merged entity results from the divestment of assets in order to prevent the merged entity establishing a dominant position. However, a remedy that creates a large viable competitor may also increase the likelihood of tacit collusion by creating/increasing symmetry between the buyer of the divested assets and the merged firm.
- Most of the EC focus appears to have been on ensuring a viable competitor, while largely ignoring the possibility that the remedies might create a market structure which is subsequently conducive to collective dominance.

METHODOLOGY

- The authors have two principle objectives: (i) to identify the impact of the remedies imposed by the EC for a sample of mergers; and (ii) to explore how the choice is made between alternative theories of harm.
- We examine a tightly specified sample of markets in which the European Commission (EC) has imposed structural merger remedies. It has two key features: (i) it includes all mergers in which the EC appears to have seriously considered, simultaneously, the possibility of collective dominance, as well as single dominance; (ii) in a previous paper,² for the same sample, we estimated a model which proved very successful in predicting the Commission's merger decisions, in terms of the market shares of the leading firms. The former allows us to explore the choices between alternative theories of harm, and the latter provides a yardstick for evaluating whether markets are competitive or not - at least in the eyes of the Commission.
- Structural remedies are evaluated in terms of their impact on the competitive structure of the markets concerned. This evaluation applies the same theories of harm as used to assess the mergers in the first place, namely, single dominance and collective dominance.

KEY FINDINGS

- Even before merger, a significant proportion of markets examined in the study are *not* competitive.
- Typically, divestment remedies return the market to the same structure as existed before the proposed merger.

¹ See for example Motta, M, Polo, M, and Vasconcelos, M, (2003). "Merger remedies in the European Union: an overview", in F.Lévêque and H.Shelanski (eds.), *Merger Remedies in American and European Union Competition Law*, Cheltenham, Edward Elgar, chapter 7.

² Davies, SW, Olczak, M, and Coles, H, (2008). "Tacit collusion, firm asymmetries and numbers: evidence from EC merger cases." CCP Working Paper 07-7.

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- In nearly half the cases examined, divestment remedies have resulted in structures which the EC would have sought to remedy had they been the result of a merger, rather than a remedy.
- Of the 53 cases where both the prospective merger and the pre-merger structure entailed dominance, in 40 the EC chose to intervene, and in 13 it chose not to.
- For a given post-merger market structure, the EC is less likely to remedy on the grounds of collective dominance if, post-merger, the merged entity would be the #2 firm.
- For those market structures in which the EC (typically) intervenes on the grounds of collective dominance if the merged firm is #1 but not #2, the predicted probability of single dominance *pre-merger* is significantly lower.

POLICY ISSUES

- Merger remedies (including prohibitions) will not necessarily return a market to a competitive structure. In practice, the state of competition in the market pre-merger will often constrain how much can be achieved by a competition authority if and when it remedies a merger.
- A corollary is that there may sometimes be an argument for not intervening in a seemingly anticompetitive merger if the pre-merger market structure was also anticompetitive.
- Mergers should always be assessed, not only in terms of their likely impact on competition, but also in terms of the potential limits on what might be attainable by intervention.
- The EC's decisions suggest that they seem to have preferred the possibility of collective to single dominance, especially when the merger involves a firm which would be ranked #2. This may be because, while a strengthened #2 firm may increase the chances of tacit collusion, it might alternatively act as a counteracting force, constraining the power of an otherwise dominant market leader.
- The apparently overriding effect of the revision of European Commission Merger Regulation (ECMR), at least in the three years after revision, has been to reduce the incidence of all types of intervention, but especially for coordinated effects.

THE CCP

The ESRC Centre for Competition Policy (CCP), at the University of East Anglia, undertakes competition policy research, incorporating economic, legal, management and political science perspectives, that has real-world policy relevance without compromising academic rigour.

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The full working paper (CCP Working Paper 08-28) and more information about CCP and its research is available from our website: www.ccp.uea.ac.uk

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