



Merger Analysis and the Role of Efficiencies in the EU

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(*) The views expressed are those of the author and
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EC Merger Control – Background



- n EC merger control system (in place since 1990) has been the subject of a review process, recently
 - Process resulted in an amended EC Merger Regulation (applicable as of 01.05.2004), Horizontal Merger Guidelines (idem), internal reorganization measures ...
- n On the substantive side, the two main issues underlying the reform were:
 - Scope of the existing “dominance” test (Art. 2 ECMR)
 - Role of efficiencies in merger analysis

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Art. 2 ECMR



- n 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)
 - Clarification was necessary
- n 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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Efficiencies under the ECMR



- n Fair to say that efficiencies have not received much emphasis in EC merger control in the past
 - some cases featured efficiency arguments, but not many
- n Conclusion of the review process: compelling reasons to give more explicit consideration to efficiencies in merger control, from the understanding that efficiencies may bring more competition to the market
 - efficiencies natural element (although not the easiest) in a competition analysis, they provide the right focus
 - In line with more effects based (economics based) approach to merger control

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Treatment in new ECMR



- n Was no need to change Art. 2 ECMR for the purpose of analysing efficiencies.
 - Existing Art. 2 ECMR is already a competition test
 - Efficiencies should be part of an integrated competition analysis
 - Further: Article 2(1)(b) ECMR (“the Commission shall take into account ... the development of technical and economic progress provided that it is to the consumers’ advantage and does not form an obstacle to competition.”)
- n Nonetheless, the new wording probably better expresses that Art. 2 ECMR is an effects-based competition test
 - Further: Recital 29 in ECMR (“It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition.”)

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Treatment in Guidelines



- n EU Guidelines on the assessment of horizontal mergers, adopted 30 January 2004
- n Approach to efficiencies: open but cautious
- n Focus lies on the “ability and incentive of the merged entity to act pro-competitively for the benefit of consumers”
- n Consumer welfare focus derives from Article 2(1)(b) ECMR.

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Treatment in Guidelines (cont.)



n Three conditions for efficiencies to be taken into account:

n benefit to consumers

- "The relevant benchmark in assessing efficiency claims is that consumers will not be worse off as a result of the merger."
- In principle, in the relevant market
- Efficiencies may take various forms (cost savings leading to lower prices; synergies leading to new or improved products). Marginal costs "more likely to be relevant" to the assessment than fixed costs.

n merger-specificity

- efficiencies are relevant to the competitive assessment when they are a direct consequence of the notified merger (causation)

n verifiability

- Parties must provide relevant information demonstrating the claimed efficiencies are merger-specific and likely to be realised, and must show to what extent consumers will benefit.