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Concentration Indices and Market Shares in the EU Horizontal Merger Guidelines

Vincent Verouden
European Commission, DG Competition.

(*) The views expressed are those of the author and do not necessarily reflect those of the European Commission

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EC Merger Control – Background

- EU Horizontal Merger Guidelines published on 30.01.04.
- Guidelines complement the new EC Merger Regulation (adopted on 20.01.04).
- Both texts will become applicable as of 01.05.04.
- Background: reform of the EU merger control system (in place since 1990).
- On the substantive side, the two main issues underlying this reform were:
  - Scope of the existing “dominance” test (Art. 2 ECMR)?: “SLC vs. dominance: does it make a difference?”
  - Role of efficiencies in merger analysis

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Art. 2 ECMR

- Existing test: whether a merger "creates or strengthens a dominant position as a result of which effective competition would be significantly impeded"
  - Perceived by some commentators as not covering all mergers that produce anti-competitive effects (e.g., mergers in oligopolistic markets where the new entity would only become the No. 2 in the market)
- New test: whether a merger "would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position"

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EU Merger Guidelines

- Complement the change in the test
- Set out the analytical approach
- Central question: will the merger enhance the level of market power, i.e. lead to increased prices or other harm to consumers ?
- Distinction: unilateral effects and co-ordinated effects
- Unilateral effects may arise, in particular, when the merger leads to a dominant position
  - In such cases, single firm dominance "typically" associated with the new entity having an appreciably larger market share than the next competitor post-merger

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Market share indications

- Very large market shares – 50% or more – may in themselves be evidence of the existence of a dominant market position
  - Further, it is noted that the Commission has in “several cases” found dominant positions with market shares in 40-50% range, and in “some cases” with shares below 40%
- Limited market share leads to presumption of compatibility. An “indication to this effect”: market share below 25%. (But: does not cover co-ordinated effects)

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HHI indications

- In addition, Commission “unlikely to identify competition concerns” when
  - HHI < 1000 (such cases normally do not require extensive analysis)
  - 1000 < HHI < 2000 and delta < 250
  - HHI > 2000 and delta < 150
- “Soft Safe Harbour” approach (also consistent with 25% market share indicator)
- HHI indications not applicable where certain special circumstances are present which make HHI less informative (see next slide)

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HHI indications (cont.)

- Special circumstances, e.g.
  - Merger involves potential or recent entrant
  - One or more merging parties important innovators
  - Significant cross-shareholdings among market participants
  - One of merging firms a “maverick”
  - Indications of past or ongoing coordination, or facilitating practices
  - A merging party pre-merger has market share above 50%

- By using this technique, HHI indications more informative in relation to the application of the merger control standard under “normal” circumstances. List also pedagogic by itself