

**DEVELOPING EFFECTIVE MERGER
CONTROL IN EMERGING
ECONOMIES:
LESSONS FROM ESTABLISHED POLICY
AND PRACTICE**

**John Kwoka
Northeastern University
Boston, Massachusetts**

20 May 2011

Northeastern University
College of Social Sciences and Humanities

BACKGROUND

- **Effective competition policy requires**
 - **Resources**
 - **Experience**
 - **Expertise**
 - **Political and judicial support**
- **Even countries with these advantages do not have “perfect” competition policy**
- *But they represent upper bound on likely success of competition policy in emerging economies*

- **Study examines experience with competition policy in established setting: Upper bound analysis**
- **Purposes are to determine how accurate, effective is competition policy under most favorable circumstances**
- **Also to identify aspects of policy that are done best *and* can be used as guidance for policy in other countries**

EXAMINE MERGER CONTROL

- **Setting is U.S.**
- **Examine merger control only**
 - **Unlike cartels, requires case-specific analysis**
 - **Unlike monopoly practices, requires prediction**
- **Allows use of new data from project evaluating U.S. merger control**

MERGER CONTROL PROCESS

(A) Initial conditions that prompt investigation of merger



(B) Agency analysis, prediction, and action



(C) Outcome of merger and policy action

"END-TO-END" EVALUATION

- **Permits insight into**
 - **Criteria for investigation**
 - **Relationship between conditions and type of action**
 - **Causal connection between types of actions and outcome**
- **Some studies of cases, linkages exist**
 - **For example, retrospective studies of mergers**
- **Entire end-to-end process has not been studied systematically**
 - **Nor any previous effort to draw implications for developing merger control**

MERGER CONTROL IN U.S.

- **Merger Guidelines intended to explain analytical process:**
 - **Market definition, shares and concentration**
 - **Entry, efficiencies, etc.**
 - **Most recently, theory of competitive harm**
- **Guidelines first issued in 1968**
 - **Major revisions in 1982, 1992 and 2010**
- *Merger rules change over time with understanding and experience*

FROM GUIDELINES TO PRACTICE

- **DOJ/FTC Data permit comparison of Guidelines to actual practice**
- **Few mergers challenged unless:**
 - **concentration very high, *and* change in concentration very large**
 - **Also, no actions where entry said to be easy**
- **Despite Guidelines that say challenge likely when $HHI > 1000$ and $\Delta HHI > 100$**
- ***Actual practice may diverge from Guidelines, even systematically***

Cases in which the Agencies Challenged Mergers (1999-2003)

Post-Merger HHI	Change in the HHI								
	0-99	100-199	200-299	300-499	500-799	800-1,199	1,200-2,499	2,500+	total
0-1,799	0	17	18	19	3	0	0	0	57
1,799-1,999	0	7	5	14	14	0	0	0	40
2,000-2,399	1	1	7	32	35	2	0	0	78
2,400-2,999	1	5	6	18	132	34	1	0	197
3,000-3,999	0	3	4	16	37	63	53	0	176
4,000-4,999	0	1	3	16	34	30	79	0	163
5,000-6,999	0	2	4	16	9	14	173	52	270
7,000+	0	0	0	2	3	10	44	223	282
total	2	36	47	133	267	153	350	275	1263

RETROSPECTIVE STUDIES

- **Another element of “end-to-end” analysis:**
 - **Ex post evaluations of actual mergers**
 - **Examine prices before and after merger**
 - **Use difference-in-difference estimation**
- **Survey of all merger retrospectives finds 26 studies**
 - **covering 45 mergers**
 - **with 59 estimates of price effects**

SUMMARY OF PRICE EFFECTS

Estimated Effect	Frequency
PRICE INCREASE	
Large	29
Small	7
MIXED OR NO EFFECT	17
PRICE DECREASE	
Small	0
Large	6

FURTHER ON FINDINGS

- **More than half of all studies find price increases after merger—most large**
 - **Almost none find decrease**
- *Implies policy may need tightening*
- **Joint ventures and airline code-shares have lesser effects**
- *Implies primary concern should be with true mergers*

FROM MERGERS TO POLICY

Evaluation of merger policy requires further information

- **Industry facts prior to merger**
- **Agency concern/theory/prediction**
- **Type of agency action**
 - **Approve without conditions**
 - **Impose conduct conditions**
 - **Require divestiture**
 - **Disapprove**

DATA AND RESULTS

- **Compile data on actual cases filed**
 - **Matched to retrospective studies**
- **Result is “end-to-end” data on 23 merger cases**
 - **covering 30 distinct products**
 - **with 25 price outcomes**

AGENCY ACTIONS

- Of 25 completely specified cases of products undergoing merger

Action	No. of cases
Approved without conditions	5
Approved subject to conduct remedies	11
Approved subject to divestiture	4
Disapproved (but overridden)	4

INDUSTRY CONDITIONS

- Next we match data on prior industry conditions:

Action	No. of cases	Concentration	Entry
Approved/ no conditions	5	HHI between 1500 and 6390 CR2 = 100	Easy
Approved/ conduct remedies	11	HHI between 2540 and 3000 CR2 = 100	Difficult
Approved/divestiture	4	"Moderate/high" HHI between 6000 and 8000	Difficult
Disapproved	4	"High/moderate"	

TENTATIVE CONCLUSIONS I

- **Somewhat higher concentration in cases requiring divestiture, compared to conduct remedies**
- **Ease of entry appears to override concerns in cases of high concentration**

MERGER OUTCOMES

- **Price outcomes from studies, according to agency action:**

<u>AGENCY ACTION</u>	<u>OUTCOME</u>				
	Large Increase	Small Increase	Mixed/ None	Price Decrease	Total
Approved/ no conditions	2	0	3	0	5
Approved/ conduct remedies	8	2	1	0	11
Approved/divestiture	3	1	1	0	5
Disapproved	2	1	1	0	4
Total	15	4	6	0	25

MERGER OUTCOMES

- Price outcomes from studies

<u>AGENCY ACTION</u>	<u>OUTCOME</u>				
	Large Increase	Small Increase	Mixed/ None	Price Increase	Total
Approved/ no conditions	2	0	3	0	5
Approved/ conduct remedies	8	2	1	0	11
Approved/divestiture	3	1	1	0	5
Disapproved	2	1	1	0	4
Total	15	4	6	0	25

TENTATIVE CONCLUSIONS II

- **Mergers with no (or mixed) price effect approved in 3 of 6 cases**
- **Mergers resulting in price increases approved in 2 of 19 cases**
 - **Difference is statistically significant**
- *Agencies have some ability to identify more problematic mergers*

- **Of 19 mergers with large price increases:**
 - **Only 2 opposed outright**
 - **Three others had structural conditions attached**
 - **8 of 11 subject only to conduct remedies**

Policy erred systematically toward weaker remedies than underlying conditions required

U.S. MERGER CONTROL: SOME REFLECTIONS

- **U.S. competition agencies have \$280M budget total**
 - **Staffs of 130 economists, 750 lawyers**
 - **Investigate 50 to 100 mergers per year**
 - **File 5 to 20 challenges per year**
- **Despite resources and experience, execution imperfect**
 - **Sizeable overall rate of errors**
 - **Some systematic errors**

MERGER CONTROL IN OTHER ECONOMIES: IMPLICATIONS

1. Heavily case-specific determination is resource intensive but without clear gain in accuracy

- *Cheaper and easier to rely on structural presumption*

2. Ease of entry is very important safeguard, even in face of high concentration

- *Policy should aggressively seek removal of barriers to entry*

- **Conduct remedies are weaker and harder to enforce than divestitures**
 - *Policy should employ structural remedies wherever possible*