

Professional interpretation of the standard of proof: an experimental test on merger regulation

January 2010

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CCP Policy Briefing

BACKGROUND

- There is considerable debate about the alternative economic approaches to merger control taken by competition authorities. However, differences in economic analysis are not the only reason for alternative decisions.
- Decisions may be influenced by the legal environment, required standard of proof, uncertainty associated with the evidence, perceived cost of errors and individual characteristics such as age and experience.
- The aim of this paper is to understand how competition agency decision-making is influenced by the interpretation of standards of proof in the face of limited and conflicting evidence.

METHODOLOGY

- The authors conduct an experiment in decision making in the context of merger appraisal. They analyse whether alternative standards of proof make any practical difference to decision making; whether the interpretation of standards of proof is professionally determined; whether there is a connection between experience and toughness; whether people take the volume of evidence and cost of errors into account; and whether there are systematic cognitive biases in their decision making.
- A distinctive feature of this experiment is that it is conducted on current practitioners from eleven different jurisdictions, in addition to student subjects. This allows an analysis of the specific effects of professionalization.

KEY FINDINGS

- The central finding of the research is that standards of proof, volumes of evidence and perceived error costs matter.
- The 'accurate, reliable, consistent and sufficient evidence' criterion suggested by a European Court of Justice judgment was interpreted as placing almost as high a standard of proof as the 'beyond reasonable doubt' standard from criminal law.
- Both lay and professional samples adapt their decisions in the light of the stated standard. Both also adopt a similarly conservative reluctance to find harm in a proposed merger and they weigh the costs of false prohibitions.
- Professionalization matters importantly in at least three ways:
 - (i) it sharpens distinctions between standards;
 - (ii) it is associated with a more sophisticated weighing of different volumes of evidence; and
 - (iii) it is associated with a greater adjustment for the potential cost of errors.
- Some reasons behind this professionalization effect can be eliminated. The authors find that it is not particularly associated with years of work experience, gender, legal versus economics training, nationality, or civil versus common law background. This leaves explanations based on agency-provided training, internalisation of competition agency culture and self-selection of individuals into careers in competition agencies.
- There is evidence that older practitioners tend to be tougher.

POLICY ISSUES

- As an increasing number of international authorities adopt competition policy, and more firms operate internationally, there is increasing scope for conflicting decisions. It is not only alternative policy objectives or economic theories of harm that can lead to different decisions. The wording of standards of proof, perceived costs of error and some predictable individual characteristics also matter. Such factors need to be addressed if we want to achieve more consistent decisions and reduced business costs of uncertainty.

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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 10-3 and more information about CCP and its research is available from our website: www.uea.ac.uk/ccp

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