Assessing the efficacy of structural merger remedies: choosing between theories of harm?

Previous empirical studies on the efficacy of structural merger remedies have typically evaluated 'success' in terms of subsequent viability of divested assets. Here, instead, we focus on the market structures resulting from those remedies (divestment), using a specially selected sample of EC mergers and remedies. Applying the results from a previous econometric model (Davies et al, 2008), which achieves a high predictive power in explaining Commission decisions, we identify two types of apparent inconsistency in its decisions. In Type 1, it requires divestment remedies that lead to subsequent market structures which it has found generally unacceptable when resulting from most other mergers. In Type 2, it refrains from requiring divestment, even though the merger leads to a market structure which, in other mergers, it has judged would lead to dominance.

One explanation of these results might be, quite simply, that the Commission has been inconsistent in its decision making between mergers. However, we consider an alternative explanation, that these anomalies can be explained in terms of an apparent reluctance or inability by the Commission to seek remedies which would do more than return the market concerned to its status quo, i.e. the market structure which obtained pre-merger. If that status quo already involved a structure consistent with dominance, then the choice of whether or not to remedy necessarily involves a choice between two forms of competitive harm. On this reasoning, a Type 1 inconsistency implies a judgement that the harm resulting from remedy is less than the harm from doing nothing, while in others (Type 2) the reverse is true.

Second, given this implicit choice in many cases, we assess whether the Commission reveals a preference for single or collective dominance. Here, although the evidence is mixed, the weight of the results suggests a tendency to tolerate outcomes which, in other cases, would be identified with collective dominance, if the alternative is an outcome more consistent with single dominance. This is seen, most obviously (but not only), in markets where the merged firm is not the largest post-merger. In those circumstances, pre-2004, by definition, the merger could not be remedied to counteract single dominance. But, beyond this, the Commission also appears to have been much less inclined to intervene against possible collective dominance, on the grounds that to do so would have led to an outcome consistent with single dominance.

The paper goes on to ask how, if at all, these conclusions require qualification following the 2004 revisions to the Regulation. Here, it should be recalled that these armed the Commission with an extra tool (to judge Unilateral Effects even where the merged firm is not the single most dominant). In fact, our most striking early findings on this are that it has been extremely rare since 2004 for the Commission to remedy any merger in any market on the grounds that it would lead to Coordinated Effects (Collective Dominance). In the two markets where it has, rather strangely, it has justified its remedies on the grounds that the merger might lead to either unilateral or coordinated effects, or both!

This research is ongoing at the time of writing. We hope that it fits perfectly with the general objectives of the workshop in that it draws on EC cases, drawing largely on Commission decision reports.

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