European Commission - DG Comp: Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control

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Consultation response from the

Centre for Competition Policy

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This consultation response has been drafted by the named academic members of the Centre, who retain responsibility for its content.

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Response to European Commission consultation on
Evaluation of procedural and jurisdictional aspects of EU Merger Control

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This consultation response is concerned with a possible fault-line in the threshold logic: a market in which there is a series of 'small' mergers, none of which individually would significantly lessen competition, but when taken in their entirety might. We find that previously cartelised markets become more concentrated through sequences of mergers (individually each below the threshold). As these industries had already been susceptible to collusion (evidenced by the cartels), these below-threshold mergers can potentially make tacit collusion easier.

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In merger control, a competition authority (CA) will only intervene if it expects the merger to lead to a Significant Lessening of Competition (SLC) in the relevant market. This obviously begs the question when does a possible lessening of competition become significant? Part of the answer is that an SLC is unlikely in those cases where the merger only involves a relatively small turnover and/or only a small increase in concentration. For this reason, many authorities typically apply size thresholds – mergers are waved through unless the threshold is exceeded.

This response is concerned with a possible fault-line in the threshold logic: a market in which there is a series of 'small' mergers, none of which individually would significantly lessen competition, but when taken in their entirety might. We ask can a series of insignificant lessening of competition become significant when they're combined? And, if so, what should the CA do about it?

We draw on our recently completed study of whether cartel breakdown provokes a period of intensive merger activity amongst the former cartelists, designed to re-establish tacit collusion.[3] For a sample of 84 European cartels, our research shows that in half there was merger activity (128 mergers in total), sometimes very intense, in the years following the cartel's breakdown. Using a novel application of recurrent event survival analysis we find that mergers are significantly more frequent in the immediate post-cartel period, especially in markets which are less concentrated. Moreover, in a significant minority of concentrated markets in which there were mergers, both the magnitudes of market shares and the response of financial markets were consistent with the possibility of coordinated effects.

[3] Davies, S., Ormosi, P. & Graffenberger, M. (2015) Mergers after cartels: How markets react to cartel breakdown. *Journal of Law and Economics*, 58(3).

In this response we now extend our previous work by examining how, if at all, competition authorities reacted to these mergers after cartels. We have been able to collect sufficient market share data to estimate the likely impact of 83 of the mergers. Of these, rather surprisingly, only half were investigated by either the European Commission or a national Competition Authority. Of these, most (34) were cleared without remedies, and in only 7 were remedies agreed, of which only 1 had any impact on the market shares in the previously cartelised markets.

Table 1 Merger investigations by CAs in previously cartelised markets

	Total	ΔHHI>250	ΔHHI<250
Mergers not-investigated	42	10	32
Mergers investigated	41	11	30
Cleared	34	7	27
Remedied	7	4	3
Total mergers	83	21	62

Table 1 reveals that this relative inactivity is largely explicable by the 'small' size of most of the mergers. All of the 42 un-investigated mergers involved a turnover below the EC's minimum disclosure threshold, and in 30 of the 41 cases which were investigated, the increase in concentration implied by the merger would have been lower than the level identified in the EC's merger guidelines as significant (ΔHHI<250).

To illustrate, consider the Industrial Thread cartel. At the time of its breakdown (1996), this involved nine active players (after a leniency application, this was officially detected by the EC in 2000.) The market was dominated by two firms, Amann and Coats, although there were also three other members each with a market share of roughly 10% each, and three other much smaller 'fringe' firms. Based on our market share estimates, the HHI index at the time of breakdown was 0.187 – a level of concentration not necessarily associated with serious competition concerns.

However, in the three years after breakdown, and then later in 2008, the top two acquired all three of their middle sized rivals – unopposed by the competition authorities largely because the sizes of the individual transactions and the increments in concentration were relatively small. Nevertheless, when taken together these acquisitions rendered the market twice as concentrated as initially and effectively a tight duopoly of two roughly equal sized firms. Ceteris paribus, such a market structure would undoubtedly raise concerns of potential tacit collusion.

Table 2: Industrial Thread Cartel

	Estimated market shares		
	1996	2009	
Amman	26	39	
Coats	20	36	
Oxley	10	-	Amman (2008)
Donisthorpe/Dollfus	10	-	Coats (2000) & Amman (2001)
Barbour	8	-	Coats (1999)
Belgian Sewing	6	6	
Guetermann	5	6	
Bieze	3	3	
Zwicky	1	-	Guetermann (2000)
Estimated HHI index	0.187	0.340	

However, when we consolidate the effects of all mergers in each market, we find a slightly more worrying outcome: in a sizeable number of markets there appears to be the potential for tacit collusion. As a rough rule of thumb, suppose we identify as a necessary condition for a market to be considered potentially collectively dominant as one in which the combined market shares of the leading players exceeds 50% (but neither has more than 50% individually), then 19 markets satisfy this criterion: in 8 the combined effect of the mergers was to introduce "collective dominance" and in 11, the market already exhibited collective dominance prior to the mergers.

Moreover, this is only an example. In total, there are 8 markets in our sample (Table 2) where there was a sequence of mergers post-cartel, and where the resulting market structure involved two dominant firms, with a combined market share in excess of 50%. In each of these intervention was minimal: of the 22 mergers, only 7 were investigated and only 1 required a remedy.

Table 2 Other cases where mergers lead to dominant duopolies

	Mergers	**Investigated**	**Uninvestigated**	**Below threshold**	**ΔHHI < 250**
Copper Fittings	3	0	3	3	3
Industrial Thread	5	0	5	5	2
Copper Plumbing Tubes	3	1	2	2	1
Speciality Graphite	2	0	2	2	2
Carbonless Paper	1	0	1	1	0
Alloy Surcharge	2	2	0	0	0
Ferry Operators	3	2	1	1	0
UK Tractors	3	2	1	1	1
Total	22	7	15	15	9

While all 15 un-investigated mergers was `small' relative to the EC's turnover threshold, taken together their effect was to reinforce the dominance of leading firms. Moreover, in 7 of the 15, we estimate that, even when treated separately, the merger had more than a trivial impact on concentration (ΔHHI>250). This evidently occurs in those cases where the cartel market, often defined very narrowly, is small relative to the merger size threshold.

Conclusions are difficult: although there is doubt concerning the use of size thresholds in merger control: a sequence of relatively small mergers may have a significant deadening impact on competition, even although none in itself seems significant. However, at what point does a CA become aware (if at all) that it is observing a sequence, and how can it justify intervening in one case, having let others through? These are questions which must be left open, pending further discussion. *Perhaps the most uncontroversial conclusion is that the Commission should be particularly alert, and general threshold rules should not apply, when confronted with mergers in a market which was previously cartelised*. These markets will sometimes be small – as is the case for many cartels – but the potential for harm is still there.