**GRC Conference, 29th September, Brussels**

# First impressions on the Revised US and UK Merger Guidelines

Damien Neven*

Chief Competition Economist

DG COMP, European Commission

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

# Objective of guidelines

- Express the ultimate objective of enforcement without ambiguity (e.g. prevent consumer harm)
- Explain how we understand the pro competitive aspects and the mechanisms through which a merger significantly impedes effective competition (or SLC) , in conformity with economic theory and reliable evidence
- Explain the factors that the authority shall take into account
- Provide safe harbors and presumptions if and where appropriate
- But most of all Guidelines act mostly as an intellectual discipline on the authority and the parties considering a merger

# Revised US guidelines

# Overview

- Less rigid approach to market definition
- Convergence on the treatment of countervailing buyer power
- Advances on innovation, variety, failing firm defense, partial acquisitions
- Divergence : presumption of harm, coordinated effects, anti-competitive buyer power
- Missed opportunity : vertical and conglomerate effects

# On the role of market definition

- “The Agencies’ analysis need not start with market definition”
- “Evidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects”
- “Where analysis suggests alternative and reasonably plausible candidate markets, and where the resulting market shares lead to very different inferences regarding competitive effects, it is particularly valuable to examine more direct forms of evidence concerning those effects”.
- “the concept of a hypothetical profit-maximizing cartel comprised of the firms (with all their products) that sell the products in the candidate market. This approach is most likely to be appropriate if the merging firms sell products outside the candidate market that significantly affect their pricing incentives for products in the candidate market”.
  - [Note ownership of complementary products would tend to lead to broader markets and ownership of substitute products to narrower markets]

# On the role of market definition (ii)

- Market definition as a discrete approximation to a continuous problem
- Alternative : direct evaluation of the unilateral effects
  - Diagnosing unilateral price effects based on the value of diverted sales need not rely on market definition or the calculation of market shares and concentration. The Agencies rely much more on the value of diverted sales than on the level of the HHI for diagnosing unilateral price effects in markets with differentiated products.

# But…market shares "on steroids"

- The Agencies normally calculate market shares for all firms that currently produce products in the relevant market, subject to the availability of data. The Agencies also calculate market shares for other market participants if this can be done to reliably reflect their competitive significance.

- The Agencies may project historical market shares into the foreseeable future when this can be done reliably.

- Market participants that are not current producers may then be assigned positive market shares, but only if a measure of their competitive significance properly comparable to that of current producers is available.

- Market shares and concentration levels provide useful first indications of the market structure and of the competitive importance of both the merging parties and their competitors.

- However, current market shares may be adjusted to reflect reasonably certain future changes, for instance in the light of exit, entry or expansion

# And structural presumptions...

- Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power.

- The purpose of these thresholds is not to provide a rigid screen to separate competitively benign mergers from anticompetitive ones, although high levels of concentration do raise concerns. Rather, they provide one way to identify some mergers unlikely to raise competitive concerns

- The emphasis on obtaining as meaningful as possible market shares by introducing all sorts of correcting factors seems to enhance the importance and significance of market shares. This is somewhat contradictory.

# On coordinated Effects

- A merger also can enhance market power by increasing the risk of coordinated, accommodating, or interdependent behavior among rivals. Adverse competitive effects arising in this manner are referred to as "coordinated effects." In any given case, either or both types of effects may be present, and the distinction between them may be blurred.
- Coordinated interaction includes a range of conduct.
- the explicit negotiation of a common understanding of how firms will compete or refrain from competing.
- also can involve a similar common understanding that is not explicitly negotiated but would be enforced by the detection and punishment of deviations that would undermine the coordinated interaction.
- can involve parallel accommodating conduct not pursuant to a prior understanding. Parallel accommodating conduct includes situations in which each rival's response to competitive moves made by others is individually rational, and not motivated by retaliation or deterrence nor intended to sustain an agreed-upon market outcome, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms.

- (an HM may SIEC) by changing the nature of competition in such a way that firms that previously were not coordinating their behaviour, are now significantly more likely to coordinate and raise prices or otherwise harm effective competition. A merger may also make coordination easier, more stable or more effective for firms which were coordinating prior to the merger (coordinated effects).
- Coordination is more likely to emerge in markets where it is relatively simple to reach a common understanding on the terms of coordination.
- In addition, three conditions are necessary for coordination to be sustainable. First, the coordinating firms must be able to monitor to a sufficient degree whether the terms of coordination are being adhered to. Second, discipline requires that there is some form of credible deterrent mechanism that can be activated if deviation is detected. Third, the reactions of outsiders, such as current and future competitors not participating in the coordination, as well as customers, should not be able to jeopardise the results expected from the coordination
- The Commission examines whether it would be possible to reach terms of coordination and whether the coordination is likely to be sustainable. In this respect, the Commission considers the changes that the merger brings about.

# On the definition of coordinated effects

- The terms "accommodating" and "interdependent" are often used in reference to equilibrium responses by rivals. That is, the actions of competitors are determined by the same Nash equilibrium, best-response functions before and after the merger (which can be considered the defining characteristic of unilateral effects)

- Indeed, one would normally associated unilateral effects with a change in  the Nash equilibrium in a static game and coordinated effects with a shift towards a Nash equilibrium in  repeated game with infinite horizon.

- Unilateral and coordinated effects can be considered simultaneously in probabilistic terms. But either one’s understanding of competition in the market correspond to a unilateral effect story or a coordinated effect story.  Arguing both at the same time is bound to involve contradictions in the competitive assessment.

- So what is it meant by “parallel accommodating conduct”?  Back to a pre-Airtours world ?
  - Common agency?; increased differentiation that leads to the softening of competition (e.g. through tying)?

# The OFT/CC merger guidelines

# Some general features

- Like the US guidelines, sober on the role of market definition
- And downplaying the structural indicators like market shares and concentration indices
- Generally consistent with the EU non horizontal guidelines
- Coordinated effects generally consistent with EU guidelines and practice

# Articulation of the substantive criteria

- What is meant by substantial lessening of competition (SLC) : "A merger gives rise to an SLC when it has a significant effect on rivalry over time" and "will be expected to lead to an adverse effect for consumers"
- So rivalry is not equivalent to consumer harm. What is it ? What is the underlying economic model ? How is it measured ?
- Hard to integrate with the EU horizontal and non horizontal guidelines, in which SIEC is understood in terms of consumer harm
  - Constant tension : eg discussion of theories of harm more closely related to consumer harm (4.2.1), discussion of coordinated effects in terms of price increase...

# Efficiencies ?

- In this framework, efficiencies can be taken into account as long as they enhance “rivalry”
- In addition, the OFT can take into account “relevant consumer benefits” in its decision not to refer
- But it seems that the CC can take “relevant consumer benefits” only in choosing alternative remedies (1.15 on CC guidelines on remedies) – and might decide that a remedy is not required to “ensure retention of relevant consumer benefits”
- A little convoluted ?
- Relative to the EU approach where a finding of SIEC is a necessary and sufficient condition for lack of compatibility with the common market
- So that the assessment of SIEC takes into account the potential efficiencies
- And might lead to a different outcome

# Vertical mergers

- In vertical mergers,  there is less rivalry from the integrated firm in supplying downstream buyers.  But it leads to consumer harm only if despite the internalisation of double mark ups the integrated firm (and its competitors downstream) increase price..
- The efficiencies and the reduction in rivalry are intertwined.
- The EU would consider net effect on consumers  The UK will conclude that there is SLC and might consider that the internalisation of double mark ups leads a relevant consumer benefit ?  Or conclude that pricing efficiencies enhance rivalry?
- Does it provide a discipline ?

# Conclusion

- The merger guidelines have a different status in the EU – formally adopted as a notice
- Pure ex ante enforcement
- The Commission has a margin of discretion
  - Greater flexibility in enforcement policy
  - But greater responsibility to explain to reasons for clearances as well interventions
- Convergence is not a goal in itself