MERGER REMEDIES VERSUS EFFICIENCY DEFENCE

Does the current merger remedy practice create a disincentive to reveal efficiencies?

Peter L. Ormosi

Abstract

When merging parties – that are aware of the fact that their merger might attract the suspicious attention of competition authorities – decide to seek regulatory approval, they face a choice between two merger control instruments: efficiency defence or merger remedies. The choice is not a binary one in a sense that the two can as well be applied simultaneously. The initial motivation behind this paper was the idea to examine the relationship between these two instruments. A consequent question was to see how companies decide between remedies and efficiency defence where efficiencies are prevalent. Thirdly, I attempted to find how the current legal framework and the Commission's case law can influence this decision. As a starting point I looked at the European Commission's merger decisions (that contained some form of intervention – either prohibition or remedy) regarding these two instruments between 2001 and 2007. I found that in mergers where industry information supports the existence of efficiency gains, parties send different signals to shareholders than to the European Commission. The paper examines the possible causes of this differentiated signalling. The goal was not to entice criticism on substantive issues of the Commission's merger control procedures but to analyse how signalling from the Commission, as is perceived from an entrepreneurial viewpoint, is capable of altering the merging parties' strategy. I found that the way the Commission currently communicates its decisions is capable of creating incentives to prefer remedies over efficiency defence, especially in the case of companies that try to avoid a lengthy phase II procedure. Using a sample of all the merger decisions I found evidence showing that shorter procedure can be reached (1) by an earlier remedy offer, (2) with a sufficiently large initial offer (in order to cut the length of negotiations), or (3) by avoiding efficiency arguments. I also looked for exogenous variables to see what effects the timing of the first commitment in this model. Using quantified information on the expected cost savings of a merger as a proxy for the expected efficiencies – collected from annual reports or business newspapers – I found evidence that the more efficiencies companies communicate to their shareholders pre-merger, the earlier they come up with a remedy offer. The experience of the Commission seems to have similar effect on the timing of the first commitment.