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European Competition Policy in a Transatlantic Perspective

Lars-Hendrik Röller
European Commission, DG Competition

(*) The views expressed are those of the author and not necessarily reflect those of the European Commission

Overview

- n The Transatlantic Relationship in Competition Policy
- n Soft Convergence
 - i. Merger Control (horizontal and vertical)
 - ii. Abuse of Dominance (Art. 82)
 - iii. State Aid
- n Factors leading to different outcomes
- n The Role of Economists and Economics

The Transatlantic Relationship in Competition Policy

- n most important trading relationship
- n US influence over EU approaches (office of the CE)
- n US academic debates
- n close cooperation between agencies
- n very little disagreement (GE/HWL)

The Transatlantic Relationship in Competition Policy Example: Merger Control

- n very close (almost daily) contacts with FTC or DOJ
- n in the last 12 month 40 cases where at least one firm was US based (this is certainly not going down...)
- n Oracle/Peoplesoft, Sony/BMG, Air France/KLM, Sanofi/Aventis, etc.
- n bilaterals and meetings (including CET)

The Transatlantic Relationship in Competition Policy

- n multi-jurisdictional approach is a reality (no hard convergence)
- n procedural convergence
 - n "best practice" agreements
 - n reduce regulatory burden (ECN) / increase legal certainty
- n soft convergence
 - n same objectives (same micro-economics)
 - n close cooperation between agencies (cases & guidelines)
- n multilateral frameworks
 - n ICN => forum for advocacy - role of US-EU
 - n OECD, WTO

Soft Convergence

- i. Merger Control (horizontal and vertical)
- ii. Abuse of Dominance (Art. 82)
- iii. State Aid

i. Merger Control – horizontal mergers

- n New EU test: whether a merger “would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position”
- n EU Guidelines
 - n Distinction: unilateral (“non-coordinated”) effects and co-ordinated effects
 - n Consideration of efficiencies (open but cautious)
 - n benefit to consumers timely, and substantial, likely to be realized
 - n merger-specificity
 - n Verifiability
- n Economic approach: effects based, integrated approach
- n Focus on intermediate cases: reduce type I and type II errors

.....overall approach to horizontal Merger Control

- n approach is rooted in sound economic analysis of competitive effects and efficiencies
- n modern economic analysis has advanced (analysis of competitive effects, empirical methods: econometrics, simulations, "reduced form" evidence)
- n strong similarities with US Guidelines and methodology

=> soft convergence



i. Merger Control – vertical mergers

n consumer approach & effects-based

n role of efficiencies

⇒ there will be guidelines....(pending case: GE/HWL)

⇒ soft convergence likely



ii. Abuse of Dominance (Art. 82)

§ approach to dominance / market definition / efficiencies

n effects based approach

n consumer standard (as efficient competitor, "but for")

n rebates (Michelin II and BA)

n predation

n tying & bundling

n refusal to deal

n accessive pricing

n price discrimination

=> internal working group, ECN, EAGCP

=> soft convergence possible

iii. State Aid

The current framework



Article 87.1 of the treaty identifies four criteria defining State aid:

- n Granted through State resources
- n Favours certain undertakings or the production of certain goods (economic advantage and selectivity)
- ~~n Distorts or threaten to distort competition~~
- ~~n It affects trade between member states~~

Based on case law the last two criteria are assumed to hold where selectivity is exists.

De minimis rule for aid: less than €100.000 for 3 years period is considered no aid

The legal framework: When is it compatible?



General provisions

- n Art. 87.2
Compatible: individual social measures, natural disaster
- n Art. 87.3
May be compatible: areas with low living standard, aid to facilitate the development of certain economic activities, render serious disturbance in the economy, culture, etc.



n Guidelines

- n R&D (2005)
- n risk capital (2006)
- n Regional aid (2006)
- n MSF (2007)
- n Sectoral (2006)
- n environment (2007)
- n Rescue & Restructuring (2009)
- n SGEI (2005)

n Block exemptions

- n Employment (2006)
- n training (2006)
- n SME/R&D (2006)

Assessing State aid (economic principles)



Benefits => achieve Objectives (+)

n Correcting Market Failures

- n Externalities
- n Asymmetric information
- n Provision of public goods

n Equity / Social Reasons

- n Social and Economic Cohesion
- n Economic adjustment

Distortion of Competition (-)

n Create Market Failures

- n Create or strengthen Market Power (Dominant position)
- n reduce dynamic efficiency
- n Subsidy / tax competition
- n Increase budget deficits / tax burden

n Reduce Fairness

Factors leading to different outcomes (1)

- n Legal Systems differ
 - n administrative system - judicial control
 - n treatment of efficiencies - burden of proof
 - n private action
- n Markets may differ
 - n The impact of globalization (Neven and Röller, JICT)

Factors leading to different outcomes (2)

- n Differences in Prior Beliefs matter...
 - n The road to dominance
 - n Dynamics of markets (entry)
 - n Reactions by competitors
 - n Customers & consumers
 - n Technology, etc.
 - n „Speculative“ dynamic benefits vs. „sure thing“ static benefits
 - n Competition as an institution (Hayek)

Factors leading to different outcomes (3)

- n Political/Policy Environment
 - n Institutional set-up differs
 - n Lisbon agenda: national/european champions debate
 - n Industrial policy / social objectives
 - n Varies across fields – Ex: state aid (SGEI)

In sum: Convergence

- ∅ soft convergence well advanced and is likely to increase (Challenge is the ICN and the ECN)
- ∅ Despite similar guidelines and tests we will not necessarily always get the same outcome (legal framework, markets, institutional set-up, and prior beliefs differ)

.....what is the role of economic analysis

The Role of Economists and Economics

Potential Benefits of Economics

- n emphasis on markets and efficiency (not politics)
- n reduces Type I and II harm
- n leads towards convergence..... (Bayesian world)

Prior Beliefs + economic analysis + new evidence \Rightarrow decisions



Potential for abuse through Economics

- n „the more economic approach“ critique
 - n efficiencies in mergers
 - n market failures in state aid
 - n complexity of economic analysis (no capacity)
- n simple rules vs. discretion critique
 - n simplicity, transparency, legal certainty, predictability



What “kind” of economics?

- n robust economic principles (refining and re-assessing „per se“ rules)
- n Capacity building
 - n CET (EU Model as compared to FTC and DOJ)
 - n Best Practice for empirical evidence
 - n Expertise in empirical analysis
 - n [econometrics & simulations, reduced-form evidence, facts, natural experiments] => Identification
 - n ECN, FTC-DOJ, EAGCP

Conclusion



- n US-EU relationship in Competition Policy is strong
- n Convergence not in outcomes, but on process and substance
 - n economics is a contributor
 - n potential to reduce political interference
 - n it is good for consumers and business
- ∅ emphasis on “economics” reduces the likelihood of conflict
- ∅ challenges to economists/ economics in antitrust