

Merger Remedies versus Efficiency Defence: An analysis of merging parties' litigation strategy in EC merger cases

December 2009

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BACKGROUND

- Payoffs to the merger litigation strategy of merging parties is substantially determined by the regulatory framework, and more relevant to this paper, the practice of the European Commission (the Commission) in past merger cases.
- The prohibition of mergers that raise anticompetitive concerns with the Commission can be avoided by the behaviour of the parties with respect to the merger. Specifically, if they offer acceptable merger remedies and/or if expected post-merger efficiencies are greater than the potential harm to consumers resulting from reduced competition.
- The Commission's case law implies that the examination of efficiency arguments requires a longer - typically phase II - procedure.
- Merging parties design their litigation strategy to gain early approval while minimising the cost of the merger.
- This paper tests empirically the impact of signals embodied in the Commission's past decisions on the behaviour of merging parties with respect to remedy offers and efficiency claims.

METHODOLOGY and DATA

- The sample of 198 EC merger cases was collected, covering the period 1999 to 2008. All cases required intervention by the Commission.
- The method of estimation is duration analysis, which - in this particular case - offers advantages over OLS estimation. In particular, it allows the analyst to account for the time elapsed before a given event takes place (for example, the offering of a merger remedy) in addition to the examined independent variables.

KEY FINDINGS

Finding Heading

- The merger guidelines and the body of evidence embodied in past Commission decisions has a strong impact on the merger strategy of firms.
- Merging parties face strong disincentives to reveal their efficiency expectations to the Commission.
- Remedies are offered in the same way, regardless of the likelihood of efficiency gains, since this minimises procedural delay and increases the probability of regulatory approval.
- Early remedy offers are a good way of avoiding delays in approval, but presenting efficiency arguments is likely to lead to delays. Efficiencies are revealed in only a small proportion of cases.
- The timing of the remedy offer is determined by the urgency of the merger to the parties. If delays are costly, then early remedy offers are likely.

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POLICY ISSUES

- The current merger control practice of the Commission places efficiencies in a secondary role. This is a potentially damaging message given the emphasis placed on efficiency by the Lisbon Agenda.
- Unbiased competition analysis of mergers requires consideration of potential benefits as well as harms. There are currently disincentives for parties to reveal expected efficiency gains. This may be redressed if the Commission tailors remedies to reflect recurring efficiencies.
- The negative effect of remedies on efficiencies may be addressed by the design of the remedy. Behavioural remedies may be preferred to divestitures when efficiencies are crucial.
- To deal with cases where procedural delays are socially undesirable, definite length suspensions may be introduced.

THE CCP

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The full working paper (CCP Working Paper 10-1) and more information about CCP and its research is available from our website: www.uea.ac.uk/ccp

ABOUT THE AUTHORS

- Peter Ormosi is a part time Research Associate at the CCP.