Tactical Dilatory Practice in Litigation: Evidence from EC Merger Proceedings

An ESRC Research Centre
CCP CENTRE FOR COMPETITION POLICY

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Tactical Dilatory Practice in Litigation

CCP Executive Summary

BACKGROUND

- A delaying tactic, or strategic delay, is a strategy typically applied by one of the parties to litigation to intentionally delay a legal procedure. Examples include jurisdictional challenges, discovery challenges, challenging the arbitrator, or requesting new expert evidence or a site visit.
- Delaying tactics are generally perceived negatively by the public and by the legal profession because they lengthen the litigation and lead to higher litigation costs.
- The economic analysis of delay in legal procedures has received considerable attention in the past. Most of this work focuses on the main determinants of delay in litigation.
- Relatively little attention has been dedicated to the analysis of tactical dilatory practices that are induced by one of the parties to the litigation.

METHODOLOGY

- The author provides an empirical example of strategic delay in pre-trial administrative litigation.
- The analysis is focused on 11 years of EC merger decisions (1999-2009). 214 cases of tactical delay motivated by the willingness to gain more time for an adequate remedial offer are examined.
- The analysis distinguishes between two procedural stages: the Phase I initial examination of notified merger cases, and the Phase II investigation which takes place if a case is not settled in Phase I.

KEY FINDINGS

- The evidence shows that, where mergers are found to be problematic, merging parties (or their legal advisors) may tactically delay the procedure by causing a suspension until they find a remedial proposal which is likely to settle the case without the need to engage in a lengthy and costly Phase II investigation. This type of delay can be beneficial to merging parties as well as to society.
- However, Phase II suspensions do not on average help in avoiding the prohibition and the (typically) subsequent judicial review of the case. In these cases, the delay in an already lengthy Phase II procedure may be indicative of parties with lower delay costs.
- Phase I strategic delay serves a socially desirable goal: saving on regulatory resources, and reducing the risks threatening successful merger integration. But Phase II delay seems only to indicate the negligence of the merging parties with respect to delay and the success of their merger.
- The author draws an analogy between administrative and civil proceedings and suggests that results can be generalised to apply to other areas of law, especially in cases where the pre-trial phase of litigation is characterised by time constraints.

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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.

FOR MORE INFORMATION

The full working paper (11-12) and more information about CCP and its research is available from our website: www.uea.ac.uk/ccp

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