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The Definition of the Relevant Market and the Degree of Market Concentration in the Emerging Economies

Case Study on Brazil and Argentina

Marco Botta
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Introduction

- Objective of the paper: analyzing the challenges faced by NCAs emerging economies in applying the SSNIP and HHI tests in merger control

- Case study on Brazil and Argentina

- Outline of the presentation:

1) Overview of the functioning of the HHI and SSNIP tests
2) Brazilian merger control and application econometric tests
3) Argentinean merger control and application econometric tests
4) Conclusions: lessons for other emerging economies

SSNIP test

- ‘Hypothetical monopolist test’ → definition relevant market
- Relevant market defined in terms of demand substitutability, assessing if the hypothetical monopolist can impose a ‘small but significant and non-transitory price increase’ (SSNIP)
- 2010 US horizontal merger guidelines: small price increase equivalent to 5%
- EU Commission merger guidelines: small price increase equivalent from 5% to 10% price increase
- Alternative indicators: cross-price elasticity and price correlation tests

HHI test

- Herfindahl-Hirschman Index is used to estimate the level of concentration of relevant market
- HHI = sum of the square market share of each firm operating in the relevant market → variation from 1 to 10000
- 2010 US Merger Guidelines: 1500 – 2500 HHI → moderatly concentrated market (1000 - 1800 in 1992 Guidelines)
- EU Horizontal Merger Guidelines: 1000 – 2000 HHI → moderatly concentrated market. EU Non-Horizontal Merger Guidelines: no challenge of concentrations below 2000 HHI.
- Alternative indicator market concentration: C4

Brazilian System Merger Control

- Art. 54 Law 8884/94
- Triangular system of enforcement: CADE, SDE, SEAE
- 2001 SDE/SEAE Horizontal Merger Guidelines:
  1) SSNIP test: small price increase of 5%, 10%, 15% Brazil affected by hyper inflation during ’80s and ’90s → difficulty for the NCA to obtain reliable price data

  2) Reference to C4, rather than HHI test: highly concentrated market when: i) merging parties have 20% market share OR ii) four largest firms control 75% market and merging parties 10%.

Application SSNIP AND HHI tests in Brazil

- SEAE officers interviewed: Brazil affected by hyper inflation during ’80s and ’90s → difficulty for the NCA to obtain reliable price data to apply the SSNIP test in a strict way
- SEAE officers interviewed: in spite of reference to C4 in the Guidelines, HHI test is usally relied. C4 seemed easier to apply at the time the Guidelines when drafted (i.e. no need market share of all market players).
- Case Colgate Palmolive – Kolynos: internal debate within CADE if Brazilian NCA should tollerate higher HHI values in comparison to US and EU

Argentinean System of Merger Control

- System of merger control introduced by Law 25156/99
- Lack of establishment Competition Tribunal → Enforcement by the CNDC and the Secretary of Internal Trade
- 2001 CNDC Horizontal Merger Guidelines:

1) Reference to SSNIP test → 5% / 10% price increase
2) Reference to HHI, rather than C4 test, but no concentration levels identified

Application of the HHI and SSNIP tests in Argentina

- Case Quilmes-AMBEV: the CNDC defined the relevant market by referring to the product definition of the US and EU NCAs, rather than conducting an alternative market study
- Case Carrefour-Norte: the CNDC cleared the concentration, though it generated high HHI level increases in some local retail markets, due to the presence of informal economy and the possibility of further expansion of the demand, which would attract new entrants
- Case Cablevisión – Multicanal: manipulation of the definition of the relevant market by the CNDC to decrease market power of the merging parties

Conclusions, lessons for other emerging economies

- NCAs of the emerging economies face challenges to apply SSNIP and HHI tests in a strict manner: lack of human resources, lack of expertise, lack of reliable market data
- High inflation rates hamper application SSNIP test: high inflation is usually unstable, and thus it becomes difficult defining the appropriate “small but significant price increase” → relevant market defined in qualitative terms (i.e. reference to foreign NCAs, product characteristics, opinion merging parties).
- Reference to the same HHI values of US and EU may cause false negative presumptions: tendency towards high contration ratio in local relevant markets in poorest and under populated areas

Conclusions, lessons for other emerging economies 2

- NCA emerging economies need degree of flexibility in applying the HHI test → reference to US and EU HHI values may be not suitable for the structure of their economies

- Lack of reference to any specific HHI value (i.e. Argentinean Guidelines) may cause legal uncertainty → NCA should focus their attention to the HHI increase before and after the merger, rather than on the absolute level of concentration of the market

- Degree of discretion granted to the NCA should be proportional to the level of indipendence and institutional maturity of the NCA to avoid cases of manipulation relevant markets (case Cablevisión-Multicanal).