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MERGERS IN THE COMPETITION POLICY OF THE EU

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Mergers may contribute to the realization of economies of scale and scope, thus allowing greater productive efficiency. At the same time, their behaviour can be in conflict with allocative efficiency. We are going to use the Williamsonian merger analysis (Williamson, 1968) as the analytical basis of the efficiency argument.

Commission’s activities on forcing the firms to give access to “essential facilities” usually implying intellectual property rights objects may affect the incentives to invest in R&D [3, p. 316]. It would not correspond to the smart growth priority set by the EU 2020 strategy – “developing an economy based on knowledge and innovation” [2, p.3]. Enforcement authorities should avoid focusing on short-term consumer welfare; this approach can discourage firms from competing dynamically and consequently delay the production of the improved products and services for the benefit of the consumers in future [3, p. 317].

Merger Regulation 139/2004 and Guidelines on the assessment of horizontal mergers acknowledge the importance of taking efficiencies into account but only if they are substantial, merger specific, verifiable and quantifiable. The burden of proof is on the participating parties and is difficult to discharge before the directors take charge of the target company. Moreover, the requirement of the efficiency being merger specific is vague as the more important dynamic efficiencies may occur to management while organising the assets of the merging firms [5, p.352].

Classical welfare economic analysis says that the creation of a monopoly can have a positive impact on total welfare and even consumer surplus. In case of a natural monopoly a single firm can supply a good/service to an entire market at the smaller cost than could two or more firms [6, p.290]. Monopolies are welcome in certain areas such as the development of operating systems, since this sphere requires uniformity of the products which correspond to the universal standard and are charged the single price all over the world. The Commission’s competition policy has a more sceptical approach on this matter [8, p. 330]. “It is highly unlikely that a merger leading to a market position approaching that of a monopoly, or leading to a similar level of a market power can be declared compatible with the common market” [8, p. 335].

Efficiencies should be taken into consideration in the case of creation of a dominance situation. “Economists have shown that, in certain circumstances, conduct such as price discrimination can have pro-competitive effect. The rigidity of the Commission test is at odds with economic theory, according to which it is not the nature of the conduct but the effects on the competitive structure that should be determinative” [3, p. 355].

Industrial Policy Considerations

“A sound competition policy is not in contrast with a sound industrial policy [7]”. The Commission decisions in the sphere of merger control should be influenced by industrial policy considerations. The EU industrial policy is highly determined by productivity and employment. The Commission claims that the weakness in Europe’s labour productivity is mainly due to the slowdown of Total Factor Productivity which increases as a result of the more efficient use of capital and labour in the economy and is dependent on industrial policy and structural reforms [1, pp.2-3]. One of the three Europe 2020 mutually reinforcing priorities is inclusive growth – “fostering a high-employment economy delivering social and territorial cohesion” [2, p.3]. This objective can be realised with the help of large enterprises which can be created as the result of mergers. The impact of large enterprises on labour productivity can be shown in the relevant statistics. Large enterprises usually contribute a higher share of sectoral value added than employment, while the opposite is true for microenterprises. This shows a relatively high apparent labour productivity (value added per person employed) for large enterprises and a low level for microenterprises [4].

National vs EU regulation

Europe needs European champions rather than national ones. The National Competition Authorities (NCAs) should apply substantive EU merger control rules where a merger has cross border effects, and improve cooperation among them. The revision of the mergers regulation's mechanisms for case allocation and re-allocation is important. This would mean abolishing the “two-thirds rule”, which forsees that mergers in principle forbidden under the EU merger regulation are nevertheless left to NCAs when more than two thirds of the parties turn-over is realised in one and the same Member States. The advantage would be a more consistent merger control in key areas of the EU economy [7, p. 86-87].

International trade

Sustainable growth priority of the EU 2020 strategy as “promoting a more resource efficient, greener and more competitive economy” [2, p.3] is not at odds with the creation of the merged companies. The European Parliament expressed its belief that “… merger regulation must now be interpreted in the context of international competitiveness within increasingly globalized markets”. Monopolies do not produce global welfare losses and it benefits the host state by creating a producer surplus. “While some consumers in the host state might suffer, most of the lost consumer surplus will be externalized to the outsiders. Strategic trade theory, as developed by Krugman and others in the late 1970s, addresses these features of international trade. It maintains that increasing returns to scale characterize production in many sectors and that monopoly industrial organization thus constitutes the norm rather than a deviation for large portions of the most developed economies.”

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