

Interaction between academic work and enforcement in merger control

Damien Neven, Chief Economist*
DG COMP, European Commission

*The views expressed are those of the authors and do not necessarily reflect those of DG COMP or the European Commission

Introduction



- Understanding how the market works
- Develop a rigorous analysis of the effects induced by the concentration
- Development of reliable empirical evidence and calibration
- Policy instruments and guidelines

Guidelines



- Non horizontal merger guidelines
 - Principles : focus on consumers, emphasis on efficiencies
 - Ability and incentive to foreclose
 - Anti-competitive foreclosure
 - A selection of theories of harm inspired by the economic literature
 - Focus on on dynamic effects

Enforcement



- Travelport/Worldspan
 - GDS – platforms between travel agents and content providers (airlines)
 - Multi-homing for content providers
- Google/2click
 - Software to monitor on line advertisements
 - Platform between publishers and advertising agencies
- Efficiencies on one side of the market
- Tom/Tom-Tele Atlas, Nokia Navtec
 - Input foreclosure
 - ability to commit ?

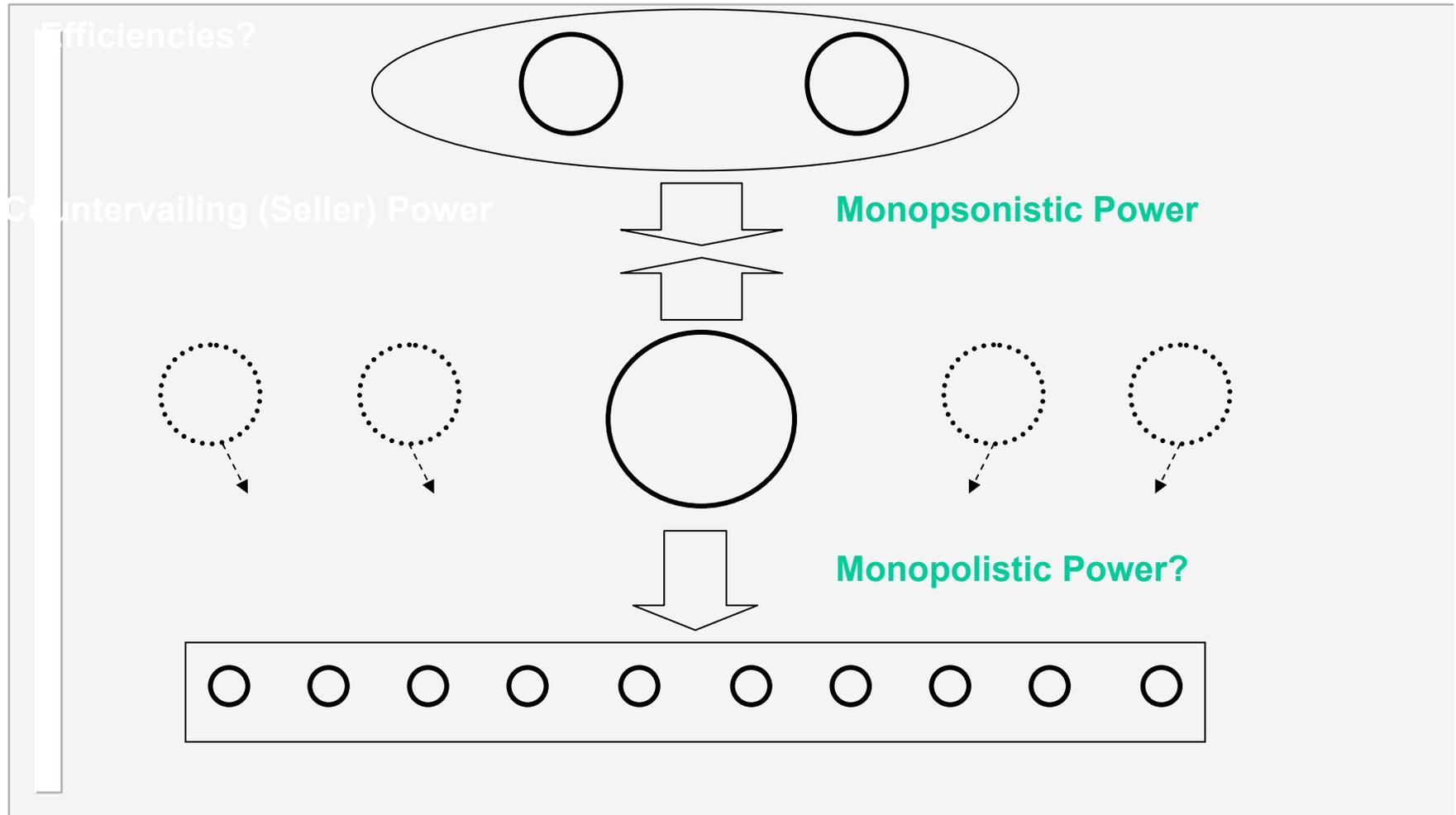
Enforcement



■ Universal/BMG

- Aggregation of rights
- Split rights and strict complementarity
- Portfolio of songs
- Negotiation with Itunes ? Pivotal seller ?

Creation of countervailing (seller) power (in the HMG?)



Countervailing Seller Power



- 3-2 merger - Korsnäs/AD Cartonboard
- One remaining competitor (Stora/Enso) but 3 customers (Tetra Pak, Combibloc and Elopak)
- Merger will « rebalance the relation between Tetra and its suppliers »
- But also efficiencies likely to be passed on
- Rio Tinto /BHP

Evidence



- Ryanair / Aer Lingus
- Sony/Bmg
- Expert advise on econometrics
- Development of a code of conduct
- Calibration in vertical mergers

Conclusion



- Slaves of defunct and alive economists..

Art 81



- The alchemy of fines
- Calibration of the level (probability of detection, price increases)
- Do we need to renew the guidelines on vertical restraints ?
- Roaming (82 - 1)
- High prices sustained by a network of contracts; such that each host commits to offer the same menu of contracts to (competing) foreign operators
- High costs exchanged for high revenues (see Tsyganok (2006))

Art 81(ii)



- Mastercard (and Visa II)
- Decision announced for 2007
- MIF can be used to exercise market power
- But also to balance external effects across issuing and acquiring markets
- What is the “right” MIF, in the presence of platform competition ?
- Airline alliances – Sky team settlement

81 (iii)



- Eon/Gaz de France
- "agreement and/or concerted practice ...restricting competition in their respective home markets, in particular concerning supplies of natural gas transported over the MEGAL pipeline."
- Agreement not to enter into each other's home markets
- "initiation of proceedings does not imply that the Commission has conclusive proof of an infringement"

Merger control (iii)



- Extensive econometric work in Ryanair/Air Lingus, Sony/Bmg (le retour), Ineos/Kerling.
- More limited work in about 10 cases (market definition, bidding studies)
- Development of procedures
- Mergers in two sided markets : Google/2click, Travelport/Worldspan
- No formal analysis, potentially difficult question with respect to efficiencies

Art 82



- Guidelines delayed by the Microsoft judgment
- Judgment clarifies the test with respect to refusal to supply
 - Indispensability (Bronner minus)
 - Elimination of effective competition
 - Emergence of new products (IMS +)
- Considers the analysis of effects while giving substantial deference to the Commission
- Reasoned guidance on enforcement priorities shared with MS in 2007

Art 82 (ii)



- While we (you) wait...
- Intel/AMD, analysis of retroactive rebates
- Telefonica, margin squeeze
- Rambus, Qualcomm; standard setting organisations, ex ante competition and ex post FRAND terms
- Interface with regulated industries

Art 82 (iii)



- RWE : "creation of unjustified obstacles to third party access to the natural gas transportation network and supply markets"
 - "high prices charged for access to the gas networks"
 - "inflation of RWE TSO's costs,
 - "maintenance of an artificial network fragmentation"
 - "failure to release transportation capacity to allow customer switching"
- ENI : "Exclusion of potential competitors from the Italian gas supply markets"
 - "capacity hoarding"
 - "strategic underinvestment in the transmission system"

Economic analysis of State aids



- Is the aid well designed to deliver the objective of common interest i.e. does the proposed aid address a market failure or other objective?
- Is there an incentive effect, i.e. does the aid change the behaviour of firms?
- Are the distortions of competition and effect on trade limited, so that the overall balance is positive?
- Experience in RDI projects (mostly Beffa)

SA – Market failures



- Long shopping lists
- Careful consideration of underlying principles (e.g. pecuniary external effects)
- Validation is often very crude
- Environmental concerns
- Government failures
- Focus the analysis
- Develop validation methods

SA – Incentive effects



- Financing constraints
 - Internal ?
 - External ? Bank loans and equity
 - Cost of capital
 - Confidence in the numbers presented by the parties
 - Marginal effect of public support on overall financial prospects
 - Access to documents
- Implement a consistent framework

SA – Competition and balancing



- Unresolved issues of principles
 - What is a distortion of competition
 - Relevant market (by comparison with antitrust)
- Balancing without scale
- Focus the analysis of distortions
 - Are competitors affected
 - Are consumers likely to be hurt
- Provide a structure for balancing

Conclusion



- Resources
- Bureaucratic capture
- Checks, balances and procedures
- Type II errors in mergers, Type I elsewhere

Illustration: NeoVal (R&D&I)



- First case to be analysed under the new R&D&I Framework
- NeoVal: R&D project by Siemens Transport Systems (STS) and Lohr
- A metro system with innovative features
 - e.g.: on-board energy storage, modular train composition; single-coach configuration
- Eligible costs: EUR 60 mln (IR: 22 mln; ED: 38 mln)
- Aid: EUR 23 mln for STS (10 mln in grants; 13 mln in repayable advances)
- Detailed assessment for STS



- *When you have an upstream regulated monopoly:
"when vertical integration by the monopolist is allowed, the regulator's task is made harder insofar as the monopolist has anticompetitive incentives to raise rival's cost."*

Vickers in "Competition and Regulation in Vertically Related Markets" RES (1995)

- Structural unbundling is:
 - *"ideal model in theory"*
 - *"For-profit Transco is easier to regulate with P[erformance] B[ased] R[egulation] since objectives and incentives are clear"*

Paul Joskow at a Cambridge-MIT Electricity Workshop,
London, September 28, 2007

- What we do while waiting...



- Based on inspections
- “creation of unjustified obstacles to third party access to the natural gas transportation network and supply markets”
 - “high prices charged for access to the gas networks”
 - “inflation of RWE TSO’s costs,
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Long term contracts



- DISTRIGAS:
 - *"70 percent of the gas it and connected undertakings supplied to industrial users and electricity producers in Belgium would be contestable for competitors each year. In addition no contract with industrial users and electricity producers in Belgium covered by the commitments could have a duration of over five "*
- Procedures opened against SUEZ group and EDF

Proceedings opened against ENI



- Based on inspections
- "Exclusion of potential competitors from the Italian gas supply markets"
 - "capacity hoarding"
 - "strategic underinvestment in the transmission system"
- "initiation of proceedings does not imply that the Commission has conclusive proof of an infringement"